IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
[ORIGINATING SUMMONS NO: BA-24C(ARB)-3-05/2021]

BETWEEN

KNM PROCESS SYSTEMS SDN BHD
(Co. No.: 200140-X) **... PLAINTIFF**

AND

1. CECA GOLD COMPANY LIMITED

2. MBSB BANK BHD (Co. No.: 716122-P) **... DEFENDANTS**

JUDGMENT

(Court enclosure no. 1)

A. Introduction

[1] This originating summons (**OS**) raises three novel issues as follows:

(1) whether the plaintiff company (**Plaintiff**) is required to comply with a "*multi-tier dispute resolution process*" (**Multi-Tier Dispute Resolution Process**) provided in a "*Lump Sum Turnkey Contract for the Engineering, Procurement and Construction of a LPG Receiving, Tanking, Storage and Bottling Facility at Land No. 607, Ga Yan Kwin, No. 1(E), Thida, Myaing Ward, Kyaut Tan Township Thilawa, Myanmar*" (**EPC Contract**) between

the Plaintiff and first defendant company (**1st Defendant**) before the Plaintiff can apply for interim measures from the High Court under s. 11(1) and (3) of the Arbitration Act 2005 (**AA**) pending the resolution of a dispute between the Plaintiff and 1st Defendant regarding the EPC Contract by way of arbitration (**Arbitration**) in Singapore International Arbitration Centre (**SIAC**);

(2) as clause 38.1 of the EPC Contract (**Clause 38.1**) has provided that the EPC Contract shall be governed by the law of Singapore, should the court give effect to Clause 38.1 and rely on an expert opinion of a practising lawyer in Singapore that Singapore's Covid-19 (Temporary Measures) Act 2020 [**COTMA (Singapore)**] does not invalidate a demand made by the 1st Defendant on the second defendant company (**2nd Defendant**) to pay a performance bond issued by the 2nd Defendant to the 1st Defendant for a sum of US$2,487,200.00 (**PB**)?; and

(3) on the assumption that our Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019 (Covid-19) Act 2020 (**Act 829**) is applicable to the EPC Contract, does s. 7 of Act 829 [**s 7 (Act 829)**] support this OS against the 1st and 2nd Defendants (collectively referred in this judgment as the "**Defendants**")?

B. Background

[2] The Plaintiff and 2nd Defendant are companies incorporated in Malaysia while the 1st Defendant is a Myanmarese company.

B(1). EPC Contract

[3] By way of the EPC Contract dated 31.12.2018, the 1st Defendant had appointed the Plaintiff to, among others, construct a liquefied petroleum gas (**LPG**) receiving, tanking, storage and bottling facility on a piece of land (specified in the EPC Contract) which had been leased by the 1st Defendant in Kyaut Tan Township Thilawa, Myanmar.

[4] I reproduce below the relevant provisions in the EPC Contract:

(1) according to clause 2.1.1 of the EPC Contract (**Clause 2.1.1**), the Plaintiff "*shall*", among others, perform the "*Works*" (defined in clause 1.1.118) and correct all "*Defects*" (defined in clause 1.1.33) "*in strict accordance*" with the EPC Contract. In this regard, clause 1.1.19 of the EPC Contract (**Clause 1.1.19**) has defined "*Contract Programme*" as the "*schedule of dates attached as Schedule 10*" by which the Plaintiff is required to achieve certain stages of completion of the "*Facility*" (defined in clause 1.1.44 of the EPC Contract), including the "*Guaranteed Main Works Completion Date*" (defined in clause 1.1.50 of the EPC Contract as the meaning given in clause 21.1 of the EPC Contract).

Schedule 10 to the EPC Contract (**Schedule 10**) has listed out the "*CONTRACT PROGRAMME & WORK BREAKDOWN STRUCTURE*". According to Schedule 10, the Plaintiff was required to, among others, procure and deliver the following four LPG tanks (**4 LPG Tanks**) to the "*Site*" (defined in clause 1.1.104 of the EPC Contract) -

(a) the first and second LPG tanks ("**1st LPG Tank**" and "**2nd LPG Tank**") within 330 days from the date of commencement of the EPC Contract; and

(b) the third and fourth LPG tanks ("**3rd LPG Tank**" and "**4th LPG Tank**") within 360 days from the date of commencement of the EPC Contract;

(2) clause 2.1.2 of the EPC Contract (**Clause 2.1.2**) stated that the Plaintiff "*shall*" perform the Works on a turnkey basis;

(3) by virtue of clause 2.2.1 of the EPC Contract (**Clause 2.2.1**), the Plaintiff agreed that any information supplied by the 1st Defendant to the Plaintiff, namely "*Owner Supplied Information*" (defined in clause 1.1.80), "*has not been and will not be relied upon*" by the Plaintiff "*for any purpose*" (including entering into the EPC Contract or performing its obligations under the EPC Contract), except for significant deviations which have a material impact on the Plaintiff's performance of the Works;

(4) according to clause 2.2.2 of the EPC Contract (**Clause 2.2.2**), except as stated in Clause 2.2.1 above, the 1st Defendant "*does not assume any responsibility or duty of care in respect of or warrant, guarantee or make any representation*" as to the Owner Supplied Information (including its accuracy, completeness or adequacy for the purposes of the EPC Contract);

(5) clause 3.1.2 of the EPC Contract (**Clause 3.1.2**) provided that, among others, the Plaintiff "*shall promptly commence*" the "*Main Works*" (defined in clause 1.1.68) from the date of the "*Notice to Proceed*" (defined in clause 1.1.74);

(6) clause 3.1.3 of the EPC Contract (**Clause 3.1.3**) stated that the Plaintiff "*shall*" deliver the PB to the 1st Defendant in accordance with Clause 8 of the EPC Contract (**Clause 8**). Clause 8.2.1 provides that -

(a) the Plaintiff shall, no later than 30 days after the "*Effective Date*" (defined in clause 1.1.38), provide to the 1st Defendant the PB to "*guarantee the due performance and completion of its obligations*" under the EPC Contract in the amount equal to 10% of the "*Contract Price*", ie. US$24,872,000.00 (according to the definition in clause 1.1.18 read with clause 6.1.1); and

(b) the PB shall be in the form set out in Schedule 16 to the EPC Contract "*which at minimum shall be an unconditional, irrevocable and on demand bond and from a registered first class bank trading in Malaysia that is rated at least "BBB" by Standard & Poor's Corporation*";

(7) in clause 4.5.1 of the EPC Contract (**Clause 4.5.1**) the Plaintiff acknowledged that the Plaintiff "*shall rely entirely on its own skill and judgment in the performance of its duties and obligations*" under the EPC Contract;

(8) clause 21.1.1 of the EPC Contract (**Clause 21.1.1**) had provided that the "*Guaranteed Main Works Completion Date*" is 18 months after the date on which the 1st Defendant has issued the Notice to Proceed while according to clause 21.2.1(i) of the EPC Contract [**Clause 21.2.1(i)**], the Plaintiff "*shall achieve*" the "*Main Works Completion*" (defined in clause 1.1.69) by the Guaranteed Main Works Completion Date. According to clause

21.2.2(i) of the EPC Contract [**Clause 21.2.2(i)**], the Plaintiff "*shall promptly notify*" the 1st Defendant if the Plaintiff becomes aware that the Plaintiff "*may or will be unable to achieve*" the Main Works Completion by the Guaranteed Main Works Completion Date;

(9) if the Plaintiff fails to achieve Main Works Completion within 60 days from the Guaranteed Main Works Completion Date, the Plaintiff shall pay to the 1st Defendant "*Main Works Completion Delay Liquidated Damages*" at the rate specified in Schedule 9 to the EPC Contract per day for each day of delay until Main Works Completion occurs - clause 21.3.1 of the EPC Contract (**Clause 21.3.1**)

(10) clause 21.4.1 of the EPC Contract (**Clause 21.4.1**) stated that, among others, the 1st Defendant "*at its sole discretion, may*" -

(a) invoice the Plaintiff for "*Delay Liquidated Damages*" (defined in clause 1.1.35) after the Guaranteed Main Works Completion Date and within 15 days of the Plaintiff's receipt of the invoice, the Plaintiff "*shall pay*" the 1st Defendant the Delay Liquidated Damages;

(b) withhold from the Plaintiff amounts that are otherwise due and payable to the Plaintiff in the amount of such Delay Liquidated Damages; or

(c) collect on the PB in the amount of the Delay Liquidated Damages after the Guaranteed Main Works Completion Date;

(11) by reason of clause 21.5.1 of the EPC Contract (**Clause 21.5.1**), the Plaintiff and 1st Defendant have agreed that the Delay Liquidated Damages are "*a fair and reasonable pre-estimate of the damages likely to be sustained*" by the 1st Defendant as a result of the Plaintiff's failure to achieve Main Works Completion by the Guaranteed Main Works Completion Date and represent the parties' "*desire to avoid the difficulty of having to prove damages in connection with such failure*" by the Plaintiff;

