IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: W-02(IM)(ADM)-251-02/2021

BETWEEN

COCKETT MARINE OIL (ASIA) PTE LTD

(SINGAPORE COMPANY NO.: 201310611D) …APPELLANT

AND

MISC BERHAD

(COMPANY NO.: 8178-H) …RESPONDENT

HEARD TOGETHER WITH

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(In the Matter of High Court of Malaya of Kuala Lumpur
Admiralty In Personam No.: WA-27NCC-46-05/2020

Between

MISC Berhad
(Company No: 8178-H) …Plaintiff

And

Cockett Marine Oil (Asia) Pte Ltd
(Singapore Company No.: 201310611d) …Defendant

CORUM

KAMALUDIN BIN MD. SAID, JCA
HADHARIAH BINTI SYED ISMAIL, JCA
GUNALAN A/L MUNIANDY, JCA

JUDGMENT

INTRODUCTION

[1] These are appeals by the Appellant/Defendant in the High Court ['Cockett Marine'] against two decisions by the Learned Judicial Commissioner ['LJC']: to dismiss the Defendant's application for a stay of proceedings in favour of arbitration [Enclosure 16] and to allow the Plaintiff's ['MISC's] application [Enclosure 22] for an anti-arbitration injunction to restrain Cockett Marine from taking any further steps in the

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said arbitration proceedings. Encl. 16 was made pursuant to s.10 of the Arbitration Act, 2005 ['AA 2005'] whereas Encl. 22 was pursuant to Order 29, Rule 1 of the Rules of Court, 2012. ['O.29, r.1, ROC'].

BRIEF FACTS

[2] The Appellant is a Singaporean company which supplies bunker fuel for shipping vessels. The Respondent is a bunker supplier and is the owner of a vessel, Seri Amanah ("the Vessel").

[3] On 28.8.2018 the Plaintiff invited the Defendant and a number of other bunker suppliers to tender for the supply of bunkers for delivery by barge to the Vessel on 10.9.2018. A series of emails were exchanged between the Plaintiff and Defendant's officers on 28.2018 leading to the Tender being awarded to the Defendant.

[4] The Appellant and Respondent entered into a contract for the supply of bunker fuel in which the Appellant was to supply fuel for the Vessel ("the Supply Contract").

[5] On 12.9.2018, the Appellant made arrangements for supply of the first parcel of bunker fuel. This was to be done via a transfer from the Appellant's barge, MV RAHMAT to the Vessel.

[6] However, on the same day, the Vessel and the Appellant's barge, MV RAHMAT were detained by the Malaysian Maritime Enforcement Agency ["MMEA"] for potential offences under the Malaysian Customs Act 1967. The Vessel's tank was sealed and the Appellant was ordered not to use the bunkers pending the completion of an investigation.

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[7] On 12.10.2018, the Respondent terminated the Supply Contract on the ground that the Appellant was in breach of its obligation to deliver the bunkers free of claims and encumbrances under clause 9.1 and 11.1 of the Respondent's Terms.

[8] On 28.5.2020, the Respondent filed an action in the High Court for breach of the Supply Contract by the Appellant.

[9] After obtaining leave to serve out of jurisdiction, the writ and statement of claim were then served on the Appellant's solicitors on 8.7.2020.

[10] The Appellant then commenced arbitration proceedings in London on 14.8.2020. A Notice of Commencement of Arbitration was issued by the Appellant's solicitors in London, Messrs Preston Turnbull LLP, to the Respondent citing clauses 21.1 and 21.2 of the Appellant's Terms.

[11] On 17.8.2020, the Appellant filed Enclosure 16 for a stay of proceedings in the pending reference to arbitration under s.10 of the AA 2005.

[12] On 25.8.2022, the Respondent filed Enclosure 22 seeking for an anti-arbitration injunction against the Appellant under O.29 r.1 of the Rules of Court 2012 ["ROC 2012"].

