

MAURITIUS COMMERCIAL BANK LTD v UBS AG. SINGAPORE BRANCH & ANOR

2015 SCJ 307

Record No. SC/COM/PWS/01455/2014

IN THE SUPREME COURT OF MAURITIUS
(COMMERCIAL DIVISION)

In the matter of:

The Mauritius Commercial Bank Ltd

Plaintiff

v.

- 1. UBS AG. Singapore Branch**
- 2. UBS AG.**

Defendants

Judgment

In a plaint with summons, the plaintiff (The MCB) is suing the two defendants for contractual negligence and *faute* and is claiming from them, damages in an amount of USD 13,031,218.

The claim arises out of an agreement entered between the plaintiff and the defendant No. 1 (UBS) the Singapore Branch of the defendant No. 2, a Swiss international banking Corporation. Under the agreement the plaintiff agreed to participate with UBS, the lender of record, in a USD 100M secured term loan facility to Ammalay International Pte Ltd (Ammalay). The terms and conditions of the agreement between the plaintiff and UBS are contained in a side letter dated 31 July 2012 which was sent by UBS to the plaintiff. In terms of the agreement the plaintiff funded a sum of USD 20M towards UBS's loan to Ammalay.

The plaintiff has averred in its plaint that in or about 16 January 2014 it discovered that UBS had reduced its participation in the Facility to USD 15M. It is the contention of the plaintiff that its own participation also had to be reduced to USD 15M such that its participation in the funding of the Facility be at most "equal to" that of UBS, as the lender of record in accordance

with the agreement of the 31 July 2012. UBS has not agreed to The MCB's claim for reduction of its participation in the Facility. Hence the present claim for damages.

The defendant No. 2 has not filed any plea on the merits but at the outset has raised a preliminary objection consisting of two limbs and it has put in an affidavit in support of its contentions. The material part of the preliminary objection for present purposes, reads as follows:

“The Defendant No. 2 does not agree to submit to the jurisdiction of the Supreme Court of Mauritius in respect of the plaint with summons, objects to and opposes such jurisdiction and avers that the Supreme Court has no jurisdiction in the present matter.”

In support of its objection, the defendant No. 2 has averred that the Facility under reference is governed by an agreement dated 16 August 2012 (“the Facility Agreement”) to which the plaintiff and the Singapore Branch of the defendant No. 2, i.e. the defendant No. 1, are parties. The said Facility Agreement contains an arbitration clause as follows:

“39.1 Arbitration

Subject to Clause 39.5 (Agent's option), any dispute, controversy or claim arising in any way out of or in connection with this Agreement (including: (1) any contractual, pre-contractual or non-contractual rights, obligations or liabilities; and (2) any issue as to the existence, validity or termination of this Agreement) (a “Dispute”), shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules (the “Rules”) of the Singapore International Arbitration Centre (“SIAC”) for the time being in force, which Rules are deemed to be incorporated by reference in this Clause 39.”

“39.2 Formation of arbitral tribunal, seat and language of arbitration

(b) the seat of the arbitration shall be Singapore.”

The defendant No. 2 has accordingly prayed for –

“a. an Order under Section 5 of the International Arbitration Act (the Act) for the present proceedings (the case bearing number SC/COM/JICA/01455/2014) to be transferred to the Supreme Court constituted under Section 42 of the Act for the latter to determine whether the parties should be referred to Arbitration, and/or

b. such other Order/s which the justice of the case may require.”

The plaintiff does not agree with the defendant No.2's above contentions. The matter has now come for arguments before me.

In his submissions counsel for the defendant No. 2 has argued that *ex facie* the facts pleaded in the plaint, the plaintiff's claim is in relation to contractual or pre-contractual rights, obligations or liabilities arising in connection with the Facility Agreement. It is therefore a dispute arising "*out of or in connection with the Facility Agreement*". As such, the issue has to be resolved by arbitration in Singapore as provided under clauses 39.1 and 39.2 of the Facility Agreement and the Supreme Court in Mauritius does not have jurisdiction to entertain the present matter. According to counsel the matter must be automatically transferred to a properly constituted bench of the Supreme Court pursuant to Section 5 of The International Arbitration Act ("The Act").

Counsel for the plaintiff has argued that the plaintiff's claim is based on the contractual agreement existing between itself and UBS i.e. the side letter of the 31 July 2012 and which is the only contractual agreement between the parties. Counsel has argued that the plaintiff's claim does not arise under the Facility Agreement but under the side letter. This letter does not form part of the pre-contractual negotiations targeted at clause 39.1 of the Facility Agreement. It is the contention of the plaintiff that the "*rights, obligations and liabilities*" under the side letter are not "*out of or connected with the Facility Agreement*" and clause 39.1 has no application to disputes arising under the side letter. The side letter in fact predates the Facility Agreement which was concluded on 16 August 2012 and is totally separate and distinct from the Facility Agreement. The parties to the side letter never intended their agreement to be governed by any arbitration agreement. The said letter according to the plaintiff is in the nature of a "*contre lettre*" and it is not governed by any arbitration clause or still less by the Facility Agreement since it was the clear intention of the parties that this letter would remain confidential between the two parties.

As such the plaintiff has maintained that the present court is the proper forum to entertain the plaint with summons and has jurisdiction to hear and determine the matter.

I have considered the arguments of both counsel and I find that in the light of the averments of the plaint and the submissions of counsel, it is clear that an issue as to the applicability of the arbitration clause under the Facility Agreement has been raised in the

preliminary objection and it is not open for the present court to determine the issue. The case must under Section 5 of “The Act”, be automatically transferred to the Supreme Court. Under Section 5(1) of “The Act” hereunder reproduced –

“5. Substantive claim before Court

(1) Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.”

The defendant No. 2 has refused to submit itself to the jurisdiction of the Supreme Court, it has not put in any plea and has from the very outset, made an application under Section 5 of “The Act” (“a Section 5 claim”)

The procedure for “a Section 5 claim” is set out under Rule 13(1) & (2) of the Supreme Court (International Arbitration Claims) Rules 2013 “The Rules” which read as follows:

“1. Where a party to an action before a referring Court contends that the action is the subject of an arbitration agreement, it shall make an application (“a Section 5 claim”) to that effect to that Court, supported by written evidence in the form of one or more affidavits or witness statements, together with any supporting documents.”

“(2) Where the application complies with paragraph (1) and section 5(1) of the Act, the referring Court shall immediately stay its proceedings and notify the Chief Justice who shall promptly constitute the adjudicating Court.”

In the present case the defendant No. 2 has put in an affidavit in support of its application. It has in its affidavit averred the facts material to the application under Section 5 of “The Act”. It has set out its case and the issue which needs to be determined by the adjudicating court. It has also annexed documents in support of its affidavit. As such I find that the defendant No. 2 has complied with the procedure under Rule 13(1) of “The Rules”.

I accordingly find that the defendant No. 2’s claim complies with Section 5(1) of “The Act” as well as Rule 13(1) of “The Rules”. In the circumstances I agree that the present action must, pursuant to Rule 13(2) of The Rules, be referred to the Supreme Court for a determination under Section 5 of “The Act”.