(12) according to clause 22.1 of the EPC Contract (**Clause 22.1**), the Plaintiff "*guarantees*" that the "*Facility*" (defined in clause 1.1.44) "*shall meet all*" "*Minimum Acceptance Guarantees*" (defined in clause 1.1.72) and all "*Performance Guarantees*" (defined in clause 1.1.89) as specified in Schedule 8 as a condition precedent to achieving "*Provisional Acceptance*" (defined in clause 1.1.94);

(13) sub-clauses (i) to (vii) in clause 29.1.1 of the EPC Contract (**Clause 29.1.1**) have listed all the events of "*force majeure*". Clause 29.3.1 of the EPC Contract (**Clause 29.3.1**) requires a party affected by any *force majeure*, to give a written notice to the other party setting forth the full particulars of the *force majeure* and the estimated duration of the *force majeure* within 14 days of becoming aware or should have reasonably become aware of the *force majeure*;

(14) clause 31.1 of the EPC Contract (**Clause 31.1**) has stated that the Plaintiff "*shall within 14 days from the first occurrence of any incident or event of whatsoever nature affecting or likely to affect the progress of the Works, or*

such longer time period as is expressly set forth elsewhere in the [EPC Contract] with respect to certain incidents or events, give written notice to the [1st Defendant] of such incident or event";

(15) clause 31.5.1 of the EPC Contract (**Clause 31.5.1**) has provided that, among others, subject to Clause 31, the Plaintiff "*may be entitled to an extension of time to the Guaranteed Main Works Completion Date …, as the [1st Defendant] assesses only to the extent a delay in the critical path of the "Contract Programme"* (defined in clause 1.1.19) *necessitates an adjustment*" of such dates and only if the delay is caused by one of the events specified in Clause 31.5.1(i) to (ix) and in each case of delay subject to -

(a) the cause of delay **not** being as a result of an act or omission, the negligence or default of the Plaintiff or its personnel;

(b) the cause of delay not being beyond the reasonable control of the Plaintiff or its personnel; and

(c) the Plaintiff and its personnel taking all reasonable steps to preclude the occurrence of the cause and minimize the consequences of the delay;

(16) it is clear in clause 31.8 of the EPC Contract (**Clause 31.8**) that if the Plaintiff fails to submit the notices required under, among others, Clause 31.1, "*strictly within the stated times, then the [Plaintiff] shall have no entitlement to an extension of time*";

(17) according to clause 34.2.1 of the EPC Contract (**Clause 34.2.1**), among others, if the Plaintiff has committed a "*Major Performance Default*" (defined in clause 1.1.71), the 1st Defendant may give notice to the Plaintiff that a Major Performance Default has occurred (**Major Performance Default Notice**) and the upon the receipt of the Major Performance Default Notice -

(a) the Plaintiff "*shall promptly prepare and submit*" a "*Corrective Action Plan*" (defined in clause 1.1.27);

(b) the Corrective Action Plan shall detail the "*steps that will be taken to remedy the Major Performance Default and the time required to remedy that default*" and the period for cure of the Major Performance Default stated in the Corrective Action Plan "*shall be as short as reasonably possible (but in any event no longer than 270 days after the Plaintiff's receipt of the [Major Performance Default Notice])*";

(c) the Plaintiff "*shall incorporate any comments or requirements received from the [1st Defendant]*";

(d) if the Plaintiff fails to deliver a Corrective Action Plan or insert the 1st Defendant's comments or requirements as required, the 1st Defendant may impose a Corrective Action Plan on the Plaintiff; and

(e) the Plaintiff "*shall promptly implement the Corrective Action Plan, and cure the Major Performance Default in accordance with such Corrective Action Plan, including the schedule for cure therein*";

(18) clause 34.1.1 of the EPC Contract (**Clause 34.1.1**) has stated that, among others, the 1st Defendant may, without prejudice to any other rights or remedies it may possess under the EPC Contract at law, immediately exercise its rights under clause 34.3 of the EPC Contract (**Clause 34.3**) to terminate the EPC Contract by giving a notice to the Plaintiff if the Plaintiff does not cure the Major Performance Default with the Corrective Action Plan;

(19) clause 37 of the EPC Contract (**Clause 37**) has provided for the Multi-Tier Dispute Resolution Process as follows -

(a) a "*dispute*" (defined widely in clause 1.1.37) shall be first be resolved informally by the parties;

(b) if a dispute cannot be resolved informally, either party may, by giving written notice to the other party and providing full particulars of the nature and the extent of the dispute, refer the dispute to the 1st Defendant's "*Representative*" (defined in clause 1.1.83) and the Plaintiff's "*Representative*" (defined in clause 1.1.26) for a resolution;

(c) if the dispute is not resolved by the parties' representatives within 20 days of the referral, the dispute shall be referred to the "*Executive Panel*" (defined in clause 1.1.41) for a resolution; and

(d) if the dispute is not resolved by the Executive Panel within 10 days of the referral or if the Executive Panel does not within that 10 day period agree to alternative procedures to determine the dispute, the dispute will be deemed not to be resolved and -

(i) in the case of a "*Technical Dispute*" (defined in clause 1.1.110), any party may refer the dispute to the "*Independent Expert*" (defined in clause 1.1.57) for a determination pursuant to clause 37.5 of the EPC Contract. Clauses 37.5.1 to 37.5.8 of the EPC Contract have provided an elaborate procedure for the resolution of a Technical Dispute by an Independent Expert; or

(ii) in the case of a dispute that is not a Technical Dispute or if the parties cannot decide or agree whether or not a dispute is a Technical Dispute within 20 days of the Executive Panel failing to agree to alternative procedures to determine the dispute, either party may commence arbitration in respect of the dispute; and

(e) clause 37.8 of the EPC Contract (**Clause 37.8**) has provided that no party may commence arbitral proceedings or an expert determination unless the parties have undertaken the Multi-Tier Dispute Resolution Process or one party has attempted to follow this process and the other party has failed to participate, and the Multi-Tier Dispute Resolution Process has failed to resolve the dispute. The only exceptions to Clause 37.8 are provided in clause 37.9.1 of the EPC Contract (**Clause 37.9.1**) as follows -

(i) by applying to a court of competent jurisdiction to seek urgent or injunctive relief and if practicable, to comply with the Multi-Tier Dispute Resolution Process; or

(ii) by initiating any legal process immediately prior to the end of any period specified by a relevant law during which legal process or the bringing of an action shall be initiated;

(20) according to clause 37.10.1 of the EPC Contract (**Clause 37.10.1**), when a dispute is referred to arbitration at the request of either party, the dispute shall be finally resolved in SIAC;

(21) Clause 38.1 has provided that EPC Contract "*shall be governed and construed in accordance with the laws of Singapore (without giving effect to the principles thereof relating to conflicts of law)*";

(22) clause 38.3.1 of the EPC Contract (**Clause 38.3.1**) states that the Plaintiff is an "*independent contractor performing [EPC Contract]*" but nevertheless, the the Plaintiff "*shall strictly comply with all provisions, terms and conditions of [EPC Contract], and the fact that the Plaintiff is an independent contractor does not relieve it from its responsibility to fully, completely, timely and safely perform the Works in strict compliance with [EPC Contract]*";

(23) by reason of clause 38.3.3 of the EPC Contract (**Clause 38.3.3**), that the Plaintiff is "*solely responsible for the manner in which the Works are performed*";

(24) it is provided in clause 38.4.1 of the EPC Contract (**Clause 38.4.1**) that -

(a) "*no relaxation, forbearance, delay or indulgence*" by either party in enforcing any of the terms and

conditions of the EPC Contract or the granting of time by either party to the other, prejudices, affects or restricts the rights of that party under the EPC Contract; and

(b) waiver by either party of any breach of the EPC Contract does not operate as a waiver of any subsequent or continuing breach of the EPC Contract;

(25) clause 38.8 of the EPC Contract (**Clause 38.8**) has stated that preparation and finalisation of the EPC Contract has been a joint effort of the parties and the EPC Contract shall not be construed more strictly against one of the parties than against the other; and

(26) clause 38.9 of the EPC Contract (**Clause 38.9**) has provided that -

(a) the EPC Contract contains the entire understanding of the parties with respect to the subject matter hereof;

(b) the EPC Contract incorporates all prior agreements and commitments of the parties; and

(c) there are no other oral understandings, terms or conditions, and neither party has relied upon any representation, express or implied, not contained in the EPC Contract.

B(2). PB

[5] Pursuant to the EPC Contract, the Plaintiff had caused the 2nd Defendant to issue the PB dated 18.5.2020 for a sum of US$2,487,200.00 in favour of the 1st Defendant.

[6] The PB had been extended and amended by a letter dated 27.5.2020 by the 2nd Defendant to the 1st Defendant [**2nd Defendant's Letter (27.5.2020)**]. The 2nd Defendant's Letter (27.5.2020), among others, substituted clause 3(a) of the PB [**Clause 3(a) PB**] and provided that the 2nd Defendant's Letter (27.5.2020) shall form an integral part of the PB.

