DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM DALAM NEGERI SELANGOR DARUL EHSAN [SAMAN PEMULA NO. BA-24NCC(ARB)-1-04/2021]

Dalam perkara satu timbang tara antara IPL Middle East DMCC dan KNM Process Systems Sdn Bhd di bawah Akta Timbang Tara Sweden (SFS 1999:116 seperti yang dipinda dalam SFS 2018:1954) di Stockholm, Sweden; SCC Arbitration Case v. 2018/049

Dan

Dalam perkara satu Award Muktamad bertarikh 12.2.2021 yang diisukan oleh Encik Lars Boman, Encik Willem Claassen dan Encik Philip Riches QC di bawah Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1 January 2017) dan Seksyen 6 Akta Faedah Sweden (SFS 1975:635 seperti yang dipinda dalam SFS 2013:55)

Dan

Dalam perkara Seksyen 38 Akta Timbang Tara 2005 Dan Dalam perkara Aturan 69 Kaedah-kaedah 2(k), 4 dan 8 Kaedah-kaedah Mahkamah 2012

Dan

Dalam perkara kuasa sedia ada Mahkamah yang Mulia ini, menurut Aturan 92 Kaedah 4 Kaedah-kaedah Mahkamah 2012

ANTARA

IPL MIDDLE EAST DMCC
(No. Pendafataran JLT2435) **... PLAINTIF**

DAN

KNM PROCESS SYSTEMS SDN BHD
(No. Syarikat 199001008569 / 200140-X) **... DEFENDAN**

DECISION

(ENCLOSURE 9)

Introduction

[1] These are the written grounds for this Court's decision on Enclosure 9 which was filed by the defendant. In Enclosure 9, the defendant sought, *inter alia*, to set aside an *ex-parte* Order dated 10.6.2021 (hereafter the '*ex-parte* Order') which was obtained by the plaintiff in the Originating Summons action.

[2] In the Originating Summons action, the plaintiff applied through an *ex-parte* application for an arbitration award delivered on 12.2.2021 (hereafter the 'the Final Award') which was made in a foreign state (Sweden) to be recognised as binding and be enforced in

Malaysia by entry as a judgment in the Malaysian court in terms of the award. The Final Award was made after arbitration under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (hereafter 'the SCC') at Stockholm, Sweden, via case number SCC Arbitration Case v. 2018/049. The plaintiff's Originating Summons action was filed pursuant to **section 38 of the Arbitration Act 2005** (hereafter 'the Act') and read together with **Order 69 rule 8(1) of the Rules of Court 2021** (hereafter 'the RoC').

[3] On 10.6.2021, this Court allowed the plaintiff's *ex-parte* application and the Final Award was recognised as binding and be enforced by entry as a judgment in Malaysia in the following terms:

> "*1.1. the Defendant is ordered to pay to the Plaintiff an amount of USD5,000,000 or the counter value in any alternative currency, should the Defendant prefer this and the Plaintiff accepting this currency;*
>
> *1.2. the Defendant is ordered to pay to the Plaintiff interest, to run from 21.12.2016, upon USD5,000,000, calculated on the basis of 12% per annum upon an amount of USD4,000,000 remaining outstanding until payment in full of the debt of USD5,000,000*
>
> *1.3. the Defendant is ordered to pay to the Plaintiff an amount of USD147,750.20, or the counter value in any alternative currency, should the Defendant prefer this and the Plaintiff accepting this currency, plus interest as from the due date of each invoice pursuant to clause 12.2.5 of the Purchase Order 14900639 YS 0002 dated 13.2.2015 (the "PO"), ie, 3.65% until payment in full and with a total cap of 10% as per Article 12.2.5 of the PO;*

1.4. the Plaintiff and the Defendant are ordered to pay, jointly and severally, the Costs of the Arbitration finally decided by the SCC Institute in the following amounts:

(a) Lars Boman Fee EUR102,918 (no Value Added Tax ("VAT")) Expenses SEK4,000 and SEK19,538 (no additional VAT)

(b) Willem Claassen Fee EUR61,751 (no VAT)

(c) Philip Riches QC Fee EUR61,751 (no VAT)

(d) The Administrative fee of the SCC Fee EUR31,130 (no VAT)

1.5. The Defendant is ordered, as between the parties, to pay the Costs of the Arbitration in the amounts set out in paragraph 1.4 above to the Plaintiff, plus interest in accordance with Section 6 of the Swedish Interest Act (the Swedish official reference rate + 8% per annum) until payment in full;

