MTC ENGINEERING SDN BHD v VME PROCESS ASIA PACIFIC PTE LTD

CaseAnalysis
| **[2025] MLJU 3634**

MTC Engineering Sdn Bhd v VME Process Asia Pacific Pte Ltd [2025] MLJU 3634

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COURT OF APPEAL (PUTRAJAYA)

RAVINTHRAN PARAMAGURU, AZHAHARI KAMAL RAMLI AND AHMAD FAIRUZ ZAINOL ABIDIN JJCA

CIVIL APPEAL NO W-03(IM)(NCC)-1-01 OF 2024

23 October 2025

Mokhzani Harris bin Yusof (with Zainol Aziz bin Mohamad) (Zainol, Kiong & Azizi) for the appellant.
Siew Ka Yan (Skrine & Co) for the respondent.

Ravinthran Paramaguru JCA:

JUDGMENT

Introduction

[1] The appellant appeals against the decision of the High Court which overturned the decision of the Senior Assistant Registrar to stay proceedings under section 10 of the Arbitration Act 2005. The principal issue in this appeal is whether the appellant may invoke the benefit of an arbitration agreement contained in a main contract to which it is not a party, merely by reference to the said main contract in a separate agreement to which it is a party.

Background Facts

[2] The dispute arises out of a contract entered into between VME Process Asia Pacific Pte Ltd ("VME"), the respondent, and Sandakan Offshore (M) Sdn Bhd ("SOM"), a subsidiary of the appellant, MTC Engineering Sdn Bhd ("MTC"). For convenience, we shall refer to the parties by their abbreviated names.

[3] VME is a company incorporated in Singapore specialising in the supply of oil and gas topside processing modules for production facilities. MTC, a Malaysian company based in Shah Alam, Selangor, provides engineering and technical consultancy services within the oil and gas sector. Its subsidiary, SOM, is similarly engaged in project development and engineering works in the same industry.

[4] On 16 January 2018, VME entered into an engineering, procurement, construction, and pre-commissioning contract with SOM for the supply of topside process modules for the MDA-MBH field development project. This contract shall hereinafter be referred to as the VME/SOM Contract. Clause 44.2 of the VME/SOM Contract provides for arbitration in Singapore in the following terms:

> "Any dispute or difference of any kind whatsoever arising out of the Contract or any interpretation thereof which cannot be resolved by agreement between the Parties hereto shall be settled by binding arbitration in accordance with the rules Singapore International Arbitration Centre ("SIAC Rules"), which are deemed incorporated by reference into this cl 44. The seat of arbitration shall be in Singapore. The language to be used in the arbitral proceedings shall be English."

[5] On the same day, MTC issued a Letter of Undertaking ("LOU") in favour of VME, whereby it assumed all payment obligations under the VME/SOM Contract. Consequently, MTC's obligations to VME mirrored those of SOM under that contract. The LOU contains no arbitration clause but was attached to the VME/SOM Contract as Appendix J. Both documents are dated 16 January 2018. Clause 1.1 of the VME/SOM Contract defines "Contract" as follows:

> "Contract": this contract, its appendices, schedules, exhibits and attachments expressly made an integral part of this contract for the performance or supply of any part of the Work by the Contractor.

[6] Clause 1.11 of the VME/SOM Contract further stipulates that the appendices referred to in clause 1.1 shall be read and construed as integral components of the contract.

[7] In June of 2022, VME commenced proceedings against MTC, seeking to recover USD 25 million in respect of two unpaid invoices owed by SOM. The claim was founded upon the LOU. On 13 July 2022, MTC applied for a stay of proceedings under section 10(1) of the Arbitration Act 2005. The Senior Assistant Registrar granted the stay, but the learned High Court Judge subsequently set it aside, prompting the present appeal.

Issues in the appeal

[8] In the High Court and before us, counsel for MTC contended that the arbitration clause contained in the main VME/SOM Contract was incorporated by reference into the LOU, as the main VME/SOM Contract designated the LOU as an integral part of it. The learned Judge, however, held that there was no express reference in the LOU to the arbitration clause and therefore no incorporation by reference occurred. His Lordship further observed that MTC was not a party to the VME/SOM Contract, which existed solely between VME and SOM.

[9] The instant claim by VME is not based on the VME/SOM Contract. It is based on the LOU issued by MTC. Thus, the main issue before this Court is whether the arbitration clause contained in the VME/SOM Contract has been incorporated into the LOU issued in favour of VME, by which MTC assumed SOM’s payment obligations.

[10] In deciding this issue, we shall refer to the VME/SOM Contract, the LOU, the Arbitration Act 2005 and the authorities cited in the parties’ submissions.

