IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 31

Originating Application No 10 of 2024 (Summons No 46 of 2024)

Between

DKB

… *Claimant*

And

DKC

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Foreign law — Whether question of foreign law to be determined by submissions or proof]

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DKB
v
DKC

[2024] SGHC(I) 31

Singapore International Commercial Court — Originating Application No 10 of 2024 (Summons No 46 of 2024)
Thomas Bathurst IJ
14, 18 October 2024

25 October 2024

Thomas Bathurst IJ:

Background

1 The Applicant, DKB is the Assignee of the Final Award issued on 9 October 2023 in ZCC Claim No [redacted] (the "B Award") arising from the Swiss-seated arbitration between B and the Defendant, DKC. By an order made *ex parte* on 29 December 2023 DKB was granted leave to enforce the B Award pursuant to s 29 of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"). In the application seeking the order DKB also sought payment of the amount awarded to its Assignor in the arbitration namely the sum of US$ 315,913,822.32.

2 By summons HC/SUM 1177/2024 filed on 24 April 2024, DKC sought an order that all further proceedings in the action brought by DKB be stayed pursuant to s 6 of the IAA (the "Stay Application"). On the same day by

summons HC/SUM 1133/2024 DKC sought an order that the order made on 22 December 2023 be set aside.

3 In support of its application DKC relied on the provisions of a deed dated 23 March 2017 between DKB, DKC and two other parties, C and D (the "Settlement Deed") whereby it was agreed among other things that D would transfer its shares in a company, E, to C in consideration of the sum of US$ 150,000,000 payable by various instalments commencing on 30 June 2017 and concluding on 31 March 2027. The Settlement Deed provided (Clause 4.2) on payment of the total consideration DKC would be released from its obligations under the B Award. It also provided that DKB would stay any proceedings under the B Award provided that DKC and C were not in breach of the Settlement Deed.

4 Clause 6.1 of the Settlement Deed provided that the Award would be governed by and construed in accordance with the laws of England whilst Clause 6.2 provided that any dispute would be settled in accordance with the Rules of Expedited Arbitration of the Arbitration Institute of the Stockholm Chambers of Commerce. It provided for the seat of the arbitration to be Stockholm and the language to be used English.

5 DKB claims that the payment obligations under the Settlement Deed have been breached as the payments required by it have not been made. DKC contends there has been no breach because any payments would constitute a breach of United States sanctions and, therefore, it is legally impossible to make the required payments.

6 Relevantly for present proceedings, DKC contends there is a dispute under the Settlement Deed which must be resolved in accordance with the

arbitration provision in that deed and any enforcement of the [B] Award must await resolution of that arbitration.

7 The stay application is listed for hearing on 8 November 2024.

8 By summons SIC/SUM 25/2024 filed on 29 May 2024 ("SUM 25") DKB sought leave to file two affidavits to adduce expert opinion on United States and English law.

9 In written submissions dated 5 July 2024, DKB stated that it was seeking to adduce an expert opinion on English law which sets out why in circumstances relating to US sanctions that there is no dispute under the Settlement Deed (paragraph 13 of DKB's submissions of 5 July 2024).

10 In its subsequent submissions of 26 July 2024 it made the following submission (paragraph 11):

> As the Stay Application should be decided on the basis of English law and that the Stay Application would prejudice the Claimant's right to enforce the [B] Award, it is further submitted that the merits of the Defendant's dispute should be considered by the Honourable Court in its determination of the Stay Application. This is because English law will show (which will be supported by the further expert opinion by Mr Andrew Lomas) that all stay applications will ultimately depend on their own factual and legal circumstances to the extent that not every dispute will invariably fall within the realm of a dispute requiring arbitration.

11 DKC by contrast has contended that the evidence of English law sought to be adduced by DKB is irrelevant to the question of a stay which it submits is governed by Singapore law. It submits referring to *Tjong Very Sumito v Antig Investments Pte Limited* [2009] 4 SLR(R) 732 ("*Sumito*") that it was sufficient for the Defendant to assert that it disputed or denied the claim to obtain a stay of the proceedings in favour of arbitration.

