IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 131

Admiralty in Rem No 206 of 2020 (Registrar's Appeal No 323 of 2020)

Between

Batavia EXIMP &
Contracting (S) Pte Ltd

… *Appellant*

And

Owner of the vessels *New Breeze* & 9 Ors

… *Respondent*

Admiralty in Rem No 207 of 2020 (Registrar's Appeal No 324 of 2020)

Between

Batavia EXIMP &
Contracting (S) Pte Ltd

… *Appellant*

And

Owner of the vessels *Ever Golden* & 9 Ors

… *Respondent*

Admiralty in Rem No 208 of 2020 (Registrar's Appeal No 325 of 2020)

Between

Batavia EXIMP &
Contracting (S) Pte Ltd

… *Appellant*

And

Owner of the vessels *New*
Breeze & 9 Ors

… *Respondent*

GROUNDS OF DECISION

[Admiralty and Shipping] — [Bills of lading] — [Hague-Visby Rules]
[Admiralty and Shipping] — [Bills of lading] — [Incorporation of charterparty terms]
[Arbitration] — [Stay of court proceedings] — [Court's discretion under Arbitration Act]
[Arbitration] — [Stay of court proceedings] — [Terms for grant of stay]

The "Navios Koyo" and other matters

[2021] SGHC 131

General Division of the High Court — Admiralty in Rem No 206 of 2020 (Registrar's Appeal No 323 of 2020); Admiralty in Rem No 207 of 2020 (Registrar's Appeal No 324 of 2020); Admiralty in Rem No 208 of 2020 (Registrar's Appeal No 325 of 2020)
Chua Lee Ming J
15 March 2021

31 May 2021

Chua Lee Ming J:

1 The plaintiff, Batavia EXIMP & Contracting (S) Pte Ltd ("Batavia"), filed three separate admiralty *in rem* actions against the defendant – HC/ADM 206/2020, HC/ADM 207/2020 and HC/ADM 208/2020 ("the Admiralty Actions"). The three actions were based on different bills of lading; otherwise, the facts were similar. On 17 December 2020, the assistant registrar ("AR") stayed the Admiralty Actions and all subsequent proceedings in favour of arbitration in London pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), unconditionally.

2 Batavia appealed against the AR's decision on 21 December 2020 and commenced arbitration in London against the defendant ("the London arbitral proceedings") the next day on 22 December 2020.

3 I heard all three appeals together. Batavia argued that the stay should be conditional upon the defendant waiving any defence of time-bar in the London arbitral proceedings (the "time-bar waiver").

4 I dismissed the three appeals. Batavia has appealed against my decisions.

Background

5 Batavia's claims arose in relation to four bills of lading (the "Bills of Lading") in connection with the delivery of New Zealand pine logs (the "Cargo"):[1]

(a) Bill of lading no CHVWTABR190501 in HC/ADM 206/2020;

(b) Bill of lading no CHVWTABR190503 in HC/ADM 207/2020; and

(c) Bills of lading nos CHVWTABR190502 and CHVWTABR190504 in HC/ADM 208/2020.

6 Batavia claimed that it was the lawful holder of the Bills of Lading. It had extended financing to Amrose Singapore Pte Ltd ("Amrose") for the purchase of the Cargo and taken the Bills of Lading as security.[2] The terms of the financing were found in a Memorandum of Understanding (the "MOU") dated 25 July 2019.[3] Pursuant to the MOU, Batavia was to procure its banks to issue letters of credit to Amrose's supplier, TPT Forests Ltd ("TPT Forests") for shipments of the Cargo from New Zealand to India on board the *Taikoo Brilliance*.[4] TPT Forests subsequently endorsed the Bills of Lading to the order of the Bank of Baroda, which in turn endorsed the Bills of Lading to the order

of Batavia.[5] Batavia received the Bills of Lading from the Bank of Baroda on or about 12 September 2019.[6]