Incorporation by reference

[11] Put simply, incorporation by reference is a legal concept whereby a separate document is treated as part of another document by virtue of an express reference. Section 9(5) of the Arbitration Act 2005 which is based on section 7(2) of Uncitral Model Law gives statutory recognition to this principle. Thus, even where an agreement does not itself contain an arbitration clause, such a clause may nonetheless apply if another document incorporating it is referred to in writing. Section 9(5) reads as follows:

> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[12] The above clause was considered and applied in the landmark Federal Court case of *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625. In that case, sales contracts between the parties did not contain any arbitration clause. However, the sales contracts referred to an external document, i.e. the standard terms and conditions which contained an arbitration clause. Relying on section 9(5) of the Arbitration Act 2005, the Federal Court said that a written agreement to arbitrate does not necessarily mean a formal agreement executed by both parties. It would be sufficient so long as the arbitration agreement is incorporated into a written document. The Federal Court said as follows:

> We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required."

[13] Section 9(5) was again was applied to give recognition to the concept of incorporation by reference by the Court of Appeal in the case of *Cockett Marine Oil (Asia) Pte Ltd v. MISC Berhad & Another Appeal* [2023] 1 MLRA 720. In that case, a supply contract was concluded through an exchange of correspondence which did not itself provide for arbitration. However, the correspondence included a hyperlink to standard terms and conditions containing an arbitral clause. Applying section 9(5) and the *Ajwa* case, the Court of Appeal held that the arbitration clause was binding upon the parties.

[14] Thus, from a reading of section 9(5) of the Arbitration Act 2005 and the above mentioned cases, it is clear that the arbitration agreement need not be contained in the very contract that is the subject of a dispute. It is sufficient if there is reference to another document that contains an arbitration agreement. However, section 9(5) says that the "reference is such as to make that clause (the arbitral clause) part of the agreement". This phrase is pivotal and shall be examined further later.

Document to be construed

[15] In the instant case, the document that underlies the dispute between the parties is the LOU. The respondent is suing MTC under the LOU to enforce the payment obligations of its subsidiary, namely SOM. The reference to an arbitration agreement is contained in another document. Thus, as correctly noted by the learned High Court Judge, the document to be construed in considering whether there was incorporation by way of reference is the LOU itself.

Nature of reference

[16] As we said, the LOU does not contain any arbitration agreement. However, there is a reference to the VME/SOM contract. The reference is cursory as observed by the learned High Court Judge. It merely says that in consideration of VME entering into a contract with SOM, MTC undertakes to perform the payment obligations of SOM. It does not stipulate that parties to the LOU are bound by the VME/SOM Contract. Thus, the LOU is in the nature of a guarantee and nothing more. It is also of a temporary nature as the LOU says it is to "survive" until a Letter of Credit or Letter of Guarantee Performance is issued.

[17] In our view, the High Court correctly decided that the reference in the LOU to the VME/SOM Contract did not incorporate the arbitration agreement found in it. We agree with the High Court for the following reasons.

[18] We accept learned counsel for the appellant's submission that section 9(5) of the Arbitration Act 2005 does not require an express reference to the arbitration clause contained in the other document. Nevertheless, the provision stipulates that the reference must be "such as to make that clause (the arbitration clause) part of the agreement." Accordingly, a mere reference that falls short of satisfying this condition would be insufficient. This issue was considered by this Court in *Gise Kam Kwan International Trade Ltd v Antara Steel Mills Sdn Bhd* [2024] 6 MLJ 662.

[19] In the above-mentioned case, the plaintiff instituted legal proceedings to recover the outstanding amount under the termination and settlement agreement (TSA). The defendant applied for stay of proceedings to refer the dispute to arbitration. The TSA did not contain any arbitration agreement. The High Court was satisfied that the TSA contained a reference to the main agreement that contained an arbitration clause and granted a stay. Upon appeal, issues that arose, inter alia, were as follows:

(1) whether the arbitration agreement in the main agreements had been incorporated by reference such as to make that arbitration clause part of the TSA;

(2) whether the TSA was a stand-alone entire agreement independent of the main agreements and superseding the main agreement.

[20] The Court of Appeal speaking through Justice Lee Swee Seng JCA (now FCJ) held that not every reference in an agreement to another document containing an arbitration clause automatically incorporates that clause. The reference must be made for the purpose of making the clause part of the agreement. His Lordship said as follows:

> **[13]** Further s 9(5) of the AA 2005 deals with the incorporation of an arbitration clause by reference to it in an agreement and the reference is such as to make that clause part of the agreement as follows:
>
> > (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing *and the reference is such as to make that clause part of the agreement.* (Emphasis added.)
>
> **[14]** Thus, it is not every reference in an agreement to a document containing an arbitration clause that would automatically incorporate that arbitration clause as part of the agreement. The reference must be for the purpose of making that arbitration clause part of the agreement which in this case is the TSA.