B(3). Plaintiff's breaches of EPC Contract

[7] Firstly, as explained in *KNM Process Systems Sdn Bhd v. Cypark Sdn Bhd* [2020] 10 MLJ 321 (**Cypark**), at [31(5)], this court cannot decide on the merits of the dispute between the parties (which by virtue of Clause 37.10.1, the parties had agreed to be decided by way of the Arbitration). The judgment in **Cypark** has been affirmed on appeal to the Court of Appeal. Accordingly, my decision in this OS as well as the reasons and reasoning in support of such a decision -

(1) solely concern whether the Plaintiff is entitled to interim measures under s. 11(1)(a) and/or (b) AA against the Defendants pending the outcome of the Arbitration; and

(2) should not affect in any manner how the arbitral tribunal will conduct and determine the Arbitration in SIAC.

[8] As explained in Part G(1) below, the law of Singapore applies to the EPC Contract by virtue of Clause 38.1. Having said that, to decide this OS, I can construe the EPC Contract based on the wording of the EPC Contract as manifestly intended by the Plaintiff and 1st Defendant.

[9] Mr. Filippo Molinari, the Plaintiff's Project Director (**Mr. Molinari**), had affirmed an affidavit on 21.5.2021 (**Plaintiff's 1st Affidavit**) in support of this OS. Paragraph 8 of the Plaintiff's 1st Affidavit had made an allegation that the Plaintiff received the Notice to Proceed on 31.3.2019. I should add that in paragraph 3.1.2 of the Plaintiff's letter dated 23.2.2021 to the 1st Defendant [**Plaintiff's Letter (23.2.2021)**] and paragraph 9 of the Plaintiff's letter dated 28.5.2021 to the 1st Defendant [**Plaintiff's Letter (28.5.2021)**], the Plaintiff claimed that the Plaintiff had commenced the Works on 1.3.2019. However, the 1st Defendant's Chairman, Mr. David Tsung-Hung Chao, (**Mr. Chao**), responded in sub-paragraph 8.1 of his affidavit affirmed on 29.5.2021 that the Plaintiff had commenced the Works on 1.1.2019. Mr. Chao had relied on item 1 of the minutes of the "*Project Monthly Progress Review Meeting*" (**PMPRM**) which was held in the Plaintiff's office on 27.6.2019 [**PMPRM (27.6.2019)**].

It is to be noted that regarding all PMPRM's -

(1) PMPRM's were attended by representatives of the Plaintiff and 1st Defendant; and

(2) minutes of PMPRM's were confirmed by the signatures of the representatives of the Plaintiff and 1st Defendant.

[10] I accept the 1st Defendant's contention that the Plaintiff had commenced the Works on 1.1.2019. This decision is premised on the following evidence and reasons:

(1) item 1 of the minutes of PMPRM (27.6.2019) clearly showed that the Plaintiff had commenced the Works on 1.1.2019;

(2) the accuracy of the minutes of PMPRM (27.6.2019) had been confirmed by the signatures of two representatives of the Plaintiff, namely Mr. "*C.C. Choy*" (**Mr. Choy**) and Mr. "*G.S. Ravi*" (**Mr. Ravi**). The minutes of PMPRM (27.6.2019) recorded -

(a) Mr. Ravi as the Plaintiff's Project Director;

(b) Mr. Choy as the Plaintiff's Project Manager; and

(3) the Plaintiff had not adduced any evidence to rebut item 1 of the minutes of PMPRM (27.6.2019) regarding when the Plaintiff commenced the Works.

[11] I have not overlooked paragraph 8 of Mr. Molinari's second affidavit which had been affirmed on 1.7.2021 (**Plaintiff's 2nd Affidavit**). According to paragraph 8 of the Plaintiff's 2nd Affidavit, the Notice to Proceed was "*issued*" on 1.6.2019 and not on 1.3.2019. The Notice to Proceed [signed by the 1st Defendant's Project Manager, Mr. Steven Tan (**Mr. Tan**)] was exhibited in the Plaintiff's 2nd Affidavit. Mr. Chao's second affidavit affirmed on 12.7.2021 (**1st Defendant's 2nd Affidavit**) had explained as follows regarding the Notice to Proceed:

(1) both the Plaintiff and 1st Defendant had agreed that the latter would hand over the Site to the former on 1.6.2019. Hence, Mr. Tan had mistakenly signed the Notice to Proceed to document the handing over of the Site (not the commencement of Works by the Plaintiff). Item 2(a) of the minutes of PMPRM on 21.5.2010 showed that the Site was handed by the 1st Defendant to the Plaintiff on 1.6.2019; and

(2) Mr. Tan had no authority to sign the Notice to Proceed on behalf of the 1st Defendant. Only Mr. Robert Lemmey, a consultant of "*Green Rock*"), was authorized to act for the 1st Defendant regarding the Works. Such a fact was expressly made known by the 1st Defendant to the Plaintiff when the 1st Defendant handed over to the Plaintiff a document entitled "*CECA Gold Project EPC: Reporting and Authority Matrix Reporting Lines (Direct reports with solid line, second matrix reports dotted line)*" in a PMPRM held on 18.3.2019 and 19.3.2019.

The above averments in the 1st Defendant's 2nd Affidavit had not been rebutted by any affidavit by the Plaintiff. Hence, such allegations are deemed admitted by the Plaintiff - please refer to the Federal Court's judgment delivered by Chong Siew Fai CJ (Sabah & Sarawak) in *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533, at 541. In the circumstances, I place no reliance on the Notice to Proceed.

[12] As explained in the above paragraphs 9 to 11, since the Plaintiff commenced the Works on 1.1.2019, in accordance with Clause 2.1.1 read with Schedule 10, the Plaintiff was required under the EPC Contract to, among others, deliver to the Site -

(1) the 1st and 2nd LPG Tanks on **27.11.2019** (within 330 days from 1.1.2019, the date of commencement of the EPC Contract) [**Dateline (1st and 2nd LPG Tanks)**]; and

(2) the 3rd and 4th LPG Tanks on **27.12.2019** (within 360 days from 1.1.2019, the date of commencement of the EPC Contract) [**Dateline (3rd and 4th LPG Tanks)**].

[13] The Plaintiff did not apply to the 1st Defendant pursuant to Clause 31.1 for any extension of time (**EOT**) regarding the

Works, including an extension of the Dateline (1st and 2nd LPG Tanks) and Dateline (3rd and 4th LPG Tanks). Clause 31.8 provides that if the Plaintiff fails to submit the notices required under, among others, Clause 31.1, "*strictly within the stated times*", the Plaintiff "*shall have no entitlement to an extension of time*".

[14] It is clear that the Plaintiff had breached Clause 2.1.1 read with Schedule 10 (**Plaintiff's 1st Breach**) when the Plaintiff failed to deliver -

(1) the 1st and 2nd LPG Tanks on the Dateline (1st and 2nd LPG Tanks); and

(2) the 3rd and 4th LPG Tanks on the Dateline (3rd and 4th LPG Tanks).

The Plaintiff's 1st Breach is a Major Performance Default within the meaning of clause 1.1.71(ii) of the EPC Contract (*material breach or default by the [Plaintiff] of its obligations under [the EPC Contract]*).

[15] The Plaintiff's 1st Breach is supported by the following provisions in the EPC Contract:

(1) as provided in Clause 2.1.2, the Plaintiff "*shall*" perform the Works on a turnkey basis. It is clear that a turnkey contractor, such as the Plaintiff in this case, assumes all the duties and responsibilities to perform the turnkey contract in question.

(2) according to Clause 38.3.3, that the Plaintiff is "*solely responsible for the manner in which the Works are performed*";

(3) in Clause 4.5.1, the Plaintiff acknowledged that the Plaintiff "*shall rely entirely on its own skill and judgment in the performance of its duties and obligations*" under the EPC Contract;

(4) Clause 38.3.1 states that the Plaintiff is an independent contractor who "*shall strictly comply*" with all provisions in the EPC Contract and the fact that it is an independent contractor does not relieve it from its responsibility to "*fully, completely, timely and safely perform the Works in strict compliance*" with the EPC Contract;

(5) Clause 38.4.1 provides that -

(a) "*no relaxation, forbearance, delay or indulgence*" by either party in enforcing any of the terms and conditions of the EPC Contract or the granting of time by either party to the other, prejudices, affects or restricts the rights of that party under the EPC Contract; and

(b) waiver by either party of any breach of the EPC Contract does not operate as a waiver of any subsequent or continuing breach of the EPC Contract;

(6) in Clause 22.1, the Plaintiff has guaranteed that the Facility "*shall*" meet the Minimum Acceptance Guarantees for the performance of the Facility as set out in Schedule 8 to the EPC Contract;

(7) in accordance with Clause 2.2.1, the Plaintiff cannot rely on Owner Supplied Information (which had been supplied by the 1st Defendant to the Plaintiff regarding the Works,

Site and Project). Clause 2.2.2 further states that the 1st Defendant does not assume any responsibility or duty of care in respect of the Owner Supplied Information;

(8) Clause 38.8 provides that the "*contra proferentem*" rule of construction does not apply to the EPC Contract; and

(9) Clause 38.9 is clear that the EPC Contract constitutes the "*entire agreement*" between the Plaintiff and 1st Defendant.