[13] On 7.1.2021, the LJC dismissed Enclosure 16 and allowed Enclosure 22.

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[14] The LJC's grounds of decision can be summarized as follows:

(a) That the Appellant has failed to demonstrate the existence of an arbitration agreement between the parties and therefore cannot rely on s.10 of the AA 2005.

(b) That in any event, the Appellants are not entitled to a stay under s.10 of the AA as they had taken steps in the proceedings which indicates an abandonment of their rights to refer the matter to arbitration

(c) That Enclosure 22 ought to be granted as there are serious issues to be tried at the trial of this action

OUR DECISION

[15] In support of the LJC's decisions as above in respect of Encls. 16 and 22, the thrust of the Respondent's submission is as follows:

i) The LJC properly appreciated the facts leading up to the genesis of the contractual relationship between the parties.

ii) The LJC properly exercised his duty to examine the contract to ascertain if there was an arbitration agreement between the parties. In doing so, he did not, as a matter of law, fall foul of the Court's role under Sections 8, 10 and 18 of the Arbitration Act 2005 (hereinafter referred to as "AA 2005").

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iii) The LJC found, correctly, that there was no arbitration clause in the contract that governs the relationship between the parties; and

iv) The LJC also correctly found, having looked at the facts, that the Appellant has taken a step in the proceedings and as the Court has no power to stay the proceedings under Section 10; and

v) By reason of the fact that there is no arbitration agreement and there was in fact a submission to the High Court, the anti-arbitration injunction should properly be granted.

vi) There is no error in the High Court's reasoning. Accordingly, there is no need for appellate intervention in this case.

[16] As can be readily seen from the above, the determinant question in this appeal concerns the nature and terms of the contractual relationship between Cockett and MISC. Crucially, the most pertinent question for our determination was whether there was in existence an arbitration agreement between the parties for S.10 of AA 2005 to come into operation.

[17] Apart from that, the Respondent urged us to take into consideration two separate sets of facts as below:

i) The background facts relating to the formation of the contract between the Appellant and the Respondent, which illustrate that the Respondent's terms apply; and

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ii) The Appellant's conduct in the High Court, disentitling them to the right to obtain the stay under Section 10 of the AA 2005.

[18] We would proceed to examine how the LJC arrived at the conclusion that there was no arbitration clause existent between the parties that was applicable to the present dispute. Briefly, the LJC's findings were these:

i) The Supply Contract by virtue of cl. 13.1 was on the Plaintiff's Terms. The Supply Contract is subject to Malaysian law and the exclusive jurisdiction of the Malaysian Courts which provided for Malaysian law and jurisdiction to apply and not on the Defendant's terms which provided, inter alia, for arbitration in London.

ii) The Supply Contract was concluded on 28.8.2018 at 1622 hours on the Plaintiff's Terms. By then, cl.14.2 of the Plaintiff's Terms, an entire agreement clause which superseded all prior negotiations, representations or agreements, became oral or written, operative. Thus, the Supply Contract was not made after 30.8.2018 and accepted by conduct.

iii) The hyperlink is not sufficient to incorporate the Defendant's Terms. The invitation to tender issued by the Plaintiff via email dated 28.8.2018 (0941 hours) was an offer and capable of immediate acceptance.

[19] At the core of the present dispute is the jurisdiction of the Court under S.10 of the AA.Whilst the Respondent conceded that it was the policy of the Malaysian Courts to defer the issue of the existence of

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jurisdiction to the arbitrator under S.18 of the AA 2005, the LJC had not erred in determining the existence of an arbitration agreement. Also, that the Malaysian Courts leaned towards applying the 'kompetenz' principle whereby deference is given to the arbitrator to decide issues which can be decided by him under S.8, AA 2005. However, the Respondent took a different position from the Appellant in respect of the latter's purported incorrect position that where it is alleged that an arbitration agreement may have come into existence, the Court should immediately wash their hands of the issue and instantly order the stay to enable the arbitrators to decide their jurisdiction.

