HKL Group Co Ltd *v* Rizq International Holdings Pte Ltd
[2013] SGHCR 5

Case Number	: Suit No 972 of 2012/P (Summons No 6427 of 2012/J and Summons No 70 of 2013)
Decision Date	: 19 February 2013
Tribunal/Court	: High Court
Coram	: Jordan Tan AR
Counsel Name(s)	: Kendall Tan and Daniel Liang (Rajah & Tann LLP) for the plaintiff; Hussainar Bin K Abdul Aziz (H.A. & Chung Partnership) for the defendant.
Parties	: HKL Group Co Ltd — Rizq International Holdings Pte Ltd

Arbitration

19 February 2013 Judgment reserved.

Jordan Tan AR:

Introduction

1 The defendant, Rizq International Holdings Pte Ltd ("Rizq Singapore"), applied by way of Summons No 6427 of 2012 for court proceedings to be stayed in favour of arbitration on the basis of an arbitration clause which was ostensibly defective, or more pejoratively put, pathological. That clause reads (verbatim) as follows:

> Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed.

2 This clause was drafted without legal assistance and it was common ground between the parties that there was no entity in Singapore named the "Arbitration Committee".

3 The plaintiff, HKL Group Co Ltd ("HKL"), resisted the application on the ground that the arbitration clause was inoperable on account of this defect. The plaintiff also argued, as the main plank of its response, that there was, in any event, no dispute within the meaning of the arbitration clause. In the circumstances, because Rizq Singapore had not filed its defence, HKL filed Summons 70 of 2013 seeking default judgment.

Background

4 HKL entered into an agreement dated 28 September 2011 ("the Agreement") with Rizq Singapore for the sale of sand which was to be shipped from Cambodia to Singapore. Rizq Singapore would then sell the sand to Samsung C & T Corporation ("Samsung"). Article 3 of the Agreement provided that HKL was to "follow back to back conditions from [Rizq Singapore's principal, *ie* Samsung] with every payment direct TT by [Rizq Singapore] to [HKL] immediately upon receipt of payment from

[Samsung]". Therefore, Rizq Singapore was to pay HKL immediately once it had received payment from Samsung.

5 Because no time period was specified apart from the use of the word "immediately", the parties agreed in a joint letter dated 15 May 2012 that Rizq Singapore would pay HKL within 24 hours of receipt of Samsung's payment. HKL also sought and obtained notification from Samsung as to when it had made payment.

6 The focus of HKL's claim in the present proceedings is on seven invoices, specifically, invoice number 2012-030, 2012-031, 2012-033, 2012-035, 2012-055, 2012-057, 2012-059 (referred to respectively as the first to seventh invoices). The first to fourth invoices pertained to shipments made in March 2012, the fifth, to May 2012, and the sixth and seventh, to June 2012. For the first to fourth invoices, HKL agreed for payment to be deferred, subject to conditions, so that Rizq Singapore would only have to pay HKL upon the conclusion of its arrangement with Samsung. For the fifth to seventh invoices, Rizq Singapore only made part payment.

7 To add a wrinkle to the facts, although Rizq Singapore had entered into the Agreement with HKL, it was common ground that it was Rizq International Holdings Ltd ("Rizq BVI"), a company registered in the British Virgin Islands, but operating out of the same address as Rizq Singapore, which entered into the separate agreement with Samsung. Rizq Singapore and Rizq BVI belong to the same group of companies.

8 HKL thus brought the present suit to recover that which it was owed under the first to seventh invoices and Rizq Singapore resisted, arguing that the matter should be stayed in favour of arbitration.

Parties' submissions

9 Rizq Singapore submitted that although the arbitration clause was defective, it was clear that the parties' intention was to arbitrate and that the court should rely on the principle of effective interpretation to find that parties could still agree to arbitrate the matter in Singapore, for instance, by referring the matter to the Singapore International Arbitration Centre ("SIAC") for ad-hoc arbitration and agreeing that the International Chamber of Commerce ("ICC") rules are to apply.