1.6. The Defendant is ordered to pay to the Plaintiff interest in respect of the Plaintiff's payment of the Defendant's part of the Advance on Costs as per the Separate Awards rendered by the tribunal on 14.6.2019 in the amount of EUR83,153 and on 2.7.2020 in the amount of EUR70,096.50 as from the dates of these Separate Awards and until the date of this Final Award in accordance with Section 6 of the Swedish Interest Act (the Swedish official reference rate + 8% per annum) until payment in full

1.7. The Defendant is ordered to pay the Plaintiff an amount of SEK7,800,000 in respect of costs incurred by the Plaintiff, plus interest in accordance with Section 6 of the Swedish Interest Act (the Swedish official reference rate + 8% per annum) as from the date of this Final Award until payment in full;

> *1.8. A party may apply to amend the Final Award regarding the decision on the fees of the arbitrators. Such application should be filed with the Stockholm District Court within three months from the date when the Party received this Final Award.*
>
> *2. no order as to costs; and*
>
> *3. the Defendant may make an application to set aside this order pursuant to Order 69 rule 8(7) of the Rules of Court 2012, if the Defendant has grounds for doing so.*"

[4] On 21.7.2021, the defendant filed Enclosure 9 seeking for an order to set aside the *ex-parte* Order. The defendant's main contentions are encapsulated in its summary grounds for its application as follows:

> "(b) terdapat satu permohonan yang masih berjalan ('Permohonan Pembatalan") di Mahkamah Rayuan Svea, Stockholm untuk membatalkan Award Muktamad tersebut bertarikh 12.2.2021 ("Award Muktamad"); dan
>
> (c) Plaintif telah gagal membuat pendedahan penuh dan terus terang termasuk mendedahkan Permohonan Pembatalan tersebut."

[5] The plaintiff's counsel objected to the defendant's application on the ground that the defendant filed its application to set aside the *ex-parte* Order out of time. Although the defendant was late in filing its application, this Court, in the interest of justice, allowed the defendant's application to be filed out of time. This Court then proceeded to deal with the merits of the application.

[6] On 14.12.2021, this Court, after having read the respective parties' counsels' written submissions and heard their oral submissions, dismissed the defendant's Enclosure 9. The reasons for the decision are set out as below.

Brief Facts

[7] The plaintiff is a foreign company incorporated in the United Arab Emirates, and the defendant is a Malaysian company. On 13.2.2015, the plaintiff as supplier and the defendant as purchaser entered into a contract for freight forwarding, transportation and certification of certain equipment (hereafter 'the Contract') as set out in a Purchase Order 14900639 YS 0002 dated 13.2.2015 (hereafter 'the PO') and five subsequent addenda. A dispute arose whether payment of certain invoices had become due and payable under the terms of the Contract. The plaintiff claimed it was due; whereas, the defendant refuted the plaintiff's claim. The dispute was referred to arbitration and culminated in the Final Award. The Final Award was delivered to the defendant by the SCC. The defendant did not satisfy the terms of the Final Award. The plaintiff has no alternative but to enforce the Final Award in Malaysia through the filing of the Originating Summons action.

The Findings of this Court

[8] The defendant relied on section 39(1)(a)(vii) of the Act as one of its main contentions to set aside the *ex-parte* Order. Section 39(1)(a)(vii) of the Act states as follows:

> "**Section 39 Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked-
>
> (a) where that party provides to the High Court proof that-
>
> (i) ...;

(ii) …;

(iii) …;

(iv) …;

(v) …;

(vi) …; or

(vii) **the award has not yet become binding on the parties** or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that-

(i) …; or

(ii) ….

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) ….”

[9] The defendant relied on section 39(1)(a)(vii) of the Act to say that the Final Award has not yet become binding on the parties because on 11.5.2021, before the *ex-parte* Order was granted, the defendant had filed a Pending Annulment Application to the Svea Court of Appeal in Stockholm, Sweden, to challenge and annul the Final Award. In short, the defendant’s counsel submitted that the

defendant has a good chance of success in its Pending Annulment Application to the Svea Court of Appeal. As such, based on the defendant's application to the Svea Court of Appeal, the Final Award could not have become binding on the parties.

[10] This Court is of the considered view that the wording "the award has not yet become binding on the parties" in the Act has to be understood within its context. The mere fact that there is an appeal against or challenge to the award in a higher forum, such as a court of law, could not be construed literally as "the award has not yet become binding on the parties." In general, arbitration awards, regardless where the seat of arbitration is or what the governing laws or Rules of the arbitration proceeding are, are subject to challenge or appeal. Hence, section 39(1)(a)(vii) of the Act should not be given a liberal interpretation, in that an award is construed as "not yet become binding on the parties" solely on the basis that there is an appeal or challenge, otherwise, the provision for recognition and enforcement of an arbitration award in the Act would be rendered futile.

