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Analysing The Court of Appeal's Ruling In The Asia Pacific Higher Learning Sdn Bhd Case: Stay Of Court Proceedings In Favour Of Arbitration

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The Respondent (Stamford College (Malacca) Sdn Bhd) entered into an agreement (Agreement) with the Appellant's undergraduate programmes on the Respondent's premises. The Agreement contained the following dispute resolution clause (Arbitration Clause):

> "*Any dispute under this Agreement between the parties to this Agreement shall be settled by a single arbitrator mutually as agreed by the parties to this Agreement* ***or*** *under the courts of Malaysia*."

Thereafter, disputes relating to the Agreement arose. The Respondent commenced legal proceedings at the Shah Alam High Court against the Appellant premised on various purported breaches of the Agreement. Prior to the filing of the Appellant's Defence, the Appellant filed an application to stay the litigation at the Shah Alam High Court (Stay Application) pursuant to Section 10 of the Arbitration Act 2005 (Act). In effect, the Appellant was seeking to enforce the Arbitration Clause as a valid arbitration agreement pursuant to Section 9 of the Act and stay the litigation.

The High Court adopted the approach proposed in *Macsteel International Far East Ltd v Lysaght Corrugated Pipe Sdn Bhd* [2023] 4 MLJ 551. The Macsteel decision can be summarised as follows:

a) When a court hears an application to stay legal proceedings to give way to arbitration proceedings, the court has 4 options to exercise:

i) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay.

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ii) to give directions for the trial by the court of the issue.

iii) to stay the proceedings on the basis that the arbitrator will decide the issue.

iv) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay.

b) When both the High Court and the arbitral tribunal are clothed with jurisdiction, the appropriate forum to investigate and determine the validity of the arbitration agreement must be the forum that was on balance, more just and convenient having regard to the facts and circumstances in issue.

Issues Before The Court Of Appeal

The Correct Approach(es?) to Determining the Operativity of the Arbitration Clause

The Court of Appeal was first asked to determine the applicability of the Arbitration Clause. In doing do, the Court of Appeal was asked to determine whether the High Court's application of the Macsteel approach was correct. The Appellant argued that the High Court ought to have adopted the "*prima facie*" approach proposed in of *Cockett Marine Oil (Asia) Pte Ltd v MISC Bhd and Another Appeal* [2022] 6 MLJ 786. The Court of Appeal in *Cockett Marin*e outlined the following approach:

"Where a party challenges the existence of the arbitration agreement, the jurisdiction of the court is to consider whether prima facie there is an arbitration agreement to resolve disputes. In this respect the jurisdiction of the court is to decide if the issue on the existence of the arbitration agreement is in dispute and not merely a dubious or frivolous allegation."

Per the Appellant's argument, had the High Court adopted the approach in *Cockett Marine*, the issue of the operativity of the Arbitration Clause ought to have been ceded to the arbitrator after the Stay Application had been granted. The High Court was wrong in attempting to interpret the Arbitration Clause.

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The Court of Appeal disagreed and upon a thorough analysis of the nature of the disputes in *Macsteel* and *Cockett Marine*, the Court of Appeal distinguished the two tests adopted in the respective decisions as follows:

Case	Nature of Dispute	Name of Approach Taken
Macsteel	The validity of the arbitration agreement	Just and ConvenientApproach
Cockett Marine	The very existence of the arbitration agreement itself	*Prima Facie* Approach

This is arguably a more pragmatic distinction - where there is greater scrutiny on the purported arbitration agreement, the court responds with a higher level of scrutiny itself. While initially this may seem to neatly delineates the two types of disputes arising out of a Section 10 Arbitration Act stay, it is yet to be seen how well this distinction will hold. Without further clarification, arbitration claimants may still continue to shoehorn their disputes under the heading of an "existence of the arbitration agreement" dispute even where unsuited and vice versa. In order to give the ratio in *Asia Pacific Higher Learning* its necessary teeth, the High Court must remain vigilant in correctly identifying the core nature of the disputes before it.

The Arbitration Clause - A Case of "Poor Drafting"

Based on the analysis above, the Court of Appeal concluded that *Asia Pacific Higher Learning* was a case warranting the just and convenient approach because the operation of the Arbitration Clause was entirely a question of law.

The Court of Appeal proceeded to deem the Arbitration Clause inoperative due to its ambiguity. The Court of Appeal found the "option" for the parties to resolve their disputes by arbitration or litigation failed to impose a binding obligation to

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mandatorily refer their disputes for resolution via arbitration. This is logical and pragmatic. Any dispute resolution clause similar to the Arbitration Clause could easily lead to parallel proceedings. However, in its rebuke of the Arbitration Clause, the court did not mince its words:

"[31]…This uncertain poorly drafted arbitration clause here, in our view, is fatal to the Appellant's Application."

This is useful guidance for all parties who have a similar dispute resolution clause or are contemplating a similar dispute resolution clause in their commercial contracts. The *Asia Pacific Higher Learning* case serves as a timely reminder that dispute resolution clauses are only effective where they are unambiguous and unequivocal. Malaysian courts will not give effect to "what parties intended" but rather "what parties had contracted for".

Conclusion

As a decision of the Court of Appeal, *Asia Pacific Higher Learning* is undoubtedly a significant decision in the realm of Malaysian arbitration jurisprudence. While its full repercussions are yet to be fully understood, at the very least, the Court of Appeal has nudged lawyers and businesses alike to review their dispute resolution clauses / arbitration agreements for ambiguities. No matter how unique one's commercial needs are, parties have to ensure clarity and reasonableness prevails.