CIRCUMVENTING THE ARBITRATION AGREEMENT IN CONSTRUCTION CONTRACTS: NEW FRONTIERS IN *TINDAK MURNI SDN BHD V JUANG SETIA SDN BHD*

A.M. Abdul Razak[1], S. Mohd Zin[2], N.E., Rahmat[3], and N.H., Fathi[4]

[1],[2],[3]Faculty of Law, University Teknologi MARA 40450 Shah Alam, Selangor, Malaysia

[4]NHF Consulting, 20-1 Jalan USJ 1/1B 47620, Subang Jaya, Selangor, Malaysia

Email: *[1]abdmuiz@uitm.edu.my; [2]shahrizalzin@uitm.edu.my; [3]nurezan@uitm.edu.my; [4]nik.nhf@gmail.com

ABSTRACT:

The arbitration agreement in standard form construction contracts is rampant in the industry whereby parties chose in advance their preferred dispute resolution method should the need for it arises. There are a plethora of cases where the courts have taken an active step to uphold contractual parties' autonomy in determining their rights and obligations arising from their contractual relationship, including the stipulation as to agreement to arbitrate their dispute and differences. Using a doctrinal study, this paper examines the legal position concerning arbitration agreements, especially dealing with a unilateral attempt to divert disputes or differences to a civil suit in Court. *Tindak Murni v Juang Setia* cemented the position of the law regarding the courts' powers in safeguarding the arbitral process, which is consistent with practices in the United Kingdom and Singapore. Construction industry players are recommended to pay close attention to their dispute resolution clauses to avoid such matters escalating to a seemingly endless litigation process. Should an arbitration agreement be included in the construction contract, parties should bear in mind the steps taken to avoid being posited as acquiescing to the court proceeding and abandoning the arbitral process.

KEYWORDS: *Arbitration Agreement, Construction Contract, Stay of Proceedings, Judgment in Default, New Frontiers*

DOINumber: 10.14704/NQ.2022.20.12.NQ77159 NeuroQuantology2022;20(12): 1814-1831

1.0 INTRODUCTION

The construction industry is one of the fastest-growing sectors of the global economy, resulting in vast sums of money being spent in construction-related disputes [1][2]. The judicial tide in responding to arbitration agreements has intensified in the Federal Court case of *Tindak Murni v Juang Setia* [3], where the Court reiterated the position of the law concerning the application for stay of court proceedings pending referral of the dispute to arbitration. The existence of an arbitration agreement that directed the parties to arbitrate any dispute either during or after the completion of the construction works provides for a dispute resolution mechanism between the parties [4]. S.10 of the Arbitration Act 2005 provides for statutory requirement to stay the court proceedings if it appears that the dispute falls within the agreement to arbitrate. This must also mean that parties are bound to have their dispute arbitrated if such an election is made in the context of the parties' contractual relationship [5]. Referring to the courts in light of the statutory provision and the arbitration

agreement, it is viewed that the courts are to be supportive of the parties' agreement to have their disputes arbitrated and not to engage in an interventionist role [6]. *Tindak Murni v Juang Setia* is pivotal in analysing the current state of the law on a stay of court proceedings in response to an arbitration agreement. The defendant did not enter an appearance to respond to the claim and resulted in a judgement in default. This begs the question of whether a court judgement is capable of circumventing a valid arbitration agreement, thereby eliminating any consequence for the breach of the arbitration agreement.

2.0 METHODOLOGY

This research employs a qualitative research methodology in which the doctrinal approach has been used to provide detail and technical commentary upon and systematic exposition of the content of legal doctrine [7] [8]. A legal analysis focuses on the primary sources of law, including cases, statutes, rules, legal principles and interpretation of construction contracts. Whenever applicable, reference also be made to the secondary sources of law that consist of books, journal articles and law reports. The method employed subjective to the authors' interpretation of events occurring within the research subject by using an in-depth study of the area [9].

3.0 RESULTS AND DISCUSSION

3.1 Literature Review

Arbitration agreement as defined in s.9(1) of the Arbitration Act 2005 is an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them regarding a defined legal relationship, whether contractual or not. This particular definition echoed what was provided in Article 7 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) without any fundamental modifications. It is important to note that s.9(1) defines the extent of agreements subject to the Arbitration Act 2005 [10]. The agreement to arbitrate encompassed the contractual parties' intention to be legally bound by the award that would be decided by the arbitral tribunal, either a sole arbitrator or a panel of arbitrators. "Parties" in s.9(1) does not only mean conferring bilateral rights to both or all parties to the contract in question to refer their dispute to arbitration, it might also mean unilateral right to refer to arbitration which is conferred only on one party of the contract provided that this is mutually agreed upon by the parties to the contract [11].