7 The defendant is the registered owner of the *Taikoo Brilliance*. The *Taikoo Brilliance* was on time charter from the defendant to The China Navigation Co ("China Navigation").[7] China Navigation sub-chartered the *Taikoo Brilliance* to TPT Shipping Ltd ("TPT Shipping") by way of a voyage charterparty dated 3 July 2019 ("the Voyage Charterparty").[8]

8 On 15 September 2019, the *Taikoo Brilliance* entered Kandla Port, India and commenced discharge of the Cargo. Batavia claimed that it was unaware of the exact date on which the Cargo was delivered and to whom it was delivered.[9] Regardless, it appeared that the discharge was completed latest by 23 September 2019 as the *Taikoo Brilliance* departed from Kandla Port on that day.[10]

9 According to Batavia, sometime in July 2020, it became concerned about Amrose's ability to make payment under the MOU. On 18 August 2020, Batavia commenced the Admiralty Actions against the defendant on the basis that the defendant had failed to deliver the Cargo to Batavia upon the presentation of the Bills of Lading. Batavia also commenced similar actions in Malaysia and New Zealand on 20 August 2020 and 7 September 2020 respectively.[11]

10 Batavia alleged that at around the same time, it also asked Amrose for a copy of the relevant charterparty but Amrose refused and instead assured Batavia that it would make payment under the MOU.[12] In the event, Amrose failed to make payment.

11 On 18 September 2020, a warrant was issued in HC/ADM 207/2020 for the arrest of the *Navios Koyo*, a sister ship of the *Taikoo Brilliance*. The *Navios Koyo* was arrested later that same day. On 19 September 2020, Batavia's solicitors gave the defendant's Protection and Indemnity Club ("P&I Club") copies of the writ, warrant of arrest and supporting affidavit.[13]

12 On 23 September 2020, China Navigation's solicitors wrote to Batavia's solicitors at 6.36pm seeking confirmation of the amount of security demanded by Batavia for the release of the *Navios Koyo*, and pointing out that the charterparty which the Bills of Lading referred to contained a reference to arbitration in London.[14] Batavia's solicitors replied on the same day at 7.13pm and asked for a copy of the relevant charterparty.[15] China Navigation's solicitors sent Batavia's solicitors a copy of the Voyage Charterparty the next morning, on 24 September 2020 at 9.08am.[16]

The stay proceedings

13 Clause 1 (found on the reverse side of the Bills of Lading) provided as follows:[17]

> All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herewith incorporated.

14 The front side of the Bills of Lading identified a charterparty dated 3 July 2019. The defendant's case was that the relevant charterparty was the Voyage Charterparty, which was dated 3 July 2019. The Voyage Charterparty consisted of a fixture recap, which stated that the charterparty would be "as per the Nord Vancouver-CNCo/TPT charter party dated 05 June 2013, with logical amendments as per main terms agreed".[18] Clause 31 of the Nord Vancouver-

CNCo/TPT charterparty, which was the arbitration clause, was replaced by cl 60 of the rider clauses ("Clause 60").[19] Clause 60 provided as follows:[20]

> *Any dispute arising from or in connection with this Charter Party shall be referred to arbitration in London.* In the event of such dispute, the parties shall endeavour to agree on the choice of a sole arbitrator or, failing agreement on the appointment of such an arbitrator within 14 days of one party calling on the other to do so, such sole arbitrator shall be appointed by the London Maritime Arbitrators Association. The decision of the sole arbitrator shall be final and binding. [emphasis added]

15 On 6 November 2020, the defendant applied for a stay of the Admiralty Actions in favour of arbitration in London pursuant to s 6 IAA. On 17 December 2020, the AR granted an unconditional stay of the Admiralty Actions in favour of arbitration in London.

The issue in the appeal

16 On 21 December 2020, Batavia filed a notice of appeal against the AR's decision. As Batavia had commenced the London arbitral proceedings on 22 December 2020, it no longer contested the grant of the stay at the hearing of the appeal.[21] Instead, Batavia argued that the stay should be conditional on the time-bar waiver.

