

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 293

Adm in Personam 489/1992

Between

Uni-Navigation Pte Ltd

... Plaintiff

And

Wei Loong Shipping Pte Ltd

... Defendant

GROUND OF DECISION

Arbitration — Stay of court proceedings; Civil Procedure; Civil Procedure —
Stay of proceedings

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Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd

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G P Selvam JC
28 November 1992

1 *Introduction*

2 This was an appeal against an order made by Assistant Registrar Mr Christopher Tang staying the proceedings on the ground that the subject matter of the action was to be determined by arbitration.

3 The facts of the case are as follows. The plaintiffs were the owners of the Singapore registered ship Allissa. By a charterparty in the Gencon form they chartered the ship to the defendants to load a cargo of about 14,000 metric tons of bagged cement at Padang, Indonesia for carriage to and discharge at two named Bangladesh ports. The freight payable was at US\$14.25 per ton. Freight was deemed earned as cargo was on board, discountless and non-returnable. The plaintiffs claimed that the ship carried a total cargo of 15,400 tons and earned freight in the sum of US\$219,450.

4 Clause 8 on the payment of freight read as follows:

Ninety-five percent (95%) freight paid within three (3) banking days after completion of loading upon signing/releasing first set bill of lading marked 'freight collect' at loadport and second set

*freight prepaid bill of lading at Singapore against charterers`
letter of indemnity and confirmation of freight remittance.*

5 The charterparty was silent on when the remaining 5% freight (US\$10,972.50) was payable.

6 The defendants conceded that on the quantity of 15,400mt of cargo the freight earned was US\$219,450 and that the ship had earned US\$27,449.92 as demurrage at loading port. These two amounts totalled US\$246,899.92.

7 The defendants paid US\$178,891.25 being 95% of US\$219,450. But they also cross-claimed amounts in respect of additional premium, address commission, discharge, port disbursements and despatch earned at discharge ports. These amounted to \$85,459.93. In addition the defendants made claims for lightening expenses and short landing of cargo. The total of these additional claims was US\$43,082.08.

8 Thus there were owners` claims for balance of freight and demurrage and charterers` cross-claims. The charterparty contained an arbitration clause:

Should any dispute arise between owners and charterers, the matter shall be referred to three (3) persons in Singapore, one to be appointed by each of the parties hereto and the third by the two so chosen. Their decision or that of any two of them shall be final and for the purpose of endorsing any award this agreement may be made a rule of court. The arbitrators shall be commercial men and English law to apply.

9 In compliance with the arbitration clause arbitrators were appointed in March 1992. The first meeting of the arbitrators was held on 24 March 1992.

10 Without proceeding with the arbitration the solicitors for the plaintiffs on 4 June 1992 wrote to the defendants` solicitors as follows:

The fixture has now been concluded and there remains the demurrage/ despatch and balance freight to be paid.

11 From our clients' statement of account dated 5 May 1992, there is a sum of US\$87,010.22 out of which US\$10,972.50 comprises the balance freight of 5%. As it is well-settled law that freight is to be settled without set-off or counterclaim, we hereby demand on our clients' behalf that the same be settled by 6 June 1992.

12 If your clients fail to do so, our clients will take the appropriate steps to recover the same from them.

13 To that demand and threat the defendants' solicitors on 9 June 1992 responded by setting out the defendants' cross-claims and demanded US\$17,533.34 as the amount due from the plaintiffs after set-off.

14 On 11 July 1992 the plaintiffs made good their threat by filing an admiralty action in personam in the High Court claiming US\$10,972.50 as 'balance of freight that was due and owing'. The defendants applied for all proceedings in the action to be stayed pursuant to s 7 of the Arbitration Act (Cap 10)(the Act) on the ground that the parties had agreed to refer the matter in respect of which the action was brought to arbitration. Assistant Registrar Mr Christopher Tang made the order which is appealed against. I dismissed the appeal out of hand. The purpose of this judgment is to state the grounds for the dismissal.

15 **Jurisdiction to stay action**

16 First the law. Section 7 of the Act confers on the court a discretionary power to stay an action commenced by a party to an arbitration agreement by

which it has been agreed to refer the subject matter of the action to arbitration. A court seized of an application must first consider the content and extent of the arbitration agreement to confirm that the subject matter of the action is caught by the arbitration agreement.

