Tindak Murni Sdn Bhd
v
Juang Setia Sdn Bhd (and Another Appeal)

Federal Court – Civil Appeal Nos. 03-2-11/2018(B) and 02(i)-104-11/2018(B) Tengku Maimun Tuan Mat CJ, Azahar Mohamed CJ (Malaya), Nallini Pathmanthan, Vernon Ong Lam Kiat and Abdul Rahman Sebli FCJJ

February 17, 2020

Arbitration *– Judgment in default – Stay and setting aside – Appeal – Respondent initiated court proceedings and obtained judgment in default despite agreement to arbitrate – Whether agreement between parties to arbitrate should be subordinated to judgment in default obtained in court proceedings contrary to the terms of the governing contract thereby rendering the agreement to arbitrate nugatory – Whether the court in hearing an application to set aside a judgment in default where a valid arbitration clause is binding on the parties, should consider the merits or existence of the disputes raised – Arbitration Act 2005, ss 9(1), (2), 10*

The appellant had entered into a building construction contract with the defendant. The contract was a standard form Pertubuhan Akitek Malaysian contract. Clause 34 of the said contract specifically provided that all disputes between the parties are to be referred to arbitration. The respondent subsequently terminated the contract as a result of the unresolved disputes between the parties and commenced proceedings in the High Court claiming payment of monies allegedly due and owing to it for work done. It thereafter proceeded to enter judgment in default against the appellant. The High Court upon the application by the appellant, set aside the judgment in default on the ground that there was a defence on the merits and as there was a valid arbitration clause which was binding on the parties. The proceedings were accordingly stayed pending referral of the disputes to arbitration.

The appellant appealed separately against the setting aside of the judgment in default and against the stay pending arbitration. The Court of Appeal found in favour of the appellant and reversed the High Court's decision to set aside the judgment in default and restored the said judgment. Based on its finding that the judgment in default was regular, the Court of Appeal proceeded to allow the appeal against the stay of proceedings pending arbitration without considering or addressing the matter. Hence the instant appeal on the following questions of law namely, whether a judgment in default can be sustained when the plaintiff who obtained the said judgment is bound by a valid arbitration agreement/clause and the defendant has raised disputes to be ventilated via arbitration pursuant to the arbitration clause ("Question 1"); and whether the court in hearing an application to set aside the judgment in default where a valid

arbitration clause is binding on the parties, should consider the merits or existence of the disputes raised by the defendant ("Question 2").

In support of its appeal the appellant contended inter alia that the Court of Appeal had erred in failing to consider the arbitration clause and its effect in light of s 10 of the Arbitration Act 2005 ("the Act") and in dealing solely with the merits of the dispute and concluding that there was no defence on the merits. The respondent in reply submitted inter alia that the appeal with regard to the default judgment had to be determined first as there would be no need to consider the appeal on the stay if the default judgment is maintained.

Issue

Whether an agreement between parties to arbitrate should be subordinated to a judgment in default obtained in court proceedings contrary to the terms of the governing contract and thereby effectively rendering the agreement to arbitrate nugatory.

Held, allowing the appeal with costs of RM20,000 to the appellant subject to allocator, setting aside the order of the Court of Appeal and reinstating the order of the High Court; Questions 1 and 2 answered in the negative

1. Applying s 9(1) and (2) of the Act, it follows that clause 34 of the contract comprises an arbitration agreement which stipulates that all disputes "shall" be referred to arbitration. The use of the word "shall" underscores the mandatory nature of the agreement between the parties. Hence all disputes arising under the contract are to be referred to arbitration unless the arbitration agreement in clause 34 is deemed null, void, inoperable or incapable of being performed. [*see p 398 paras 43-46; p 400 para 49*]

2. From the statutory perspective, s 10 of the Act remains applicable even when a judgment in default has been procured. This would mean that the court is bound to consider the matters set out in s 10(a), (b) and (c) of the Act notwithstanding the judgment in default. In this regard, by initiating the court proceedings, the respondent had thereby breached the arbitration agreement as contained in clause 34 of the contract. The said judgment in default cannot or ought not to act as bar to arbitration. It would render the arbitration agreement nugatory if the commencement of litigation by the respondent in breach of clause 34, is condoned. [*see p 398 para 48(i) - p 399 para 48(iii); p 401 para 53(a) - p 402 para 53(a)*]

3. The application for stay pending arbitration raised a jurisdictional point which the court was bound to consider. This could only have been done had the Court of Appeal considered the form and substance of the appeals in totality and appreciated the significance of both applications and which applications clearly, were intertwined. [*see p 399 para 48(iv) - p 400 para 48(iv); p 408 para 72 - p 409 para 72*]

4. In the circumstances and notwithstanding the initiation of the civil suit and unless the arbitration agreement is null, void or inoperative, it was incumbent upon the court to carry out its function under s 10 of the Act namely, to refer the dispute to arbitration. The failure by the Court to Appeal to consider these issues amounts to a fatal flaw, warranting appellate intervention. [*see p 400 paras 49-50; p 408 para 72 - p 409 para 72*]

5. By virtue of clause 30.3(ii) and based on the use of the words "shall be referred to an arbitrator for judgment under clause 34.0" therein, disputes or differences relating the employer's i.e. the appellant's rights to set-off or counterclaim or any allegations of defective work, are mandatorily required to be referred to arbitration. [*see p 403 para 53(b) - p 404 para 53(b); p 408 para 72 - p 409 para 72*]

6. Advocates and solicitors have an overriding duty to the court and ultimately the administration of justice as a whole and are duty bound not to suppress facts or law which are either against their client's case or does not support it. Suppressing or deliberately presenting a legal position that does not fully disclose the facts or the law would be a grave dereliction of the responsibilities of an advocate and solicitor. [*see p 405 para 55*]

