

Citibank NA v Robert
[2011] SGHC 21

Case Number : Suit No 175 of 2010 (Registrar's Appeal No 243 of 2010)
Decision Date : 24 January 2011
Tribunal/Court : High Court
Coram : Chan Seng Onn J
Counsel Name(s) : Gerald Kuppusamy, Yap Cui Xian and Michelle Lee (Wong & Leow LLC) for the plaintiff; Gurbani Prem Kumar (Gurbani & Co) for the defendant.
Parties : Citibank NA — Robert

Conflict of laws

24 January 2011

Judgment reserved.

Chan Seng Onn J:

Introduction

1 The plaintiff brought Suit No 175 of 2010 ("the Suit") against the defendant pursuant to an "Irrevocable Guaranty and Indemnity" dated 10 August 2004 ("the Guaranty"). Summons No 1543 of 2010 ("the Summons") was the defendant's application to stay the Suit on the basis that Singapore was not the appropriate forum. The present appeal was brought before me following the learned Assistant Registrar's dismissal of that application.

Facts

Background

2 The plaintiff is a US bank licensed to carry on business in Indonesia and elsewhere. The defendant, an Indonesian citizen, is the President Director of PT Permata Hijau Sawit ("PHS"), an Indonesian company.

3 The plaintiff has a long course of dealing with PHS dating back to 2001. However, for the purposes of the present proceedings, only a handful of agreements are material. The Guaranty, as mentioned above, was signed on 10 August 2004. It was governed by New York law. Pursuant to cl 2 of the Guaranty, the defendant guaranteed certain obligations owed by PHS to the plaintiff. This included obligations arising from agreements including and in connection with an ISDA Master Agreement and a Schedule ("ISDA Agreement") entered into on 18 May 2001 in respect of multi-currency cross-border transactions between PHS and the plaintiff. New York law also governed the ISDA Agreement.

4 On 2 January 2008, the plaintiff sent a letter of offer ("the LO") to PHS and other companies that were part of the same group offering foreign exchange facilities of up to US\$5 million. The defendant accepted the offer on behalf of PHS. However, while the LO originally required a personal guaranty from the defendant and his wife for up to US\$ 20 million each as well as a corporate guaranty from PHS for the same amount to cover the indebtedness of related companies, the defendant struck out these requirements before signing the document and returning the same to the

plaintiff. The only other security asked for in the LO was a standby letter of credit for US\$500,000. PHS duly provided this.

5 The plaintiff and PHS subsequently entered into a Confirmation Agreement dated 5 September 2008 in respect of certain Callable Forward transactions. The Confirmation Agreement was entered into pursuant to the foreign exchange facility granted under the plaintiff's LO. By its terms, the Confirmation Agreement was to supplement and form part of the ISDA Agreement that the plaintiff and PHS entered into on 18 May 2001.

6 PHS incurred a debt to the plaintiff of the sum of US\$ 23,146,749.41 in respect of the Callable Forward transactions. It defaulted on this debt. Consequently, in letters dated 22 December 2008 and 9 January 2009 respectively, the plaintiff demanded that the defendant pay the sum of US\$5,250,000. It alleged that the defendant was required to pay this sum pursuant to the terms of the Guaranty.

Procedural history

7 On 16 January 2009, PHS commenced an action in the District Court of South Jakarta, Indonesia, against the plaintiff for, *inter alia*, a declaration that the Callable Forward transactions were "annulled by law". On 26 November 2009, the District Court handed down the judgment that the Confirmation Agreement and the Callable Forward transactions were null and void on the ground of illegality. PHS and the plaintiff were each ordered to refund money belonging to the other under the respective transactions. The plaintiff appealed this decision. I am given to understand that the District Court's decision has no executory effect pending the appeal.

8 In Singapore, on 12 March 2010, the plaintiff commenced the Suit against the defendant in respect of the Guaranty. On 7 April 2010, the defendant took out the Summons to stay the Suit on the ground that Singapore was not the convenient or appropriate forum for the determination of the dispute that was the subject matter of the Suit. As mentioned above, the defendant's application was dismissed, upon which, the present appeal was brought.

