Carlsberg Breweries A/S *v* CSAPL (Singapore) Holdings Pte Ltd [2020] SGHC(I) 5

Case Number : Suit No 5 of 2019 (Summons No 5626 of 2019)

Decision Date : 04 March 2020

Tribunal/Court : Singapore International Commercial Court

Coram : Jeremy Lionel Cooke IJ

Counsel Name(s) : Chew Kei-Jin, Yeo Chuan Tat and Tan Silin, Stephanie (Ascendant Legal LLC) for the plaintiff; Davinder Singh SC, Jaikanth Shankar, David Fong, Tan Mao Lin, Vanessa Poo, Shannon Peh (Davinder Singh Chambers LLC) (instructed), Michael Palmer, Martin Eddie Butler, Lim Wei Ming, Keith, Wee Shilei and Joel Ng Yuan-Ming (Quahe Woo & Palmer LLC) for the defendant.

Parties : Carlsberg Breweries A/S — CSAPL (Singapore) Holdings Pte Ltd

Arbitration – Stay of court proceedings – Case management stay of proceedings

4 March 2020

Jeremy Lionel Cooke IJ:

1 This is an application by the defendant for a stay of the proceedings in Suit No 5 of 2019 ("the Suit") in their totality pending the final determination of Arbitration No 152 of 2019 ("the Arbitration") in the Singapore International Arbitration Centre. The Arbitration is a conjoined arbitration arising out of a number of different requests for arbitration made by both parties. The defendant contends that the claims, issues and matters raised in the Arbitration between the same parties overlap with, and will have a direct impact on, the claims, issues and matters raised in the Suit. The defendant therefore submits that a stay of all proceedings in the Suit, pending the final determination of the Arbitration, will be the fairest and most efficient way forward and will save judicial time and resources.

2 The plaintiff's claim in this action is for repayment of a loan under a loan agreement that was amended by two addenda ("the Amended Loan Agreement"), which is interconnected with an Amended Shareholders' Agreement, a Deed of Undertaking and a Deed of Release and Discharge ("the Deed of Release"). The Amended Shareholders' Agreement contains an arbitration clause. [note: 1]

3 The plaintiff contends that repayment of the loan was triggered by way of a notice issued to the defendant on 12 July 2019. According to the plaintiff, its entitlement to make such a demand resulted from the defendant's breaches of clauses 2(a) and 2(c) of the Deed of Undertaking, some of which were constituted by breaches of the Amended Shareholders' Agreement. The issues which arise in that latter respect are, by common consent, to be determined in the conjoined references to arbitration.

4 The essence of the defendant's case is that it was not in breach of the Amended Shareholders' Agreement and that it was the plaintiff which was in breach. At the heart of the dispute is Carlsberg South Asia Pte Ltd ("CSAPL"), a joint venture company in which both the parties are shareholders. The dispute principally boils down to whether clause 5 of the Amended Shareholders' Agreement (a) required the parties to cooperate in bringing about an Initial Public Offering ("IPO") of CSAPL's combined businesses in India and Nepal *in India alone*, or (b) provided for an IPO in a number of possible locations *inside or outside India* ("the clause 5 issue"). Each alleges that the other failed to

cooperate in bringing about the IPO inside or outside India, as the case may be, and alleges breaches of the Amended Shareholders' Agreement in blocking CSAPL's Board of Directors or company meetings or causing failures in proper governance of the various other connected companies, with a view to achieving their respective desired outcomes.

5 There is only one issue between the parties on this application, which is the extent of the stay that should be ordered. The plaintiff maintains that the stay should only extend to the part of the Suit which is the subject of the reference to arbitration and that there remains a discrete area of the Suit which does not overlap with the Arbitration. Both parties agree that the part of the plaintiff's claim which proceeds on the basis of a breach of clause 2(a) of the Deed of Undertaking should be stayed because that alleged breach itself depends upon alleged breaches of the Amended Shareholders' Agreement, including the clause 5 issue. Similarly, the counterclaims brought by the defendant in the Suit all allege breaches of the Amended Shareholders' Agreement and hence fall to be decided in the Arbitration.

6 By contrast, the plaintiff argues that its claim in relation to the breach of clause 2(c) of the Deed of Undertaking and the defences thereto ("the clause 2(c) issues") are independent of any breach of the Amended Shareholders' Agreement, in circumstances where the Deed of Undertaking contains an exclusive jurisdiction clause in favour of the Singapore courts. [note: 2]

7 In these circumstances, if the plaintiff is right, the court will have to hear parties on the clause 2(c) issues in the absence of either:

(a) any agreement between the parties that they be included in the Arbitration; or

(b) some finding of fact in the Arbitration which precludes the plaintiff from pursuing the clause 2(c) claim.