7. Where a passage in a judgment is sought to be relied upon, it is incumbent upon counsel to set out and explain:

   (a) how the passage cited is applicable to the matter before the court;

   (b) the nature of the case cited;

   (c) the facts of the case, particularly whether and how such facts are relevant, similar or distinguishable from the matter before the court;

   (d) the context in which the statement relied upon was made;

   (e) whether the statement amounts to the ratio or is obiter;

   (f) whether the case is being cited for a principle of general application; and

   (g) whether the statement comprises an expansion of an existing principle;

   failing which, such randomly cited passage would be of little or no assistance to the court in adjudicating the matter. [*see p 407 para 67*]

8. Res judicata is inapplicable to the present factual and legal matrix particularly when the judgment in default is being actively sought to be set aside. The attempt to stifle the appellant from having its case heard by way

of arbitration as agreed upon, amounts to a breach of the fundamental principles of natural justice. [*see p 407 para 69 - p 408 para 69*]

9. The effect of clause 34 is not to subordinate a judgment in default neither does s 10 of the Act have the effect of subordinating a judgment in default. Bearing in mind the agreement by the parties for arbitration to be the sole and exclusive mode of dispute resolution, the breach of the said agreement and the subsequent obtaining of the judgment in default by the respondent cannot then be said to amount to a subordination of a judgment by an arbitration clause. [*see p 408 para 70*]

10. On the facts and in the circumstances, the Court of Appeal had erred in arriving at the decision that it did. In the premises appellate intervention is warranted to reverse the decision of the Court of Appeal and to reinstate the decision of the High Court. [*see p 408 para 72 - p 410 para 75*]

Cases referred to by the court

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 AMR 2559; [1995] 3 MLJ 189, SC *(ref)*
Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646; (1937) 53 TLR 689, HL *(ref)*
Hasil Bumi Perumahan Sdn Bhd & 5 Ors v United Malayan Banking Bhd [1994] 1 AMR 297; [1994] 1 CLJ 328, SC *(ref)*
Henderson v Foxworth Investments Ltd [2014] UKSC 41, SC (Scotland) *(ref)*
Jaginder Singh & Ors v AG [1983] CLJ (Rep) 176, FC *(ref)*
King v Hoare (1844) 13 M & W *(ref)*
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] AMEJ 0743; [2016] 2 MLJ 428, CA *(ref)*
Tjong Very Sumito and Ors v Antig Investments Ptd Ltd [2009] SGCA 41, CA (Sing) *(ref)*
TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 1 LNS 288, CA *(ref)*
Virgin Atlantic Airways Ltd (respondent) v Zodiac Seats UK Ltd [2013] UKSC 46, SC *(ref)*

Legislation referred to by the court

Malaysia
Arbitration Act 2005, ss 8, 9, 9(1), (2), 10, 10(1)
Contracts Act 1950, s 65
Federal Constitution, Articles 121(3), 123

Other references

Professor Sundra Rajoo and Dr Thomas R Klotzel, *"UNCITRAL Model Law & Arbitration Rules – The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules 2018*", Sweet & Maxwell, 2019, pp 30-31

Justin Voon and *Cheng Sing Yih* (Justin Voon Chooi & Wing) for appellant
Chew Chang Min, Liza Chan Sow Keng and *Shareen Tan Sze Ying* (Liza Chan & Co) for respondent

Appeal from Court of Appeal – Civil Appeal Nos. B-03(IM)(NCvC)-102-12/2017 and B-02(IM)(NCvC)-2542-12/2017

Judgment received: February 26, 2020

Nallini Pathmanthan FCJ

Introduction

[1] When the governing contract between two parties provides for an agreement to arbitrate, should that arbitration agreement be subordinated to a judgment in default obtained in court proceedings, contrary to the terms of the governing contract and effectively rendering the agreement to arbitrate, nugatory?

[2] This was the issue in the two related appeals before us. It necessarily involves a comprehension and application of s 10 of the Arbitration Act 2005.

[3] In the instant case, one of the contracting parties initiated court proceedings, notwithstanding the existence of an arbitration clause. As no appearance was entered by the other party, judgment in default was obtained. When an application to set aside the judgment in default fell to be determined, together with an application for a stay pending arbitration, the issues before the courts below included the following:

(a) Whether the arbitration agreement or the proceedings in court obtained despite the agreement to arbitrate took precedence;

(b) Whether the judgment in default ought to be set aside.

[4] On September 19, 2019 we heard both appeals one after the other in relation to the following questions of law:

1) Can a judgment in default in court be sustained when the plaintiff who obtained the judgment in default is bound by a valid arbitration agreement/clause and the defendant has raised disputes to be ventilated via arbitration pursuant to the arbitration clause?

2) Should the court in hearing an application to set aside the judgment in default where a valid arbitration clause is binding on parties consider the "merits" or "existence" of the disputes raised by the defendant?

[5] We allowed both appeals, answered both questions in the negative, and restored the decision of the High Court. Below we set out our full reasons for doing so.

Salient factual background and chronology of court proceedings leading to these appeals

[6] The appellant before us, Tindak Murni Sdn Bhd was the defendant in the High Court at Shah Alam in Civil Suit No. BA-22-NCvC-70-02/2017 ("the civil suit"). The respondent, Juang Setia Sdn Bhd, was the plaintiff that initiated the civil suit.

[7] As stated earlier Tindak Murni Sdn Bhd, the employer ("employer") and defendant in the civil suit, entered into a building construction contract with Juang Setia Sdn Bhd, the contractor ("contractor") and plaintiff in the civil suit.

[8] The building contract is dated June 1, 2015. It related to a project for the construction of the remaining portions of a main access road, earthworks and infrastructure works in relation to 428 condominium units in Dengkil, Selangor. It is a standard form Pertubuhan Akitek Malaysia ("PAM") contract. Disputes arose between the parties resulting in the contractor initiating the civil suit. The suit was initiated notwithstanding the clear and unambiguous provision requiring parties to refer any dispute or difference arising between them in relation to any matter arising in connection with the contract, to arbitration.