With regards to whether the legal relationship is contractual or not, as provided in s.9(1), it is interesting to note that in *Alami Vegetable Oil Sdn Bhd v Lombard Commodities Limited*, the Court of Appeal ruled that an arbitral award was unenforceable because there was never an arbitration agreement in the first place [12]. Abdul Malek JCA in *Alami Vegetable Oil Sdn Bhd* further stated that it is pertinent that an arbitration agreement must be the basis on which an arbitral award can be granted. The absence of an arbitration agreement would negate the arbitral tribunal's jurisdiction to

eISSN 1303-5150

grant an award, and mere participation in the arbitral proceedings cannot cure the defect resulted from the absence of the arbitration agreement. It should be noted that s.9(1) makes it clear that the arbitration is not limited to claims in contract, but this depends on the construction of the arbitration agreement and whether in the contractual relationship between the parties, it is provided that the tortious claims or otherwise is within the scope of the arbitration agreement.

An agreement is considered a written agreement if it is one in which terms on both sides are reduced into writing [13]. Under the Arbitration Act 2005, such a requirement does not demand a formal agreement, and such an agreement can either be in a single document or a series of document [14]. It is further noted in *Ajwa for Food Industries Co (MIGOP) Egypt v Pacific Inter-Link Sdn Bhd* that the requirement of a written agreement requires only that the arbitration agreement be incorporated into a written document [15]. The purpose of the insertion of the arbitration agreement is to ensure the method of dispute resolution, should it arise in the future relationship of the contractual parties, would be recourse to arbitration and it is put into effect regardless of whether there is primarily a dispute resulting from the provisions of the contract [16] [17].

The arbitration process pursuant to an agreement to arbitrate is primarily controlled by statutory provisions with little to restricted intervention by the courts. It is pertinent to note that the courts will uphold the arbitration agreement, which is consensually agreed to by the parties. However, this does not mean that the arbitration agreement displaces the courts' jurisdiction. It is still afforded the power to oversee and safeguard the integrity of the arbitral process. This is in response to parties to an arbitration agreement which brought the disputes or differences between them to be heard in Court, and even if the arbitration agreement is absent or invalid, the Court may exercise its inherent jurisdiction and issue an order for the dispute or difference between the parties to be arbitrated [18].

As evident in standard form contracts, the arbitration agreement in construction contracts is considered a pre-dispute agreement in which the agreed provisions are included in the contractual documents ahead of any dispute that may arise between the parties. This is included when the parties were uncertain about the potentiality of dispute or what kind of dispute [19] but nevertheless provided for it to safeguard the parties' interests. In a social setting between employers and consumers whereby the bargaining powers may not be equal, arbitration agreements were criticised for stripping the legal rights of the other contracting party, as noted by Hylton [20]. However, parties to construction contracts which included an arbitration agreement, are taken to be of equal bargaining power; hence the criticisms against inserting such an agreement are actually securing the legal rights of the parties under the contract with a plethora of cases whereby the courts upheld the parties' intention to have their disputes settled by arbitration [21].

According to s.10(1) of the Arbitration Act 2005 provides that there is a requirement for the Court to mandatorily stay proceedings before it and refer the dispute between the parties of an arbitration agreement to arbitration unless the courts either finds that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is, in fact, no dispute between the parties with regard to the matters to be referred [22]. Kasi argued that the applicant for a stay of the Court's proceedings must make such application before taking any step further in the proceedings [23]. A party to an arbitration agreement who have taken a step before the Court is taken to have breached that agreement, and if there is a judgement in default that was granted against the other party, such judgement in default may be set aside as provided in the case of *Tindak Murni v Juang Setia.* The courts' jurisdictions and powers are subject to the general limitation provided in s.8 of the Arbitration Act 2005, and the courts' intervention in the arbitral process is limited to the circumstances as provided by the statute [24]. S.8 provided that no court shall intervene in matters by this Act, except where so provided in this Act [25]. The phrase "shall" in s.10(1) provided that the stay of proceedings before the Court should be mandatorily imposed and the parties are required to refer the matter to arbitration when the defendant has not taken any other steps in the proceedings [26].

The bedrock of choosing in advance a preferred dispute resolution method lies in the principle of the party's autonomy in contracting. This supports the notion that parties should enjoy maximum flexibility in drafting their own private dispute resolution process [27]. However, it should be noted that enforcement of such consensus of the parties relies on the courts as the safeguard of the arbitral process [28], and this can be done through the legislative provisions which provided the courts with the power to enforce the arbitration agreement while staying the proceeding before the courts. Evidently, s.10(1) provided for this. This is further illustrated in the *Cosmos Infratech Sdn Bhd v Melati Evergreen Sdn Bhd & Third Party* [29], whereby the Court acknowledge the existence of a valid arbitration agreement between parties to the construction contract and give effect to it.

3.2 Analysis of the case of Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd

The parties employed the Persatuan Arkitek Malaysia (PAM) Form of Contract, and it is provided that any disputes or differences between them shall be referred to arbitration. The respondent (contractor) maintained that the appellant (employer) failed to make payment of a sum of RM1,702,870.37 due to it, and there was no response made by the appellant when the former issued a notice of the determination to the latter. A civil suit was commenced by the respondent claiming a sum was owing under three payment certificates totalling RM2,684,924.55 being the value of work done. The employer paid a sum of RM1,143,149.65 while maintaining that there was a dispute between the parties

eISSN 1303-5150

relating to material defects, warranting a set-off or complete defence to the claim.