[16] The following documents (in chronological order) support the 1st Defendant's submission that the Plaintiff's 1st Breach has been committed:

(1) the 1st Defendant's letter dated 14.12.2020 to the Plaintiff [**1st Defendant's Letter (14.12.2020)**], had stated as follows, among others -

(a) the Plaintiff lacked the capability to perform the Works in a timely manner as required by the EPC Contract;

(b) the Plaintiff had delayed in the delivery of the 4 LPG Tanks to the Site for more than a year (**Plaintiff's Delay**). The Plaintiff's Delay was due to the following reasons -

(i) there was delay by the Plaintiff in the fabrication of the LPG tanks in the Plaintiff's fabrication plant in Malacca which was before the commencement of the Covid pandemic in Malaysia (**Pandemic**);

(ii) the Plaintiff had delayed in the appointment of a logistics company (**Transporter**) to deliver the 4 LPG Tanks to the Site [**Plaintiff's Delay (Appointment of Transporter)**]; and

(iii) the Plaintiff's Delay (Appointment of Transporter) was not due to the Pandemic; and

(c) the 1st Defendant's Letter (14.12.2020) had put the Plaintiff on notice that the Plaintiff's performance of the Works did not comply with the EPC Contract;

(2) the Plaintiff's 1st Affidavit had exhibited the 1st Defendant's letter dated 20.1.2021 to the Plaintiff [**1st Defendant's Letter (20.1.2021)**]. The 1st Defendant's Letter (20.1.2021) had been marked "*without prejudice*" but paragraph 11 of the 1st Defendant's letter dated 6.2.2021 to the Plaintiff [**1st Defendant's Letter (6.2.2021)**] stated that the caption of "*without prejudice*" in the 1st Defendant's Letter (20.1.2021) should be disregarded. According to the 1st Defendant's Letter (20.1.2021), among others -

(a) in view of, among others, the Plaintiff's 1st Breach, the 1st Defendant's Letter (20.1.2021) served as a Major Performance Default Notice to the Plaintiff under Clause 34.2.1; and

(b) the Plaintiff was required to submit a Corrective Action Plan to the 1st Defendant within seven days after the date of the 1st Defendant's Letter (20.1.2021);

(3) item 1 of the minutes of PMPRM held on 21.1.2020 and 22.1.2020 had alluded to the Plaintiff's Delay and Plaintiff's Delay (Appointment of Transporter);

(4) the Plaintiff replied to the 1st Defendant's Letter (20.1.2021) by way of a "*without prejudice*" letter dated 28.1.2021 [**Plaintiff's Letter (28.1.2021)**]. The Plaintiff's Letter (28.1.2021) had been exhibited in the Plaintiff's 1st Affidavit. As such, the Plaintiff had waived its right to object to the admissibility of the Plaintiff's Letter (28.1.2021) on the ground that the Plaintiff's Letter (28.1.2021) was marked "*without prejudice*" - please refer to *Gary Teh Chin Yeong v. Kwong Yan Loy & Ors* [2019] 5 CLJ 329, at [12(4)].

The Plaintiff's Letter (28.1.2021) essentially requested for time to respond to the the 1st Defendant's Letter (20.1.2021). In this regard, the Plaintiff did not comply with Clause 34.2.1(ii) which stated the Plaintiff "*shall promptly prepare and submit*" a Corrective Action Plan;

(5) in reply to the Plaintiff's Letter (28.1.2021), the 1st Defendant's Letter (6.2.2021) had, among others, requested for the Plaintiff's Corrective Action Plan; and

(6) the Plaintiff's Letter (23.2.2021) purportedly gave a Corrective Action Plan. The contents of the Plaintiff's Letter (23.2.2021) did not provide in detail the steps to be taken by the Plaintiff to remedy the Plaintiff's 1st Breach and the time period required to remedy the Plaintiff's 1st Breach which should be "*as short as reasonably possible*" as required by Clause 34.2.1(ii) and (iii) (**Plaintiff's 2nd Breach**). I have perused many letters sent by the Plaintiff to the 1st Defendant [after the Plaintiff's Letter

(23.2.2021)] and none of them had provided a Corrective Action Plan as required by Clause 34.2.1(ii) and (iii).

[17] When the Plaintiff failed to pay its sub-contractors, such a failure constituted a Major Performance Default under clause 1.1.71(xi) of the EPC Contract (**Plaintiff's 3rd Breach**). The Plaintiff's 3rd Breach is clear from the following documents:

(1) the 1st Defendant's Letter (20.1.2021); and

(2) the 1st Defendant's Letter (6.2.2021).

The Plaintiff did not provide a Corrective Action Plan regarding the steps and time period to rectify the Plaintiff's 3rd Breach as required by Clause 34.2.1(ii) and (iii).

[18] I should state that the Plaintiff had sent many letters to the 1st Defendant to, among others, deny the Plaintiff's 1st to 3rd Breaches (collectively referred to in this judgment as the "**Plaintiff's 3 Breaches**"). In view of the relevant clauses in the EPC Contract (please refer to the above paragraphs 14 and 15), I cannot accept these self-serving letters as a credible basis to deny the Plaintiff's 3 Breaches, in particular the Plaintiff's 1st Breach.

[19] In view of the Plaintiff's 3 Breaches, the 1st Defendant sent to the Plaintiff a notice dated 17.5.2021 to terminate the EPC Contract [**1st Defendant's Termination Notice (EPC Contract)**].

B(4). 1st Defendant's call on PB

[20] By way of a letter dated 10.5.2021 to the 2nd Defendant, the 1st Defendant demanded the 2nd Defendant to pay the sum of

US$2,487,200.00 to the 1st Defendant pursuant to the PB [**1st Defendant's Demand (PB)**].

[21] The 2nd Defendant informed the Plaintiff regarding the 1st Defendant's Demand (PB). Consequently, the Plaintiff sent a letter dated 19.5.2021 to the 2nd Defendant which alleged, among others, that the 1st Defendant's Demand (PB) was "*unreasonable and unconscionable*".

[22] The Plaintiff's solicitors, Messrs Michael Chow (**Messrs MC**), sent a letter dated 20.5.2021 to the 2nd Defendant [**Messrs MC's Letter (20.5.2021)**]. According to Messrs MC's Letter (20.5.2021), among others -

(1) the 1st Defendant was not entitled to demand payment under the PB because the 1st Defendant's Demand (PB) was unreasonable and unconscionable; and

(2) the 1st Defendant's Demand (PB) was unlawful due to any one of the three reasons -

(a) the 1st Defendant is "*closely linked*" to Myanmar Economic Corporation (**MEC**) which is subject to economic sanctions imposed by the United States [**US Sanctions (Myanmar)**] following the military coup in Myanmar [**Military Coup (Myanmar)**]. The 2nd Defendant's payment of US$2,487,200.00 to the 1st Defendant pursuant to the PB "*could potentially violate*" US Sanctions (Myanmar);

(b) any payment by the 2nd Defendant to the 1st Defendant under the PB would breach Act 829; and

(c) the EPC Contract is governed by the law of Singapore and any payment by the 2nd Defendant to the 1st Defendant pursuant to the PB -

(i) would contravene COTMA (Singapore); and

(ii) any party who contravenes the relevant provisions of COTMA (Singapore) would have committed an offence under COTMA (Singapore).

C. This OS

[23] The Plaintiff, through Messrs MC, filed this OS which prayed for the following relief, among others:

(1) a declaration that the 1st Defendant's Demand (PB) was invalid (**Prayer 1**);

(2) an injunction to restrain the 1st Defendant from receiving any of the proceeds of the PB (**Prayer 2**); and

(3) an injunction to restrain the 2nd Defendant from processing the 1st Defendant's Demand (PB), including making any payment to the 1st Defendant pursuant to the PB (**Prayer 3**).

[24] Pending the disposal of this OS, the Plaintiff had filed an *ex parte* application in court enclosure no. 2 (**Enc. 2**) for *ex parte* interim injunctions to restrain the Defendants regarding the 1st Defendant's Demand (PB) pending the disposal of the OS (***Ex Parte* Interim Injunctions**).

[25] When Enc. 2 was heard on an *ex parte* basis by me, I inquired from the Plaintiff's learned counsel, Mr. Michael Chow Keat Thye, on the following two questions:

(1) did the Plaintiff disclose all material facts to the court with regard to Enc. 2?; and

(2) whether the Plaintiff had misrepresented the facts in support of Enc. 2 in a material manner.

Mr. Chow orally confirmed to this court that -

(a) the Plaintiff had disclosed all material facts in support of Enc. 2; and

(b) the Plaintiff had not misrepresented the facts in support of Enc. 2 in a material manner.

