Belbana N.V *v* APL Co Pte Ltd and another
[2014] SGHCR 17

Case Number	: Admiralty in Personam No 50 of 2013, Summons No 1620 of 2014 and No 2325 of 2014
Decision Date	: 15 August 2014
Tribunal/Court	: High Court
Coram	: Paul Tan AR
Counsel Name(s)	: Richard Kuek and Eugene Cheng (Gurbani & Co) for the plaintiff; Kendall Tan and Daphne Chua (Rajah & Tann LLP) for the defendants
Parties	: Belbana N.V — APL Co Pte Ltd and another

Conflict of Laws – Lis alibi Pendens – Doctrine of Forum Election – Stay

15 August 2014 Judgment reserved.

Paul Tan AR:

Introduction

1 These were two applications, one by the Plaintiff and the other by the Defendants, that appeared to be cross applications but were essentially asking for different end results on the same grounds. SUM 1620 of 2014 ("SUM 1620") was the Plaintiff's application for stay for *lis alibi pendens*. SUM 2325 of 2014 ("SUM 2325") was the Defendants' application for the Court to order the Plaintiff to elect which jurisdiction it wished to proceed under the doctrine of forum election and for the proceedings in the other jurisdiction to be discontinued. SUM 2325 was the Defendants' alternative argument if they could not persuade me that there was no *lis alibi pendens*.

2 I heard the parties on 7 July 2014 and delivered my decision with oral grounds on 25 July 2014. I ordered the Plaintiff to elect between pursuing its claim in Belgium or in Singapore. In the event, the Plaintiff elected to pursue its claim in Belgium, the local proceedings would be stayed. In the event that the Plaintiff elected to proceed in Singapore, the Plaintiff was to discontinue Belgian proceedings No. A/13/00461 and serve its Statement of Claim in the present action. The Plaintiff has since elected to pursue its claim in Belgium. The Defendants, not being satisfied with my decision, have appealed. I now render written grounds for my decision.

Background

3 The Plaintiff contracted with the 1st Defendant, who acted as agent for the 2nd Defendant, under a Service Contract to ship bananas from Ecuador to Belgium. Pursuant to the contract, the Defendants shipped the Plaintiff's cargoes of bananas in seven separate shipments from April to August 2012.

4 What appears to be a bill of lading was issued for each of the seven shipments. I use the term "appears" because there is some dispute between the parties as to whether these were bills of lading as stated on the document or meant to be sea waybills. However, nothing turns on that at this point and I will refer to them as the "B/Ls" for convenience.

5 The cargoes of bananas were to be shipped from Ecuador to the Rotterdam in The Netherlands before being further transported by road to Blankenberge, Belgium. The Plaintiff claims that the Defendants breached their contractual obligations or duties as bailees or were negligent in their stowing, handling, custody, care and discharge of the cargoes and claim damages against the Defendants.

6 The Plaintiff then commenced proceedings against the Defendants in the Bruges Court in Belgium on 1 February 2013. They subsequently commenced this action in the Singapore Courts on 8 February 2013.

7 Before me, Plaintiff's Counsel stressed that the Singapore proceedings were commenced only to preserve the limitation period and not to make a double claim. The reason for this was that the B/Ls contained a governing law clause, which stated that the law governing the contract would be Singapore law, and an exclusive jurisdiction clause ("EJC") in favour of the Singapore Courts. The limitation period on the claim was one year. Should the Defendants succeed in challenging the jurisdiction of the Bruges Court, the Plaintiff may potentially find its claim in Singapore time-barred if it did not preserve its cause of action by issuing the writ of summons.

8 The Plaintiff asserted that the Bruges Court had jurisdiction over the claim pursuant to the Convention on the Contract for the International Carriage of Goods by Road ("CMR") which was adopted as Belgian law. Article 1 of the CMR provides that where there is an international carriage of goods by road, the CMR shall apply. Article 31 of the CMR provides that where there is such applicable carriage, any claim must be brought in a court or tribunal in 1) a contracting country by agreement, or 2) a country within whose territory the defendant was ordinarily resident or had his principle place of business or 3) the place where the goods were taken over by the carrier or the place designated for delivery is situated. Article 41 of the CMR states that that subject to Article 40, any stipulation which would directly or indirectly derogate from the provisions of the CMR shall be null and void. In the present case, the goods were to be discharged at Blankenberge, Belgium. It is the Plaintiff's argument that the CMR applies and hence Article 41 of the CMR renders the EJC null and void.