12 At a case management hearing on 2 August 2024, with some hesitation I granted DKB leave to file evidence of English law on the matters raised in paragraph 13 of the submissions of 5 July 2024 and paragraph 11 of the submissions of 24 July 2024. I gave directions for evidence in reply to be filed.

13 Pursuant to those directions DKB filed an expert opinion by Mr Andrew Lomas whilst DKC in response filed a report by Mr Ng Jern-Fei KC.

14 By summons filed on 23 September 2024 SIC/SUM 46/2024 ("SUM 46"), DKB sought an order that Mr Roderick Cordara KC be entitled to appear before the Court to make submissions on behalf of DKB on English law. That application was opposed by DKC.

15 On 18 October 2024, I dismissed the application in SUM 46. These are the grounds of my decision on SUM 46.

The parties' submissions

DKB

16 DKB submitted that SUM 46 should be allowed, first, because English law is relevant to the determination of the stay application and, second, there were issues of English law that could not be sufficiently addressed if the Court saw no more than the written materials that had been thus far furnished.[1]

17 In relation to the first submission, DKB relied on its earlier submissions. Consistent with the approach which I took at the Case Management Conference

[1] Applicant's Written Submissions in SUM 46 dated 14 October 2024 ("AWS"), Heading D.

of 2 August 2024, I was prepared to proceed on the assumption that questions of English law may be relevant to the stay application.

18 In relation to the second submission it was contended that if SUM 46 was allowed the Court would derive a great deal of assistance from the "flexible format of submissions as opposed to the comparatively inflexible format of expert evidence".[2] It submitted the evidence filed showed a "wide gap of legal perception between the parties" with a significant number of English points of law, case references and legal arguments that had not been fully or sufficiently addressed in the materials that had been furnished to the Court.[3]

19 The submissions referred to the fact that the expert reports identify the following fundamental differences between them. First, whether payments under the Settlement Deed were required to be made in United States dollars.[4] Second, whether payments were contractually required to be made by interbank transfer.[5] Third, whether English courts would view bank transfers of United States dollars as requiring a United States correspondent or intermediary bank.[6] Fourth, whether United States sanctions were applicable in the present circumstances.[7] Fifth, if they were, whether DKC was entitled to rely on the exception contained in *Ralli Brothers v Compania Naviera Sota y Aznar* [1922] KB 287.[8] Sixth, whether DKC could with reasonable efforts have obtained an

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2 AWS at para 9.

3 AWS at para 10.

4 AWS at para 11(a).

5 AWS at para 11(b).

6 AWS at paras 11(c)−11(e).

7 AWS at para 11(f).

8 AWS at paras 11(g)−11(l).

OFAC licence without falling foul of sanctions[9] and finally, whether clause 4.1(c) of the Settlement Deed when read with clauses 3.8 and 3.9 allowed DKB to automatically lift the stay on enforcement on the failure of TAL to make the necessary payments under the Deed.[10]

20 DKB submitted its Singapore solicitors were not qualified to address the Court on these issues.[11]

21 DKB further submitted that the application should be allowed as there may have been relevant legal developments which postdated the experts' reports.[12] In that context, it referred to the decision of the United Kingdom of the Supreme Court in *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, a judgment it submitted considered and applied *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117. It submitted these cases mirrored an approach to choice of law questions affirmed by the Court of Appeal in Singapore and submitted that the Court should consider English law on the determination of the stay application.[13]

22 DKB further submitted that I should accede to the application as I had not made a final determination on its application to adduce expert evidence (SUM 25).[14] It submitted the experts' reports should stand as skeletal arguments.[15] It submitted that submissions from two leading English counsel on

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9 AWS at para 11(m).

10 AWS at paras 11(n)−11(p).

11 AWS at para 13.

12 AWS at para 14.

13 AWS at paras 15−16.

14 AWS at para 17.

15 AWS at para 18.

English law would assist the Court in illuminating the differences between the views of Mr Ng KC and Mr Lomas, in explaining the relevance of recent updates in the law of England and making submissions on the central points of dispute.[16]

23 It submitted that submissions on the law were more appropriate than requiring the parties to tender responsive reports and to compel cross-examination of the experts.[17] It should be noted that no application has been made by DKB to tender a responsive report nor has any application been made to cross-examine the experts.