[21] To paraphrase Justice Lee Swee Seng JCA, it is not necessary for there to be an explicit reference to the arbitration clause contained in the other document; however, the purpose of the reference must be to incorporate that clause into the agreement in question. A reference made merely for contextual or incidental purposes will not suffice to import an arbitration clause from another document. In support of this proposition, His Lordship cited the following passage from the Court of Appeal judgment in *Best Re (L) Ltd v Ace Jerneh Insurance Bhd (formerly known as Jerneh Insurance Bhd)* [2015] 5 MLJ 513:

> **[27]** Reading the section it is obvious that incorporation of an arbitration clause in one agreement may be made by way of reference to an arbitration clause found in another agreement, in most instances, the agreement that exist between the same parties. But, *what is most important is that the reference clause must be clear as to the intentions of the parties to incorporate that particular arbitration clause in their agreement. We say so because of the expression '... the reference is such as to make that clause part of the agreement'*, found in s 9(5) of the Act.

[22] In the *Gise Kam Kwan case*, the reference appeared in the recital to the TSA executed by the plaintiff and the defendant. It referred to the earlier main agreements which had since been superseded. Those agreements contained an arbitration clause. The Court of Appeal held that the operative part of the TSA made no reference to the documents containing the arbitration clause and, consequently, the clause could not have been incorporated into the TSA. Moreover, the Court of Appeal observed that the TSA constituted a stand-alone and entire agreement, independent of, and superseding, the main agreements.

[23] We respectfully adopt the reasoning of the Court of Appeal in the above mentioned case, as it gives proper effect to whole of section 9(5) of the Arbitration Act 2005. Accordingly, in order for an arbitration clause contained in another document to be incorporated, that document must be in writing, and the reference to it must clearly indicate that the parties intended the said arbitration clause to form part of the agreement in question. A mere cursory reference in a recital made only for contextual purposes will not suffice.

[24] We now turn to the LOU. Shorn of the heading and the subject line, it reads as follows:

> We refer to the above matter.
>
> In consideration of VME Process Asia Pacific Pte. Ltd. **("**Contractor**")** entering into a contract with Sandakan Offshore (M) Sdn. Bhd. **(**Company No.: 833359-M) ("Company") for the Engineering, Procurement, Construction, and Pre-Commissioning (EPC) of Topsides Modules for the MDA-MBH Field Development**,** We, MTC Engineering Sdn. Bhd. (Company No.: 843778-T), a company incorporated under the laws of Malaysia, do hereby undertake to perform the payment obligations of the Company.
>
> The abovementioned undertaking shall remain in force until a Letter of Credit or a Performance Letter of Guarantee has been issued and received from Indonesia Infrastructure Finance**.** *This undertaking includes* any other liability, guarantee,

> warranty and/or condition and/or innominate term imposed or implied by law, custom, statute, or otherwise *by reason of the performance of the payment obligations of the Company.* (emphasis ours)

[25] The parties are not in dispute as to the nature of this letter. It is a letter of undertaking issued by MTC, which records the consideration moving from VME to MTC in connection with the main agreement, namely the VME/SOM Contract. It is also undisputed that SOM is a subsidiary of MTC. In the circumstances, the reference to the VME/SOM Contract in the LOU is purely in the nature of a recital, serving only to provide context for the undertaking. Without such a reference, the LOU would be devoid of meaning, or could be said to have been drafted *in vacuo*, without context and for no discernible purpose.

[26] Therefore, it is plain that the reference in the LOU to the VME/SOM Contract is merely to provide context for the undertaking. By doing so, the parties, particularly MTC, could not have intended to incorporate the terms of the VME/SOM Contract, including the arbitration clause into the LOU. Moreover, as we have earlier observed, the second paragraph of the LOU underscores its temporary nature. This further supports the conclusion that the parties could not have intended the arbitration clause in the VME/SOM Contract to form part of the LOU.

[27] We are also of the view that, very much like in the *Gise Kam Kwan* case, the LOU, though attached to the VME/SOM Contract is a standalone and independent contract. A cause of action would accrue upon its breach, independently of the VME/SOM Contract.

Significance of integration clause

[28] Clause 1.1 of the principal contract, namely the VME/SOM Contract, provides that the eleven appendices, including the LOU, form an integral part of the contract. Similarly, clause 1.11, stipulates that the appendices constitute an "integral" component of the contract. In our view, the mere fact that the LOU is attached to and described as part of the VME/SOM Contract does not alter its independent legal character. Nor does the integration clause operate to incorporate the arbitration agreement into the LOU. Our reasons are as follows.

