IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 269

OS 581/1999

Between

Concordia Agritrading Pte Ltd

… Plaintiff

And

Cornelder Hoogewerff
(Singapore) Pte Ltd

… Defendant

GROUNDS OF DECISION

Arbitration — Agreement — Incorporation; Arbitration — Agreement

Version No 1: 20 Nov 2026 (01:16 hrs)

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Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd

[1999] SGHC 269

OS 581/1999
Lim Teong Qwee JC
13 October 1999

1 : This is an appeal against the decision of the deputy registrar dismissing the plaintiff`s application for Mrs Schenk, Mr Neeman and Mr Van Gool to be appointed `arbitrators in the claim by the plaintiff against the defendant pursuant to an agreement dated 13 November 1995 made between the plaintiff and the defendant`. At the conclusion of the hearing on 28 July 1999 I dismissed the appeal. The plaintiff has given notice of appeal and these are my written grounds.

2 The application was made by originating summons. Order 7 r 3(1) provides that every originating summons must include a statement of the questions on which the plaintiff seeks the determination of the court or as the case may be a concise statement of the relief or remedy claimed in the proceedings. This originating summons states:

> *By this summons the plaintiff seeks the determination of the court on the following:-*

3 No question is then stated. Instead an order for the appointment of arbitrators is asked for. This is the relief or remedy claimed. Order 7 r 3(1) goes

on to provide that where a statement of the relief or remedy claimed is included there must be sufficient particulars to identify the cause or causes of action. This originating summons has not given such particulars. Nothing turns on these irregularities but I have encountered them very often and I think it is right that attention is drawn to the requirements of O 7 r 3(1).

4 ***The agreement dated 13 November 1995***

5 In this agreement between the parties the plaintiff is referred to as `CAT` and the defendant as `CHS` and I shall refer to them as such. I shall also refer to this agreement as the service agreement. The service agreement provides by way of a recital:

> *CAT carries on the business of a trading company, trading in commodities and has entered into a series of contracts with Lam Guan Chan (Pte) Ltd ... (hereinafter referred to as `LGC`) for the delivery of Latin American and USA origin bulk Commodities.*
>
> *The Conditions of sale are CAD ex Warehouse in either Sembawang Port, Port Butterworth or Port Klang within 90 days from Vessel Discharge Date.*
>
> *CHS carries on the business of an Independent Warehouseman and In-house Surveyor and having the ability to provide Warehouse Management to control the inventory.*
>
> *To ensure that the commodities supplied by CAT to LGC are controlled both CAT and LGC agree to accept the Warehouse Management Services provided by CHS.*

6 `CAD` probably means `cash against documents` but no attempt has been made by either party to say what it stands for. LGC is not a party to the service agreement although it is provided that both CAT and LGC agree to accept the warehouse management services provided by CHS.

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7 `Warehouse Management Services` is not defined in the service agreement but in cl 1 these definitions are provided:

Warehouse	The Warehouses for the storage of the commodities will be supplied by LGC. All expenses and charges incurred for the leasing of the warehouse will be for the account of LGC.
Warehouse Management	The services that will be undertaken by CHS to ensure that the commodities are handled and stored in accordance with the rules of good warehousing.

8 I think `Warehouse Management Services` is a reference to the services provided or `undertaken` by CHS as stated in the definition of `Warehouse Management`.

