Piallo GmbH *v* Yafriro International Pte Ltd
[2013] SGHCR 20

Case Number : Suit No 354 of 2013 (Summons No 2423 of 2013)

Decision Date : 02 July 2013

Tribunal/Court : High Court

Coram : Delphine Ho AR

Counsel Name(s) : Mr Peter Doraisamy and Ms Rafizah Gaffoor (Selvam LLC) for the Plaintiff; Mr Sim Chong (JLC Advisors LLP) for the Defendant.

Parties : Piallo GmbH — Yafriro International Pte Ltd

Civil Procedure – Stay of Proceedings

Arbitration

2 July 2013 Judgment reserved.

Delphine Ho AR:

1 This is an application by Yafriro International Pte Ltd ("the Defendant") for a stay of all proceedings in Suit No 354 of 2013, including but not limited to the filing and service of the Defendant's defence, in favour of arbitration pursuant to the International Arbitration Act (Cap 143A) ("IAA"), or alternatively the Supreme Court of Judicature Act (Cap 322), or alternatively the inherent jurisdiction of the court ("the Stay Application").

2 After hearing the submissions from parties' counsel, I reserved judgment in order to fully consider the written submissions, as well as the numerous authorities referred to by counsel in both their oral and written submissions.

Background

3 Piallo GmbH ("the Plaintiff") is an Austrian company that manufactures watches, jewellery and accessories under the luxury brand "DELACOUR". The Defendant is a company incorporate in Singapore and which carried on business as a general wholesale trader.

4 By a distributorship agreement dated 17 September 2008 ("Distributorship Agreement"), the Plaintiff granted to the Defendant the exclusive right to market, distribute and sell all collections of DELACOUR watches, jewellery and accessories ("DELACOUR Products") in certain markets in Asia for a period of 5 years.

5 It is not disputed that pursuant to the Distributorship Agreement, the Plaintiff supplied the Defendant with DELACOUR Products for which the Defendant was liable to pay. Indeed, the relationship between the Plaintiff and the Defendant appeared to have proceeded quite nicely along until some time in 2012. Thereafter, the Plaintiff claimed that it had supplied DELACOUR Products to the Defendant (and invoiced the Defendant for the same) from May 2012 to December 2012 for which no payment was made.

6 The Plaintiff claimed that the total amount outstanding was CHF 570,333.45. While the

Defendant admits that there are sums owing to the Plaintiff, the Defendant has alleged that the Plaintiff had breached the terms of the Distributorship Agreement.

7 In any event, it is not disputed the Defendant proffered part payment for the DELACOUR Products by providing the Plaintiff with 15 post-dated cheques ("the Cheques") in late 2012. The Cheques were dated between 10 January 2013 to 30 April 2013 and totalled S$680,198.00 (approximately CHF 511,210.00).

8 However, before the earliest Cheque was due to be encashed, by a letter dated 8 January 2013, the Defendant informed the Plaintiff that it would be countermanding payment on all the Cheques. The Defendant does not dispute that it had taken steps to countermand payment on the Cheques, and the Plaintiff does not dispute that it received notice of the Defendant's intention to countermand the Cheques.

9 The wording of the Defendant's letter of 8 April 2013 is pertinent, and for that reason, I set it out in full below:

"Dear Alfred,

Please be informed that Yafriro will proceed to terminate the following cheques that were handed over to you:

Date	**Cheque Number**	**Amount SGD**
10 January 2013	UOB 104329	34,666
15 January 2013	BOC 322187	19,000
24 January 2013	UOB 636489	124,000
24 January 2013	UOB 724666	22,500
30 January 2013	BOC 322193	38,400
10 February 2013	UOB 104330	34,666
15 February 2013	BOC 322188	19,000
24 February 2013	UOB 724667	112,500
28 February 2013	BOC 322194	38,400
10 March 2013	UOB 104331	34,666
15 March 2013	BOC 322189	19,000
20 March 2013	BOC 322191	62,000
30 March 2013	BOC 322200	38,400
15 April 2013	BOC 322190	19,000
30 April 2013	BOC 322192	64,000

In replacement, Yafriro will make transfer of CHF50,000 within the last week of each month,

starting from January 2013, as payment against outstanding amounts due.

I had personally agreed to the substantial payment schedule through series of post dated cheques over a very short period of time to support our partnership and deLaCour's arrangement of financial facilities with banks. Unfortunately, your unexpected and premature alteration to our existing Exclusive Distributorship Agreement signed on 17th September 2008 had resulted in significant damage to the sales of the brand in Yafriro as well as our credibility to our customers, making the payment schedule highly impossible.

