Stay Pending Arbitration & Anti-Arbitration Injunction : Arbitration Agreement Impugned with Allegation of Forgery

MACSTEEL INTERNATIONAL FAR EAST LIMITED V LYSAGHT CORRUGATED PIPE SDN BHD AND ANOTHER & 2 OTHER APPEALS [W-02(IM)(NCC)-2002-10/2021 / W-02(IM)(NCC)-2003-10/2021 / W-02(IM)(NCC)-2004-10/2021]

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ISSUES

Where a contract contains an arbitration agreement and one of the contracting parties initiate a Court action, the counterparty can apply to stay the Court action by virtue of Section 10 of the Arbitration Act 2005 ("**AA 2005**").

However, what happens if the arbitration agreement is impugned on the basis of forgery, i.e. that the arbitration agreement did not exist at all and is a product of forgery?

Can such an impugned arbitration agreement still be the basis of stay under Section 10 of the AA 2005? How will the Courts treat such an impugned arbitration agreement and what is appropriate forum to determine if the arbitration agreement is forged or otherwise?

These questions were answered in the recent Court of Appeal decision in **Macsteel International Far East Limited v Lysaght Corrugated Pipe Sdn Bhd and Another & 2 Other Appeal**s [W-02(IM)(NCC)-2002-10/2021 / W-02(IM)(NCC)-2003-10/2021 / W-02(IM)(NCC)-2004-10/2021].

BRIEF FACTS

The brief facts of the case are as follows:-

(a) The Respondents, Lysaght Corrugated Pipes Sdn Bhd ("**LCP**") as well as Lysaght Galvanized Steel Sdn Bhd ("**LGS**") and Popeye Resources Sdn Bhd [1st Defendant in High Court] ("**PR**") executed various supply contracts for purchase of imported hot rolled coils, produced by Macsteel International Far East Ltd ("**MIFE**").

(b) Between March 2019 to February 2020, LCP and PR executed 11 written supply contracts where LCP made payments to PR amounting to RM14,718,510.00 for supply of the hot rolled coils.

(c) Whereas, LGS and PR executed 9 written supply contracts between January 2019 to February 2020 and LGS made payment to PR amounting to RM10,522,675.00 for supply of the hot rolled coils.

(d) In September 2020, both LCP and LGS received a demand from MIFE for overdue unpaid payment for hot rolled coils supplied in respect of 5 supply contracts with LCP and 3 supply contracts with LGS, amounting to USD1,151,630.84 and amounting USD1,555,656.12 respectively ("**Impugned Contracts**").

(e) These Impugned Contracts contained an arbitration clause for dispute to be resolved by way of arbitration under the auspice of Hong Kong International Arbitration Centre.

(f) Both LCP and LGS alleged that these Impugned Contracts are forged as they only dealt with PR. LCP and LGS accordingly made police reports in relation thereto. MIFE retorted that there were 14 previous similar supply contracts between LCP / LGS and MIFE where PR acted as intermediary and payments in Ringgit Malaysia were made in timely manner.

(g) On 15.12.2020, MIFE commenced arbitration in Hong Kong against both LCP and LGS to recover the alleged unpaid amount ("**Arbitration**").

PROCEEDINGS BEFORE THE HIGH COURT

On 14.03.2021, LCP and LGS commenced a Suit in the Kuala Lumpur High Court, claiming for:-

"57.1. A declaration that the Contracts No. 168758, 168298 and 168803 were forged and/or fraudulently prepared;

57.2. A declaration that the Contracts No. 168758, 168298 and 168803 are null and void and/or cancelled;

57.3. A declaration that two (2) letters dated 17.03.2020 and one (1) letter dated 29.04.2020 were forged and/or are fraudulent in nature and are null and void;

57.4. A declaration that the purported authorisation letter dated 10.6.2020 were forged and/or are fraudulent in nature and are null and void;

57.5. A permanent injunction prohibiting, preventing and/or restraining the Second Defendant whether acting by itself, its directors, officers, employees, servants or agents or any of them howsoever from taking any action against the Second Plaintiff in relation to the Contracts No. 168758, 168298 and 168803 including

proceeding with the arbitration proceedings commenced by the Second Defendant against the Second Plaintiff on 15.12.2020;

57.6. Further and/or in the alternative, a permanent injunction prohibiting, preventing and/or restraining the Second Defendant whether acting by itself, its directors, officers, employees, servants or agents or any of them howsoever from taking any action against the Second Plaintiff for the registration and/or enforcement of any arbitral award;

57.7. General damages to be assessed;

57.8. Exemplary damages and/or aggravated damages to be assessed;

57.9 Interest at the rate of 5% per annum on all damages awarded by this Honourable Court from the date of judgment until the date of full and final settlement;

57.10 Costs of this action; and

57.11 Such further or other reliefs that this Honourable Court deems fit."

PR did not enter appearance. MIFE and LCP / LGS filed the following applications:-

(1) Upon entering appearance, MIFE filed an application to stay the proceedings in the Suit pursuant to s. 10 of AA ("**Stay Application**"); and

(2) LCP and LGS filed their respective applications to injunct the continuation of the Arbitration ("**Anti-arbitration Injunction Applications**").

These applications were heard together.

