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**IN THE HIGH COURT OF MALAYA AT JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TA'ZIM, MALAYSIA
CIVIL SUIT NO: JA-22NCvC-190-12/2020**

BETWEEN

CHINA STATE CONSTRUCTION ENGINEERING (M) SDN BHD
(COMPANY NO.: 201301030805 (1060634-X)) **...PLAINTIFF**

AND

ASTAKA PADU SDN BHD
(COMPANY NO.: 199301012127 (266865-X)) **...DEFENDANT**

GROUND OF JUDGMENT

Introduction

- [1] This is the Defendant's application ("this Application") in enclosure 5 made pursuant to section 10 of the Arbitration Act 2005 ("Arbitration Act") and Order 69 rule 10 of the Rules of Court 2012 ("Rules of Court") for a stay of all further proceedings in respect of the action instituted by the Plaintiff ("the Plaintiff's claim"), pending determination by arbitration.

Factual background

- [2] Pursuant to a contract comprising the letter of award dated 18 December 2014 and the Conditions of Contract (PAM 2006 With Quantities) ("the Contract"), the Defendant had appointed the Plaintiff to carry out construction works for the project known as *Cadangan Pembangunan Fasa 1 – Bangunan Perdagangan 70 Tingkat* ("the Project").
- [3] The Defendant had defaulted in its payment obligation towards the Plaintiff and as a result thereof, and after negotiations pertaining to the payment arrangement, the Plaintiff entered into a loan agreement ("the Loan Agreement") with the Defendant and two other parties to allow the Defendant additional time to pay. Since the Defendant had failed to pay pursuant to the Loan Agreement, the Plaintiff initiated adjudication proceedings against the Defendant by way of a payment claim dated 11 July 2019 ("the First Payment Claim"), for the unpaid sum. Parties then entered into negotiations which crystallised into a settlement agreement dated 1 October 2019 ("the Settlement

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Agreement”), whereby the Defendant had agreed to settle outstanding payments.

[4] The Defendant, however still failed to make payment according to the timeline stipulated in the Settlement Agreement. The Plaintiff then demanded from the Defendant the outstanding sums under the Settlement Agreement, to which the Defendant had failed to comply with. As a result thereof, the Plaintiff issued the second payment claim on 25 November 2020 (“the Second Payment Claim”) to claim for sums due under the Settlement Agreement.

[5] On 30 December 2020, the Plaintiff’s claim was filed in this Court to recover the sums owed by the Defendant under the Settlement Agreement, which was the same claim made by the Plaintiff in the Second Payment Claim. The Defendant proceeded to file its Defence and Counterclaim and on 17 February 2021, this Application was filed.

[6] This Application was dismissed for the following reasons.

The applicable law

[7] With regard to an application for stay of proceedings, reference was made to section 10 of the Arbitration Act, which reads:

Section 10 – Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party

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makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[Emphasis added.]

- [8]** What needs to be established are that, there is in existence an arbitration agreement, and that the party making the application had not taken any step in the proceedings.

Contentions, evaluation, and findings

Whether the Settlement Agreement contained an arbitration clause

- [9]** On the issue of whether the Settlement Agreement contained an arbitration clause, the Defendant took the position that the arbitration clause between the parties was clause 34.5 of the Contract itself, and since the Settlement Agreement emanated from the Contract, the arbitration clause would apply *via* the Settlement Agreement as well.
- [10]** The Defendant took the position that incorporation by reference applied in the present case, pursuant to section 9(5) of the Arbitration Act, since the Settlement Agreement had made reference to the Contract which contained the arbitration clause. Section 9(5) of the Arbitration Act reads:

Section 9 – *Definition and form of arbitration agreement*

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A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of that agreement.

[Emphasis added.]

[11] A scrutiny of section 9(5) of the Arbitration Act indicates that two requirements must be established for its application, namely that a reference has been made to a document containing an arbitration clause, and that the reference was such as to have made that clause part of the agreement. Reference on this point was made to the Federal Court case of *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1.

[12] The Court's attention was brought to several authorities including the Federal Court case of *Ajwa for Food Industries Co (Migop) Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625, where it was stated by Zulkefli Makinudin CJ (Malaya):

[26] Section 9(5) of the Act therefore clarifies that the applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration made "by reference". Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement.

[Emphasis added.]