Due to the current situation, I am obliged to make the necessary changes.

10 The above letter was signed by Mr Iwan Hew, the Defendant's Managing Director.

11 The Plaintiff responded with the following email dated 10 January 2013:

Dear Iwan,

As I have always mentioned during all my visits, we always said that we want to continue to work with you even though:

- Your purchases have decreased in during the last 3 years:
    - 2010: 1450700
    - 2011: 1124600 (-22%)
    - 2012: 687000 (-39%)
- You never paid us on time and as per today you still owe us CHF 598413.--. (87% of 2012 purchases). This brought us to an untenable situation in 2012 which obliged us to sell all your cheques to our bank as I mentioned to you yesterday.

...

And to show you once more our interest to continue working with you, we have been renegotiating your cheques this whole morning with our banks. They confirmed that they cannot cannot cancel January and February cheques but they are ready to return the cheques of March and April against new cheques as following to settle your debts:

- March 20th : CHF 50000
- April 20th : CHF 50000
- May 20th : CHF 50000
- June 20th : CHF 50000
- July 20th : CHF 44503,45.__

Total : CHF 244503,45

As soon as we receive your new cheques the old ones dated March and April will be returned (6 cheques). I hope that our efforts are appreciated in order to maintain our commercial relationship and friendship. ... [emphasis in original.]

12 It appears from the evidence before me that the Defendant did not respond to the Plaintiff's email of 10 January 2013 until end-January 2013, by which time the Plaintiff's bankers had presented some of the Cheques for payment and the Cheques were, not unexpectedly, dishonoured.

13 Despite the Defendant's notice of its intention to countermand the Cheques, and the actual countermand of the Cheques (as evidenced by the aforesaid dishonoured Cheques), the Plaintiff continued to present the Cheques for payment.

14 All the Cheques were dishonoured upon presentation, save for the Cheques numbered 322000, 322190 and 322192, which were not presented for payment as the Plaintiff has taken the position that the presentation of these three Cheques had been dispensed with and/or waived by the Defendant.

15 On or about 28 May 2013, the Plaintiff commenced the present proceedings seeking the sum of S$680,198.00, being the total value of all 15 Cheques.

The Present Application

16 Pursuant to Section 6(1) of the IAA, the Defendant entered appearance in the Suit and filed this Stay Application within the prescribed timelines.

17 It is common ground between the parties that an arbitration agreement existed between the parties and that the IAA was applicable to the said arbitration agreement.

18 That being the case, counsel for the Defendant submitted that Section 6(2) of the IAA mandated a stay of the court proceedings in favour of arbitration. The Defendant relied heavily on the Court of Appeal decision in *Tjong Very Sumito & Ors v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 in support of its position.

19 The Plaintiff, on the other hand, took the position that a stay was not warranted in the present proceedings. The Plaintiff's objections to the Stay Application rested on two key arguments:

(a) First, the Plaintiff's claim in these proceedings is based solely on the dishonoured Cheques and a claim of this nature falls outside of the scope of the arbitration clause. Accordingly, the requirements of Section 6(1) of the IAA have not been met and a stay should not be granted.

(b) Alternatively, even if the Plaintiff's claim fell within the scope of the arbitration clause, there was no dispute in the present proceedings which ought to be referred to arbitration.

The Issues

20 There are therefore two issues before me to be considered and these must be taken in sequence:

(a) First, does the Plaintiff's claim fall within the scope of the arbitration clause in the Distribution Agreement? If the answer is negative, then the Defendant's application for a stay under Section 6 of the IAA would not be made out. I would then have to consider whether to

exercise the inherent jurisdiction of the court to grant the stay.

(b) Second, if the first question was found to be in the affirmative, then the question to be determined is whether there is any dispute in the present case that is referable to arbitration.

The Arbitration Clause

21 At this juncture, it is appropriate to set out the precise words of the arbitration clause. It is found at Article 20 of the Distributorship Agreement and states:

20.1 Any dispute arising out of or in connection with the present contract shall be finally settled under the rules of Arbitration of the ICC Paris by one arbitrator appointed in accordance with the said Rules.

