PRESS METAL SARAWAK SDN BHD v. ETIQA TAKAFUL BHD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
BADARIAH SAHAMID JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-02(IM) (NCC)-1104-06-2014]
24 APRIL 2015

CIVIL PROCEDURE: *Stay of proceedings – Appeal against – Stay of suit pending matter being referred to arbitration – Arbitration Act 2005, s.10 – Applicability of – Whether arbitration clause part of contract – Whether a nullity or incapable of being performed – Whether disputes come within scope of s. 10(1)(b) of Arbitration Act 2005 – Whether judge correct in granting stay sought*

ARBITRATION: *Arbitration clause – Insurance policy – Arbitration Act 2005, s. 10 – Applicability of – Whether arbitration clause part of contract of insurance – Whether a nullity or incapable of being performed – Whether all matters capable of being subjected to arbitration – Whether disputes come within scope of s. 10(1)(b) Arbitration Act 2005*

This appeal arose from an application made by the respondent ('the defendant') pursuant to s. 10 of the Arbitration Act 2005 ('the said Act') and/or pursuant to the inherent jurisdiction of the court to stay proceedings in the High Court pending the matter being referred to arbitration. The High Court granted the said order and hence, the appellant ('the plaintiff') appealed. The facts germane to this appeal were that the defendant, as the lead *takaful* operator, agreed with the plaintiff, a company operating an aluminium smelting plant in Sarawak, to insure all critical plant and machineries in relation to machinery breakdown and loss of profit against sudden and unforeseen damages. Subsequently, the plant was severely and adversely impacted by a power outage, causing the plaintiff to suffer tremendous and substantial loss and damages ('the incident'). The plaintiff duly notified the defendant of the incident. However, the defendant disclaimed substantially its liability in respect of the plaintiff's claim for machinery breakdown and had disclaimed full liability in respect of the plaintiff's claim for loss of profit by relying on various exclusions as contained in Machinery Breakdown and Loss of Profit Policy ('the policy'). The defendant also issued a Notice of Arbitration ('Arbitration Notice') alleging, *inter alia*, that differences had arisen between the plaintiff and the defendant. The plaintiff, however, was not agreeable to refer the matter for arbitration and thus filed a suit seeking for indemnity in respect of all losses and damages arising from the incident. The plaintiff submitted that as the arbitration clause was not part of the contract of insurance between the plaintiff and the defendant, there was no arbitration agreement in place and s. 10 of the said Act had no applicability in this case. The defendant, however, argued that the arbitration clause was part of the contract of insurance between the parties.

Held (dismissing appeal with costs)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) The arbitration clause was clear, part of the contract between the parties and was not a nullity or was incapable of being performed. The question of whether the arbitration clause was a part of the contract of insurance between the parties or not is a matter that goes to the jurisdiction of the appointment of the arbitrator and the arbitrator is competent to deal with that issue at arbitration itself (s. 18 of the Act). The court should be slow to place technical hurdles against having the matter referred to arbitration in the face of the clear injunction to do so by s. 10 of the said Act. (para 5)

(2) The plaintiff had also raised the issue of fraud and breach of good faith and submitted that the plea took the matter out of the compass of the said Act. A reading of s. 10(1) of the Act clearly showed that could not be the case, and all such matters were capable of being subjected to arbitration. There were in fact several disputes between the parties with regards to matters to be referred and therefore came within the scope of s. 10(1) (b) of the said Act. Therefore, the judge was correct in granting the stay sought. (paras 6 & 7)

(3) If the courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide on whether or not there is a good defence to the claimant's claim - in other words, whether or not the claim is in truth indisputable. Whatever the position in the past, when the courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) was that there was no good reason why the courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them. (para 9)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini timbul daripada permohonan responden ('defendan') di bawah s. 10 Akta Timbang Tara 2005 dan/atau menurut bidang kuasa mahkamah untuk menangguhkan prosiding di Mahkamah Tinggi sementara menunggu perkara dirujuk kepada timbang tara. Mahkamah Tinggi membenarkan perintah tersebut dan oleh itu, plaintif merayu. Fakta kes menunjukkan bahawa defendan, sebagai pengendali utama *takaful*, bersetuju dengan plaintif, sebuah syarikat yang mengoperasi sebuah kilang peleburan aluminium syarikat, untuk menginsuranskan segala loji dan jentera berhubungan dengan kerosakan jentera dan kehilangan keuntungan terhadap kerosakan yang tidak disangka. Seterusnya, kilang tersebut terjejas dengan teruk akibat gangguan kuasa menyebabkan plaintif mengalami kerugian dan kerosakan yang amat dahsyat ('kejadian itu'). Plaintif memaklumkan kepada