Salient clauses of the building contract

[9] *Clause 34* of the contract provides for an agreement to arbitrate in respect of any and all disputes arising between the parties in relation to the contract.

[10] *Clauses 34.2 to 34.6* provide for the process of arbitration and the provision of an award, which is binding on the parties.

[11] *Clause 34.4* stipulates that the arbitrator shall have power to open up, review and revise any, inter alia, certificate and to determine all matters in dispute submitted to him as if no such certificate had been given.

The dispute

[12] Works proceeded under the contract. On January 29, 2016, the architect issued a certificate of practical completion certifying that the works were satisfactorily completed.

[13] The contractor maintained that the employer failed to make payment of a sum totalling RM1,702,870-37 due to it. The parties entered into negotiations in respect of this dispute, but failed to resolve it. This resulted in the contractor issuing a "notice of determination" on August 29, 2016. The effect of this notice was to give the employer seven days to remedy the breach of the agreement. There was no response from the employer as a result of which the contractor issued a notice of termination of the contract pursuant to clause 26.1(i) of the contract.

[14] The contractor then filed the civil suit. The claim was for the sum alleged to be owing to it under three interim certificates amounting to RM2,684,924-55 being the value of works done.

[15] The employer paid the contractor the sum of RM1,143,149-65, maintaining, inter alia, that there was a dispute between the parties relating to material defects, warranting a set-off or complete defence to the claim.

[16] No appearance was filed within the requisite time period allowed, as a consequence of which the contractor obtained a judgment in default against the employer on March 1, 2017.

[17] The employer then filed a notice of application dated April 10, 2017 to set aside the judgment in default. The bases for the application were that:

(a) The employer had valid disputes against the contractor's claims; and

(b) The existence of the arbitration clause.

[18] The application to set aside the judgment in default was first heard before the registrar of the High Court who determined that there was a defence on the merits in that there were disputes and/or triable issues justifying the matter being heard on its merits. Accordingly the judgment in default was set aside on July 31, 2012.

[19] The employer as defendant did not file a defence as this would constitute a "step in the proceedings" precluding the referral of the matter to arbitration. An application for a stay pending arbitration instead was filed on August 10, 2017. The objective was to stay the court proceedings pending arbitration premised on the arbitration clause.

[20] The contractor appealed to the judge in chambers against the decision of the registrar. The judge heard both:

(a) The appeal against the order setting aside the judgment in default; and

(b) The application for a stay pending arbitration.

[21] The judge:

(a) Dismissed the appeal against the setting aside of the judgment in default; and

(b) Allowed the employer's application for a stay pending arbitration on November 14, 2017.

[22] In so determining the High Court judge found, inter alia that:

(i) There was a defence on the merits as there were issues or disputes of fact that required resolution at trial, in relation to the employer's contention

that there were defects in the work undertaken which precluded recovery of the sum claimed by the contractor; and

(ii) There was a valid arbitration clause that parties had agreed to be bound by. Applying s 10 of the Arbitration Act 2005, the judge found that there was nothing to show that the arbitration agreement between the parties was null and void, inapplicable, or inoperative. The court proceedings were therefore stayed pending referral of the dispute to arbitration.

[23] The contractor then filed two appeals to the Court of Appeal against the decision of the High Court, one in respect of the judge upholding the registrar's decision to set aside the judgment in default and the other against the grant of the stay pending arbitration. On May 3, 2018, the Court of Appeal:

(i) Allowed the contractor's appeal, reversed the decision of the High Court to set aside the judgment in default, effectively granting judgment to the contractor on the grounds that there was no defence on the merits; and

(ii) Allowed the contractor's second appeal in relation to the stay pending arbitration, effectively refusing to stay the court proceedings pending arbitration.

[24] In essence the Court of Appeal dealt solely with the setting aside of the judgment in default. Having concluded that the judgment in default was erroneously set aside, it did not consider or address the application for a stay pending arbitration.

[25] The Court of Appeal dealt with the two applications (i.e. the setting aside and the stay) separately (as did the High Court), as if the two had no nexus whatsoever with the other. In dealing with the application to set aside the judgment in default, the Court of Appeal undertook an extensive study of and provided a treatise on the law relating to certificates of payment.

[26] From paragraphs 31 to 57 of its judgment, it focussed solely and intricately on this area of the law, citing a multitude of cases to support the contention that certificates of payment are final in nature.

[27] Nowhere is there any mention of the arbitration clause nor the law relating to arbitration. The Court of Appeal determined that the certificates of payment in dispute were in fact, conclusive. It thereby effectively dismissed outright any possibility of defects in the work done. It then determined that there were no merits in the defence, and that the High Court had erred in setting the judgment in default aside. The Court of Appeal then allowed the contractor's appeal, restoring the judgment in default. The application for a stay pending arbitration was simply not addressed at all.

[28] The Court of Appeal approached the appeals by starting with the appeal relating to the setting aside of the judgment in default. Only after that was the stay appeal considered. In view of the fact that they had decided that the judgment in default was to be restored, the only possible conclusion that they could come to was that the stay be dismissed. It was entirely untenable for them to conclude that the stay ought to be allowed in the face of their finding that the judgment in default was regular. It was their manner of approaching the two appeals that led to this result. We were of the view that the approach adopted by the Court of Appeal was flawed, as we analyse further below.

Analysis of the submissions before the Federal Court

(I) The approach to be adopted by the courts in dealing with the two appeals

[29] What approach is to be undertaken by a court faced with two applications of this nature? Should the appeals have been considered sequentially but in isolation without any consideration whatsoever of the other? Or should the appeals have been heard together such that the issues arising in both applications were available for the court to consider and then determine which of the two should be accorded priority?

