ARBITRATION : Set-off Across Multiple Contracts, Each With Its Own Arbitration Agreement

PERTAMA FERROALLOYS SDN BHD V SAC TEC (MALAYSIA) SDN BHD

ISSUES

At times, a party may undertake several types of work under one project. This may result in multiple contracts being executed between parties, each for different type of works.

What if one of these contracts provides for set-off against, not only any amount owed under that contract but other contracts as well? And to compound matters, each of these contracts has its own arbitration clause. Would that set-off clause clothed the arbitral tribunal with the jurisdiction to determine the defence of set-off and counterclaim arising from other contracts?

This question was answered in the recent High Court case of **Pertama Ferroalloys Sdn Bhd v SAC TEC (Malaysia) Sdn Bhd (Originating Summons No.WA-24NCC(ARB)-2-01/2020)**.

BRIEF FACTS

The brief facts of the case, relevant to this article, are as follows:-

(a) The Plaintiff ("**Pertama**"), Defendant ("**SAC-M**") together with their respective shareholders, *"entered into 5 independent contracts at different times to govern their relationship in relation to Pertama's project of setting-up a ferro-alloys plant at Samalaju Industrial Park in Bintulu, Sarawak" ("***Project***").*

(b) The 5 independent contracts, each with their own arbitration clauses, are as follows:-

i. The Furnace Contract;
ii. The RMHS Contract;
iii. The Steel Structure Contract;
iv. The Carbon Casing Contract;
v. The Maintenance Contract;

(c) Only the Carbon Casing Contract contains a set-off clause providing, "*a right for Pertama to set -off any liability of SAC-M to Pertama under the Carbon Casing Contract or any other contracts between them against any liability of Pertama to SAC-M under the Carbon Casing Contract."*

(d) Several disputes arose between SAC-M and Pertama. In the upshot, SAC-M had amongst others, commenced arbitration against Pertama under the Carbon Casing Contract ("**Carbon Casing Contract Arbitration**") for premature termination, while claiming for damages and payment for carbon casing delivered to Pertama.

(e) In response, Pertama relying on the set-off clause under the Carbon Casing Contract, raised the defence of set-off and in addition to that, had counterclaimed for, amongst others, the amount due under the Maintenance Contract.

(f) SAC-M raised a jurisdictional challenge specifically to Pertama's counterclaim and contended, amongst others, that the Maintenance Contract contains a valid arbitration clause thus, claims arising therefrom are not the subject matter of the Carbon Casing Contract Arbitration ("**Preliminary Objection**").

ARBITRATOR'S DECISION ON JURISDICTIONAL CHALLENGE

On 20.12.2019, the Arbitrator decided in favour of SAC-M's jurisdictional challenge and ruled that:-

(1) The Arbitrator has jurisdiction to determine the defence of set-off pursuant to the set-off clause (**clause 18 of the Carbon Casing Contract**);

(2) However, the Arbitrator has no jurisdiction to determine the sums due under other contracts, "*insofar as they are disputed and have not been determined by a tribunal or Court of competent jurisdiction*."

("**Jurisdiction Award**")

In the upshot, the Arbitrator ruled that the Arbitrator has jurisdiction to determine the defence of set-off but not the counterclaim for amount due under the other contracts.

ISSUES BEFORE THE COURT

Following the Jurisdiction Award, Pertama filed an appeal to the High Court pursuant to **Sections 18(1) and (8) of the Arbitration Act 2005**.

The Learned Judge identified the following 2 issues to be determined:-

(1) *"The first has to do with the determination of the jurisdiction of an arbitral tribunal in the context of a relationship between parties where there exist a series of different agreements entered into with each agreement containing differently expressed arbitration clauses with distinct arbitral regimes and governing laws"*

(2) "The second issue deals with a party's contractual right of set-off which extends to claims arising from the Other Contracts and the interpretation of the set-off clause to see if the set-off claims fall within the jurisdiction of the arbitral tribunal."

[Emphasis added]

COURT'S DECISION AND REASONING

JURISDICTION OF ARBITRAL TRIBUNAL WHERE THERE ARE MULTIPLE CONTRACTS, EACH WITH ITS OWN ARBITRATION AGREEMENT

The Learned Judge reasoned that the "*one-stop*" jurisdiction presumption propounded by Hoffmann LJ in **Fiona Trust Corp v Privalov [2007] UKHL** would not apply because each contracts are different with their own arbitration clauses. Instead, the present case would fit into the 2nd situation described in the case of **AmTrust Europa v Trust Risk Group [2014] EWHC 4169**:-

> *"… The 5 contracts in this case fits into the second situation described by Beatson LJ in **AmTrust Europa v Trust Risk Group** (supra) in which 'there is a single contract creating a relationship which is followed by a later contract embodying a subsequent agreement about the relationship'. **Each of these contracts is a fully operational free-standing contract on its own. Given that these contracts were all separated in time, i.e. not being 'part of one package' and given the detailed arbitration clauses stipulated in each agreements, there is greater weight to the presumption that the parties had chosen to have different jurisdictions to deal exclusively with its own subject matters and not intended to overlap.**"*
>
> [Emphasis added]