[20] MISC correctly brought to our attention the position under the relevant provisions of the AA 2005 as follows:

> "Section 10 of the AA 2005 only empowers the Court to order a stay with regard to "a matter which is the subject of an arbitration agreement".
>
> An "arbitration agreement" is defined in Section 9 of the AA 2005 as "an agreement by the parties to submit to arbitration" and "must be in writing". More importantly, in the context of this appeal, "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 the agreement".

[21] It was contended that following the Court of Appeal decision in **Capping Corporation Limited & Ors v Aquawalk Sdn Bhd & Ors** [2013] 1 LNS 574 "the Court itself when seized prematurely with the issue

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of the arbitrator's jurisdiction would confine itself to find that an arbitration agreement exists and to refer the parties to arbitration."

[22] Guidance may be sought from the English Court of Appeal decision in the case of **Ahmad Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Inc** [2000] 1 LI.LR 522 Waller LJ held, inter alia, that:

> "It is not mandatory and, contrary to a suggestion made by Mr Palmer, the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal."

[23] A dispute as to the existence of an arbitration agreement should be left to be decided by the arbitral tribunal where the court considers that it is virtually certain that there is an arbitration agreement. [See Ahmad Al-Naimi (supra)].

[24] Likewise, where an application is made to stay proceedings under the AA 2005, the duty on the Court is to determine whether there ever was an agreement to arbitrate [see **Albon (trading as NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 4)** [2008] 1 Lloyd's Rep 1 (Malaysia arbitration)].

[25] Be that as it may, the core issue in dispute between the parties is the jurisdiction to determine the existence of an arbitration agreement. In

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regard to this issue, our attention was brought to the governing provision in the AA 2005, S.18(1), which reads as follows:

> "18(1) The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement."

[26] We share the view of the Appellant that the correct position in law is as follows:

> "Where a party challenges the existence of the arbitration agreement, the jurisdiction of the Court is to consider whether prima facie there is an arbitration agreement to resolve disputes. In this respect the jurisdiction of the Court is to decide if the issue on the existence of the arbitration agreement is in dispute and not merely a dubious or frivolous allegation."

[27] Before us, the primary question for our determination was whether the LJC had correctly decided the following threshold issues:

1. Whether there was a prima facie case of the existence of an arbitration agreement; and

2. Whether, if prima facie the above agreement was in existence, should the Court stay the civil proceedings and refer the dispute to the arbitral tribunal for determination of that issue.

[28] In the Hong Kong Court of Appeal case of **Private Company 'Triple V' Inc. v Star (Universal) Co. Ltd & Anor** [1995] 3 HKC 129 at 132 it was

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held that when there is a prima facie evidence of a dispute between the parties as above, an arbitrator ought to be appointed to arbitrate the dispute and if instead, the judge were to delve into the matter more deeply, he would in effect be usurping the function of the arbitrator. The duty of the judge is to made a judgment whether there existed an underlying agreement to arbitrate to form a prima facie view.

[29] We are in agreement with the view expressed by the learned judge in **CMS Energy Sdn Bhd v Poscon Corp** [2008] 6 MLJ 561 who held that the language of S.18(1) conferred broad and wide powers to the arbitral tribunal to determine not only substantive issues but also on preliminary objections to its jurisdiction.

[30] Importantly, we have also noted the S.18(8) of the AA provides that where the arbitral tribunal makes a preliminary ruling on its jurisdiction, a party who is dissatisfied with that ruling may appeal to the High Court within 30 days to decide the matter.

[31] We agree with the Appellant that the wording of S.18(8) implies that at the 1st instance, it is the role of the arbitral tribunal to determine its jurisdiction and not that of the High Court which assumes an appellate and not an original jurisdiction.