17 The issue of time-bar arose because of the Hague Rules and the Hague-Visby Rules, which were incorporated by cll 2(a) and 2(b) of the Bills of Lading.[22] Article III r 6 of the Hague-Visby Rules states as follows:

> Subject to paragraph 6*bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, *unless suit is brought within one year of their delivery or of the date when they should have been delivered.* This period may, however, be extended if the parties so agree after the cause of action has arisen. [emphasis added]

18 As stated earlier, the discharge of the Cargo appeared to have been completed by 23 September 2019. The Admiralty Actions were commenced on 18 August 2020 within the one-year time-bar. However, the London arbitral proceedings were commenced on 22 December 2020, after the one-year time-bar. Batavia made no concessions as to whether its claims under the Bills of Lading in the London arbitral proceedings were time-barred but was prepared to admit *for the purposes of the stay applications* that they were.[23]

19 The applicable law was not controversial. Section 6 IAA provides as follows:

> **Enforcement of international arbitration agreement**
>
> **6.**—(1) 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 other party to the agreement in respect of any matter which is 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.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

20 In granting a stay under s 6(1) IAA, the court has an unfettered discretion in imposing conditions whenever the justice of the case calls for it: *The Duden* [2008] 4 SLR(R) 984 ("*The Duden*") at [12], [13] and [16]. However, as it is a wide discretionary power, it should be exercised with great caution and courts generally should be slow to interfere in the arbitration process: *The Duden* at [14]–[15].

21 In *The Duden*, the court also cautioned (at [16]) that the imposition of a condition as to the waiver of a defence of time-bar can only be justified "in very special circumstances as it takes away a substantive right of one of the parties". I respectfully agree. A defendant is entitled to assert a time-bar defence. The responsibility is on a plaintiff to commence its action before its claim becomes time-barred. A plaintiff, seeking a time-bar waiver as a condition to a stay pending arbitration, has to show that it is unjust to penalise it for having allowed its claim to become time-barred. In my view, two factors are relevant in this context: (a) whether the plaintiff's own conduct in not commencing arbitration, before the claim was time-barred, was reasonable, and (b) whether the defendant should be faulted for the plaintiff's failure to commence arbitration proceedings before its claim became time-barred.

22 The issue before me was whether, on the facts before me, the stay order should be made conditional on the time-bar waiver.

Whether the stay should be conditional on the time-bar waiver

23 Batavia submitted as follows:

(a) It had done all that was reasonable in the circumstances to protect its position.

(b) The defendant's conduct after the arrest of The *Navios Koyo* demonstrated an intention to withhold information from Batavia such that Batavia's claims became time-barred.

(c) The grant of an unconditional stay would cause undue and disproportionate hardship to it.

Batavia's failure to commence arbitration before its claims became time-barred

24 Batavia submitted that it had done all that was reasonable:

(a) It had filed protective writs in three jurisdictions within the one-year period.[24]

(b) It was unaware of the relevant terms of the Bills of Lading, including the arbitration clause because (i) Amrose had refused to provide it with a copy of the Voyage Charterparty despite its repeated demands,[25] and (ii) China Navigation's solicitors gave its solicitors a copy of the Voyage Charterparty only on 24 September 2020, by which time its claims were time-barred.[26]

25 The thrust of Batavia's submission was that it was unaware of the terms applicable to the Bills of Lading until it was too late. However, I agreed with the AR that Batavia had ample time to obtain a copy of the charterparty. Batavia received the Bills of Lading on or about 12 September 2019.[27] Yet, Batavia did not try to obtain a copy of the charterparty until sometime in July/August 2020 when it allegedly asked Amrose for a copy of the same.[28] It was clear that Batavia had no difficulty finding out who the owner of the *Taikoo Brilliance* was.[29] Enquiries would no doubt have led Batavia to China Navigation.

26 I also agreed with the AR that, even without having obtained a copy of the Voyage Charterparty, Batavia would have known of the existence or potential existence of an arbitration clause. Clause 1 on the reverse side of the Bills of Lading expressly referred to the incorporation of "the Law and Arbitration Clause" (see [13] above). This made Batavia's inaction between September 2019 and July/August 2020 all the more unreasonable.

