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Have the Singapore Courts faltered in the enforcement of arbitration agreements?

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Have the Singapore Courts faltered in the enforcement of Arbitration agreements?

***TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21**

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In *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21, the Singapore High Court took the view that an arbitration clause did not meet the *prima facie* standard to warrant a stay of court proceedings because it designated an inapplicable arbitral institution. Commentators have suggested that the decision is "*surprising*" and out of line with the prevailing judicial policy of upholding arbitration agreements. This note takes the view that the ultimate decision is defensible because, on a proper interpretation of the dispute resolution clauses, there was no clear intention to arbitrate the dispute at hand.

Facts

TMT Co., Ltd ("**TMT**"), a Liberian ship-owning company, opened a trading account with the Royal Bank of Scotland plc ("**RBS**") in May 2007. The trades were cleared by RBS through the London Clearing House, of which RBS was a Clearing Member.

In 2010, TMT commenced proceedings against RBS in England for breach of the trading account agreement (referred to in the judgment as the "**FFA Account Agreement**") negligence, breach of statutory duty concerning risk management and other obligations and negligent misrepresentation as to the margin requirements of the trading accounts. It was essentially alleged that incorrect information was provided by RBS and relied upon by TMT to make trading decisions, leading to substantial losses. The FFA Account Agreement is governed by English law. Clauses 20 and 22 of the FFA Account Agreement provide as follows:

> *20. Arbitration*

* Advocate & Solicitor, Singapore, Solicitor-Advocate, England & Wales, Attorney and Counselor-at-law, State of New York, *Ascendant Legal LLC*

> *Any dispute arising from or relating to these terms or any Contract made hereunder shall, unless resolved between us, be referred to arbitration under the arbitration rules of the relevant exchange or any other organization as the relevant exchange may direct and both parties agree to, such agreement not to be unreasonable [sic] withheld, before either of us resort to the jurisdiction of the Court.*
>
> *…*
>
> *22. …*
>
> *Subject to term 20 [the arbitration clause] above, disputes arising from these terms or from any Contract shall, for our benefit, be subject to the jurisdiction of the English courts to which both parties hereby irrevocably submit, provided however that we shall not be prevented from bringing an action in the courts of any other competent jurisdiction.*

In 2012, the parties entered into a settlement agreement to settle the English proceedings (referred to in the judgment as the "**Settlement Agreement**"). The Settlement Agreement is governed by English law. The Settlement Agreement contains an exclusive English jurisdiction clause.

In 2015, TMT sued RBS's Singapore branch and a number of RBS's officers (collectively the "**Defendants**") for losses arising from imposing improper and erroneous margin requirements, improper and erroneous valuation, diversion of monies and delay of instructions, wrongful or fraudulent assistance, and conspiracy to carry out the wrongful acts, relating to TMT's margin trades.

The Defendants applied for a stay of the Singapore proceedings and succeeded before an Assistant Registrar. On appeal before the Singapore High Court, TMT argued, *inter alia*, that:

(a) The Settlement Agreement covered only claims raised in the English proceedings.

(b) The arbitration clause in the FFA Account Agreement was inoperative and incapable of being performed. There was no relevant exchange because the London Clearing House is not an exchange.

(c) The arbitration rules governing the London Clearing House Clearing Members are inapplicable because they are intended solely for Clearing Members. TMT is a non-clearing member.

(d) Under the jurisdiction clause in the FFA Account Agreement, TMT must submit to the jurisdiction of the English courts if RBS commenced proceedings there. Otherwise, both parties are entitled to commence legal proceedings anywhere else.

On the other hand, the Defendants raised various alternative arguments, including:

(a) Any dispute about the scope of the Settlement Agreement should be determined by the English courts pursuant to the exclusive jurisdiction clause in the Settlement Agreement.

(b) All the claims in the Singapore proceedings arise from or relate to the terms of the FFA Account Agreement, and would be subject to the arbitration clause under the FFA Account Agreement.

(c) All the claims are subject to the exclusive jurisdiction of the English courts under the FFA Account Agreement.