[32] In the determination of the question central to this appeal, i.e., whether the LJC had misconstrued the provisions of S.18(1) and (8) of the AA, the question boiled down to whether the Appellant had satisfied the requirement of showing that there is a prima facie case for the incorporation of the arbitration agreement. For this purpose, Cockett relied on the exchange of correspondence incorporating its Terms & Conditions

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(via hyperlink) and in particular its Confirmation of Supply on its Terms on 30.8.2018. We were urged to consider Cockett's Confirmation of Supply to be the last contractual document between the parties on the Supply Contract. Also to be persuaded by the Hong Kong decisions based on the international character of arbitration agreements and the need for some degree of uniformity in the various jurisdictions on the applicable law and procedure. Where the same law and procedure were applicable, parties should expect the same result expect where policy considerations support a different result.

[33] In the alternative, Cockett submitted that its Terms incorporate the arbitration agreement via the hyperlink and that this binds the parties and that whether the agreement had been concluded is a question of fact within the purview of the Arbitral Tribunal.

[34] The facts relied upon are these: the exchange of correspondence shows that the Appellant's offer, counter-offer and final confirmation of contract all bear a hyperlink to its Terms; and the final confirmation of contract on 30.8.2018 in fact sets out the Terms & Conditions by direct link to the "Standard Terms and Conditions for the Sale of Marine Bunker Fuels, Lubricants and Other Products". In addition, and equally important is that Cockett's Confirmation of Supply was the final contractual document that was exchanged between the parties on the Supply Contract.

[35] Of importance to our resolution of the present dispute is the question as to what constitutes an arbitration agreement within the meaning of S.9 of the AA. Is reference to an arbitration agreement sufficient to incorporate the arbitration clause under S.9? In the judgment of the Federal Court in

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Ajwa for Food Industries Co. (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625 it was pronounced that:

> "[28] For the reasons above stated we would answer the two questions of law posed for our determination as follows:
>
> (a) there is no requirement under the Act that where a reference is said to be made to a document containing an arbitration clause in an agreement, that agreement must be signed. In the present case, it is clear that the contract of sale was in writing and satisfies the requirement of S.9(4) of the Act. That agreement in writing incorporates the STC which contains the arbitration clause and satisfies the requirement of S.9(5) of the Act, and
>
> (b) S.9(5) of the Act does not require that the STC which contains the arbitration agreement being attached or published. It is sufficient that the incorporation is by notice in the document."

[36] In the final analysis, the question left for our judgment was whether the LJC had in principle proceeded on a correct basis in determining the question of the existence of an arbitration agreement by identifying whether there was prima facie existence of an arbitration agreement. We accept Cockett's proposition that in law the jurisdiction of the Court is limited to making the said identification. Flowing from that, the question that arose was whether the LJC had erred in principle in making a factual

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determination that the agreement was, even if existent, not binding on the parties.

[37] In contrast to the contentions as above of Cockett, MISC's basic proposition was that the contract evolved and was concluded between the parties on 28.08.2018 when Cockett responded to MISC's invitation to tender for the proposed job on the latter's Terms and Conditions ['T&C']. There was purportedly an unconditional acceptance of MISC's offer without any reference to Cockett's offer to accept MISC's T&C being subject to Cockett's T&C except for 2 hyperlinks to Cockett's email dated 28.08.2018. There was apparently no mention that Cockett was unwilling to contract on MISC's terms as per its invitation to tender.

[38] We do not propose to review the series of e-mail trails and the correspondence that followed between the parties in view of the fact that the primary contention of MISC was that there was a concluded contract 28.08.2018 on its terms and nowhere in the communication thereafter was there any rejection of the said terms in favour of Cockett's terms, particularly for arbitration in London. We would ultimately have to make a determination on the core issue as to the correctness of the LJC's finding that the impugned hyperlink that we have alluded to was insufficient to incorporate Cockett's terms as at that point in time the agreement incorporated the entire agreement clause which became operative. As the Supply Contract had come into effect on 28.08.2018, the hyperlink via the email dated 30.08.2018 was superseded by the said clause in the LJC's view.

