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Construction
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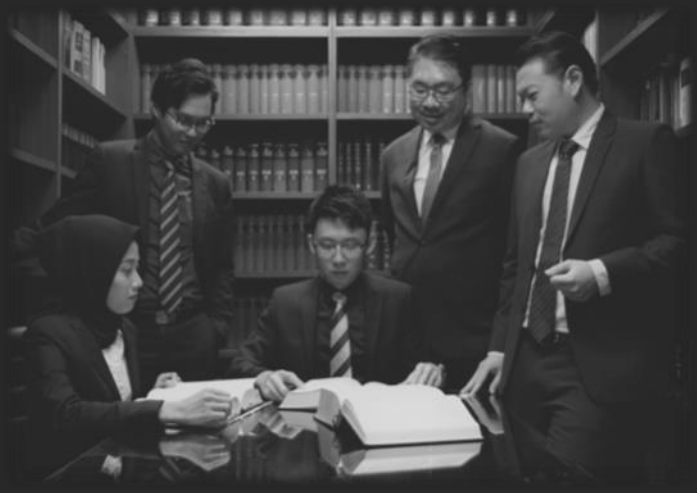

Many landmark decisions were made by the Malaysian Courts in 2019 on matters affecting construction, adjudication and arbitration.

In this digest, we provide a synopsis of selected cases in relation to Construction & Development, Adjudication (Construction Industry Payment and Adjudication Act 2012) and Arbitration.

ZAIN MEGAT & MURAD
Advocates & Solicitors
D2-5-1 to D2-5-3A, Block D
Solaris Dutamas No.1, Jalan Dutamas 1,
50480 Kuala Lumpur, Malaysia
+6 03 6207 9331
+6 03 6207 9332
zmm@zainmegatmurad.com

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Can the Liquidated Ascertained Damages be imposable as of right?

CUBIC ELECTRONICS SDN BHD (IN LIQUIDATION) V MARS TELECOMMUNICATION SDN BHD [2019] 6 MLJ 15; [2019] 2 CLJ 723

►►Federal Court ruled that contractual LAD can be recovered without proof of actual loss unless LAD sum is unreasonable or exorbitant

INTRODUCTION

It was long settled law that when there has been a breach of contract, the innocent party cannot per se recover the Liquidated Ascertained Damages ("**LAD**") stipulated in the contract simpliciter. The innocent party is only entitled to the damages/ losses ACTUALLY suffered and proven in court.

However, the Federal Court had revisited the laws on Section 75 of Contracts Act 1950 and brought about monumental changes on the present state of law in the case of **Cubic Electronics Sdn Bhd (In Liquidation) v Mars Telecommunication Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723** ("**Cubic Electronic**").

PREVIOUS POSITION OF LAW: PRE-CUBIC ELECTRONIC

The stipulation of LAD is governed by Section 75 of Contracts Act 1950. Previously, in the case of **Selva Kumar Murugiah v Thiagarajah Retnasamy [1995] 1 MLJ 817**, the Federal Court had adopted a restrictive approach in interpreting Section 75.

The Federal Court reasoned that the literal construction of Section 75 is undesirable as it would dispense with the need of proving actual losses / damages incurred. Pursuant thereto, the Federal Court held that the innocent party must prove the actual damages/losses incurred or reasonable compensation in accordance with the settled legal principles, where the LAD stated in the contract merely serves as a ceiling cap of the damages/losses to be allowed. The only exception to this rule is when it is difficult to assess the actual damage suffered.

THE FEDERAL COURT DECISION IN CUBIC ELECTRONIC

Having considered the previous position of law in Selva Kumar, the Federal Court remarked that the legal principles propounded therein should not be interpreted as "*imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point*".

The Federal Court found that there is no need to prove actual loss or damages incurred where there is a LAD clause in the contract. In order to activate the LAD clause, the onus that lies on the innocent party is merely to adduce evidence to show that there was, in fact, a breach of contract and the contract contains a clause specifying a sum to be paid upon breach.

HOW TO FRUSTRATE A LAD CLAIM?

Having said above, the Federal Court nevertheless held that the party in breach is able to defeat the LAD clause by showing that the sum stipulated therein is unreasonable or exorbitant.

On this score, the Federal Court endorsed the methodology propounded in the celebrated English case of **Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67** whereby an onerous burden is imposed on the party in breach to show that the provision of the LAD is disproportionate with the commercial interest of the LAD clause that seeks to guarantee performance of the contract.

FORFEITURE OF DEPOSIT

Corollary to the foregoing, the Federal Court further held that the Section 75 is equally applicable in relation to forfeiture of deposits. Following therefrom, a deposit, which possesses the dual characteristic of earnest money and part payment, is subject to the same test discussed hereinabove.

SIGNIFICANCE OF THE DECISION

Following the Federal Court's decision, when the contract contains a LAD clause and/or provides for a sum forfeitable in the event of a breach, all the innocent party is required to prove is that there was a breach of contract to be entitled of the LAD sum.

Whereas in order to defeat the LAD clause, the Federal Court decision imposes an onerous burden on the breaching party to show that the provision of the LAD is disproportionate with the commercial interest of the LAD clause that seeks to guarantee the performance of the contract.

COMMENTARY

It is pertinent to take note the Federal Court did not expressly overrule the case of **Selva Kumar** and **Johor Coastal Development**, and merely noted in passing that the decisions ought not be interpreted as a straightjacket requiring actual loss to be proven.

Following therefrom, it remains to be seen how the court will reconcile with these two contrasting line of decisions and also the clear wording of Section 75 which provides that the amount stipulated in the contract is merely a ceiling cap on the maximum recoverable amount.

Finally, an interesting point to note is that the introduction of Section 75 Contracts Act 1950 was intended to do away the complicated rules of penalty. With that in mind, has the decision of Cubic Electronics subtly reintroduce the rule of penalty back into the Malaysian jurisprudence, despite it being couched as a test of reasonableness/proportionality?

CONTACT

LEE KAI JUN
Associate

+6 016 403 9678
kaijun@zainmegatmurad.com

Housing Development: The Legality Of Extension Of Time By Controller And Its Legal Impact

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162

Housing Controller has no power to grant extension of time to Housing Developer and the extension of time granted thereunder is ultra vires.

INTRODUCTION

Housing development in Malaysia is governed by the **Housing Development (Control & Licensing) Act 1966** ("**HDA**").

Under **Section 24 of HDA**, the Minister is empowered to make regulation to, inter alia, prescribe a standardised Sales and Purchase Agreement ("**SPA**") to be adopted in all Housing Development and to regulate and prohibit the conditions and terms of the SPA.