SUM 1620

9 The Plaintiff applied in SUM 1620 of 2014 for the Court to stay the Singapore proceedings pending the final determination of the issue of jurisdiction in Belgium. The Plaintiff has highlighted to me that the Defendants have made and lost a challenge against the Bruges Court's jurisdiction. However, the Defendants may still appeal this decision and the appeal would be heard at the same time as an appeal against the decision of the Bruges Court on the merits of the claim.

Is there a lis alibi pendens situation?

10 The Plaintiff's argument was that there was a *lis alibi pendens* situation such that there were parallel proceedings and there would be a risk of inconsistent decisions if the Singapore proceedings were to continue parallel to the Belgium proceedings. The Plaintiff stressed that the claims in both Singapore and Belgium were for the same subject matter that is for breach of a multi-modal transport contract and for damage to the cargoes of bananas.

11 The Defendants' argument was that the Singapore proceedings should not be stayed because there is no *lis alibi pendens* because the claims are completely different. They argued that the Plaintiff's claim in Belgium was under the CMR and the CMR receipts whereas the Plaintiff's claim in Singapore was under the B/Ls. The Defendants further argued that the causes of action and the

issues to be decided in the two actions were different.

12 In this respect, the Defendants rely on the decision in *Lanna Resources Public Co Ltd v Tan Beng Phiau Dick* [2011] 1 SLR 543 ("*Lanna*"). In *Lanna*, the Plaintiff contracted under a memorandum of agreement ("MOA") with two companies, SRL and SBH, to provide loans to SRL. Pursuant to that MOA, the defendants in *Lanna* agreed to provide guarantees to the plaintiff for the loans to SRL. Following a call on the loan to SRL by the plaintiff, SRL refused to repay the loan. The plaintiff called on the guarantees and commenced proceedings in the Singapore Courts against the defendants. The plaintiff also commenced arbitration against SRL.

13 The defendants sought to stay the Singapore Court proceedings on several grounds including that there was a multiplicity of proceedings. The learned Judge refused a stay and held at [16] of the decision that for there to be concurrent proceedings, both parties to both sets of proceedings must be the same, the issues being decided in the proceedings and the reliefs claimed must be the same and arise from the same transactions.

14 The Plaintiff argues that the Court of Appeal in *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 ("*Virsagi*") at [47] held that to show that there was *lis alibi pendens* the party seeking a stay did not need to show a total correspondence of issues but the Court would be more likely to find a *lis alibi pendens* where the issues are of greater similarity.

15 I am of the view that the situation in *Lanna* was different from the present case. In *Lanna*, the plaintiff was suing different parties pursuant to two different contracts, the MOA and the guarantees. Those two agreements contained two separate sets of terms which is not the case here. However, I must still be satisfied that there was a confluence in the proceedings.

16 It was not disputed before me that the parties and reliefs claimed in both proceedings were identical. While there appears to be a claim in tort in the Singapore proceedings which is not present in the Belgium proceedings I note that in both proceedings there are contractual claims.

17 While the Defendants have submitted that the issues before the Bruges Court and the Singapore Court are different, I do not think that that is the case. Given that both the Singapore action and the Belgian action include a contractual claim, the Bruges Court would have to determine whether the Defendants have breached their contractual duties to the Plaintiff. In this respect, I note that since the reliefs claimed are similar, there would likely be a confluence of issues to be decided especially since they arose from the same transaction and set of facts.

18 I would note that there may be some difference given that the CMR has effect under Belgian law and not Singapore law but broadly I do not think that the issues would be all that different. Given that the identities of the parties and the nature of the reliefs are identical, there is some overlap in terms of the causes of action and the issues to be decided, I am satisfied that there is a common plaintiff *lis alibi pendens* situation and a risk of inconsistent decisions.

Should the Plaintiff be put to an election as to where to proceed?

19 Having decided that there was a common plaintiff *lis alibi pendens* situation, the question is how to resolve it. Here the Plaintiff and Defendants differ in how to deal with it. The Plaintiff has argued that it should not be put to an election as to which jurisdiction it wishes to proceed in and a stay should merely be granted as in *Attorney General v Arthur Andersen & Co* [1989] ECC 224 ("*Arthur Andersen*").