[30] In other words, enabling the court to consider, in light of the express provisions of s 10 of the Arbitration Act 2005 and the express provisions of the governing contract between the parties, whether the judgment in default ought to be subordinated to the agreement to arbitrate.

(II) Submissions for the employer prosecuting the appeals

[31] Counsel for the employer (the appellant) submitted that the Court of Appeal had erred in failing entirely to consider the arbitration clause and its effects, particularly in light of s 10 of the Arbitration Act 2005. It had instead erroneously proceeded to deal solely with the "merits" of the "dispute", concluding that there was no defence on the merits.

[32] The Court of Appeal ought, it was contended, to have considered that a valid arbitration clause together with the disputes raised by the employer comprised a valid defence to the judgment in default of appearance. The employer was prejudiced irrevocably by the court's failure to acknowledge or recognise its legal and contractual rights to have the dispute arbitrated. The employer had never acquiesced to the court proceedings and to that end had not taken "any step in the proceedings".

[33] With respect to s 10 of the Arbitration Act 2005 and general law, it was submitted that it was neither the intention nor purpose of the law that a judgment in default should supersede or override an agreement to arbitrate as contained in the arbitration clause.

[34] The contractor had breached the agreement to arbitrate by filing the civil suit when there had been neither waiver nor concession of the agreement to arbitrate. No prejudice would be occasioned to the contractor by the setting aside of the judgment in default and staying the matter pending arbitration, as the dispute would then be dealt with on its merits as parties had originally agreed. By reason of the decision of the Court of Appeal, the employer had effectively been shut out or deprived of its rights to have the matter determined by arbitration.

[35] When the appeals came up for disposal before the High Court, the judgment in default had already been set aside. Neither had the employer taken any step in the proceedings. Pursuant to s 10 of the Arbitration Act 2005 the stay pending arbitration granted by the High Court ought to have been upheld by the Court of Appeal. This is more so in light of s 8 of the Arbitration Act 2005 which prescribes a statutory non-interventionist approach by the courts, as well as the principles of party autonomy which underscore the law relating to arbitration.

(III) Submissions for the contractor defending the appeals

[36] Counsel for the contractor submitted that the appeal on the default judgment had to be determined first as there would be no need for the court to consider the appeal on the stay if the default judgment is maintained. His reasons for this were, inter alia, that:

(a) A reading of clauses 30.2 and 30.3(i) warranted the conclusion that payments certified under the interim certificate payments were immediately due and payable and not subject to deductions or set-offs for defective works or otherwise. To this end, it was contended, these payments were "carved out" of the mandatory requirement to arbitrate;

(b) A judgment of the High Court has constitutional force and recognition under Article 121(3) of the Federal Constitution. It stipulates that a judgment of the courts or a judge has full force and effect according to its tenor throughout the Federation and may be executed or enforced accordingly;

(c) The doctrine of merger prevents an arbitration clause from severing a judgment because the cause of action has merged in the judgment and the judgment acquires a higher status per Lord Sumption in *Virgin Atlantic Airways Limited (respondent) v Zodiac Seats UK Limited* [2013] UKSC 46;

(d) Res judicata prevents the arbitration clause from severing the judgment per Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 AMR 2559; [1995] 3 MLJ 189 where Peh Swee Chin SCJ explained the two kinds of estoppel, namely issue estoppel and cause of action estoppel. Reliance was placed on the latter; and

(e) It was also submitted that any subordination of a judgment of the High Court had to be specifically and deliberately legislated.

(IV) The analysis and reasons for our decision

[37] The starting point for an analysis of the issues in these appeals requires firstly a consideration of the arbitration clause in the governing contract so as to ascertain whether it comprises a valid agreement to arbitrate.

[38] The question arises why this should be an initial or primary consideration. The reason is s 10 of the Arbitration Act 2005, which sets out the role of the court when confronted with an application for a stay pending arbitration. It reads as follows:

> A court before which proceedings are brought in respect of *a matter which is the subject of an arbitration agreement* shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (Emphasis ours.)

[39] The emphasised portions make it clear that the first step is to ascertain whether there is in fact an agreement to arbitrate in respect of the dispute in question (see inter alia *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 1 LNS 288).

[40] Section 9 of the Arbitration Act 2005 is relevant here. It is entitled "definition and form of arbitration agreement". Subsection 9(1) defines an "arbitration agreement" to mean "*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*."

[41] The same section goes on to state in subsection 9(2) that an arbitration agreement may be in the form of an arbitration clause in an agreement, or in the form of a separate agreement. The former situation is applicable to the present facts.

[42] In the instant appeals, the building construction contract (as we stated earlier) is based on the PAM form of contract. The contract contains the following arbitration clause, which fulfils the requirements of subsection 9(2) of the Arbitration Act 2005. The agreement to arbitrate is contained *in clause 34* of the governing contract. It reads:

> 34.0 *Arbitration*
>
> 34.1 *In the event that any dispute or difference arises between the Employer,* or the Architect on his behalf, *and the Contractor*, either during the progress or *after completion* or abandonment *of the Works regarding*:
>
> > 34.1(i) *any matter or thing of whatsoever nature arising thereunder or in connection therewith*, including any matter or thing left by this Contract to the discretion of the Architect; or

34.1(ii) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to; or

34.1(iii) *the measure and valuation in sub-clause 30.5(i)*; or

34.1(iv) the rights and liabilities of the parties under Clauses 25.0, 26.0, 31.0 or 32.0 or

34.1(v) the unreasonable withholding of consent or agreement by the Employer or the Architect on his behalf or by the Contractor

then such disputes or differences shall be referred to arbitration.

(Emphasis ours.)

[43] Applying s 9(1) and (2) of the Arbitration Act 2005, it follows that clause 34 of the governing contract comprises an arbitration agreement.

