IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO. B-02(C)(A)-1701-09/2021]

BETWEEN

KNM PROCESS SYSTEMS SDN BHD
(Company No. 200140-X) **... APPELLANT**

AND

1. CECA GOLD COMPANY LIMITED

2. MBSB BANK BERHAD
(Company No. 716122-P) **... RESPONDENTS**

[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

In the matter of a Lump Sum Turnkey Contract dated 31.12.2018 between KNM Process Systems Sdn Bhd (Company No. 200140-X) and CECA Gold Company Limited

And

In the matter of a Bank Guarantee No. 695013320000246 dated 18.5.2020 by MBSB Bank Berhad (Company No. 716122P) in favour of CECA Gold Company Limited

And

In the matter of Sections 41 and 50 and other relevant provisions of the Specific Relief Act 1950

And

In the matter of Sections 11(1)(a), (b) and Section 50 of the Arbitration Act 2005

And

In the matter of Order 7, Order 28, Order 29, Order 69 and Order 92 Rule 4 of the Rules of Court 2012

And

In the matter of Section 7 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid- 19) Act 2020

Between

KNM PROCESS SYSTEMS SDN BHD
(Company No. 200140-X) … Plaintiff

And

1. CECA GOLD COMPANY LIMITED

2. MBSB BANK BERHAD
(Company No. 716122-P) … Defendants]

CORAM:

MOHAMAD ZABIDIN MOHD DIAH, (Now FCJ)
ABU BAKAR JAIS, JCA
NORDIN HASSAN, JCA

GROUNDS OF JUDGMENT

Introduction

[1] We had allowed the Appellant's appeal against the decision of the High Court which dismissed the Appellant's Originating Summons for among others, an injunction to restrain the 1st Respondent from receiving the proceeds under an unconditional on demand bank guarantee.

[2] In reversing the decision of the High Court, we gave the declaration that the demand made by the 1st Respondent on the bank guarantee issued by the 2nd Respondent is invalid and unlawful. We also ordered that the 1st Respondent is not to receive the proceeds of that bank guarantee.

[3] The Respondents are aggrieved by our decision and hence our reasons for the same are explained hereafter.

Background Facts

[4] The 1st Respondent, a Myanmar company, awarded the Appellant a contract dated 31.12.2018 called Lump Sum Turnkey Contract for the Engineering, Procurement, and Construction of a Liquefied Petroleum Gas ("LPG") Receiving, Tanking, Storage and Bottling Facility at Land No.607, Ga Yan Kwin, No1 (e), Thida, Myaing Ward, Kyaut Tan Township Thilawa, Myanmar ("EPC Contract").

[5] Pursuant to the EPC Contract, the Appellant is to provide a bank guarantee to the 1st Respondent for the amount of USD2,487,200.00 being 10% of the contract price of USD24,872,000.00. This amount was later deposited in the 2nd Respondent by the Appellant.

[6] Subsequently, disputes arose between the Appellant and 1st Respondent regarding the performance of the EPC Contract. As a consequence, by a letter dated 17.5.2021, the 1st Respondent gave the notice to terminate the EPC Contract. Prior to that, by way of a letter dated 10.5.2021 to the 2nd Respondent but without notifying the Appellant, the 1st Respondent demanded from the 2nd Respondent the sum of USD2,487,200.00 under the bank guarantee. Only on 19.5.2021 the 1st Respondent informed the Appellant of the demand to the 2nd Respondent.

[7] The crux of the dispute before us is the call for the bank guarantee made by the Respondent against the Appellant.

At the High Court

[8] The Originating Summons ("OS") filed by the Appellant at the High Court ("HC") requested for the following prayers:

(a) a declaration that the call for the bank guarantee by the 1st Respondent is invalid **("Prayer 1")**;

(b) an injunction preventing the 1st Respondent from receiving proceeds from the bank guarantee (**"Prayer 2"**); and

(c) an injunction against the 2nd Respondent from paying the proceeds of the bank guarantee to the 1st Respondent (**"Prayer 3"**).