20 The Defendants argue that the usual course is for the Court to put the Plaintiff to an election because the Plaintiff should not be allowed to simply stay the proceedings. The Defendants rely on the Court of Appeal decision in *Virsagi* at [42], where the Court of Appeal laid out how a Court should deal with a common plaintiff *lis alibi pendens* situation. I note in this case that the Plaintiff is not asking for the continuation of concurrent proceedings which the Court would find to be vexatious unless there are special circumstances to justify it (See *Halsbury's Laws of Singapore* Volume 6(2) (LexisNexis, 2009 Reissue) at paragraph 75.108).

21 Here, I see no reason to depart from the usual manner in which the doctrine of forum election is applied, that is, by compelling the Plaintiff to decide which jurisdiction it wishes to proceed in (see *Virsagi* at [42]). In fact as I will elaborate on at [39] below, there are good reasons for requiring the Plaintiff to elect which forum to proceed in.

SUM 2325

22 Having decided that there is a common plaintiff *lis alibi pendens* situation and the Plaintiff should be put to an election, the real issue is, in the event that the Plaintiff elects to pursue the matter in Belgium, should the Singapore action be discontinued or stayed. This is especially in light of the fact that the EJC is in favour of the Singapore Court and the Plaintiff is *prima facie* in breach of the EJC.

Should the Singapore action be discontinued or stayed if the Plaintiff elects for Belgium?

23 The Plaintiff's position is that the action should be stayed because there is a challenge to the Belgium Court's jurisdiction and that this is similar to the situation in *Arthur Andersen*. The Plaintiff also relies on the statement in *Virsagi* where the Court of Appeal stated that a stay would be granted in the *appropriate circumstances* instead of a discontinuance (*Virsagi* at [36]). The Plaintiff highlighted that it remained willing to discontinue the Singapore proceedings if the Defendants agree not to appeal the Bruges Court's decision on jurisdiction.

24 The Defendants argue that there is an EJC in favour of the Singapore Courts and the Plaintiff has breached that EJC in commencing the Belgian proceedings and the Singapore Court should not further assist the Plaintiff by allowing a stay. Defendants' Counsel highlighted that in *Bouygues Offshore SA v Caspian Shipping Company (No. 5)* [1997] 2 Lloyd's Rep 533 ("*Bouygues*") the English Court of Appeal citing *Arthur Andersen* held that generally once a plaintiff has commenced an action with all hardship to the defendant with the expense, worry and disruption, he should be in general made to face up to the situation which he has chosen to create and not be permitted to conduct the action to a timetable which corresponds to his own whimsy (see *Bouygues* at 539).

25 Defendants' Counsel also cites the case of *Ledra Fisheries Ltd v Turner* [2003] EWCA 1049 (Ch) ("*Ledra*"), where the English Court declined to stay the English proceedings on the claimant's own application. The English Court held that where a claimant had brought a claim against the same defendants for essentially the same relief arising from the same set of facts in two different jurisdictions, then absent special circumstances, it would be wrong for the Court to grant a stay of one set of proceedings at the instigation of the claimant, the very person who has brought both sets of proceedings. The English Court went on to state that the usual approach was to put the Plaintiff to election as to which set of proceedings to discontinue and if the party did not elect, to strike out one set of proceedings (*Ledra* at [12]).

26 I was also referred to the English Court's decision in *Insurance Company of the State of Pennsylvania v Equitas Insurance Ltd* [2013] EWHC 3713 (Comm) ("*ICOSP*") where the English Court also declined to stay proceedings brought by the plaintiff in the English Courts. There the plaintiff had

begun proceedings in the English Courts but later began a new set of proceedings in the US Courts of New York and sought to stay the English proceedings. The English Court held that the plaintiff had not shown that justice required the English proceedings to be stayed pending the US proceedings (*ICOSP* at [32] to [35]).

27 I note that the English Court of Appeal in *Bouygues* accepted that the test is as set out in *Arthur Andersen*, whether justice required the proceedings before the Court be stayed (*Bouygues* at 539). This test is further expanded on in *Arthur Andersen* where the question was whether the good management of the concurrent sets of proceedings clearly requires the Court, in charge of one set of those proceedings, to decree a temporary halt. Temporary to see what the foreign court is going to do regarding jurisdiction.