10 As for the existence of a dispute, Rizq Singapore disputed the quantum on the ground that the parties had agreed by way of a letter dated 24 April 2012 ("the 24 April letter"), signed by the parties, that not only should payment be on a back to back basis but the liabilities as well meaning that if Samsung refuses to pay for the remaining invoices, Rizq Singapore could refuse to pay HKL as well. Accordingly, because Samsung was seeking to make deductions for various items such as demurrage claims, Rizq Singapore was entitled to withhold from HKL payment of the remaining sum.

11 In response, HKL argued that the arbitration clause was so defective as to be inoperable because it refers to a non-existent entity. HKL also argued that even if the arbitration clause was not inoperable, there was no "dispute" within the meaning of that clause to refer to arbitration. HKL pointed out that Rizq Singapore had never denied liability and that its only basis for disputing the quantum was unsustainable. The 24 April letter clearly stated that the variation of the Agreement for liabilities to be on a back to back basis as well was "subject to contract". HKL further argued that even if liabilities were on a back to back basis, Samsung had already paid Rizq Singapore where the seven invoices were concerned.

My decision

Whether the arbitration clause was so defective as to be inoperable

12 In the majority of cases where an arbitration clause, whether independently or as part of a contract, meets the contractual requirements for validity and where the meaning of that clause may be discerned by the court applying the general principles of contractual interpretation, the party seeking to rely on that clause will simply need to persuade the court that the conditions stipulated in that clause have been satisfied in order to succeed. But, in a case where the arbitration clause, although contractually valid, is defective and by this I mean that after applying the general principles of contractual interpretation, or after rectification as the case may be, the court is unable to discern the meaning of that clause either in part or entirely, that clause is said to be pathological. There is no magic in that term. It merely describes the clause as one which is defective (see *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 ("*Insigma*") at [37]). Whether that clause may or may not be upheld depends on the nature and extent of its pathology.

13 When faced with a pathological arbitration clause, the court generally seeks to give effect to that clause, preferring an interpretation which does so over one which does not. As the Court of Appeal in *Insigma* stated (at [31]):

> [W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars ... so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. ...

14 The court went on to observe that this approach is similar to the principle of effective interpretation in international arbitration law which provides that where a clause may be interpreted in different ways, the interpretation which enables the clause to be effective should be adopted in preference to the others which lead to contrary effect.

15 Beyond these statements, it is difficult to state with greater specificity the approach the court will take to pathological clauses. This is so as the diversity of pathological arbitration clauses, from the slightly ambiguous to the wholly incomprehensible, is limited only by the vocabulary and imagination of the parties. Hence, the court will have to decide on a case by case basis whether such clauses may be upheld, keeping in mind the overarching principle of effective interpretation. In other words, while the broad aim is to keep the clause alive, the treatment which will be administered will differ depending on the diagnosis, as will the result.

16 Nonetheless, it will be beneficial to characterise and compare pathologies to ensure consistency of treatment by the courts so that like pathologies are treated in like manner. In this way, judicial decisions on the fate of pathological clauses will tend towards predictable outcomes, lending some certainty to the uncertain circumstances in which parties have found themselves and mitigating the increased transactional cost incurred in resolving the pathology.

17 On this point, the nature and extent of the pathology may be ascertained by assessing the pathological clause in terms of its deviation from the essential elements of an arbitration clause as stated by Frédéric Eisemann, who coined the term "pathological clauses" or "clauses pathologiques", in "La clause d'arbitrage pathologique" in *Commercial Arbitration Essays in Memoriam Eugenio Minoli* (Torino: Unione Tipografico-editrice Torinese, 1974). Eisemann's essential elements are as follows (translated into English from the original French in Benjamin G Davis, "Pathological Clauses: Frédéric Eisemann's Still Vital Criteria" (1991) 7 Arb Int 365):

(1) The first, which is common to all agreements, is to produce mandatory consequences for the parties,

(2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award,

(3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties,

(4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement.

