

Mitsui Engineering & Shipbuilding Co Ltd v PSA Corp Ltd And Another
[2002] SGHC 170

Case Number : Suit No 114 of 2002/L, RA No 88 of 2002
Decision Date : 02 August 2002
Tribunal/Court : High Court
Coram : Woo Bih Li JC
Counsel Name(s) : Leslie Chew SC, John Chung and Alvin Chang (Khattar Wong & Partners) for the plaintiff; Steven Chong SC, Deanna Seow and Chua Kee Loon (Rajah & Tann) for the second defendant
Parties : Mitsui Engineering & Shipbuilding Co Ltd — PSA Corp Ltd And Another

Arbitration – Stay of court proceedings – Mandatory stay under international arbitration act – Whether arbitration an international one – Which of plaintiff's two places of business has closer relationship to arbitration agreements – Place of substantial performance – International Arbitration Act (Cap 143A, 1995 Rev Ed) ss 5(2) and 5(3)

Judgment

FOUNDATIONS OF DECISION

INTRODUCTION

1. The Plaintiff Mitsui Engineering & Shipbuilding Co Ltd ('Mitsui') and the Second Defendant Keppel Engineering Pte Ltd ('Keppel') acting as a consortium, were contractors of a project with the First Defendant PSA Corporation Limited ('PSA').
2. There were two contracts between PSA on the one hand and Mitsui and Keppel on the other hand i.e Contract Nos 619 and 801.
3. Under Contract No 619, the Consortium was required to carry out the design, construction, supply, installation, testing, commissioning and integration of an Overhead Bridge Crane System comprising 16 units of 40-tonne lifting container handling overhead bridge cranes ('cranes') including superstructure and foundation for the new container terminal at Pasir Panjang plus eight additional cranes at PSA's option.
4. Under Contract No 801, the Consortium was required to carry out the design, construction, supply, installation, testing, commissioning and integration of 16 cranes for the new container terminal at Pasir Panjang, including an option for eight additional cranes (however, in the event, PSA only required the Consortium to supply a total of 20 cranes under Contract No 801).
5. There were also two contracts as between Mitsui and Keppel each dated 29 December 1997. These were referred to as Consortium Agreement Nos 619 and 801.
6. Article 14 of the Consortium Agreements provides:

 'All disputes arising in connection with the present Agreement shall be finally settled according to the UNCITRAL Arbitration Rules of 1976 which Rules are deemed to be incorporated in this Clause, by a sole arbitrator. The arbitration will be held in Singapore unless otherwise agreed.
7. At the time the present suit was filed, arbitration had already commenced in which Keppel is the Claimant and Mitsui is the Respondent. The arbitration is undertaken pursuant to arbitration provisions

in each of the two Consortium Agreements.

8. PSA is not a party to the Consortium Agreements. There is an arbitration provision in Contract No 619 but not in Contract No 801, although both contracts relate to the same project.

9. In the present suit, Mitsui's claims against PSA and Keppel arise from both contracts. However, Keppel applied for a stay of the claims by Mitsui against it in the suit in view of the arbitration provisions in the Consortium Agreements. It was common ground that their disputes fell within such arbitration provisions. Keppel's application for a stay was granted by an Assistant Registrar. Mitsui then appealed against the stay.

10. Keppel's application was based on two grounds:

- (a) if the International Arbitration Act ('IAA') applies to the arbitration, the stay is mandatory,
- (b) if the Arbitration Act applies, the stay is discretionary and the court should exercise its discretion in favour of a stay.

11. Mitsui did not dispute that if the IAA applies, the stay is mandatory. Hence, the first and main argument was whether the IAA applies.

12. Keppel contended that the arbitration was an international arbitration for the purpose of the IAA on various grounds:

- (a) Mitsui's place of business was in Japan within the meaning of s 5(2)(a) read with s 5(3)(a) IAA,
- (b) alternatively, if Keppel's and Mitsui's places of business are considered to be in Singapore under s 5(2)(a) read with s 5(3)(a), a substantial part of the obligations of the commercial relationship was nevertheless to be performed by Mitsui in Japan and hence s 5(2)(b)(ii) IAA applies.

13. Mitsui contended that:

- (a) its place of business was in Singapore, and not Japan under s 5(2)(a) and s 5(3)(a), and
- (b) as regards s 5(2)(b)(ii), both Keppel and Mitsui have their places of business in Singapore and no substantial part of the obligations of the commercial relationship is to be performed outside Singapore.