Pursuant thereto, the Minister had prescribed the **Housing Development (Control and Licensing) Regulation 1989** ("**The Regulation**") which provides, inter alia, that:-

i) The Housing Developers shall deliver vacant possession ("**VP**") of the property to the purchaser within 36 months (Schedule H – for high rise housing development) and 24 months (Schedule G – for landed housing development) respectively; and
[Regulation 11(1) of the Regulation]

ii) The Controller is empowered to waive or modify the terms of the statutorily prescribed purchase and sale agreements.
[Regulation 11(3) of the Regulation]

The exercising of power by the Controller, specifically the power to grant an extension of time for the delivery of vacant possession, was called into question and the issue was canvassed by the Federal Court in the case of **Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor and Other Appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162**

BACKGROUNDS FACTS

The Developer and Purchasers entered into the respective Sale and Purchase Agreements ("**SPAs**") whereby it was agreed that the delivery of vacant possession ("**VP**") of the units shall be thirty-six (36) months from the date of SPAs. The SPAs were the statutorily prescribed form under Schedule H;

After the execution of SPAs, the Developer applied for an extension of time for the delivery of VP to the Controller of Housing ("**Controller**") pursuant to Regulation 11(3) of Housing Development Regulation ("**HDR**") on the grounds that:-

i) complaints by nearby residents due to extended working hours;
II) stop-work order issued by authorities; and
IIII) investigation conducted by piling conductor.

The Controller rejected the Developer's application for extension of time. Dissatisfied with the Controller's decision, the Developer appealed to the Minister pursuant to Regulation 12 of HDR and the Developer's appeal was allowed by the Minister and an extension of time of twelve (12) months was granted to the Developer.

DECISION OF FEDERAL COURT

Having considered the parties' submissions and the plethora of authorities canvassed before the Federal Court, the Federal Court first turned to the wording of Section 24(2)(e). The Federal Court remarked that the express wording of Section 24 (2)(e) of HDA only empowers the Minister to regulate and prohibit the terms and conditions of the SPA. The Federal Court then observed that, in the absence of any express terms in the Act, the Minister shall not sub-delegate the power to the Controller.

Having said the above, the Federal Court then turns to the wording of Regulation 11. The Federal Court pointed out that by virtue of Regulation 11 (3), the Minister had sub-delegated the power to regulate to the Controller. As the enabling act, i.e. the HDA, does not confer the Minister the power to delegate, the Federal Court ruled that the Minister's delegation of power to the Controller to regulate, viz-a-viz the Regulation 11(3) is ultra vires.

EFFECT OF THE DECISION

The Federal Court decision has far-reaching implications and raises enthralling issues of LAD claims.

It appears that NOT ONLY the extension of time granted by the Controller during the construction of the housing development **AFTER** the execution of SPA is ultra vires, **BUT** all extended time to deliver vacant possession beyond the prescribed 24 months (Schedule G) and/or 36 months (Schedule H) issued by the Controller **BEFORE** the execution of SPA would similarly be caught by this Federal Court decision as well if Regulation 11(3) is ultra vires per se.

In the circumstances, would the extension of time to deliver vacant possession approved by the Controller BEFORE the execution of SPA be seen as inconsistent with the Schedule H and/or Schedule G (as the case may be) and effectively void in the light of the Federal Court's previous decision in the case of **Sea Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31** ("**Sea Housing Corporation**") which held that any clause "*being inconsistent with rule 12 and not designed to comply with the requirements of the rules and in the absence of waiver or modification by the Controller of Housing under Rule 12(2), is void'?*"

Pertinently, it should be noted that the Federal Court is silent as to whether the Ang Ming Lee's decision applies prospectively or retrospectively, bearing in mind that the Federal Court had in the present case appeared to have departed from its previous decision in Sea Housing Corporation where the Federal Court recognised the validity of Rule 12 (which is now repealed and is similar with Regulation 11(3) of the Regulation).

It remains to be seen whether this Federal Court's seemingly new ruling will be given a retroactive bearing and thereby make invalid what was hitherto valid, in the doing?

WHAT'S NEXT?

Moving forward, will the Minister regularise the sub-delegation of power to the Controller, by giving notification in the Gazette pursuant to Section 5 of Delegation of Powers Act 1956, and thus bringing the sub-delegation of power to the Controller intra vires? If so, could the Minister then ratify the Extension of Time granted, pursuant to Section 7 of Delegation of Powers Act 1956?

These are nagging questions for which only a determination by court would put the matter to rest.

CONTACT

LEE KAI JUN
Associate

+6 016 403 9678
kaijun@zainmegatmurad.com

Retention Sum Monies Are Not Ipso Facto Trust Monies

SK M&E Bersekutu Sdn Bhd v. Pembinaan Lagenda Unggul Sdn Bhd & Anor Appeal [2019] 4 CLJ 590

ISSUES

In the absence of an express clause in the construction contract creating a trust and/or conducts evincing a clear intention of the parties to create a trust, would the retention monies deducted and held under a construction contract be treated as trust monies? In the absence of such clauses and/or conducts, can a trust arise by implication of law due to the nature of retention monies?

These questions arose in the Federal Court case of **SK M&E Bersekutu Sdn Bhd v. Pembinaan Lagenda Unggul Sdn Bhd & Anor Appeal [2019] 4 CLJ 590.**

BRIEF FACTS

The Respondent is the main contractor, while the Appellants are the sub-contractors under two separate construction sub-contracts.

The relevant clauses in the sub-contracts are identical. Clause 16.3 of the conditions of sub-contract read together with the Appendix provide that each interim payment is subject to a 10% deduction for retention, up to the limit of 5% of the sub-contract value. The retention would be release as follows:-

- 2.5% upon issuance of Certificate of Practical Completion ("**CPC**");
- The balance 2.5% upon issuance of Certificate of Making Good Defects ("**CMGD**") or upon the end of defects liability period ("**DLP**").

> ***"if retention monies are to be impressed with trust, the contract should identify by clear wordings that the retention monies are held in trust and for the trust fund to be established before the insolvency."***

In both appeals the sub-contract works were completed by the Appellants where CPC were issued. The DLP period had also lapsed. However, the Respondent did not release the retention monies.

Following a creditors' meeting under section 260 of the Companies Act 1965 ("**CA**"), a special resolution was passed for the voluntary winding up of the Respondent.

Based on the Respondent's Statement of Affairs as at 08.10.2015, there were about 250 creditors, out of which 128 are creditors claiming for retention sums totaling to RM8,230,087.61. This amount includes the retention sums owed to the Appellants in these appeals.

Consequently, the Appellants respectively instituted an action at the High Court (which were heard together) seeking leave to commence with court, arbitration and/or adjudication proceedings against the Respondent and an order to preserve the retention monies in a separate account pending final determination of the same.

The High Court held that the retention monies were held on trust by the Respondent. Whilst there was no express clause providing for the creation of trust, a trust could still arise as there was a provision for the release of retention upon completion of rectification.

QUESTIONS OF LAW BEFORE THE FEDERAL COURT

The questions of law to be determined by Federal Court were:-

(1) Where a building contract provides that a certain percentage of the certified sum for works done by a contractor is to be retained by the employer until the conditions for the release of the sum retained ("**retention sum**") are met,

(a) is it implied by law that the retention sum is to be held in trust by the employer for the benefit of the contractor; or

(b) is it a matter of construction (interpretation of contract) whether or not the retention sum is to be held in trust by the employer for the benefit of the contractor?

(2) Where in a building contract, there exists an agreement (whether arising by implication of law or upon construction of the contract) that the retention sum is to be held on trust by the employer for the benefit of the contractor, can the trust of the retention sum be constituted without the employer first appropriating and setting aside the money as a separate trust fund?