18 These elements are not comprehensive; they are not intended to be. Instead, they should be viewed as part of a framework for assessing the nature and extent of the pathology and as widely accepted as Eisemann's essential elements are in international arbitration law, they are a useful basis for comparison of the treatment of the various pathologies in the different jurisdictions. The elements may be explained thus. The first essential element, namely, to produce mandatory consequences, simply refers to the need for a clause to state *definitively* the consequences upon the occurrence of a particular event, for instance, that should a dispute arise, it *shall* (as opposed to *may*) be referred to arbitration so parties are not left uncertain as to the next step to take. The second essential element speaks to the intrinsic nature of an arbitration clause to provide a means of dispute resolution apart from court proceedings. The third essential element is necessary to produce a final and binding award so as to dispose of the dispute between the parties. The fourth essential element is a broader, in a sense a catch-all element, which reflects the rationale that underpins arbitration as an alternative mode of dispute resolution, namely, the resolution of disputes more efficiently and speedily as compared to litigation and yet affording parties the advantages of judicial enforcement.

19 In the present case, the defect in the arbitration clause is the reference to a non-existent "Arbitral Committee at Singapore", which, when considered against the framework of Eisemann's essential elements, is a deviation from the fourth element as it leads to inefficiency and slows down the arbitral process as parties are bogged down by the dispute over the preliminary question of the mode of dispute resolution instead of moving on to resolve the substantive dispute.

20 Various courts, in facing a similar problem of uncertainty of the arbitral institution, have generally been able to give effect to clauses which are a long way from certain (see *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 5th Ed, 2009) at para 2.179). For instance, a Stuttgart court read a clause referring disputes "without resource [*sic*] to the ordinary court to Stockholm, Sweden" to refer to a Stockholm Chamber of Commerce arbitration (see OLG Stuttgart [2006] OLG Report Stuttgart 685). An Oldenburg court read a reference to "the International Court of Arbitration (*Internationales Schiedsgericht*) in Austria" to refer to the international arbitration centre of the Austrian Federal Economic Chamber (see OLG Oldenburg [2006] Schieds VZ 223).

21 It seems that generally an incorrect reference to the arbitral institution has not prevented the courts from referring the matter to arbitration. The following observations in Julian D M Lew QC, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ("*Comparative International Commercial Arbitration*") at para 7-75 are apposite:

> A typical defect is the incorrect reference to the institution under the rules of which an arbitration should take place. There have been references to the "Official Chamber of commerce

in Paris", the "Arbitration Court at the Swiss Chamber for Foreign Trade in Geneva" or "International trade arbitration organization in Zurich." While these clauses refer to non existing institutions they show clearly that the parties intended to submit their disputes to arbitration. For this reason courts and tribunals are reluctant to consider these clauses void for uncertainty. In general the reference to a particular city, the type of dispute or industry sector involved have allowed the courts to identify the chosen institution. Only in exceptional cases where it was not possible to ascertain which institutional rules should govern the arbitration have tribunals found such agreements invalid.

22 The judicial inclination to uphold an arbitration clause the wording of which, despite its defects, demonstrates that parties intended to refer their dispute to arbitration, is epitomised in the High Court of Hong Kong decision in *Lucky-Goldstar v Ng Moo Kee Engineering* [1993] 1 HKC 404 ("*Lucky-Goldstar*"). In that case, the court was faced with an arbitration clause which reads as follows:

> Any dispute or difference arising out of or relating to this contract or the breach thereof which cannot be settled amicably without undue delay by the interested parties shall be arbitrated in the third country under the rules of the third country and in accordance with the rules of procedure of the International Commercial Arbitration Association.