[11] This Court is of the considered view that reference has to be made to the Rules where parties had agreed to be submit to and be bound by. In this instant case, the parties had submitted to the Arbitration Rules of Arbitration Institute of the Stockholm Chamber of Commerce (hereafter 'the SCC Rules') which Article 46 states:

> "**Article 46 Effect of an Award**
>
> An award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay."

[12] As such, the parties are bound by Article 46 of the SCC Rules.

[13] The defendant's counsel relied on *Malaysian Bio-Xcell Sdn Bhd v. Lebas Technologies Sdn Bhd and another appeal* [2020] 3 MLJ 723

to state that its application ought to be allowed based on the decision of the Court of Appeal. This Court is of the considered view that the Court of Appeal decision turns on its own peculiar facts. The peculiar facts in the appeal rendered the first award yet to become binding because the parties had by consent categorically agreed to refer the intrinsically and inextricably related matters of the equipment and the first award to a second arbitration. Pending the disposal of the second arbitration, therefore, inevitably, the first award could not be construed as final and binding on the parties.

[14] This Court fully agrees with the plaintiff's counsel's submission on the interpretation of the word "binding" in the Plaintiff's Written Submissions (Enclosure 19) at paragraphs 39 to 51. This Court will not regurgitate the counsel's submission here, but will emphasize the point made in the submission that the Final Award could not be challenged on its merits.

[15] The defendant's counsel also contended that (i) the Final Award has dealt with disputes not contemplated by or not falling within the terms of the submission to arbitration (see s. 39(1)(a)(iv) of the Act); (ii) the Final Award contains decisions on matters beyond the scope of the submission to arbitration (see s. 39(1)(a)(v) of the Act); and (iii) the award is in conflict with the public policy of Malaysia (see s. 39(1)(b)(ii) of the Act).

[16] With regard to the first and second contentions, they touch on the jurisdiction of the arbitral tribunal which ought to be decided by the Svea Court of Appeal.

[17] With regard to the third contention, the defendant's counsel submitted that (i) the Final Award was allowed to be paid in alternative currency which was not contemplated and/or did not fall within and/or was beyond the scope of the terms of submission to the Arbitration Tribunal, (ii) the Arbitration Tribunal failed to properly assess the defendant's argument on the US Sanctions which indirectly

related to the plaintiff company and (iii) that the Final Award was designed to circumvent the US Sanctions by allowing the award to be paid in currency other than in US dollar.

[18] This Court is of the considered view that the none of the contentions raised by the defendant's counsel would render the Final Award to be in conflict with the public policy of Malaysia. The mere fact that payment of the award sum could be made in any currency other than US dollar could not in any way be in conflict with any public policy in Malaysia.

[19] The defendant's counsel did not identify what public policy the defendant was relying on that the Final Award was in conflict with or had breached. The defendant's counsel also failed to show how the breach, if any, has prejudiced the rights of the defendant (see *The Government of India v. Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149). All these contentions do not justify this Court to order the ex-parte Order to be set aside.

[20] With regard to the contention raised by the defendant's counsel that the plaintiff did not make full and frank disclosure to this Court when applying for the *ex-parte* Order, this Court cannot accept the defendant's counsel argument. Paragraphs 60 to 62 of the Plaintiff's Written Submissions (Enclosure 19) have sufficiently explained the plaintiff's position which this Court fully accepts.

[21] This Court, after having considered the plaintiff's counsels' written submissions (Enclosures 19, 20 and 28), has accepted the plaintiff's counsel's written submissions *in toto*, except the part containing the plaintiff's objection to the defendant's late filing of its application.

Conclusion

[22] For the reasons as stated above, the defendant's application was dismissed with costs of RM10,000.00 (subject to allocator fees) to be paid by the defendant to the plaintiff.

(CHOO KAH SING)
Judge
High Court Shah Alam

Dated: 3 JANUARY 2022

COUNSEL:

For the plaintiff - Kwong Chiew Ee & Jasmine Goh; M/s Rahmat Lim & Partners

For the defendant - Michael Chow & Neoh Kai Sheng; M/s Michael Chow

Case(s) referred to:

Malaysian Bio-Xcell Sdn Bhd v. Lebas Technologies Sdn Bhd and another appeal [2020] 3 MLJ 723

The Government of India v. Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149

Legislation referred to:

Arbitration Act 2005, s. 38

Swedish Interest Act, s. 6

Stockholm Chamber of Commerce, art. 46

Rules of Court 2012, O. 69 r. 8(1)