8 There is no agreement that the clause 2(c) issues be referred to arbitration. The basis for a stay of the clause 2(c) issues is therefore that it would be a more efficient, expeditious and cost-effective way of dealing with the dispute between the parties for the Arbitration to take place first in order to see if the grounds for the clause 2(c) claim are ruled out by a finding of the arbitrators. If the Arbitration does not have that effect, however, the clause 2(c) issues will have to be determined by this court. The position is therefore that unless there is good reason to consider that the arbitrators' findings will be or may well be determinative of the clause 2(c) issues, there would be no good reason for a stay.

9 I was taken through the pleadings in some detail by counsel and have considered them with care, including the 62-page defence and counterclaim, in order to focus upon the nature of the issues which arise in relation to clause 2(c). Clause 2(c) provides that the defendant "… shall use its best efforts to ensure that the director appointed by Rajendra Kumar Khetan to the board of directors of [Gorkha Breweries Pte Ltd ("GBPL")] attends all meetings of the board of directors of [GBPL]". GBPL is a subsidiary of CSAPL.

10 The plaintiff expressly pleads at paragraphs 45 and 46 of its statement of claim that the defendant breached clause 2(c) by failing to use its best endeavours to ensure that the appointed director, PP Khetan, attended four different board meetings scheduled for 26 February 2019, 25 March 2019, 26 April 2019 and 1 July 2019, with the result that there was no quorum present and GBPL's Board of Directors was unable to proceed with board business. The plaintiff's case is that it was consequently entitled to:

(a) give notice of this breach of clause 2(c), revocation of the Deed of Release and termination of the Deed of Release;

(b) declare the loans under the Amended Loan Agreement immediately due and payable; and

(c) demand repayment of the sum of approximately USD$36.74 million, with interest of approximately USD$6.2 million.

11 The plaintiff did all of the above on 12 July 2019. Since a breach of clause 2(c) constitutes a "Write-off Termination Event" within the meaning of clause 3 of the Deed of Undertaking, [note: 3] which may in itself amend the Deed of Release, the clause 2(c) issues are, on their face, potentially determinative of the whole dispute between the parties, regardless of the issues which arise in relation to the alleged breaches of clause 2(a).

12 The defendant, however, argues otherwise on account of the "prevention principle", which encapsulates the idea that a party cannot obtain a benefit from his own contractual breaches. The defendant alleges that but for the plaintiff's breaches of clause 5 of the Amended Shareholders' Agreement in refusing to co-operate in setting up an IPO in India, the IPO would have taken place before 26 July 2019 (when the plaintiff commenced the Suit by writ) and the terms of the Deed of Release would have been triggered, with the result that no loan remained outstanding as of 12 July 2019 when the plaintiff demanded repayment of the loan.

13 The plaintiff's response is that as a matter of construction of the Deed of Undertaking, Deed of Release and the various agreements which have to be read in the light of one another, and in particular of clauses 2 and 3 of the Deed of Undertaking, the plaintiff had accrued rights in respect of the clause 2(c) breaches. The plaintiff argues that those accrued rights cannot be defeated by a later failure to complete the IPO, even if the defendant's position on the clause 5 issue is correct. All four board meetings in issue under clause 2(c) occurred prior to 12 July 2019 when the demand for repayment was made, and clause 2(a) allowed for a 30-day period from either the defendant's discovery or the plaintiff's giving notice of any breach in which to make a demand in respect of such breach. The result, according to the plaintiff, is that it had accrued rights to do what it did, regardless of the position under clause 5. The plaintiff submits that the prevention principle cannot operate on the basis of the allegations made, as a matter of law and/ or construction of the relevant contracts.

14 It is evident from paragraphs 86–92 of the defence that the clause 2(c) issues are in themselves discrete and capable of determination with limited evidence. The defendant admits, at paragraph 86(c), that PP Khetan did not attend the four board meetings to which I have referred at [10] above. The defendant expressly denies that it failed to use its best endeavours to procure PP Khetan's attendance at those meetings; it is pleaded at paragraph 86(h) that the defendant did everything that it could to ensure his attendance. Particulars extending to some three pages of the defence are then given, setting out PP Khetan's concerns about attendance and the defendant's efforts to persuade him to attend the board meetings. The defendant then alleges at paragraph 86(h)(iv) that the plaintiff hindered and/ or blocked and/ or frustrated the defendant's attempts to ensure PP Khetan's attendance by refusing to address his concerns and suggesting that he resign from GBPL's Board of Directors. Paragraph 86(h)(v) also states that PP Khetan had personal issues including ill health.