9 Clause 3 of the service agreement provides:

> 3.1 CAT hereby appoints CHS to oversee the offloading of the commodities from the vessel, the transportation of the commodities to the warehouse, the storage of the commodities and the delivery or the release of the commodities to LGC.
>
> 3.2 Since CHS does not have its own handling and warehousing facilities in the respective ports, CHS will utilize LGC facilities as LGC has a contract with the Port Authority of the respective ports, under which LGC leases the warehouses and can use the handling services provided by the port.
>
> 3.3 CHS will contract with LGC to handle the discharging of the commodities and store them in the warehouses provided by LGC at zero cost, as these cost are for the account of LGC under the sales or purchase contracts entered between CAT and LGC.`

10 Clause 7 of the service agreement provides:

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> 7.4 CHS shall only act upon receipt of written instructions from CAT …
>
> 7.7 CHS shall only release the Commodities or such part of the same to the party named by CAT in its written instructions to CHS … The Commodities shall be deemed effectively delivered by CHS upon the acknowledgment or endorsement of the Delivery Order of CHS by the party or its duly authorised representatives so named in the instructions, whereupon CHS`s obligations or duty to release the Commodities under this Agreement shall be deemed fully discharged.

11 It is clear that CAT has sold to LGC bulk commodities of Latin American and USA origin which will be stored in warehouses provided by LGC. These warehouses will be leased to CHS but all expenses and charges will be for the account of LGC. In effect the warehouses will be provided by LGC at no cost to CHS `as these cost (sic) are for the account of LGC under the sales or purchase contracts entered between CAT and LGC`. See cl 3.3.

12 It is also clear that although the goods will be in LGC`s warehouses LGC will only receive the documents and be entitled to the goods upon payment to or as directed by CAT. CAT will then issue written instructions to CHS under cl 7.4. The written instructions will name the party to whom the goods are to be released and under cl 7.7 CHS will issue a delivery order for the goods to be released. LGC or the party named in CAT`s written instructions will in all probability retain one set of the delivery order signed on behalf of CHS as evidence of its right to take delivery of the goods from the warehouse and CHS will receive another set or a copy endorsed by LGC or the party named as evidence of the discharge of its duty to release the goods under the service agreement.

13 Clause 8 of the service agreement provides:

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> 8.1 CHS undertakes to exercise due care and skill in the performance of its services.
>
> 8.3 The liability of CHS to CAT in respect of any claims for loss or damage to or expenses arising from the Commodities or in respect of the Warehouse Management Operations shall be subjected to CHS Warehousing and Forwarding Conditions to the extent not specified by this Agreement.

14 There are two sets of conditions known as the CHS warehousing conditions and the CHS forwarding conditions. The CHS warehousing conditions (`warehousing conditions`) are conditions printed on a document separate from the agreement of 13 November 1995. The CHS forwarding conditions are not relevant and have not been referred to in these proceedings.

15 Clause 38 of the warehousing conditions provides:

> (i) All disputes which may arise between the Company and the Customer shall be referred to arbitration in the Republic of Singapore under and in accordance with the Arbitration Act (Chapter 16) or any statutory modification or re-enactment of the same for the time being in force, by three (3) arbitrators to the exclusion of the ordinary courts of law …

16 Provisions are made for the parties to appoint arbitrators. Clause 38 then provides:

> (vi) If all three (3) arbitrators have not been appointed within thirty (30) days of the Notice having been given all of them shall be appointed by the High Court upon the application of whichever party shall first make the same.

17 `The Company` is a reference to CHS and `the Customer` is defined in the warehousing conditions to include a person with whom CHS has agreed to store or deliver goods and a person to whom CHS has issued a delivery order.

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`The Customer` will include CAT and LGC if they are bound by the warehousing conditions.

18 ***The claim***

19 LGC has defaulted in its obligations and CAT has recalled the goods stored at the warehouses in Malaysia. It is alleged that there has been a substantial shortfall in the goods and also that the goods have deteriorated. CAT has given notice of its claim `including but not limited to any and all losses and damages suffered on and in connection with the commodities which were handed to [CHS] for storage in the various ports in Malaysia`. Clause 38 of the warehousing conditions has been referred to and a claim to arbitration has been made. CHS has declined arbitration and has taken no step to appoint arbitrators.

