Oei Hong Leong *v* Goldman Sachs International
[2014] SGHCR 2

Case Number : Suit No 834 of 2013; Summons No 5777 of 2013

Decision Date : 20 January 2014

Tribunal/Court : High Court

Coram : Eunice Chua AR

Counsel Name(s) : Siraj Omar and Joanna Chew (Premier Law LLC) for the plaintiff; Andre Maniam SC, Lim Wei Lee and Oh Sheng Loong (WongPartnership LLP) for the defendant.

Parties : Oei Hong Leong — Goldman Sachs International

Arbitration – Stay of court proceedings

Civil Procedure – Stay of proceedings

20 January 2014 Judgment reserved.

Eunice Chua AR:

1 This application for a stay of proceedings pursuant to s 6 of the International Arbitration Act (Cap. 143A) was made in the context of two potentially applicable contracts between the parties, one of which contained arbitration agreements and the other a non-exclusive jurisdiction clause in favour of the English courts. As there is little local jurisprudence on a stay application in this particular type of factual context, I reserved judgment to fully consider the matter.

Background

2 The plaintiff, Mr Oei Hong Leong ("Mr Oei"), is a prominent Singapore businessman. The defendant, Goldman Sachs International ("GSI"), is a firm providing investment banking services and is a part of the Goldman Sachs group ("Goldman Sachs"), which also includes Goldman Sachs (Asia) LLC ("GSA").

3 Mr Oei's private banking relationship with Goldman Sachs began in 2001. His present claim against GSI centred on alleged fraudulent misrepresentations made to him by two GSA employees concerning the Brazilian Real ("BRL") and foreign exchange option trades involving the BRL and Japanese Yen ("JPY"). It is not disputed that on 15 May 2013, Mr Oei entered into two BRL/JPY currency option trades with GSI. These trades were terminated on 17 June 2013 at a loss.

4 The parties recognised that two agreements, both governed by English law, were relevant to their dispute.

5 The first was an ISDA Master Agreement dated 29 May 2001 ("the ISDA Agreement") between Mr Oei and GSI. The BRL/JPY currency option trades were subject to the terms of the ISDA Agreement. The ISDA Agreement contains a non-exclusive jurisdiction clause in favour of the English courts.

6 The second was the Goldman Sachs Private Wealth Management Client Agreement Pack ("the Account Agreement Pack"), which was delivered to Mr Oei on 9 September 2011 under cover of a

letter expressly stating that:

> … [the Account Agreement Pack] will supersede all the prior account agreements (including addenda and supplements thereto) in relation to your Account … For the avoidance of doubt, any prior specific security arrangements (including cross-collateralisation documents) or trading agreements (including ISDA documentation) in connection with your Account … shall remain effective.

7 Mr Oei signed and returned an acknowledgment receipt of the Account Agreement Pack on 27 March 2012, which included the following confirmation in similar terms:

> … you agree that the [Account Agreement Pack] … shall supersede all the prior account agreements (including addenda and supplements thereto) in relation to your Account … save for any prior specific security arrangements including cross-collateralisation documents or trading arrangements including ISDA documentation in connection with your Account(s), … which will continue to be effective.

8 The parties accept that that the Account Agreement Pack is binding on them and that the present dispute is capable of falling within the ambit of the arbitration agreements contained in the Account Agreement Pack.

9 Where the parties disagreed was the approach towards determining whether these proceedings should be stayed in favour of arbitration given the existence of competing dispute resolution agreements, as well as the parties' objective intentions as to the applicability of the ISDA Agreement and the Account Agreement Pack.

10 At this juncture I should also note that Mr Oei has commenced proceedings in New York against other Goldman Sachs entities founded on the same alleged misrepresentations.

Issues

11 Accordingly, the issues I had to decide were as follows:

(a) What was the correct approach for the court to take in deciding whether or not to order a stay of proceedings in favour of arbitration where there were two relevant agreements – one containing arbitration agreements and the other a non-exclusive jurisdiction clause;

(b) Applying that approach, whether the requirements for a stay of proceedings in favour of arbitration in the present case were satisfied.

