

Mersing Construction and Engineering Sdn Bhd v A
Kejuruteraan Bintai Kindenko Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22-1104 OF 2009 B
HASNAH JC
27 JULY 2010

Civil Procedure — Stay of proceedings — Arbitration — Whether claim subject to C
arbitration — Whether stay should be granted — Arbitration Act 2005 ss 9 & 10

Contract — Building contract — Claim for payment — Claim for payment for D
work done under subcontract — Subcontract between plaintiff and second
defendant based on main contract but only appendix to main contract exhibited —
Appendix showed referral of dispute to dispute adjudication board — Whether E
court could ascertain intention of parties based on appendix only — Whether
appendix contained arbitration clause — Whether there was evidence of
arbitration clause in writing — Arbitration Act 2005 ss 9 & 10

Vide letters of award dated 26 April 2004 and 22 May 2004 the second F
defendant/applicant had appointed the plaintiff/respondent as the
subcontractor of the project for the construction of the KL sewerage treatment
plant (‘the project’). The plaintiff commenced an action against the second
defendant wherein it claimed the sum of RM914,110.55 for work done under
the project. The dispute between the parties was the amount the plaintiff was
claiming from the second defendant. The second defendant averred that under
the letters of award the parties were bound by the terms and conditions
imposed under the main contract between the fourth defendant and the first G
defendant and the Ministry of Housing and Local Government (‘the main
contract’) and that the appendix to the main contract provided that all disputes
had to be referred to arbitration. It was thus the second defendant’s case that,
based on item 14 of the appendix to the main contract which made reference to
para 20.4 of the main contract, the instant claim should also be referred to H
arbitration. This was the second defendant’s application for a stay of
proceedings. In applying for a stay the second defendant submitted that it was
settled law that if the parties agreed to refer to arbitration as provided in the
agreement then the court ought to grant a stay of proceedings pursuant to s 10
of the Arbitration Act 2005 (‘the 2005 Act’). In reply, the plaintiff submitted I
that the second defendant had failed to discharge its burden to show that there
was an arbitration clause governing the dispute between the parties, since it had
only exhibited the appendix to the main contract which was not signed by the
parties. Objecting to the stay the plaintiff submitted that even if the appendix

A to the main contract were to apply, the procedure for settlement of dispute referred to in the appendix to the main contract was to the dispute adjudication board ('DAB') without any reference to the term 'arbitration'. In deciding whether to grant a stay the court had to determine whether the plaintiff's claim was subjected to any arbitration agreement.

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Held, dismissing the second defendant's application with costs:

C (1) As the second defendant had only exhibited the appendix to the main contract without the main contract, the court could not make a decision as to whether it was the decision of the parties that the whole provision on resolving the dispute would be based on the FIDIC General Conditions of Contract 1999. It was found that the court could not make a decision based on conjecture (see para 19).

D (2) Further the appendix only made reference to the DAB for settlement of dispute and there was no specific or express provision in the appendix of referring any disputes to arbitration. Neither were there any contemporaneous documents nor other evidence as required under s 9 of the 2005 Act to record that the parties had agreed to refer disputes between them to arbitration. As such, the second defendant had failed to show that there was an arbitration agreement that was signed between the parties and the plaintiff's claim was not subjected to any arbitration agreement (see paras 20–21).

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F (3) Since there was no provision to refer to arbitration, the court could not consider an application for stay under s 10 of the 2005 Act (see para 25).

[Bahasa Malaysia summary]

G Melalui surat award bertarikh 26 April 2004 dan 22 Mei 2004 defendan kedua/pemohon telah melantik plaintiff/responden sebagai subkontraktor projek untuk pembinaan loji pemprosesan pembetungan KL ('projek'). Plaintiff memulakan tindakan terhadap defendan kedua di mana ia menuntut wang sejumlah RM914,110.55 untuk kerja yang telah siap di bawah projek tersebut. Pertikaian di antara pihak-pihak adalah jumlah yang dituntut oleh plaintiff daripada defendan kedua. Defendan kedua menegaskan bahawa di bawah surat-surat award pihak-pihak terikat dengan terma-terma dan syarat-syarat yang dikenakan di bawah kontrak utama di antara defendan keempat dan defendan pertama dan Kementerian Perumahan dan Kerajaan Tempatan ('kontrak utama') dan bahawa lampiran kepada kontrak utama memperuntukkan bahawa kesemua pertikaian hendaklah dirujuk kepada timbang tara. Ia oleh itu adalah kes defendan kedua bahawa, berdasarkan item 14 lampiran kepada kontrak utama yang merujuk kepada perenggan 20.4 kepada kontrak utama, tuntutan ini juga patut dirujuk kepada timbang tara. Ini adalah permohonan defendan kedua untuk penangguhan prosiding. Dalam memohon untuk penangguhan defendan kedua berhujah bahawa ia