27 Batavia explained that it only became concerned that Amrose could not make payment sometime in July 2020. However, this was not an acceptable reason for its failure to ascertain the terms applicable to the Bills of Lading. Indeed, it merely served to emphasise Batavia's disinterest in the terms before July 2020.

28 Further, when Amrose allegedly refused to give Batavia a copy of the charterparty, Batavia made no effort to contact the owner of the *Taikoo Brilliance*.

29 It was also clear that Batavia had no difficulty finding out the date the Cargo was discharged, even if it was an estimate.[30] Batavia would then have known, or have been able to estimate, when its claims would be time-barred.

30 Finally, Batavia argued that there was ambiguity as to the relevant arbitration agreement because the Bills of Lading identified the shipper of the Cargo as TPT Forests, whereas the sub-charterer in the Voyage Charterparty was TPT Shipping.[31] Batavia submitted that it was unable to determine the arbitration clause that was incorporated and that this then caused delay in the commencement of arbitral proceedings because it needed to confirm the incorporation of the arbitration clause. In my view, this was not a good reason for Batavia's failure to commence arbitration before its claims were time-barred. The submission was disingenuous. The fact remained that Batavia had taken no steps to obtain a copy of the Voyage Charterparty for months after it received the Bills of Lading. There was no reason to think that if Batavia had obtained a copy of the Voyage Charterparty earlier, it could not have confirmed the relevant arbitration agreement in time for it to commence arbitration before its claims became time-barred.

31 In my judgment, the predicament that Batavia found itself in was due to its own failure to ascertain the terms applicable to the Bills of Lading despite becoming holders of the same. Batavia had shown complete disinterest in finding out what terms had been incorporated into the Bills of Lading until it was too late.

The defendant's conduct

32 Batavia provided a copy of the supporting affidavit for the arrest of the *Navios Koyo* to the defendant's P&I Club on 19 September 2020.[32] Batavia submitted that:

(a) the defendant would have been put on notice that it had no knowledge of the relevant charterparty terms, including the arbitration clause;[33] and

(b) the defendant chose to remain silent until Batavia's claims were time-barred. The defendant had not explained why it did not bring the existence of the charterparties or the arbitration clause to Batavia's attention before that.[34]

33 In my view, Batavia's complaints were unjustified. I agreed with the AR that there was no evidence of impropriety on the defendant's part. The defendant was under no obligation to bring the existence of the Voyage Charterparty or the arbitration clause to Batavia's attention. Besides, Batavia would have known from the Bills of Lading of the existence of the charterparty dated 3 July 2019 (*ie*, the Voyage Charterparty) as well as the existence (or at least the potential existence) of an arbitration clause. Further, the defendant could not be expected to second guess Batavia's reasons for commencing the Admiralty Actions instead of arbitration.

34 In my view, the defendant could not be faulted for Batavia's failure to commence the London arbitral proceedings before its claims became time-barred.

Undue and disproportionate hardship

35 Batavia pointed out that its claims amounted to US$4,419,833.61 and submitted that an unconditional stay would cause undue and disproportionate hardship to it. In my view, the value of Batavia's claims carried little weight in the context of a time-bar waiver. It had nothing to do with whether Batavia had acted reasonably in not having commenced arbitration before its claims became time-barred, or whether the defendant should be faulted for Batavia's failure to commence arbitration in time. Further, it would be wrong in principle to treat a plaintiff more favourably on account of the fact that it has a higher value claim.

The Duden and The Xanadu

36 Batavia relied on *The Duden* and *The Xanadu* [1997] 3 SLR(R) 360. In both cases, the court had granted a stay pending arbitration on the condition that any time-bar defence be waived. However, in *The Duden*, no charterparty was identified on the bill of lading and the plaintiff was informed of the charterparty only after its claim was time-barred. Even then, the plaintiff was given the wrong information at first instance. It was in those circumstances that the court there found (at [22]) that "it would be wrong for the respondents to be subject to the defence of time bar in light of the uncertainty and confusion surrounding the identity of the charterparty referred to in the [b]ill of [l]ading". In contrast, the circumstances here were quite different; the Bills of Lading clearly identified a charterparty dated 3 July 2019, which corresponded to the date of the Voyage Charterparty.