In the upshot, the Learned Judge decided that:-

> *"Accordingly, in my judgment, I hold that in this particular case, the parties must have intended for each of the disputes under each of the agreements to be determined by their respective arbitral tribunals to be constituted thereunder. However, this is not the end of the matter. We will now need to deal with the specific arbitration clause under the Carbon Casing Contract and the express set-off clause thereunder."*

ARBITRAL TRIBUNAL'S JURISDICTION VIZ. CONTRACTUAL RIGHT OF SET-OFF WITH CLAIMS FROM OTHER CONTRACTS

The 2nd issue relates to the interpretation of the set-off and arbitration clauses under the Carbon Casing Contract.

The Learned Judge noted that, when the Carbon Casing Contract was executed, parties had already executed the Furnace Contract, the RMHS Contract as well as the Steel Structure Contract and yet "*the parties have specifically provided in Clause 18 of the Carbon Casing Contract a right for Pertama to set-off any liability of SAC-M to Pertama under the Carbon Casing Contract or any other contracts between them against any liability of Pertama to SAC-M under the Carbon Casing Contract*."

Notwithstanding that each contract has its own arbitration clause, the Learned Judge, by reference to the set-off clause in the Carbon Casing Contract, finds that:-

> *"…both Pertama and SAC-M have by an express term made clear their preference for the arbitral tribunal constituted under the Carbon Casing Contract to be a single, centralized dispute resolution mechanism to deal with their disputes relating to claims arising not only under the Carbon Casing Contract but also claims arising under the Other Contracts* ***insofar where such claims can be made to set-off the claims by SAC-M under the Carbon Casing Contract****."*
>
> [Emphasis added]

The Learned Judge also observed that the set-off clause is only present in the Carbon Casing Contract and that the same is significant:-

> *"This suggests a conscious decision on the part of the parties of an intention to confer only on the arbitral tribunal constituted under the Carbon Casing Contract, when a claim is made by SAC-M under the Carbon Casing Contract, a wide jurisdiction to be the centralized dispute forum for the determination of sums due after taking into account all claims arising under the 5 contracts entered into between the parties."*

In relation to the arbitration clause in the Carbon Casing Contract, the Learned Judge also noted that:-

> *"The words 'arising from or in connection with' in Clause 24 suggest that the parties have intended to confer a more extensive jurisdiction on the arbitral tribunal than limiting its jurisdiction to only disputes within the confine of the factual matrix of the Carbon Casing Contract itself."*

To this end, the Learned Judge finds that the words used in the arbitration clause in the Carbon Casing Contract are wide enough to encompass Pertama's claims in other contracts insofar where such claims can be made to set-off SAC-M's claims under the Carbon Casing Contract.

> *"In short, the parties have agreed in Clause 18 that SAC-M's claims under the Carbon Casing Contract can be met by Pertama with a defence of set-off based on claims arising under the Other Contracts. The parties have by consent conferred on the Arbitrator the jurisdiction to determine these claims under the Other Contracts as otherwise Pertama's substantive right of set-off will be meaningless and Clause 18 rendered redundant. Rational businessmen must be presumed to have intended that they would not agree to meaningless term."*

DECISION

Following the above findings, the Learned Judge:-

(1) Set aside the Jurisdiction Award;

(2) Dismissed SAC-M's Preliminary Objection in the Carbon Casing Contract Arbitration;

(3) Pronounced that the Arbitrator has jurisdiction to determine Pertama's Defence of Set-Off **and** Counterclaim in relation to claims arising from other contracts.

MOVING FORWARD

Following the decision, it is important to note that:-

(a) Whilst a series of contracts may relate to the same project, it does not automatically attracts the "*one-stop*" jurisdiction presumption and have all disputes settled under a single tribunal constituted under any of the contracts, especially where the contracts are free-standing of each other and each contains its own arbitration clause.

(b) However, parties can specifically provide for one of the arbitral tribunal in those contracts to be the "*single, centralized dispute resolution mechanism*" for certain claims.

(c) In this case, this was done by way of the set-off clause in the Carbon Casing Contract where parties conferred the arbitral tribunal therein to determine Pertama's claims in other contracts **insofar where such claims can be made to set-off SAC-M's claims under the Carbon Casing Contract.**

(d) This case demonstrates that the Court will give a harmonious interpretation to the interplaying clauses relevant to the jurisdictional challenge to ensure that the set-off clause is not rendered redundant.

(e) As such, where parties are involved in numerous contracts relating to a single project, it is imperative for parties to properly structure its dispute resolution mechanism and to carefully craft its dispute resolution clauses.

(f) A carefully crafted dispute resolution clause, especially in the context of a series of contracts, will save costs and time, as it would give certainty to the jurisdiction of each arbitral tribunal constituted under such contracts.

If you have any questions or comments on this article, please contact:-

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