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adalah undang-undang nyata bahawa jika pihak-pihak bersetuju untuk merujuk kepada timbang tara seperti yang diperuntukkan di dalam perjanjian oleh itu mahkamah sepatutnya memberikan penangguhan prosiding berikutan s 10 Akta Timbang Tara 2005 ('Akta 2005'). Dalam menjawab, plaintif berhujah bahawa defendan kedua telah gagal untuk melepaskan bebannya untuk menunjukkan bahawa terdapat klausa timbang tara yang mengawal pertikaian di antara pihak-pihak, memandangkan ia hanya menunjukkan lampiran kepada kontrak utama yang tidak ditandatangani oleh kedua-dua pihak. Plaintif membantah penangguhan tersebut berhujah bahawa walaupun lampiran kepada kontrak utama diaplikasikan, prosedur untuk penyelesaian pertikaian yang dirujuk di dalam lampiran kepada kontrak utama adalah kepada lembaga penghukuman pertikaian ('LPP') tanpa apa-apa rujukan kepada terma 'arbitration'. Di dalam memutuskan sama ada untuk memberikan penangguhan, mahkamah terpaksa menentukan sama ada tuntutan plaintif tertakluk kepada mana-mana perjanjian timbang tara.

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Diputuskan, menolak permohonan defendan kedua dengan kos:

- (1) Memandangkan defendan kedua hanya menunjukkan lampiran kepada kontrak utama tanpa kontrak utama, mahkamah tidak dapat membuat keputusan sama ada ia adalah keputusan pihak-pihak bahawa kesemua peruntukan di dalam menyelesaikan pertikaian akan didasarkan atas 'FIDIC General Conditions of Contract 1999'. Ia didapati bahawa mahkamah tidak dapat membuat keputusan berdasarkan tekaan (lihat perenggan 19).
- (2) Selanjutnya lampiran hanya membuat rujukan kepada LPP untuk penyelesaian pertikaian dan tidak terdapat peruntukan spesifik atau nyata di dalam lampiran yang merujuk mana-mana pertikaian kepada timbang tara. Juga tidak terdapat apa-apa dokumen yang sama ataupun keterangan yang lain seperti yang dikehendaki di bawah s 9 Akta 2005 untuk merekodkan bahawa pihak-pihak telah bersetuju untuk merujuk pertikaian di antara mereka kepada timbang tara. Oleh itu, defendan telah gagal untuk menunjukkan bahawa terdapat perjanjian timbang tara yang ditandatangani di antara pihak-pihak dan tuntutan plaintif tidak tertakluk kepada mana-mana perjanjian timbang tara (lihat perenggan 20–21).
- (3) Memandangkan tidak terdapat peruntukan untuk merujuk kepada timbang tara, mahkamah tidak dapat mempertimbangkan permohonan untuk penangguhan di bawah s 10 Akta 2005 (lihat perenggan 25).]

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Notes

For cases on arbitration, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7296–7318.

- A For cases on claim for payment, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2867–2868.

Cases referred to

- B *Daewoo Corp v Bauer (M) Sdn Bhd* [1998] 7 MLJ 25, HC (refd)
Innotec Asia Pacific Sdn Bhd v Innotech GMBH [2007] 8 CLJ 304, HC (refd)
Scott v Avery and others [1843–60] All ER Rep 1, HL (refd)
Suncast Sdn Bhd [No Syarikat 296912–W] v Padang Indah Sdn Bhd [No Syarikat 206187–A] [1999] MLJU 31, HC (refd)

C Legislation referred to

Arbitration Act 1952 (repealed) s 6
Arbitration Act 2005 ss 9, 10, 10(1)

- D *Alvin Lai (Sidek Teoh Wong & Dennis) for the plaintiff.*
Eric Lai (Lai & Associates) for the second defendant.

Hasnah JC:

- E [1] This application vide a summons in chambers in encl 22 by the second defendant/applicant for the following orders:

- F (1) Writ Terpinda bertarikh 13.7.2009 didalam tindakan di sini diketepikan atau secara alternatifnya, kesemua prosiding di sini digantung berturutan dengan Seksyen 6, Akta Timbangtara 1950 dan/atau seksyen 10, Akta Timbangtara 2005, sementara pelupusan pendamaian dan/atau prosiding timbangtara;
- (2) Kos permohonan;
- (3) Apa jua relif, perintah atau arahan lain atau lanjut diberikan sebagaimana Mahkamah menganggap wajar dan suai manfaat.