37 As for *The Xanadu*, first, the court found (at [6]) that there was sufficient ambiguity as to whether the relevant bill of lading had identified the relevant arbitration clause which was invoked. It was therefore reasonable for the plaintiffs to commence the admiralty proceedings. Second, the court found that the defendants there had waited until after the expiry of the time-bar before they applied to stay the proceedings. Third, the court took into account that undue and disproportionate hardship would be caused to the plaintiff as its claim was in excess of US$200,000. Again, in contrast, the Bills of Lading here clearly identified a charterparty dated 3 July 2019, which corresponded to the date of the Voyage Charterparty. Also, as discussed earlier, the defendant's conduct could not be faulted. Finally, the reference to the amount of the plaintiffs' claim in *The Xanadu* has to be looked at in the context of the other two reasons relied on by the court.

Batavia did not show very special circumstances

38 In my view, Batavia had not acted reasonably; its own conduct led to its failure to commence arbitration before its claims were time-barred. The defendant could not be faulted for Batavia's failure to commence arbitration in time. Batavia had therefore failed to show very special circumstances to justify a time-bar waiver being imposed as a condition to the stay order.

39 For completeness, I should add that the defendant did not admit that Batavia was the lawful holder of the Bills of Lading and/or the party with the rights of suit under the Bills of Lading.[35] However, I did not have to decide this issue, which would be more appropriately dealt with in the London arbitral proceedings.

Conclusion

40 I dismissed the three appeals and ordered Batavia to pay costs of the appeals fixed at $5,000 inclusive of disbursements.

Chua Lee Ming
Judge of the High Court

Bazul Ashhab, Prakaash Silvam and Tan Yu Hang (Oon & Bazul LLP) for the appellant;
Timothy Tan, Edwin Cai and Tay Rui Lin (AsiaLegal LLC) for the respondent.

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1 Mody Atish Jitendra's 2nd affidavit filed on 24 November 2020 ("2 MAJ"), at para 6.
2 2 MAJ, at para 7.
3 2 MAJ, at pp 20–26.
4 2 MAJ, at para 7.
5 2 MAJ, at para 8.
6 2 MAJ, at para 8.
7 Higaki Hidefumi's 1st Affidavit in HC/ADM 206/2020 filed on 9 November 2020 ("1 HH"), at para 8 and pp 11–62.
8 1 HH, at para 9 and pp 63–102.
9 2 MAJ, at para 18.
10 Mody Atish Jitendra's 1st affidavit in HC/ADM 207/2020 filed on 18 September 2020 ("1 MAJ"), at para 12.
11 Tan Yu Hang's 1st affidavit filed on 16 December 2020 ("Tan YH's 1st affidavit"), at pp 11–52.
12 2 MAJ, at para 15.
13 Tan YH's 1st affidavit, at pp 60–61.
14 Tan YH's 1st affidavit, at p 55.
15 Tan YH's 1st affidavit, at pp 54–55.
16 Tan YH's 1st affidavit, at p 54.
17 2 MAJ, at pp 13, 15, 17 and 19.
18 1 HH, at pp 63–104, at p 65.
19 1 HH, at pp 69 and 80–81.
20 1 HH, at pp 80–81.

[21] Appellant's Written Submissions dated 9 March 2021 ("Appellant's Submissions"), at para 5.
[22] 2 MAJ, at pp 13, 15, 17 and 19.
[23] Appellant's Submissions, at para 29.
[24] Appellant's Submissions, at para 31.
[25] Appellant's Submissions, at para 31.
[26] Appellant's Submissions, at para 32.
[27] 2 MAJ, at para 8.
[28] 2 MAJ, at para 15.
[29] 1 MAJ, at para 18.
[30] 1 MAJ, at para 12.
[31] Appellant's Submissions, at paras 41–43.
[32] Tan YH's 1st affidavit, at pp 60–61.
[33] Appellant's Submissions, at para 36.
[34] Appellant's Submissions, at para 37.
[35] 1 HH, at para 5.