CLAMSHELL DREDGING SDN BHD

v.

ZELAN CONSTRUCTION SDN BHD

High Court Malaya, Kuala Lumpur
S Nantha Balan J
[Civil Suit No: WA-22NCVC-712-11-2016]
16 February 2017

Arbitration: *Agreement — Referral of dispute to arbitration — Defendant applied for stay of proceedings in court pending arbitration — Whether agreement between parties contained an arbitration agreement — Whether said agreement valid and operative — Whether dispute should be referred to arbitration*

This was an application by the defendant pursuant to s 10(1) of the Arbitration Act 2005 ('the Act') to stay the proceedings between the parties, pending arbitration. The documents that formed the contractual relationship between the parties were the Letter of Charter Agreement ('LCA') and a Charter Agreement ('CA'). The plaintiff had commenced proceedings against the defendant for the charter hire fees due. The defendant disputed the plaintiff's claim and sought that the matter be referred to arbitration as per cl 15 of the CA, which it asserted was an arbitration agreement. On the other hand, the plaintiff contended that the CA had expired and therefore cl 15 was no longer operative.

Held (allowing the defendant's application with costs):

(1) Clause 15 of the CA survived the expiry of the CA and had its own independent existence as an arbitration agreement as per the provision of s 9 of the Act. Hence, cl 15 remained extant and enforceable. (paras 11-12)

(2) Following the provision of s 10(1) of the Act, there was a valid and operative arbitration agreement and cl 15 of the CA was sufficient to invoke the statutory power to mandatorily refer the dispute to arbitration. (*Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Berhad (refd)*). (paras 13-14)

Case(s) referred to:

Press Metal Sarawak Sdn Berhad v. Etiqa Takaful Berhad [2016] 5 MLRA 529 (refd)

Legislation referred to:

Arbitration Act 2005, ss 9, 10(1)
Rules of Court 2012, O 14

Counsel:

For the plaintiff: K Sarasvathi; M/s Dorairaj Low & Teh
For the defendant: Afif Ahmayuddin; M/s Amin Karlos

JUDGMENT

S Nantha Balan J:

[1] These are my grounds in respect of an application by the defendant under s 10(1) of the Arbitration Act 2005 for stay of proceedings pending arbitration. The documents which form the contractual relationship between the parties are the Letter of Charter Agreement dated 28 January 2016 ("LCA") and Charter Agreement dated 29 January 2016 ("CA"). The plaintiff is claiming from the defendant the sum of RM3,049,472.45 as detailed in "Appendix 1" annexed to the Statement of Claim being the charter hire fees charged and calculated up to 30 April 2016.

[2] The defendant is disputing the plaintiff's claim and seeks to have the matter referred to arbitration under the auspices of the Kuala Lumpur Regional Center for Arbitration ("IGLRCA"). The defendant relies on cl 15 of the CA which provides as follows:

> "Any dispute or differences between the parties arising out of or in connection with this Agreement shall first be settled amicably by the parties, failing which the matter shall be referred to arbitration under the auspices of the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") and the reference shall be to a panel of three (3) arbitrators. The arbitration shall be conducted in Kuala Lumpur in accordance with the Arbitration Act 2005 of Malaysia. The language of the Arbitration shall be the English Language. The decision of the arbitrators shall be final and binding upon both parties. Pending settlement of the disputes, the parties shall continue to perform their obligations under this Agreement."

[3] The defendant asserts that cl 15 of the CA is an "arbitration agreement" as defined under s 9 of the Arbitration Act 2005. Section 9 of the Arbitration Act 2005 defines arbitration agreement as follows:

> "9. Definition and form of arbitration agreement
>
> (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.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
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> (3) An arbitration agreement shall be in writing.
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> (4) An arbitration agreement is in writing where it is contained in:
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> (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) 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."

[4] The defendant therefore moves this court under s 10 (1) of the Arbitration Act, 2005 which provides as follows:

> "A court before which proceedings are brought in respect of the matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings and refer the parties to arbitration **unless it finds that the agreement is null and void, inoperative or incapable of being performed**."
>
> [Emphasis Added]

[5] Thus, under s 10(1) of the Arbitration Act 2005, a stay is mandatory if the court finds that all the relevant requirements have been fulfilled. At the outset, it is clear that there is no dispute resolution clause in the LCA whereas there is a clear and unambiguous dispute resolution clause in the CA namely cl 15, which provides that all disputes shall be referred to KLRCA for arbitration in accordance with the Arbitration Act 2005.