Pursuant to the civil suit that was commenced by the respondent, there was no appearance that was filed by the appellant within the time allowed, which resulted in the respondent obtaining a judgement in default (JID) against the appellant on the 1st of March 2017. Appellant then filed a notice of application on the 10th of April 2017 to set aside the JID mainly on the basis that there is an arbitration agreement and that there was a valid dispute to be tried because there were issues relating to defective works allegedly done by the respondent. The application was allowed by the Registrar, and the JID was set aside on the 31st of July 2017.

When the JID was set aside, the appellant did not file their memorandum of appearance but instead filed an application to stay the court proceeding pending arbitration on the 10th of August 2017. Respondent appealed against the decision of the Registrar to the High Court judge in chambers in setting aside the JID and on the application to stay pending arbitration. At the High Court, the appellant did not file a defence to the claim as this would constitute a “step in the proceedings” provided in s.10(1) of the Arbitration Act, precluding the referral of the matter to arbitration. The High Court opined that there was a defence on the merits to support the contention that resolution is needed at trial and that there was a valid arbitration agreement for the parties to settle their dispute. On this basis, the High Court dismissed the appeal against the setting aside of the JID and allowed the appellant’s application to stay pending arbitration. Respondent appealed against the decision of the High Court to the Court of Appeal.

The Court of Appeal dealt solely with the setting aside of JID. Regarding the setting aside of JID, the Court of Appeal focused on the finality of certificates of payment and ruled that they are conclusive. The Court of appeal found no merits in the defence by the appellant and basically concluded that if the JID is acceptable, then why stay the proceedings altogether? With all due respect, the Court of Appeal, by considering the issues on setting aside and stay separately, made an error by not appreciating that the two had nexus with each other. The appellant then appealed to the Federal Court.

The Federal Court is tasked to consider two questions of law. Firstly, was a JID sustainable when the party that obtained it was bound by a valid arbitration agreement and the opposing party had raised disputes to be dealt with by arbitration? Secondly, if a valid arbitration agreement was binding on both parties, should the court hearing an application to set aside the JID consider the merits of the existence of disputes raised by the opposing party? The crux of the appellant’s submission is the existence of a valid arbitration agreement in that the Court of Appeal failed to acknowledge that its legal and contractual rights to have their dispute arbitrated and a valid arbitration agreement coupled with the disputes raised comprised a valid defence to the JID. Respondent submitted that the

appeal on JID had to be determined first as there was no necessity to consider the appeal on stay if the default judgement is maintained, which is basically the Court of Appeal approach. They further state that the clauses in the PAM Form of Contract disallowed set off on the basis of defective works and payments under the certificates are immediately due and that these payments were "carved out" of the mandatory requirement to arbitrate.

The Federal Court firstly considered whether there exists a valid arbitration agreement in accordance with s.9 of the Arbitration Act, and after analysing the specific clauses in PAM Form of Contract, the bench concurred that there was and that it is the exclusive dispute resolution clause choice of the parties. The phrase "disputes or differences shall be referred to arbitration", as evident in the agreement, emphasises the mandatory nature of the agreement between the parties. From the circumstances of the case, the Federal Court acknowledged that courts are only allowed to act within the stipulation in s.10(1). Courts are afforded the powers to consider only on matters which are:

i. whether there subsists an agreement to arbitrate;
ii. whether there was any step taken by the other party that would be considered as acquiescing to the court proceedings;
iii. whether the arbitration agreement is not null, void, inoperative or incapable of being performed.

The fact that there is a JID does not relinquish the courts' powers with regards to the above considerations as these are within the ambit of the courts' interventionist role in safeguarding the integrity of the arbitral process. Furthermore, the Federal Court noted that there is no requirement in s.10(1) for the Court to delve into the facts of whether there is a dispute or otherwise, as contended by the respondent. The legislative effect of s.10(1) is to render a mandatory stay unless the agreement is found to be null and void, inoperative or incapable of being performed.

3.3 Judicial Acceptance/Response to Arbitration Agreement vis-à-vis stay application to court proceedings

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the dispute is subject to an arbitration agreement [30] [31]. The High Court can only refuse to grant a stay when the arbitration agreement is null and void, inoperative or incapable of being performed. The Malaysian courts have taken a pro-arbitration stance by interpreting this provision narrowly, as in cases like *Chut Nyak Hisham Nyak Ariff v. Malaysian Technology Development Corporation Sdn Bhd* [2009] 9 CLJ 32 and *Renault Sa v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32.

Where a party invokes an arbitration agreement under s.10(1) of the 2005 Act to stay court proceedings brought in breach of the arbitration agreement, the Court will examine whether there is an arbitration agreement between the parties which is not null and void, inoperative or incapable of being performed. In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 4 MLJ 857, the Court of Appeal allowed an application for a stay of proceedings, even in circumstances where there was doubt as to the existence of an arbitration agreement. The Court ruled that any jurisdictional issue was to be determined by the arbitral tribunal itself, and any recourse against the arbitral tribunal's decision on jurisdiction may then be referred to the courts. This was upheld by the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 5 MLJ 417 where it was held that in the context of an application to stay court proceedings brought in breach of an arbitration agreement, a challenge to that application on the grounds that an arbitration agreement is null and void, inoperative or incapable of being performed, is a matter which ought to be decided by the arbitral tribunal at first instance. There is no element of discretion to be exercised by the courts.

