IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 51

Originating Summons No 936 of 2017
(Summons No 4920 of 2017)

In the matter of Regulations 79 and 80 of the Companies Regulations (Cap. 50, Section 411)

And

In the matter of Acesian Star (S) Pte. Ltd. (formerly known as Air System Technology (S) Pte Ltd)

Between

TAKENAKA CORPORATION

… *Applicant(s)*

And

1. TAM CHEE CHONG
2. LIM LOO KHOON

… *Respondent(s)*

GROUNDS OF DECISION

[Arbitration] — [Stay of court proceedings]

TABLE OF CONTENTS

Takenaka Corp
v
Tam Chee Chong and another

[2018] SGHC 51

High Court — Originating Summons No 936 of 2017 (Summons No 4920 of 2017)
Aedit Abdullah J
17 January 2018

7 March 2018

Aedit Abdullah J:

Introduction

1 A stay of proceedings in favour of arbitration was sought and granted. The party opposing the stay application has now appealed. In Originating Summons No 936 of 2017 ("OS 936/2017"), Takenaka Corporation sought to set aside the rejection by the Judicial Managers of Acesian Star (S) Pte Ltd ("the Company") of a proof of debt filed by Takenaka Corporation. In Summons No 4920 of 2017 ("SUM 4920/2017"), the Judicial Managers sought a stay of OS 936/2017 on the basis of an arbitration agreement between the Company and Takenaka Corporation.

2 As Takenaka Corporation is the applicant in OS 936/2017 but the respondent to the stay application in SUM 4920/2017, while the Judicial Managers are in the opposite position, for clarity, the terms applicant and

respondents will not be used in this judgment. In addition, no distinction needs to be drawn in this judgment between the Judicial Managers and the Company.

Background

3 The Company, *inter alia*, provides engineering, mechanical, electrical and plumbing services for construction projects.[1] It is a wholly owned subsidiary of Acesian Partners Limited (APL).[2]

4 Takenaka Corporation is the main contractor for various projects at Changi Airport, including the provision of addition and alteration works for Terminal 1 ("the T1E project") and Terminal 4, ("the T4 project").[3] By way of subcontracts, Takenaka Corporation engaged the Company for air-conditioning works under the T1E project and the T4 project.[4]

5 A dispute arose between Takenaka Corporation and the Company in respect of payments due under the subcontract for T4. An adjudication determination was made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) under which Takenaka Corporation was to pay a sum of about $7.9 million to the Company.[5] Subsequently, Takenaka Corporation sought partial review of the sum, which led to a determination reducing the sum awarded to the Company to about $7 million.[6]

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1 Judicial Managers' written submissions dated 12 January 2017 ("JM Submissions") at paras 2.1.2 and 2.1.4.

2 JM Submissions at para 2.1.4.

3 JM Submissions at para 2.2.1.

4 JM Submissions at paras 2.2.2 – 2.2.3.

5 JM Submissions at para 2.3.5.

6 JM Submissions at para 2.3.7.

Takenaka Corporation however asserted that it was entitled to refuse further payments as it had a counterclaim for back charges and liquidated damages.[7]

6 On 4 November 2016, the T1E subcontract was terminated by Takenaka Corporation because of an alleged breach by the Company.[8] The Company then applied for Judicial Management in Originating Summons No 1163 of 2016, and this was ordered in January 2017.[9] In the meantime, Takenaka Corporation terminated the T4 subcontract on the basis that the Judicial Management application was a default event under the T4 subcontract.[10]

7 In February 2017, Takenaka Corporation filed a proof of debt for an amount of about $27.8 million under both the T1E and T4 subcontracts against the Company. This proof of debt was rejected by the Judicial Managers five months later in July 2017. In August 2017, by way of OS 936/2017, Takenaka Corporation sought an order for the setting aside of the rejection of the proof of debt and for the claim set out in its proof of debt to be accepted by the Judicial Managers.[11]

8 After the appointment of the Judicial Managers, on Takenaka Corporation's application in Summons No 4023 of 2017 ("SUM 4023/2017"), a third Judicial Manager was appointed to investigate the viability of a clawback action.