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BRIEF FACTS

- H [2] The plaintiff/respondent was appointed by the second defendant/applicant as a subcontractor vide letters of award dated 26 April 2004 and 22 May 2004 to supply all machinery, equipment and manpower for pipe jacking and manholes in the project known as the construction of KL sewerage treatment plant project. The scope of works under the subcontract covered pipe jacking, pits manholes and associated works to all areas and phases. The total order value was RM11,900,000. In the letter it was stated that the appendix to the main contract shall form part of the order.

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- [3] The plaintiff is claiming from the second defendant RM914,110.55 as at 31 May 2009 for work done under the subcontract.

[4] The second defendant averred that under item 3 of the letter of award the form of the subcontract will embody terms and conditions reciprocal with the terms and conditions imposed under the main contract between the fourth defendant and the first defendant and the Ministry of Housing and Local Government of Malaysia:

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The form of the sub-contract will embody terms and conditions reciprocal with those imposed on Kejuruteraan Bintai Kindenko Sdn. Bhd. (KBK) under the terms and conditions imposed under the Main Contract between NCC/KBK ('the Main Contractor') and the Ministry of Housing and Local Government of Malaysia, you agree to fully indemnify KBK for all circumstances arising from or attributable to the sub-contract works except as specifically identified within this letter or the sub-contract agreement.

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[5] The appendix to the main contract reads as follows:

Sub-Contractor takes note the following extract from the KEJURUTERAAN BINTAI KINDENKO SDN. BHD Main Sub-Contract with NISHIOMATSU CONST. CO. LTD.

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[6] The second defendant contends that under item 14 of the appendix all dispute must be referred to arbitration. Therefore this claim before the court must be referred to arbitration the main reason for this stay application:

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Item	Sub-Clause Conditions of Contract
14 Procedure for Settlement of Disputes	20.4 The procedure for Settlement of Dispute is DAB (Dispute Adjudication Board in accordance with Clause 20 of the FIDIC General Conditions Edition 1999.

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[7] Based on those provisions the claim should be referred to arbitration.

[8] The plaintiff however submitted that the second defendant has failed to discharge their burden to show that there is an arbitration clause in the governing dispute between the parties. The second defendant had only exhibited the appendix to the main contract which was not signed by the parties. Learned counsel for the plaintiff referred to the case of *Suncast Sdn Bhd [No Syarikat 296912-W] v Padang Indah Sdn Bhd [No Syarikat 206187-A]* [1999] MLJU 31 where His Lordship Justice Abdul Malik bin Hj Ishak said:

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In my judgment for s 6 of the Act to apply, there must be in existence a 'written agreement' properly executed by both parties which expressly agree to submit differences to arbitration.

- A** [9] It is further submitted by the plaintiff even if the appendix to the main contract is referred to para 20.4 provides that the procedure for settlement of dispute is to the DAB (dispute adjudication board) in accordance with cl 20 of the FIDIC General Conditions Edition 1999. The term 'arbitration' is not referred to and therefore only provisions relating to the DAB in the FIDIC General Conditions are only relevant. In *Daewoo Corp v Bauer (M) Sdn Bhd* [1998] 7 MLJ 25 it was held that:

- C** ... mere reference to a contract containing an arbitration clause is inadequate to incorporate that clause into another contract; there must be specific reference to the arbitration clause itself... It is trite law that a dispute in relation to contracts without an arbitration clause cannot be referred to arbitration...

[10] The decision of the High Court was upheld by the Court of Appeal.

- D** [11] The second defendant submitted that it is settled law that if the parties agreed to refer to arbitration as provided in the agreement then a stay of proceedings can be granted by the court pursuant to s 10 of the Arbitration Act or s 6 of the 1952 Act. Learned counsel cited the case of *Innotec Asia Pacific Sdn Bhd v Innotech GMBH* [2007] 8 CLJ 304 where it was held that:

- E** The facts herein were as such that the precise seat of arbitration could be made certain with reasonable certainty. The defendant had understood 'SIHK' to mean at all times as referring to the Sudwestfalische Industrie- und Handelskammer or the Chamber of Industry and Commerce of Southern Westphalia, as the law of the agreements was German law, the arbitration clause met the formal requirements of the German Code of Civil Procedure, the manner in which the parties transacted were reflective of German Law, the other localities identified by the plaintiff in interpreting 'SIHK' had no bearing on the relationship between the parties, the plaintiff had at no point in time ever objected to the inclusion of such arbitration clauses in the agreements and the agreement had been executed by the parties on their own free will. There being no uncertainty as to the venue of arbitration, the issue in relation to the 'venue' of arbitration therefore did not present a serious question to be tried.

