

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)**

GUAMAN SIVIL NO: S2-23-181-2008

ANTARA

PANARON SDN BHD

.....PLAINTIF

DAN

CONTROL COMPONENTS INC

.....DEFENDANT

GROUND OF JUDGMENT

This is the defendant's application for an order that all further proceedings in this action be stayed and referred to arbitration pursuant to section 10 of the Arbitration Act 2005 and under the inherent jurisdiction of the Court.

The basis of the application is that ;

- the present dispute ought to be arbitrated in California, United States of America pursuant to section 10 of the Arbitration Act 2005;

- the basis of the present action is a subject of an arbitration agreement between the parties.

Brief Facts

The Plaintiff was appointed as the sales representative agent of the defendant via Sales Representative Agreement (the Agreement) sometime around 1996.

By the Agreement it was agreed that the Plaintiff would undertake to secure orders for the defendant's products within Malaysia. As consideration the defendant agreed to remunerate the Plaintiff up to 10 % of the net invoiced amount for any products that were ordered through the Plaintiff.

On or around 21.9.2007 the defendant issued a notice to the Plaintiff that there were some irregular payments associated with certain trading contract entered into by the Defendant and these irregular payments may have been made via commission agents . Pending investigation, the defendant suspended its dealings with commission agents. The defendant further issued a directive that sales contracts in place before 16th August, 2007 will be executed in the normal way, however for commissions in respect of new shipments and all outstanding prior shipments cannot be paid.

The defendant issued a Bulletin worldwide to the effect that pending investigation they have placed a temporary freeze on all new orders involving agents. The defendant will only accept orders direct from

customers and they will resume dealings with commission agents if and when they have passed the Defendant's clearance process.

During the operational of the Bulletin period, customers of the Plaintiff had made orders directly to the Defendant. The Plaintiff alleges that as a result of orders made directly to the defendant and sales commissions., the defendant has secured certain sums by way of agreed commissions.

Subsequently on 27.2.2008 the defendant terminated the Agreement between the Plaintiff and the defendant.

The Plaintiff alleged that to date the defendant have not provided a basis for the termination of the Agreement. In the light of the termination and the defendant's continued failure to clear the Plaintiff of any wrong doing following from the defendant's Bulletin, the Plaintiff asserts that the words written and published therein were and are defamatory of the Plaintiff. Therefore the Plaintiff claims against the defendant:

- a) An account of all sales of the Products from 21.9.2007 to 27.2.2008;
- b) The defendant do pay the Plaintiff all sums due to the Plaintiff upon taking such account;
- c) The sum obtained by the defendant as a result of orders made directly to the defendant by the Plaintiff's customers;
- d) General damages and exemplary damages.

The Law:

Section 10(1) of the Arbitration Act 2005 provides 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-

- (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.”

Authorities have shown that if parties have agreed to arbitrate in relation to their disputes, then they ought to abide by what have been agreed. (Refer to ***Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd*** [1994] 2 MLJ 97).

The judgment of the Federal Court in the case of ***Tan Kok Cheng & Sons Co Sdn Bhd v Lim Ah Pat*** [1995] 3 MLJ 273, at page 282 states:

“..given an agreement to arbitrate of the conditions set out in section 6 of the Act, a court should lean towards granting stay”.

Issues:

The issue here is whether the Plaintiff's claim fall within the Arbitration clause.

Section 10.5 of the (the Agreement) provides as follows:

“ Any controversy or claim out of or arising to the Agreement shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrators may be entered in any Court....”

The Court would have to determine whether the claims by the Plaintiff in the Suit herein falls within “ any controversy or claim out of or arising to the Agreement”.

In summary, the Plaintiff's claim are for commissions and damages out of the termination of the Agreement between the Plaintiff and the Defendant, and also damages for defamation.

Claims for Commission and damages for termination of agreement

As far as the claims for commissions and damages out of the termination of the Agreement, I am of the view that these claims arises out of the Agreement between the parties.