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7 JM Submissions at para 2.3.8.

8 JM Submissions at para 2.3.10.

9 JM Submissions at paras 2.3.11 and 2.3.13.

10 JM Submissions at para 2.3.12.

11 JM Submissions at paras 2.4.1 – 2.4.3.

The Judicial Managers' case

9 Both the T1E and T4 subcontracts contain arbitration clauses. The Judicial Managers argued for a stay of OS 936/2017, relying on the arbitration agreement between the Company and Takenaka Corporation under Clause 33(1) of the T4 subcontract, which reads:[12]

> If any dispute arises between the Contractor and the Sub-Contractor in connection with this Sub-Contract, it shall, subject to the provisions of this clause, be referred to arbitration and final decision of a single arbitrator to be agreed upon between the parties or failing agreement by either party within twenty-eight (28) days of being requested in writing by the other party to be nominated by the President of the Singapore International Arbitration Centre (SIAC) and any such references shall be a submission to arbitration in accordance with and subject to the provisions of the Arbitration Act (Cap. 10) or any statutory modifications thereof for the time being in force in Singapore and the rules of the SIAC.

10 Specifically, it was argued that there is a clear overlap in the disputes which form the subject matter of OS 936/2017 and the arbitration that has been filed in ARB 316 at the Singapore International Arbitration Centre (SIAC). The arbitration agreement covers the subject matter of OS 936/2017 insofar as it relates to the dispute under the T4 subcontract.[13] The Court should grant a stay of OS 936/2017 under s 6(2) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Arbitration Act") as there is no sufficient reason why the dispute should not be referred to arbitration and the Judicial Managers have been and remained ready and willing to do all things necessary for the proper conduct of the arbitration.[14]

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12 JM Submissions at para 2.5.3.

13 JM Submissions at paras 5.1.1-5.1.2.

14 JM Submissions at paras 6.1-6.2.

11 In particular, the Judicial Managers contended that the criticisms by Takenaka Corporation of the alleged delay in the adjudication of the proof of debt and pursuit of clawback claims were unfounded.[15] It could not also be said that the proceedings in OS 936/2017 are so inextricably linked to the clawback and Judicial Management proceedings that arbitration would not be appropriate.[16] Further, the ends of justice would be better served by allowing the arbitration to proceed in precedence to OS 936/2017, as the latter is only limited to the rejection of the proof of debt; the dispute between the parties arising out of the T4 subcontract cannot be fully determined by OS 936/2017.[17]

12 Furthermore, the Company was, and remained ready and willing to arbitrate. Allegations made by Takenaka Corporation that there was a pattern of conduct showing a lack of readiness or willingness to arbitrate were unfounded. The present application was filed shortly after Takenaka Corporation raised jurisdictional objections to the arbitration. APL, the parent company, has also committed firmly to funding the Company's participation in the arbitration, and to indemnify the Judicial Managers against any cost orders.[18] In any event, as noted in *Sim Chay Koon v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871, cost savings or the subjective preference of one party for litigation would not be sufficient grounds for the Court to refuse to grant a stay in favour of arbitration.[19]

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15 JM Submissions at paras 5.2.1-5.2.2.

16 JM Submissions at paras 5.2.4.

17 JM Submissions at paras 5.3.1-5.3.3.

18 JM Submissions at paras 6.2.1-6.2.5.

19 JM Submissions at para 6.2.3.

Takenaka Corporation's case

13 Takenaka Corporation argued against a stay as the Company was not ready or willing to do all things necessary for the proper conduct of the arbitration, and other sufficient reasons existed for the matter not to be referred to arbitration.

14 At the time of the commencement of OS 936/2017, it is said that the conduct of the Judicial Managers was not consistent with them being ready or willing to do all necessary things for the proper conduct of the arbitration. Both the arbitration and the application to stay OS 936/2017 were not taken promptly. The Judicial Managers did not act until the Court directed the Judicial Managers to decide whether the disputes would be referred to arbitration by a specific date.[20] The Judicial Managers' claim that they needed to firm up financing showed that they were not ready.[21] Indeed, this showed that there was a lack of funding at the material time. Even at the hearing for the present application, all that the Judicial Managers had was a bald representation that APL had committed to fund the Company's participation in the arbitration, which provided no comfort.[22] The stay application was also only taken up two months after the commencement of OS 936/2017, and one month after the commencement of the arbitration.[23] No explanation was given for this delay. The Judicial Managers have also not paid the Company's share of the arbitration deposit.[24]

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20 Takenaka Corporation's written submissions dated 12 January 2018 ("TC submissions") at para 22.