However, the Court may impose conditions when it grants a stay. For example, in *Majlis Ugama Islam dan Adat Resam Melayu Pahang v. Far East Holdings Bhd & Anor* [2007] 10 CLJ 318, after the Court had granted a stay, a condition was imposed pursuant to s. 10(2), namely that the dispute be referred to the Director of the AIAC for an appointment of an arbitrator as provided under s.13(5) of the 2005 Act. It does not, however, follow that a grant of stay compels one party to commence an arbitration unless ordered to do so.

A court only undertakes a *prima facie* review of the evidence to determine whether there is an arbitration agreement between the parties which is not null and void, inoperative or incapable of being performed [32][33]. In this regard, the Malaysian courts appeared to adopt the approach of the Canadian Supreme Court in *Dell Computer Corporation, Appellant v. Union des Consommateurs and Oliver Sumoulin, Respondents, and Canadian Internet Policy and Public Interest Clinic, Public Interest Advocacy Centre, ADR Chambers Inc ADR Institute of Canada and London Court of International Arbitration, Interveners* (2007 SCC 34) namely:

i. Any challenge to the arbitrator's jurisdiction or arbitration agreement must be resolved first by the arbitral tribunal;
ii. A court may opt to make the first instance decision if the challenge is based solely on a question of law;
iii. If the challenge requires the production and review of factual evidence, the Court should typically refer the case to arbitration; and
iv. Where questions of mixed law and fact are concerned, the Court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

As opined by the Court in *CMS Energy Sdn Bhd v. Poscon Corp* [2008] 6 MLJ 561, it is the 'unmistakable intention of the legislature that the Court should lean towards arbitration proceedings. In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 4 MLJ 857, the Court confirmed the mandatory nature of s.10. The learned Anantham Kasinather JCA stated that:

The present form of s10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on the 1st of July 2011 (Act A1395). [...] The Court is no longer required to delve into the facts of the dispute when considering an application for a stay. Indeed, following the decision of the Court in CMS Energy Sdn Bhd v. Poscon Corp, a court of law should lean towards compelling the parties to honour the 'arbitration agreement' even if the Court is in some doubt about the validity of the 'arbitration agreement'. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal.

A party seeking a stay should tread carefully; however, taking a step in High Court proceedings may jeopardise the right to arbitration. In *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Bhd*, [2010] 3 CLJ 634, the High Court held that a stay would not be granted if the applicant has taken part in court proceedings. In *Lau King Kieng v. AXA Affin General Insurance Bhd and Another Suit* [2014] 8 MLJ 883, the Court found that the defendants, by requesting an extension of time from the plaintiff, had, in fact, intimated their intention to deliver a statement of defence, thereby abandoning the right to arbitration [34].

The cases mentioned here are to show the approach made by the courts to stay of proceedings in the situations where the parties can prove that there is an arbitration agreement in the underlying contracts.

3.4 Amendments to Arbitration Act 2005: Pre and Post 2018 Amendment and position of the law

The Federal Court found that pursuant to s.10 of the Arbitration Act, the appeal regarding the stay warranted consideration ahead of the appeal regarding the judgment in default.

In essence, the Federal Court established the following findings. First, s.10 applies even when a judgment in default has been obtained. Second, the commencement of the civil suit by the contractor amounted to a breach of the arbitration clause. In this regard, unless and until such a breach is accepted by the employer, the contract remains valid. Third, if the judgment in default were allowed to stand, it would, in effect, undermine the parties' intentions when entering into the construction contract. Finally, the appeal regarding the stay was in substance a jurisdictional point which the Court was bound to consider. This dictates that the form and substance, as well as the significance of both appeals, had to be considered in their totality. In

this respect, the Federal Court observed that the Court of Appeal had failed to appreciate that these two appeals were "inextricably intertwined" [35].

In its attempt to convince the Federal Court, the appellant submitted that its claim, which had arisen from certificates of payment, was not subjected to a dispute between parties. Therefore, there was no dispute which warranted referral to arbitration. It bears noting the contractor had premised its argument based on the old s.10(b) before it has been entirely removed by the amendment of the Arbitration Act post-2011. According to the old s.10, the Court is at liberty not to grant a stay of proceedings if there is 'no dispute' between the parties with regard to the matters to be referred. In other words, the old s.10(b) requires the Court to examine the existence of a dispute between the parties before granting the order for a stay of proceedings. Had the Court satisfied that no dispute exists between parties, then the Court should not grant a stay of proceedings and let the civil suit run its course at the Court than sending it back to arbitration [36].