[26] Upon Mr. Chow's confirmation of the matters stated in the above paragraph 25, I granted the *Ex Parte* Interim Injunctions with the Plaintiff's undertaking to pay damages to the Defendants if the court subsequently dismisses the OS [**Plaintiff's Undertaking (Damages)**]. When the OS was heard *inter partes*, I granted *ad interim* injunctions to restrain the Defendants with respect to the 1st Defendant's Demand (PB) pending the disposal of the OS (***Ad Interim* Injunctions**).

D. Is Plaintiff required to comply with Multi-Tier Dispute Resolution Process before filing this OS?

[27] I reproduce below the relevant part of s. 11 AA:

> "***Arbitration agreement and interim measures by High Court***

*11(1)**A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to -***

*(a) **maintain or restore the status quo pending the determination of the dispute**;*

*(b) **take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process**;*

(c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(d) preserve evidence that may be relevant and material to the resolution of the dispute; or

(e) provide security for the costs of the dispute.

...

*(3) **This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia**.*"

(emphasis added).

[28] The effect of a contractual provision which provides for a dispute resolution process has been explained in the following judgment of the Federal Court delivered by Raus Sharif PCA (as he then was) in *Juara Serata Sdn Bhd v. Alpharich Sdn Bhd* [2015] 6 MLJ 773, at [36]:

> "*[36]**In the final analysis, we would go as far to state that the defendant in this case is not in a position to resile from the terms inserted in the agreement which had imposed obligations on it. To allow it to do so would be tantamount to allowing a party in breach to take advantage of its own wrong. Parties must be held to their bargain. In our instant case, the decision of the courts below were based upon a consideration of the dispute resolution process in cll 16 and 17 of the agreement which required an initial reference to the architect/consultant for a decision and if no decision was made by him or if either party was aggrieved by the decision, it may then refer the dispute to arbitration. The defendant failed to refer its dispute on the decision to arbitration resulting in the decision becoming 'final and binding upon the parties'. The High Court found, which we have no reasons to disagree, that the various reasons for non-payment of the interim certificate amount by the defendant were described as 'non-starters' because of the failure by the defendant to adhere to the contractual mechanism for dispute resolution*. ..."
>
> (emphasis added).

[29] In this case, Clause 37.9.1 allowed the Plaintiff to apply to "*a court of competent jurisdiction to seek urgent or injunctive relief*". Consequently, the Plaintiff is not barred by the Multi-Tier Dispute Resolution Process from filing this OS.

[30] Even if it is assumed there is no Clause 37.9.1 or there is a contractual provision which ousts the court's jurisdiction from hearing any application for interim measure pursuant to s. 11

AA, I am of the view that the Plaintiff is nonetheless entitled to institute this OS. My reasons are as follows:

(1) any party to an "*arbitration agreement*" [according to s. 2(1) AA, an "*arbitration agreement*" is defined in s. 9 AA] has a statutory right under s. 11(1)(a) to (e) AA to seek interim measures from the High Court (**Statutory Right**). The Statutory Right extends to an "*international arbitration*" as understood in s. 2(1) and (2)(a) read with s. 11(3) AA; and

(2) the Statutory Right prevails over any contractual provision, including the Multi-Tier Dispute Resolution Process. If otherwise -

(a) this will render redundant s. 11(1)(a) to (e) and (3) AA; and

(b) an injustice may be caused to a party to an arbitration agreement who has to seek urgent interim measure from the court under s. 11(1)(a) to (e) AA so as to support, assist, aid and/or facilitate the dispute resolution process, including the arbitral process.

E. Can Plaintiff apply for a declaration under s. 11 AA?

[31] It is decided in **Cypark**, at [31(5)], [33] and [34], as follows:

"*[31]**Regarding the Present s. 11(1) AA, I am of the following view:***

...

(5) ***the court cannot decide on the merits of the dispute between the parties under the Present s. 11(1) AA***

because the parties have agreed in their "arbitration agreement" [as understood in ss. 2(1) and 9(1) to (5) AA] that all legal and factual issues which arise from their dispute shall only be decided by the "arbitral tribunal" [as defined in s. 2(1) AA]. This is fortified by s. 11(2) AA which provides that where a party applies to court for any interim measure after an arbitral tribunal has made a finding of fact, the court "shall" treat the factual finding as "conclusive' for the purposes of the application under the Present s. 11(1) AA.

> ***Although the court cannot decide on the merits of a dispute under the Present s. 11(1) AA, in deciding an application under the Present s. 11(1) AA, the court has to assess the evidence and decide the following two matters [Court's Decision (Interim Measure)] -***

(a) ***whether an applicant for interim measure has met the requirements for seeking the interim measure as laid down in s. 11(1)(a) to (e) AA; and***

(b) ***whether the court should exercise its discretion to grant the interim measure sought for.***

> ***The reasons and reasoning of the Court's Decision (Interim Measure) do not bind the arbitral tribunal in any manner. Nor are parties bound or estopped in the arbitral proceedings by the reasons and reasoning of the Court's Decision (Interim Measure);***
>
> ...

> *[33]* ***It is not disputed that there is an arbitration agreement between the Plaintiff and Defendant (Arbitration Agreement) that any dispute between them regarding the Contract (Dispute) shall be decided by way of arbitration***.
>
> *[34]* ***As explained in the above sub-paragraph 31(5), in view of the Arbitration Agreement, the merits of the Dispute can only be decided by an arbitral tribunal and not by the court. As such, I should not have made the 2 Declarations in the 1st Order***."
>
> (emphasis added).

[32] Premised on Clause 37.10.1 and **Cypark**, I have no hesitation to dismiss Prayer 1.

F. Whether court should restrain 2nd Defendant regarding PB

[33] Clause 3(a) PB provides as follows:

> "***GUARANTOR [2nd Defendant] shall forthwith pay to the OWNER [1st Defendant] free and clear of, and without deduction for or on account of any present or future taxes, duties, charges, fees, deductions or withholdings of any nature whatsoever and by whomever imposed, the sum of [US$2,487,200.00] of the CONTRACT PRICE ("Bond Amount")***, *or sums (when aggregated with any amount previously so paid under this [PB]) not exceeding the Bond Amount.* ***All sums demanded pursuant to this [PB] shall be paid within five (5) Kuala Lumpur, Malaysia working days upon receipt of the [1st Defendant's] first written demand to [2nd Defendant] made from time to time and shall be made without***

> ***needing to give any proof or evidence of the CONTRACTOR'S [Plaintiff] default or the [1st Defendant's] entitlement to such sum under the [EPC Contract], and notwithstanding any contest or protest by the [Plaintiff] or by the [2nd Defendant] or by any other third party and without the need for any proof or conditions and without any right of set-off or counterclaim and without the need for [1st Defendant] or [2nd Defendant] to take any legal action against or obtain the consent of the [Plaintiff].***"
>
> (emphasis added).

[34] Firstly, as between the Plaintiff and 2nd Defendant, I am of the view that Malaysian law is applicable to the PB and 1st Defendant's Demand (PB). This decision is due to the following reasons:

(1) clause 3(g) PB provides that the PB "*shall be governed by and construed in accordance with the laws of Malaysia*"; and

(2) the 2nd Defendant is not a party to the EPC Contract. Hence, Clause 38.1 does not apply to the 2nd Defendant.

[35] It is clear from the wording of Clause 3(a) PB that the PB is an "*unconditional guarantee payable on demand*" as explained by Mohd. Dzaiddin FCJ (as he then was) in the Federal Court case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) & another appeal* [1996] 2 MLJ 517, at 534, as follows:

> "***A bank guarantee is a performance bond. There are two types of performance bond. The first type is a conditional***

bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second type is an unconditional or 'on demand' performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract. According to the learned authors of The Modern Contract of Guarantee (2nd Ed) at p 664, the tendency of the English courts (since, according to the authors, that the Australian courts have not yet been faced with the same problems of construction) has been to treat the performance bonds as unconditional if there was a clear statement that the amount guaranteed was payable by the bank simply upon a written demand being made, even though there might be some indications to the contrary elsewhere in the document. The learned authors cited Esal (Commodities) Ltd's case, where the bank 'undertook to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance ' (emphasis added), it was held that the latter words did not alter the fact that the money was payable upon a written demand being made as stated in the earlier part of the clause. The beneficiary of the bond did not have to show a failure to perform by the supplier in order to claim upon the bond."

(emphasis added).

[36] As the PB is payable by the 2nd Defendant to the 1st Defendant on the 2nd Defendant's receipt of the 1st Defendant's Demand (PB), I cannot accede to Prayer 3.

[37] There is another reason why the 2nd Defendant cannot be restrained from paying to the 1st Defendant pursuant to the 1st Defendant's Demand (PB). Section 11(1) AA does not apply to a person (such as the 2nd Defendant in this case) who is not a party to -

(1) the arbitration agreement as understood in ss. 2(1) and 9 AA; and

(2) arbitral proceedings for which interim measures are sought from the High Court.