[6] It is not in dispute that cl 15 of the LA is plainly and patently an arbitration agreement as defined under s 9 of the Arbitration Act 2005. But the question is whether cl 15 of the CA is in conflict with any term or condition of the LCA. This is important because cl 2 on the last page of LCA states that in the event there is any conflict between the terms and conditions of the LCA and CA, then the LCA shall prevail. It reads as follows:

> "In the event of conflict between the terms and conditions under this Agreement and the Charter Agreement, the terms and conditions under this Agreement shall prevail."

[7] But as stated earlier, there is no dispute resolution clause in the LCA such as to give rise to a conflict between LCA and CA. Further, it should also be borne in mind that cl 1 in the same page of the LCA reads as:

> "1. **This agreement is to be read: together with** the Charter Agreement dated 29 January 2016 (Ref No ZCSB/MOLF/HQ/COP/HAZ/ 2016/L057) executed between Zelan Construction Sdn Bhd and Clamshell Dredging Sdn Bhd for the Equipment ("Charter Agreement")."
>
> [Emphasis Added]

[8] Thus the LCA is to be read together with the CA — which means that both contractual documents should be read consistently and harmoniously so as to give proper effect to each term and condition as appearing in the two contractual documents. In the result, I find that there is no conflict between the LCA and CA in terms of cl 15 of the latter. Thus, cl 15 of the CA is in my view, a valid and operative arbitration agreement.

[9] However, in an attempt at asserting that the arbitration agreement is no longer operative, it was submitted by the counsel for the plaintiff that the CA has expired and therefore cl 15 was no longer operative. The plaintiff's argument was based on the following lines of submission.

[10] The counsel submitted that under the LCA, the last day of charter period falls on 30 April 2016 and the defendant had instructed the plaintiff to demobilise on 4 May 2016. She referred to cl 1.4 of LCA which provides "The Period of Hire: the charter period shall he for a minimum duration of one month with optional extension shall be mutually agreed upon". She also referred to cl 3 of CA which provides "the duration of the lease shall be for a period of four (4) calendar weeks commencing from 2 February, 2016". Elaborating further, the counsel submitted as follows:

> "10.1 Under cl 1.4 of LCA, the charter hire is for a period of one month and any extension is subject to mutual agreement by both parties;
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> 10.2 Under cl 1.4 of LCA, the charter period for February, 2016 falls on 29 February 2016 and was extended from 1 March 2016 to 31 March 2016. The last extension was from 1 April 2016 to 30 April 2016;
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> 10.3 According to counsel, the duration of lease under cl 3 and attachment 1 of the CA, was for four weeks and commenced from 2 February 2016 and ended on 29 March 2016;
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> 10.4 It was emphasised by counsel that unlike cl 1.4 of LCA, there is no provision under CA for extension of the lease;
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> 10.5 Finally, counsel referred to the following words which appear in cl 15 CA, "... Pending settlement of the disputes, the parties shall continue to perform their obligations under this Agreement.
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> 10.6 Thus, counsel submitted that based on cl 15 of CA, it is only valid or effective during the subsistence of the CA and not after the agreement has ended on 29 February 2016;
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> 10.7 As such, it was contended that the so-called dispute of "Additional Breakdown Period" does not fall within the described dispute or difference as the case may be and there is no reason to refer to arbitration;
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> 10.8 In addition, the CA is no longer in operative since 29 February 2016 as such cl 15 of CA is not effective or valid; and
>
> 10.9 Hence, it was submitted that cl 15 of the CA is inoperative."

[11] Having considered the counsel's submission in this regard, I find that the point that was taken is untenable. The view I take is that cl 15 CA survives the expiry of the CA and has its own independent existence as an arbitration agreement as per the provision of s 9 of the Arbitration Act 2005.

[12] Hence, even if the CA has expired or is terminated, the arbitration agreement (cl 15 of the CA) is severable from the CA and remains extant and enforceable. That is the singular uniqueness of an arbitration agreement.

[13] Thus, following the provision of s 10(1) of the Arbitration Act 2005, I find that there is a valid and operative arbitration agreement (as per cl 15 CA) and this clause is sufficient for this court to invoke the statutory power under s 10(1) Arbitration Act 2005 to mandatorily refer the dispute to arbitration.