However, the Federal Court held that this argument could not stand. Under the current s.10 of the Arbitration Act, there was no question of the court venturing into the realm of whether a dispute existed between the parties. The Court's role is simply defined within the parameters of s.10. Hence, a dispute is for the consideration and determination of the arbitral tribunal as the Court's scope of power is restricted after the amendment came into effect in 2011. The Federal Court based its reasoning on the removal of subsection (b) during the amendment to s.10. Prior to its amendment, s.10 read as follows:

> (1) The Court before which proceedings brought in respect of a matter which is the subject matter of an Arbitration Agreement shall, where a party makes an application before taking any other step in the proceedings, stay those proceedings and refer the parties to arbitration unless
> it finds: –
> (a) That the agreement is null and void, inoperative or incapable of being performed;
> or
> (b) That there is, in fact, no dispute between the parties with regard to the matters to be referred.

As such, the removal of subsection (b) clearly signifies that the days where the courts could delve into whether a dispute exists are long gone. In light of the above, the Federal Court ordered the Court of Appeal’s order to be set aside and reinstated the order of the High Court.

It bears noting that the Federal Court’s decision aligns with other appellate court decisions on s.10 of the Arbitration Act. Decisions in cases such as *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857 and *Press Metal Sarawak Sdn Bhd v Etiga Takaful Bhd* [2016] 5 MLJ 417 show that the courts will not review whether a dispute exists between parties, regardless of whether a judgment in default has

been obtained, as illustrated in the present case. As with many amendment exercises, the Arbitration Act 2005 was amended in 2011 to keep up with the development of arbitration law that took place in other developed jurisdictions. In this regards, s.10(b) has been removed to ensure the agreement to arbitration is adhered to by the parties [37]. This is to reinforce the parties' freedom of contract and thus to avoid a unilateral attempt to revert a dispute to the Court, which amount to an abuse of the Court's process. Therefore, once the parties agree to arbitrate, they are bound by the arbitration agreement. The Court shall give effect to the arbitration agreement by granting a stay of proceedings of any related suit that crop up in Court. In the absence of mutual consent by the parties to opt-out from the arbitration agreement, the Court should stay the proceedings and refer the matter back to arbitration.

Efforts to improve Malaysian arbitration law again saw new lights in 2018. This latest round of amendment saw further improvement in a few more areas to keep abreast with the latest revision of the UNCITRAL Model Law and arbitral laws of leading jurisdictions in the region and worldwide. The Amendment Act introduces changes to the Arbitration Act 2005 namely the status of an emergency arbitrator and its orders/awards (s.2 and new s.19H), reinstatement of parties' right to choose representation (new s.3A), a court's power to look at the subject matter of the dispute in deciding on arbitrability (s.4), recognition of electronic means of communication (s.9), balanced provisions dealing with the High Court's and arbitral tribunal's powers to grant interim measures (s.11, s.19 and new ss.19A-19J), reinstatement of parties' right to choose any law or rules of law applicable to the substance of a dispute and arbitral tribunal's right to decide according to equity and conscience (s.30), express provisions empowering arbitral tribunal to grant pre and post award interest (s.33), express provisions ensuring confidentiality or arbitration and arbitration-related court proceedings (new ss.41A and 41B) and reinforcement of principles of minimum court intervention and finality of arbitral awards (repeal of ss.42 and 43). In short, The amendment of the Arbitration Act in April 2018 by incorporating mainly the UNCITRAL Model Law 2006 revisions and other provisions for regional competitiveness was aimed at ameliorating the perception caused by the previous Federal Court's decision in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals* [2018] 1 MLJ 1 seen by commentators as undermining the efficacy of arbitration and Malaysia as a safe seat [38].

Even though it was not pleaded by either party, the appellant in not filing a defence or even a memorandum of appearance in response to the civil suit initiated by the respondent, which is breaching the arbitration agreement, is considered not taking any step in the proceeding. This move is crucial in demonstrating whether the appellant had waived its rights under the PAM Form of Contract to have the dispute between them

arbitrated. If the appellant had "*responded*" to the civil suit in any manner, that would be considered as taking a step in the proceeding in which the Court would acknowledge that the parties are in consensus to abandon the arbitration agreement and have their dispute heard in a civil suit.

3.5 Comparative approach to Arbitration Agreement in the United Kingdom and Singapore

3.5.1 Position in the United Kingdom

In the Arbitration Act 1996 of the United Kingdom (UK), Part 1 of the Act (being sections 1 to 84) only applies to an arbitration agreement that is made or evidenced in writing (s.5). An agreement in writing does not need to be signed and can comprise an exchange of communications in writing (s.5(2)). Although arbitration agreements are typically included in the commercial contract to which they relate, it is possible for them to be set out in a separate document and incorporated into the commercial contract by reference (s.6(2)). Common law rules apply when determining the effect of an oral arbitration agreement unless that oral agreement is by reference to terms that are in writing (s. 5(3)).

The courts have been prepared to interpret arbitration agreements broadly to encompass non-contractual as well as contractual disputes as provided in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40. In this case, Lord Hoffman held that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. Nonetheless, the *Fiona Trust* principles must be applied carefully to the facts of the particular case. For example, the Court of Appeal recently considered an application for an anti-suit injunction restraining, among other claims, a company's claims against a "quasi-partner" in the New South Wales courts, in its capacity as assignee of the rights of certain third parties to contributions toward a monetary judgment from the quasi-partner. While the claims related to a partnership agreement, since the third parties were not parties to that agreement, the Court deemed it highly unlikely that the partners had intended to include these claims within their arbitration clause. Accordingly, the assigned claims did not fall within the scope of the arbitration clause and could not be restrained, as seen in *Michael Wilson & Partners, Ltd v John Forster Emmott* [2018] EWCA Civ 51.