24 DKB also submitted that if the application was granted the court would be able to conduct the hearing on the basis of oral submissions in "the normal way".[18] It submitted that submissions rather than a further round of experts' reports would be proportionate and enable the hearing timetable to be adhered to.[19] It submitted that leading counsel could be expected to bring to their oral submissions the usual professional obligations to act independently of the client's interests, placing their duty to assist the Court ahead of all other considerations.[20] It should be noted in that context that each of the experts affirmed that in preparing their reports they were aware of the obligations of an expert under Singapore law and that their primary duty to the Court overrides any duty or obligation to the party from whom they have received their instructions.

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16 AWS at para 19.

17 AWS at para 20.

18 AWS at para 20(a).

19 AWS at para 20(c).

20 AWS at para 20(d).

DKC

25 DKC submitted that O 16 r 8(1) of the Singapore International Commercial Court Rules 2021 ("SICC Rules") provides that any issue of foreign law may be determined on the basis of submissions instead of proof.[21] DKC submitted that O 16 r 8(1) prevents a party from establishing a proposition of foreign law by way of both expert evidence and submissions.[22] It submitted that conclusion was compelled by the decision of the Court of Appeal in *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265.[23]

26 DKC submitted that DKB, having considered the evidence of Mr Ng KC now sought to take a contrary position to that which it took in relation to SUM 25.[24] It submitted the difficulties it raised with respect to expert evidence could have been identified prior to the filing of SUM 25 and DKB could have applied for orders under O 16 r 8(1) that the question of foreign law be determined on the basis of submissions instead of proof.[25]

27 DKC submitted referring to *Sumito* that it was wholly unnecessary for English law to be adduced.[26] The question before me was not whether which evidence is appropriate or necessary but whether to the extent relevant, it should be the subject of evidence or submissions pursuant to O 16 r 8(1) of the SICC Rules.

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21 Respondent's Submissions Opposing SIC/SUM 46 dated 14 October 2024 ("RWS") at para 3.

22 RWS at para 3.

23 RWS at paras 4 and 7.

24 RWS at para 5.

25 RWS at para 6.

26 RWS at paras 13 and 19.

28 DKC submitted that if SUM 46 was allowed it would have necessarily involved a duplication of costs, namely, the cost of retaining Mr Ng KC to prepare his report and instructing an English law counsel to prepare, attend and make submissions essentially on the same issues as those raised in the reports of Mr Lomas and Mr Ng KC.[27]

29 It also submitted that there is no basis on which the report of Mr Lomas could stand as a skeletal argument of Mr Cordova KC.[28] It pointed to the fact that Mr Lomas has no right of audience under the SICC Rules.[29]

Consideration

30 Order 16 r 8(1) of the SICC Rules provides an alternative method of dealing with foreign law on the basis of submissions instead of proof thus obviating the need and correlative expense for experts to give evidence. The rule plainly was not intended to provide for evidence by way of experts' reports on the issue of foreign law together with submissions by separate counsel or a foreign law expert on the relevant question.

31 In the present case, whilst it may have been desirable for reasons set out in DKB's submissions to have dealt with matters of foreign law under the provisions of O 16 r 8(1), DKB chose the alternative course and I gave leave for expert evidence to be led on the question. Both parties had filed experts' reports dealing with the issue and it would be quite inappropriate to have ordered the alternative with the consequent cost and disruption to DKC.

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27 RWS at para 20.

28 RWS at para 8.

29 RWS at para 24.

32 The application was dismissed with costs.

Thomas Bathurst
International Judge

Ang Cheng Ann Alfonso and James Ch'ng Chin Leong (A.Ang, Seah & Hoe) for the claimant;
Chong Yee Leong, KarLuis Quek, Liew Pei Jun Annette and Ng Ying Ning Theodora (Allen & Gledhill LLP) for the defendant.