[9] The learned High Court Judge ("HCJ") dismissed the Appellant's OS on the following grounds:

(a) the 1st Respondent is entitled to terminate the EPC Contract as the Appellant had breached the terms of the same;

(b) the 2nd Respondent could not be restrained to make payment to the 1st Respondent as the latter had made a call on the bank guarantee;

(c) Singapore law is the governing law pursuant to a term of the EPC Contract and the call made by the 1st Respondent;

(d) based on expert opinion produced by the 1st Respondent, the call was valid under Singapore law;

(e) the call cannot be nullified by s. 7 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid- 19) Act 2020;

(f) the above is not applicable because:

(i) the Appellant's non-performance happened before the Covid-19 pandemic and before the above statutory provision came into effect;

(ii) the non-performance of the Appellant under the EPC Contract was not caused by the measures taken under the Prevention and Control of Infectious Diseases Act 1988;

(iii) the 2nd Respondent was not under any inability to honour the 1st Respondent's call; and

(iv) even if the 2nd Respondent was under an inability to comply with the 1st Respondent's demand, such an inability was not due to the Prevention and Control of Infectious Diseases Act 1988.

(g) the Appellant had no seriously arguable case, nor a strong *prima facie* case that the 1st Respondent's call is unconscionable;

(h) balance of convenience lies in not granting the injunction;

(i) the ability to provide for damages was against the Appellant; and

(j) merits of the disputes must be decided by arbitration and not by the court and therefore no declaration can be given by the court under section 11 of the Arbitration Act 2005.

Summary of the contentions

[10] Before us, the Appellant submitted that the demand for the bank guarantee is unreasonable and unconscionable.

[11] The Appellant also argued that it is protected by statutory provision in the performance of the EPC Contract to prevent the spread of Covid-19 and the 1st Respondent is estopped to exercise its right under the EPC Contract because of this protection in law given to the Appellant.

[12] It was also contended that there were discussions and negotiations between the Appellant and the 1st Respondent in resolving the disputes between both parties prior to the calling of the bank guarantee.

[13] The 1st Respondent in turn argued that the bank guarantee is an on- demand guarantee as reflected in its terms. The 1st Respondent said it has the right to be paid once the demand is made.

[14] The 1st Respondent also submitted that the Appellant had failed to perform its obligations in the EPC Contract.

[15] It is also contended that the Appellant failed to deliver the LPG Tanks in time pursuant to the terms of the EPC Contract.

[16] The Appellant's purported corrective action plan was manifestly unacceptable to the 1st Respondent.

[17] The law applicable in respect of EPC Contract should have been the Singapore laws.

[18] The 2nd Respondent did not file any written submissions and must have taken the approach it is not supporting nor objecting to the OS. It took a neutral stance. This is rightly so as it will merely obey what the court is to decide. If it strongly supports the appeal, it would have not disregarded the instruction of the court to file written submissions during case management. However, this approach by the 2nd Respondent should not at all be construed negatively as the matrix of this case points to the fact that whatever the decision on this appeal, it should not affect the 2nd Respondent in any significant way as the issuing bank.

Our Decision

[19] There are only a few relevant issues in our view that are material for deliberation to indicate why the present appeal should be allowed. These issues are decisive in support of the Appellant's appeal, even when the elaboration of the reasons for the judgment by the learned HCJ is considered and the counter arguments of the 1st Respondent are examined.

[20] However, before these issues are highlighted, it is appropriate to note s. 11 of the Arbitration Act 2005 ("AA") which was referred to by the learned HCJ as the statutory provision governing the Appellant's OS. This section of the AA states as follows:

"(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.

(1) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.

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

[21] The above statutory provision is relevant in the determination of whether the interim measure of restraining the call on the bank guarantee pending arbitration ought to be granted to the Appellant.

First issue – Can a declaratory order be issued

[22] In respect of Prayer 1, the learned HCJ followed his own decision in *KNM Process Systems Sdn Bhd v. Cypark Sdn Bhd* [2020] 10 MLJ 321 ("Cypark") to dismiss the same. Following Cypark, the learned HCJ said the merits of the dispute between the parties cannot be decided by the court as the parties had agreed that the dispute shall be decided in the arbitration. Thus, Prayer 1 for a declaration that the call for the bank guarantee by the 1st Respondent is invalid is refused by the HC. In this regard, the learned HCJ is of the view, s. 11 of the AA narrated above, allows for interim order but not a declaratory order.