A court is only permitted to intervene in arbitration proceedings to the extent expressly permitted by the Arbitration Act (s.1(c)), for example, to:

i. Order a party to comply with a peremptory order made by the tribunal (s.42).
ii. Require the attendance of a witness to give testimony or to produce documents or other material evidence (s.43).
iii. Grant an interim injunction with regard to specified matters under

s.44(2) of the Arbitration Act,

iv. Determine a question of law arising in the course of the proceedings (s.45).

As a general principle, the Court will only intervene when it is satisfied that the applicant has exhausted any available arbitral process. For example, the Court will not grant interim relief in circumstances where the parties can submit such matters to an emergency arbitrator with jurisdiction to order urgent relief (which is the default position under Article 9B of the LCIA Rules 2014) in *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327. Even then, the intervention will be designed to cause minimum interference with the progress of the arbitration. The risk of the English courts intervening to frustrate arbitral proceedings is low because they are supportive of arbitration. The Court's powers to intervene are designed to support rather than displace the arbitral process and are also expressly limited by the Arbitration Act. The decision of in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* steered the direction of the position of the law in Malaysia in this aspect towards consistency with the UK position, and thus internationally the arbitral process in Malaysia would be more streamlined with international practice. Furthermore, this consistency would attract more international parties choosing Malaysia as their seat of arbitration. Malaysia's approach, through *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd,* is evidently more detailed in that the Federal Court took an active step to recognise parties' autonomy in coming to a consensus as to their preferred choice of dispute resolution process and subsequently gave effect to it.

If the parties decide to refer their dispute to arbitration, they should also decide which arbitral institution should administer the arbitration, as that institution will have rules, which will govern the arbitration process. Some of the most well-known institutions are the International Chamber of Commerce, the London Court of International Arbitration and the American Arbitration Association. If the parties decide on an arbitration administered by such an institution, the safest approach is to adopt the standard arbitration clause of the arbitral institution concerned. [39]

3.5.2 Position in Singapore

There are three legislations enforceable in Singapore, namely the International Arbitration Act 2002 (IAA), the Arbitration Act 2002 (AA) and Arbitration (International Investment Disputes) Act 2012. The IAA incorporates and gives effect to the Model Law on International Commercial Arbitration (the "Model Law") adopted by the United Nations Commission on International Trade Law, which aims to harmonise arbitration laws in different states. It incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). It is applicable to arbitrations that are international (defined as any arbitration proceeding that contains a cross-border element), but parties may agree for the IAA to apply to arbitration that would not be considered international if it is

clearly stated in the arbitration agreement [40][41]. The AA applies to arbitrations that are not considered international and generally provide for more excellent supervision by the Singapore courts than the IAA. For example, the Singapore courts have discretion regarding whether or not to grant a stay in favour of arbitration, whereas, under the IAA, no such discretion exists. The Arbitration (International Investment Disputes) Act gives effect to the United Nations Convention on the Settlement of Disputes Between States and Nationals of Other States.

The arbitration agreement is covered under section 4 of AA, and it may be in the form of an arbitration clause in a contract or in the form of a separate agreement. If the parties seek to incorporate an arbitration clause by reference to another document, they must be specific in doing so. The language must be sufficient to demonstrate a clear intention by the parties to subject any disputes to arbitration, and the Singapore courts tend to construe such language narrowly as provided in *Astrata (Singapore) Pte v Portcullis Escrow* [2011] SGCA 20 [42]. A “unilateral” arbitration clause is one in which one or more of the parties to a contract have the right to elect to arbitrate a dispute at the time the dispute arises. A properly drafted clause that evinces the parties’ intent to permit one or more of them to elect unilaterally to arbitrate is enforceable in Singapore [43][44].

A multi-tiered dispute resolution (or escalation) clause provides for various steps to be taken by parties to resolve a dispute before the dispute is turned over for resolution by arbitration or litigation. For example, parties may agree to conduct working-level negotiations, meetings between executives, or to mediate and only commence arbitration proceedings if all of the applicable tiers of dispute resolution are unsuccessful [45]. In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and Anor* [2014] 1 SLR 130, the Court of Appeal held that if the steps of negotiating or mediating are pre-conditions to arbitration, and those steps are not taken by the parties, a tribunal will lack jurisdiction to determine the dispute. In such a case, the parties must complete those earlier steps to attempt to resolve the dispute before they can commence arbitration.

So-called "pathological" clauses are arbitration clauses that are drafted in a way that makes their effect unclear or uncertain. The Court will generally seek to give effect to an arbitration clause so long as it finds that there was an intention to arbitrate, even where the clause may not have been clearly drafted. In *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5, the courts found that the parties intended to arbitrate their disputes and upheld their clauses, even when they referred to non-existent arbitral institutions or appeared to require one arbitral institution to administer the rules of another [46].