23 It was common ground that the "International Commercial Arbitration Association" was a non-existent organisation and that the "third country" meant any country other than Hong Kong. There was thus uncertainty as to the arbitral institution *and* the place of arbitration. The court nonetheless upheld the arbitration clause and stayed the proceedings in favour of arbitration. In making this decision, the court stated as follows (at 408):

> I believe that the correct approach in this case is to satisfy myself that the parties have clearly expressed the intention to arbitrate any dispute which may arise under this contract. I am so satisfied. I am also satisfied that they have chosen the law of the place of arbitration to govern the arbitration even though that place has not yet been chosen by the plaintiffs. As to the reference to the nonexistent arbitration institution and rules, I believe that the correct approach is simply to ignore it. I can give no effect to it and I reject all reference to it so as to be able to give effect to the clear intention of the parties.

24 This has been described as an "extreme" case by the learned authors of *Comparative International Commercial Arbitration* at para 7-77. Although I leave open the question, as it is not before this court, of whether the Singapore courts will likewise uphold an arbitration clause where there is uncertainty as to *both* the arbitral institution and the place of arbitration, it will suffice to note that the Singapore courts will, consistent with the approach under international arbitration law, give primacy to the decision of the parties to arbitrate and will seek to resolve the various pathologies with the aid of the principle of effective interpretation.

25 In the present case, from a comparative point of view (which merits are stated above at [16]), the pathology in the present arbitration clause is closer to that in the Stuttgart and Oldenburg cases (referred to at [20] above), as compared to *Lucky-Goldstar*, in that although there is uncertainty as to the arbitral institution, the place of arbitration is certain.

26 Like the Stuttgart and Oldenburg cases, the arbitration clause with which we are concerned provides for the place of arbitration, namely, Singapore, although it also specifies a non-existent arbitral institution. To add a wrinkle to the facts, the arbitration clause also makes reference to the ICC rules. The ICC is headquartered in Paris, France and has National Committees in various jurisdictions. The pathology would be easily overcome if there was a National Committee in Singapore

as the reference to the ICC rules would then be strongly indicative of an ICC arbitration administered by the National Committee. As observed in *Comparative International Commercial Arbitration* at para 7-76:

> Arbitration agreements which refer to the International Chamber of Commerce in some city are generally interpreted as referring to ICC arbitration with the place of arbitration in the specified city. Difficulties can arise where the clause uses an ambiguous title of the institution. Where there is a well known local arbitration institution at the designated place and it is unclear which institution has been selected, a court or tribunal may be able to resolve the difficulty by the name of the institution's rules.

But, there being no National Committee of the ICC to administer an ICC arbitration in Singapore, the reference to the ICC rules does not aid the court in applying the principle of effective interpretation. This also precludes me from concluding that the arbitration clause was making specific reference to the SIAC, despite the similarities in the term "Arbitration Committee" referred to in the arbitration clause and the words "Arbitration Centre" in "Singapore International Arbitration Centre" as well as the reputation of the SIAC regionally (bearing in mind that this was a regional contract made between a Cambodian company and a Singapore company), since the SIAC does not ordinarily apply the ICC rules.

27 Nonetheless, in my view, the arbitration clause is operative and workable for the following reasons. First, it clearly evinces the intention of the parties to resolve any dispute by arbitration. Second, it provides for mandatory consequences in that if a dispute arises, the matter has to be referred to arbitration. Third, it states the place of the arbitration, namely, Singapore. Fourth, it provides that the arbitration is to be governed by a particular set of rules, namely, the ICC rules.

28 In the circumstances, although the arbitration clause is uncertain as regards the arbitral institution, it would be open to the parties to approach any arbitral institution in Singapore which would be able to administer the arbitration, applying the ICC rules, to resolve their dispute. Of course, it is by no means easy for any arbitral institution not established for the purpose of conducting an ICC arbitration to do so given the unique rules and structure of the institution needed to conduct an ICC arbitration. But, as the Court of Appeal in *Insigma* noted, the SIAC was able and willing, for that particular case, to conduct a hybrid arbitration, applying the ICC rules.

29 In my view, the arbitration clause is workable and not "null and void, inoperative or incapable of being performed" within the meaning of s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") if the parties are able to secure the agreement of an arbitral institution in Singapore, such as the SIAC, to conduct a hybrid arbitration, applying the ICC rules. Accordingly, if the conditions of the arbitration clause are satisfied, I will stay the matter on the condition that parties obtain such an agreement from an arbitral institution in Singapore. After all, s 6(2) of the IAA affords the court the power to impose any conditions and terms it thinks fit when granting the stay.