Having considered the submissions of parties, the Federal Court dismissed the appeal and affirmed the decision of the Court of Appeal.

FEDERAL COURT'S DECISIONS

The Federal Court found that "...*being a creature of a contractual provision, the legal status of a retention sum, including its management pending release to the rightful payee, is very much subject to the term or terms as stipulated in such a provision"*.

The Federal Court observed that, *"in order for legal relationship of a trustee and beneficiary to come into existence as regards express private trusts, three essential features must be present. They are (a) certainty of words; (b) certainty of subject; and (c) certainty of object"*.

Having examined the contractual provision in these Appeals, the Federal Court finds that:-

1) there is no express provision specifically requiring the retention sums to be held on trust by the employer as the fiduciary;

2) there is no clause mandating the retention monies to be kept separately; and

3) there is no clear intention or evidence of strong conduct from the parties indicating that the retention monies should be accorded the status of trust monies.

In summary, for retention sums to be deemed as monies held on trust, there must be clear contractual provision creating such trust and *"the requirement to keep a retention sum segregated from and unmixed with other monies of an employer is very much a significant indicator of the parties' intention"* to create a trust.

In the upshot, the Federal Court answered the question of laws as follows:

1) The question 1(a) of the leave question is answered in the negative.

2) The question 1(b) of the leave question is answered in the affirmative.

3) The question 2 of the leave question is answered in the negative.

EFFECT OF DECISION

This Federal Court's decision is significant as it departs from the previous position in the Court of Appeal's case of **Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor [2012] 3 MLJ 422**, as the Federal Court found that "*it is difficult to sustain the decision in Qimonda (supra) in the light of the settled principles in trust law*".

Following the Federal Court's decision, in the absence of the clear contract provisions and/or conducts creating a trust, including separation of the retention monies, retention sum will not ipso facto be considered trust monies.

As such, it is important for contractors / subcontractors to ensure that the retention sum deducted satisfies the prerequisite of a trust whilst the employer is solvent, failing which such monies will not be protected against the liquidation process and the contractors / subcontractors will be treated as unsecured creditors in the event the employer is wound up.

CONTACT

NURUL AZUREEN AHSIN
ASSOCIATE

+6 011 2527 0838
azureen@zainmegatmurad.com

Common Sense Approach to Apportion LAD

MS Elevators Engineering Sdn Bhd v Jasmurni Construction Sdn Bhd [2019] 5 MLJ 209

> ***I would go so far as saying that even if the Architect has not granted any extension of time or as in this case no extension of time was not (sic) applied for, the Court is not prevented from making a finding from the evidence adduced that the Employer here as in the Defendant had caused the delay resulting in the Plaintiff not being able to complete the Works on time.***
>
> **-Kuala Lumpur High Court**

Under the "prevention principle", a party cannot benefit from its own breach. If the employer had caused delay to the completion of works, the employer would not be entitled to Liquidated Ascertained Damages ("**LAD**") for the delay that it caused.

What if both the employer and the contractor caused the delay?

And what if the contractor failed to apply for EOT even when the contract provides such mechanism?

To compound matters, what if the employer is also "*unable to pinpoint the specific number of days of delay due solely to the contractor*"?

Can LAD still be imposed under such circumstances?

If so, can the Courts apportion the LAD?

These issues arose in the Court of Appeal case of **MS Elevators Engineering Sdn Bhd v Jasmurni Construction Sdn Bhd [2019] 5 MLJ 209**

BRIEF FACTS

Kensington Vision Sdn Bhd ("**Employer**") appointed the Defendant as the main contractor in a mixed development project ("**Project**") where the date of commencement is 17.12.2012 and the completion date is 16.12.2014 ("**Main Contract**");

The Defendant in turn appointed the Plaintiff as its nominated subcontractors for the supply, installation and commissioning of 22 lifts for the project ("**Subcontract**"). There are 2 parts to the Subcontract works, i.e. (1) 10 lifts for Blocks A, B and C and (2) 12 lifts for the shop lots ("**Subcontract Works**");

Vide a Letter of Acceptance ("**LOA**"), the Plaintiff entered into the Subcontract based on the PAM Form of Agreement and Schedule of Conditions of Building Contract 2006 (without quantities) ("**Subcontract**"). The LAD clause and completion date in the Subcontract are based on those in the Main Contract;

The Defendant could not complete the project within the contractually agreed period, i.e. by 16.12.2014. The completion date was extended to 30.04.2015 and was further extended thereafter;

The Plaintiff issued several letters dated 05.02.2015, 05.03.2015, 18.03.2015 and 27.04.2015 to the Defendant, complaining that the site was not ready for the Plaintiff to start work ("**Plaintiff's Complaint Letters**");

Following the issuance of Certificate of Non-Completion ("**CNC**") under the Main Contract, the Defendant had correspondingly issued CNC dated 30.06.2015 to 7 subcontractors, including the Plaintiff;

Notwithstanding the CNC issued to the Plaintiff, the Plaintiff continued to encounter problem on site possession as recorded in the Plaintiff's letter dated 28.07.2015. However, the complaints taper off after July 2015;

However, the Plaintiff never applied for any extension of time, although the Subcontract provides for such application;

The Consulting Engineer for the Project issued a letter dated 23.09.2015 stating that the M&E Works had been completed save for the lift works where the lifts at Blocks A to C had been completed but the lifts at the shop lots have not ("**M&E Confirmation Letter**");

The Plaintiff obtained PMA (Permit untuk Mesin dan Angkutan) certification for part of the works on 31.10.2015 and certification for the other part on 16.02.2016. The Architect certified practical completion being achieved on 29.02.2016 vide Certificate of Practical Completion dated 15.03.2016 ("**CPC**");

On 04.12.2015, the Plaintiff submitted its final claim amounting to RM1,058,644.00 to the Defendant. The amount was revised after the Plaintiff received the Statement of Final Account dated 24.02.2017;

As there was no payment made, the Plaintiff initiated a Suit in the High Court to claim for work done and the Defendant counterclaimed the sum of RM3,910,000.00 as Liquidated Ascertained Damages ("**LAD**") paid by the Defendant to the Employer, amount which the Defendant said was solely attributed to the Plaintiff's delay.

HIGH COURT PROCEEDINGS

After full trial, the High Court allowed the Plaintiff's amended claim for work done (revised based on Final Account issued after the Suit) amounting to RM1,235,670.74 together with interest and also allowed part of the Defendant's counterclaim, awarding RM977,500.00 out of the total LAD counterclaim of RM3,910,000.00.

In allowing only part of the counterclaim for LAD, the Learned High Court Judge reasoned and found that the Defendant was partly responsible

The Learned High Court Judge finds that the Defendant cannot insist on the timely performance of the Subcontract when it is the cause of the non-performance. The fact that there was no EOT application made by Plaintiff does not prevent the Court from finding that the Defendant had cause the delay.

Following the above and having examined the evidence at Trial, the Learned High Court Judge finds that the clear evidence as to when the Plaintiff could be made liable is when the Consulting Engineer confirmed in the M&E Confirmation Letter dated 23.09.2015 that the M&E Works were completed save for the 10 lifts at the Shop Lot.