defendan berkenaan kejadian itu. Walau bagaimanapun, defendan menafikan sebahagian besar liabilitinya berkenaan tuntutan plaintif untuk kerosakan jentera dan menafikan liabiliti secara keseluruhannya berkenaan tuntutan plaintif untuk kehilangan keuntungan dengan bergantung kepada pelbagai pengecualian yang terkandung dalam Dasar Kerosakan Jentera dan Kehilangan Keuntungan ('Dasar'). Defendan juga mengeluarkan Notis Timbang Tara ('Notis Timbang Tara') dengan dakwaan bahawa, antara lain, terdapat pertikaian yang jelas timbul antara plaintif dan defendan. Plaintif, walau bagaimanapun, tidak bersetuju untuk merujuk perkara kepada timbang tara dan dengan itu memfailkan tindakan guaman menuntut ganti rugi berhubungan dengan segala kerugian dan kerosakan yang berbangkit daripada kejadian itu. Plaintif menghujahkan bahawa klausa timbang tara bukan sebahagian daripada kontrak insurans antara plaintif dan defendan, oleh tu tiada persetujuan timbang tara dan s. 10 Akta tersebut tidak boleh diguna pakai dalam kes ini. Defendan, walau bagaimanapun, menghujahkan bahawa klausa timbang tara adalah sebahagian daripada kontrak insurans antara pihak-pihak yang terlibat.

Diputuskan (menolak rayuan dengan kos)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Klausa timbang tara adalah jelas, sebahagian daripada kontrak antara pihak-pihak yang terlibat dan bukan satu pembatalan atau tidak mampu dilaksanakan. Persoalan sama ada klausa timbang tara adalah sebahagian daripada kontrak insurans antara pihak-pihak terlibat adalah perkara di bawah bidang kuasa pelantikan penimbangtara dan penimbangtara adalah cekap untuk menghadapi isu itu di timbang tara (s. 18 Akta). Mahkamah harus enggan untuk meletakkan halangan-halangan teknikal terhadap perkara itu dirujuk kepada timbang tara memandangkan terdapat injunksi yang jelas untuk berbuat demikian oleh s. 10 Akta tersebut.

(2) Plaintif juga membangkitkan isu penipuan dan pelanggaran niat baik dan menghujahkan bahawa pli tersebut mengeluarkan perkara tersebut daripada kompas Akta tersebut. Satu bacaan s. 10(1) Akta dengan jelasnya menunjukkan bahawa itu tidak mungkin kesnya, dan segala perkara adalah berkebolehan tertakluk kepada timbang tara. Terdapat beberapa pertikaian antara pihak-pihak tersebut berhubung perkara-perkara yang perlu dirujuk dan dengan itu ia terangkum dalam skop s. 10(1)(b) Akta tersebut. Oleh itu, hakim adalah betul apabila membenarkan penangguhan yang dituntut.

(3) Jika mahkamah memutuskan sama ada tuntutan boleh dipertikaikan, mereka melakukan dengan tepat apa yang pihak-pihak terlibat telah bersetuju harus dilakukan oleh sebuah tribunal swasta. Fungsi

penimbangtara adalah untuk memutuskan sama ada terdapat pembelaan yang memadai kepada tuntutan pemohon – dalam erti kata lain, sama ada tuntutan adalah tidak boleh dipertikaikan. Walau apa pun kedudukan pada masa lalu, apabila mahkamah cenderung kepada pendapat bahawa klausa timbang tara sebagai mengalihkan bidang kuasa mereka, pandangan moden (yang seiring dengan prinsip asas undang-undang Inggeris kebebasan kontrak dan Konvensyen-Konvensyen Antarabangsa) adalah bahawa tiada alasan yang bagus kenapa mahkamah harus berusaha untuk mengambil perkara-perkara dari genggaman tribunal di mana pihak-pihak terlibat telah bersetuju untuk meletakkannya.

Case(s) referred to:

Ellerine Bros (Pty) Ltd and another v. Klinger [1982] 2 All ER 737, [1982] 1 WLR 1375 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 10(1)(a), (b), 18

For the appellant - Lim Kian Leong (Justin Voon, Goh Gin Jhen & Alvin Lai with him); M/s Justin Voon Chooi & Wing

For the respondent - Anad Krishnan (Navamalar Ganesan with him); M/s Anad & Noraini

[Appeal from High Court, Kuala Lumpur; Suit No: 22NCVC-53-02-2014]

Reported by Suhainah Wahiduddin

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] This appeal was heard on 30 day of October 2014. The appeal arose from an application made by the respondent (defendant) (encl. 4) pursuant to s. 10 of the Arbitration Act 2005 (the said Act) and/or pursuant to the inherent jurisdiction of the court to stay proceedings in the High Court pending the matter being referred to arbitration (at pp. 115-116 of the appeal record vol. 1). The appellant (plaintiff) opposed the application. The High Court granted the said order sought (at p. 35 of the appeal record vol. 1). The plaintiff appealed to this court on 18 June 2014 (at pp. 37-38 of the appeal record vol. 1).

