**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA**
**(BIDANG KUASA RAYUAN)**
**RAYUAN SIVIL NO. 02-03-01/2012 (W) &**
**RAYUAN SIVIL NO. 02-02-01/2012 (W) &**

ANTARA

**AJWA FOR FOOD INDUSTRIES CO (MIGOP), EGYPT … PERAYU**

DAN

**PACIFIC INTER-LINK SDN BHD … RESPONDEN**

(Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Sivil No. W-02(NCC)-130-2011

Antara

Ajwa For Food Industries Co (Migop), Egypt … Perayu

Dan

Pacific Intr-Link Sdn Bhd … Responden

Coram: Zulkefli bin Ahmad Makinudin, CJ (Malaya)
Richard Malanjum, CJ (Sabah-Sarawak)
Suriyadi Halim Omar, FCJ
Hasan bin Lah, FCJ
Zaleha Bt. Zahari, FCJ

## JUDGMENT OF THE COURT

Introduction

1. There are two appeals before this Court. They are in respect of two related appeals by the appellant against the decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court based on common issues. Before us the parties have agreed to refer to the Records of Appeal filed under Civil Appeal No. 02-03-01/2012(W) and our decision in Civil Appeal No. 02-03-01/2012(W) will bind the parties in respect of the other Civil Appeal No. 02-02-01/2012(W).

2. Leave to appeal was granted by this Court in respect of both appeals and the questions of law framed for determination are as follows:

Question 1

Whether for the purpose of section 9(5) of the Arbitration Act 2005, the agreement in writing where a reference is said to be made to a document containing an arbitration clause must satisfy the conditions of an agreement in writing as set out in section 9(4) of the Arbitration Act, 2005.

Question 2

Whether an arbitration agreement in writing in respect of specific transactions, can be constituted by reference in an

agreement to a document containing an arbitration clause pursuant to section 9(5) of the Arbitration Act 2005, where:

(i) the document containing an arbitration agreement is not attached to the purported agreement or otherwise published; and/or

(ii) notice of the document containing an arbitration clause is purportedly founded on past conduct of the parties in referring to arbitration disputes arising out of unrelated transactions.

Background Facts

3. The relevant background facts of the case may be summarized as follows:

(1) The respondent had initiated the two arbitration proceedings against the appellant alleging that the appellant had failed to take delivery of palm oil products which the appellant had ordered from the respondent pursuant to written contracts which contained arbitration clauses.

(2) Before the High Court the appellant filed two separate applications to set aside or vary two arbitration awards dated 13.4.2010 made by tribunals constituted under the Palm Oil Refiners Association of Malaysia ["PORAM"] Rules of Arbitration and Appeal. The said PORAM awards are:

(a) Award in Arbitration Reference No. A296 which awarded damages in the sum USD 2,261,100.00 to the respondent; and

(b) Award in Arbitration Reference No. A272 which awarded damages in the sum USD 1,374,200.00 to the respondent.

(3) It is undisputed that parties had always dealt in an informal basis. The appellant did not dispute purchasing the products from the respondent. The appellant admitted that agreements were concluded through telephone conversations and email exchanges prior to any formal documentation being exchanged for confirmation. The appellant however contended that it never agreed to refer disputes to PORAM arbitration.

(4) The arbitral tribunal assumed jurisdiction relying on the following written sales contracts ["Sales Contracts"].

| Arbitration Reference | |
|---|---|
| <u>No. A 296</u> | <u>No. A 272</u> |
| PIL/PO/SC/0449/08 | PIL/PO/SC/0351/08 |
| PIL/PO/SC/0782/08 | PIL/PO/SC/0447/08 |
| PIL/PO/SC/0720/08 | PIL/PO/SC/0448/08 |
| PIL/PO/SC/0722/08 | PIL/PO/SC/0450/08 |

(5) The arbitral tribunal also assumed jurisdiction relying on the so-called standard terms and conditions of sale ["STC"] which the respondent had produced during the arbitration and which it alleged contained the arbitration clause which was agreed to by the appellant.

(6) The appellant alleged that the Sales Contracts which were relied on by the respondent did not contain any specific dispute resolution clause and in most cases, were unsigned. As for the STC, this was a separate document produced during the arbitration which the appellant contended it had never seen nor agreed to.

(7) It is the appellant's case that the PORAM tribunal has no jurisdiction to conduct the arbitral proceedings on grounds that there was no agreement, written or otherwise, to refer disputes arising from the sales transactions.

Findings of the PORAM Arbitration Tribunal

4. The PORAM Arbitral Tribunal upon considering the pleadings and hearing testimonies of both parties' witnesses and taking into account both oral and written submissions of the parties made the ruling on the preliminary issue of jurisdiction in that the Tribunal finds there are contracts in writing between the Claimant (Respondent) and the Respondent (Appellant), incorporating the STC of the Claimant by reference to Arbitration. The Tribunal therefore rules that it has

jurisdiction to hear the dispute. The Tribunal thereafter made and published its Final Award in favour of the respondent.

