Teck Guan Sdn Bhd v Beow Guan Enterprises Pte Ltd
[2003] SGHC 203

Case Number : Suit 331/2003, RA 174/2003

Decision Date : 10 September 2003

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Yong Kai Chang (Drew & Napier LLC) for the appellants/defendants; Edwin Mah Chwee Bock (Phang & Co) for the respondents/plaintiffs

Parties : Teck Guan Sdn Bhd — Beow Guan Enterprises Pte Ltd

Arbitration – Agreement – Incorporation – Defendant relying on contractual clause referring to rules of Cocoa Merchants' Association of America – Whether arbitration clause incorporated by reference

1. The appellants, Beow Guan Enterprises Pte Ltd ("BG"), who were sued by the respondents, Teck Guan Sdn Bhd ("TG"), for non-delivery of a consignment of Sulawesi cocoa beans, sought an order that the action against them be stayed on the ground that their contract required the dispute to be resolved through arbitration. Their application for a stay of proceedings was dismissed by the assistant registrar. I dismissed BG's appeal against the assistant registrar's ruling and now set out the reasons for my decision.

Background

2. In June 2000, TG purchased 1,000 metric tonnes of Sulawesi cocoa beans from BG. The FOB contract provided for the cocoa beans to be loaded in Indonesia and shipped to Malaysia. It was agreed that 500 metric tonnes of the cargo would be delivered to TG in September 2000 and the balance of the agreed cargo would be delivered to TG in November 2000. The first shipment of 500 metric tonnes of cocoa beans was duly delivered to TG.

3. The second shipment of cocoa beans was delayed. The determination of the causes and effect of the delay will no doubt shed light on which party breached the contract. What is relevant for present purposes is that on 8 December 2000, TG nominated Palu, a port in Sulawesi, as the port of loading. On 3 February 2001, TG nominated a vessel to load the second shipment at Palu and informed BG that the estimated arrival date of the vessel was 5th or 6th February 2001. The nominated vessel could carry 1,500 metric tonnes of cargo and TG paid the freight charges for 500 metric tonnes of cocoa beans. However, BG loaded only 250 metric tonnes of cocoa beans.

4. According to TG, BG represented that they would deliver the balance of the cocoa beans to them at a future date and notice would be given to them when the said beans were available for loading. In the meantime, the price of cocoa beans went up. In May, the price of cocoa beans was USD 1,000 per metric tonne in May 2001. This was much higher than the contract price of USD 644 per metric tonne. When BG did not deliver the remainder of the agreed cargo, TG purchased from the available market 250 metric tonnes of cocoa beans of the quality and description in their contract with BG. The difference between the contract price and the price paid by TG for the 250 metric tonnes in question amounted to RM824,162.41.

5. TG expected BG to compensate them for the loss incurred as a result of the latter's failure to supply the agreed quantity of cocoa beans. However, BG contended that they were not in breach. They asserted that they were ready to deliver the second batch of 500 metric tonnes of cocoa beans

to BG at the material time and that TG were themselves in breach by failing to provide a vessel to load the cargo by the end of November 2000. They pointed out that it was not until early February 2001 that the vessel nominated by TG to load the cocoa beans arrived at Palu. BG asserted they were compelled to sell a part of the cargo intended for TG because cocoa beans are perishable products. After fruitless attempts to resolve their dispute regarding the non-delivery of the 250 metric tonnes of cocoa beans, TG commenced an action in April 2003 to recover damages from BG.

6. BG filed a memorandum of appearance but contended that this was strictly without prejudice to their right to have the action stayed.

Whether a stay of proceedings should be ordered

7. BG relied on section 6(1) of the International Arbitration Act (Cap 143A) ("IAA"), which provides as follows:

> Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this act applies institutes any proceedings in any court against any party to the agreement in respect of any matter which the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

8. Whether BG's application for a stay of proceedings could succeed depended on whether or not there was an arbitration agreement between the contracting parties. BG asserted that the following clause in their contract with TG expressly required the parties to refer their dispute to the Cocoa Merchants' Association of America ("CMAA"):

> Any quality dispute would be settle [sic] amicably with reference to an independent surveyor. However, any dispute out of this contract to be governed by the rules of the Cocoa Merchants' Association of America Inc … in force on that date.

