HCA 1240/2017
[2019] HKCFI 1287

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO 1240 OF 2017

BETWEEN

VASILIEVA ELENA NIKOLAEVNA, Plaintiff
the Liquidator of Agricultural Productive Cooperative
<<Fishing Collective Farm <<Severnaya Zvezda>>>>,
a Russian corporate (in liquidation)

and

DRAGON SEAFOODS LIMITED Defendant

Before: Madam Recorder Yvonne Cheng SC in Chambers
Date of Hearing: 15 May 2019
Date of Judgment: 27 May 2019

J U D G M E N T

A. INTRODUCTION

1. By summons of 1 September 2017 ("**the Summons**"), the defendant applied, *inter alia*, for a stay of this action pending the final determination of the disputes between the parties by the court of the Russian Federation.

2. The plaintiff is a Russian company and the supplier of fish products. The defendant is a Hong Kong company and a purchaser of fish products.

3. The parties entered into a "Master Agreement for Fish Supplies" on 17 December 2010 ("**the Agreement**"), by which the plaintiff agreed to sell, and the defendant agreed to buy, various fish or fish products. The plaintiff claims for outstanding payment and interest under the Agreement in an amount of US$3,387,116.25.

B. THE PARTIES' RESPECTIVE POSITIONS

B1. The defendant's case

4. The defendant's case is that the proceedings should be stayed in favour of a court of the Russian Federation pursuant to Order 12, rule 8 of the Rules of the High Court, which provides (in material part) as follows:

> " (2) A defendant who wishes to argue that the Court should not exercise its jurisdiction in the proceedings on one or more of the grounds specified in paragraph (2A) or on any other grounds shall also give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the Court for:
> …
> (b) an order staying the proceedings …
> …
>
> (2A) The grounds specified for the purposes of paragraph (2) are that—
> (a) considering the best interests and convenience of the parties to the proceedings and the witnesses in the proceedings, the proceedings should be conducted in another court,
> (b) the defendant is entitled to rely on an agreement to which the plaintiff is a party, excluding the jurisdiction of the Court, …
> …"

5. The defendant says that:

(1) clause 5 of the Agreement contains an exclusive jurisdiction clause which excludes the jurisdiction of the Hong Kong Courts (applying Order 12, rule 8(2A)(b));

(2) alternatively, applying the principles in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, the courts in Russia rather than those in Hong Kong are the more appropriate forum to determine the parties' dispute (applying Order 12, rule 8(2A)(a)).

B2. The plaintiff's case

6. The plaintiff says that:

(1) clause 5 of the Agreement has been held by the Commercial Court of Murmansk Oblast of the Russian Federation ("**the Russian Commercial Court**"), upon application by the defendant, to be invalid, so that there is no jurisdiction clause which excludes the jurisdiction of the Hong Kong Court;

(2) the Russian Commercial Court has also held, again upon the defendant's claim, that the parties' dispute is not within the jurisdiction of the commercial courts in the Russian Federation. Accordingly, the defendant fails to show that there is another available forum which is clearly or more distinctly appropriate than Hong Kong to determine the dispute.

C. THE RELEVANT PRINCIPLES

7. There is no dispute as to the applicable principles.

8. On an application for a stay of proceedings on the grounds that there is an exclusive jurisdiction clause, the Court should exercise its discretion to grant a stay unless strong cause for not doing so is shown: *The "El Amria"* [1981] 2 Lloyd's Rep 119 at 123.

9. If a stay is sought not on the basis that there is an exclusive jurisdiction clause, but pursuant to Order 12, rule 8(2A)(a), which is a statutory recognition of the traditional *forum non conveniens* challenge, the applicable principles are as stated by the Court of Final Appeal in *SPH v SA* (2014) 17 HKCFAR 364 at [51] (citing *DGC v SLC (née C)* [2005] 3 HKC 293):

> " 1. The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action ie in which the action may be tried more suitably for the interests of all the parties and the ends of justice?
>
> 2. In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum ('appropriate' in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.
>
> 3. If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceedings has to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong.
>
> 4. If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he is able to establish to the court's satisfaction that substantial justice will be done in the available appropriate forum."

10. Where jurisdiction is founded in the Hong Kong Court as of right — as in the present case — the party seeking the stay has to establish that there is another available forum which is clearly or distinctly more appropriate than the Hong Kong forum: *SPH* at [52].

D. THE DEFENDANT'S GROUNDS FOR SEEKING A STAY OF PROCEEDINGS

D1. Whether there is exclusive jurisdiction clause ousting jurisdiction of Hong Kong Courts

11. The defendant relies on clause 5 of the Agreement, which provided as follows:

> " 5. Consultations and Arbitration, Legal Force
>
> Consultations
>
> In the event a dispute arises in connection with the interpretation or implementation of this Agreement, the Parties shall attempt to resolve such dispute through consultations. … If the dispute cannot be resolved in this manner within thirty (30) days after the commencement of discussion, any Party may submit the dispute to arbitration.
>
> Arbitration
>
> If the Party of this Agreement fails to perform its obligations, the other Party shall have the right to address for the security of its rights to the permanently acting Arbitration tribunal under the Limiter Liability Company 'Murmansk shore' having its location at: 450008, Bashkortostan Republic, Ufa, Kirov Street, building 1, office 338. The Arbitration tribunal decides the disputes in accordance with the regulations of the Arbitration tribunal and the substantive laws of the Russian Federation.
>
> The Parties agreed to consider that the decision of the Arbitration tribunal is final, not appealed, enters into the effect immediately after the declaration, acts directly and does not require the confirmation of the other authorities and officials. …
>
> Legal Force of the Agreement
>
> Any illegality, invalidity or unenforceability of any provision of this Agreement under the law of any jurisdiction shall not effect [*sic*] its legality, validity or enforceability under the law of any other jurisdiction nor the legality, validity or enforceability of any other provision.
>
> This Agreement is severable in that if any provision hereof is determined to be illegal or unenforceable, the offending provision shall be declared void and without any legal effect, but without affecting the legal validity of the remaining provisions of the Agreement.
>
> …"