Hence the Plaintiff is only liable for the LAD from 23.09.2015 to 16.02.2016, where the PMA was issued, which is about 50% of the LAD period counterclaimed by the Defendant. The Defendant is liable for the delay from 30.05.2015 to 23.09.2015 ("**Defendant's Delay**").

The Learned High Court Judge also noted that the LAD counterclaimed of RM3,910,000.00 is lesser than the agreed RM68,000.00 per day as the Defendant managed to procure sectional Certificate of Completion and reduction of LAD from its Employer. The RM3,910,000.00 counterclaimed in the Suit is the actual amount paid by the Defendant to its Employer.

Further to the above, the Learned High Court Judge was inclined to take into consideration that part of the works were completed as at 23.09.2015, i.e. the 10 lifts at Blocks A to C prior to the overall completion ("**Partial Completion**"). Hence the Learned High Court Judge made a further reduction of 50% on the LAD to take into account of the completed works.

With the above in mind, the Learned High Court Judge apportioned the LAD as follows:-

RM3,910,000.00 less 50% for Defendant's Delay = RM1,955,000.00 and RM1,955,000.00 less 50% for Partial Completion = RM977,500.00.

COURT OF APPEAL

After hearing submissions from both the Plaintiff and Defendant, the Court of Appeal dismissed both the Appeals and affirmed the Learned High Court Judge's decision.

In affirming the decision, the Court of Appeal found that the Learned High Court Judge had adopted a common sense approach in assessing the LAD and quantifying it at RM977,500.00 on the basis of proportionality and the Learned High Court Judge was not plainly wrong to do so.

EFFECT OF DECISION

The Court of Appeal appeared to have endorsed the Learned High Court Judge's common sense approach in assessing damages based on the principle of proportionality where a Trial Judge would not be plainly wrong to apportion quantum of LAD claimed by the employer for part of the delay caused by the employer.

This is notwithstanding that the Plaintiff did not make any EOT application even though the Subcontract provides for the same.

However, it should be noted that the "LAD" claimed in this case is the actual loss suffered by the Defendant, i.e. the actual LAD paid by the Defendant / Main Contractor to its employer, under the Main Contract.

Would the outcome differ if the claim was purely for contractual LAD calculated based on the sum provided under the contract? Would the failure to make an EOT application in accordance to the contract disentitle the contractor to an apportionment of LAD like this case?

> *"The learned High Court Judge was entitled to adopt a common sense approach in assessing the damages. On the evidence before him, the learned High Court Judge assessed the LAD at RM977,500.00 and had given his reasons for his assessment. This was based on proportionality. On the facts and circumstances, he was not plainly wrong."*
>
> **- Court of Appeal**

CONTACT

ANDREW HENG YENG HOE
Partner

+6012 205 8413
andrew@zainmegatmurad.com

CIPAA Applies Prospectively, Not Retrospectively

Jack-in-Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd & Another Appeal
[2020] 1 MLJ 174

Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd & Other Appeals
[2020] 1 MLJ 311

INTRODUCTION

Since CIPAA came into force, numerous contractors, subcontractors and consultants resorted to adjudication as a mean of "*speedy dispute resolution*" for recovery of payments and consultant fees. However, does CIPAA apply to construction contract entered before the coming into force of CIPAA or is it confined to construction contract entered into after CIPAA? In other words, does it apply prospectively or retrospectively?

This question was the main issue before the Federal Court in the decided cases of **Jack-in-Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd & Another Appeal [2020] 1 MLJ 174** ("**Bauer**") and **Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd & Other Appeals [2020] 1 MLJ 311** ("**Ireka**").

PRE-BAUER / IREKA

On 05.12.2014, the High Court in the case of UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and Another Case [2015] 5 CLJ 527, found that CIPAA applies retrospectively and applies to construction contracts regardless of the date when such contracts are made.

The aforesaid was the position until the Court of Appeal case of Bauer (Malaysia) Sdn Bhd v Jack-In-Pile (M) Sdn Bhd & Another Appeal [2018] 10 CLJ 293, where the Court of Appeal had on 22.02.2018, decided that CIPAA is prospective in nature and took "*a different view to the rationale expressed by the learned judge in UDA Holdings*".

FEDERAL COURT'S DECISION

Following the Court of Appeal's decision in Bauer, the Applicant in both Bauer and Ireka's matters obtained leave to appeal to the Federal Court, principally on the question as to whether CIPAA applies prospectively or retrospectively.

Both the appeals were heard together and the Federal Court delivered its decision in both matters on 16.10.2019 finding that the "*provisions of the CIPAA undoubtedly affect the substantive rights of parties and such rights ought not be violated as it is of fundamental importance*" to Bauer and Ireka "*besides being an essential component of the rule of law*".

Thus, the Federal Court ruled that the entire CIPAA ought to be applied prospectively.

It is pertinent to note that the construction contracts in both Bauer and Ireka were executed prior to the coming into force of CIPAA. Both Bauer and Ireka contended that by applying CIPAA retrospectively, their contractual rights which existed pre-CIPAA will be impaired.

On the other hand, the construction contracts in the Ireka matters clothed Ireka with the rights to multiple cross-contracts setoff and the Federal Court finds that Ireka's rights to cross-contracts setoff would be impaired if CIPAA applies retrospectively as section 5 of CIPAA only allows resolution of dispute under one construction contract and would effectively exclude Ireka's rights to cross-contracts setoff.

With the above in mind, the Federal Court finds that CIPAA has various provisions that impacts party's substantive rights, i.e. freedom to contract by adopting a "*pay-when-paid" clause which makes the main contractor's obligation to pay a subcontractor conditional upon the main contractor having received payment from the principal*" as in Bauer's matters or "*cross-contract set-offs as manifested in clause 11.1 of the agreement*" in Ireka's matters.

Having considered the above, the Federal Court reversed the position in UDA Holdings and upheld the decision of the Court of Appeal in Bauer by finding that the entire CIPAA applies prospectively for it "*cannot be the case that some parts of the CIPAA have retrospective application whereas the other parts are held to have prospective application*".

Further, the Federal Court set aside both the adjudication decisions in Bauer and Ireka's matters as the entire adjudication proceedings therein are rendered void by virtue of the Federal Court's finding that CIPAA applies prospectively.

IMPORTANCE OF THE DECISIONS

The direct implication of the Federal Court case is clear. CIPAA only applies prospectively, i.e. to construction contracts entered on or after 15.04.2014 and does not apply to construction contracts executed before 15.04.2014. However, the wider implication does not appear to be so clear.

As the Federal Court ruled that the entire CIPAA applies prospectively, the finding thereby resulted in the entire adjudication proceedings and decisions in both Bauer and Ireka to be void.

Following the same logic, are previous adjudication decisions relating to construction contracts entered into before 15.04.2014 automatically voided as well? Are such adjudication decisions liable to be set aside? What if parties had acted upon such decisions and consequently made payment? Can the payments now be recovered?

The answer to these questions depends on whether the Federal Court decisions in Bauer and Ireka themselves have retrospective application or will they only apply prospectively to pending and future adjudications.