- H** [12] Learned counsel also cited the case of *Scott v Avery and others* [1843-60] All ER Rep 1 where it was held by the House of Lords that 'Parties cannot by contract agree to oust the jurisdiction of the courts to deal with their rights under the contract, but a term in a contract which provides that, in the event of a dispute arising, it shall be referred to arbitrators...'

- I** [13] Counsel for the second defendant submits that the parties had agreed to refer any disputes based on the terms of FIDIC and the second defendant is prepared and willing to refer the dispute to arbitration as indicated in letter to the plaintiff dated 15 July 2009. Counsel referred to Chow Kok Fong's *Law*

and Practice of Construction Contracts, (3rd Ed) at p 835 where he had stated that '... the courts have generally leaned in favour of giving effect to the dispute resolution procedure expressly chosen by the parties'. A

[14] Therefore the second defendant submits that the dispute in this case must be referred to the DAB as provided by the FIDIC terms. B

THE COURT'S FINDINGS

Whether there is a dispute

[15] The plaintiff submitted that there is no dispute but I cannot accept that argument. Parties won't be before the court if there was no dispute. The dispute is the amount which the plaintiff is claiming from the second defendant. C

Whether there is an arbitration clause

[16] The appendix to the main contract ie item 14 makes reference in particular to sub-cl 20.4 of the main conditions of contract as follows: D

The procedure for Settlement of Dispute is DAB (Dispute Adjudication Board in accordance with Clause 20 of the FIDIC General Conditions Edition 1999. E

[17] There is no reference of arbitration even though as pointed out by the second defendant in the FIDIC General Conditions of Contract if the DAB is unable to resolve the dispute then it will be referred to arbitration. This is provided under cl 20.6 in the FIDIC General Conditions: F

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties: G

- (a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- (b) The dispute shall be settled by three arbitrators in accordance with these Rules, and the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4. H

[18] Section 9 of the Arbitration Act 2005 provides: I

- (1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

- A** (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing where it is contained in:
- B** (a) a document signed by the parties;
- (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or
- C** (c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- (5) 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.
- D**
- E** [19] Even though item 14 refers to the main contract cl 20 of the contract was not exhibited. The court cannot make a decision based on conjecture whether it was the intention of the parties that the whole provision on resolving dispute would be based on the FIDIC General Conditions of Contract. The document exhibited by the second defendant in its affidavit in support is the appendix to the main contract. In the appendix reference is made to referring dispute to DAB and there is clearly no mention of arbitration.
- F** [20] There is no express provision in the appendix that states that the whole of cl 20 of the FIDIC General Conditions Edition 1999 shall apply. Neither is there any express provision that parties submit to arbitration disputes which may arise between them. In the instant case parties have agreed that the procedure for DAB shall be in accordance with FIDIC. In the absence of any contemporaneous documents providing otherwise and based on the appendix any dispute under this contract will not be referred to arbitration. The dispute will have to be referred to the DAB.
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- H** [21] There is no document signed by the parties neither was there evidence produced to show of any exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement as required under s 9(4) of the aforementioned Act. The second defendant failed to show to this court that there was an arbitration agreement that was signed between the plaintiff and the second defendant.
- I** [22] I therefore agree with the submission of the plaintiff's counsel that the plaintiff's claim is not subjected to any arbitration agreement.

Since there is no arbitration clause in the appendix to the main contract can the court allow a stay under the Arbitration Act 2005 A

[23] Section 10 of the Act provides as follows:

- (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds — B
 - (a) that the agreement is null and void, inoperative or incapable of being performed; or C
 - (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
- (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit. D
- (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court. E

[24] Section 10(1) of the abovementioned Act clearly provides that the matter must be the subject of an arbitration agreement before the court can consider an application for a stay of proceedings. Under the said Act arbitration agreement means ‘... an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not’. The arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement. In the instant case the appendix to the main contract only makes reference to a dispute adjudication board for settlement of dispute. There is no specific or express provision that the dispute will be referred to arbitration. F G

[25] Since there are no express provisions in the appendix to the main contract referring any disputes to arbitration therefore this court cannot consider an application for stay under s 10 of the Arbitration Act 2005. Based on the above reasons the application of the second defendant in encl 22 is dismissed with cost. H

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A [26] Since there is no provision to refer to arbitration therefore the court cannot consider an application for stay. Based on the above reasons the application of the second defendant in encl 22 is dismissed with costs.

Second defendant's application dismissed with costs.

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Reported by Kanesh Sundrum

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