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

[45] The clause read in its entirety warrants the construction that a dispute relating to a claim for monies certified, countered by a defence or set-off of defective works, "shall" be referred to arbitration. The use of the word "shall" underscores the mandatory nature of the agreement between the parties. The fact that the dispute falls within the scope of the arbitration clause further fortifies this conclusion.

[46] It therefore follows that unless the arbitration agreement in clause 34 is null, void, inoperable or incapable of being performed, all disputes arising under the governing contract are to be referred to arbitration.

[47] *In the instant appeals the more pressing question might well be whether the position is any different where one of the contracting parties, the contractor here, had obtained judgment in default in court proceedings, notwithstanding the arbitration clause*.

[48] The plain answer can only be that it makes no difference whatsoever. There are several reasons for this.

(i) Firstly, s 10 stipulates that the court can act only as stipulated under the section. When analysed s 10 only allows consideration of the following matters:

(a) That there subsists an agreement to arbitrate;

(b) That no step has been taken in court proceedings (which is not in issue here);

(c) That the arbitration agreement is not null, void, inoperative or incapable of being performed.

Therefore from the statutory perspective, even when a judgment in default has been procured, s 10 remains applicable. This in turn means that the court is bound to consider the matters set out in (a), (b) and (c) *notwithstanding the judgment in default*. This is particularly so when there are active efforts being made to set aside the judgment in default of appearance such that the matters in dispute can be ventilated fully by way of arbitration.

(ii) The second reason why the judgment in default cannot or ought not to act as a bar to arbitration is that the contractor, by initiating court proceedings, has effectively breached the arbitration agreement. The commencement of court proceedings or litigation amounts to a breach of the arbitration agreement as contained in clause 34.

The breach of the arbitration agreement however remains just that, namely a breach or even a repudiatory breach, but unless and until such a breach is accepted by the innocent party, namely the employer, the contract remains valid and subsisting (see s 65 of the Contracts Act 1950).

In the instant case the "innocent party" namely the employer has, by conduct clearly evinced an intention to be bound by the contract, namely to have the dispute referred to arbitration. This is evident from the application to set aside the judgment in default followed by the application for a stay of proceedings. As such, the contractor cannot then rely on its own breach to seek to impugn or subordinate the agreement to arbitrate. Neither does the agreement to arbitrate stand voided or inoperative or incapable of being performed.

(iii) Thirdly, if the commencement of litigation by the contractor in breach of the agreement to arbitrate in clause 34 is condoned, it would effectively render that agreement nugatory. It would be open to parties to an agreement to stipulate at the outset that the sole and exclusive mode of dispute resolution is arbitration and then renege on the same, in the event of a dispute, with impunity. The intention of the parties at the point in time when the contract was concluded would be effectively undermined.

(iv) Fourthly, the employer's application to stay the court proceedings pending arbitration raised a jurisdictional point which the court was

bound to consider. This could only have been done if the Court of Appeal had considered the form and substance of the appeals in totality and appreciated the significance of both applications. While both applications were indeed separate, i.e. the setting aside of the judgment in default and the stay pending arbitration, it is crystal clear that the two applications (and thus appeals) were inextricably intertwined. It was incumbent upon the Court of Appeal to consider the effect of hearing the first appeal relating to the setting aside in vacuo, as it were, without even mentioning or addressing the stay pending proceedings. That effect was to ignore the existence of an arbitration agreement and to exclude the application s 10 of the Arbitration Act 2005. The Court of Appeal missed an essential jurisdictional issue, namely whether the dispute ought to be dealt with by way of litigation or arbitration.

This was a relevant consideration even when determining the appeal relating to the setting aside of the judgment in default because the fact of the subsistence of the arbitration agreement, a jurisdictional issue, amounted to a matter warranting further investigation. In other words it afforded a defence on the merits (see *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646; (1937) 53 TLR 689 and *Hasil Bumi Perumahan Sdn Bhd & 5 Ors v United Malayan Banking Bhd* [1994] 1 AMR 297; [1994] 1 CLJ 328).

[49] In all these circumstances it therefore remained incumbent upon the court, notwithstanding the initiation of the civil suit by the contractor, to carry out its function as set out in s 10, namely to refer the dispute to arbitration unless the arbitration agreement is null, void or inoperative. The court carries out its prescribed statutory duty by ascertaining:

(a) Whether there is an agreement to arbitrate the dispute;

(b) Whether the arbitration agreement is valid or null, void or inoperative;

Having done so, the following consequences ensue from s 10:

(a) If there is a valid agreement to arbitrate then the court must refer the dispute to arbitration;

(b) If the agreement to arbitrate is null, void or inoperative then the matter/suit need not be referred to arbitration.

[50] The failure of the Court of Appeal to even cite or consider these issues amounts to a fatal flaw, warranting the intervention of this court.

(V) Is the agreement to arbitrate null, void or inoperative or incapable of being performed?

[51] Counsel for the contractor did not submit that the arbitration agreement was null, void or inoperative. As stated earlier the thrust of the argument was simply that a judgment of the court, albeit a judgment in default, could not be subordinated to an arbitration agreement such as that contained in clause 34.

(VI) The contractor's submission that there was no dispute that warranted referral to arbitration

[52] It was also emphasised by counsel for the contractor in the course of the oral hearing before us that the relevant clauses of the governing contract and case-law relating to interim certification was such that its claim was beyond dispute. In other words, the existence of a debt due and owing to the contractor was undisputed. As such the contention was that there was simply ***no dispute*** that warranted referral to arbitration.

[53] With respect this contention is flawed and affords no answer to the employer's application to have the dispute referred to arbitration for the following reasons:

(a) Under s 10 of the Arbitration Act 2005 as it presently stands, there is no question of the court entering into the arena of whether or not a "dispute" subsists between the parties. The role of the court is simply as set out in s 10, which we have explained in extenso above.