CONTACT

ANDREW HENG YENG HOE
Partner

+6012 205 8413
andrew@zainmegatmurad.com

CIPAA Applies to Terminated Contract and Final Payment

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and Another Appeal [2019] 8 CLJ 433

ISSUES

In the Federal Court decision of **Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Anor Appeal [2019] 8 CLJ 433**, 3 principal issues arose:-

(a) Whether disputes arising from terminated contract fall within the ambit of CIPAA?

(b) Whether CIPAA applies to final claim (as compared to interim claim)?

(c) Whether disputes between an architect and his client ought to be resolved via the specific provision created for such purpose, i.e. rule 21 of the Fourth Schedule to the Architect Rules 1973(as amended in 1986)?

BRIEF FACTS

(1) Vide a Letter of Appointment dated 22.08.2014, the Appellant (Martego) appointed the Respondent (Arkitek Meor & Chew) as its project architect for a multistory development in downtown Kuala Lumpur.

(2) On 07.08.2015, the Appellant terminated the Respondent's service and the Respondent accepted the termination.

(3) However, a dispute arose as to the amount of professional fees that is due following the termination.

(4) Without a resolution, the Respondent initiated adjudication pursuant CIPAA to recover the sum of RM599,500.00.

(5) On 14.04.2015, the Adjudicator awarded the sum of RM258,550.00 to the Respondent ("**Adjudication Decision**").

(6) The Appellant applies to set aside the Decision whereas the Respondent applies to enforce it in the High Court. The High Court ruled in favor of the Respondent.

(7) The Appellant appealed to the Court of Appeal. The Court of Appeal, by majority of 2-1, affirmed the High Court's decision. Hence, the appeal to the Federal Court.

A. JURISDICTION: TERMINATED CONTRACT

In addressing whether a valid CIPAA claim can be framed on a terminated construction contract, the Federal Court notes that this issue turns on the proper interpretation of the construction contract in the context of CIPAA.

The Federal Court recognised that both parties accepted that the construction contract had been lawfully terminated and that the termination clause in the construction contract expressly contemplates payment being made after the contract has terminated.

However, it is important to note that the Federal Court also finds that the absence of an express provision for entitlement of payment post termination will not deprive the party of such payment as the parties' past rights and obligations prior to termination are not affected by the termination.

Having considered the above, the Federal Court finds that the right to payment under the construction contract survives the termination.

B. CIPAA IS CONFINED ONLY TO INTERIM CLAIM?

Further to the above, the Federal Court examined the intent behind CIPAA and held that interpretation expounded by the majority in the Court of Appeal is consistent with the purpose and structure of the adjudication process outlined in CIPAA 2012.

The Federal Court also noted that it saw no conceivable basis for Parliament to take a different approach between interim payment and final payment and if "*Parliament had intended to exclude final claims from the adjudicatory ambit of CIPAA 2012, it could have clearly included a proviso or provisions to that effect. Further, if the Parliament intended a different approach for interim and final claims, the Parliament would have deliberately utilised a different language evincing such an intention*."

Having examined the Preamble to CIPAA 2012, the Explanatory Statement to the CIPAA Bill 2011 as well as the Deputy Minister's speech during the Second Reading of the Bill to introduce CIPAA 2012 in Dewan Rakyat on 02.04.2012, the Federal Court found that "*the primary objective of CIPAA 2012 is to alleviate cash flow issues by providing an effective and economical mechanism... Therefore, the mischief that CIPAA 2012 intends to cure is none other than the cash flow in the construction industry through effective and economical mechanism; for deciding otherwise would run counter to the legislative purpose of creating an expedited adjudication process.*"

Having made the above findings, the Federal Court concludes that CIPAA 2012 is not confined to interim claims only and final claims are not precluded from CIPAA 2012. Naturally, the challenge on the jurisdiction of the Adjudicator to adjudicate a claim mounted on a final claim fails.

C. ARBITRATION AS SPECIFIC REMEDY PURSUANT TO STATUTE (ARCHITECTS ACT 1967)

In relation to this issue, the Appellant contends that since the Architects Act 1967 ("**AA**") provided for a specific dispute resolution mechanism, i.e. arbitration, the payment dispute ought to be arbitrated instead of adjudicated under CIPAA 2012.

However, the Federal Court was not pursuaded and instead, endorsed the High Court's decision (which was in turn endorsed by the majority in the Court of Appeal) that adjudication and arbitration are not mutually exclusive of each other as they can run concurrently and in parallel.

EFFECT OF DECISION

This decision brings much clarity as to whether CIPAA 2012 applies to terminated contract and/or final claims. The Federal Court answered both these questions in the affirmative.

Viewing the Federal Court's decision as a whole, as long as there is a sum payable under a construction contract for work done, which remained unpaid, the claim can be adjudicated under CIPAA 2012 as a payment dispute under the construction contract.

> *"There can be no doubt that so long as there is a sum payable under a construction contract for work done and as long as the party remains unpaid, the claim can still be brought against the other party through CIPAA 2012 as it is payment dispute under the construction contract. The section does not suggest that the payment claim should be confined to interim claims only."*
>
> -Federal Court

CONTACT

Andrew Heng Yeng Hoe
Partner

+6012 205 8413
andrew@zainmegatmurad.com

CIPAA: "Unregistered" Adjudication Decision as Basis of Debt Due in Winding Up Petition

Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244

> *As such, we were inclined to agree with the proposition that,* ***for the purpose of filing a notice to wind up under section 465 of the Companies Act 2016, a successful litigant in an adjudication proceeding need not have to register the said adjudication decision under section 28 of CIPAA****…*
>
> - Court of Appeal

ISSUES

Is it necessary for a successful Claimant in adjudication to make an application to enforce the adjudication decision pursuant to section 28 of the Construction Industry Payment and Adjudication Act 2012 before initiating winding up proceedings based on the adjudication decision?

The Court of Appeal case of **Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244** addressed this question.

BRIEF FACTS

The Respondent obtained an adjudication decision against the Appellant pursuant to CIPAA 2012 for the certified sums of RM16,439,628.24 ("**Adjudicated Sum**").

The Respondent then served a Statutory Notice of Demand pursuant to Section 465 of Companies Act 2016 ("**CA 2016**") to the Appellant.

The Appellant neglected and/or failed to pay or satisfy or compound the Adjudicated Sum within the statutory period.

Consequently, the Respondent presented the winding up petition to wind-up the Appellant on the grounds that the Appellant was unable to pay its debts and that it is just and equitable to wind up the Appellant.

The High Court granted the winding up order. Dissatisfied with the decision, the Appellant appealed to the Court of Appeal.

ISSUES BEFORE THE COURT OF APPEAL

The Appellant raised 3 principle points of submissions in the Court of Appeal:-

1) The Respondent's winding up notice is premature as the adjudication decision has not been registered and converted to a High Court Order pursuant to section 28 of CIPAA 2012;

2) The adjudication decision did not name the Respondent as the recipient of the awarded sum. Instead, the Appellant was ordered to pay KLRCA (now the Asian International Arbitration Centre). Hence, there was no monies owing to the Respondent;

3) It is not just and equitable to wind up the Appellant.

Having considered the submissions of parties, the Court of Appeal dismissed the Appeal and affirmed the High Court's Order.