20 CAT`s case is that cl 8.3 of the service agreement incorporates by reference the warehousing conditions including cl 38 which provides for arbitration. The service agreement itself contains no agreement to refer any disputes to arbitration and it is not disputed that if cl 38 of the warehousing conditions is not incorporated or is otherwise inapplicable then CAT`s application must fail. It is also not disputed that in cl 38 of the warehousing conditions the reference to arbitration under the Arbitration Act includes a reference to arbitration under the International Arbitration Act (see s 26(3) of the International Arbitration Act) and that the arbitration under cl 38 would be an international arbitration on the ground that the place or places where a substantial part of the obligations under the service agreement are or ought to have been performed are situated outside Singapore (see s 5(2)(b)(ii)).

21 ***Incorporation of cl 38 by reference***

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22 In **Star-Trans Far East Pte Ltd v Norske-Tech Ltd & Ors** [1996] 2 SLR 409 Karthigesu JA (delivering the judgment of the Court of Appeal) said at p 416:

> *It is well-settled from those cases that the courts will construe words of incorporation used in bills of lading narrowly (see the leading authority of* ***TW Thomas & Co Ltd v Portsea Steamship Co Ltd, The Portsmouth*** *[1912] AC 1).*

23 The cases referred to were concerned with arbitration clauses in charterparties in relation to disputes between the parties to the contracts evidenced by or contained in the bills of lading issued pursuant to the charterparties. Karthigesu JA then referred to **The Varenna; Skips A/S Nordheim & Ors v Syrian Petroleum Co Ltd** [1984] QB 599[1983] 2 Lloyd`s Rep 592 where it was held that general incorporating words had to be construed restrictively to incorporate only conditions and exceptions as were appropriate to the carriage and delivery of goods and that as a matter of construction, the words would not extend to a collateral term such as an arbitration clause even if that clause was expressed in terms which were capable of referring to the bill of lading.

24 Later at p 417 His Honour said:

> *In* ***Aughton****`s case [* ***Aughton Ltd v MF Kent Services Ltd*** *[1992] ADRLJ 83], Sir John Megaw stated the following three policy reasons for adopting the strict approach from the bill of lading cases:*
>
> (a) clear language is required to oust the jurisdiction of the courts;
>
> (b) the statutory requirement for an arbitration agreement to be in writing (see s 2 of the Act) was a clear indication that a party was [not] to be regarded as relinquishing access to the courts lightly;

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> (c) an arbitration clause is an independent and self-contained contract, and is not to be regarded as merely another term in the main contract which can be incorporated by reference to that main contract.
>
> *These views have been reflected in the reinsurance cases cited above. Merkin (**Arbitration Law** [1991] para 4.22) has thus opined that `the general policy of the law as regards the purported incorporation by general wording of arbitration clauses in other contracts must be regarded as firmly settled`.*

25 The reference to s 2 of the Act in para (b) above was a reference to s 2 of the Singapore Arbitration Act and the omission of `not` was I believe a printing error. See ***Aughton*** `s case at p 92 where Sir John Megaw said:

> *The object, or the effect, of that statutory requirement must be to emphasise, and seek to ensure, that one is **not** (italics added) to be deprived of his right to have a dispute decided by a court of law, unless he has consciously and deliberately agreed that it should be so.*

26 ***Star-Trans*** was concerned with an arbitration clause in a contract to organize ocean carriage of plant and equipment from various parts of the world to the construction site of a proposed pulp and paper mill in Indonesia in relation to disputes between the parties to a performance guarantee given pursuant to the main contract and with respect I think the Court of Appeal adopted the general policy in respect of which there is this statement in Merkin, **Arbitration Law** [1991] at para 4.24:

> *... the general policy of the law as regards the purported incorporation by general wording of arbitration clauses in other contracts must be regarded as firmly settled and that general words will not suffice in the absence of a clear intention held by the parties to incorporate the arbitration clause.*

27 ***Star-Trans*** was not a bill of lading case and the arbitration clause was contained in another contract. In the case before me the arbitration clause is not

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contained in another contract but in the warehousing conditions but I think the principle is equally applicable.