[2] Facts Germane To This Appeal

(a) The plaintiff operates an aluminium smelting plant ("plant") in Mukah, Sarawak;

(b) By a placement slip numbered D12EE0852324 dated 24 October 2012 ("placement slip") (at pp. 286-295 of the appeal record vol. 2(1)), the defendant, as the lead *takaful* operator, agreed with the plaintiff, in consideration or payment of premium of RM300,000 among others, to

insure all critical plant and machineries including pots and furnace, parts accessories, tools, systems and installation ("machinery breakdown") and loss of profit ("loss off profit") against sudden and unforeseen damage from any cause not excluded occurring after successful completion of acceptance tests while working or at rest and during overhaul cleaning or movement in the premises for such purposes;

(c) Subsequently, the plaintiff received a document issued by the defendant entitled "The Schedule" dated 28 November 2012 ("schedule") (at pp. 298-299 of the appeal record vol. 2(1)), in relation to the machinery breakdown and loss of profit. The schedule also enclosed another document entitled "Machinery Breakdown *Takaful* Certificate" ("Machinery Breakdown Certificate") but no similar certificate or "loss of profits" were received;

(d) On 27 June 2013, the State of Sarawak was affected by a statewide power outage ("power outage"). The plant was severely and adversely impacted by the power outage ("incident");

(e) As a direct result of the incident, the plant suffered major damage and business disruption. Consequently, the plaintiff suffered tremendous and substantial loss and damage. The plaintiff duly notified the defendant of the incident on or about 28 June 2013;

(f) Only after the incident, on or about 12 July 2013, the insurance broker, Messrs BIB Insurance Brokers Sdn Bhd ("BIB") received a document entitled "Machinery Breakdown and Loss of Profit Policy" ("policy") and purportedly dated 18 June 2013 (at pp. 244-269 of the appeal record vol. 2(1)). BIB then forwarded the policy to the plaintiff on or about 12 July 2013;

(g) In this case, the defendant asserted that the policy was the same as the previous insurance policies ("Jerneh's policies") (which had already expired) issued by Jerneh Insurance Bhd ("Jerneh") to the plaintiff. The defendant replaced Jerneh as the plaintiff's insurer. The defendant further alleged that BIB had given Jerneh's policies to the defendant. BIB's "New Business Development Manager" Mr Gan Tze Keong affirmed an affidavit ("GTK's affidavit") (at pp. 232-235 of the appeal record vol. 2(1)), (PCBD, Tab 9) denying the defendant's contention that BIB had previously sent Jerneh's "Machinery Loss of Profits" policy to the defendant;

(h) By a "coverage letter" dated 15 November 2013 ("coverage letter"), (at pp. 388-397 of the appeal record vol. 2(2)), the defendant had in reality and in substance disclaimed substantially its liability in respect of the plaintiff's claim for machinery breakdown and had disclaimed full liability in respect of the plaintiff's claim for loss of profit by relying on various exclusions as contained in the policy;

(i) Together with the coverage letter, the defendant issued a "Notice of Arbitration" dated 15 November 2013 ("Arbitration Notice") (at pp. 399-401 of the appeal record vol. 2(2)). In the Arbitration Notice, the defendant alleged, among others:

(a) The defendant had purportedly "admitted liability" to the extent which was stated in the coverage letter;

(b) A clear "difference" had arisen between the plaintiff and the defendant; and

(c) The defendant relied on cl. 4.7 (Section I – Machinery Breakdown) and cl. 4.11 (Section II – Loss of Profits) ("cl. 4.11 (LOP)") of the policy in referring the matter for arbitration. Clauses 4.7 (MB) and 4.11 (LOP) ("purported arbitration clauses").

(j) By way of a letter dated 23 January 2014, the plaintiff informed the defendant, among others, that the plaintiff was not agreeable to refer the dispute for arbitration;

(k) On 13 February 2014, the plaintiff filed this suit seeking for, among others, indemnity in respect of all losses and damages arising from the incident.

[3] The plaintiff submits that as the arbitration clause was not part of the contract of insurance between the plaintiff and the defendant, there was not an arbitration agreement in place and s. 10 has no applicability in this case. The argument was also put that the defendant's breach of good faith and alleged fraud took it out of the compass of the said Act. The defendant argues that the arbitration clause was part of the contract of insurance between the parties.