PREMATURE NOTICE AND NON-REGISTRATION OF CIPAA DECISION

The Court of Appeal was of the view that the language under section 28 of CIPAA does not convey the interpretation that an adjudication decision must be registered before a statutory notice under section 465(1) and (h) of the Companies Act 2016 could be issued. To this end, the Court of Appeal held that "*it is not a mandatory requirement that there must be a judgement entered in favour of the Respondent Petitioner for the amount that was being claimed and pursued against the Appellant debtor for payment of the same*."

Further, the Court of Appeal noted that the adjudication decision had evinced the amount stated therein was due and owing and that there was no application to set aside the said adjudication decision. In the premises, the Court of Appeal finds that "*such an adjudication decision was good and proper as a basis upon which a winding up petition notice against the Appellant may be filed for a debt in the amount, as stated in the said adjudication decision against the Appellant.*"

Consequently, the Court of Appeal is of the view that the winding up petition was not premature.

RESPONDENT PETITIONER NOT NAMED AS RECIPIENT OF THE MONIES UNDER THE DECISION

Whilst that the adjudication decision directed for payments to be made to KLRCA, the Court of Appeal noted that "*the payments due from the Appellant referred to in the said order were for the benefit of the Respondent Petitioner*" and that the Learned Judicial Commissioner in the High Court did not made any error allowing the Winding Up Petition notwithstanding that the adjudication decision ordered for payments to be made to KLRCA.

NOT JUST AND EQUITABLE TO WIND UP THE APPELLANT

The Appellant contended that it is not just and equitable to wind up the Appellant as it was expecting progress payment amounting to RM18,606,483.03 from Malaysia Building Society Berhad and that it has a gross development value amounting to RM237,817,686.00 in connection with the construction of a proposed 25 storey student hostel.

The Court of Appeal rejected the aforesaid submission and affirmed the decision of the High Court.

The Court of Appeal found that the test for insolvency is whether the company is *"able to meet its current debts based on assets presently available"*. In relation to this, the Court of Appeal finds that "*with the debt of approximately RM20 million claimed under this Petition, it is clear that the Appellant's current bank balance is not sufficient to pay the debts owed to the Respondent Petitioner."*

EFFECT OF DECISION

Following the decision:-

I. A successful Claimant in adjudication need not have the adjudication decision registered before issuing a statutory notice under section 465 of CA 2016; and

II. This position will be fortified by the fact that there is no setting aside application and where the company does not have a healthy bank balance.

It remains to be seen if the outcome would be any different if the Respondent in the adjudication applies to set aside the adjudication decision pursuant to section 15 of CIPAA 2012 **after** it is served with a 465 Notice and at the same time, apply for a Fortuna Injunction to restrain the presentation of any winding up petition.

Would the Respondent's position be strengthened in the event that it can demonstrate ability to pay?

CONTACT

Andrew Heng Yeng Hoe
Partner

+6012 205 8413
andrew@zainmegatmurad.com

CIPAA: Direct Payment from Principal when the Losing Party was wound up?

CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2018] MLJU 471

A successful Claimant in CIPAA proceeding could request for direct payment from the Principal notwithstanding that the losing party had been wound up.

INTRODUCTION

When a Claimant successfully obtained an Adjudication Decision in its favour against the losing party, CIPAA offers 3 methods to enforce the Adjudication Decision, where the successful Claimant may:-

1) apply to the High Court to enforce the Adjudication Decision as if it is a judgment or order of the High Court under Section 28 of CIPAA;

2) suspend the performance of work under Section 29 of CIPAA; and/or

3) request for direct payment from the Principal of the losing party under Section 30 of CIPAA;

However, if the project has been completed and/or the losing party has been wound up, the former 2 options would not be possible.

Under such circumstances, could the successful Claimant requests for direct payment from the Principal, notwithstanding that the losing party has been wound up?

This issue was canvassed before the Court of Appeal in the case of **CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2018] MLJU 471.**

BACKGROUND FACTS

BHL Gemilang ("***Developer***") was the Developer of the project known as "The Mark" ("**Project**").

The Developer had appointed BHL Builders ("***Main Contractor***") as the main contractor of the Project.

The Main Contractor in turn subcontracted the super structure work to CT Indah Construction Sdn Bhd ("**Subcontractor**") for the sum of RM43,144,275.98.

Subsequently, a payment dispute arose between the Main Contractor and the Subcontractor and following therefrom, the Subcontractor commenced CIPAA proceedings against the Main Contractor.

By an adjudication decision dated 13.10.2016, the Adjudicator allowed the Subcontractor's claim for the principal sum of RM9,065,335.67 ("**Adjudicated Sum**") together with interest and costs against the Main Contractor ("**Adjudication Decision**").

The Main Contractor failed to settle the Adjudicated Sum.

Following therefrom, the Subcontractor had issued a statutory demand against the Main Contractor for the Adjudicated Sum. On 07.12.2016, the Subcontractor also avails itself by requesting the Main Contractor's principal, the Developer for direct payment of the Adjudicated Sum pursuant to the Section 30 of CIPAA.

The Developer failed to "*show proof of payment*" to the Subcontractor or "*to state that direct payment would be made after the expiry of ten working days of the service of the notice*" in accordance with Section 30(2) of CIPAA.

Subsequently, the Main Contractor was wound up by a third party due to an unrelated debt by a Winding Up Order dated 17.08.2017.

Following therefrom, the Subcontractor initiated the present action against the Developer for direct payment of Adjudicated Sum.

DECISION OF THE COURT

Whether Section 30 of CIPAA is subjected to the prohibition of preferential payment under Section 293 of Companies Act?

The Court of Appeal reversed the High Court's decision and allowed the Subcontractor's claim herein for direct payment of Adjudicated Sum.

The Court of Appeal noted that in the absence of proof of payment by the Developer, it becomes mandatory for the Developer to pay the Adjudicated Sum to the Subcontractor. In the circumstances, notwithstanding that the Main Contractor was wound up, by virtue of Section 30 (3) of CIPAA, the Court of Appeal held that there was an independent and separate statutory obligation on the part of Developer/Principal to make direct payment to the Subcontractor.

SIGNIFICANCE OF THE JUDGMENT

Following the decision of the Court of Appeal, it would now appear that if the Claimant successfully obtained an adjudication decision in its favour and there is money due or payable by the Principal to the losing party, the successful Claimant could request for direct payment from the Principal irrespective of whether the losing party had been wound up or otherwise.

Having said the above, it remains to be seen whether the direct payment from the Principal remedy is still possible in the event that the Adjudicated Decision was only obtained, and/or the request for direct payment from Principal was only issued, after the Main Contractor was wound up.

CONTACT

Lee Kai Jun
Associate

+6 016 403 9678
kaijun@zainmegatmurad.com

ANTI-ARBITRATION INJUNCTION GRANTED TO A PARTY NOT PRIVY TO THE ARBITRATION AGREEMENT

JAYA SUDHIR JAYARAM V NAUTICAL SUPREME SDN BHD & ORS [2019] 7 CLJ 395

ISSUES

What would you do if an ongoing arbitration affects your proprietary rights but yet you are not party to that arbitration by virtue of you not being a party to the arbitration agreement? Can you initiate court proceedings to assert your rights and apply for an injunction to restrain the ongoing arbitration? Conversely, if the parties to the arbitration are also party to the court proceedings, can they apply to stay the court proceedings pending the arbitration?