Summary of the parties' positions

12 Counsel for GSI, Mr Andre Maniam SC, argued that the court should order a stay of proceedings as long as GSI could demonstrate that it was "at least arguable" that Mr Oei's claim was the subject of the arbitration agreements in the Account Agreement Pack. The authorities Mr Maniam SC cited for this proposition were *Tjong Very Sumito v Antig* [2009] 4 SLR(R) 732 ("*Tjong*"), *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 636 ("*Dalian*") and *Gulf Canada Resources Ltd v Avochem International Ltd* 66 BCLR (2d) 114 ("*Gulf Canada Resources*"). Mr Maniam SC further argued that such an approach would be consistent with the principle of "*kompetenz-kompetenz*" contained in Art 16 of the UNCITRAL Model Law on International Commercial Arbitration.

13 Mr Maniam SC relied on the expert opinion of Mr David Joseph QC that there was at least an arguable case to be made that Mr Oei's claim was the subject of the arbitration agreements in the Account Agreement Pack because having regard to, *inter alia*:

(a) the substance of the dispute (alleged fraudulent misrepresentations made by GSA employees);

(b) the comprehensive scope of the Account Agreement Pack in that it dealt with Mr Oei's relationship with all relevant entities of Goldman Sachs; and

(c) the limited scope of the ISDA Agreement in that it dealt with the operation and conduct of over-the-counter derivative transactions,

it was reasonable and rational to conclude that the parties intended for the present dispute to be resolved by arbitration in accordance with the arbitration agreements in the Account Agreement Pack.

14 Counsel for Mr Oei, Mr Siraj Omar, sought to distinguish *Tjong*, *Dalian* and *Gulf Canada Resources* on the basis that those cases did not involve circumstances where there were competing dispute resolution clauses in multiple agreements and that they were in the context of determining whether there was a dispute between the parties that fell within the ambit of the arbitration clause. Mr Omar argued that the court's approach should be to construe the objective intentions of the parties in respect of the operation of the ISDA Agreement and the Account Agreement Pack and make a finding as to which of the two agreements lay at the commercial centre of the dispute.

15 In Mr Omar's submission, relying on the expert opinion of Mr Tim Lord QC, the parties should be construed as intending the non-exclusive jurisdiction clause in the ISDA Agreement to govern their dispute because, *inter alia*:

(a) the Account Agreement Pack was said not to supersede ISDA documentation;

(b) the jurisdiction provisions in the Account Agreement Pack did not contain clear words abrogating those in the ISDA Agreement;

(c) the confirmations sent by GSI to Mr Oei on his making and termination the BRL/JPY currency option trades referred to the "Transaction" which was subject to and governed by the ISDA Agreement; and

(d) the Account Agreement Pack was on standard terms drafted by Goldman Sachs whereas the ISDA Agreement was on a standard form but negotiated in part.

16 Mr Lord QC was also of the opinion that it was "strongly arguable" that the commercial centre of the transaction consisted of the two BRL/JPY currency option trades which were governed by the ISDA Agreement.

My decision

17 It would be apposite to begin by referring to the relevant portions of s 6 of the International Arbitration Act:

Enforcement of international arbitration agreement

6.—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of *any matter which is the subject of the agreement*, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) *shall make an order*, upon such terms or conditions as it may think fit, *staying the proceedings so far as the proceedings relate to the matter*, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

[emphasis added]

18 It is trite that the effect of the above provisions is that the court *must* grant a stay of proceedings unless the party resisting the stay can show that one of the statutory grounds (*ie* the arbitration agreement is null and void, inoperative or incapable of being performed) for refusing a stay exists (see *Tjong* at [22]).

19 Mr Omar has correctly observed that *Tjong*, *Dalian* and *Gulf Canada Resources* were focused on whether the matter before the court was the subject of the arbitration agreement as required by s 6(1) of the International Arbitration Act, in that a dispute existed between the parties within the meaning of the arbitration agreement. This was not in issue in the present case. However, the underlying rationale for judicial non-intervention in arbitration elucidated in those cases – the need to respect party autonomy as manifested by the parties' contractual bargain – remains an important guiding consideration here as the stay of proceedings granted by the court under s 6(2) of the International Arbitration Act is only "so far as the proceedings relate to the matter [which is the subject of the arbitration agreement]".

20 In my view, it was necessary for this court to consider the terms of the ISDA Agreement and the Account Agreement Pack in their respective contexts to determine if the parties only intended one and not the other to apply to their present dispute. As stated by Andrew Ang J in *Transocean Offshore International Venture Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 ("*Transocean*") at [26] (cited approvingly in *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm) ("*PT Thiess*") at [42]):

> … the nature of the claim and the particular agreement out of which the claim arose ought to be considered. Where a claim arose out of or was more closely connected with one agreement than the other, the claim ought to be subject to the dispute resolution regime contained in the former agreement, even if the latter was, on a literal reading, wide enough to cover the claim.

