Tjong Very Sumito and Others v Antig Investments Pte Ltd
[2008] SGHC 202

Case Number : Suit 348/2008, RA 333/2008

Decision Date : 10 November 2008

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Michael Hwang SC and Charis Tan (instructed) / Nicholas Narayanan (Nicholas & Co) for the appellant/defendant; Manjit Singh (Manjit Govind & Partners) for the respondents/plaintiffs

Parties : Tjong Very Sumito; Iman Haryanto; Herman Aries Tintowo — Antig Investments Pte Ltd

Arbitration – Stay of court proceedings – Mandatory stay under International Arbitration Act (Cap 143A, 2002 Rev Ed) – Whether dispute in fact existed – Whether positive assertion of dispute by a party sufficient to stay proceedings – Section 6(2) International Arbitration Act (Cap 143A, 2002 Rev Ed)

10 November 2008

Choo Han Teck J:

1 The plaintiffs and the defendant entered into a Shares Sale and Purchase Agreement in November 2004 ("SPA"), under which the plaintiffs agreed to sell to the defendant 72% of the entire paid-up share capital of a company. The SPA also provided that "*any and all disputes, controversies or conflicts arising out of or in connection with [the SPA] or its performance shall be settled by arbitration…*". The parties subsequently entered into four supplementary agreements, the last of which was dated 19 August 2005 and provided, *inter alia*, that:

> 2.2(e)(ii) on the date falling 24 months from the Completion Date, US$3,700,000 shall be paid to Aventi, who is authorised to receive the same for and on behalf of the Vendors.

2 In late September 2007, Aventi requested for an early settlement of the US$3.7m (the original payment date being 13 June 2008). In return, Aventi granted the defendant a discount of 5.6%. On or about 7 November 2007, the defendant released a sum of some $3.5m to Aventi. This was not the first occasion that the defendant paid Aventi in advance. In July 2006, the defendant was granted a 6% discount for the early settlement of a US$2m payment. On 12 November 2007, the first plaintiff wrote to the defendant stating that:

> I have agreed on 29 October 2007 that the final amount of the Balance Purchase Price due to me is US$1,138,772. Kindly issue a cheque for the sum of $1,630,038.24 (equivalent to US$1,138,772), being final settlement of the Balance Purchase Price.

3 On 9 April 2008, the plaintiffs informed the defendant that the sum of US$3.7m was to be made to the first plaintiff, and that no payments should be made to Aventi. The defendant refused to do so. On 20 May 2008, the plaintiffs commenced an action in the High Court to restrain the defendant from effecting payment of the sum of US$3.7m to any party other than the plaintiffs. There was also a claim for damages to be assessed. The defendant then applied for a stay under s 6 of the International Arbitration Act (Cap 143A) ("IAA") or alternatively under the court's inherent jurisdiction. The plaintiffs resisted the stay application on the ground that there was "no dispute" and that the

defendant had no defence to the plaintiffs' claim. The matter was heard by an assistant registrar who agreed with the plaintiffs. The defendant's application for a stay was accordingly dismissed. The defendant then appealed.

The decision of the court

4 The applicable law was not in dispute and counsel for both parties relied on *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646 ("*Dalian*"). The relevant principles set out in *Dalian*, were as follows:

> As regards s 6(2) IAA, I am of the view that once there is a dispute, a stay must be ordered unless the arbitration agreement is null and void, inoperative or incapable of being performed. *The court is not to consider if there is in fact a dispute or whether there is a genuine dispute.* The more difficult question is when it can be said that a dispute exists. For example, is there a dispute when the defendant simply refuses to pay or to admit the claim or remains silent? Although there have been statements that suggest that such conduct is sufficient to constitute a dispute I do not share that view. A defendant may refuse to pay or to admit a debt or remain silent because he has no money to pay or simply because he is intransigent. To my mind that is not a dispute. *It is different if the defendant at least makes a positive assertion that he is disputing the claim. If he is prepared to and does assert that, then there is a dispute even though it can be easily demonstrated that he is wrong.* However, an admission by a defendant will, generally speaking, be contrary to a dispute but not every admission will necessarily avoid a stay order. [emphasis added]

5 The plaintiffs relied on the purported factual similarities with *Dalian* in resisting the defendant's application. I was, however, of the view that such reliance was misplaced, as the facts in *Dalian* are distinguishable from the case at hand. The factual background in *Dalian* is as follows, at [29] and [30]:

> I was of the view that the phrase "any dispute" should also be given a wide interpretation. Nevertheless, it would not cover a dispute unrelated to the transaction covered by the Armonikos contract. For example, if there was a dispute between DHE or DJOM on the one hand and Louis Dreyfus on the other hand under a separate contract which did not have an arbitration agreement, would that dispute be caught by the arbitration agreement in the Armonikos contract? Surely not. Likewise, even if that separate contract had its own arbitration agreement, the dispute thereunder would be referred to arbitration under that arbitration agreement and not under the arbitration agreement in the Armonikos contract.
>
> On the facts before me, I had found that there was an admission that the sums claimed under the Armonikos contract would be due and payable but for the claim under the Hanjin Tacoma contract. The disputes under the Hanjin Tacoma contract were *separate and distinct* from the Armonikos contract. Furthermore, neither DHE or DJOM was a party to the Hanjin Tacoma contract. While it was true that the sums claimed by the plaintiffs were payable under the Armonikos contract, the allegation about the running account arose only because of Louis Dreyfus' claim under the Hanjin Tacoma contract. Furthermore, the issue as to whether there was a running account or not was, in my view, unrelated to the very transaction under the Armonikos contract. Indeed, the submission for Louis Dreyfus was simply that the "defence of a running account undoubtedly falls within the scope of the arbitration agreement". This was a bald argument. In my view, it was clear that the set-off issue was not the subject of the arbitration agreement. [emphasis added]

6 *Dalian* involved two separate and distinct contracts. There, the defendant's defence in relation to the plaintiff's claim under the Armonikos contract was that it had a right of set-off under the Hanjin Tacoma contract. On the other hand, the defendant in the present case refers to the fourth supplementary agreement which states that the US$3.7m "*shall be paid to Aventi*" and that "*[Aventi] is authorised to receive the same*". Its case was that the payment to Aventi extinguished its liabilities under the SPA and they aver that this was collaborated by the first plaintiff's letter dated 12 November 2007. While it could be said that the early payment arrangement between Aventi and the defendant constitutes a "side agreement", I was of the view that this side agreement could not be seen as separate and distinct from the SPA. In fact, it was one which was inextricably linked to the SPA *ie.* in the absence of the SPA, the side agreement would never have materialised. There was therefore a dispute referable to the SPA. Of course, the issue of whether the payment made under the side agreement extinguished the defendant's liability under the SPA would be a matter reserved for the arbitrator(s) to decide.

7 A further point was that far from admitting the claim, the defendant asserted that "the plaintiffs' claim is clearly devoid of any merit". English cases such as *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki*") expressed the view that "*there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable*" (at p 761). In this regard, while there are some minor differences between the English position and the position elucidated by the High Court in *Dalian* (especially in relation to silence on the part of the defendant), the common ground remains that a positive assertion by the defendant that he is disputing the claim would suffice for the purposes of s 6(2) of the IAA. This would be so even if it can be easily demonstrated that the defendant was wrong. Further, it bears mention that "*[t]he court is not to consider if there is in fact a dispute or whether there is a genuine dispute*": *Dalian* at [75].

8 In conclusion, I was of the view that: (i) a dispute referable to the SPA exists; and (ii) a positive assertion had been made by the defendant challenging the plaintiffs' claim (albeit after the commencement of court proceedings). Either of these grounds would justify an order for a stay of proceedings. In the premises, I allowed the appeal with costs here and below fixed at $7,000 excluding disbursements.

9 I note that costs on an indemnity basis have been awarded in recent English decisions: see *Russell on Arbitration* (Sweet & Maxwell, 23rd ed, 2007) at p 357. For instance, in *A v B (Costs)* [2007] 1 Lloyd's Rep 358, the defendant B successfully obtained a stay in favour of arbitration, and the plaintiff A was subsequently ordered to pay B costs on an indemnity basis. The following remarks by Colman J are on point:

> 10 This would give rise to a fundamentally unjust situation. There can be no question but that the procedural consequence of conduct by a party to an arbitration or jurisdiction agreement which amounts to a breach of it and causes the opposite party reasonably to incur legal costs ought to be that the innocent party recovers by a costs order and/or by an award of damages the whole, and not merely part, of its reasonable legal costs. Against that background, it is necessary to ask whether there is any sustainable policy consideration which would require that unless there were some special circumstances, excluding the fact that it was an arbitration or jurisdiction agreement that had been broken, the successful party should have to forego part of its costs or alternatively to bring a separate claim for damages to cover any shortfall on assessment of costs. The relevant considerations point very strongly indeed against either result. To forego part of the loss would be unjust. To be placed in a position where the balance of the recoverable damages could not be quantified until after the costs had been formally assessed would involve delay in obtaining compensation properly due and a formalistic and cumbersome procedure which would in itself involve more costs and judicial time. Where the defendant who

had been improperly impleaded in the English courts was outside the jurisdiction, no claim for damages could be brought in the English courts without submitting to the jurisdiction.

11 In my judgment, provided that it can be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.

…

15 The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from "the norm" as to require judicial discouragement by more stringent means than an order for costs on the standard basis. However, although an order for indemnity costs will usually be appropriate in such cases, there may be exceptional cases where such an order should not be made. …

10 I agree with the views expressed in the above passages. In the present case, the issue of costs was not fully argued before me. In future cases where a party has breached an arbitration clause by commencing court proceedings without good cause, I may impose an order for indemnity costs.