Eventually, the Singapore High Court decided that the Singapore proceedings fell within the scope of the Settlement Agreement properly construed. The Court also found that, even if there was any dispute about the scope of the Settlement Agreement, such a dispute would fall within the scope of the exclusive jurisdiction clause in the Settlement Agreement. The proceedings in Singapore should thus be stayed.

By way of *obiter*, the Court proceeded to examine whether a stay would be warranted on the basis of the arbitration clause in the FFA Account Agreement. The Court's reasoning was that, because there is no relevant exchange in this case, the arbitration clause does not on its face apply to the present dispute. On the evidence before the Court which appears to be undisputed, the trades that were executed under the FFA Account Agreement were carried out through a clearing house, which is different from an exchange.

The Defendants tendered an English legal opinion which took the view that the English courts would not limit the arbitration clause to only situations where an exchange is involved. The English courts would focus on the provision for arbitration, treating the rest of the clause as the relevant mechanism which could be modified to the situation at hand.

The Court rejected the Defendants' argument on the premise that the Courts would be slow to override the plain words in the parties' agreement. The Court was unable to conclude on the evidence that there is any absurdity or that parties had intended to give an expanded meaning to the word "*exchange*". The Court took the view that the threshold for granting a stay under section 6 of the International Arbitration Act was not met.

Comments

Observers have suggested the Court's decision is "*unusual*" because the arbitration clause in this case was coherently drafted – the Singapore Courts have on previous occasions, such as *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 and *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, saved other defective arbitration agreements between commercial parties when the defect was more apparent. These observers have suggested one way of rationalising this decision: a bad arbitration

clause is more likely to be saved than one that is coherent but inapplicable, because the Court would be reluctant to "rewrite" the clause.

In this writer's view, the Court's decision is defensible. The outcome of such cases does not simply turn on how well-drafted the clause is; a fundamental touchstone is whether the parties have evinced, *prima facie*, an intention to arbitrate the specific dispute at hand. On the facts of this case, the intention of the parties is gleaned by reading *both* the dispute resolution clauses in the FFA Account Agreement, *ie* clauses 20 (arbitration clause) and 22 (jurisdiction clause), together.

It is uncontroversial that, as a starting point, Singapore courts strive to uphold arbitration clauses—a paradigm example would be *K.V.C. Rice Intertrade Co., Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32, where the Singapore High Court recently enforced "bare" arbitration clauses which specified neither the seat or means of appointing arbitrators. However, unlike a typical case where the parties only included an arbitration clause but not a jurisdiction clause, in this case the dispute resolution mechanism included a jurisdiction clause. One would need to give effect to the existence and language of the jurisdiction clause.

On a plain reading of clauses 20 and 22 of the FFA Account Agreement, it is arguable that, under the FFA Account Agreement:

(a) Before parties "*resorted to the jurisdiction*" of the courts, parties would first submit disputes that are amenable for resolution "*under the arbitration rules of the relevant exchange or any other organization as the relevant exchange may direct*"; and

(b) Any disputes not so amenable would then be resolved by way of the jurisdiction clause in clause 22.

If the Defendants' expansive interpretation of clause 20 were accepted, clause 22 may be rendered practically otiose. There is no evidence that was the intention of the parties. Furthermore, that outcome would be inconsistent with the language of clause 20 because clause 20 itself refers to the possibility of parties "*resort[ing] to the jurisdiction*" of the courts. On its terms, clause 22 applies to any disputes that are not amenable for arbitration under clause 20.

Put simply, it is arguable the scope of the arbitration agreement here is expressly limited to disputes that are amenable for resolution "*under the arbitration rules of the relevant exchange or any other organisation as the relevant exchange may direct*". There appears to be no evidence, *prima facie* or otherwise, that the Singapore proceedings fell within that scope.

The decision at hand is a good example of how, despite adopting a pro-arbitration policy, the Singapore courts will not enforce arbitration clauses indiscriminately. The mere existence of an arbitration clause does not, without more, carry the day.

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