9. BG took the view that the CMAA is in the best position to assist the parties resolve their dispute because of its stature in the cocoa industry. In contrast, TG asserted that the clause in the contract relied on by BG to support their case for a stay of proceedings does not constitute an arbitration agreement and does not incorporate by reference any document or rule requiring the parties to resolve their disputes through arbitration.

10. BG's application for a stay of proceedings can only succeed if there is an arbitration clause in the contract or if an arbitration clause in another document is incorporated by reference. The clause in the contract relied on by BG as evidence that there was an agreement to resolve disputes through arbitration is badly drafted and rather vague. It cannot be seriously argued that the words "any dispute out of this contract to be governed by the rules of the Cocoa Merchants' Association of America" make it clear that disputes that do not concern the quality of the goods delivered are to be resolved by arbitration. As for whether these words incorporate an arbitration clause in another document, it is worthwhile reiterating at the outset that "the law as regards the purported incorporation by general wording of arbitration clauses in other contracts must be regarded as firmly settled and that general words will not suffice in the absence of a clear intention held by the parties to incorporate the arbitration clause" (see Merkin, Arbitration Law (1991), paragraph 4.24, which was endorsed in *Concordia Agritrading Pte Ltd* v *Cornelder Hoogewerff (Singapore) Pte Ltd* [2001] 1 SLR 222).

11. Although reference is made in the contract between TG and BG to the rules of the CMAA, it ought to be noted at the outset that neither TG nor BG were members of the CMAA when the contract was made, when the dispute arose, when the writ was filed or when BG filed their application for a stay of the action against them. More importantly, there is nothing in the CMAA's rules and regulations that requires non-members to have their dispute settled through arbitration. As such, the question of incorporating by reference an arbitration clause in another document does not arise.

12. It is also pertinent to note that in their reply dated 31 October 2002 to TG's solicitors, Phang & Co, who had written to enquire about the Association's position on arbitration in relation to disputes between non-members, the CMAA made it clear that they would not be involved with the dispute in view of the fact that neither TG nor BG were their members. the relevant portion of the letter is as follows:

> …. [t]here was a meeting on October 30, 2002 …. the purpose of this meeting was to determine if the association would accept a request from [TG] for arbitration against [BG] (also a non-member of the Association).
>
> The special committee determined that the CMAA would not choose to arbitrate this dispute under the current circumstances. It has been the express wish of our current members … that arbitration should be a service extended only to our own membership.

13. It should also be borne in mind that the dispute between the parties arose more than 2 years ago. TG had corresponded with BG and after having been instructed to act, their respective solicitors had also written to each other on numerous occasions. For a long time, neither BG nor their solicitors wrote to say that the dispute with TG should be resolved through arbitration. Indeed, when TG's solicitors, Phang & Co, threatened legal action in a letter dated 31 July 2002, BG's solicitors, Drew & Napier, stated in their reply dated 19 August 2002 that if TG decided "to proceed with legal action, our instructions are to accept service". No reference whatsoever was made in this letter to the issue of arbitration. BG's *volte face* so late in the day cannot be countenanced.

14. Apart from not insisting on arbitration for a long time, BG initially relied on rule 17.1.2 of the Rules of the Cocoa Association of London instead of the rules of the CMAA to deny liability to TG for the non-delivery of 250 metric tonnes of cocoa. This is evident from their letter to TG dated 18 May 2001. This also does not advance BG's case for a stay of proceedings.

15. As it was clear that was no arbitration agreement in this case, there was no reason to order a stay of TG's action against BG. I thus dismissed BG's appeal against the decision of the assistant registrar with costs.