9 After the Suit was commenced, the defendant filed a second action in the District Court of South Jakarta, Indonesia, seeking an order that the Guaranty was null and void. At the time parties first appeared before me, that second application was still in a nascent state. Later, however, on 9 December 2010, the South Jakarta District Court issued a decision declaring the guaranty null and void. This decision is now under appeal. It is a point to which I will return below.

My decision

The law on forum non conveniens

10 The general principles governing *forum non conveniens* have been summarised in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [25] – [26] ("*CIMB*"):

25 The *locus classicus* on the question of when a stay would be granted on the basis of *forum non conveniens* is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), a decision of the House of Lords where Lord Goff of Chieveley, in delivering the leading judgment, laid down certain guiding principles (at 476-478) for determining the question of *forum non conveniens* ("the *Spiliada* test"). Those principles have been adopted by this court in several cases such as *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345, *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851, *PT Hutan Domas Raya v*

Yue Xiu Enterprises (Holdings) Ltd [2001] 1 SLR(R) 104 and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*").

26 The gist of these principles is that, under the doctrine of *forum non conveniens*, a stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant and it is not enough just to show that Singapore is not the natural or appropriate forum. The defendant must also establish that there is another available forum which is clearly or distinctly more appropriate than Singapore. The natural forum is one with which the action has the most real and substantial connection. In this regard, the factors which the court will take into consideration include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If the court concludes, at this stage of the inquiry ("stage one of the *Spiliada* test"), that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, at this stage, it concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In this connection, the court will consider all the circumstances of the case. For this second stage inquiry ("stage two of the *Spiliada* test"), the legal burden is on the plaintiff to establish the existence of those special circumstances.

Where no jurisdiction clause is relevant to the dispute, the above principles are applied in a straightforward manner in deciding whether or not a stay ought to be granted.

11 The plaintiff submitted, however, that where a jurisdiction clause exists, a different test ought to be applied. It pointed out that cl 13 of the Guaranty gave it (but not the defendant) the specific option to submit any dispute to any court having jurisdiction over the defendant's assets, which included the courts of Singapore. The plaintiff described cl 13 as a semi-exclusive jurisdiction clause and submitted that in such instances as the present, the appropriate test to apply ought to be the "strong cause" test set out in *Baiduri Bank Bhd v Dong Sui Hung and Another* [2000] 2 SLR(R) 271 ("*Baiduri*"). It is this issue of the appropriate test to apply that my attention now turns.

12 The court has discretion whether or not to grant a stay on the grounds of *forum non conveniens*. This discretion exists even when parties have agreed to an exclusive jurisdiction clause (*Bambang Sutrisno v Bali International Finance Ltd and others* [1999] 2 SLR(R) 632 at [7] – [9] ("*Bambang*"). However, while each case has to be decided within its particular factual matrix, where parties have agreed to litigate exclusively in a forum other than Singapore, a stay would ordinarily be granted unless exceptional circumstances warrant otherwise (see *The "Eastern Trust"* [1994] 2 SLR(R) 511 at [8]). Similarly, where a defendant, in breach of an agreement applies for a stay of proceedings on the ground of *forum non conveniens*, the court, while not bound to refuse a stay, would in usual circumstances give effect to the agreement between parties (*Bambang* at [9]). In *Baiduri* at [23], I held that where a jurisdiction clause exists that limits jurisdiction to a few countries (including Singapore) but no special or specific right of election or option is given to either party to select which of those countries to proceed in, and where a plaintiff has chosen to litigate here but the defendant prefers another jurisdiction, a court would ordinarily refuse to grant a stay if the foreign forum is not clearly more appropriate for the trial of the action. However, where a jurisdiction clause limits jurisdiction to a few countries (including Singapore), but a special or specific right is conferred on the plaintiff but not on the defendant to select any one of these specified countries to institute his action, a stay would ordinarily not be granted unless the defendant shows strong cause (*Baiduri* at [25]).