Unlike Malaysia, there is no specific provision for arbitration agreement and substantive claim before Court. But sections 6 and 7 of AA portray that the Court has discretion regarding whether or not to stay court proceedings in favour

of arbitration. A stay of court proceedings in favour of arbitration is mandatory in the case of international arbitrations governed by the IAA unless the Court is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. Singapore is one of the popular seat of arbitration chosen between international parties. Be that as it may, it should be noted that the position of the law in the republic is slightly different than that currently held in Malaysia when it comes to domestic arbitral tribunal whereby the jurisdiction of the court still very much alive and robust in that it depends on the discretion of the court whether to grant a stay of proceedings. This discretionary power would entail the examination on the existence of the disputes between the parties. On the other hand, the Federal Court in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* has done away such discretionary powers and gave full effect to the intention and interpretation behind s.10(1) of the Malaysian Arbitration Act 2005.

3.6 Best practices to be adopted by construction industry players

The case demonstrates a number of lessons learnt. First, Malaysian Courts no longer consider whether a dispute exists for the purposes of an application to stay court proceedings. By way of *stare decisis*, the Federal Court's decision in the present case will bind the lower courts in relation to similar issues in the future. Second, a party seeking to circumvent an arbitration agreement may sometimes choose to obtain a default judgment from a domestic court in an attempt to enforce it as a debt in the courts of the country where the 'defaulter' is located or has its assets. In order to avoid the risk of costly procedural complications in any national court, parties should take proactive steps to obtain a stay order of the proceedings brought in breach of an arbitration agreement. Finally, there is a greater need to introduce a summary disposition procedure, namely early dismissal of unmeritorious claims or defences at an early stage. This will pave the way for the arbitral tribunal to address disputes in the construction industry efficiently, as evident in other jurisdictions such as Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and the International Chamber of Commerce (ICC).

4.0 CONCLUSION

The notions of "party autonomy and "freedom of contract" are applicable to arbitration agreements inserted into construction contracts. The courts, as the bastion of contractual legal rights, will uphold agreements between parties entered into willingly, specifically regarding arbitration agreements. The courts will effectuate the arrangements made between the construction contractual parties concerning their preferred dispute resolution process. Fortifying this position is the legislative requirements provided in s.10(1) of Arbitration Act 2005 that entrusted the courts as the safeguards to the arbitral process, focusing on its power to stay the proceedings before it if there exists a valid arbitration agreement. This is provided that none of the parties has taken any step in the court proceedings or that the arbitration agreement is not null and void, inoperative or incapable of performance. Construction industry players who opted for arbitration as their dispute resolution process should be wary about their actions which can be taken as acquiescing to the court process and abandoning the arbitration agreement.

5.0 ACKNOWLEDGEMENT

This research is financially supported by Lestari Covid-19 Research Grant (600-RMC/LESTARI COVID/5/3 (026/2020) provided by Universiti Teknologi MARA (UiTM).

6.0 REFERENCES

[1] P. Dugane and S. Charhate, Arbitration: A Case Study in the Construction Industry, SSRG International Journal of Civil Engineering (SSRG-IJCE), vol.5, issue.5, pp 58-63, 2018.

[2] A.A. Gulghane and P.V. Khandve, Arbitration in Construction Industry: an Overview, International Journal of Modern Engineering Research, vol.5, pp 1-4, 2015.

[3] *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal,* 2020.

[4] A. Kasi, "The Constituents of Arbitration Agreement," Malayan Law Journal Articles, vol. 2, p. clxxv, 2013.

[5] *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service,* 1995.

[6] G. Xavier, "Comparative Study of Arbitrations in Malaysia and Selected Jurisdictions in the European Union," Malayan Law Journal Articles, vol. 4, p. lxxxix, 2002.

[7] Salter and J. Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research: Longman, 2007.

[8] N.C. Abdullah, Legal Research Methodology, Petaling Jaya: Thomson Reuters Asia, 2018.

[9] N.M. Noor, Writing Research and Thesis Proposals: Guidelines and Examples, Shah

Alam: University Publication Centre (UPENA) UiTM, 2011.

[10] S. Rajoo and W. Davidson, The Arbitration Act 2005 UNCITRAL Model Law as Applied in Malaysia, Petaling Jaya: Sweet & Maxwell Asia, 2007, p. 41.

[11] "Arbitration Agreements and Arbitral Tribunals," Halsbury's Laws of Malaysia - Arbitration, vol. 5, no. 130 - Arbitration, p. 130.010.

[12] *Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Limited,* 2009.

[13] "Arbitration Agreement and Arbitral Awards," Halsbury's Laws of Malaysia - Arbitration, vol. Vol 5, no. 130 , p. 130.010.

[14] *Bauer (M) Sdn Bhd v Daewoo Corp,* 1999.

[15] *Ajwa for Food Industries Co (MIGOP) Egypt v Pacific Inter-Link Sdn Bhd,* 2013.

