CASE UPDATE

The High Court Considers the Status and Scope of an Arbitration Agreement in the Context of a Termination of the Main Contract

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Introduction

1. In the recent decision of *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama and another* [2018] SGHC 126, the Singapore High Court considered the issues of how an arbitration clause survives the termination of the main contract, as well as the scope of such an arbitration clause. In making its orders, the Court also addressed its inherent case management powers.

Facts and Background

2. The Plaintiff is a Singapore-incorporated company in the business of selling chemical products. The 1st Defendant and the 2nd Defendant are companies incorporated in Indonesia involved in the energy business. The 2nd Defendant is the largest single shareholder of the 1st Defendant (48.59%).

3. The Plaintiff leased various catalysts to the 1st Defendant under a Lease Agreement. The Lease Agreement was set to expire by March 2009 but the parties entered into an agreement to extend the lease to December 2010. Even though after December 2010 no new formal agreement was concluded regarding the catalysts, the 1st Defendant continued to hold on to the catalysts and the Plaintiff continued to charge rent.

4. As a result of subsequent financial difficulties, the 1st Defendant entered into a composition agreement in Indonesia (this is akin to the Scheme of Arrangement in Singapore) with its creditors in December 2012, *inter alia*, the Plaintiff. This composition agreement settled the Plaintiff's claims against the 1st Defendant for outstanding rent for the catalysts for the period 1 January 2011 to 5 November 2012.

5. After the composition agreement, the 1st Defendant continued to hold on to the catalysts and the Plaintiff continued to charge rent. The Plaintiff's claim in the present proceedings were for rent for the period after 5 November 2012.

6. The Plaintiff commenced the present Singapore proceedings against the 1st Defendant and the 2nd Defendant. In these proceedings, the Plaintiff made claims for conversion and/or detinue (against the 1st Defendant), joint tortfeasorship (the 2nd Defendant) and unlawful conspiracy (against both the 1st and 2nd Defendants).

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7. In response, the Defendants took out separate applications to stay the proceedings.

   a. The 1st Defendant applied to stay the conversion claim against it in favour of arbitration. It relied on the arbitration clause at Clause 14.2 of the Lease Agreement, which provides that any disputes arising out of or in connection with the lease or shall be settled amicably within 30 days, failing which will be finally and exclusively settled by arbitration in Singapore.

      This application did not extend to the other claims in the proceedings. The parties had agreed that the joint tortfeasorship and conspiracy claims would not come within the scope of the arbitration clause, and the Court found that in any case the 2nd Defendant was not party to the arbitration agreement.

   b. The 2nd Defendant made 3 applications on a further and/or in the alternative basis – first, to set aside an *ex parte* order granted to the Plaintiff to serve out of jurisdiction on the 2nd Defendant; second, for a stay of proceedings on the basis that Singapore was not the proper forum for the dispute; and third, for a stay of proceedings in the exercise of the Court's inherent case management powers.

8. On the facts, the Court decided:

   a. The conversion claim against the 1st Defendant was stayed in favour of arbitration pursuant to Section 6 of the International Arbitration Act ("*IAA*");

   b. The joint tortfeasorship claim against the 2nd Defendant was stayed on the basis that Singapore was not the proper forum and Indonesia was the more appropriate forum; and

   c. The conspiracy claims against both Defendants were also stayed, for the same reasons as the joint tortfeasorship claim. The Plaintiff and the 1st Defendant had agreed that if the conspiracy claim against the 2nd Defendant was stayed (as it was), the conspiracy claim against the 1st Defendant should be litigated in the same forum as that in which the conspiracy claim against 2nd Defendant would be litigated.

The High Court's Decision

The 1st Defendant's Application to Stay in Favour of Arbitration

9. A stay in favour of arbitration may be granted under Section 6 of the *IAA* only if there is a *prima facie* case that:

   (i) There is a valid arbitration agreement between the parties;

   (ii) The dispute in the Court proceedings falls within the scope of the arbitration agreement; and

   (iii) The arbitration agreement is not null and void, inoperative or incapable of being performed.

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Whether there was a Valid Arbitration Agreement

10. The Plaintiff's primary submission was that pursuant to Clause 8 of the composition agreement (set out below), the Lease Agreement, having not been expressly confirmed to remain in force by the 1st Defendant, had been terminated. To that extent, the arbitration clause was no longer operative.