21 TC submissions at para 23.

22 TC submissions at paras 25-26.

23 TC submissions at para 27.

24 TC submissions at para 31.

15 Takenaka Corporation also argued that sufficient reasons existed for the stay not to be granted. The Court should have direct and overall conduct of all proceedings arising from the judicial management of the Company, including the resolution of mutual claims between Takenaka Corporation and the Company. The Judicial Managers in rejecting Takenaka Corporation's proof of debt had invoked the claims of the Company against Takenaka Corporation; it could not be argued then that OS 936/2017 is merely limited to the proof of debt.[25] In addition, significant cost savings would be made if the dispute is resolved by litigation rather than arbitration. Arbitration costs were estimated to be high.[26] No evidence was adduced to show a binding funding arrangement between APL and the Company to see the arbitration to its conclusion.[27] It was also not known if there were any cap to APL's commitments.[28] This is particularly dire in view of the fact that the Company is insolvent.

Decision

16 I determined that stay of OS 936/2017 should be granted as the requirements of s 6 of the Arbitration Act were made out: there was no sufficient reason why the dispute should not be referred to arbitration in accordance with the arbitration agreement under the T4 subcontract, and the Company, through the Judicial Managers, was ready and willing at the time of the commencement of the proceedings to do all things necessary for the proper conduct of the arbitration and remained so. I granted the stay subject to the condition that

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25 TC submissions at para 39-42.

26 TC submissions at paras 44-45.

27 TC submissions at paras 46.

28 TC submissions at paras 47.

payment of the deposit to SIAC be made by the Company by 31 January 2018 and with liberty to apply if arbitration was not being diligently pursued.[29]

Analysis

The law on stay of proceedings

17 Section 6(1) of the Arbitration Act permits any party to an arbitration agreement to apply for a stay to a court in which proceedings are instated in respect of a matter subject to the arbitration agreement. Under s 6(2), the Court may stay proceedings if the Court is satisfied both that:

(a) There is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

(b) The applicant was, at the time when the proceedings were commenced, and still remains, ready, and willing to do all things necessary to the proper conduct of the arbitration.

The Court's order may be made on such terms as the Court considers fit.

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[29] NE at p 6.

18 While the Court's power to grant a stay in favour of arbitration under s 6 of the Arbitration Act is discretionary rather than mandatory, where the applicant seeking a stay remains ready and willing to arbitrate, the Court will only deny a stay in exceptional circumstances. As the High Court explained in *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong* [2016] 3 SLR 431 (at [23]):

> [I]t must be kept in mind that even though the court's power to grant a stay in favour of domestic arbitration under s 6 of the AA is discretionary, the burden is on the party who wishes to proceed in court to "show sufficient reason why the matter should not be referred to arbitration". Assuming the applicant is ready and willing to arbitrate, the court will only refuse a stay in exceptional cases … This is in line with the desirability of holding the parties to their agreement, as well as Singapore's strong policy in favour of arbitration … Hence, the courts should be slow to exercise the option of allowing *all* the claims to proceed in court, including those governed by the arbitration agreement. Certainly, the fact that there are related actions, some governed by arbitration agreements and some not, is not *in itself* a sufficient reason to sanction a breach of an arbitration clause and depart from the policy in favour of arbitration.

Application of the arbitration agreement

19 The Judicial Managers argued that the arbitration agreement in the T4 subcontract clearly covered the dispute under OS 936/2017.[30] Takenaka Corporation did not dispute the applicability of the Arbitration Act, or that the dispute in OS 936/2017 fell within the scope of the arbitration agreement. Rather, Takenaka Corporation's focus was on making out that stay should not be ordered as sufficient reasons existed for the matter not to be sent to arbitration, and that the Company (or Judicial Managers) was not ready and willing at the commencement of proceedings to do all things necessary for the conduct of the arbitration and remained so.