G. Whether 1st Defendant should be restrained regarding PB

[38] Regarding the duties of the court in deciding an application under s. 11(1) AA, it is decided in **Cypark**, at [31] and [32], as follows:

> "*[31]**Regarding the Present s. 11(1) AA, I am of the following view:***
>
> *(1)* ***the court had wide powers under the Previous s. 11(1) AA, especially in its paragraph (h) (the court could award "an interim injunction or any other interim measure"). In contradistinction to the Previous s. 11(1) AA, the court's power to grant interim measures pursuant to the Present s. 11(1) AA is confined to any one or more of its paragraphs (a) to (e). In other words, the scope of the court's power under the Present s. 11(1) AA is narrower as***

compared to its power pursuant to the Previous s. 11(1) AA. As such, Malaysian cases decided under the Previous s. 11(1) AA may not necessarily apply to the Present s. 11(1) AA;

(2) ***the use of the word "may" in the Present s. 11(1) AA clearly shows that the court has a discretion to grant any interim measure under s. 11(1)(a) to (e) AA. Needless to say, from the view point of the stare decisis doctrine, the court's decision on the exercise or non-exercise of its discretion under the Present s. 11(1) AA does not constitute a binding legal precedent;***

(3) ***as expressly provided in the Present s. 11(1) AA, the court may grant interim measures "before*** *or during* ***arbitral proceedings";***

(4) ***according to s. 11(3) AA, the court may grant interim measures pursuant to the Present s. 11(1) AA before or during an "international arbitration" [as understood in s. 2(1)(a) to (c), s. 2(2)(a)(i) and (ii) AA];***

...

(6) ***based on the words "interim measure" in the Present s. 11(1) AA, the court may only grant interim measure and not permanent or final relief. This is understandable because since the arbitral tribunal is the sole arbiter of the dispute between the parties [please refer to the above sub-paragraph (5)], final relief should only be given by the arbitral***

tribunal in the form of a Final Award and not by the court;

(7) ***an applicant for interim measure under the Present s. 11(1) AA has the legal and evidential burden to satisfy the court to exercise its discretionary power to grant any interim measure under s. 11(1)(a) to (e) AA;*** *and*

(8) *after the court has granted any interim measure under the Present s. 11(1) AA, parties may apply to court to vary or discharge the interim measure if there is a subsequent and material change of relevant circumstances (**Subsequent Event**). In **Bumi Armada Navigation**, at [47(d) and (e)], I have given examples of a Subsequent Event for the court to vary or discharge the interim measure.*

[32] ***I am of the following opinion regarding the question of whether a party to an arbitration agreement (X) may apply to court for an interim injunction to restrain a beneficiary of a BG (Y) from making a call on the BG or from receiving any proceeds from the BG pending the commencement and disposal of an arbitration between X and Y (Interim Injunction):***

(1) ***the court has a discretion under s. 11(1)(a) and/or (b) AA to grant the Interim Injunction in any one or more of the following three circumstances (3 Circumstances) -***

(a) ***the Interim Injunction is granted pursuant to s. 11(1)(a) AA to "maintain" the status quo pending the disposal of the arbitration;***

(b) ***the Interim Injunction is ordered under s. 11(1)(a) AA to "restore" the status quo pending the disposal of the arbitration****; or*

(c) ***by reason of the second limb of s. 11(1)(b) AA [Section 11(1)(b) (2nd Limb)], Y is refrained by the Interim Injunction from "taking action that is likely to cause current or imminent harm or prejudice to the arbitral process"; and***

(2) ***X has the burden to satisfy the court of the following eight matters (8 Matters) when X applies for an Interim Injunction against Y (X's Application)*** *-*

(a) ***X has a valid and arguable cause of action against Y (X's Cause of Action). X is only required to show to the court a valid and arguable X's Cause of Action because only the arbitral tribunal can finally decide on the existence of X's Cause of Action*** *- please see the above sub-paragraph 31(5).*

The Present s. 11(1) AA does not expressly require a valid and arguable X's Cause of Action as a condition for X's Application. However, such a requirement is necessarily implied in the Present s. 11(1) AA. This is because if there is no valid and arguable X's Cause of Action, X has no right to commence arbitral proceedings against Y. In such a case, X's Application is frivolous, vexatious and/or constitutes an abuse of court process for

which Y can apply to the court to strike out X's Application;

(b) ***the existence of one or more of the 3 Circumstances;***

(c) ***there are four possible grounds for X to challenge Y's call on a BG (Y's Call), namely -***

*(i) Y's Call is fraudulent (**1st Ground**);*

(ii) ***Y's Call is unconscionable** (**2nd Ground**);*

*(iii) Y's Call is contrary to the contract between X and Y (**3rd Ground**); and/or*

*(iv) Y's Call does not comply with the BG (**4th Ground**).*

If X relies on the 1st and 2nd Grounds (1st Two Grounds), X has to satisfy the court by applying one of the following two tests, namely -

(ci) ***X has a "seriously arguable case that the only realistic inference" is Y's Call is fraudulent or unconscionable; or***

(cii) ***X has adduced a "strong prima facie case" that Y's Call is fraudulent or unconscionable.***

There is a third test if X is relying on the 2nd Ground, namely X must satisfy the court that the "events or conduct are of such degree such as to prick the conscience of a reasonable and sensible" person.

The above three tests (3 Tests) have been laid down by the Federal Court in a judgment delivered by Abdull Hamid Embong FCJ in Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, at [33], [36] and [39], as follows -

...

If X relies on the 3rd and 4th Grounds, X should adduce a "strong prima facie case" to support those two grounds;

(d) ***the remedy of damages is not an adequate remedy for X;***

(e) ***the "balance of convenience" or the "balance of justice" lies in favour of the grant of the Interim Injunction;***

(f) *X has provided an undertaking to court to pay damages to Y if the Final Award is in Y's favour and if Y has suffered any loss due to the Interim Injunction (**Undertaking**). In exceptional circumstances, the court has a discretion to exempt X from furnishing the Undertaking;*

(g) *X has complied with all the procedural requirements as laid down in O. 29 r. 1 RC; and*

(h) *there is no policy or equitable consideration which militates against the grant of the Interim Injunction.*"

(emphasis added).

G(1). Should the court apply law of Singapore or Malaysia regarding 1st Defendant's Demand (PB)?

[39] I have applied Malaysian law as between the Plaintiff and 2nd Defendant - please refer to the above paragraph 34. As between the Plaintiff and 1st Defendant, I accept the submission by the 1st Defendant's learned counsel, Mr. Yap Yeow Han, that by reason of Clause 38.1, the law of Singapore "*shall*" apply to the 1st Defendant's Demand (PB) without giving effect to the principles relating to conflict of laws. An application of Malaysian law as between the Plaintiff and 1st Defendant will be contrary to the parties' clear intention as manifested in Clause 38.1.

G(2). Whether Plaintiff could rely on COTMA (Singapore) in this case

[40] Sections 45 and 51 of the Evidence Act 1950 (**EA**) provide as follows:

> "***Opinions of experts***
>
> *45(1)* ***When the court has to form an opinion upon a point of foreign law*** *or of science or art, or as to identity or genuineness of handwriting or finger impressions,* ***the opinions upon that point of persons specially skilled in that foreign law****, science or art, or in questions as to identity or genuineness of handwriting or finger impressions,* ***are relevant facts****.*
>
> *(2)* ***Such persons are called experts****.*
>
> ***Grounds of opinion when relevant***

> *51. **Whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant**.*"
>
> (emphasis added).

[41] Unlike the construction of the EPC Contract (which a Malaysian court may construe as explained in the above paragraph 8), in deciding whether the Plaintiff can rely on COTMA (Singapore) to invalidate the 1st Defendant's Demand (PB), an expert opinion by a Singaporean lawyer and his or her reasons on this question, are relevant under s. 45(1) read together with s. 51 EA.

[42] The Plaintiff had adduced an affidavit affirmed by Mr. Ng Lip Chih (**Mr. Ng**) on 28.5.2021 to resist this OS. According to Mr. Ng's affidavit, among others -

(1) Mr. Ng's "*Curriculum Vitae*" (**Mr. Ng's CV**) is as follows, among others -

(a) Mr. Ng obtained his Bachelor of Laws degree from the University of London (London School of Economics and Political Science) with Second Class Upper Honours in 1994;

(b) in 1995, Mr. Ng completed his Diploma in Singapore Law (with Merit) in the National University of Singapore;

(c) Mr. Ng commenced legal practice in Singapore in 1996 after he was admitted to the Singapore Bar as an Advocate and Solicitor;

(d) in 1999, Mr. Ng has qualified to practise as a solicitor in England; and

(e) Mr. Ng has conducted many cases in Singapore's Court of Appeal and High Court; and

(2) Mr. Ng has opined that the 1st Defendant's Demand (PB) was lawful under the law of Singapore and was not nullified by COTMA (Singapore) (**Mr. Ng's Expert Opinion**). Reasons had been given for Mr. Ng's Expert Opinion.

