High Court re-affirms that ships converted to floating storage structures for oil and gas industry are adjudicatable under CIPAA and that considerations of estoppel and waiver apply to parties' rights under a "construction contract"

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The High Court in the recent case of **E.A Technique (M) Berhad** ("**EAT**") **v. Malaysia Marine and Heavy Engineering Sdn Bhd** ("**MMHE**") in Originating Summons No. WA-24C-96-06/2019 ("**OS 96**") re-affirmed the decision of YA Dato' Lee Swee Seng (now JCA) ("**Lee J**") in ***MIR Valve Sdn Bhd v TH Heavy Engineering Bhd and other cases [2018] 7 MLJ 796*** ("**Mir Valve**") in holding that ships converted to floating storage structures for the purposes of oil and gas industry fall within the ambit of the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**").

Mir Valve

To recap, in Mir Valve, Lee J was asked to consider whether (1) the conversion work from a ship to a floating platform floating, production, storage and offloading (FPSO) vessel was a 'construction work' under CIPAA; and (2) contract for the procurement of valves for the FPSO fell within the meaning of 'construction contract' under the CIPAA. He answered both questions in the affirmative.

Amongst others, Lee J made the following pronouncements:

(1) The conversion of a ship to a FPSO vessel is such that the ship no longer serves the purpose of a ship but is now transformed into a different purpose; to serve the oil and gas industry (*para. 23*).

(2) The place where a FPSO vessel is prefabricated is not important as in whether it be in a shipyard or a steelyard. What is important is the purpose for which the FPSO vessel is put to use (*para. 75*).

(3) The functional purpose of a FPSO vessel or platform rather than whether it is a chattel or a building with affixation would be the determining factor as to whether the subject matter falls within CIPAA (*para. 70*).

As part of his Judgment, Lee J's attention was drawn to, and disagreed with, the published views of YA Dato' Lim Chong Fong J (now judge at the High Court of Malaya). In one of the articles cited at *para. 64*, Lim J was quoted as having opined as follows:

"*It is unclear as to whether ship building such as a FPSO vessel common in the oil & gas industry is encompassed by the CIPAA. Again, it is submitted that the CIPAA does not apply because the genus of the definition of construction work relates to fixtures whereas the FPSO is a chattel*."

OS 96

OS 96, as it turned out, was assigned before Lim J, with facts, not unlike Mir Valve.

In the course of arguments the question arose whether the Vessel (i.e. the Floating, Storage and Offloading (FSO) Facility – the subject matter of the adjudication proceedings between EAT and MMHE) falls within CIPAA.

Brief Background

On 9.6.2015, EAT appointed MMHE to carry out construction and conversion work of a vessel into an "FSO Facility" ("**Contract**"). The works under the Contract ("**Works**") were carried out at MMHE's shipyard at Pasir Gudang.

During the course of the Works, EAT instructed MMHE to carry out additional works not forming part of its original scope under the Contract by way of Additional Work Orders ("**AWOs**"). The AWOs contain descriptions of additional work to be carried as well as the applicable unit rates. All in all, EAT signed off and/or endorsed 1,264 AWOs.

The confirmation of completion of the additional works were recorded in documents known to parties as Work Completion Reports ("**WCRs**"). The

[1] Mohanadass Partnership successfully represented Malaysia Marine and Heavy Engineering Sdn Bhd in the adjudication proceedings as well as in OS 96 and OS 116 before YA Dato' Lim Chong Fong at the High Court. K. Mohan, the Firm's Managing Partner acted as lead counsel.

WCRs confirmed the actual state of completion of the additional works, including that of the quantities. EAT signed off and/or endorsed 1,264 WCRs corresponding to the AWOs.

Based on the rates in AWOs and quantities in WCRs, MMHE submitted invoices to EAT for payment. EAT disputes its obligation to pay on the invoices and following failure to resolve the disputes amicably, EAT initiated arbitration proceedings against MMHE. MMHE, on the other hand, referred some parts of the dispute to two different adjudication proceedings under the CIPAA.

On 27.5.2019, the Adjudicator, Mr. Wong Chong Wei, determined that MMHE is entitled to payment in the sum US$21,607,206.38 as well as costs and interests ("**Adjudication Decision**").

i. The Applications before the High Court

EAT applied to set aside the Adjudication Decision pursuant to s.15 of the CIPAA i.e. **OS 96**, amongst others, on the basis that the Adjudicator lacks jurisdiction as the AWOs are not part of the Contract. OS 96 was heard together with MMHE's application to enforce the Adjudication Decision pursuant to s. 28 of the CIPAA in WA-24C-116-07/2019 ("**OS 116**").

On 1.6.2020, Lim J dismissed OS 96 and allowed OS 116, both with costs to MMHE.

ii. Grounds of Judgment

At the outset, it is pertinent to note that Lim J determined that he was (1) not bound by his own prior views (inclusive of the quoted passage in Mir Valve which he was referred to); and (2) capable of adjudging the case impartially despite the aforesaid.