SECTION 5 IAA

14. Section 5 IAA states:

'5.(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part of the Model Law shall apply to that arbitration.

(2) Notwithstanding Article 1(3) of the Model Law, an arbitration is international if -

- (a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State

other than Singapore; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(3) For the purpose of subsection (2) -

(a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, a reference to his place of business shall be construed as a reference to his habitual residence.

(4) Notwithstanding anything to the contrary in the Arbitration Act, that Act shall not apply to any arbitration to which this Part applies.'

[Emphasis added.]

WHETHER MITSUI'S PLACE OF BUSINESS IS IN JAPAN FOR THE PURPOSE OF S 5(2)(a) READ WITH S 5(3)(a)

The Arguments

15. It was common ground that Mitsui is a company incorporated in Japan and its head office is in Japan. It is also a foreign company registered in Singapore with an office in Singapore for which it has a lease. Mitsui also alleged that it manages and oversees projects in Singapore through its Singapore office.

16. Hence, it was not disputed that Mitsui has a place of business in Japan and a place of business in Singapore. This brought into play s 5(3)(a) which required me to determine which of these two places of business 'has the closest relationship' to the arbitration agreements.

17. Mr Stephen Chong SC, Counsel for Keppel, submitted that it was common ground that the closest relationship was to be determined with reference to the negotiations leading to the Consortium Agreements which contained the arbitration provisions. Therefore, the individuals who took part in the negotiations and the place of the negotiations were important in this determination.

18. Mr Chong referred to an Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration. Article 1(3) of the Draft Text is similar to s 5(3)(a) and (b) IAA. With regard to 'the closest relationship to the arbitration agreement', the Commentary states, at para 32:

'Determination of place of business, paragraph (3)

32. If a party has two or more places of business, one of which is in the same State as is the other party's place of business, it is necessary to determine which of his places is relevant for the purposes of paragraph (2). According to paragraph (3), first sentence, it is the one which has the closest relationship to the arbitration agreement. An instance of such close relationship would be that a contract, including an arbitration clause, is fully negotiated by the branch or office in question, even if it is signed at another place (e.g. the principal place of business).'

19. As regards negotiations, Mr Chong submitted that:

(a) the main negotiator from Mitsui was Mr Shirai who was from Mitsui's head office. The involvement of Mitsui's personnel from its Singapore office was purely administrative and insignificant. They did not initiate any material change to terms during negotiations.

(b) The Consortium Agreements referred to Mitsui being a company incorporated under the laws in Japan and its head office's address. Any formal communication thereunder was to be sent by Keppel to Mitsui in Japan. Much of the correspondence on negotiations were in fact sent to Mitsui's head office.

(c) There was a Portions List attached to each of the Consortium Agreements. The List sets out the respective party's scope of work and purchasing of materials. The Mitsui representative responsible for the List was one Mr Ehira who is stationed in Japan.

20. Mr Leslie Chew SC, Counsel for Mitsui, submitted that the following factors regarding the negotiations showed that Mitsui Singapore had the closest relationship to the Consortium Agreements:

(a) Mr Shirai was not the only Mitsui negotiator. Mr Chew listed others some of whom had employment passes to work in Singapore.

(b) The negotiations took place primarily in Singapore.

(c) The Portion Lists were negotiated primarily by Mitsui's representatives in Singapore.

21. Mr Chew further submitted that I should also take into account the following additional factors:

(a) the governing law of the arbitration is Singapore law,

(b) the place of arbitration is Singapore,

(c) the subject matter of the Consortium Agreement is in Singapore.

MY DECISION

22. My initial view was that the place of substantial performance by Mitsui should logically be an important factor in determining which place of business of Mitsui had the closest relationship to the Consortium Agreements. By 'the place of substantial performance' I mean the place where Mitsui's main obligations were to be carried out. However, my initial view was checked by two points.

23. First, I noted that the Analytical Commentary did not refer specifically to the place of

substantial performance as a factor in determining the closest relationship.

24. Secondly, the place of substantial performance appeared to be already specifically provided as one of the factors under s 5(2)(b)(ii). If this same factor is already applicable under s 5(3)(a), then s 5(2)(b)(ii) would be otiose.

25. However, upon further reflection, I was of the view that it was not out of place to include the place of substantial performance by Mitsui as a factor in determining which of its places of business has the closest relationship to the Consortium Agreements.

26. First, s 5(3)(a) does not specifically exclude the place of substantial performance as a factor. Neither does the Analytical Commentary.