15 At paragraph 86(i), the defendant alleges that "having regard to the matters stated above, it was [the plaintiff's] representatives [*sic*] conduct which caused and/or resulted in Mr PP Khetan not attending the four GBPL board meetings". The defendant further alleges at paragraph 86(j)(i) that "it

was [the plaintiff] which prevented [the defendant's] performance of its obligations under Clause 2(c) of the Deed of Undertaking", relying solely on the contents of paragraph 86 itself.

16 In paragraph 86(j)(ii), however, the defendant states that "[the plaintiff] cannot take advantage of its own wrong. [The defendant] adopts and repeats paragraphs 18 and 21 above." When those paragraphs are referred to, the defendant's adopted and repeated plea is clear: the plaintiff's wrongful conduct and breaches of clause 5 of the Amended Shareholders' Agreement, in failing to co-operate in bringing about an IPO in India, resulted in the delay of the release date (*ie*, the date on which the defendant would be discharged from all obligations under the Amended Loan Agreement) beyond 26 July 2019 (*ie*, the date the plaintiff issued the writ in the Suit) and the loan falling due before the release date. Absent such breaches, the IPO would have occurred before 26 July 2019 and the loan and undertakings in the Deed of Undertaking would thereby have been discharged. The defendant does not allege that the plaintiff's clause 5 breach in failing to advance the IPO in India caused the clause 2(c) breaches, but simply that if the IPO had occurred earlier, those breaches could not have had the consequence of rendering the loan repayable.

17 Issues of timing therefore arise. Clauses 5.1 and 5.3(d) of the Amended Shareholders' Agreement provided that the parties were to commit to an IPO by the end of 2019 and were to work towards the indicative timelines set out in Annex 4, which set 30 June 2019 as the date for the listing and quotation of shares on the relevant securities exchange. There is obviously room for argument about the ambit of the obligations undertaken which fall to be resolved in the Arbitration, but a finding in relation to the plaintiff's breach of clause 5 cannot be said to be bound to, or even more likely than not to, cut away the ground for the plaintiff's claim under clause 2(c) of the Deed of Undertaking, even though the defendant argues that this could be the case.

18 The plaintiff's case is that the failure to use best endeavours to ensure PP Khetan's attendance at the board meetings constitutes an independent breach giving rise to the plaintiff's entitlement to the loan repayment. The defendant does not allege that the clause 5 breach caused the failure of attendance in any way and, as a matter of timing, there is some difficulty in linking the two, as set out at [13] above. The board meetings and the alleged failures to ensure PP Khetan's attendance had all occurred by 12 July 2019 when the plaintiff demanded repayment of the loan. Even if an Indian IPO had occurred by 30 June 2019, which was the indicative scheduled completion date in Annex 4, any breaches in respect of three board meetings (on 26 February 2019, 25 March 2019 and 26 April 2019) would already have occurred. It should be noted that the defendant expressly pleads that the IPO would have been completed before 26 July 2019 but for the plaintiff's clause 5 breach. [note: 4] Before me, the defendant urged an unpleaded point that the plaintiff's statement of unwillingness to agree to an IPO in India, as opposed to elsewhere, could be a renunciatory or repudiatory breach. However, on a proper view of the obligations in the Amended Shareholders' Agreement, there is plenty of scope for argument as to accrued rights to call in the loan. This could mean that the alleged breach of clause 5 in relation to the IPO is irrelevant to the clause 2(c) issues, which the arbitrators cannot decide.

19 In fact, paragraph 21 of the defence refers specifically to clause 2(a) of the Amended Shareholders' Agreement only. The result is that paragraph 86(j)(ii), which repeats paragraph 21, does not apply to clause 2(c) as such. Whilst paragraph 18 is framed in much wider terms, the defendant's allegation is not that the breach of clause 5 prevented PP Khetan from attending the board meetings, but simply that the breaches would not have occurred if the IPO had been completed by 26 July 2019 (or perhaps implicitly by 30 June 2019), as mentioned at [16] above. This issue of timing and/ or causation does not impact upon the narrow dispute which arises in relation to the "best efforts" obligation. The true "prevention" point which is pleaded and which arises here is specifically limited to paragraphs 86(h)(iv) and 86(j)(i), as referred to in [14] and [15] above.