[23] With respect, we are of the considered opinion the learned HCJ erred in his conclusion that pursuant to s. 11 of the AA as shown above, only interim orders could be granted but not a declaratory order. We say this because in the Court of Appeal case of *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC* [2020] 1 LNS 479 a declaration was indeed granted restraining the calling of the bank guarantees. In fact, the facts of this case are similar to our present case. It is also about an OS filed under s. 11 of AA for interim measures by the HC pursuant to an arbitration agreement and it is also about restraining the call for bank guarantees. In addition, in this case too a declaration was requested that the call was invalid, the same declaration as in Prayer 1 in our case.

[24] Mary Lim JCA (now FCJ) in disallowing the call said:

> "[87] …We unanimously agree that the learned judge had not exercised discretion correctly on the facts and on the law when refusing to grant the interim injunction on the terms sought by the appellant. The balance of convenience leans in granting a restraining order on all three calls so that the validity of the calls may be finally determined at the arbitration. Such a restraining order will in our regard, surely aid, support and

facilitate the arbitration of the substantive dispute that started before the High Court in the first place.

[86] Accordingly, we allow the appeal and set aside the decision of the High Court with costs. We further grant prayer (2) as appearing in the Originating Summons at page 35 of the record of appeal."

[25] Further, the HC in *Kining Exeton Sdn Bhd v. Majlis Perbandaran Kuantan* [2020] 1 LNS 217, also granted such declaratory order. The facts in Kining, likewise are also similar to the facts of the present case. In Kining too an OS was filed pursuant to s. 11 of the AA for a declaration that a demand for a bank guarantee was invalid, null and void. Having considered the arguments, the HC in Kining granted the declaration as requested.

[26] Thus, the above two cases are authorities that a declaratory order and not merely interim orders could be given pursuant to s. 11 of the AA. These two cases are proof that granting a declaratory order is not alien in the context of this statutory provision.

Second issue – Can the 2nd Respondent be restrained

[27] Related to s. 11 AA, the learned HCJ is also of the finding that the 2nd Respondent as the issuing bank for the bank guarantee cannot be restrained to honour the call. This is because the 2nd Respondent is not a party to the arbitration agreement.

[28] We respectfully disagree with the learned HCJ on this point. Although, the 2nd Respondent is not a party to the arbitration agreement between the Appellant and 1st Respondent, it should be quite obvious if the 2nd Respondent is not restrained, it will start processing the call and will accordingly make the payment to the 1st Respondent. These actions will of course defeat the very purpose of

requesting interim measures pending arbitration as provided by s. 11 of the AA.

[29] Besides, the three parties needed for a bank guarantee must certainly include the 2nd Respondent as the issuing bank, apart from the Appellant and the 1st Respondent. Without the 2nd Respondent, there cannot be a bank guarantee. Thus, the interim measure under s. 11 of the AA can only serve its purpose if the 2nd Respondent is also restrained. The 2nd Respondent in this sense is a necessary party involved and closely connected in the whole scheme of the grant for interim measures pursuant to this statutory provision of the AA in this case.

Third Issue - Can the Appellant be protected by s. 7 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ("Act 829")

[30] The Appellant submitted it is excused from performing its contractual obligation to the 1st Respondent by virtue of S. 7 of Act 829 that states as follows:

> "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."

[31] The Appellant also relied on items 1 and 2 of the relevant Schedule mentioned above which states as follows:

> **"List Of Categories Of Contracts**

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**

3. Professional services contract

4. Lease or tenancy of non-residential immovable property

5. Event contract for the provision of any venue, accommodation, amenity, transport, entertainment, catering or other goods or services including, for any business meeting, incentive travel, conference, exhibition, sales event, concert, show, wedding, party or other social gathering or sporting event, for the participants, attendees, guests, patrons or spectators of such gathering or event

6. Contract by a tourism enterprise as defined under the Tourism Industry Act 1992 [Act 482] and a contract for the promotion of tourism in Malaysia

7. Religious pilgrimage-related contract

8. Hire-purchase agreement as defined under Hire-Purchase Act 1967 [Act 212] or leasing contract, that has been entered into by micro enterprises, B40 or M40 class of persons as specified in the Inland Revenue Board of Malaysia database, as the case may be, for the following vehicles:

   (a) motor vehicles as classified under section 5 of the Road Transport Act 1987 [Act 333];

   (b) goods or public service vehicle—

(i) in relation to Peninsular Malaysia, has the meaning assigned to it in the Land Public Transport Act 2010 [Act 715]; or

(ii) in relation to Sabah, Sarawak and Federal Territory of Labuan, has the meaning assigned to it in the Commercial Vehicles Licensing Board Act 1987 [Act 334]; or

(c) tourism vehicle—

(i) in relation to Peninsular Malaysia, has the meaning assigned to it in the Land Public Transport Act 2010 [Act 715]; or

(ii) in relation to Sabah, Sarawak and Federal Territory of Labuan, has the meaning assigned to it in the Tourism Vehicles Licensing Board 1999 [Act 594]

9. Credit sales contract under the Consumer Protection Act 1999 [Act 599]" [Emphasis Added]

[32] Therefore, the Appellant contended the 1st Respondent must not call on the bank guarantee as the performance of the EPC Contract is affected by Covid-19.