[43] Firstly, based on Mr. Ng's CV, I accept that Mr. Ng is an expert within the meaning of s. 45(1) and (2) EA on the law of Singapore regarding the issue of whether the 1st Defendant's Demand (PB) is valid under the law of Singapore or is invalid pursuant to COTMA (Singapore).

[44] Secondly, I accept the reasons given in Mr. Ng's Expert Opinion on why the 1st Defendant's Demand (PB) is valid under Singaporean law and has not been invalidated by COTMA (Singapore).

[45] Messrs MC's Letter (20.5.2021) had relied on COTMA (Singapore) to demand that the 2nd Defendant should not accede to the 1st Defendant's Demand (PB). It was alleged in sub-paragraph 13(c) of the Plaintiff's 1st Affidavit that the 1st Defendant's Demand (PB) was "*unlawful and void*" pursuant to COTMA (Singapore). The Plaintiff's solicitors had been served with Mr. Ng's affidavit which contained Mr. Ng's CV and Mr. Ng's Expert Opinion. During the case management of this OS, I had given sufficient time for the Plaintiff to obtain an expert opinion from a Singaporean lawyer on the question of whether the 1st Defendant's Demand (PB) is invalid according to

COTMA (Singapore). The Plaintiff however did not adduce any expert opinion from a Singaporean lawyer to rebut Mr. Ng's Expert Opinion.

[46] Due to the reasons explained in the above paragraphs 42 to 45, I decide that the 1st Defendant's Demand (PB) is valid under the law of Singapore and is not nullified by COTMA (Singapore). Furthermore, the Plaintiff's 3 Breaches justify the 1st Defendant's Termination Notice (EPC Contract) and 1st Defendant's Demand (PB).

G(3). Does Act 829 support Prayer 2?

[47] I will now assume Act 829 applies as between the Plaintiff and 1st Defendant.

[48] Part II of Act 829 [**Part II (Act 829)**] is given retrospective effect from 18.3.2020. Part II (Act 829) contains s. 7 (Act 829) which states as follows:

> "***Inability to perform contractual obligation***
>
> ***7. The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (Act 342) to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract***."
>
> (emphasis added).

[49] Paragraphs 1 and 2 of Schedule to Part II (Act 829) have listed the following categories of contracts to which s. 7 (Act 829) applies -

> "*1.* ***Construction work contract*** *or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract.*
>
> *2.* ***Performance Bond*** *or equivalent that is granted pursuant to a construction contract or supply contract.*"
>
> (emphasis added).

[50] Mr. Chow has sought to persuade me to apply s. 7 (Act 829) in this case. With respect, I am unable to apply s. 7 (Act 829) because of the following reasons:

(1) with regard to the EPC Contract -

(a) the Plaintiff's 1st Breach occurred as early as 28.11.2019 when the Plaintiff failed to deliver the 1st and 2nd LPG Tanks on 27.11.2019 [Dateline (1st and 2nd LPG Tanks)] - please refer to the above paragraphs 12 to 16. It is thus clear that the Plaintiff's 1st Breach had occurred prior to the Pandemic and more importantly, before the retrospective enforcement of s. 7 (Act 829); and

(b) the Plaintiff's "*inability*" to perform its contractual obligations under the EPC Contract (which led to the Plaintiff's 1st Breach), was not due to the measures (**PCIDA Measures**) prescribed under the Prevention and Control of Infectious Diseases Act 1988 (**PCIDA**) within the meaning of s. 7 (Act 829); and

(2) regarding the PB -

(a) the 2nd Defendant is not under any "*inability*" to honour the 1st Defendant's Demand (PB) as understood in s. 7 (Act 829); and

(b) even if it is assumed that the 2nd Defendant is under an inability to comply with the 1st Defendant's Demand (PB), such an inability is not due to PCIDA Measures.

G(4). Can Plaintiff rely on s. 11(1)(a) to (e) AA against 1st Defendant?

[51] It is clear that paragraphs (c) to (e) of s. 11(1) AA cannot be invoked by the Plaintiff in this case.

[52] I am of the view that the Plaintiff cannot rely on s. 11(1)(a) AA to support Prayer 2 because there is no need to maintain or preserve the status quo pending the disposal of the Arbitration. Nor is there any "*current or imminent harm or prejudice*" to the Arbitration which may persuade me to apply s. 11(1)(b) AA in this OS.

[53] The reasons stated in the above paragraphs 51 and 52 are sufficient in themselves for me to refuse Prayer 2.

G(5). Does Plaintiff have a cause of action against 1st Defendant for breach of EPC Contract?

[54] The Plaintiff had not adduced any evidence to show that the 1st Defendant had breached the EPC Contract. In fact, the many letters sent by the Plaintiff to the 1st Defendant in this case did

not allude to any particular provision in the EPC Contract which had been breached by the 1st Defendant. Nor have the Plaintiff's two written submission filed in support of this OS identify any specific provision in the EPC Contract which had not been observed by the 1st Defendant. In the circumstances, the Plaintiff has no valid and arguable cause of action against the 1st Defendant for a breach of the EPC Contract. This is an additional ground to dismiss Prayer 2.

G(6). Was 1st Defendant's Demand (PB) unconscionable?

[55] Based on the case law discussed in **Cypark**, this court determines that the 1st Defendant's Demand (PB) is **not** unconscionable as follows:

(1) the Plaintiff has no "*seriously arguable case that the only realistic inference*" is that the 1st Defendant's Demand (PB) is unconscionable;

(2) the Plaintiff has not adduced a "*strong prima facie case*" that the 1st Defendant's Demand (PB) is unconscionable; and

(3) all the events which have happened regarding the EPC Contract, the 1st Defendant's Termination (EPC Contract) and 1st Defendant's Demand (PB) are not of such a degree which can "*prick the conscience of a reasonable and sensible person*".

The above decision is premised on the following evidence and reasons -

(a) the Plaintiff's 3 Breaches (please refer to the above paragraphs 12 to 17) provide the legal bases for the 1st

Defendant's Termination Notice (EPC Contract) and 1st Defendant's Demand (PB). A party who has breached an agreement (**Defaulting Party**) should not be allowed to exploit the Defaulting Party's own breach of the agreement. I rely on the following judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 MLJ 489, at 492 -

> "*Quite apart from the construction of para 1(3)(b) of the First Schedule,* ***there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage if his own breach****. See* ***Alghussein Establishment v. Eton College*** *[1988] 1 WLR 587,* ***New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France*** *[1919] AC 1.*
>
> ***But as I have said, the principle is of universal application****."*
>
> (emphasis added); and

(b) the EPC Contract is a turnkey construction contract which has been freely negotiated and agreed to by the Plaintiff and 1st Defendant. Accordingly, the 1st Defendant's reliance on the relevant provisions of the EPC Contract in this case (as stated in the above paragraphs 4, 14 and 15) cannot amount to unconscionable conduct on the 1st Defendant's part so as to support Prayer 2.

G(7). Whether damages constitute an adequate remedy for Plaintiff

[56] The EPC Contract is a commercial contract with a Contract Price of US$24,872,000.00. Even if it is assumed that -

(1) the Plaintiff has a valid and arguable cause of action against the 1st Defendant regarding the latter's breach of the EPC Contract; and

(2) the Arbitration is decided in favour of the Plaintiff against the 1st Defendant

- monetary relief of damages is sufficient for the Plaintiff. As such, Prayer 2 ought to be refused on the ground that damages constitute an adequate remedy for the Plaintiff against the 1st Defendant in the Arbitration - please see the Supreme Court's judgment delivered by Hashim Yeop Sani CJ (Malaya) in *Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor* [1990] 1 CLJ (Rep) 30, at 32.

G(8). Where does balance of convenience lie?

[57] It is trite law that an interim injunction would be refused by the court if the balance of convenience does not favour the granting of such interim injunctive relief. Where the balance of convenience lies depends on which proposed court order carries a lower risk of injustice - please refer to the Supreme Court's judgment delivered by Mohd. Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, at 270-271.

[58] It is clear to me that the balance of convenience lies against the grant of Prayer 2 because -

(1) if an interim injunction is not granted in favour of the Plaintiff against the 1st Defendant, there is a low risk of injustice to the Plaintiff because -

(a) if the Plaintiff is successful at the Arbitration against the 1st Defendant, the Plaintiff may claim for a substantial sum of damages from the 1st Defendant because of the high Contract Price of US$24,872,000.00; and

(b) the PB sum is only 10% of the Contract Price. Even if the 2nd Prayer is dismissed and the 2nd Defendant pays the PB sum to the 1st Defendant, the PB sum can be easily recouped by the Plaintiff from the 1st Defendant if the Plaintiff is successful at the Arbitration; and

(2) if I allow Prayer 2, such an order will carry a higher risk of injustice to the 1st Defendant. This is because the 1st Defendant has suffered and continues to suffer substantial losses due to the Plaintiff's 3 Breaches. The 1st Defendant has to expend much time, effort and expense to find another contractor to complete the Facility.