20.2 The seat of the arbitration is Geneva.

20.3 This contract is governed by the laws of the Switzerland.

20.4 The language of arbitration is English.

The Law

Principles governing the grant of a stay under Section 6 of the IAA

22 The principles governing the grant of a stay under Section 6 of the IAA were fully canvassed by the Court of Appeal in *Tjong Very Sumito* at [69]. In summary:

(a) In order to obtain a stay under Section 6 of the IAA, the applicant has to satisfy the court that (i) he was a party to an arbitration agreement, and (ii) the proceedings in question fell within the terms of the arbitration agreement.

(b) If the aforesaid are satisfied, then it falls on the party resisting a stay to show that the arbitration cause was "null and void, inoperative or incapable of being performed" in order to avoid the grant of a stay.

(c) Even if the proceedings in question fall within the terms of the arbitration agreement, the subject matter of the proceedings could still fall outside the terms of the arbitration agreement if there was no dispute between the parties.

23 In relation to (c), the word "dispute" will be interpreted "broadly", and the court "will readily find that a dispute exists unless the defendant has unequivocally admitted that the claim is due and payable".

24 Both counsel are in agreement with respect to the above principles.

Does the Plaintiff's claim in the present proceedings fall outside the terms of the arbitration agreement?

25 In relation to the first issue, I start with the Court of Appeal decision in *Wong Fook Heng v. Amixco Asia Pte Ltd* [1992] 1 SLR(R) 654 which stands for the principle that a bill of exchange is a separate contract from the contract pursuant to which the said bill of exchange was furnished.

26 In *Wong*, the appellant granted the respondent an option to purchase certain properties. The option was to expire on 5 June 1981. On 30 May 1981, the respondent gave the appellant a cheque dated 30 May 1981 as payment of the option fee. However, on 1 June 1981, the appellant's bank informed him that the respondent had stopped payment on the cheque and written confirmation of the respondent's countermand of the cheque was received by the appellant on 2 June 2013.

27 The appellant commenced proceedings against the respondent seeking the sum due under the dishonoured cheque. The respondent did not deny that he had countermanded by cheque, but alleged that the appellant had repudiated the option contract by offering a second option to another party before the first option had even expired. It was this purported repudiation by the appellant which led directly to the respondent countermanding their cheque.

28 The Court of Appeal allowed the appeal, and held that:

> A bill of exchange evidenced a contract separate and distinct from the original and underlying contract in pursuant of which the bill was executed. It did not depend for its enforcement on the performance of the original contract. A bill of exchange, once given, was to be treated as cash and was to be honoured unless there was some good reason to the contrary.

29 I move now to the decision of the House of Lords in *Nova (Jersey) Knit Ltd v. Kammgarn Spinnerei GmbH* [1977] 1 WLR 714, the facts of which are particularly relevant to the present proceedings and which I will recount in greater detail. In *Nova*, the appellant and the respondent had entered into a partnership agreement for the supply of machinery (by the appellant) to be used in Germany in the parties' partnership operations. The partnership agreement contained an arbitration clause requiring "all disputes arising from the partnership relationship or occasioned by (or 'in connection with') the partnership relationship between the partnership and partners" to be determined by arbitration.

30 The appellant sold certain machines to the respondent and in return, the respondent issued 24 bills of exchange to the appellant. The bills were issued in January 1973 and post-dated to between 31 March 1973 to 31 December 1975. The first six bills were paid on maturity but on 21 December 1973, the respondent informed the appellant that the remaining bills would not be met.

31 The appellant commenced proceedings against the respondent for the amounts due on the unmet bills. The respondent sought to stay the proceedings on the basis of the arbitration agreement referred to at paragraph 29 above. The House of Lords held, by a majority, that a stay of the action should be refused because the arbitration agreement did not extend to cover the appellant's claim on the bills of exchange, which constituted separate and independent contracts.

32 In *Pacific Forex Ltd v. Lei Kuan Leong* [1999] HKCA 364, the Hong Kong Court of Appeal, in adopting *Nova*, held (at [11]):

> The approach to be adopted in Hong Kong law is no different from that in English law ... A bill of exchange is not valid if it incorporates an arbitration clause. **To hold that an arbitration clause referring to disputes arising from the underlying agreement, applies to bills of exchange would make "a very substantial inroad upon the commercial principle on which bills of exchange have always rested."** Accordingly there must be a plain manifestation in the arbitration clause that it is to apply to bills of exchange if the presumption against taking bills of exchange into arbitration is to be rebutted. As Lord Russell indicated, there is an inconsistency between the nature and function of such a bill and an arbitration clause. [Emphasis added.]