[33] In respect of this issue, first, we are of the view although the project site under the EPC Contract is in Myanmar, a major part of the fabrication works is to be carried out in Malaysia. This is proven by the list of approved vendors in Schedule 22 of the EPC Contract.

[34] Second, since the beginning of March 2020, it is not disputed that Malaysia was affected by the spread of Covid-19. There were various lockdowns imposed by the Malaysian Government since then. The Appellant informed the 1st Respondent about this, first, by a letter dated 17.3.2020. Then various updates were sent to the 1st Respondent

by the Appellant until 10.2.2021. In this regard, the movement control orders ("MCO") issued by the Malaysian Government because of the spread of Covid-19 had affected not only the performance of the EPC Contract but it is also common knowledge, other contracts had been impacted as well, involving many other unrelated parties to the EPC Contract. It is also very important to note, the lockdowns and MCOs are not one-off, isolated incident but a sustained, continuous episode for the very least, more than two years.

[35] In this regard, it is also important to note Act 829 has been gazetted on 23.10.2020 and Part II of the Act 829 is given retrospective effect from 18.3.2020. Act 829 has been passed by the Parliament precisely to deal with the very situation at hand. In this regard it is to be noted that pursuant to P.U.(A) 313, the operation of Act 829 in particular Section 7, has been further extended until 31.12.2021.

[36] It was the finding of the learned HCJ that pursuant to the EPC Contract, it was the Appellant's obligation to deliver the 1st and 2nd LPG Tanks on 27.11.2019 and the 3rd and 4th LPG Tanks by 27.12.2019. Thus, these dates are well before the retrospective date of Act 829. However, this is immaterial because the correspondence between the Appellant and the 1st Respondent showed parties agreed to an extension of time on the delivery of these Tanks.

[37] The correspondence showed in February and March 2020 (pages 692 to 696 of Enclosure 25), that despite the delay on the part of the Appellant in delivering the LPG Tanks, an extension of time was granted by the 1st Respondent for the Appellant to perform the relevant part of the EPC Contract by April and May 2020, before the monsoon season in Myanmar. Thus, the dates to deliver the LPG Tanks as found by the learned HCJ above for the 1st and 2nd LPG Tanks on 27.11.2019 and the 3rd and 4th LPG Tanks by 27.12.2019 are insignificant because of this extension of time granted to the Appellant.

[38] By that extension of time granted until April and May 2020, Covid-19 had already spread in Malaysia and as said earlier, Act 829 is given retrospective effect from 18.3.2020. Hence, the works for the EPC Contract are covered by Act 829. The Appellant could not perform the EPC Contract because of Covid-19 and Act 829 renders protection for the Appellant against liability in respect of the performance of the EPC Contract.

[39] This issue should be decided in the arbitration. However, by virtue of s. 11 of the AA as explained earlier, at this stage, the Appellant is at liberty to seek for interim measures on the calling of the bank guarantee, which will also relate to and involve the issue of Covid-19 and its direct implications to the issue of the performance of the EPC Contract during the arbitration. Meanwhile, the court is empowered to grant the interim measures at this stage before the issues are arbitrated. S. 11 of the AA is applicable to preserve the *status quo* of the parties including on the lawfulness of the call on the bank guarantee by the 1st Respondent because the calling of the bank guarantee does affect the rights of both parties. In this regard, the Court of Appeal case of *Ahmad Zaki Sdn Bhd v. SN Akmida Holdings Sdn Bhd* [2021] 5 AMR 67 is relevant where it is held:

> "The respondent has the right to seek the injunction by relying on s. 11(1)(a) and (b) of the AA 2005 to respectively maintain the *status quo* pending arbitration of the disputes and to take action that would prevent anything that is likely to cause current or imminent harm or prejudice to the arbitral process. The language of s. 11(1)(a) and (b) of the AA 2005 is wide enough to be used to restrain the appellant from calling on the PB and APG. Bearing in mind the agreement between the parties for disputes affecting them to be referred to arbitration, the appellant with respect, erred in contending that the issue should not first be referred to arbitration and should only be decided by the court. Contrary to the appellant's submission, the statutory

provisions of s. 11(1)(a) and (b) of the AA 2005 clearly apply as regards the PB and the APG."

