Starboard News: "EXCLUSIVE" MEANS EXCLUSIVE

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In October last year, Starboard announced that the Singapore Court of Appeal has changed the law on exclusive jurisdiction clauses in a case that Dentons Rodyk handled. The change to the law was significant not least because the court said that it will no longer follow its own previously-stated principle - that it was entitled to consider the merits of a defendant's case when it considered whether to order a stay of Singapore proceedings commenced in breach of an exclusive jurisdiction clause. The change in the law was to have general retroactive effect.

The case concerned, in essence, a trader (Vinmar) who contracted on four previous occasions to purchase goods from another trader (PTT) or its parent company. In each of these four previous contracts of sale was an exclusive jurisdiction clause referring disputes to the English High Court. Vinmar then entered into a fifth contract to purchase goods from PTT, the terms of which Vinmar contended were contained in a draft contract, sent by PTT to Vinmar, that included an exclusive jurisdiction clause similar to the ones that appeared in the previous four contracts. A dispute arose between Vinmar and PTT which led Vinmar to terminate the contract. PTT began proceedings in Singapore and Vinmar applied for a stay of Singapore proceedings on the ground of what it contended to be an exclusive jurisdiction agreement favouring the English High Court. The Assistant Registrar, who heard the application, found that the exclusive jurisdiction agreement was a term of the contract but refused to grant a stay on the basis that Vinmar did not have a genuine defence to PTT's claim. He relied on a line of cases from the Singapore Court of Appeal as authorities for the proposition that the absence of a meritorious defence was a sufficient ground to refuse a stay, and found that Vinmar did not have an arguable defence. On appeal, the High Court came to a similar decision. Vinmar applied for and obtained leave to appeal the High Court's decision to the Singapore Court of Appeal, Singapore's apex court.

At the Singapore Court of Appeal, Vinmar argued two principal points. First, Vinmar argued that it had a good arguable case that the terms in the draft contract reflected the terms of the contract. Alternatively, it had a good arguable case that the exclusive jurisdiction agreement was incorporated into the contract by the parties' course of dealings. Second, Vinmar argued that the Singapore Court of Appeal should depart from its previous decisions and rule that the merits of parties' cases are either irrelevant or of very limited relevance in an application for a stay of proceedings commenced in breach of an exclusive jurisdiction clause. PTT argued that the draft contract did not reflect the terms of the contract and that there was no incorporation of any previous exclusive jurisdiction clause into the current contract. PTT also argued that the Singapore Court of Appeal should affirm its previous decisions that the court was entitled to have regard to the merits of parties' cases when it considered a stay application. Alternatively, if these decisions were overruled that there should be no retroactive ruling and the case should not be affected by the overruling. PTT also argued that litigation was more convenient in Singapore, rather than in England, as both parties were Singapore companies, the witnesses and documents were either in or more easily brought to Singapore, and the Singapore court was used to applying English law (which was the putative governing law of the contract).

The Singapore Court of Appeal decided to appoint a leading law professor as an *amicus curiae* on the issue whether the merits of parties' cases should be considered in an application to stay proceedings commenced in breach of an

exclusive jurisdiction agreement and, if so, how this factor should be incorporated into the test applied by the court and how much weight should be attached to it. The *amicus curiae* returned an opinion that in such applications, the merits of the parties' cases should generally be irrelevant to the application unless the lack of a meritorious defence shows along with other things that the applicant is acting abusively or where convenience and expense favour the refusal of a stay (albeit that it would have little weight in a freely negotiated jurisdiction agreement between commercial parties).

After hearing the parties and the *amicus curiae*, the Singapore Court of Appeal released an extensive judgment (now reported as *Vinmar Overseas (Singapore) Pte Ltd v. PTT International Trading Pte Ltd* [2018] 2 SLR 1271). It decided that although Vinmar did not, in the Singapore Court of Appeal's view, establish a good arguable case that the parties agreed a contract in the terms of the draft contract, it had established a good arguable case that an exclusive jurisdiction agreement had been incorporated into the contract through the parties' course of dealings.

The Singapore Court of Appeal then went on to restate the law in relation to exclusive jurisdiction agreements. It maintained the age-old test in *The Eleftheria* [1969] 1 Lloyd's Rep.237 but emphasised that:

1. In applying the factors laid out in the case, the court should bear in mind that factors relating to the relative convenience of litigation in Singapore and abroad had little weight if they were foreseeable at the time of the parties contracted with one another (for a recent case on convenience of litigation, albeit on *forum non conveniens* principles, see where is justice best served).
2. In determining a stay application, the merits of the defendant's defence was irrelevant. In saying so, the Singapore Court of Appeal decided that the previous line of at least four Court of Appeal cases beginning with *The Jian He* [1999] 3 SLR(R) 432 were inconsistent with the central principle of party autonomy as it generated uncertainty for commercial parties in international trade and would lead parties to expend significant costs at the interlocutory stage and delayed the resolution of disputes.
3. It proposed to abandon *The Jian He* line of cases to promote coherence in the law, not least because it thought that the proposition - that a defendant who had no defence did not genuinely desire trial in the contractual forum – to be flawed.
4. Instead, it thought that the consideration that should lead to a refusal to stay should be that of an abuse of process by the party applying for a stay. The conclusion that a party was guilty of abuse of process would not be drawn lightly. The threshold was high and the cases in which the court would regard abuse of process to exist would be few and far between.

In the course of its written judgment, the Singapore Court of Appeal also expressed its view that it might be appropriate to refuse a stay of proceedings commenced in breach of an exclusive jurisdiction agreement if a "denial of justice" ground was made out. An example would be where the contractual court was dissolved or was not realistically available because war had broken out or if there was, exceptionally, overwhelming difficulty or inconvenience in resolving the dispute in the contractual court such that a stay operated to effectively deny the claimant access to justice.

This judgment is significant not least because of what is, in effect, an overruling by the Singapore Court of Appeal of at least four of its own previous judgments given over 20 years. It has set Singapore law in a direction similar to Singapore's regard for party-autonomy in international arbitration agreements, the Convention on Choice of Court Agreements done at The Hague on 30th June 2005 and, indeed, with English principle on exclusive jurisdiction clauses which had developed in the direction of upholding the bargain of the parties. It recognises that there is no legal or practical difference between parties' choice of seat of arbitration and parties' choice of a court to resolve their disputes. It also retains sensitivity to exceptional situations where access to real and substantive justice is an objective rather than a subjective concern. The judgment shows that it is important for a party, when it contemplates commencing proceedings in Singapore in breach of an exclusive jurisdiction clause to ask itself whether it possesses the right conditions to ask the Singapore court to refuse a stay. Parties can no longer do so in the belief that if a stay

application is made, it can be countered by asking the Singapore court to embark on a pure litigation convenience analysis.

Subsequent editions of Starboard will explore some of the issues raised by or left open by the Singapore Court of Appeal in the *Vinmar* case, for example, whether the restatement of law applies to forum selection in bills of lading, when new declarations of law have retroactive application, and what might give rise to a course of dealing.

Dentons Rodyk represented Vinmar the successful appellant in V*inmar Overseas (Singapore) Pte Ltd v. PTT International Trading Pte Ltd* [2018] 2 SLR 1271. The full judgment may be accessed here.

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