27. Secondly, s 5(2)(b)(ii) refers to 'any place where a substantial part of the obligations of the commercial relationship is to be performed' (emphasis added) and not the place of substantial performance.

28. Thus, for example, even if the place of substantial performance by Mitsui were to be, say, Singapore, a substantial part of the performance by Mitsui could still be in Japan. Conversely, if a substantial part of performance by Mitsui was in Japan, it did not necessarily mean that Japan was the place of substantial performance by Mitsui.

29. Thirdly, s 5(3)(a) refers to the closest relationship of a party to the arbitration agreement where that party has more than one place of business. The substantial performance must be of that party before it is taken into account as a factor in determining which place of business of that party has the closest relationship to the arbitration agreement.

30. This can be contrasted with s 5(2)(b)(ii). The reference therein to the performance of 'a substantial part of the obligations' is not confined to performance by a party to the arbitration agreement. It can be performance by a non-party for a party so long as that performance constitutes a substantial part of the obligations undertaken under the contract in dispute. Thus, the Analytical Commentary states, at para 29:

'29. Under sub-paragraph (ii), internationality is established if a substantial part of the obligations of the commercial relationship is to be performed in a State other than the one where the parties have their places of business. This would be the case, for example, where a producer and a trader conclude a sole distributorship agreement concerning a foreign market or where a general contractor employs an independent sub-contractor for certain parts of a foreign construction project. While the arbitration agreement must cover any dispute or certain disputes arising out of this relationship, it is not necessary that the dispute itself relates to the international element.'

31. This is illustrated in the Hong Kong case of *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd*. There, two Hong Kong companies with their places of business in Hong Kong, entered into an agreement for the sale and purchase of Chinese soybean FOB Dalian, China. The place of delivery was stated to be Dalian, China, and payment by letters of credit through a Hong Kong bank. The document provided for arbitration in Hong Kong under the laws of Hong Kong. One of the issues was whether the arbitration was an international or domestic one.

32. The plaintiff there argued that as a substantial part of the commercial obligations between it and the defendant was to be performed in China (delivery of the goods), the dispute was an international arbitration to which the UNCITRAL Model Law applied. The defendant argued that the

arbitration was a domestic one because of various factors:

- (a) Both parties were Hong Kong companies.
- (b) The defendant's failure to nominate a vessel occurred in Hong Kong.
- (c) Acceptance of repudiation occurred in Hong Kong.
- (d) The commercial relationship commenced in Hong Kong in that the contract was made there.
- (e) The plaintiff was to cause its head supplier to deliver the cargo at Dalian. Thus causation was in Hong Kong.
- (f) The defendant failed to open a letter of credit in Hong Kong.
- (g) Hong Kong law would seem to be the applicable law of the contract.

33. Justice Kaplan of the Hong Kong High Court, in dealing with the equivalent of s 5(2)(b)(ii) said:

'The definition refers to 'substantial part of the obligation'. What is meant by substantial? In Hong Kong Arbitration - Cases and Materials (Butterworths, 1991), one finds the following at p 180: 'Substantial' means 'considerable', 'solid' or 'big'. In one case, a substantial amount was held to be 13 out of 80 but it will be dangerous to try to apply any mathematical formula. In one case, it was held that 1,000 firms out of 6,000, and 150,000 employees out of 474,000 were not insubstantial and, therefore, substantial. (*Thorneloe v Board of Trade* [1950] 2 All ER 245).'

34. He then concluded that, 'a substantial part of the obligations of the commercial relationship' was to be performed in a place where the parties did not have their places of business, i.e China and that the arbitration was an international arbitration to which the Model Law did apply.

35. Fourthly, there is some support for my view in another commentary i.e Avon Broches' Commentary on the Uncitral Model Law on International Commercial Arbitration published by Kluwer. There, Article 1(4)(a) of the UNCITRAL Model Law is similar to our s 5(3)(a). Page 7, para 26, of this commentary states:

'26. The Law deals in subparagraph (4)(a) with the case in which a party has more than one place of business, and in (4)(b) with the rare case in which a party has no place of business. Divergent views were expressed in the Working Group with respect of what became (4)(a). Some felt that where a party had more than one place of business, its principal place of business should be regarded as its place of business for the application of subparagraph (3), since this would provide a clear criterion. The prevailing view in the Working Group was, however, in favour of the place of business which has the closest relationship to the arbitration agreement, a criterion which was similar to Art. 10(a) of the 1980 Vienna Sales Convention. The relationship between a place of business and an arbitration agreement is not a very clear concept. It should probably be understood as meaning, or at least including, the implementation of the agreement and the subject matter of the dispute.