17 Thus, in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH*¹ the arbitration agreement was part of a partnership agreement. Pursuant to it English partners sold certain machinery to German partners to be used in partnership operations in Germany. Bills of exchange issued by the Germans in payment for the machinery were dishonoured. When sued in England on the bills of exchange the German partners applied for stay of the action on the ground that the matter ought to be referred to arbitration.

18 The House of Lords held that the arbitration agreement did not extend to an action on the bill of exchange which constituted independent contracts. In addition it was held that there was no dispute as to the claims on the bills of exchange as distinct from `disputes arising from partnership relationship or occasioned by the partnership relationship between the partnership and the partners` as was stipulated by the arbitration clause.

19 It therefore follows that where the claim is undisputed or indisputable the courts and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration. So, in a case where the defendant in the action has made a clear and unqualified admission of the claim the court cannot stay the action: *London and North Western Railway Co v Jones*², *London and North Western and Great Western Joint Railway Companies v JH Billington Ltd*³ and *Bede Steamship Shipping Co Ltd v Bunge Y Born Limitada SA*⁴.

20 The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. The reasoning in support of this view is found in **Commercial Arbitration** by MJ Mustill and SC Boyd (2nd Ed) at p 123:

Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed.

21 If the defendant, therefore, makes out a prima facie case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.

22 **The case at hand**

23 The defendant disputed the plaintiffs' claim for the balance freight. Notwithstanding that, the plaintiffs filed a High Court writ for US\$10,972.50. The amount was within the jurisdiction of the district court. It is trite law that where a cheaper and equally efficient or more efficient process is available, such process is to be preferred. In this case the filing of the writ by appending the

label `admiralty action in personam` when it could have been filed in the subordinate courts was without justification. It was an abuse of the process of the court. The High Court has an inherent jurisdiction to prevent such abuse.

24 To justify the action the plaintiffs relied on the following statement by Browne LJ in *`The Fuohsan Maru`* 5 at p 31 :

Where a claim (admittedly within the arbitration agreement) consists of separate identifiable and quantified items, for example, the case put by Mr Justice Kerr of an admitted claim for freight and a disputed claim for demurrage, the court would in my view be entitled to hold that there was `not in fact any dispute` as to the admitted item and to refuse a stay in respect of that part of the claim.

25 The plaintiffs further relied on the principle enunciated in *Colonial Bank v European Grain and Shipping Ltd* 6 that a charterer may not set up a cross-claim for breach of contract against a claim for freight.

26 In my view the principle relating to freight can only apply to the 95% freight payable after release of the freight prepaid bills of lading. The defendants discharged their liability in respect of it. There was no stipulation as to when the remaining 5% was payable. It was not payable upon loading as it was inconsistent with the payment of freight provision in the charterparty. It was not payable against delivery as owners agreed to issue `freight prepaid` bills of lading. It therefore became part of the shipowner`s general claim which was subject to the right of set-off of the charterers.

27 The plaintiffs` counsel cited *`The Karin Vatis`* 7 where the facts were very similar to this case. The charterparty provided that:

Freight deemed earned as cargo loaded ... 95% of freight to be paid within three (3) banking days after completion of loading and surrender of signed bills of lading ... vessel and/or cargo lost or not lost. Balance of freight ... to be settled within twenty (20)

days after completion of discharge and owners' presentation of laytime statements from load/discharge ports.

28 It was held that the phrase 'freight deemed earned as cargo loaded' meant that the debt for freight accrued due when loading was completed. If the ship and cargo were lost on voyage the debt remained due notwithstanding the provision that it was payable 'after discharge of cargo'. It was further held that in accordance with the clause, demurrage or despatch and the balance of freight were to be settled at the same time.

29 Another pertinent point arose from '*The Karin Vatis*' case.⁷ The owners in that case did not file a writ in the court for the balance of freight. Pursuant to the arbitration clause they in fact submitted their claim for balance of freight together with their demurrage claim to be adjudicated by arbitrators. The case did not decide that the claim for balance of freight can be recovered by action. The case therefore did not assist the present plaintiffs on the arbitration point. The plaintiff likewise should submit its claim to arbitration.

30 I therefore viewed the matter as a whole and concluded that the charterers rightly disputed the plaintiffs' claim. The dispute was within the ambit of the arbitration clause. They were accordingly entitled to have it decided by arbitration as agreed to by both parties.

31 **Outcome:**

G P Selvam JC

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Augustine Liew (Haridass Ho & Partners) for the appellants/plaintiffs
Beh Eng Siew (YM Jumabhoy & Co) for the respondents/defendants