28 The line of English authorities cited has been at pains to stress that it is only in exceptional cases that a stay would be ordered. However, I note that in all three English cases there were circumstances in those cases that meant that the balance of justice was not in favour of a stay.

29 In *Bouygues*, the Court held that the real purpose of starting and then staying the English proceedings was not to protect against an issue of the claim being time-barred and to then prevent further expenditure of costs but to deprive the defendant its right to limit its liability under a more advantageous limitation convention. While Defendants' Counsel has attempted to argue that this is the case here in that the Plaintiff was seeking to prevent the Defendants from being able to rely on the terms of the B/Ls, I am not convinced that is the case here. In *Bouygues*, the English Court had already determined that the defendant had a right to limit its liability in the English Courts. There was a very real right there that the plaintiff in *Bouygues* was attempting to stymie by seeking a stay, a very real collateral reason for the stay apart from preventing further expenditure of costs. I am of the view that this is not the case here.

30 Similarly, in *ICOSP*, there were serious issues that meant that justice did not dictate that a stay be granted and in fact it appeared to be quite the opposite. In *ICOSP*, the Court noted that the plaintiff had misled the defendant into thinking that the claim would be litigated in England and that the plaintiff sued in New York only after testing the waters in England. This is not the situation in the present case. Here the Plaintiff began both proceedings shortly after one another and there has been no testing of the waters in the Singapore Courts. If anything, the evidence before me indicates that the Plaintiff was very reluctant to proceed with the Singapore action and the Defendants had to pressure the Plaintiff to even serve the writ of summons.

31 The English Court in *Ledra* noted that where a person began proceedings in a jurisdiction and there were no grounds for disputing jurisdiction, the Court would be slower to exercise its power to stay proceedings in light of other proceedings brought abroad. However, in the present case, there appears to be a real question as jurisdiction. While it is not disputed before me that there is an EJC in favour of the Singapore Courts, the Plaintiff has raised the issue of Article 31 of the CMR read together with Article 41 of the CMR. Unfortunately, neither party has adduced any evidence as to the interaction of Article 31 and Article 41 of the CMR with the EJC in the B/Ls and its effect on the EJC. I note that while the Bruges Court has decided that based on the CMR that it has jurisdiction, it did not consider the EJC and the terms and conditions of the B/Ls because it was not before the Court. Given the above, I am of the view that this gives rise to a real issue as to which Court has jurisdiction. However, it should be noted that the issue of which forum is more appropriate is not relevant in the present case, only that there is a challenge to the jurisdiction of the Belgian Courts.

32 What is clear from the English authorities is that there must still be a weighing of the facts and circumstances in each case to determine if justice requires that a stay and not a discontinuance be

granted. As the Court of Appeal in *Virsagi* noted at [36], the court is not restricted to discontinuing the local proceedings. The question would then be whether there are appropriate circumstances in the present case to grant a stay of proceedings instead of a discontinuance.

33 The factors that I find relevant before me are that there is an EJC in favour of the Singapore Court and, on the face of it, it appears that the Plaintiff has breached that EJC in commencing proceedings in Belgium. This is weighed against the fact that if the Defendants succeed in challenging the Belgium Court's jurisdiction, the Plaintiff may find itself potentially without recourse if a discontinuance is ordered because it would not be able to bring fresh proceedings as its claim would be time-barred.

34 In this respect, it is apt to remind ourselves as to the reason why in a common plaintiff *lis alibi pendens* situation a plaintiff should be compelled to elect. This is stated by the Court of Appeal in *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at para 22:

> "Not only would the same issue be litigated twice but there would also be the risk of having two different results, each conflicting with the other."

35 I am of the view that the more serious concern is that the parallel proceedings would put the courts in the different jurisdictions in a race with each other as to which court would reach a decision first. Further, there is real risk that there are inconsistent and incompatible results which leave parties mired in further conflict as to which Court's decision should apply. It is as the English Court of Appeal in *The El Amria* [1981] 2 Lloyd's Rep 119 stated at 128 "a potential disaster from a legal point of view".