This is borne out inter alia by the decision of the Court of Appeal, as comprehensively explained by Anantham Kasinather JCA in *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 1 LNS 288. His Lordship compared the present version of s 10(1) of the Arbitration Act 2005 with the earlier version of the section and stated:

> 24. The present form of s 10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on July 1, 2011 (Act A1395). ***It is generally accepted that the effect of the amendment is to render a stay mandatory unless the agreement is null and void or impossible of performance. The court is no longer required to delve into the facts of the dispute when considering an application for stay.*** … (Emphasis ours.)

The position stated above is therefore trite, namely that the court is not to enquire or investigate whether there subsists a dispute warranting referral to arbitration. That is a matter for the consideration and determination of the arbitral tribunal.

Prior to the amendment to s 10 the courts expended considerable time and effort in determining whether a "dispute" subsisted by virtue of the earlier wording of s 10:

> (1) The court before which proceedings brought in respect of a matter which is the subject matter of an arbitration agreement shall, where 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.* (Emphasis ours.)

(See for example *Tjong Very Sumito and Ors v Antig Investments Ptd Ltd* [2009] SGCA 41 which stated that "*if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered … it is only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement*". This resulted in the courts undertaking an exercise of determining whether a dispute existed between the contracting parties.)

With the removal of limb (b) however, the issue of the subsistence or otherwise of a dispute between the parties is rendered obsolete and irrelevant.

In the textbook entitled "*UNCITRAL Model Law & Arbitration Rules – The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules 2018*" by Datuk Professor Sundra Rajoo (special contributor Dr Thomas R Klotzel),[1] the author discussed the effect of amending s 10 of the Arbitration Act 2005 (at pp 30-31):

> 1.161 The amendment to section 10 removes the courts' power to stay arbitration proceedings where the court is satisfied that there is no dispute between the parties with regard to the matters to be referred to arbitration. The old provision placed an undue restriction on the arbitration process which was not contained in the UNCITRAL Model Law or the New York Convention.
>
> 1.162 In line with Article 8A of the UNCITRAL Model Law, under the current section 10 of the AA 2005 the High Court is under the obligation to refer the parties to arbitration unless the High Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. …

[1] Published by Sweet & Maxwell in 2019.

The merits of the contractor's contention that no dispute subsists between the parties

(b) The second reason why a stay is justified is that there is in point of fact a dispute subsisting between the parties. We are constrained to deal with this issue, notwithstanding our explanation of the law above, as it comprised a substantive part of the contractor's response, in defending the appeals.

The contractor did not submit that clause 34 is invalid, nor that it does not constitute a valid arbitration agreement. It instead attempted to convince the court to accept that this contractual provision does not oblige all disputes to go for arbitration. This in turn is because when clause 34 is read together with clauses 30.2 and 30.3(i), the court is to infer that interim certificates are "carved out" or "removed" from the scope of the arbitration clause.

Clause 30.2 of the governing contract mandates payment of certified sums and specifies how such certificates are to be procured. It states:

> *Issue of Interim Certificates*
>
> During the Period of Interim Certificates stated in the Appendix, the Contractor shall submit details and particulars to the Architect, sufficient for the Architect to consider and ascertain the amount to be stated in an Interim Certificate. Upon receipt of the Contractor's details and particulars, the Architect shall issue an Interim Certificate to the Contractor with a copy to the Employer, and the Contractor shall be entitled to payment thereafter within the Period of Honouring Certificates stated in the Appendix. Provided always that the Architect shall have the discretion to make interim valuations whenever he considers necessary for ascertaining the amount to be stated as due in an Interim Certificate.

Clause 30.3 (i) provides that the employer is not entitled to withhold or deduct any amount certified as due under the certificates by way of set-off or counterclaim or allegation of defective works, unless otherwise expressly provided in the contract. It reads:

> *No Entitlement to Set-Off by Employer in Respect of Amount Stated in Interim Certificates*
>
> Unless otherwise expressly provided in these Conditions, the Employer shall not be entitled to withhold or deduct any amount certified as due under any Architect's certificates by reason of any claims to set-off or counterclaims or allegation of defective works, materials or goods or for any other reasons whatsoever which he may purport to excuse him from making payments of the amount stated to be due in an Interim Certificate.

For the contractor it was submitted that when clause 34 is read with and in the light of clauses 30.2 and 30.3(i), the effect is that disputes on the interim certificates are "carved out" and not subject to arbitration.

It was further submitted that the court must consider the contract in its entirety, give effect to every clause and harmonise each clause with the other clauses.

However in making this submission, counsel for the contractor failed and neglected to bring the attention of the court to the clause immediately following upon 30.3(i) namely clause 30.3(ii) which reads as follows:

> *Disputes of Difference in Respect of Right to Set-Off, to Arbitration*
>
> In the event of any disputes or differences as to any rights of the Employer to set off or to any counterclaim or any allegations of defective works, materials or goods or for any other reasons then such disputes or differences shall be referred to an arbitrator for judgment under Clause 34.0.

It is clear from this clause that the employer enjoys and is entitled to refer any disputes or differences in relation to set-offs or counterclaims or any allegations of defective works or for any other reason whatsoever to an arbitrator under clause 34.

What is clearer still is that by referring solely to clauses 30.2 and 30.3(i), counsel for the contractor chose, deliberately or otherwise, to submit to the court that disputes relating to defective works giving rise in turn to set-offs were effectively NOT to be referred to arbitration as they were carved out. This is patently incorrect given the express provision of clause 30.3(ii). Contrary to what was submitted, it provides that in the event of disputes relating to the employer's right to set-off from the interim certificates by reason of defective works, such disputes were mandatorily required to be referred to arbitration as set out in clause 34. The use of the words "***shall be referred to an arbitrator for judgment under Clause 34.0***" bears this out.

At best, this submission on behalf of the contractor was "selective reading", and at worst concealment of a wholly relevant contractual provision.