[4] Findings Of This Court

We first set out in full s. 10(1) of the said Act on which the application of the respondent in the High Court was premised and we quote:

> 10. **Arbitration agreement and substantive claim before court**
>
> (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:
>
> (a) **that the agreement is null and void, inoperative or incapable of being performed; or**
>
> (b) **that there is in fact no dispute between the parties with regard to the matters to be referred.**
>
> (emphasis added)

[5] Under the said Act, the court has no discretion but to grant a stay save and except for the exceptions set out above in s. 10(1) of the said Act. The learned judge held and we agree, the arbitration clause is clear, part of the contract between the parties and it is not a nullity or incapable of being performed. At any rate the question of whether the arbitration clause is a part of the contract of insurance between the parties or not is a matter that goes to the jurisdiction of the appointment of the arbitrator and the arbitrator is competent to deal with that issue at the arbitration itself (see s. 18 of the said Act). As a matter of policy, the courts should be slow to place technical hurdles against having the matter referred to arbitration in the face of the clear injunction to do so by s. 10 of the said Act. We refer to the commentary on s. 10(1)(a) contained the text *the Arbitration Act 2005 Uncitral Model Law* as applied in Malaysia Sundra Rajoo •WSW Davidson and we quote:

> 10.4. The text of section 10 follows closely article 8 of the Model Law and the first exception from the mandatory provision is also found in the Model Law. As to the scope of this exception, it needs to be noted that under section 18 of the Act, the arbitral tribunal does have power to determine and rule on its own jurisdiction. It is now necessary for the court to make a final ruling on the arbitrator's jurisdiction if this point is taken in the course of the stay application, although it is implicit in section 10(1)(a) that it retains the right to make a ruling Solicitor as to make a finding on whether the arbitration agreement is operative. It would clearly be desirable for the court to make a ruling where the arbitrator's lack of jurisdiction is clear to save time and expense. *Alternatively the court may decline to make a ruling and by granting a stay leave it to the arbitral tribunal to make their own ruling on jurisdiction*. If the court does make a ruling, the granting of a stay by the court would not preclude the arbitral tribunal from determining that it did not have jurisdiction.

We also refer to the same text on the arbitration agreement at paras. 18.9, 18.10 and 18.11 and we quote:

> 18.9 Separability means that an arbitration clause in a contract is to be considered a separate agreement, detached from the main contract, and therefore to be treated as an agreement independent of the other terms of the contract (see *Binder*, p144, paragraph 4.009). In other words, the validity of the arbitration clause does not depend on the validity of the contract as a whole. The arbitration clause by surviving the demise of the main contract then constitutes the necessary agreement of the parties that any disputes between them should be referred to arbitration. The doctrine therefore seeks to preserve the arbitral process. The concept of separability of the arbitration clause because of its obvious practical advantages is now widely accepted both by arbitration rules and in national laws.
>
> 18.10 Section 18(2) provides a legal basis for the appointment of the arbitrator. If the arbitrator is to decide on his own jurisdiction he must first assume that jurisdiction. The doctrine of separability allows him to do Solicitor (see *Redfern and Hunter*, p 299).

> 18.11. *It is now provided that an arbitration agreement, whether part of a main agreement or in a self-contained contract, is a distinct legal obligation as the principle of separability provides that the arbitration clause and the contract which incorporates it are two distinct contracts*. The arbitration agreement within the contract is separate from that of the contract (see *Bremer Vulkan Schiffbau und Maschinenfabrik v. South Indian Shipping Corp Ltd, The Bremer Vulkan* [1981] 1 Lloyd's Rep 253; [1981] 1 All ER 289 at 297; *Paal Wilson & Co A/S v. Partnenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 All ER 34; *Harbour Assurance Co (UK) Ltd v. Kansa General International Insurance Co Ltd* [1993] QB 701; *Dalmia Dairy Industries v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223). It is clear now that with the enactment of section 18, the doctrines of separability and *Kompetenz-Kompetenz* are part of Malaysian law. (emphasis added)

[6] The plaintiff have also raised the issue of fraud and breach of good faith and submit that plea takes it out of the compass of the said Act. A reading of s. 10(1) of the said Act clearly shows that cannot be the case, and all such matters are capable of being subject to arbitration and we are therefore of the view the learned judge was right in granting the stay sought.

[7] To our mind, there are in fact several disputes between the parties with regard to matters to be referred and therefore come within the scope of s. 10(1)(b) of the said Act.

[8] We refer to the *dictum* of Lord Justices Templeman, and Fox in *Ellerine Bros (Pty) Ltd and another v. Klinger* [1982] 2 All ER 737, [1982] 1 WLR 1375 and we quote from the judgment of His Lordship Lord Justice Templeman (with respect) and with approval at p. 1383 onward:

> There is a dispute until the defendant admits that the sum is due and payable.
>
> In my judgment in this context neither the word "disputes" not the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

[9] In the third place, if the courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claim – in other words, whether or not the claim is in truth indisputable. Again, to our mind, whatever the position in the past, when the courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with

the basic principles of the English law of freedom of contract and indeed international conventions) is that there is no good reason why the courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.

[10] For all the aforesaid reasons, we dismissed the appeal with costs.