DECISION OF THE HIGH COURT

Both parties relied on foreign authorities to advance their respective case for the Stay Application. To this end, the Court of Appeal observed that parties relied on the following authorities in the High Court:-

> *"MIFE relied on the Singapore cases of **Malini Ventura v. Knight Capital [2015] 5 SLR 707 and Tomolugen Holdings Ltd v. Silica Investors Ltd [2016] 1 SLR 373** as well as the Canadian case of **Dell Computer Corp v. Union des consommateurs [2007] SCJ no. 34** to justify immediate stay of the court proceedings for the parties to refer and continue with the Arbitration whilst LCP and LCS relied on the English case of **Nigel Peter Albon v. Naza Motor Trading Sdn Bhd [2007] 2 All ER 1075** to oppose the same."*

In deciding the Stay Application, the High Court "*preferred and adopted the full merits approach set out in Nigel Peter Albon (supra) based on the available evidence rather than the cursory prima facie approach set out in Malini Ventura (supra) to determine whether the arbitration agreement was properly concluded."*

To this end, Nigel Peter Albon, by reference to guidelines in **Birse Construction Ltd v. St David Ltd [1999] BLR 194**, sets out 4 options where the **conclusion** of the arbitration agreement is in issue:-

> *"(1) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay;*
> *(2) to give directions for the trial by the court of the issue;*
> *(3) to stay the proceedings on the basis that the arbitrator will decide the issue; and*
> *(4) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay."*

Based on the available affidavit evidence, the High Court found that MIFE *"only had circumstantial but not direct evidence that the impugned supply contracts were not forged"* and that this is *"insufficient to conclude at this stage that there is a valid arbitration agreement".* Hence, the High Court directed this issue be tried based on the 2nd option in the Nigel Peter Albon guideline.

Arising thereof, the High Court also exercise the discretion to grant the Anti-arbitration Injunction on the following grounds:-

(1) On the balance of justice, the Anti-arbitration Injunction Application did not cause injustice to MIFE;

(2) *"the legal and equitable rights of LCP and LGS have been infringed or threatened by the continuation of the Arbitration as well as that the continuation of the Arbitration would be vexatious, oppressive and unconscionable."*

DECISION OF THE COURT OF APPEAL

The Court of Appeal recognised that the decision of the High Court in both applications primarily involved the exercise of discretion.

Having considered the interplay of section 10 of the AA 2005, which concerns the Stay Application and section 18 of the AA 2005, which concerns arbitral tribunal to determine its own jurisdiction, the Court of Appeal found that both the High Court and the Arbitral Tribunal have the jurisdiction and power to determine the validity of the arbitration agreement:-

> *"[33] **Based on the available options in the guidelines prescribed in Nigel Peter Albon (supra),** we acknowledge that the determination on whether there is a concluded arbitration agreement that is not null and void cannot be meaningfully made based on the existing affidavit evidence before us to invoke the 1st option or 4th option. **There is the necessity for further investigation here. This may be made by the High Court pursuant to the 2nd option premised upon s. 10(1) AA or by the arbitral tribunal pursuant to the 3rd option premised upon s. 18 (1) and (2) AA. In other***

words, both the High Court and the arbitral tribunal are forums that have jurisdiction and power to investigate and conclude on the validity of the arbitration agreement."

[Emphasis added]

In the circumstances where there is concurrent jurisdiction and power, the Court of Appeal finds that a flexible approach should be adopted to determine which forum is more just and convenience:-

"[34] In such instance of concurrent jurisdiction and power, we proffer a flexible approach that ***the appropriate forum to investigate and determine the validity of the arbitration agreement must be the forum that is on the balance more just and convenient having regard to the facts and circumstances in issue****."*

[Emphasis added]

On the facts and circumstances of this case, the Court of Appeal found that the High Court would be the appropriate forum, but only to carry out a limited inquiry into the validity of the arbitration agreement and not the merit of MIFE's claim:-

"[35] It is plain and obvious to us that the investigation ought to be carried out in Malaysia because of the specific fact that the impugned supply contracts emanated from Malaysia probably through the participation of PR which is based in Malaysia. If the investigation is undertaken by the High Court, there is the availability of the power to compel PR's attendance via subpoena which is unavailable to the Hong Kong-based Arbitration. In this sense, the Malini Ventura (supra) case is distinguishable on its special facts particularly in that the antecedent transaction was all done in Singapore.

[36] We are mindful that the investigation by the High Court is a limited inquiry into the validity of the arbitration agreement only and not the entire determination of MIFE's unpaid payment claims."

Consequently, the Court of Appeal also found that there is a need to preserve status quo pending the High Court's investigation and thus warranting the Anti-arbitration Injunction against the Arbitration.

In the upshot, the Court of Appeal found that there is no serious error in the High Court's exercise of discretion to dismiss the Stay Application or to allow the Anti-arbitration Injunction Application. Consequently, the appeals were dismissed.

MOVING FORWARD

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

(a) Where a party alleges that the arbitration agreement is forged, both the High Court and the arbitral tribunal *"have jurisdiction and power to investigate and conclude on the validity of the arbitration agreement."*

(b) In such circumstances, the Court of Appeal proffer a flexible approach to determine the forum where *"the appropriate forum to investigate and determine the validity of the arbitration agreement must be the forum that is on balance more just and convenient having regard to the facts and circumstances in issue."*

(c) Pending the High Court's inquiry into the validity of the arbitration agreement (and not on the merits of the dispute), there is also a need to preserve status quo by way of an anti-arbitration injunction.

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

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