Mizuho Corporate Bank Ltd v Cho Hung Bank
[2004] SGHC 159

Case Number : Suit 66/2004, RA 105/2004

Decision Date : 31 July 2004

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Chou Sean Yu (Wong Partnership) for appellant; Toh Kian Sing and Ian Teo (Rajah and Tann) for respondent

Parties : Mizuho Corporate Bank Ltd — Cho Hung Bank

Conflict of Laws – Natural forum – Application by issuing bank for stay of Singapore proceedings on ground that South Korea more appropriate forum – Whether stay of action should be granted

31 July 2004

Tan Lee Meng J:

1 The appellant, Cho Hung Bank ("CHB"), who applied for a stay of the action against them by the respondent, the Mizuho Corporate Bank Limited's Singapore branch ("MCB"), on the ground that South Korea is a more appropriate forum than Singapore, appealed against the assistant registrar's dismissal of its application. I dismissed the appeal and now give the reasons for my decision.

Background

2 On 14 August 2003, CHB issued a letter of credit no M1655308NS00057 (the "letter of credit"), which was amended on or about 28 August 2003, for the purchase of a cargo of gas oil. The confirming bank was MCB and the beneficiary of the letter of credit was Nissho Iwai Petroleum (Singapore) Pte Ltd ("Nissho").

3 The letter of credit was subject to the provisions of the Uniform Customs and Practice for Documentary Credit (International Chamber of Commerce Publication No 500, 1993 Revision), which is commonly known as "UCP 500". It called for the presentation of two documents, namely a full set of clean on-board bills of lading and the seller's commercial invoice. The beneficiary, Nissho, presented to MCB in Singapore the requisite commercial invoice and a full set of the bills of lading. MCB negotiated and/or purchased and/or gave value for the same.

4 On 11 November 2003, MCB despatched the documents required by the letter of credit to CHB for the purpose of obtaining payment of US$1,715,699.15. These documents were received by CHB on the following day. On 18 November 2003, CHB rejected the documents and cited the following discrepancies:

(a) overdrawn

(b) no on-board date on B/L.

5 MCB took the view that there were no discrepancies. CHB commenced proceedings in South Korea for a declaration that it was not liable to MCB under the letter of credit while MCB instituted legal proceedings in Singapore against it. CHB applied for a stay of the Singapore proceedings on the ground that South Korea is, when compared to Singapore, clearly the more appropriate forum for the

determination of its rights and liabilities under the letter of credit. The assistant registrar, Mr Vincent Leow, dismissed CHB's application on 8 April 2004. CHB appealed against his decision.

The appeal

6 That the court has a discretion in deciding whether to grant a stay of proceedings on the ground that there is a more appropriate forum elsewhere has been reiterated on innumerable occasions. The approach of the courts with respect to applications for such a stay of proceedings was elucidated by Yong Pung How CJ in *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253 at 257, [10] in the following terms:

> The principles governing this matter are clear and established. The approach suggested by Lord Goff in *The Spiliada* [1987] 1 Lloyd's Rep 1 has since been approved and applied by the Court of Appeal in *Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia and another appeal* [1992] 2 SLR 776. We set out the relevant passages from the judgment of Lord Goff:
>
> > In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded as of right …
> >
> > …
> >
> > Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which points in the direction of another forum … and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction … and the places where the parties respectively reside or carry on business.
> >
> > …
> >
> > If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay …
> >
> > …
> >
> > If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

7 At the hearing of the appeal, CHB failed to establish that Singapore is not the appropriate forum and that South Korea is, when compared to Singapore, clearly the more appropriate forum. For a start, as far as the governing law of the contract is concerned, under English and Singapore law the governing law of a contract between an issuing bank and a confirming bank is, without more, that of the place where the confirming bank carries on its business: see *European Asian Bank AG v Punjab and Sind Bank Ltd* [1981] 2 Lloyd's Rep 651 and *Kredietbank NV v Sinotani Pacific Pte Ltd* [1999] 3 SLR 288. Although CHB's counsel, Mr Chou Sean Yu, argued before the assistant registrar that the governing law of the contract is South Korean law, he did not dispute during the hearing of

the appeal that as the confirming bank's place of business is Singapore, the governing law of the contract in question is Singapore law. In any case, CHB did not show that even if South Korean law is applicable, there are material differences between Singapore and South Korean law with respect to the issues pertaining to their dispute with MCB. It should also be borne in mind that the letter of credit in question is governed by UCP 500, which is intended to help produce a uniform result in national courts and reduce discrepancies resulting from the application of national laws.