These issues arose in the Federal Court case of **Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395.**

BRIEF FACTS

(1) The 3rd Respondent is a joint venture company ("**JV Company**"), where the 1st Respondent and the 2nd Respondent are its shareholders, holding 20% and 80% shares respectively.

(2) The Appellant contended that vide a collateral understanding between the Appellant, the 1st and the 2nd Respondents, the parties agreed for 10% shares of the JV Company held by the 2nd Respondent to be transferred to the Appellant in consideration of the Appellant acting as its white knight.

(3) The 1st Respondent took the position that the transfer of shares to the Appellant was in contravention of the terms and conditions of the Shareholders' Agreement between the 3 Respondents, which prohibited the transfer of shares in the JV Company to 3rd party.

(4) The 1st Respondent also commenced arbitration proceedings against the 2nd Respondent and the JV Company on 19.10.2016 pursuant to the arbitration clause in the Shareholders' Agreement, claiming for breach of the Shareholders' Agreement ("**Arbitration Proceeding**").

(5) From July 2016 to February 2017, the 1st Respondent commenced 3 civil suits in the Kuala Lumpur High Court, i.e. OS 280 Suit, OS 9 Suit and 544 Suit. Of relevance, the 544 Suit was filed by the 1st Respondent against the Appellant based on tort of inducement for the Appellant's alleged inducement of the 2nd and 3rd Respondents' breach of the aforesaid Shareholders' Agreement.

(6) Subsequently, the Appellant had on 08.05.2017 commenced the present suit against all the Respondents, seeking, inter alia, declarations to assert its rights over the 10% shares in the JV Company and an injunction to restrain commencement and continuation of any legal proceedings or arbitration which affected or impacted upon the rights attached to the 10% and 70% shares registered in the name of the Appellant and the 2nd Respondent respectively without the presence of the Appellant as a party to such legal proceedings or arbitration ("**Injunction Application**"). This action and the 544 Suit were subsequently consolidated.

(7) Midstream in the Injunction Proceeding, the 2nd Respondent and 3rd Respondent moved an application to stay the Appellant's proceeding pending determination of the arbitration and the 544 Suit ("**Stay Application**").

(8) The High Court allowed the Injunction Application and dismissed the Stay Application. There was no appeal on the dismissal of the Stay Application but upon the 1st Respondent's appeal on the Injunction Application, the Court of Appeal allowed the appeal and set aside the injunction order.

FEDERAL COURT'S DECISIONS

The Federal Court reversed the Court of Appeal's decision and reinstated the High Court's decision. In relation to the same:-

1. The Federal Court noted that there is no arbitration agreement between the Appellant and the 1st Respondent. Further, the Appellant is also not a party to the ongoing arbitration. Therefore, it is not possible for the Appellant to refer the dispute in this Suit to arbitration, as the claim herein and Injunction Application do not come within the ambit and scope of Section 10 of Arbitration Act.

2. Separately, the Federal Court agreed with the High Court that the "*primary consideration on whether to grant the injunction to restrain the arbitration proceedings where the rights of a non-party thereto are involved is what would be the fairest approach to all parties. It must not result in any party suffering a severe disadvantage and for the ends of justice to be met, the benefits must outweigh the advantage*."

3. On the facts of the matter, the Federal Court noted that there was a significant degree of multiplicity, duplication and overlap of issues in the Arbitration Proceeding, Injunction Proceeding and the 544 Suit. There "*is the need to circumvent multiplicity of proceedings to avoid the same subject matter of both proceedings from being fought on two fronts before different tribunals and risks of inconsistent findings*".

4. Further, the Federal Court finds that it would be "*oppressive, vexatious and unconscionable for the arbitration proceedings to continue because the Appellant is not a party thereto while his proprietary rights are sought to be impinged*".

5. The Federal Court also finds that this Suit together with the 544 Suit are already at trial stage and considering the other circumstances, "*attach a very strong and significant degree of credence to the argument of the Appellant that this suit should take precedence over the arbitration. Hence the injunction granted by the learned judge is undoubtedly correct*."

6. Against this backdrop, the Federal Court allowed the Appellant's appeal and reinstated the injunction to restrain the Arbitration Proceedings.

7. In conclusion, the Federal Court also found that: "*generally it is often said that an injunction would issue where the balance of justice is as such. In the present case, we find that the learned judge correctly concluded that the balance of justice was in favour of the injunction order… We are satisfied that there are serious issues to be tried and the balance of convenience lies in favour of the instant case proceedings over the arbitration for the reasons earlier given*."

EFFECT OF DECISION

This Federal Court's decision is significant for bringing certainty to the following:-

1. A non-party to an arbitration agreement may apply to restrain others from commencing and/or maintaining arbitration proceedings, which are conducted without him being a party to the arbitration, provided if his rights are and/or will be affected or impacted by the arbitration proceedings; and

2. This is especially the case if the Court proceedings are in an advance stage and there is no prejudice caused to the parties involved in the arbitration.

CONTACT

ROGER LEONG CHUN LIM
Senior Associate

+60 16-245 5054
roger.leong@zainmegatmurad.com

Dismissal of Winding-up Petition When There Is An Arbitration Agreement?

AWANGSA BINA SDN BHD V MAYLAND AVENUE SDN BHD [2019] 1 LNS 590; [2019] MLJU 1365

ISSUES

Ordinarily, in order to defeat a winding-up petition and/or to restrain the presentation of a winding-up petition, one would need to prove that there is a 'bona fide dispute of the debt'.

However, when the underlying agreement contains an arbitration clause, would the test still be the same? Can the winding-up petition be stayed and referred to arbitration when the debt appears to be disputed?

These issues were considered in the Malaysian High Court case of **Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd.**

BRIEF FACTS

The salient facts of the case are as follows:-

1. The Petitioner was appointed as the contractor by the Respondent.

2. The Petitioner completed the Project and the Statement of Final Account was certified by the Respondent's Quantity Surveyor and Consultant Architect for the sum of RM5,829,742.60 ("**Outstanding Sum**"). However, it was not signed by the Respondent and because of this, the Consultant Architect did not issue the Final Certificate.

3. The Respondent did not make payment of the Outstanding Sum. Following therefrom, the Petitioner issued a Section 466 statutory demand against the Respondent and thereafter, proceeded to present a winding-up petition against the Respondent.

4. The contract between the parties contains an arbitration agreement. On this basis, the Respondent resisted the winding-up petition by filing an application to (1) stay the winding-up proceedings pending arbitration ("**Stay Application**") pursuant to Section 10 of Arbitration Act 2005 and (2) alternatively, to strike out the winding-up petition ("**Striking Out Application**")

STAY OF WINDING-UP PETITION PROCEEDING WHEN THERE IS AN ARBITRATION AGREEMENT?

The High Court in dismissing the Respondent's Stay Application, held that Section 10 of the Arbitration Act 2005 does not apply to a winding-up petition. The High Court reasoned that winding -up proceeding is sui generis and not in the nature of a substantive claim contemplated within the remit of Section 10 Arbitration Act 2005.