The claim for commissions is being disputed by the defendant, both as to the amount and the right of the Plaintiff to claim. Besides that the defendant contends that the accounts by the Plaintiff and the

defendant does not tally as to the amount of commissions which is due to the Plaintiff, the Defendant also submits that there are evidence of certain corrupt practice regarding the contracts by the Plaintiff. This will be caught within the United States Foreign Corrupt Practices Act 2000, which, if true, prohibits the Defendant from paying the Plaintiff the said commissions.

Hence the claim on commissions are disputes which is a consequence of the Agreement and therefore falls within the ambit of the Arbitration clause.

As on the issue of the termination of the Agreement, it is no doubt falls within the Arbitration clause. (Refer to ***Heyman & Anor v Darwins Ltd*** [1942] 1 AER 337 which was followed in the Federal Court case of ***State Government of Sarawak v Chin Hwa Engineering Development Co*** [1995] 3 MLJ 237)

Claim for Defamation

The Arbitration Act 2005 does not limit claims to Arbitration to only claims in contract. Refer to section 9 (1) of the same which provides that an “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The arbitration clause in the Agreement provides that “any controversy or claim arising out of or relating to the Agreement” is governed by rules of the American Arbitration Association. This words

“arising out of” is wide enough to encompass any claims that arises out of the Agreement, as there is sufficiently close nexus between the defamatory claims and the Agreement, to bring the claim within the ambit of the arbitration clause. Since the defamatory claims arises out of the dissemination of the Bulletin by the Defendant, which is related to the Agreement and the termination thereof, therefore the defamatory claims flows from the Sales representative Agreement, hence it falls under the ambit of the arbitration clause. Support for this contention can be found in the case of **Woolf v Collis removal Service** [1948] 1 K.B. 11 and also the case of **Capital Trust v. Radio Design** [2002] 2 All ER CA 159, where the arbitration clause in the application form contained the following provision:

"Any dispute arising out of this application for shares in Radio Design shall be settled exclusively by arbitrator in accordance with the Swedish Arbitration Act"

Clarke LJ in the same case had this to say at page 173:

“[50] An arbitration or jurisdiction clause is very different from a general release. The purpose of such a clause is to provide a machinery for the resolution of disputes which might arise in the future. It is not, we think, suggested that the clause would not be wide enough to include claims for breach of contract, whether committed negligently or fraudulently or otherwise. In any event, the clause is in our judgment plainly wide enough to include such claims. As 'We see it, the purpose of using the wide words arising out

of is to ensure that all claims which can fairly be said to arise out of the application are included.....

[51] In our judgment the parties would be likely to have wanted one tribunal to determine all such claims.....”

It was held in that case that the claims advanced in the action being claims for negligence and fraudulent misrepresentation fell within the terms of the arbitration clause.

There are other authorities which supports the above proposition. Suffice to summarily state those cases as follows:

- ***Empresa Expotadora de Azucaro Industria Azucarera Nacional SA, The Playa Larga and the Marble Islands*** [1983] 2 Lloyd’s Rep 171 It was held that a claim for conversion had a sufficiently close connection with the claims under contract;
- ***Ashville Investments Ltd v Elmer Contractors Ltd*** [1988] 3 WLR 867 where a claim for negligent misstatement was held to be within the scope of the contractual claim in the arbitration agreement;
- ***Astro Vencedor Compania Naviera SA of Panama v Mabanft G m b H*** [1971] 2 AER 1301 where a claim for damages for wrongful arrest had a sufficiently close connection with a charterer’s claim under the contract against the owners.

Therefore from the above the claim for damages for defamation is within the ambit of the Arbitration Clause.

Therefore the Plaintiff's claim ought to go for arbitration as agreed between the parties and this court is not the proper forum.

The application of the Defendant for stay is therefore allowed with costs.

Datin Zabarian Mohd Yusof

22.6.2009