[Emphasis added.]

36. In the context of Mr Chong's argument in respect of s 5(2)(b)(ii), he stressed that Mitsui's primary obligation was the design of the cranes and this was to be done in Japan, although he did not dispute that there would be other work done by Mitsui in Singapore.

37. Mr Chew did not dispute that the design would be done by Mitsui in Japan. However he argued that the place of substantial performance of the contract with PSA is Singapore. The fabrication and assembly works were carried out in Keppel's factory in Tuas, Singapore, and the automation works, after installation onto concrete structures, were carried out substantially in Singapore.

38. I was of the view that the place of substantial performance by Mitsui was Japan as its main responsibility was the design works.

39. As for the negotiations, I was of the view that it was the head office's Mr Shirai who was in charge of negotiations. It is who is in charge of negotiations and not the number of people involved in the negotiations that is important. The place of negotiations and execution of the Consortium Agreements is less important given that Mr Shirai had from time to time flown from Japan to Singapore. I also took into account the fact that Mitsui's address in Japan, and not in Singapore, was used for the Consortium Agreements and, more importantly, that any formal communication to Mitsui was to be sent to its head office. As for the Portion Lists, they were negotiated primarily in Singapore but Mr Ehira from the head office of Mitsui was the representative in charge of the Lists.

40. The fact that the governing law is Singapore law and the place of arbitration is Singapore is irrelevant. The question is not which place has the closest relationship to the Consortium Agreements but which place of business of Mitsui has the closest relationship to the Consortium Agreements.

41. Accordingly, I was of the view that Mitsui's Japanese place of business and not the Singapore one has the closest relationship to the Consortium Agreements.

42. I would add that even if I were wrong in taking into account the place of substantial performance by Mitsui, I would still have reached the same conclusion based on the other factors which I have mentioned in para 39 above.

43. Accordingly, the arbitration was an international arbitration under s 5(2)(a) read with s 5(3)(a) and the stay of Mitsui's claims in court against Keppel was mandatory.

SECTION 5(2)(b)(ii) IAA

44. As for s 5(2)(b)(ii), it applies where a substantial part of the obligations is to be performed in a place outside the State in which the parties have their place of business.

45. Therefore, even if I had concluded that Mitsui's place of business was Singapore under s 5(2)(a) read with s 5(3)(a), and since Keppel's place of business was also in Singapore, it was still open to Keppel to argue that the arbitration was an international one under s 5(2)(b)(ii). Indeed it did rely on s 5(2)(b)(ii) as its alternative argument.

46. As I was of the view that Mitsui's substantial performance of its obligations was in Japan, it would follow that the arbitration between Mitsui and Keppel was an international one under s 5(2)(b)(ii), if not under s 5(2)(a) read with s 5(3)(a).

47. The factors which Mr Chew mentioned like the fabrication and assembly works and the installation works only showed that the place of substantial performance of the entire contract with PSA was in Singapore but that was a different matter altogether. The question was whether 'any place where a substantial part of the obligations ...' [emphasis added] is performed is a place outside the State in which the parties have their place of business.

CONDUCT OF THE PARTIES

48. Mr Chong also drew my attention to the conduct of the parties and the conduct of the arbitration proceedings so far between Mitsui and Keppel, for example:

(a) In a letter dated 2 May 2001 from Khattar Wong & Partners ('KWP'), the solicitors of Mitsui, to the Hong Kong International Arbitration Centre, KWP requested an arbitrator who was neither Japanese nor Singaporean, 'as the dispute is between a Japanese company and a Singaporean company'. While this was a fact, Mr Chong submitted that it illustrated the international nature of the dispute.

(b) In a preliminary hearing in Singapore on 27 June 2001, the arbitrator requested for a copy of the relevant Singapore statute i.e the IAA, which Keppel undertook to provide. There was then no suggestion by Mitsui that the relevant statute was the Arbitration Act instead.

49. I was of the view that the second point would have militated against Mitsui's belated argument that the arbitration was not an international one.

SUMMARY

50. In the circumstances, the IAA applied. As the Arbitration Act did not apply, it was not necessary for me to decide whether I should exercise my discretion not to order a stay of Mitsui's claims against Keppel in the suit.

51. Accordingly, I dismissed Mitsui's appeal with costs.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER

Copyright © Government of Singapore.