8 As for the connection which the parties have to the two competing forums, it cannot be said that a consideration of this factor leads to the conclusion that South Korea is the more appropriate forum. Admittedly, a South Korean bank issued the letter of credit but it was confirmed by the Singapore branch of Mizuho Corporate Bank Limited and it was for the benefit of a Singapore entity, Nissho.

9 As for the availability of witnesses, this is not a factor that clearly favours South Korea. MCB's counsel, Mr Toh Kian Sing, rightly pointed out that as the validity of CHB's rejection of the documents submitted to it depended on the construction of the provisions of UCP 500, the letter of credit, the bill of lading and the commercial invoice, there is little scope for anyone to call witnesses to give factual evidence. As such, it is not easy to show that another court is clearly the more appropriate forum.

10 Although CHB referred to two discrepancies, it was only concerned with the issue of overdrawing during the hearing of the appeal against the assistant registrar's decision. In this context, the clauses in the letter of credit that need to be construed or reconciled are cll 32B, 39A, 45A and special condition D, which, strangely enough, appears in identical terms in special condition N. Clause 32B provides that the currency amount for the letter of credit is US$1.4m. Clause 39A adds that there is a 5% credit amount tolerance. Clause 45A describes the agreed cargo as 8,200 *kl* of gas oil "+/- 5%". Clause 47A makes it clear that the price of the gas oil is to be the average of the mean of Platt's quotation for gas oil for a stated period. Finally, special conditions D and N, which are crucial in this case, stipulate as follows:

> The amount of this letter of credit shall automatically fluctuate to cover any increase/decrease according to the price clause without further amendment to this credit.

11 Relying on the above-mentioned terms of the letter of credit, CHB asserted that regardless of fluctuations in the price of the cargo of gas oil, the letter of credit was only intended to cover an amount that was not more than US$1.4m plus 5%. As such, the amount claimed by MCB exceeded the letter of credit value. On the other hand, MCB contended that the letter of credit was not overdrawn because the price for the agreed cargo of gas oil, as determined in accordance with the formula in cl 47A, amounted to around US$1.7m. In their view, the question of overdrawing did not arise because special conditions D and N provided that the amount of the letter of credit should automatically fluctuate to cover the increased amount according to the price clause without further amendment.

12 CHB sought to call witnesses to prove that the letter of credit must be construed in the manner proposed by them. They relied on *Credit Agricole Indosuez v Banque Nationale de Paris* [2001] 2 SLR 1 at 9, [21], where Chao Hick Tin JA, who delivered the judgment of the Court of Appeal, pointed out that where the meaning of a letter of credit is not clear or where an attempt is made to show that a term therein has a special meaning, the surrounding circumstances relating to the issuance of the letter of credit may be looked at. However, the present case is distinguishable because CHB did not allege that there was any ambiguity in the terms of the letter of credit or that

there was a special meaning to be attached to any of the terms. Its counsel, Mr Chou, emphasised that the terms of the letter of credit were very clear. Similarly, MCB took the line that there was nothing ambiguous about the terms of the letter of credit. In short, both parties merely took different views regarding the construction of the terms of the letter of contract. In view of this, Mr Chou's reliance on *Credit Agricole Indosuez v Banque Nationale de Paris* to support his assertion that witnesses are required to shed light on the meaning of the terms of the letter of credit does not rest on solid ground. In any case, even if CHB wanted to call South Korean witnesses to prove its assertion, MCB asserted that it ought not be overlooked that all of MCB's employees who were involved in this transaction with CHB are residents in Singapore. Furthermore, the documents and the draft presented by Nissho to MCB's Singapore branch were prepared in Singapore. As such, it cannot even be said that it would be more convenient for the witnesses if the case was heard by the South Korean courts.

13 Finally, it ought to be noted that CHB's action in South Korea was initiated for the sole purpose of obtaining a declaration that it was not liable to MCB under the letter of credit in question. Claims for such negative declarations "must be viewed with great caution in all situations involving possible conflicts of jurisdictions since they obviously lend themselves to improper attempts at forum shopping": *per* Kerr LJ in *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361 at 371. In *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588 at 593, a decision of the English Court of Appeal, Staughton LJ, with whom Sir Denys Buckley agreed, while referring to an action in Texas for a negative declaration, said:

> [T]he Texan action is an action for a negative declaration, commenced by the buyers when, as is quite plain, they were apprehensive that proceedings might be commenced against them in England. I would not do anything to encourage that sort of proceeding.

14 The assistant registrar considered the application for a stay of the present proceedings carefully and thoroughly. After having heard the arguments of both parties, I have no doubt that his decision ought to be affirmed.

15 MCB is entitled to costs.

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