33 The decision in *Pacific Forex* was followed in two subsequent Hong Kong decisions, *China Overseas Building Construction Ltd v. Profit National Development Ltd & Ors* [2005] HKEC 836 and *China Overseas Building Construction Ltd v. True Gold Investments Ltd & Ors* [2005] HKEC 853.

34 In light of the above authorities, counsel for the Plaintiff argued strongly that the Plaintiff's claim on the Cheques in the present case was a claim not on the Distributorship Agreement, but on a separate contract. Accordingly, in the absence of express words to the contrary, the Plaintiff's claim on the Cheques would fall outside of the scope of the arbitration clause in the Distributorship Agreement.

35 In *Getwick Engineers Limited v. Pilecon Engineering Limited* [2002] KCFI 189 (which was referred to *Tjong Very Sumito* but not fully addressed by Counsel), the plaintiff was the defendant's sub-contractor for the installation of ventilation and air-conditioning works. The plaintiff completed the works and thereafter, due to the defendant's failure to make payment, brought a claim against the defendant for *inter alia* sums due under six payment certificates amounting to approximately $530,000.

36 The defendant prepared a letter stating that only $350,000 was due to the plaintiff and issued three post-dated cheques amounting to that sum. The defendant further stated in the letter that "the exact amount of further payment shall be agreed after the completion of our final account to this subcontract".

37 The plaintiff then presented the three cheques for payment. Two were honoured, while the third was dishonoured. The plaintiff commenced proceedings seeking summary judgment on the sum of the dishonoured cheque, as well as for the outstanding amounts due under the payment certificates, for additional works and for variation works. The defendant disputed the plaintiff's claims and sought to stay the proceedings in favour of arbitration.

38 The Honourable Justice Ma, who heard both the plaintiff's application for summary judgment and the defendant's application for a stay, granted the stay in respect of all of the plaintiff's claims except for the claim on the dishonoured cheque. For the latter, summary judgment was granted. The learned Judge held:

> However, the cheque dated 31 September 2001 for $115,000 is in my view to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum (in that amount) under payment certificates. This cheque was issued following the 28 April letter to which I have already referred above at paragraph 10. It was one of three cheques sent to the plaintiff by the defendant as an acknowledgement of its liability under payment certificates which had been issued to the plaintiff (although it only stated the sum of $350,000). In reaching this conclusion, I have borne in mind that cheques are to be regarded as cash and save in exceptional circumstances, no set off or counterclaim will be permitted. Two of the three cheques have been honoured. I see no reason why the third cheque should not be seen in the same light. I have not been referred to any case in which a cheque or bill of exchange has been regarded as constituting a clear an unequivocal admission of liability and quantum, but in principle, I do not see why it cannot be so regarded.

39 While the arguments presented by counsel for the Plaintiff in this regard were compelling, I was hesitant to adopt *Nova* (and the cases following *Nova)* wholesale due to critical factual differences between those cases and the present case:

(a) The Cheques were post-dated cheques. This means that until the actual date of payment,

they are not payable on demand. The Malaysian High Court observed in *Lien Chung Credit & Leasing Sdn Bhd v. Chang Chin Choi* [1994] 3 MLJ 488 that a post-dated cheque "had no value as it did not represent any property that a creditor could resort to in the event he wanted to realise or recover the debt". While the facts of *Lien Chung* are of no assistance here, this observation as to the *lack* of any value of a post-dated cheque is instructive.

(b) By 8 January 2013, before the first Cheque became payable, the Defendant informed the Plaintiff that the Cheques would be countermanded.

(c) Unlike in *Nova* or *Getwick*, none of the Cheques tendered by the Defendant had been honoured.

(d) The arbitration agreement in the Distributorship Agreement was, in my view, wider than that in *Nova*.

40 In *Dalian Hualiang Enterprise Group Co Ltd & Anor v. Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646, a case also relating to the grant of a stay under Section 6 of the IAA, the Honourable Justice Woo Bih Li held (at [20]) that the court's jurisdiction to grant a stay under Section 6(2) of the IAA only arises if the subject matter of the court proceedings is also the subject of the arbitration agreement. The learned Judge further held, at paragraph [25] of the judgment:

I was of the view that I had jurisdiction to determine if the matter before the court was the subject of the arbitration agreement between the parties. **However, if that issue was arguable in that the outcome was not clear to me, then I should stay the court proceedings.** [Emphasis added.]

41 Having regard to the factual differences between the present case and *Nova* which I have already highlighted above, I was of the view that there is no clear-cut answer to the question of whether the Plaintiff's claim on the Cheques does indeed fall outside the scope of the arbitration clause. In these circumstances, and on the authority of *Dalian Hualiang*, I would order a stay of the court proceedings in favour of arbitration.