13 The underlying principle of the above scenarios is that where there is an agreement between parties as to choice of jurisdiction, the court would strongly lean in favour of giving effect to the contractual bargain unless exceptional circumstances warrant otherwise (see *eg, Golden Shore Transportation Pte Ltd v UCO Bank and another appeal* [2004] 1 SLR(R) 6 at [33] (“*Golden Shore*”). By inserting a jurisdiction clause, the parties indicate that they regard certain jurisdictions as more appropriate forums than others. Therefore, where parties have agreed to litigate exclusively in Country A, the balance would lie heavily in favour of finding that Country A is a more appropriate forum and the plaintiff who in breach of that brings an action in Singapore has to show strong cause why he is now reneging on the bargain. *Vice versa*, where the parties have agreed to litigate only in Singapore, the defendant who wishes to obtain a stay has to convince the court that despite the agreement, there is a more appropriate forum elsewhere. Similarly, where parties agree to litigate in either Singapore or Country A, but no specific right of election is given to either party, a defendant would have to explain his preference for Country A but as the defendant has not promised to litigate in Singapore and nowhere else, the burden of proving a more appropriate forum exists is less onerous than in the case where an exclusive jurisdiction clause exists. For the same reason, where the plaintiff but not the defendant has a specific right to select Singapore or Country A as the forum, the latter will have to explain why the plaintiff may not exercise his entitlement. Ultimately, however, even though the existence of a jurisdiction clause may *prima facie* weigh the scales more heavily in one direction than another, the court in exercising its discretion must still take into account factors relevant to the particular factual matrix. The above examples are not exhaustive but they are illustrative of two points. First, the court, upon construing the terms of agreement between parties, would ordinarily give effect to those contractual intentions, unless the defendant has strong cause to renege. Second, as endless permutations of jurisdiction clauses are possible and limited only by the ingenuity of the draftsman, each jurisdiction clause has to be construed carefully to determine the precise ambit of the agreement between parties.

14 In *Baiduri*, I made a distinction between different types of jurisdiction clauses and the considerations that are pertinent in deciding whether or not a stay ought to be granted when sought on the grounds of *forum non conveniens*. The plaintiff relied heavily on that case and its categorisation of types of jurisdiction clauses in its argument that the “strong cause” case should apply in situations such as the present where, according to its characterisation of cl 13, a semi-exclusive jurisdiction clause exists. I would state, however, that my decision in that case should not be construed as standing for the proposition that jurisdiction clauses ought to be pigeonholed into categories with different tests applicable for each. Rather, different factual circumstances may call for an application of different principles and approaches (*Baiduri* at [7]), and it would be futile to attempt to exhaustively categorise each scenario. Rather, the basic principle is that in cases involving jurisdiction clauses, a party should *prima facie* be held to his contractual commitment and has to show exceptional circumstances amounting to strong cause why the court should exercise its discretion in his favour and assist him in breaching his promise to bring the action in the contractual forum (*Golden Shore* at [33]). The court has to carefully construe what promises parties have made. The test not dissimilar to that set out in *Spiliada*, but heavily weighted against the party attempting to breach its obligation.

15 Summarising the above, when a stay is sought on the grounds of *forum non conveniens*, the *Spiliada* principles summarised in *CIMB* would ordinarily apply. However, where a jurisdiction clause exists, the court has to examine such carefully, and construe the ambit of what was agreed to between parties. The clause will ordinarily weigh heavily in favour of the party seeking to uphold the agreement. However, that does not preclude the grant of a stay where strong cause against enforcing the agreement is shown.

Application

16 Clause 13 of the Guaranty provides:

13. This Guaranty shall be governed by and interpreted in accordance with the laws of the State of New York, without prejudice to or limitation of any other rights or remedies available to the Bank under the laws of any other jurisdiction.

For the above purpose, the undersigned irrevocably consents to any New York state or United States federal court located in New York City, and hereby irrevocably submits to the non exclusive jurisdiction of the aforesaid courts. The undersigned upon request of the Bank irrevocably designates, appoints and empowers an entity or person acceptable to the Bank and having an address in New York as its agent to receive for and on its behalf service of process in New York in any legal action or proceeding with respect to this Guaranty. The foregoing, however, shall not limit the right of the Bank to serve process in any other manner permitted by law or to commence any legal action or proceeding in any appropriate jurisdiction including without limitation the Republic of Indonesia. For this purpose, the undersigned elects general and permanent domicile at the clerk's office of the district Court in South Jakarta. *Without limiting the foregoing, the undersigned agrees that the Bank may at its option submit any dispute to any other District Court or to District Court where the undersigned's Deed of Establishment is registered or to any court in Indonesia or elsewhere having jurisdiction over the undersigned assets.*