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30 JM submissions at paras 5.1.1-5.1.2.

Sufficient reason not to refer to arbitration

20 A broad range of factors is captured by the term "sufficient reason" (see *Fasi Paul Frank v Specialty Laboratories Asia Pte Ltd* [1999] 1 SLR (R) 1138 at [18]). This inquiry can be wide ranging, but the factors invoked should outweigh the consideration that generally point to enforcing the arbitration agreement, such as the fact that the parties had voluntarily bound themselves to arbitrate, as recognised in *Sim Chay Koon v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871.

21 Takenaka Corporation argued that it is necessary for the Court to exercise overall supervision and oversight of all proceedings and matters arising from the judicial management of the Company, as OS 936/2017 is linked to mutual claims by the parties and the potential clawback actions. In the event that the matter is not stayed, there would also be, it is said, significant cost savings as well as avoidance of uncertainty and risk of prejudice from the Company possibly running out funds to pursue the arbitration.

22 The Judicial Managers on the other hand argued that there is no sufficient reason why the dispute in OS 936/2017 should not be referred to arbitration. The Judicial Managers argued that only a bare assertion has been made by Takenaka Corporation that the determination of the claim in OS 936/2017 would have a bearing on the Company's assets and clawback actions. Stay should not be denied simply because the litigation proceedings are linked to the judicial management as a whole and to potential clawback actions, as this would mean that any dispute in respect of a company undergoing judicial management would not be arbitrable.[31] OS 936/2017 also cannot fully determine

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[31] JM submissions at paras 5.2.4-5.2.5.

the issues between the parties arising out of the subcontract, as OS 936/2017 is only an appeal against the rejection of Takenaka Corporation's proof of debt, and cannot address the Company's counterclaims against Takenaka Corporation. In contrast, the claims by the respective parties would be fully adjudicated in the arbitration.[32]

23 I was not persuaded that there was anything much to be gained by the Court's supervision and oversight if the matter proceeded instead of being stayed in favour of arbitration. I accepted the Judicial Managers' argument that not all aspects of the dispute between the parties would be canvassed if the court proceedings were to be pursued; in contrast, the arbitration would cover the claim and counterclaim between the parties. It may be that there are other areas that are covered neither by OS 936/2017 or the arbitration, but that does not rob the arbitration of the advantage it has over the proof of debt.

24 Takenaka Corporation argued that as its proof of debt was rejected because of the set-off from other claims that the Company had against Takenaka Corporation, those other claims were thus linked to OS 936/2017, and therefore court oversight would be beneficial. However, this argument could not be taken as far as Takenaka Corporation hoped. While it may be that the existence of other claims may have led to the rejection of the proof of debt, this fact did not expand the scope of OS 936/2017, which, as argued by the Judicial Managers, was still limited to the question of such rejection only, and there could not be any determination of the other claims. Additionally, Takenaka Corporation could not identify any specific advantages that were to be gained by the Court's oversight. It may be that court proceedings may ultimately lead to a faster resolution of the entire bundle of disputes between the parties, but that alone

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[32] JM submissions at paras 5.3.1-5.3.3.

could not provide sufficient reason for the Court to disregard the parties' agreement to arbitrate.

25 In addition, I was doubtful of Takenaka Corporation's argument that it would be better for the Court to have oversight, given the ongoing Judicial Management and other proceedings, including the potential clawback action. These matters are related, and it may be that there will be impact by one on the other. Indeed, the rejection of the proof of debt was tied to the counterclaims by the Company against Takenaka Corporation. But such linkage does not by itself require overview by the Court and the displacement of arbitration. Even if the dispute would be more efficiently resolved through litigation rather than arbitration, greater efficiency alone is not a reason to displace arbitration: the parties' choice in agreeing to arbitrate would mean that they would be taken to have considered the possibility that arbitration may not proceed as speedily or as efficiently as court-managed cases.