28 Ms Ang referred to Mustill & Boyd, ***The Law and Practice of Commercial Arbitration in England*** (2nd Ed, 1989) at p 106 which has this statement:

> *In principle an arbitration clause may be incorporated by a reference to a standard form of contract or the particular terms of another contract in which the clause is set out, even without express reference to the clause. But it must be clear that the parties intended the arbitration clause to apply.`*

29 and to 2 ***Halsbury`s Laws of Singapore*** at para 20.015 which has this statement:

> *As an arbitration clause in a contract is considered a separate and independent agreement, words of its incorporation must be specific.*

30 I think it is a question of construction in each case. There must be a clear intention to incorporate an arbitration clause. If the words of incorporation are specific that intention may well have been clearly expressed.

31 I turn now to the service agreement. The obligations of CHS include storage of the goods and the delivery or release of these goods to LGC. See cl 3.1. CHS undertakes to exercise due care and skill. See cl 8.1. The goods are to be handled and stored in accordance with the `rules of good warehousing`. See cl 1 and the definition of warehouse management. CHS is to release the goods to the party named by CAT in its written instructions. See cl 7.7. If CAT recalls the goods or gives written directions for the goods to be released to itself (or to any named party) as it has done and CHS cannot deliver either in whole or in part or if any of the goods have suffered deterioration for want of due care or

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skill or for breach of the rules of good warehousing or otherwise for breach of any of the express or implied terms of the service agreement then it seems to me that CHS would be liable to CAT under the service agreement.

32 Ms Ang submitted that a liability ***to the extent not specified by the service agreement*** cannot extend to arbitration. I think it may be helpful to re-state cl 8.3 leaving out the words which are not relevant:

> *The liability of CHS to CAT ... shall be subjected to [the warehousing conditions] to the extent not specified by [the service agreement].*

33 I have not heard Mr Pereira`s full submission on this but it is a substantial and compelling point.

34 Liability under the service agreement may extend to areas covered or causes of action and it may also extend to the quantum of damages payable. I have not found any provision as to the quantum of damages either in the service agreement or the warehousing conditions. However cl 8.2 of the service agreement excludes liability for loss or damage or deterioration arising out of a certain number of causes. Clause 20 of the warehousing conditions excludes liability for a wider range of causes.

35 It is possible to say that the service agreement limits liability to a certain extent but the warehousing conditions limit liability to a greater extent so that the further limitation of liability is the extent of liability not specified by the service agreement. The difficulty in the way of such a construction is that I can see no warrant for coming to the conclusion that the express term is to be struck down by a side wind bringing in another term in its wake.

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36 Another construction is that where the extent of liability is not specified by the service agreement then the liability will be `subjected to` the warehousing conditions. This is the construction I prefer of the two. Looked at in this way I think what cl 8.3 means is that where the extent of liability of CHS for the stated class of claims is not specified by the service agreement then such liability is `subjected to` the warehousing conditions.

37 A third way of construing cl 8.3 is to read `the extent` as qualifying the warehousing conditions so that the concluding words will have the effect of subjecting the liability of CHS to such only of the clauses in the warehousing conditions as are not specified by the service agreement. Such clauses in the warehousing conditions would include the arbitration clause but the question still to be answered is whether the liability of CHS is subjected to the arbitration clause.

38 In **Thomas & Co Ltd v Portsea SS Co Ltd** [1912] AC 1 the bill of lading contained this clause:

> *Deck load at shipper`s risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause.*

39 The charterparty contained an arbitration clause. Lord Loreburn LC said at p 6:

> *I do not think that this paragraph brings into the bill of lading the arbitration clause ... The arbitration clause is not one that governs shipment or carriage or delivery or the terms upon which delivery is to be made or taken; it only governs the way of settling disputes between the parties to the charter party ...*