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[13] It was, therefore, insufficient for the Settlement Agreement to merely refer to the Contract that contains an arbitration clause. Such reference must be of a nature that makes the arbitration clause in the Contract part of the Settlement Agreement, that is, by incorporating it by reference.

[14] In the present case, I was of the view that there was no reference such as to make the arbitration clause in the Contract part of the Settlement Agreement. The Settlement Agreement was a separate contract between the parties. In fact, it would defeat the purpose of entering into a settlement agreement if the parties had intended to cling onto the Contract.

[15] This is fortified by the fact that the Settlement Agreement itself contained a specific provision for its own mechanism for dispute resolution, in clause 2.5, which reads:

2. Payment of the Settlement Sum by APSB

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2.5 In the event of any default by APSB of its payment obligations under this Settlement Agreement, the entire unpaid portion of the Settlement Sum, regardless of whether it has become due under clause 2.1, shall immediately become due and payable by APSB to CSCE. CSCE shall be at liberty to immediately initiate legal proceedings against APSB for the entire unpaid portion of the Settlement Sum without any further reference and/or notice to APSB, including but not limited to: (i) initiating adjudication in accordance with the CIPA Act; and(ii) commencing winding up proceedings against APSB.

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[16] As such, the requirement in section 10 of the Arbitration Act, that there should be a written arbitration agreement as prescribed by section 9(5) of the Arbitration Act, had not been fulfilled. On this ground alone, this Application should be dismissed. However, in the interest of completeness, the second element prescribed by section 10 of the Arbitration Act was addressed, that is, whether the Defendant had taken a step in court proceedings.

Whether the Defendant had taken a step in court proceedings

[17] In resisting this Application, the Plaintiff contended that the Defendant had taken a step in the proceedings when it filed its counterclaim.

[18] Although the Defendant contended that it had to file the defence to avoid judgment in default of defence being entered, and that it had reserved its right to file a stay of proceedings, I found the Defendant's contention untenable in view of the fact that a counterclaim is a separate action, as provided for in Order 15 of the Rules of Court, which reads:

Order 15 – Causes of action, counterclaims and parties

Rule 2 – Counterclaim against plaintiff

(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he shall add the counterclaim to his defence.

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(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.

(3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.

(4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgement for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs.

[19] This was clarified by the Federal Court through Salleh Abas LP in *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] CLJ Rep 242, in the following paragraph:

What then is a counterclaim?

A counterclaim on the other hand is also a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits. Like set-off, a counterclaim is also the creation of Statutes. At common law the Court has no power to allow an action by a plaintiff to be met by a cross-claim of the defendant against the plaintiff. The Court simply left the defendant to commence a separate action. It was only by virtue of the Supreme Court of Judicature Act 1873, s. 24(3) that enabled the defendant's counterclaim to be added to the plaintiff's suit.

[Emphasis added.]

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[20] Since a counterclaim is a separate action, the Defendant's action in filing it indicated its intention and readiness to proceed with proceedings in Court, despite having reserved its right to file a stay of proceedings. In any event, I agreed with the Plaintiff's contention that the Defendant could have sought an interim stay instead, which it had elected not to do. Such election, therefore, amounted to consent that the dispute between the parties should be determined by this Court.

[21] The Defendant had further alleged that, on numerous occasions, it was coerced by the Plaintiff into entering into the Loan Agreement and the Settlement Agreement with threats of litigation, and that such Settlement Agreement was in contravention of the Moneylenders Act 1951.

[22] In my view, first and foremost, these averments were not relevant to this Application. Secondly, in contending that the Settlement Agreement was null and void, the Defendant had in actual fact submitted that there was no arbitration agreement between the parties, as the arbitration clause that the Defendant claimed existed in the Settlement Agreement, must also be null and void.

Conclusion

[23] In the upshot, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this Court, and written and oral submissions of both parties, this Application was dismissed with costs.

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Dated: 24 October 2021

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(EVROL MARIETTE PETERS)
Judicial Commissioner
High Court, Johor Bahru

Counsel:

For the Plaintiff – Choon Hon Leng and Khor Yongshi; Messrs Raja, Darryl & Loh

For the Defendant – Sanjay Mohan and Tan Jun Ling; Messrs Sanjay Mohan

Cases referred to:

- *Ajwa for Food Industries Co (Migop) Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625
- *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1
- *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] CLJ Rep 242

Legislation referred to:

- Arbitration Act 2005 – sections 9 and 10

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- Moneylenders Act 1951
 - Rules of Court 2012 – Orders 15 and 69