[40] As s. 7 of Act 829 is applicable to the Appellant, it is of no consequence that the bank guarantee is payable on demand. This statutory provision caters to the need to deal with the spread of Covid-19 affecting Malaysian business, commerce and trade. It also grants protection to parties who ought not to be liable because of the pandemic, as provided also by the legislations of other countries in protecting their own companies. It is enacted to deal with the non-performance of contracts, including the EPC Contract in times of extreme difficulties. The Appellant as a Malaysian company should not be prevented to seek refuge under the terms of s. 7 of Act 829. This will include the protection against the call of the on-demand bank guarantee.

[41] The purpose and intent of Act 829 as stated in the preamble to the Act is also applicable in the circumstances of this case. It provides as follows:

"An Act to provide for temporary measures to reduce the impact of Coronavirus Disease 2019 (COVID-19) …"

[42] The Hansard to Act 829 is also relevant as it states as follows:

"Dalam erti kata lain, rang undang-undang ini merupakan pelengkap atau, dengan izin, complement kepada usaha-usaha kerajaan membantu rakyat melalui proses pemulihan ekonomi akibat COVID-19. Rang undang-undang ini memberikan suatu pelepasan sementara-temporary relief, dengan izin, daripada tanggungjawab perjanjian atau pematuhan kepada perundangan tertentu bagi suatu tempoh yang ditetapkan demi kelangsungan hidup rakyat.

…

> Ini adalah selaras dengan hasrat kerajaan supaya rang undang-undang ini tidak bersifat menghukum yang membebankan mana-mana pihak. COVID-19 tidak memilih mangsanya, virus ini tidak mengenal yang kaya atau yang miskin, majikan atau pekerja, peniaga atau pembeli, yang berada di bandar atau di desa. Kesan COVID-19 dirasai oleh semua pihak dan apabila satu pihak terkesan, bermakna seluruh rantaian ekonomi akan turut terkesan."

[43] Referring to the preamble and Hansard of Act 829 as shown above, we are also of the considered view that the Appellant could seek refuge under the provision of s. 7 of Act 829.

Fourth Issue – Was the 1st Respondent's action unreasonable and unconscionable in calling the bank guarantee

[44] Clause 34.2.1 of the EPC Contract, provides that in the event of what is called a "Major Performance Default" on the part of the Appellant, the same is to furnish to the 1st Respondent a corrective action plan. The learned HCJ decided the 1st Respondent is entitled to terminate the EPC Contract arising from this Major Performance Default and the absence of this corrective action plan. The issue of whether the termination of the EPC Contract by the 1st Respondent is correctly and justifiably done should have been an issue in the arbitration. This is similar to the Federal Court case of *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd* [2020] 4 CLJ 301 where Nallini Pathmanthan FCJ said:

> "[44] It is evident from the foregoing that any dispute or difference arising in respect of any matter arising under the governing contract is to be referred to arbitration. Clause 34 effectively provides that arbitration is the exclusive dispute resolution choice of the parties.

> [45] The clause read in its entirety warrants the construction that a dispute relating to a claim for monies certified, countered by a defence or set-off of defective works, "shall" be referred to arbitration. The use of the word "shall" underscores the mandatory nature of the agreement between the parties. The fact that the dispute falls within the scope of the arbitration clause further fortifies this conclusion.
>
> [46] It therefore follows that unless the arbitration agreement in cl. 34 is null, void, inoperable or incapable of being performed, all disputes arising under the governing contract are to be referred to arbitration."

[45] The issue on this corrective action plan was also a matter under active discussion between the Appellant and the 1st Respondent prior to the termination of the EPC Contract. Parties were in the midst of negotiation and discussion on the corrective action plan against the backdrop of the spread of Covid-19. Under that circumstance, it was unreasonable for the 1st Respondent to spring a surprise by calling the bank guarantee. It was also unconscionable as the parties were negotiating and discussing how best to resolve the issue of delay because of the spread of Covid-19 when the call was made by the 1st Respondent.