20 The boundaries of the clause 2(c) issues have been pleaded and are clear. In my judgment, the interests of justice would be best served by the clause 2(c) issues being determined as soon as convenient, because they have the potential to be determinative of the entire dispute and can be decided in a much shorter timeframe than the Arbitration. Those issues, and the questions of construction which arise in relation to accrued rights, can be decided by the court without trespassing on the arbitrators' jurisdiction to decide on the clause 5 issue.

21 Whether the clause 2(c) issues are determinative will depend on the court's view of the effect of the agreements and the potential for the operation of the prevention principle as alleged, as a matter of law and construction, but there is the possibility of a conclusive result regardless of any finding which might be made in the Arbitration. It may be that the court will not make a conclusive determination because of issues of fact which overlap with the issues pertaining to the prevention principle in the Arbitration, but there is no greater likelihood of the Arbitration providing a determinative result, because of its inability to deal with the clause 2(c) issues and the prevention principle in that context. Regardless of whether there is an overlap relating to the prevention principle, which operates in relation to the "best efforts" obligation on the one hand and to the clause 2(a) arguments on the other, it appears to me that the court will have to rule on the prevention principle in relation to clause 2(c) in one context or another. This could occur either in the context of construction of the Deed of Undertaking (and related documents) in a trial which would take place long before an arbitration hearing on the arbitrable matters, or if neither the points of law and construction in the Suit nor the findings in the arbitration hearing are determinative, in the context of a later trial, which determines the issue as a matter of fact and causation in the light of the arbitrators' findings of fact on the clause 5 issue. Whilst the latter eventuality would result in two court hearings and an arbitration hearing, there is a greater possibility of complete resolution in one relatively short court hearing than there is in a protracted arbitration proceeding where the clause 2(c) issues cannot be determined at all.

22 On the evidence that has been put before the court in an affidavit adduced by the plaintiff [note: 5] and two affidavits adduced by the defendant, [note: 6] it is clear that this court can determine the discrete clause 2(c) issues long before the other areas of dispute can be determined in arbitration. It appears that, given the identities of the three-member arbitral tribunal and the demanding schedules of the lawyers, an arbitration award would not be forthcoming in anything less than two years from the date of the affidavit filed by the plaintiff. Whatever congestion there may be in this court, on a narrow issue of the kind presented by clause 2(c), it should be possible to hold a trial (requiring no more than a few days) much earlier with a speedy judgment to follow.

23 I doubt that there is anything much in the points made by the plaintiff as to the potential loss of witnesses' recollection from further delay by reason of the time taken for the Arbitration to progress, the potential loss of documents or the increased credit risk in pursuit of the repayment of the loan. The key issues relate to timing and potential cost savings for the parties if the Suit is stayed in part as opposed to its entirety. Since the clause 2(c) issues will probably have to be determined as discrete points by this court at some stage, it makes sense for them to be dealt with as expeditiously as possible, with the possibility of considerable savings in time and costs, rather than for the Suit to be wholly stayed to await the outcome of the Arbitration.

24 I therefore order a stay in relation to all matters other than the clause 2(c) issues. Directions can now be agreed upon or given in relation to the future progress of the Suit on that limited basis.

25 In the ordinary way costs would follow the event. The plaintiff has always recognised the arbitrability of the other issues, as appears from paragraph 52 of the statement of claim and the terms of the reply. The argument has revolved around staying all the claim or part of it and the

plaintiff has prevailed on that issue. Whether costs fall to be determined on the scale appropriate to the High Court in Singapore or as per the Singapore International Commercial Court regime is a matter on which the parties can address me in writing along with any other submissions which fall to be made in relation to the costs issue.

26 The parties should seek to reach an agreement on the form of the order to be made, the issue of costs and the directions for the future course of these proceedings on the clause 2(c) issues. If no agreement can be reached within 21 days, these matters should be referred to me with the parties' case management plans for me to make any necessary determinations.

[note: 1] Pawan Kumar Jagetia's 1st affidavit (8 November 2019), p 79, cl 19.2.

[note: 2] Pawan Kumar Jagetia's 1st affidavit (8 November 2019), p 123, cl 10.2.

[note: 3] Pawan Kumar Jagetia's 1st affidavit (8 November 2019), p 119, cl 3.1(a).

[note: 4] Defence and counterclaim (amendment no. 2) (30 October 2019), para 18.

[note: 5] Ulrik Andersen's affidavit (22 November 2019).

[note: 6] Pawan Kumar Jagetia's 1st and 2nd affidavits (8 November 2019 and 18 December 2019 respectively).