Findings of the High Court

5. The learned High Court Judge upon examination and review of the evidence led in the PORAM Arbitral Tribunal was satisfied with the findings of the PORAM Arbitral Tribunal and affirmed the decision that the PORAM Arbitral Tribunal has the jurisdiction to hear the disputes between the parties. The learned Judge inter alia had this to say on the issue of jurisdiction:

> "*Having given the both parties submissions on this issue my utmost consideration, I am inclined to agree with the Tribunal finding that here is an agreement to arbitrate the disputes between the parties and that this agreement is by incorporation of the STCs in the sales contract. In my view it is not improbable that the Plaintiff is fully aware of the terms and conditions of the sales contract in particular the dispute resolution/arbitration clause. This is true if one is to consider the long standing trade relationship between the parties and the parties' previous conduct as to the resolution of the disputes in relation to those transactions*."

Findings of the Court of Appeal

6. The Court of Appeal, besides unanimously agreeing with the learned High Court Judge's non interference of findings of facts by the Arbitration Tribunal, had inter alia stated as follows:

> "*23. On the 1st question we need to consider the relevant sections 9(3), 9(4) and 9(5) of the Arbitration Act 2005. Sections 9(3) and 9(4) provide that the arbitration agreement must be in writing and the writing requirement is satisfied if the arbitration agreement is in a document signed by the parties or is in an exchange of letters, telex, facsimile or other means of communication which provide for a record of the agreement. As such, we are of the view that such a written agreement to arbitrate does not mean a formal agreement executed by both parties, so long as the arbitration agreement is incorporated into a written document. Section 9(5) further provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement provided that the arbitration agreement is in writing and the reference is such as to make the clause part of the agreement.*"

The Contention of the Appellant

7. It is the contention of the appellant that in the absence of a written arbitration agreement between the parties, the arbitrators have no jurisdiction to adjudicate a dispute. Learned Counsel for the appellant cited to us in support of his contention the case of **Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation [1999] 4 CLJ 665** wherein the Court of Appeal held inter alia as follows at page 683:

> "*To begin with, it is important to recognize that the foundation of an arbitrator's jurisdiction is the agreement entered into between the disputants. Absent such an agreement, there is no jurisdiction*."

8. Learned Counsel then referred to us the Malaysian Arbitration Act 2005 ["the Act"] which maintained the "*in writing*" requirement of arbitration agreements from Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 in its original form. This is found in section 9 of the Act where it is expressly stated:

> "*(1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*

*(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.*

*(3) An arbitration agreement shall be in writing.*

*(4) An arbitration agreement is in writing where it is contained in –*

*(a) a document signed by the parties;*

*(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or*

*(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.*

(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.*"

9. Based on the above provision of section 9 of the Act, it was contended for the appellant that the arbitral tribunal in determining its own jurisdiction in this case had to ask itself whether the respondent has discharged the burden of establishing the existence of an agreement between the respondent and the appellant on the manner in which disputes between them should be adjudicated.

10. Learned Counsel for the appellant vehemently argued that the STC relied on by the respondent is a separate document from the Sales Contracts. It was also submitted for the appellant that there is no evidence that the STC is a genuine or even contemporaneous document used in transactions between the parties. It was further submitted for the appellant there is no reference to the STC any documentary evidence before the arbitral tribunal which signify that the appellant had seen and agreed to these particular terms in each of the transactions in question. The so-called reference to the STC in the Sales Contracts to the appellant is ambiguous. It merely states:

> "*All other terms, conditions and rules not in contradiction with the above, as per PIL's terms and conditions*."

11. It is the contention of the appellant that the STC was not attached to the Sales Contracts and it was not sent to the appellant or otherwise referred to in a specific unambiguous manner. As such no notice of the STC can be attributed to the appellant. It follows that the STC cannot be said to have been incorporated into the agreement between the parties by reference such as to make it part of the agreement between the parties.

12. Learned Counsel for the appellant raised the question of the sufficiency of words that purport to incorporate arbitration agreements by reference. On this point it was submitted that clear language is required to oust the jurisdiction of the courts. The statutory requirement for an arbitration to be in writing is a clear indication that

a party is not to be regarded as relinquishing access to the courts lightly. An arbitration clause is an independent and self-contained contract, and is not to be regarded as merely another term in the main contract which can be incorporated by reference to that main contract. It is therefore submitted for the appellant that the arbitral tribunal should have but failed to determine whether there was a clear enough intention from the words used in the Sales Contracts as a matter of construction, that the appellant agreed to the incorporation of the arbitration clause in the STC. If it had applied the correct analysis, the arbitral tribunal would not have found clear intention of the appellant to refer disputes to PORAM arbitration.