26 I noted that Takenaka Corporation cited *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 ("*Tomolugen*") (at [186] and [188]) for the proposition that the Court needs to find a balance that serves the ends of justice between a plaintiff's right to choose where he wants to sue, the Court's desire to prevent circumvention of the operation of an arbitration agreement, and the Court's inherent case management power. *Tomolugen* was a case concerned with the management of multiple proceedings and parties as the arbitration clause in question only applied to one part of a larger dispute in the court proceedings. In contrast, as I found above, not all aspects of the dispute between the parties in the present case would be canvassed if litigation were to be pursued since the court proceeding is limited to the issue of the proof of debt; on the other hand, the arbitration would cover the claim and counterclaim between the parties. In any event, I was of the view that granting the stay was

aligned with the ends of justice in the present case, as it was not established that the advantages to be gained from court oversight and case management, if any, were such as to outweigh the need to give effect to the parties' intention embodied in the arbitration agreement, in the context of Singapore's strong policy in favour of arbitration.

Ready and willing to arbitrate

27 Takenaka Corporation argued that the evidence showed that the Company was not ready or willing to do all things necessary for the conduct of the arbitration when OS 936/2017 was commenced, and remained so at the hearing of the present application. The Company, it was said, failed to promptly commence arbitration or to stay OS 936/2017, and the Judicial Managers also delayed the adjudication of the proof of debt and was slow in pursuing clawback claims. The Court had to in fact intervene to direct Judicial Managers to decide if the matter was to be referred to arbitration. As the Judicial Managers claimed that the delay was because they were firming up funds, it could not be said that the Company was ready and willing to do all things necessary for the proper conduct of arbitration. The Company's readiness is conditional on its ability to secure funding. The Judicial Managers have nothing to substantiate its position that APL had firmly committed to fund the arbitration. Even at the time of the hearing, it had not paid its share of the first deposit to the SIAC.[33]

28 The Judicial Managers responded that their conduct could not be impugned. No finding of impropriety was made by the Court in respect of Takenaka Corporation's previous application in SUM 4023/2017 for, *inter alia*, a third Judicial Manager to be appointed. Any possible prejudice to Takenaka

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[33] TC submissions at paras 20-36.

Corporation from the conduct of the Judicial Management has also been addressed by the appointment of the third judicial manager.[34] Further, any delay in commencing the arbitration arose solely out of the need to secure funding, and the Company did proceed to pursue its claim expeditiously once such funding was secured.[35]

29 I accepted the evidence of the Judicial Managers that they were trying to secure funds, which was a necessary task given the insolvency or near insolvency of the Company. I do not read the statutory requirement that the party seeking a stay be ready and willing at the commencement of the proceedings and remain so at time of the hearing to pursue arbitration as imposing an obligation to pursue arbitration immediately and without any time for preparation. Rather, the objective of the requirement is to ensure that arbitration is not merely a theoretical possibility, and that there is a genuine intention to pursue it. Any delay here was not such as to show that the Company was not ready and willing to do all things necessary for the proper conduct of the arbitration and remained so.

30 As for the argument that insufficient assurance has been given even at the point of the hearing that the Company will be able to bear the costs of the arbitration if they lose, APL's letter of indemnity which was tendered to the Court gave sufficient certainty.

31 In any event, the possibility that the party seeking arbitration is not good for any adverse cost order is not in itself a ground to deny a stay in favour of arbitration. A party remains ready and willing so long as it is in position to

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34 JM submissions at para 5.2.

35 JM submissions para 6.1.

pursue the arbitration. Neither statute nor case law requires that that party be in a position to pay for the costs that may be incurred by the other side. Exercising the Court's discretion against a stay in such a situation would not give sufficient weight to the binding nature of the arbitration agreement entered into by the parties, who would have been expected to have factored in the risk of non-reimbursement of costs following arbitration in their choice to arbitrate their disputes.

Conclusion

32 For the above reasons, I allowed the stay. Costs were ordered in favour of the Judicial Managers.

Aedit Abdullah
Judge

Yeo Boon Tat (instructed counsel) (M Pillay) for the applicant in OS 936/2017;
Fong Zhiwei, Daryl (Shook Lin & Bok LLP) for the respondents in OS 936/2017.