[16] S. Rajoo and W. Davidson, The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia, Petaling Jaya: Sweet & Maxwell Asia, 2007.

[17] M. Almanasrah and R. A. J. Ali, "Power of Arbitration Agreement," Journal of Politics and Law, vol. 12, no. 2, 2019.

[18] S. Rajoo and H. Singh, Construction Law in Malaysia, Subang Jaya: Thomson Reuters Malaysia Sdn Bhd, 2012, p. 535.

[19] S. J. Ware, "The Case for Enforcing Adhesive Arbitration Agreements - with Particular Consideration of Class Actions and Arbitration Fees," Journal of American Arbitration, vol. 5, no. 2, p. 251, 2006.

[20] K. N. Hylton , "Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis," Supreme Court Economic Review, vol. 28, p. 209, 2000.

[21] "Arbitration Agreement and Arbitral Awards," Halsbury's Laws of Malaysia - Arbitration, vol. Vol 5, no. 130 , p. 130.010.

[22] S. Rajoo and W. Davidson, The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia, Petaling Jaya: Sweet & Maxwell Asia, 2007, p. 47.

[23] A. Kasi , "The Constituents of Arbitration Agreement," Malayan Law Journal Articles, vol. 2, p. clxxv, 2013.

[24] S. A. Idid and U. A. Oseni, "The Arbitration (Amendment) Act 2011: Limiting Court Intervention in Arbitral Proceedings in Malaysia," Malayan Law Journal Articles, vol. 2, p. cxxxii, 2014.

[25] S. Rajoo, "Arbitration and its Development in Malaysia," Malayan Law Journal Articles, vol. 1, p. lv, 2020.

[26] "Arbitration Agreement and Substantive Claim before the Court," Atkin's Court Forms Malaysia - Arbitration, p. 201.

[27] J. Plotkin, "Arbitration Primacy? The Law Pertaining to Staying Court Proceedings in Favour of Arbitration," in County of Carleton Law Association

39th Annual Civil Litigation Conference, Ontario, 2019.

[28] J. Plotkin, "Arbitration Primacy? The Law Pertaining to Staying Court Proceedings in Favour of Arbitration," in County of Carleton Law Association 39th Annual Civil Litigation Conference, Ontario, 2019.

[29] *Cosmos Infratech Sdn Bhd v Melati Evergreen Sdn Bhd & Third Party,* 2019.

[30] Y.Y. Han, Arbitration Procedures and Practice in Malaysia: Overview, Subang Jaya, Thompson Reuters, 2021, p. 1-27.

[31] C. Abraham and D. C. W. Chuen, International Handbook on Commercial Arbitration, ICCA, 2018, p. 9-19.

[32] Y.Y. Han, Arbitration Procedures and Practice in Malaysia: Overview, Subang Jaya, Thompson Reuters, 2021, p. 1-27.

[33] S. Rajoo, "Alternative Dispute Resolution as a Means of Dispute Avoidance in Construction Contracts – An Institutional Perspective", Malayan Law Journal Articles, vol.3, p.i, 2017.

[34] A. Pradhan, Malaysia in James H Carter (Ed), The International Arbitration Review (Ninth Edition), Law Business Research Ltd, pp. 304-319, 2018.

[35] *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd,* 2020.

[36] S. A. Idid and U. A. Oseni, "The Arbitration (Amendment) Act 2011: Limiting Court Intervention in Arbitral Proceedings in Malaysia," Malayan Law Journal Articles, vol. 2, p. cxxxii, 2014.

[37] S. Rajoo, "Arbitration and its Development in Malaysia," Malayan Law Journal Articles, vol. 1, p. lv, 2020.

[38] s. Rajoo. "Repeal of Section 42: The Question of Law Arising out of an Award by the Amended Arbitration Act 2005," Malayan Law Journal, vol. 6, 2019.

[39] M Lewis, "The Benefits of an Arbitration Clause", IBB Solicitors, 2016.

[40] Morgan Lewis Stamford LLC (2015). *An Introductory Guide to Arbitration in Singapore* [Online]. Available: www.morganlewis.com

[41] A. J. D. Rochefort-Reynolds, Confused Seas: Identifying The Proper Law Of Arbitration Agreements In Maritime Contracts – England, Singapore And Australia

[42] A. Henderson, T. Furlong and G. Leong. (2021, the 2nd of March) *Arbitration procedures and practice in Singapore: Overview* [Online]. Available: https://uk.practicallaw.thomsonreuters.com/3-3812028?transitionType=Default&contextData=(sc.Default)

[43] Morgan Lewis Stamford LLC (2015). *An Introductory Guide to Arbitration in Singapore* [Online].

Available: www.morganlewis.com

[44] G.B. Born, "The Law Governing International Arbitration Agreements: An International Perspectives," Singapore Academy of Law Journal, vol.26, pp. 814-848, 2014.

[45] Morgan Lewis Stamford LLC (2015). *An Introductory Guide to Arbitration in Singapore* [Online]. Available: www.morganlewis.com

[46] Morgan Lewis Stamford LLC (2015). *An Introductory Guide to Arbitration in Singapore* [Online]. Available: www.morganlewis.com