Specific to the issue of adjudicability, he found that the issue as to whether the Vessel is subject to CIPAA concerns core jurisdiction of the Adjudicator and he endorsed the position in ***Ranhill E&C Sdn Bjd v. Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873** whereby Mary Lim J (now JCA) determined, amongst others, that the issue of jurisdiction, irrespective raised previously, may be brought up in any setting aside application.

MMHE, for obvious reasons, relied on Mir Valve. Further or alternatively, MMHE had also contended that the Vessel is connected to, and hence, integral to the central processing plant ("**CPP**") offshore and that CPP is affixed to the seabed.

EAT, on the other hand, contended, amongst others, that (1) the legal analysis in Mir Valve is faulty; and (2) 'construction work' in s.4 of CPAA must be construed *ejusdem generis* and there is a requirement, in such circumstances, for there to be an affixation to land for the same to fall within CIPAA.

s.4 CIPAA defines "*construction work*" as follows:
...

(d) Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or

(e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work, and includes—
(A) Any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e)*, including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and* [Emphasis Added]

According to EAT, the Vessel was not affixed to land, and therefore, not subject to CIPAA.

While Lim J acknowledged that he is not bound by the decision in Mir Valve, he, nevertheless, considered the same in detail in arriving at his Judgment.

First, he observed that the CIPAA draft bill proposed by CIDB which he had reviewed was identical to the position set out in *para. 37* of Mir Valve, as follows:

[37] If the site where the construction work is carried out is so important as in it must be affixed to the ground, then one would have thought that under s2 of the CIPAA the bracketed words (at the site) would have been included as in:

*This Act applies to every construction contract made in writing relating to construction work carried out **[at the site]** wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.* [Emphasis Added]

Lim J further observed that it unclear whether the omission of 'the site' in s.2 CIPAA was deliberate or accidental.

In the circumstances, he determined that Lee J's analysis in Mir Valve on the interpretation of ss. 2 & 4 CIPAA as jurisprudentially sound. In addition, he determined that the contention that s.4 CIPAA should be construed *ejusdem generis* is misplaced as, in his view, the genus of 'affixed work' could not be satisfactorily discerned from subsections (a)-(e) of s. 4 the CIPAA, whether based on either literal or purposive interpretation.

Lim J also found that the following additional grounds, not previously considered in MIR Valve, justified the application of the CIPAA to the FSO Facility, namely, that the Vessel is physically and functionally integrated to the CPP (which is a fixture affixed to the seabed – a point accepted by parties). Consequently, the Vessel is an "***integral part***" of "***construction work***" as contemplated by s.4(A) of CIPAA.

Against the above backdrop, His Lordship determined that the Vessel, being an FSO Facility, is an adjudicatable issue under CIPAA.

Lim J proceeded to consider EAT's other grounds.

Lim J found in favour of MMHE and specific to the AWOs, amongst others, he (1) observed that certain terms of the Contract take precedence over others – which is in line with the position taken by MMHE, that the application of the AWOs prevails over the terms of the Contract relied on by EAT i.e. Article 13 of the Contract; and (2) pertinently, noted that EAT did not raise objection to the issuance of the AWOs, save that the AWOs contain certain qualifications. His Lordship ruled as follows:
*"[41] I am mindful that EAT attempted to distinguish the AWO from the Contract that a valid variation under the Contract can only be validly made pursuant and subject to the procedure on changes set out in Article 13 of the Conditions of Contract. This is however flawed because it is plain as set out in **Articles 1.2 and 1.3 of the Conditions of Contract read together that the MBU Standard and Procedures incorporated via Appendix B prevailed and took precedence over Article 13 of the Conditions of Contract**."* [Emphasis Added]

"*[43] There were many AWO issued for changes or variations during the performance of the Contract (which led to the eventual conflict or dispute between the parties). Upon their issuance as instructed by EAT, I however find that EAT did not raise objection to the contents of the AWO at all material times on their issuance that they were not in accordance with the procedure in Article 13 of the Conditions of Contract save only on its qualification on the price and costs stated therein.* ***It must thus be deemed that EAT had waived, acquiesced or accepted that they*** *[the AWOs]* ***were issued pursuant to the Contract. Accordingly, EAT is also estopped from insisting on strict compliance of Article 13 of the Conditions of Contract.***" [Emphasis Added]

Consequently, he found that the AWOs were properly issued pursuant to the Contract.

All in all, Lim J found that EAT has not successfully made out a meritorious challenge against the Adjudication Decision under s. 15 CIPAA and dismissed OS 96.

As regards OS 116, he referred to the recent Court of Appeal decision of ***Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019]* 2 CLJ 229** whereby it was held that enforcement of an adjudication decision can only be resisted if there is an active challenge pursuant to s. 15 CIPAA. As OS 96 is dismissed, he determined that MMHE has successfully made out its case in OS 116.

Conclusion

This decision by Lim J is undoubtedly welcomed by those in the oil and gas industry as construction work relating to FSOs and FPSOs is common place in Malaysia.

This decision also serves as a timely reminder that a party cannot insist on strict compliance of the terms of a construction contract in circumstances where, by its conduct, it had demonstrated that there was estoppel.

The full grounds of Lim J's decision is available for download at this link: E.A Technique (M) Berhad ("EAT") v. Malaysia Marine and Heavy Engineering Sdn Bhd ("MMHE")

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