36 Where there is a challenge to the jurisdiction of the foreign Court, a stay pending the final determination of jurisdiction would generally suffice to ensure that the interests of the parties are protected. The stay would ensure that the same issue would not be litigated twice and there is no risk of conflicting decisions and in the event the foreign Court finds it does not have jurisdiction, the plaintiff does not find itself without recourse to a court of law.

37 The present case is slightly different because under Belgian law, the appeal against jurisdiction would have to be heard after the determination of the claim on the merits and at the same time as an appeal on the merits. The Defendants' submission is that it would effectively mean that it would have to litigate the same issue twice and would have to expend the costs of retrying the entire claim on the merits should the Belgian Court on appeal find that it has no jurisdiction.

38 While that is a concern, Defendants' Counsel had submitted before me that if the matter was tried in Singapore, the Defendants would counterclaim against the Plaintiff for beginning the Belgian action in breach of the EJC and putting the Defendants to costs in Belgium. Logically, if the Belgian Court finds it does not have jurisdiction and the claim comes back to be tried in Singapore, on the Defendants' own argument, there should be nothing preventing the Defendants from claiming the costs of the Belgian proceedings as damages in the Singapore action.

39 While I note that the Plaintiff is *prima facie* in breach of the EJC, the Court in this application which involves a common plaintiff *lis alibi pendens* situation is not concerned with which forum is the more appropriate forum (see *Virsagi* at [32]). If the Plaintiff elects to proceed in Belgium and the Defendants are of the view that the action should be tried in Singapore, it is open to them to apply for an anti-suit injunction (see *Virsagi* at [36]).

40 The issue that concerned me was that if I granted a stay and the Belgian Court's decision on

the merits does not favour the Plaintiff, can the Plaintiff then choose to then re-litigate the issue in Singapore by arguing that the Singapore proceedings are merely stayed? I am of the opinion that having elected for Belgium proceedings, the Plaintiff cannot then resurrect the Singapore proceedings to re-litigate the issue. The Plaintiff would be bound by its election and the doctrine of approbation and reprobation would preclude the Plaintiff having exercised its right to elect for Belgian proceedings from exercising a right which is alternative to or inconsistent with the right he has exercised (see *Treasure Valley Group Ltd v Saputra Teddy* [2006] 1 SLR(R) 358 at para 31). The stay of the local proceedings is only granted because there is a challenge to the Belgian Court's jurisdiction and is necessary to ensure that the Plaintiff is not left without recourse if the Belgian Court's jurisdiction is successfully challenged. This further buttresses my decision that the Plaintiff should be put to election and not merely be granted a stay without having made a choice.

41 Defendants' Counsel raised the point that the Bruges Court has already given judgment on its jurisdiction and the issue of jurisdiction has been determined. However, neither of the parties has adduced evidence that the right of appeal against the Bruges Court's decision has been extinguished. The Plaintiff has also stated on affidavit and in submissions that it is willing to discontinue the Singapore proceedings in exchange for an agreement not to appeal the Bruges Court's decision on jurisdiction.

42 Given the above, I am of the view that justice requires that if the Plaintiff elects to proceed with the Belgian proceedings, the Singapore proceedings should be stayed until the issue of the Belgian Court's jurisdiction is dealt with such that neither party can reopen the issue of the Belgian Court's jurisdiction.

43 In reaching this decision I considered that this may potentially lead to a situation where every time there is a common plaintiff *lis alibi pendens* situation, the plaintiff may argue that the local proceedings should be stayed instead of being discontinued because there is a challenge to jurisdiction and its claim may be potentially time-barred. However, as I have stated, every case would have to be decided on its own facts. In the present case there appears to be a real issue as to which forum has jurisdiction over the claim and there is no evidence before me that the Plaintiff waited until the last minute to begin proceedings so that it could argue that it would be time-barred if I discontinued its action.

Conclusion

44 For the reasons set out above, I dismissed SUM 1620. SUM 2325 was allowed with various amendments so that should the Plaintiff elect to pursue its claim in Belgium, the Singapore proceedings would be stayed and not discontinued and the Plaintiff's election was final and irrevocable unless the Belgian Courts found that it had no jurisdiction to hear the Plaintiff's claim.

45 I also fixed costs for both SUM 1620 and SUM 2325 at S$8,000 plus reasonable disbursements to be paid by the Plaintiff to the Defendants.