[29] As stated earlier, the document underlying the present dispute between VME and MTC is the LOU, and not the VME/SOM Contract. The nature of the reference to the VME/SOM Contract, as previously observed, does not satisfy the requirements of section 9(5) so as to effect the incorporation of the arbitration agreement. In the circumstances, whether or not the LOU forms part of the VME/SOM Contract is immaterial to the present dispute between VME and MTC. That question, however, may assume significance in proceedings between the original contracting parties to the main contract, namely VME and SOM, where any breach of duties or obligations relating to the appendices could potentially give rise to legal consequences. As we have already noted, the LOU possesses an independent legal character. Therefore, in our view, the integration clauses in the VME/SOM Contract do not operate to incorporate the arbitration agreement into the LOU.

[30] Counsel for the appellant contended that the facts in the Federal Court case of *CTI Group Inc v International Bulk Carriers SPA* [2017] 5 MLRA 451 are indistinguishable from those in the *instant case, and that the said authority supports the proposition that incorporation by reference had occurred in this instance.*

[31] In that case, the plaintiff had obtained a Final Award in its favour from the International Court of Arbitration in Paris under the Rules of the International Chamber of Commerce (ICC). The material facts of *CTI Group* are as follows. The document forming the basis of the action was a Share Transfer Agreement (STA) executed by the plaintiff together with several other parties. Two documents were attached to the main contract, namely the STA. These annexures were signed by the plaintiff and the defendant, the latter being a subsidiary of one of the parties to the STA, CNAN. The defendant did not sign the STA itself. However, it issued a limited guarantee and an assignment in respect of the obligations of its parent company, CNAN, under the STA. The guarantee clause stipulated that the defendant would deposit the guaranteed sum of USD 2,450,000.00 into a bank account and pledge the same as security in favour of its parent company. The guarantee and assignment were executed by the defendant and attached to the STA as Annexure 6, while the pledge concerning the deposit was attached as Annexure 7.

[32] The STA provided that the “Appendices” were to bind the parties in the same manner as the STA itself and were to constitute “an integral part” thereof. The STA also contained an arbitration clause stipulating that any dispute arising between the parties should be referred to arbitration under the Rules of the International Chamber of Commerce. When disputes subsequently arose, the plaintiff, together with a third party named Pharaon, commenced arbitration proceedings against the defendant, CNAN, and another third party, relying on the arbitration clause contained in the STA. Initially, the defendant objected to the tribunal’s jurisdiction but did not seek an interim award on that issue. Subsequently, it filed counterclaims, and the Arbitral Tribunal noted that its jurisdiction had thereby been recognised.

[33] Following the issuance of the Final Award in favour of the plaintiff, the High Court of Sabah and Sarawak at Labuan made an order under section 38 of the Arbitration Act 2005 for the recognition and enforcement of the said award. The plaintiff, however, did not annex the appendices to that application, relying solely on the STA. The defendant's application to set aside the order was dismissed by the High Court, but the decision was subsequently overturned by the Court of Appeal. The Federal Court, however, restored the decision of the High Court. In doing so, the Federal Court was mindful that the arbitration agreement was not contained within the annexures and that the party who had executed them, namely the defendant, was distinct from the parties to the principal contract (the STA) which contained the arbitration clause. Counsel for the appellant contended that this authority supports his client's position, as the Federal Court ultimately upheld the recognition and enforcement of the arbitral award.

[34] The High Court distinguished the above mentioned Federal Court case in the following passages:

> [33] However, if one were to read the judgment of the Federal Court carefully, one will realise that the Federal Court was dealing with the question regarding the requirements of s 38 of the Arbitration At 2005 in an application ex parte to recognise an arbitral award. The Federal Court did not decide on the issue as to whether the arbitration agreement had been incorporated into the documents that were signed by the defendant at all.
>
> [34] The Federal Court held that in the circumstances of the case, notwithstanding that at the time of the application under s 38 of the AA 2005, the 2 documents appended to the main contract were not produced to the Court, the applicant had discharged the burden imposed under s 38(2) of the said Act. This can be gleaned from para [100] of the judgment.

[35] We are in full agreement with the reasoning of the High Court that the said case is not relevant. The two leave questions, as well as the entire focus of the Federal Court's judgment, concerned the procedural requirement of registration under section 38 of the Arbitration Act 2005, specifically, whether the Annexure 6 and 7 ought to have been produced. Therefore, the Federal Court did not make a substantive decision on the issue whether the references in the annexures were sufficient to incorporate the arbitration agreement contained in the STA. Furthermore, we observe that the law applied by the Arbitral Tribunal was the law of the seat of arbitration, namely French law. It is also pertinent to note that counsel for the appellant has not indicated whether France is a UNCITRAL Model Law jurisdiction possessing an equivalent to section 9(5) of the Arbitration Act 2005. In any event, the question of whether there had been sufficient incorporation by reference under section 9(5) did not arise for determination before the Federal Court.

Decision

[36] For all the above reasons, we find no appealable error in the decision of the High Court. We dismiss the appeal. By agreement, we order parties to bear own costs.