Following therefrom, a winding-up petition is not a '**proceeding**' that is susceptible to a stay pending arbitration and to grant a stay of winding-up petition under Section 10 of the Arbitration Act 2005 would be patently inappropriate and conceptually incongruent within the winding-up context.

DISMISSAL OF WINDING-UP PETITION PROCEEDING WHEN THERE IS AN ARBITRATION AGREEMENT?

After deciding the above and having referred to the plethora of foreign authorities canvassed before the High Court, the High Court found that there was prima facie a dispute as to the debt and exercised discretion under Section 465 of Companies Act 2016 to dismiss the winding-up petition.

Pertinently, the High Court affirmed the following principles:-

a) Where parties have agreed to refer the dispute relating to the debt to arbitration, the merits of the dispute are to be decided by the arbitrator and not the court.

b) Under such circumstance, it would be anomalous for the Court to conduct a summary judgment type analysis of liability for an unadmitted debt on which a winding-up petition is grounded as the Court would inevitably have to conduct a summary judgment type of analysis and enquiry into the merits of the dispute of the debt. Doing so would deprive the other party of its contractual bargain – i.e. to resolve any dispute by way of arbitration.

c) Further, by exercising discretion to wind up the company under such circumstances would also encourage parties to bypass the pre-agreed arbitration agreement by presenting a winding-up petition.

SIGNIFICANCE OF THE DECISION

Following the decision, where there is an arbitration agreement, a winding-up petition can be dismissed or the presentation of a winding-up petition may be restrained if the debtor could demonstrate that:-

1. there is a prima facie dispute of the debt;

2. the purported dispute fell within the ambit of the pre-agreed arbitration clause;

Unlike the ordinary standard of “bona fide dispute of debt” which requires the Court to examine the affidavit evidence and consider summarily whether an arguable case has been made out, the test of "*prima facie dispute of debt*" requires a much lower burden of proof as “*a denial of the indebtedness constitutes a dispute*”.

Following this decision, it appears that a winding-up petition may be dismissed, if the Respondent denies the indebtedness and such indebtedness had not been finally determined in arbitration as per the pre-agreed arbitration clause.

Lower standard to resist Winding Up Petition ?

CONTACT

Lee Kai Jun
Associate

+6 016 403 9678
kaijun@zainmegatmurad.com

Registration of Arbitration Award for Reasons other than Enforcement

Jacob And Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co. KG (Germany); Toralf Mueller (Intervener)
[2019] 10 CLJ 281

ISSUES

Arbitration awards are usually registered for enforcement purposes where the award is recognised as binding and can be enforced by entry as a judgment in terms of the award.

If the counter party alleged that the registration was done for "*some ulterior or collateral purpose and not for the purpose of enforcing the award*", can the High Court only register the dispositive portion of the award, i.e. the part of the award that grants the remedies, or must the whole arbitral award be registered nevertheless?

This issue arose in the Court of Appeal case of **Jacob And Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co. KG (Germany); Toralf Mueller (Intervener) [2019] 10 CLJ 281.**

BRIEF FACTS

Pursuant to a settlement agreement dated 31.07.2008 ("**Settlement Agreement**"), the parties agreed to amicably resolve certain legal proceedings, allowing a full and final settlement of all disputes between them. There is an arbitration clause in the Settlement Agreement.

Sometime in 2009, the Appellants commenced an action against the Respondent and 5 others in the Kuala Lumpur High Court ("**2009 Suit**"). The Appellants claimed that the "*settlement agreement was entered into by reason of fraudulent misrepresentation by the Respondent and/or its representatives*".

However, the Respondent applied and obtained an order to stay the 2009 Suit and refer the disputes to arbitration, on account of the arbitration clause in the Settlement Agreement.

Thereafter, the Respondent initiated arbitration proceedings against the Appellants in Singapore pursuant to the arbitration agreement. The Respondent sought, primarily, a declaration on the validity of the Settlement Agreement.

On 08.05.2015, the arbitral tribunal delivered its final award ("**Final Award**") and found, amongst others, that "*The Settlement Agreement was procured by fraudulent misrepresentation*" and that the "*Respondent did not affirm the Settlement Agreement*".

Consequently, the Arbitral Tribunal made the disposition that "*the Claimant's [Respondent] claim be dismissed in its entirety*" and costs were awarded to the Appellants ("**Dispositive Portion of the Award**").

The Respondent attempted to set aside the Final Award in the Singapore High Court but the same was dismissed.

In December 2016, the Appellants filed the instant originating summons under. S.38 of the Arbitration Act 2005 to register the Final Award based on the findings made by the Arbitral Tribunal.

The High Court allowed the registration but only on the Dispositive Portion of the Award.

Dissatisfied, the Appellants appealed to the Court of Appeal.

ISSUES BEFORE THE COURT OF APPEAL

The Respondent contended that only the Dispositive Portion of the Award was capable of being registered as a judgment of the High Court of Malaya premised, inter alia, on the following grounds:-

(1) The application to register the whole Final Award "*appeared to be an attempt to utilize the findings of the said arbitration award for some other ulterior or collateral purpose*";

(2) There was "*nothing to enforce*" as the declaration sought by the Respondents in the Arbitration was dismissed.

By reference to the definition of an award under section 2 of the Arbitration Act 2005 ("**AA 2005**"), the Appellants submitted that "*a decision on the substance of the dispute includes the finding on the same and would therefore be a necessary portion of the award to be registered*".

COURT OF APPEAL'S DECISIONS

Having considered the submissions of parties, the Court of Appeal allowed the appeal and set aside the High Court's order.

The Court of Appeal found that the list of grounds in section 39 of AA 2005 are exhaustive for refusing recognition of enforcement and that "*the respondent's sole argument to refuse registration of the award*", i.e. attempt to utilize the findings for "*some ulterior or collateral purpose*", "*is clearly not recognised as a ground for challenge under s. 39 AA 2005*".

The Court of Appeal found that list of grounds in section 39 of AA 2005 are exhaustive for refusing recognition of enforcement and that "*the Respondent's sole argument to refuse registration of the award*", i.e. attempt to utilize the findings for "*some ulterior or collateral purpose*", "*is clearly not recognised as a ground for challenge under s. 39 AA 2005*".

The Court of Appeal also recognised that, apart from enforcement, the arbitration award has other utilities and that section 36(1) of AA 2005 "*provides a broad basis to use an award*":-

> *"36(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set off or otherwise in any proceedings in any court."*

EFFECT OF DECISION

Simply put, registration and recognition of an arbitration award entails the recognition of the whole award save for the proviso in section 39 of AA 2005. Where parties agreed to arbitrate their dispute(s) and if the arbitral tribunals made findings less than flattering in the award, such findings are to be recognised as binding as well.

There is a broad basis to use an arbitration award where it could be used in any proceedings in any court as a "*defence*, set off or **otherwise**" (emphasis added).

> *"the Respondent's sole argument to refuse registration of the award was that the registration was an attempt to utilise the findings of the said arbitration award for some ulterior or collateral purpose… This argument is clearly not recognised as a ground for challenge under s. 39 AA 2005."*
>
> *- Court of Appeal*

CONTACT

NURUL AZUREEN AHSIN
ASSOCIATE

+6 011 2527 0838
azureen@zainmegatmurad.com