40 Lord Gorell said at p 8:

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> *I think the true view to take of such a clause is that the `terms and conditions` do not really include more than refers to those matters which have to be dealt with by both the ship-owner and the consignee in relation to the carriage, discharge, and delivery of the cargo. To what extent they include what refers to those matters I do not pause to consider, but I do not see that they expressly in any way deal with the arbitration clause ...*

41 Mr Pereira submitted that liability must include the method of adjudication in respect of the rights of the parties. His argument is that liability can only be established when it has been adjudicated upon so that cl 8.3 means that the liability of CHS ***including the method of adjudication upon the same*** shall be `subjected to` the warehousing conditions. He referred to art 7(2) of the Model Law which provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement but this does not take the argument any further as the proviso to this part of art 7(2) is that the reference is such as to make the arbitration clause part of the contract.

42 There may well be an exceptional case where `liability` may have this extended meaning. If the relevant clause goes something like this:

> *The liability of the parties shall be subject to the warehousing conditions including the arbitration clause.*

43 then I should have no doubt that `liability` does in this context include the means of resolving disputes as to liability. See **The Nerarno; Daval Aciers D`Usinor et de Sacilor & Ors v Armare Srl** [1996] 1 Lloyd`s Rep 1 where the words of incorporation specifically referred to the arbitration clause. It is the specific reference to the arbitration clause which points to the intention of the parties notwithstanding the use of the phrase `the liability of the parties`. However what cl 8.3 says is quite different.

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44 The liability of CHS is what CHS is liable for. The arbitration clause in the warehousing conditions contains an agreement between the parties bound by it to refer their disputes to arbitration. It provides a means of resolving their disputes. It is no part of the liability of any one of the parties. I do not think `liability` includes the method of adjudication or the way the parties have agreed that disputes between them should be settled. In the context of cl 8.3 of the service agreement it does not.

45 Ms Ang submitted that this clause is not sufficiently clear or specific to incorporate the arbitration clause. I agree. It is the liability to the extent not specified by the service agreement that is `subjected to` the warehousing conditions. Whether it bears the `further limitation` meaning or the construction I have expressed a preference for it seems quite clear that only the warehousing conditions relevant to the ***extent*** of liability will apply. Such clauses in the warehousing conditions as are not specified by the service agreement to which the liability of CHS is subjected to do not include the arbitration clause. The arbitration clause does not apply to the service agreement or to any disputes between the parties.

46 Ms Ang also submitted that cl 8.3 only operates one way. It applies only to the liability of CHS but not to the liability of CAT. Apart from its liability for fees and other charges CAT is also liable to indemnify CHS in respect of a range of claims. See cll 8.4 and 9.1. CHS cannot refer to arbitration any dispute as to such claims. If cl 8.3 incorporates the arbitration clause in the warehousing conditions and a claim made by CAT is referred to arbitration CHS may not be able to raise a counterclaim in the arbitration. Ms Ang`s argument is that an arbitration clause must be there for the benefit of both parties and that in the

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context it would not be appropriate to construe cl 8.3 as incorporating the arbitration clause.

47 I do not think that the `one way operation` argument is relevant to the construction of cl 8.3 but it may well be a matter to take into account in the exercise of a discretionary power. That is not before me. The question before me is whether the arbitration clause contained in the warehousing conditions has been incorporated in the service agreement by reference. The arbitration clause itself has not been referred to at all. The warehousing conditions have been referred to but only in regard to the liability of CHS and to the extent not specified in the service agreement.

48 In my judgment cl 8.3 of the service agreement does not incorporate the arbitration clause in the warehousing conditions. The words relied on are not sufficiently clear or specific for this purpose. I agree with the deputy registrar and would dismiss this appeal.

49 **Outcome:**

50 Appeal dismissed.

Lim Teong Qwee JC

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Kenneth Pereira and Marcus Yip (Allen & Gledhill) for the plaintiffs
Belinda Ang Fong Saw Ean SC and Anna Quah (Ang & Partners) for the defendants

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