MEDIATION

MANDATORY MEDIATION CLAUSE IN A CONCESSION AGREEMENT: NOT SO MANDATORY AFTER ALL?...

The Court of Appeal in the case of *Godell Parking Sdn Bhd v Majlis Bandaraya Petaling Jaya [2020] 6 MLJ 43* (the "Case") decided on the applicability of what seems to be a mandatory dispute resolution for an amicable settlement clause in a Concession Agreement entered into between the parties.

This article dissects and analyses the rationale behind the decision.

ISSUE The issue before the Court of Appeal is whether the Concession Agreement dated 5 August 1999 ("CA") can be terminated without prior recourse to a mandatory mediation process under Clause 11 of the CA?

BACKGROUND FACTS Godell Parking Sdn Bhd ("Godell") and Majlis Bandaraya Petaling Jaya ("MBPJ") entered into the CA where Godell is to manage the street parking collection system in Petaling Jaya for a period of 20 years. Godell is to pay monthly rental of a certain amount to MBPJ.

Godell subsequently failed to pay monthly rentals. MBPJ then issued three notices of default to Godell. Godell was given fifteen (15) days from the date of receipt of the notices to rectify the default. Godell however responded to the notices of default on 5th June 2017 citing several alleged breaches of the CA by MBPJ as reasons for the non-payment.

MBPJ thereafter terminated the CA by serving a notice of termination to Godell pursuant to Clause 10 of the CA. Godell instituted a claim against MBPJ on the basis that the termination was unlawful and claimed for damages. MBPJ in response raised a counter-claim for the outstanding monthly rentals.

The High Court dismissed Godell's claims. In so far as Godell's argument that the termination was unlawful as MBPJ failed to exercise Clause 11 of the CA which is to refer the dispute to the State Government for mediation, the High Court held that Clause 11 is not a pre-condition to the issuance of a notice of termination.

Godell then appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL The Court of Appeal dismissed the appeal and upheld the decision of the High Court. In doing so, the Court of Appeal analysed Clause 10 and Clause 11 of the CA.

The Court of Appeal held that there is nothing in Clause 10 and Clause 11 that suggest that the two clauses should be read together or are dependant on each other. The Court of Appeal found that the operationality of Clause 10 is not dependant on the fulfilment of Clause 11.

The Court of Appeal was satisfied that termination under Clause 10 only requires two pre-conditions to be met, which are:

i. occurrence of an event of default; and
ii. issuance of a notice of default.

The Court of Appeal noted that reference to the State Government is not one of the requirements for termination under Clause 10 of the CA.

The Court of Appeal also held that Clause 11 of the CA is in pith and substance, a '*Scott v Avery'* clause which provides '*for dispute(s) to be adjudicated by a specific procedure before any right of action can accrue between the parties*', whilst Clause 10 simply deals with the termination of the CA on the occurrence of any event of default. The Court of Appeal was of the further view that failure to invoke Clause 11 would result in the disentitlement of that party to invoke any other legal process to resolve its disputes or claims and will in no way affect the parties' right to termination.

The Court of Appeal also added that Clause 11 is only applicable in a situation **where there is a dispute in existence** between parties, to which only then such a dispute can be referred to the State Government. The Court of Appeal found that before the termination, there can be no dispute on whether an impending termination is unlawful or otherwise. It is only after the termination has occurred that such a dispute is deemed to have arisen.

The Court of Appeal further distinguished the decisions of the Federal Court in *Berjaya Time Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597* and *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464* and found that:-

(i) there was no link between Clause 10 and Clause 11 of the CA; and
(ii) clause 10 of the CA being the termination clause, has its own built-in mechanism for termination without reference to Clause 11.

CONCLUSION This decision highlights the importance of drafting agreements and/or contracts and the clauses contained within with precision and clarity.

Practitioners and in-house counsels would have to take great care in reflecting the intention of contracting parties *vis-à-vis* resolution of disputes and termination (whether one is dependent upon the other) clearly in agreements and/or contracts. Taking a cue from the Federal Court decision of *SPM Membrane [supra]* and the decision above, if clauses are meant to be interconnected and/or interdependent, they must be clearly worded in the agreement and/or contract.

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