21 However, adopting a measured and common-sense approach consistent with the judicial policy towards arbitration, the court should only refuse a stay of proceedings in situations of multiple applicable agreements with conflicting jurisdiction clauses (at least one of which is an arbitration clause) where parties' intentions are clear that the whole or part of the dispute between them should not be subject to the arbitration agreement. Whether or not this threshold is crossed comes down to the facts and circumstances of each case and I am hesitant to adopt as a general rule Mr Maniam SC's suggestion that as long as it is "at least arguable" that a claim falls within the ambit of an arbitration agreement the court should grant a stay of proceedings.

22 The applicable principles of English law propounded by both parties' experts are consistent with

the approach I have outlined above. These principles may be summarised as follows:

(a) Where there are numerous jurisdiction agreements which may overlap, it is the jurisdiction clauses in the agreements which are at the commercial centre of the transaction that the parties must have intended to apply (*UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585 ("*UBS v HSH*") at [95]); alternatively, the court must ascertain where the centre of gravity of the dispute is (*Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998 ("*Sebastian Holdings*") at [49]; [61]).

(b) The essential task of the court is to construe the jurisdiction agreement in the light of the transaction as a whole and to determine the objective intention of the parties as revealed by the agreements (*UBS v HSH* at [83]; *Sebastian Holdings* at [42]).

(c) The court must consider the substance of the controversy as it appears from the circumstances in evidence and not only on the particular terms in which the claim in court has been formulated (*PT Thiess* at [35]).

(d) It may generally be assumed that parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals (*UBS v HSH* at [95]; *Sebastian Holdings* at [41]).

(e) However, the court must give effect to clear agreements even if this may result in a degree of fragmentation in the resolution of disputes between parties to the series of agreements (*Sebastian Holdings* at [50]).

23 In the application of these principles to the facts of the present case, I appreciated the force and logic of the positions put forward by both parties, but on balance I was more persuaded by counsel for GSI and the expert opinion of Mr Joseph QC.

24 The agreement at the commercial centre of the dispute or the centre of gravity of the dispute is, in my view, the Account Agreement Pack. Mr Oei's claim against GSI is for alleged fraudulent misrepresentations made to him in the context of his private banking relationship with Goldman Sachs by two employees of GSA. Although the alleged misrepresentations led to two BRL/JPY currency option trades governed by the ISDA Agreement, these trades are not at the centre of the present claim.

25 In proving his claim, Mr Oei will have to rely on clauses in the Account Agreement Pack to demonstrate that the two employees of GSA were acting as agents for GSI in the course of making the representations to him. In defending against Mr Oei's claim, GSI will be relying on clauses in the Account Agreement Pack relating to how parties agreed Mr Oei was to be treated by Goldman Sachs and what obligations Goldman Sachs was under in respect of Mr Oei. The ISDA Agreement will hardly feature.

26 The fact that the Account Agreement Pack is expressed as not superseding the ISDA Agreement does not clearly lead to the conclusion that parties intended for the jurisdiction clause in the ISDA Agreement, and not the arbitration clauses in the Account Agreement Pack, to apply to all disputes involving a transaction governed by the ISDA Agreement. One needed to look at the precise nature of the dispute. If the dispute involved a breach of the terms of the ISDA Agreement, for example, a different analysis would be required (assuming the Account Agreement Pack was also relevant) more akin to that undertaken in the cases of *Transocean*, *UBS v HSH*, *PT Thiess* and *Sebastian Holdings*, which dealt with commercial transactions with different aspects being governed

by different agreements.

27 Accordingly, it could not be said that the parties had expressed a clear intention for the non-exclusive jurisdiction clause in the ISDA Agreement to apply to the present dispute and not the arbitration agreements in the Account Agreement Pack. In fact, the breadth and scope of the Account Agreement Pack suggests that it was intended by parties to comprehensively govern their private banking relationship, especially where different Goldman Sachs entities were likely to be involved in providing services to Mr Oei.

28 Finally, I would observe that the fragmentation that would result by having proceedings relating to the same alleged misrepresentations being canvassed in multiple jurisdictions is undesirable and could not have been reasonably intended by the parties.

Conclusion

29 For the foregoing reasons I granted the application for a stay of proceedings. I will hear parties on costs.