> *Each and all agreements remaining in effect between TPPI and its creditors before the PKPU decision is to be terminated, except those strictly confirmed to remain in force by TPPI* and in respect of the creditors, the terms and conditions in the Reconciliation Plan and the supporting documents will apply. If it is considered necessary by TPPI to re-apply an agreement, re-arrangement will be sought on the terms and conditions subject to this Reconciliation Plan in a new agreement.

11. However, the Court found on a *prima facie* standard that from the conduct of both parties, the Lease Agreement was treated as continuing and binding and the Lease Agreement had been confirmed by conduct. Since the Lease Agreement survives, the arbitration clause contained within clearly remains operative.

12. In obiter, the Court went further to reiterate the principle that an arbitration clause can survive the termination of the main contract (even though it did not find that the main contract was terminated in this case). The Court cited academic commentary to emphasize that parties usually intend to terminate their underlying contract while leaving their agreed dispute resolution mechanism in place for any disputes that may emerge from that contract.

13. As such, the Court was of the view that even if the Lease Agreement had been terminated, the arbitration agreement would survive the termination. On the facts, it was also noteworthy that Clause 14.2(f) of the Lease Agreement had provided that the arbitration clause will survive any termination of the Lease Agreement.

Whether the Dispute fell within the Arbitration Agreement

14. Further, the Plaintiff argued that a surviving arbitration agreement could only apply to disputes that arise during the period that the main contract is still in force, and that because the claims in the proceedings were 2 years after the expiry of the Lease Agreement, the arbitration clause is inapplicable to the dispute.

15. The Court disagreed with the Plaintiff's argument. The Court found that the Plaintiff's claims actually arose from when the Lease Agreement was still in effect and was intricately connected to the lease. In this regard, the Court characterized the Plaintiff's claims as being about the 1st Defendant's failure to meet its obligations under the Lease Agreement to return the catalysts upon the termination of the lease term – i.e. the immediate consequences of the termination of the Lease Agreement. So notwithstanding that the Plaintiff's claims were only brought later in 2017, these claims still fell within the scope of the arbitration clause.

16. Notably, the Court considered in some detail, and distinguished from the present case, cases cited by the Plaintiff in support of its proposition summarised at paragraph 14 above. In the first cited case, the Court noted that the claims in question were not based on the main contract which contained the arbitration clause. In the second, the Court noted that the events triggering the grievances in question had arisen more than 6 months after the main contract containing the arbitration clause had

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expired. In the third, the Court noted that the arbitration agreement had itself remained subject to contract and was not binding.

17. One possible takeaway from the above discussion is that when discerning whether claims fall within the scope of an arbitration clause, it is important to ask if the claims arose from the main contract or the immediate consequences of its termination, notwithstanding the passing of time between the expiry of the main contract and when the claims were made.

The 2nd Defendant's Application to stay proceedings in Singapore

Leave to serve out of jurisdiction

18. The Court relied on the requirements in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 relating to the granting of leave to serve out of jurisdiction:

(i) The Plaintiff's claim must come within one of the heads of claim in Order 11 Rule 1 of the Rules of Court;

(ii) There must be a sufficient degree of merit; and

(iii) Singapore must be the proper forum for the trial.

19. The Court found that the Plaintiff was not entitled to the heads of claim under Order 11 Rule 1 it sought to rely on because the substance of the cause of action, and the damage suffered, took place in Indonesia and not Singapore. In considering the issue of proper forum, the Court found that the natural forum for determining a claim brought in tort is *prima facie* the place where the tort occurred. Applying this, the Court found that the place of the alleged torts was Indonesia and not Singapore. Therefore, Indonesia was *prima facie* the more appropriate forum for the Plaintiff's claims to be tried.

Conclusion

The Court's inherent power of case management

20. Notably, in making its orders, the Court turned its mind to the Court's inherent power of case management.

21. Specifically, the Court noted that the decision on whether to discharge the *ex parte* order for service out of jurisdiction on the 2nd Defendant/stay the proceedings against the 2nd Defendant had to be assessed in light of the fact that:

a. The conspiracy claim against the 1st Defendant had not been stayed in favour of arbitration; and

b. The 1st Defendant had not taken out a similar application to the 2nd Defendant, to set aside the *ex parte* order for service out of jurisdiction or seek a stay on the basis that Singapore was not the proper forum.

22. The Court ultimately decided that this was an appropriate case to discharge the *ex parte* order and stay proceedings against the 2nd Defendant. Notably, the parties had accepted in any case that in

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the event the conspiracy claim against the 2nd Defendant was stayed, the same claim should also be stayed against the 1st Defendant as the claim against both Defendants should be determined together.

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