12. The defendant says that Russian law governs the Agreement.

13. In a judgment of 27 November 2014, the Russian Commercial Court held that the arbitration clause contained in clause 5 was invalid, or void. The defendant had applied to the Russian Commercial Court for voidance of the arbitration clause as the administrator of the plaintiff had a connection with the nominated arbitral tribunal. The court agreed, coming to the conclusion that the agreement to arbitration "ensures no compliance with the principles of legality, independence and fairness", and that there would be reasonable doubts as to the fairness of any decision pursuant to the arbitration.

14. The defendant's own expert witness on Russian law, Andrey Shashorin, acknowledged that the Russian Commercial Court had held the arbitration clause to be invalid (although he opined that the parties' agreement as to the choice of Russian Federation law as the governing law of the Agreement was still valid).

15. Counsel for the defendant, Mr Toby Brown, submitted that even if clause 5 was invalid, it nevertheless showed that the parties had agreed to resolve their disputes in Russia. However, even on its face, clause 5 is not an exclusive jurisdiction clause, since:

(1) it is expressed in permissive, rather than mandatory terms. It merely gives an aggrieved party the right to refer a dispute to arbitration ("may"; the aggrieved party "shall have the right"). This may be contrasted with dispute resolution through the use of consultations, which under the same clause 5 is expressed to be mandatory ("shall");

(2) that part of the clause under the sub heading "Legal Force of the Agreement" appears to envisage enforceability in more than one jurisdiction.

16. In the circumstances, I find that there is no exclusive arbitration clause which excludes the jurisdiction of the Hong Kong Court.

D2. Whether there is another available forum which is clearly or distinctly more appropriate than Hong Kong

17. The defendant says that Russia, rather than Hong Kong, is clearly the more appropriate forum for the determination of the parties' disputes, being the forum with which the action has the most real and substantial connection. Mr Brown submitted that that part of clause 5 which contained the parties' choice of Russian law was not held to be invalid by the Russian Commercial Court, or that even if it was invalid, clause 5 nevertheless evidenced the parties' intention that Russian law should be the governing law of the Agreement, and that on the facts, the law with the closest connection to the Agreement was Russian law. He further submitted that as a number of the defences relied on by defendant to resist the plaintiff's claim for payment under the Agreement involved issues of Russian law, it would be appropriate for the dispute to be resolved in the Russian courts. In addition, the relevant witnesses were mostly located in Russia.

18. Counsel for the plaintiff, Mr Barrie Barlow SC, submitted that what the governing law of the Agreement might be, or where the witnesses were located, was of no importance, given that the defendant had to establish that there was another *available* forum in which the dispute could be determined. In the present case, there was no such forum, the

Russian Commercial Court already having ruled that it had no jurisdiction to determine the dispute.

19. It is an unusual feature of this case that the Russian Commercial Court has already ruled as to its jurisdiction. The plaintiff had commenced proceedings in the Russian Commercial Court against the defendant for the outstanding payment and interest due under the Agreement, that is, the very claim being made in the present proceedings. The defendant had claimed that the court had no jurisdiction to hear the claim. In a judgment of 20 April 2016, the Russian Commercial Court held that:

> " … the consideration of the dispute in respect of a foreign legal entity, and namely Dragon Seafoods Limited is not within the competence of the commercial courts in the Russian Federation, and therefore the proceedings in the part regarding the requirements for Dragon Seafoods Limited pursuant to Clause 1 of Part 1 of Article 150 of the Arbitration Procedural Code is subject to termination."

20. The plaintiff's expert witness on Russian law, Mr Rinat Salyaev, opined that as a result of this judgment (and the earlier judgment of 27 November 2014):

> " … resolution of the dispute between [the plaintiff] and [the defendant] by a Russian court is impossible."

21. The response of the defendant's expert witness was that whilst the Russian Commercial Court's judgment was binding on state bodies, local government bodies, other bodies, organisations official bodies and citizens of the whole territory of the Russian Federation, it was not binding on another Russian court, so that another court could come to its own decision as to whether it had jurisdiction over the parties' dispute.

22. However, the defendant has not identified any other Russian court as having jurisdiction over the parties' dispute.

23. I therefore find that the defendant has not even established that there is another *available* forum to determine the dispute, let alone that such a forum is clearly or distinctly more appropriate than Hong Kong. In these circumstances, I agree with Mr Barlow SC that I should not proceed to the next stage of the *Spiliada* test. As Recorder Geoffrey Ma SC (as he then was) said in *Rambas Marketing Co LLC v Chow Kam Fai David* [2001] 3 HKC 250 at 253H:

> " … the court will not even begin to exercise its discretion to stay until it is satisfied that there exists an available alternative forum".

E. CONCLUSION

24. I therefore dismiss the Summons and make an order *nisi* that the costs of and occasioned by the Summons be to the plaintiff, to be taxed if not agreed.

(Yvonne Cheng SC)
Recorder of the High Court

Mr Barrie Barlow SC, instructed by William K W Leung & Co,
for the plaintiff

Mr Toby Brown, instructed by Stephenson Harwood,
for the defendant