13. The appellant also raised an issue that there was a unilateral imposition of the STC into the Sales Contracts by the respondent. At the time the Sales Contracts were concluded, there was no agreement by the appellant to refer disputes to arbitration. More importantly, it was submitted that there was no agreement to accept any additional terms appearing in the STC after the contracts of sale were concluded.

14. Learned Counsel for the appellant further contended that the facts which appear to have swayed the decision of the arbitral tribunal were that the appellant and the respondent have had a long trading relationship for over twenty years and that there was past practice for both parties to refer their disputes to PORAM arbitration. Taking these facts at face value, it was submitted that the arbitral tribunal had in effect regarded any agreement to arbitrate from past

transactions to be binding on the current transactions which are in dispute, which is clearly an error. An arbitration commenced by reference to trade usage, custom or previous course of dealings most certainly does not meet the written form requirement of an arbitration agreement and such arbitration agreements are non-existent. [**See the case of H. Small Ltd v. Goldroyce Garment Ltd (1994) 2 HKC 546**].

Decision of this Court

15. The principal issue for the determination of this Court is whether there exists written agreement to refer the disputes in question for arbitration under the PORAM Rules of Arbitration within the meaning of section 9(5) of the Act. Section 9(5) of the Act provides as follows:

> "*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*."

16. The appellant's case on jurisdiction is directed on the basis that the appellant never signed or sighted the four Sales Contracts and the respondent's STC incorporated into the Sales Contracts. It follows as contended by the appellant that the arbitration agreement contained in the STC is not binding and does not confer jurisdiction

on PORAM Arbitral Tribunal. However, in our view this is essentially a question of whether there is in fact a contractual relationship between the parties containing arbitration clause or agreement, specifically stated or by imputation gathered from the materials forming part of the contract between the parties. We agree with the submission of the respondent that there exists an arbitration agreement between the parties relying on the said four Sales Contracts and Clause 31 of the STC which reads as follows:

> "*All disputes under the Sales Contract together with this STC shall be resolved amicably but if the dispute cannot be resolved then parties will opt for arbitration in Kuala Lumpur under PORAM Rules of Arbitration and Appeal. All legal matters will be governed and interpreted in accordance with the laws of Malaysia and subject to the exclusive jurisdiction of the Malaysian court in Kuala Lumpur*."

17. It is our considered view that the Sales Contracts were the restatement and confirmation of the contracts between the appellant and the respondent. On the question of whether there is an agreement between the parties to refer future disputes to arbitration useful reference can be made to a passage from **The Law and Practice of Commercial Arbitration in England** by **Mustill and Boyd (2nd Ed.)**, wherein inter alia it is stated at page 105 as follows:

"*It is unusual to find an agreement to refer future disputes to arbitration completely isolated from any other contractual relationship. The agreement almost always forms part of or is at least ancillary to, some underlying contract. If the agreement takes this form, three questions must be considered when determining whether there is in existence a binding agreement to arbitrate:*

*(i) Did the underlying contract itself come into existence?*

*(ii) If so, does it incorporate an agreement to submit future disputes to arbitration?*

(iii) *If so, are the terms of that agreement sufficiently certain to be enforceable?*"

18. Based on the above passage as regards factors to consider in determining whether there exists a binding agreement to arbitrate, we shall now examine whether there is a proper contract entered into between the parties. It is a question of whether or not the said four Sales Contracts constituted the agreement to arbitrate between the parties as contended by the respondent or that it was merely an oral contract as contended by the appellant thus excluding the STC.

19. It is to be noted that the respondent and appellant have known and dealt with each other in commercial transactions for a considerable period of time but more regularly during the last five years before the present dispute where the appellant had regularly purchased from the respondent palm oil products to meet the raw

material requirements for its factory. For the respondent it was submitted and proven through the evidence adduced before the PORAM Tribunal that it conducts its business with its buyers including the appellant in accordance with the STC. The sale prices of the respondent's supply contracts are determined at the option of the buyer through one of two pricing methods as set out in clause 6 of the STC which the appellant had full knowledge through the course of previous dealings.

20. We noted that the respondent had shown the evidence before the arbitration tribunal that it had issued and faxed to the appellant the said four Sales Contracts. The appellant had not rebutted this evidence. We find that there were no such records supporting the appellant's allegation of oral contract concluded between the two parties. The specific reference to shipment contracts in the appellant's emails and its request to defer shipments all point to the sales as having been confirmed in the Sales Contracts issued by the respondent to the appellant.

21. We are of the view when the circumstances and facts of the case are properly considered, the evidence does not support the formation of oral contracts but point invariably to the four Sales Contracts as constituting the true and proper agreement between the parties. These findings of the Arbitration Tribunal had been affirmed by the Courts below. As such we find there is no ground for us to interfere with these finding of facts.