[14] The legal position with regard to the duty of the court to mandatorily refer the dispute to arbitration in circumstances where there is an arbitration agreement is to be found in the decision of the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Berhad* [2016] 5 MLRA 529 FC at paras 91-93 where the court said,

> "[91] In determining what is the dispute or difference the parties intended to submit to arbitration, the arbitration clause ought to be interpreted widely, based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the contract or agreement was made. A proper approach to construction requires the court to give effect, so far as the language used by the parties in the arbitration clause will permit, to the commercial purpose of the arbitration clause. This principle was adopted in *Fiona Trust & Holding Corporation & Ors v. Privalov & Ors* [2007] 4 All ER 951.
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> [92] The above principle was followed by our courts. In *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2012] MLRHU 1540, Mohamad Ariff Yusof J (later JCA), in allowing an application for a stay of proceedings under s 10(1) of the 2005 Act, ruled as follows (see p 1548):
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> ... the approach in *Fiona Trust* should be followed. Quite apart from the broad reading to be given to linking words such as "in relation to", or "in connection with", or "arising under", the principle that it is to be presumed that rational businessmen would intend to have the same forum decide disputes between themselves in respect of the same broad subject matter unless they have expressed otherwise by clear language, has much to commend it, both in terms of legal principle, logic, commercial sense and policy... presently I believe it will be better to consider *Fiona Trust* as the starting point for any consideration of the principles of stay of proceeding, in relation to widely-drafted arbitration clauses.
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> [93] We agree with Mohamad Ariff Yusof J that the approach in Fiona Trust should be adopted and followed by our courts in dealing with an application under s 10(1) of the 2005 Act. It is trite law that the answer to the question as to whether a particular difference or dispute falls within an agreement to arbitrate depends primarily on the proper construction of that agreement in the circumstances of the particular case (see also: *Ashville Investments Ltd v. Elmer Contractors Ltd* [1988] 2 ALL ER 577)."

[15] The counsel for the plaintiff also contends that there is no *bona fide* dispute which warrants the matter being referred to arbitration. Here, it is relevant to refer to the grounds of objection raised by the defendant in relation to the plaintiff's claim (as per para 11 (a), (b), (c) (d) of the defendant's affidavit - Enclosure [9]) which may be stated as follows:

> - whether the plaintiff is entitled to charter charges for the period where the Marine Equipment suffered breakdown problems and was inoperable by the defendant ("Additional Breakdown Period"), in addition to the breakdown period for which the plaintiff has already deducted charter charges;
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> - whether the defendant is entitled to deduct and/or set off charter charges for the Additional Breakdown Period against the amount claimed by the plaintiff;
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> - whether there is any amount due and owing by the defendant to the plaintiff after such deduction and/or set off;
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> - whether the defendant is entitled to claim loss and damages incurred due to the defendant frequent breakdown problems of the Marine Equipment.

[16] It would suffice for me to state that based on the matters stated in the defendant's affidavit as stated above, there appears to be a credible dispute between the parties. But I pause to emphasise that ultimately whether there is or is not in existence a *bona fide* dispute, is a matter for the arbitrators to decide.

[17] At any rate, insofar as to whether there is a "*bona fide* dispute" is clear that the court which hears an application for stay of proceedings under s 10(1) of the Arbitration Act 2005 must not go into the merits and gauge whether there is a triable or meritorious defence etc. The relevant statement of law to this effect is to be found in para 33 of the *Press Metal* case at p 540 of the judgment which reads as follows:

> "[33] What the court needs to consider in determining whether to grant a stay order under the present s l0(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. **The court is no longer required to delve into the details of the dispute or difference, (see** *TNB Fuel Services Sdn Bhd (supra)***). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s l0(1). It is an issue to be decided by the arbitral tribunal**."
>
> [Emphasis Added]

[18] Thus, based on s 10(1) of the Arbitration Act 2005 as it is presently worded, the unequivocal legal position is that it is no part of this court's duty

to determine the existence of a *bona fide* dispute in order to refer the matter to arbitration. In the circumstances, encl 8 is allowed with costs of RM3,000.00 (subject to 4% allocatur). Consequently, the plaintiff's application for summary judgment under O 14 Rules of Court 2012 (encl 11) is dismissed with no order as to costs. The suit is therefore stayed pending arbitration.