30 In this regard, the defendant had in fact volunteered to explore this option and although the plaintiff was, understandably, more resistant, plaintiff's counsel took the reasonable position that this was an option the plaintiff was also willing to explore if the court upholds the clause and finds that the conditions therein are satisfied.

31 It leaves me now to consider whether a dispute had arisen within the meaning of the arbitration clause.

Whether a dispute had arisen within the meaning of the arbitration clause

32 The approach taken to determining whether a dispute had arisen was comprehensively laid out by the Court of Appeal in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*"). For present purposes, it will suffice to note the following:

(a) The court will not consider whether there is "in fact" a dispute or whether the dispute is genuine (see *Tjong Very Sumito* at [49]);

(b) It is sufficient for a defendant to simply assert that he disputes or denies the claim in order to obtain a stay of proceedings in favour of arbitration (*Id*);

(c) Exceptionally, where there is a clear and unequivocal admission, for instance where liability was admitted but there was simply an inability to pay, the court will not grant a stay (*Id* at [59]).

33 HKL has argued that Rizq Singapore had made part payment of the sum claimed. In my view, if this were all, Rizq Singapore has unequivocally admitted liability and its inability to pay the remaining sum does not raise a dispute necessary for the granting of a stay. However, Rizq Singapore is not merely resisting payment of the remainder sum because it cannot pay. Instead, it argues that on the basis of the agreement encapsulated in the 24 April letter, liabilities are back to back with the result that unless it is paid in full by Samsung, it cannot pay the remainder sum. It is clear therefore that Rizq Singapore's resistance to the claim is not premised on an inability to pay *per se* but on the basis of the nature of the contractual relationship between the parties which it said was modified by the 24 April letter.

34 I note that the 24 April letter does state that the back to back liability terms are "subject to contract". Indeed, these words do take the wind out of Rizq Singapore's sails. However, as unimpressed as I may be with the strength of Rizq Singapore's argument, I recognise that this is not my decision to make. As the Court of Appeal in *Tjong Very Sumito* has said, in assessing whether to grant a stay in favour of arbitration, it is not the role of the court to consider whether there is "in fact" a dispute or a genuine dispute. That should be left to the arbitrator.

35 It being not within my purview to consider whether the 24 April letter altered the contractual relationship between the parties to ground Rizq Singapore's argument that its payment to HKL is contingent on it receiving payment from Samsung, it is also not necessary for me to consider whether Samsung did in fact pay Rizq Singapore to trigger its obligation to pay HKL.

36 In my view, a dispute has arisen within the meaning of the arbitration clause.

Conclusion

37 For the foregoing reasons, I will stay the proceedings, but, given the defect in the arbitration clause, I impose the condition that parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules, with liberty to apply should they fail to secure any such agreement. I will hear parties on the issue of the imposition of any other conditions.

38 I must emphasise that while my decision compels the parties to resolve the matter by way of arbitration in the form of a hybrid arbitration applying the ICC rules, as I am empowered to do so under the IAA and *giving effect to the arbitration clause as it stands*, it in no way impedes the parties from resolving the matter in a more practical manner by now agreeing as between themselves to simply submit the dispute to another form of arbitration, for instance, a straightforward SIAC

arbitration, as opposed to a hybrid arbitration applying the ICC rules. Although this is admittedly rare (see D. Mark Cato, *Arbitration Practice and Procedure: Interlocutory and Hearing Problems* (London, Hong Kong: LLP, 2002) at p 41), it is a practical solution which avoids the procedural gymnastics of having the SIAC conduct a hybrid arbitration by applying the ICC rules.

39 In the light of my decision to grant a stay, I dismiss HKL's application to enter default judgment.

40 I will hear the parties on the issue of costs for both applications.

Copyright © Government of Singapore.