(VII) Duty of advocates and solicitors to the court

[54] These submissions by the contractor serve as an appropriate occasion for this court to reiterate the oft-ignored principle that advocates and solicitors are officers of the court. Their overriding duty is to the court, not their clients. As such they are under a duty to provide honest and complete submissions. Integrity is of the utmost importance in advocacy, whether oral or written.

[55] It follows sine qua non that suppression, or deliberately presenting a legal position that does not fully disclose the facts or the law, is a grave dereliction of the responsibilities of an advocate and solicitor. They are duty bound not to suppress facts or law which are either against their client's case, or does not support it, because of their overriding duty to the court, and ultimately the administration of justice as a whole.

[56] On this issue Raja Azlan Shah Ag LP (as his Royal Highness then was) approved of the following passage in *Jaginder Singh & Ors v The Attorney-General*:[2]

> ... The court can dispense justice only if counsel will not mislead, otherwise justice will suffer from the infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of the lawyers if the court itself, in which he seeks redress, is no longer safe to be in the same hands.
>
> (See also the cases cited at paragraphs 8 to 9 of Lord Clarke of Stone-cum-Ebony's speech to the Malaysian Judiciary on September 14, 2011 entitled "*Ethics and Civil Procedure*",[3] the English cases of *Saif Ali v Sydney Mitchell* [1980] AC 198 and *Arthur Hall v Simons* [2002] 1 AC 615 at 686 and 692 (particularly the judgments of Lord Hoffman and Lord Hope in the latter case) as well as the Australian case of *Giannarelli v Wraith, Shulkes v Wraith* [1988] 81 ALR 417 at 421.)

[57] In the instant appeals it is trite that the governing contract must be read and construed holistically and that the parties are not entitled to pick and choose clauses which are in their favour and ignore clauses which do not support their case.

[58] In these circumstances the contractor's submission that there was no dispute warranting referral to arbitration pursuant to clause 34 is misguided and has no merit whatsoever. The Court of Appeal therefore erred in determining that there were no merits in the defence, and that the contractor was undisputably entitled to the sum claimed. The affirmation of the judgment in default was therefore flawed.

[59] In its written submissions, the contractor also alleged inter alia (as summarised above) that a judgment of the High Court has constitutional force and recognition under Article 121(3) of the Federal Constitution. As such it has full force and effect according to its tenor throughout the Federation and may be executed or enforced accordingly. This submission is irrelevant to the issues in this appeal as the validity of a judgment in default in the context of an imminent execution or a winding-up action is not the subject matter of these appeals.

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[2] *Jaginder Singh & Ors v The Attorney-General* [1983] CLJ (Rep) 176 at 178.

[3] Accessed at http://www.kehakiman.gov.my/sites/default/files/ETHICS%20for%20Malaysian%20Judges%20O%202011_.pdf on September 30, 2019.

[60] In these latter cases, undoubtedly a judgment in default stands and may be executed upon and enforced. However the issues here relate to the agreement of the parties to arbitrate, and the failure by the contractor to honour that agreement and to initiate court proceedings, in breach of such agreement. When the judgment in default is in issue and is sought to be set aside to allow the arbitration to prevail, as agreed by the parties, what course of action should be adopted by the court? As we have discussed at length, s 10 comes into play. Therefore the reference to Article 123 is misplaced and fails to address or provide any form of response to the matters to be adjudicated upon here.

[61] The other submission that the doctrine of merger prevents an arbitration clause from "severing" a judgment because the cause of action has merged in the judgment and the judgment acquires a higher status (per Lord Sumption in *Virgin Atlantic Airways Limited (respondent) v Zodiac Seats UK Limited* [2013] UKSC 46) is similarly inapplicable in the instant appeal. A cursory reading of the case discloses that it is a judgment relating to the adjudication of patents which went through a full trial in the English courts. The appeal in the Supreme Court of the United Kingdom relates primarily to the problems arising from the system of parallel jurisdiction for determining the validity of European patents. Its relationship to the instant appeals is completely obscure.

[62] A passage mid-way in the judgment of Lord Sumption appears to have been selected and randomly cited. At paragraph 16 of the judgment, the issue in the appeal is set out, namely that an order of the Court of Appeal upholding the validity of the patent and directing an enquiry as to damages may only be varied by way of an appeal. However no further avenues of appeal were open. The issue before the court was whether one of the parties was entitled to contend in the inquiry that there were no damages because the patent had been retrospectively amended so as to remove the claims held to have been infringed. This in turn depended upon whether the Court of Appeal was correct to state that its order declaring the patent to be valid continued to bind the parties per rem judicatum notwithstanding that the patent was later amended on the basis that it was not valid in the relevant aspects.

[63] It is in this context that Lord Sumption made a statement on the doctrine of merger, in relation to res judicata. He explained the doctrine of merger as treating a cause of action as extinguished, once a judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. He also stated that this principle is a substantive rule about the legal effect of an English judgment which is regarded as of a higher nature and therefore as superseding the underlying cause of action, premised upon a decision dating back to 1844 (*King v Hoare*) (1844) 13 M & W).

[64] The nexus to the present appeals is baffling. This is particularly so, as no rational or legal coherence was drawn between the doctrine of merger and an

application to set aside a judgment in default coupled with a stay pending arbitration.

[65] If it was the intent of counsel to suggest that the cause of action that subsisted was merged in the judgment in default and accordingly the agreement to arbitrate could not survive such a merger, as the plaintiff/contractor's sole right was that on the judgment, then it is a non-starter.

[66] These principles were made by Lord Sumption in the context of res judicata. Res judicata is inapplicable in the present context as the merits of the case have not and were not determined by the contractor simply obtaining a judgment in default, which was sought to be set aside. The fact that the Court of Appeal erroneously upheld the judgment in default and wholly disregarded the agreement to arbitrate, does not afford the contractor the basis to contend in these appeals, (where the Court of Appeal's decision is being challenged) that the agreement to arbitrate stands vitiated by reason of the doctrine of merger ensuing from the principle of res judicata.