22. On the question of whether the Sales Contracts are binding without the signature, we agree with the submission of the respondent that the Sales Contracts are not subject to any condition that they be signed before coming into effect. It is common knowledge that international agreements between parties doing business from different parts of the world ranging especially in international sales of goods and charter parties are concluded and performed without the need for signatures, so long as parties have agreed on the terms. Likewise, the Sales Contracts setting out the agreed terms, despite the lack of signature as in the present case are valid and enforceable contracts. On this point we would refer to the two English cases of **Baker v. Yorkshire Fire and Life Assurance Company [1892] 1 QB 144** where it was held that it is not necessary that in all cases the written agreement to refer the matter to arbitration must be signed by both parties; and **Morgan v (W) Harrison Ltd [1907] 2 Ch 137 (CA) at p 104** where the Court held that an arbitration agreement may be deduced from correspondence between the parties.

23. In the local case of **Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd [1995] 3 CLJ 9**, **Mahadev Shankar** JCA in delivering the Judgment of the Court of Appeal was of the view that the fact that the appellant there had not dated or signed the sale and purchase agreement did not mean that there could be no concluded contract evidenced in writing. His Lordship was also of the view that where a contract had been signed by one party only, it could be enforced

where there was evidence, such as part performance by one party and acceptance by the other, that the other party had elected to be bound by it. In the present case, the appellant's emails to the respondent seeking deferment of shipments and then performance fully satisfy the criteria that the Sales Contracts are binding between them.

24. On the issue of whether there is an incorporation of the STC and arbitration clause into the Sales Contracts we noted the Sales Contracts prominently incorporate the STC with the caption "ALL OTHER TERMS, CONDITIONS AND RULES NOT IN CONTRADICTION WITH THE ABOVE AS PER PIL'S TERMS AND CONDITIONS." In our view as there is a specific mention in the Sales Contracts that all terms and conditions of the respondent's STC will be applicable, the intention of the parties is clear that arbitration clause would also be applicable.

25. We are of the view that an arbitration agreement need not be signed. Sections 9(3) and 9(4) of the Act provide that the arbitration agreement must be in writing and the writing requirement is satisfied if the arbitration agreement is in a document signed by the parties or is in an exchange of letters, telex, facsimile or other means of communication which provide for a record of the agreement. As such 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. Section 9(5) of the Act further provides as follows:

> "*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*."

26. Section 9(5) of the Act therefore clarifies that the applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration made "*by reference*". Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract. [**See the case of Astel-Peiniger Joint Venture v. Argos Engineering & Heavy Industries Co Ltd [1994] 3 HKC 328**]. 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.

27. On the contention of the appellant that the Courts below had been swayed in coming to their conclusion and decision in favour of the respondent that there was an agreement to refer their disputes to arbitration based on past conduct and transactions of the parties, we are of the view the Courts below were not in error. Such previous conducts and transactions of the parties were merely considered for the purpose of imputing knowledge of the appellant of the provisions of the STC and the arbitration agreement. On this point we would refer to the case of **Frank Fehr & Co. v. Kassam Jivraj & Co. Ltd [1949] 82 LI.LR 673**. The issue which arose for consideration was whether there was an agreement to arbitrate. The arbitration agreement was contained in a printed form which the buyer had sent to the seller. The seller never signed it but instead sent a cable acknowledging the receipt of the printed form. The English Court of Appeal in that case took into account the course of conduct between the buyer and the seller, which often took the form of cables and airmail and ruled inter alia that:

> "*Bearing in mind the course of dealing between the parties and the nature of the transaction, a firm contract was concluded between the seller and the buyer and the seller's cable recognizing the existence of a printed form of the contract (which to their knowledge contained the arbitration clause) satisfied the requirement of section 27*

*of the Act that there should be a "written agreement to submit*".

Conclusion

28. For the reasons abovestated we would answer the two questions of law posed for our determination as follows:

(1) There is no requirement under the Act that where a reference is said to be made to a document containing an arbitration clause in an agreement, that agreement must be signed. In the present case, it is clear that the contract of sale was in writing and satisfies the requirement of section 9(4) of the Act. That agreement in writing incorporates the STC which contains the arbitration clause and satisfies the requirement of section 9(5) of the Act.

(2) Section 9(5) of the Act does not require that the STC which contains the arbitration agreement being attached or published. It is sufficient that the incorporation is by notice in the document.

In the result we would dismiss the two appeals with costs and affirm the decision of the Court of Appeal. We award costs of RM30,000/- for the two appeals to the respondent. Deposit is to be refunded to the appellant.

t.t.
(ZULKEFLI BIN AHMAD MAKINUDIN)
Chief Judge of Malaya

Dated: 16th July 2013

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