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[39] We have noted MISC's submission that at the root of Cockett's position is that MISC was counter-offering after a so-called agreement had been reached without any explanation for the position taken.

[40] It is important for us to note the following passage from among the concluding paragraphs from the LJC's judgment which seem to concede that there was reference to Cockett's T&C which would include the contested arbitration clause:

> "The Defendant's email of 30.8.2018, although it makes reference to the Defendant's Terms does not incorporate these terms as contract which was concluded on the Plaintiff's Terms contains both an "entire agreement" clause (cl. 14.2) and "no modification" clause (cl. 14.5). The Plaintiff's accepting delivery of the first parcel of bunkers does not equate to the acceptance of the Defendant's Terms in writing as the Plaintiff's Terms has express provisions for amendments cannot be overridden by conduct (see Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Berhad [2004] 3 AMR 43). The Defendant did not make it clear that it was seeking to vary the already concluded agreement between the parties by drawing the Plaintiff's attention to the same."

[41] Whilst we appreciate the reasoned finding of the LJC and MISC's position premised on the factual matrix and the chronology of events surrounding the agreement between the parties, our considered view from our plain reading of the FC decision in **Ajwa For Food Industries Co**. (supra) is that it supports for the proposition of Cockett that reference to a document is sufficient to incorporate an arbitration agreement for the purposes of S.9 of the AA. Hence, it was an error for the LJC to disregard

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the impugned link highlighted by Cockett which was plainly a reference to an arbitration clause. To fortify Cokckett's position, Cockett's last email which was its Confirmation of Supply was the contractual document between the parties to the Supply Contract. Our view is that the LJC had failed to give serious consideration to this crucial aspect which would have a strong bearing on the question of the existence of an arbitration agreement.

[42] Lastly, in our judgment, by virtue of the explicit provisions of S.18 of the AA the question of the existence of an arbitration agreement is a question for determination by the arbitral tribunal and not within the purview of the Court's jurisdiction once reference is made to an arbitration clause in any document or electronic communication between the contracting parties that was not denied or rejected as in the present scenario. We concur with the contention of Cockett on this threshold question that the jurisdiction of agreement jurisdiction of the Court is limited to identifying whether there is prima facie existence of an arbitration agreement and once a prima facie determination is made the matter is to be stayed and referred to arbitration for a full determination on whether there is in fact a binding arbitrations agreement.

[43] It is indisputable that the jurisdiction of the Court under S.10 of the AA makes it mandatory to stay any matter which is subject of an arbitration agreement and to refer the parties to resolve the dispute by arbitration.

CONCLUSION

[44] For the foregoing reasons, we are, with respect to the LJC, constrained to conclude that the LJC exceeded his jurisdiction by

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purporting to determine conclusively not only that there was a prima facie case existence of an arbitration agreement but to make a factual determination that the same was not enforceable did not bind the parties.

[45] Our decision in the Appeal concerning the anti-arbitration agreement [2nd appeal] would follow the outcome of Appeal 251. We agree with the Appellant that in the event that Appeal 251 is allowed, it follows that the Appeal against the grant of the anti-arbitration injunction ought also to be allowed as it means there are no serious issues to be tried and no basis for an anti-arbitration injunction.

[46] In accordance with our judgment as above, the order we made in this appeal is as follows:

> We are unanimous in our decision that Appeals 251 and 252 have sufficient merits for appellate interference. The LJC, in our considered view, had erred in the determination of the principal question as to whether there was in existence an arbitration clause. We, therefore, allow both appeals and set aside the decision of the High Court. We allow the stay of proceedings as applied for by the Appellant in the High Court with costs of RM20,000.00 to the Appellant here and below subject to payment of allocator.
>
> Appeal No. 252 has to be allowed following our decision in Appeal No. 251 and the decision of the High Court has, accordingly, to be set aside.

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Dated: 1 November 2022

- **sgd -**

GUNALAN A/L MUNIANDY

Judge Court of Appeal

Putrajaya

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