[46] The Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Co Sdn Bhd* [2012] 3 CLJ 401 is relevant to note unconscionability as an acceptable distinct ground to defeat a call on a performance bond. Abdull Hamid Embong FCJ in delivering the judgment of the court held as follows:

> "(1) The principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense (*Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor*; *Focal Asia Sdn*

Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor). Thus, unconscionability may now be raised as a distinct ground. The determination on whether unconscionability applies in a particular case would therefore depend largely on the material facts."

Fifth Issue – Can the Malaysian statutory provision be ignored in view of the Singapore law applicable

[47] Clause 38.1 provides that the 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)".

[48] The learned HCJ also found the laws of Singapore shall apply to the 1st Respondent's call on the bank guarantee without giving effect to the principles relating to conflict of laws. The learned HCJ also found the 1st Respondent's call on the bank guarantee was valid under Singapore laws and is not nullified by the Singapore Covid-19 (Temporary Measures) Act 2020.

[49] Clause 38.1 of the EPC Contract and the learned HCJ's finding on the applicability of the Singapore laws as explained above, though could not be strictly disputed, still do not address the fact that the EPC Contract could not be performed according to the specified time because of the acute situation in Malaysia in times of Covid-19. As explained earlier, the fact remains that a major part of the fabrication works is to be carried out in Malaysia. As said, this is proven by the list of approved vendors in Schedule 22 of the EPC Contract. Thus, s. 7 of Act 829 could not simply be ignored. This provision applies for the Appellant for it to be excused in not performing the fabrication works in time.

Sixth Issue – Which law to be applied when there is a conflict of laws

[50] It is not mandatory that the laws of a country expressly stipulated in a contract must be complied and applicable compared to any laws of any other countries not so mentioned in that particular contract. The laws of a particular country not so mentioned could still be applicable depending on the justice and facts of the case.

[51] In the Federal Court case of *Scandinavian Bunkering (Singapore) Pte Ltd v. MISC Bhd* [2015] 3 MLJ 753 the contract concerned was governed by English Law. Azahar Mohamed FCJ (later CJM) in delivering judgment applied *lex fori,* Malaysian law instead of the foreign law as agreed by the parties for the contract.

[52] Likewise, in our present appeal, although Singapore law is stipulated as the governing law for the EPC Contract, the facts of this present appeal as explained earlier and the justice of the case, demand and require the Malaysian law ie, s. 7 of Act 829 to be applied and enforced instead.

Seventh Issue – Do the terms of s. 7 of Act 829 have extra-territorial application

[53] The general principle is that a statute is confined only within its limited jurisdiction unless there is clear express language specifying otherwise. This must include Act 829 including s. 7.

[54] However, it must be noted, the above proposition is immaterial because the relevant circumstance here is that the construction of the

LPG Tanks in Malaysia has been affected by Covid-19. Thus, s. 7 of Act 829 indeed applies to the Appellant and this statute need not be applied beyond territorial jurisdiction based on the facts of the present

case. It must be stressed, Malaysia is where the LPG Tanks were supposed to be constructed. Therefore, Act 829 should apply.

Conclusion

[55] Based on all the reasons explained, we are unanimous in allowing the appeal and setting aside the High Court's order with costs for the Appellant against the 1st Respondent subject to allocator.

Dated: 12 DECEMBER 2022

(ABU BAKAR JAIS)
Judge
Court of Appeal Malaysia
Putrajaya

COUNSEL:

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

For the respondent - Chong Yee Leong, Yap Yeow Han & Yap Mei Yan; M/s Rahmat Lim & Partners

For the respondent - Khor Wan Yin; M/s Shaikh David & Co

Case(s) referred to:

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

KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC [2020] 1 LNS 479

Kining Exeton Sdn Bhd v. Majlis Perbandaran Kuantan [2020] 1 LNS 217

Ahmad Zaki Sdn Bhd v. SN Akmida Holdings Sdn Bhd [2021] 5 AMR 67

Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd [2020] 4 CLJ 301

Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Co Sdn Bhd [2012] 3 CLJ 401

Scandinavian Bunkering (Singapore) Pte Ltd v. MISC Bhd [2015] 3 MLJ 753

Legislation referred to:

Arbitration Act 2005, s. 11

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019, s. 7