G(9). Has Plaintiff discharged burden for court to exercise discretion to grant Prayer 2?

[59] It is not disputed that the Plaintiff bears the onus to persuade the court to exercise its discretion to allow Prayer 2.

[60] Premised on the reasons and evidence stated in the above Parts G(1) to G(8), I find that the Plaintiff has failed to discharge the burden for the court to exercise its discretion to grant Prayer 2.

[61] All the cases cited by Mr. Chow in support of this OS can be easily distinguished from this case as follows:

(1) the Plaintiff had agreed to the particular wording of the relevant provisions in the EPC Contract (please refer to the above paragraphs 4, 14 and 15); and

(2) the Plaintiff's 3 Breaches had been committed before the Pandemic and Military Coup (Myanmar).

[62] Messrs MC's Letter (20.5.2021) has relied on, among others, the possible violation of US Sanctions (Myanmar) by the 2nd Defendant if the 2nd Defendant pays the PB sum to the 1st Defendant. Such an argument was rightly not pursued by Mr. Chow before me.

H. *Ex Parte* Interim Injunctions should not have been granted

[63] As explained by Mohd. Azmi SCJ in the Supreme Court case of *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 MLJ 153, at 155, a party moving the court for an *ex parte* order, should -

(1) disclose all material facts to the court; and/or

(2) not mislead the court and/or misrepresent any material fact.

[64] The Defendants did not apply to set aside the *Ex Parte* Interim Injunctions under O. 32 r. 6 of the Rules of Court 2012 (**RC**). However, I wish to state the following:

(1) the Plaintiff had suppressed material evidence regarding the Plaintiff's 3 Breaches in the Plaintiff's 1st Affidavit (which had been filed in support of the application for the *Ex Parte* Interim Injunction in Enc. 2); and

(2) the Plaintiff's 1st Affidavit had misled the court to believe that the Plaintiff commenced the Works after the Plaintiff's receipt of the Notice to Proceed on 31.3.2019. As explained in the above paragraphs 9 and 10, I find that the Plaintiff had commenced the Works on 1.1.2019.

[65] Paragraph 9 of the Plaintiff's 1st Affidavit had exhibited in a collective manner the correspondence between the Plaintiff and 1st Defendant. Firstly, I refer to the following judgment of Siti Norma Yaakob J (as she then was) in the High Court case of *Bakmawar Sdn Bhd v. Malayan Banking Bhd* [1992] 1 MLJ 67, at 72:

> "*As the instances of issuance of the three bad cheques happened within a period of 12 months, and the defendant wrote to the plaintiff on 20 October 1990 advising the plaintiff that it was submitting details of the plaintiff's account to the Biro, the plaintiff was fully aware that at the time the interim injunction was obtained on 1 November 1990, the Biro was already in receipt of the details of the plaintiff's account and that the second limb of the interim injunction was therefore redundant and unnecessary.* ***It is true that the defendant's letter was exhibited to the plaintiff's ex parte application but it is incumbent upon the plaintiff on an ex parte application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made. Had my attention been drawn to the fact that the second limb of the interim injunction was no longer necessary as the Biro had already been informed of the plaintiff's account, I would not have granted the order. In this case the court has been misled***

into believing that the Biro has not yet been informed of the plaintiff's account and on this ground alone, the interim injunction, at least the second limb of the injunction, must be dissolved."

(emphasis added).

[66] There is another reason why learned counsel should not present relevant documents in a collective manner in an affidavit. Such an approach does not assist the court to decide the matter in a just, expeditious and economical manner. It is decided in *LTK Façade Specialist Sdn Bhd v. Sri Mutiara Development Sdn Bhd and other appeals* [2021] MLJU 1185, at [20] and [21], as follows:

"***E. <u>Duties of A&S regarding exhibits in affidavits</u>***

[21] ***I must express my disquiet regarding how documents had been exhibited in Seri Mutiara's affidavits which had been filed to oppose these 3 OS (Seri Mutiara's Exhibits). Seri Mutiara's Exhibits had been exhibited in a haphazard manner "all over" the affidavits affirmed on behalf of Seri Mutiara. To peruse Seri Mutiara's Exhibits, I had to spend a lot of time to comb through all of Seri Mutiara's affidavits. A reasonably competent A&S would have exhibited all the relevant documents in one affidavit in a coherent manner, preferably in a chronological manner, so as to assist the court to understand and decide a dispute in a just, expeditious and economical manner. In Pacific Bunkers Pte Ltd v. Owners of the ship "Geniki Sarawak" and another case [2015] 11 MLJ 145, I have explained that an A&S's duty to the court is of greater paramount than his or her duty to the client***.

> *[21]* ***I do understand that a client may not have given all the relevant documents to an A&S. Hence, there may be an exceptional case where the client only gives an additional document to the A&S after the first affidavit has been filed by the A&S on behalf of the client (Additional Document). In such an exceptional event, the A&S has no choice but to exhibit the Additional Document in a subsequent affidavit with the client's explanation in the subsequent affidavit on why the Additional Document could not have been exhibited in the first affidavit. In the case of Seri Mutiara's Exhibits, there was no explanation in Seri Mutiara's affidavits regarding why all of Seri Mutiara's Exhibits could not have been exhibited in the first affidavit of Seri Mutiara***."
>
> (emphasis added).

I. Summary of court's decision

[67] In brief -

(1) notwithstanding the Multi-Tier Dispute Resolution Process, the Plaintiff is entitled to file this OS because -

(a) Clause 37.9.1 allows the Plaintiff to apply to court for "*urgent or injunctive relief*"; and

(b) the Plaintiff has a Statutory Right under s. 11(1)(a) to (e) and (3) AA;

(2) Prayer 1 is dismissed because the merits of the dispute between the Plaintiff and 1st Defendant can only be decided by way of the Arbitration in SIAC;

(3) Prayer 3 cannot be allowed as -

(a) the PB is an "*unconditional guarantee payable on demand*"; and

(b) the Plaintiff cannot apply for interim measures pursuant to s. 11(1) AA against the 2nd Defendant who is not a party -

(i) to the arbitration agreement between the Plaintiff and 1st Defendant; and

(ii) in the Arbitration; and

(4) this court cannot allow Prayer 2 due to the following reasons -

(a) according to Clause 38.1, the law of Singapore applies to the EPC Contract and the 1st Defendant's Demand (PB). This court accepts Mr. Ng's Expert Opinion that the 1st Defendant's Demand (PB) is lawful and is not invalid under COTMA (Singapore);

(b) s. 7 (Act 829) does not apply to -

(i) the Plaintiff's 1st Breach which occurred before the Pandemic and the retrospective enforcement of s. 7 (Act 829). Furthermore, the Plaintiff's 1st Breach was not due to PCIDA Measures; and

(ii) the PB because the 2nd Defendant is not under any inability to honour the 1st Defendant's Demand (PB) and even if there is such an inability, the inability is not due to PCIDA Measures;

(c) none of the grounds enumerated in s. 11(1)(a) to (e) AA support Prayer 2;

(d) the Plaintiff has no valid and arguable cause of action against the 1st Defendant for the latter's breach of the EPC Contract;

(e) the 1st Defendant's Demand (PB) is not unconscionable;

(f) damages constitute an adequate remedy for the Plaintiff against the 1st Defendant in the Arbitration; and

(g) the balance of convenience does not lie in favour of the granting of Prayer 2.

J. Postlude

[68] After I had dismissed this OS with costs, I asked learned counsel for both the Defendants on whether the Defendants would wish to enforce the Plaintiff's Undertaking (Damages) by filing an application under O. 37 r. 1(1) RC for the court to assess any loss or damage which may have been suffered by the Defendants as a result of the *Ex Parte* Interim Injunctions and *Ad Interim* Injunctions [**Assessment (Damages)**]. Subsequently, both the Defendants informed the court that they did not intend to proceed with the Assessment (Damages).

(WONG KIAN KHEONG)
Judge
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

Dated: 26 NOVEMBER 2021

COUNSEL:

For the plaintiff - Michael Chow Keat Thye & Wendy Yeong Wen Ling; M/s Michael Chow

For the 1st defendant - Yap Yeow Han & Yap Mei Yan; M/s Rahmat Lim & Partners

For the 2nd defendant - Shaikh Abdul Saleem; M/s Shaikh David & Co

Case(s) referred to:

KNM Process Systems Sdn Bhd v. Cypark Sdn Bhd [2020] 10 MLJ 321

Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533

Juara Serata Sdn Bhd v. Alpharich Sdn Bhd [2015] 6 MLJ 773

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 MLJ 153

Bakmawar Sdn Bhd v. Malayan Banking Bhd [1992] 1 MLJ 67

LTK Façade Specialist Sdn Bhd v. Sri Mutiara Development Sdn Bhd and other appeals [2021] MLJU 1185

Legislation referred to:

Arbitration Act 2005, s. 11(1)(1)(a), (b) (e)

Evidence Act 1950, ss. 45(1), 51

Rules of Court 2012, O. 32 r. 6 , O. 37 r. 1(1)