[67] Reverting to the issue of advocacy, written or oral, it bears reiterating that if a passage in a judgment is sought to be relied upon, it is incumbent upon counsel to set out and explain:

(a) How the passage cited is applicable to the matter before the court;

(b) The nature of the case cited;

(c) The facts of the case, particularly whether and how such facts are relevant, similar or distinguishable from the matter before the court;

(d) The context in which the statement relied upon was made;

(e) Whether the statement amounts to the ratio or is obiter or

(f) Whether the case is being cited for a principle of general application; and

(g) Whether the statement comprises an expansion of an existing principle.

[68] Otherwise such a randomly cited passage is of little or no assistance to a court in adjudicating on a matter. Similarly the contention that res judicata prevents the "arbitration clause from severing the judgment in default" lacks clarity and coherent legal reasoning.

[69] Res judicata as we know and understand it extinguishes a cause of action once a matter has been adjudicated upon its merits. That is not the case here. These appeals relate to a case where judgment was obtained because no appearance was entered. The defects complained of by the employer were never heard nor dealt with notwithstanding the arbitration agreement. The principle or doctrine cannot therefore "bite". Put another way it is simply inapplicable to the

present factual and legal matrix, particularly when the judgement in default is being actively sought to be set aside. The attempt to stifle the employer form having its case heard by way of arbitration, as agreed between the parties amounts to a breach of the fundamental principles of natural justice.

[70] Finally the submission for the contractor that any subordination of a judgment of the High Court had to be specifically and deliberately legislated is misplaced as the effect of clause 34 is not to subordinate a judgment in default. Neither does s 10 of the Arbitration Act 2005 have the effect of "subordinating" a judgment in default. This is because the parties had chosen and agreed to arbitration as the sole and exclusive mode of dispute resolution in respect of any dispute or difference arising from this contract. The breach of this agreement by the contractor and the subsequent obtaining of a judgment in default cannot then be said to amount to a subordination of a judgment by an arbitration clause.

[71] In point of fact if this form of legal rationale is allowed to persist, as stated earlier, all forms of dispute resolution agreed to between parties in their contracts would be rendered ineffectual and nugatory as it would be open to one party to breach the same and effectively put an end to the agreement to resolve disputes by way of arbitration. The defaulting party would be effectively "rewarded" for breaching the agreement to arbitrate. This is the very mischief which s 10 seeks to prohibit.

Appellate intervention

[72] For the reasons stated above we determined that the Court of Appeal had erred in law in arriving at the decision it did. The Court of Appeal erred in that it:

(a) Failed to give consideration to the nature of the two appeals before it. It simply determined the appeal relating to the setting aside of the judgment in default in vacuo, disregarding the fact that the second appeal related to a stay pending arbitration. This approach was flawed. The Court of Appeal ought to have ascertained the nature of each of the appeals and taken into consideration that one related to a s 10 application, which should therefore have been dealt with first;

(b) Even if the appeal relating to the judgment in default was heard first, the Court of Appeal should have considered that the existence of an agreement to arbitrate coupled with s 10 of the Arbitration Act 2005 warranted the conclusion that this amounted to a defence on the merits. Accordingly the judgment in default ought to have been set aside and the matter referred to arbitration in accordance with the statutory requirements of s 10;

(c) The Court of Appeal erred in that it effectively only considered one of the appeals before it and let the result of that appeal determine the result of the second appeal. In other words the second appeal was never

considered on its merits. It amounted to a failure to adjudicate on the second appeal;

(d) The Court of Appeal erred in failing to consider or give effect to the relevant provisions of the Arbitration Act in failing to consider the arbitration clause and to give effect to the relevant provisions and purpose of the Arbitration Act 2005. If it had done so it would have concluded that the dispute between the employer and the contractor had to be referred to arbitration in accordance with the agreement encapsulated in clause 34 of the governing contract; and

(e) The Court of Appeal erred in its adjudication on the subject matter of the appeal before it relating to the judgment in default in that it erroneously concluded that there was no defence on the merits. If it had read or considered clause 30.3(ii) of the governing contract it would have realised that the employer was entitled to raise allegations of defective works in response to claims by the contractor under the interim certificates and have such dispute/s referred to arbitration.

[73] We were therefore constrained to intervene, reverse the decision of the Court of Appeal, and reinstate the decision of the High Court. In so doing we reminded ourselves of the confines within which this court, as an appellate court, is bound to exercise its powers. It is only to do so in the face of clear errors of law (see *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] AMEJ 0743; [2016] 2 MLJ 428; *Henderson v Foxworth Investments Limited* [2014] UKSC 41).

[74] Applying the foregoing principles, we concluded that the Court of Appeal had wrongly interfered in the decision of the High Court. The High Court judge had not erred in law or on the facts in upholding the setting aside of the judgment in default and in allowing the stay of court proceedings pending arbitration.

[75] We were satisfied that there were clear errors of law in the decision of the Court of Appeal and that it was plainly wrong.

Answers to the questions of law

Question 1: Can a judgment in default in court be sustained when the plaintiff who obtained the judgment in default is bound by a valid arbitration agreement/clause and the defendant has raised disputes to be ventilated via arbitration pursuant to the arbitration clause?

Answer: We answer the question in the negative.

Question 2: Should the court in hearing an application to set aside the judgment in default where a valid arbitration clause is binding on parties consider the "merits" or "existence" of the disputes raised by the defendant?

Answer: We answer the question in the negative.

By way of conclusion we reiterate our decision handed down on September 19, 2019. Both appeals were allowed with costs of RM20,000-00 to the appellant, subject to allocatur. The order of the Court of Appeal was set aside and the order of the High Court reinstated.