[emphasis added]

As the Guaranty is governed by New York law, cl 13 has to be construed in accordance with such. I accept the evidence of the plaintiff's expert, Alan Schwartz, that New York courts enforce the plain meaning of contracts, and that the plain meaning of cl 13 gives the plaintiff but not the defendant, *inter alia*, the right to choose a forum to hear a suit on the Guaranty from any one of the forums listed in the Guaranty, including any court having jurisdiction over the defendant's assets. The purpose of providing that the plaintiff could submit a dispute to a court with jurisdiction over the defendant's assets was clearly to facilitate recovery in the event that sums became owed to the former. It was not disputed that the defendant had assets in Singapore. This was a factor I gave substantial weight to. The defendant's application for a stay on the grounds of *forum non conveniens* goes against his grant of an option to the plaintiff to bring a suit in any court with jurisdiction over his assets. Accordingly, the onus lay on the defendant to show strong cause why that stay ought to be granted.

17 In deciding whether there was strong cause to grant a stay, I took into account the factors enumerated in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977-1978] SLR(R) 112 at [11]. Following *The "Hyundai Fortune"* [2004] 4 SLR(R) 548 at [24], I also added to the basket other matters of convenience before deciding whether, in totality, the factors added up to strong cause warranting the stay. However, many of the factors cited by the defendant as support for the proposition that Indonesia was clearly the more appropriate forum were, in my view, of limited weight.

18 Like the learned Assistant Registrar, I accepted that in the present circumstances, as parties have chosen to confer on the plaintiff a right to sue based on the location of the defendant's assets, the relative convenience and expense of trial as between Singapore and the Indonesian courts can only be of limited weight (*Golden Shore* at [33]). The same reasoning applies to the consideration that the defendant is Indonesian and the subject matter has tenuous connection with Singapore. Moreover, I accepted that on the part of the defendant, the evidence on the issues of fact would mostly come from himself and other documentary evidence already filed in the current proceedings.

19 I took into account the fact that New York law governed the Guaranty that is the central document in the present proceedings, and also the ISDA Master Agreement and Schedule. As the learned assistant registrar reasoned, given that Indonesian proceedings are not conducted in English, it would be arguably more convenient for a Singapore court to deal with documentary evidence arising from those agreements. I did note, however, that the letter of offer of 2 January 2008 may be relevant to the proceedings and that Indonesian law may govern that document (which had no express choice of law clause). It was part of the factors I took into account in determining whether strong cause for the stay existed.

20 Two actions have been filed by the defendant and PHS respectively against the plaintiff in Indonesia. I noted, in particular, that the action taken out by the defendant was commenced only *after* this present action was started in Singapore. At the time the matter first came before me, the action brought by the defendant in Indonesia was still in a nascent stage. The defendant submitted that now that the South Jakarta District Court has issued a decision, it must be taken into consideration in determining whether or not to grant a stay. The proposition is correct. However, I also noted that during the course of the proceedings before me, many delays occurred. On 28 June 2010, when the parties first appeared before me, the defendant's counsel made an application before me for the filing of affidavits of expert opinions. While these could have been obtained at the stage of the hearing before the learned assistant registrar, the move to secure legal experts was not made by the defendant until late in the day, resulting in a four week delay for the filing of affidavits and further affidavits in reply. On 30 July 2010, the defendant's counsel wrote in to request a vacation of the hearing date that had been fixed as he wanted to file further response affidavits by the experts. This resulted in a further delay of another four weeks for parties to exchange affidavits. Yet another hearing date was fixed, this time for 6 September 2010, but again had to be vacated, because the defendant's counsel was on three weeks' leave. The parties finally appeared before me for the substantive hearing on 18 October 2010. All in all, there had been a delay of almost four months, most of it due to applications on the part of the defendant. In light of this fact, and considering the defendant ought not to profit from dragging his heels, while I took into account the second decision of the South Jakarta District Court, I did not give it as much weight in favour of the defendant as I might otherwise have had.