42 Counsel for the Plaintiff also argued that the arbitration clause did not encompass the Plaintiff's claim because the Agreement merely granted the Defendant a right to market, sell and distribute DELACOUR products and was not a contract for the sale and purchase of DELACOUR products between the parties.

43 I was not persuaded by this argument. The Distributorship Agreement contains clauses relating to *inter alia* the Plaintiff's obligation to supply DELACOUR products (Article 6 of the Distributorship Agreement), the Defendant's obligation to sell DELACOUR products (Article 3 of the Distributorship Agreement) and the agreed sales targets for such sales (Article 7 of the Distributorship Agreement). In the premises, it seemed clear to me that the supply of DELACOUR products by the Plaintiff is an issue that "arises out of or in connection with" the Distributorship Agreement.

Even if the Plaintiff's claim in the present proceedings falls within the terms of the arbitration agreement, is there a dispute that is referable to arbitration?

44 In *Tjong Very Sumito*, the Court of Appeal held that the word "dispute" in an arbitration agreement should be interpreted broadly and the court "would readily find that a dispute existed unless the defendant had unequivocally admitted that the claim was due and payable". Further, "the court would not assess the merits of a denial/defence or the genuineness of a 'dispute' since these

matters should properly be left to the arbitrator to assess in accordance with the parties' contractual bargain to arbitration" (see headnote 4 of the judgment).

45 I would also highlight that the Court of Appeal approved of the Honourable Justice Ma's approach in *Getwick* (in refusing to grant a stay in respect of the portion of the plaintiff's claim which related to a dishonoured cheque) but only in the limited circumstances of that case.

46 Counsel for the Plaintiff argued that there was no dispute in relation to the Plaintiff's claim for the following reasons:

(a) The Defendant's letter of 8 January 2013 does not dispute the Plaintiff's entitlement to payment, but merely proposes an alternatively instalment payment instead of payment under the Cheques.

(b) The Defendant has not disputed the quantum of the outstanding sums. In fact, the Defendant's letter of 8 January 2013 and the SMS from the Defendant's director to the Plaintiff suggested that the Defendant's only issue was with the frequency of the payments, but not the amount to be paid.

47 In the present case, I was of the view that the Defendant's act in countermanding the Cheques on 8 January 2013 was evidence of a dispute between the parties. The Court of Appeal has made it clear in *Tjong Very Sumito* that a dispute remains even where the defendant had originally admitted liability, but subsequently refused to make payment, and that such dispute should be referred to arbitration.

48 In any event, by the Defendant's 8 January 2013 letter, there was no unequivocal admission by the Defendant as to both liability and quantum. Although the Defendant did propose to pay CHF 50,000 within the last week of every month, there is no indication in that letter as to how long the payments would take to be made. In the premises, without a clear and unequivocal admission of liability and quantum, the parties "should be held to their contractual bargain, and the bargain should be resolved by arbitration" (see *Tjong Very Sumito*, at [64]).

49 Finally, for the same reasons as set out at paragraphs 42 and 43 above, I was of the view that the dispute is clearly related to the Distributorship Agreement in which the arbitration agreement is contained.

Summary

50 In summary, applying the steps to the analysis espoused by the Court of Appeal in *Tjong Very Sumito:*

(a) Is there an arbitration agreement between the parties? The answer to this is undisputedly yes.

(b) Does the Plaintiff's claim fall within the terms of the arbitration agreement? In my view, it is possible that the Plaintiff's claim falls within the terms of the arbitration. The uncertainty of this answer points towards a stay in favour of arbitration.

(c) Is the arbitration agreement "null and void, inoperative or incapable of being performed"? This has not been addressed by the parties, and I therefore proceeded on the basis that this question is to be answered in the negative.

(d) Is there a dispute between the parties? For the reasons set out above, I was of the view that this is a yes.

(e) Finally, is the dispute related to the contract which contains the arbitration agreement? The answer to this is again, yes.

Conclusion

51 Accordingly, for the reasons set out above, I was of the view that the requirements under Section 6 of the IAA have been met and the Defendant is entitled to a mandatory stay of the present proceedings in favour of arbitration. There was no necessity for me to consider the Defendant's alternative ground for a stay, namely for a stay pursuant to the inherent jurisdiction of the court, in the circumstances.

52 I will now hear parties on costs.

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