21 Given the voluminous affidavits filed by the New York and Indonesian legal experts on both sides, and the various points of disagreement between the opinions rendered, I was unable to say that the defendant had no genuine desire for trial. Without going into the merits, there appeared to be genuine dispute as to the effect of the LO on the Guaranty, whether the Guaranty was spent, and the validity of the Callable Forward transactions in light of the South Jakarta District Court's decision. The effect of the defendant's striking out of the requirement of a personal guaranty on the LO also could not be clearly resolved at this procedural stage. With respect to the learned Assistant Registrar, most of the expert evidence before me was not available to him. Despite this, however, the defendant did not manage to explain to my satisfaction why his desire for trial could only be consummated in Indonesia, such that he could not be held to his bargain with the plaintiff in cl 13 that the latter would be granted the option to submit this dispute to any court in any country having jurisdiction over his assets. The plaintiff had in fact duly exercised that option and filed the Suit in Singapore (where the defendant has assets) to have the dispute between them determined accordingly. Most of the defendant's arguments centred on convenience, which ought to have been taken into account at the time the Guaranty was entered into rather than at this late stage. On the other end of the scale, the plaintiff would now undoubtedly be prejudiced if the stay is granted because it would be deprived of its contractual right to bring an action in a country where the defendant's assets are located. This right was clearly sought by the plaintiff to facilitate the plaintiff's debt enforcement and would be rendered nugatory by the grant of the stay.

22 Taking all the above into consideration, I did not find that there was strong cause warranting the grant of a stay. The plaintiff had also submitted that under New York law, cl 13 operated as a waiver of the defendant's right to raise arguments based on *forum non conveniens*. In light of my decision, there is no need to go further to decide this point.

Res judicata

23 The defendant had submitted that the plaintiff was barred under New York's doctrine of *res judicata* from litigating the present action. He relied on the evidence of his New York expert, Leonard A. Rhodes:

Summary of Opinion: It is my opinion that the Indonesian Judgment bars this action for two, separate but related reasons: (1) Under New York law, the Indonesian Judgment was an "adjudication on the merits;" the claims in the Indonesian case and in this case arise from the same "nucleus of operative fact;" and the parties here were also parties, or in privity with parties, to the Indonesian case. Therefore Citibank is barred from relitigating its right to the [sic] collect the alleged debt under New York's doctrine of *res judicata* (or "claim preclusion"). (2) Even under Citibank's reading of the 2004 Guaranty, Robert has guaranteed [sic] only those obligations that actually existed at the time this lawsuit was commenced and because the Indonesian Judgment nullified the Callable Forward agreement and declared it void ab initio, New York's doctrine of "collateral estoppel" requires this Court to hold that no obligation exists that is subject to the 2004 Guaranty.

24 It was agreed between parties that finality was a requisite element of the test as to *res judicata*. The dispute centred on whether the South Jakarta District Court judgment constituted final judgment entered on the merits of the case. This point arose out of the fact that under Indonesian law, the South Jakarta District Court's judgment, which is under appeal, has no executorial power. As the Indonesian law experts of both parties agreed that the judgment under appeal could not be presently executed, and as the defendant's New York expert does not appear to have considered the effect of this point on the *res judicata* argument, I find that there is insufficient evidence for me to conclude that the claim is *res judicata*. Particularly, I accept the evidence of the plaintiff's New York law expert, Teresa Rosen Peacocke, that New York gives no more finality to foreign judgments than that given by the issuing jurisdiction. I also note that in the defendant's third affidavit, at para 16 of the defendant's Indonesian solicitor's correspondence with the South Jakarta District Court, it was conceded that "since the issue is still in the legal process, so that it has not yet had permanent legal force, then there is no certainty about the bill of [the plaintiff] in the amount of USD 23,146,749.41". Similar reasoning applies to the defendant's contention that I am required to hold that no obligation exists that is subject to the Guaranty. Going back to the *res judicata* point, I also accepted that the claims adjudicated upon by the South Jakarta District Court and those in the present proceedings differ, although there might be some degree of overlap. The former dealt with the validity of the Callable Forward transactions whereas the present is concerned with the enforceability of the Guaranty.

Conclusion

25 In light of the above, I dismiss the defendant's appeal with costs to the plaintiff.

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