

**NATIONAL UNIVERSITY OF SINGAPORE
FACULTY OF LAW**

**LL4434V, LL5434V, LL6434V
INTERNATIONAL COMMODITY TRADING LAW CLINIC
AY 20/21**

Assignment 3

You are a lawyer with Helmsman LLC. You have just been instructed as counsel by one of the parties on appeal:-

Appellant (Lamco)	Nikhil Daniel Angappan	Michael Ang Zheng Hui	Ng Wei Qi
Respondent (DSR)	Tan Li Yan, Nicole	Ho Jie, Shaun	Timothy James Chong Wen An

The Grounds of Decision by Goodman J is attached.

Counsel will have to submit his/her outline of arguments (and a list of the key authorities which he/she will be relying on during the hearing) via email (to the Court and opposing counsel) by latest **15 April 2021, 2.00 pm**. There are no requirements on the format of the outline except that it should be in Arial font size 11 with 1.0 line spacing and strictly no more than 2 pages.

The parties are not bound by the arguments made in the Court below.

The hearing has been scheduled to take place before the Court of Appeal on **17 April 2021**. The timing will be released to you by the Registry in due course.

Each counsel will have 25 minutes to make oral submissions. The Appellant's counsel will start first, followed by the Respondent's counsel, and thereafter, the Appellant's counsel will have a right of final reply (no more than 2 minutes).

As this is your first hearing as counsel before the Court of Appeal, your supervising solicitor has agreed to have a discussion with you before the hearing. The discussion (on a date/time to be arranged separately) should take place on or before 13 April 2021.

Any clarifications should be raised by no later than 31 March 2021.

Grounds of Decision

Case Number : Suit No 9999 of 2020
Decision Date : 29 March 2021
Tribunal/Court : High Court
Coram : Goodman J
Counsel Name(s) : Sum Ting Wong (Arr & Tee Singapore LLP) for the plaintiff; Nah Ting Wong, Peter (Aye & Gee LLP) for the defendant.
Parties : Dahai Shen Rong Nengyuan Co Ltd – Lamco Oil Trading Pte Ltd

29 March 2021

Eyam A Goodman J:

Introduction

1. The plaintiff, Dahai Shen Rong Nengyuan Co Ltd ("**DSR**") claimed that its seller, Lamco Oil Trading Pte Ltd ("**Lamco**"), failed to deliver the documents and/or the cargo under the 38 sale contracts between them entered some time between March 2018 and January 2019 and/or the letters of indemnity issued pursuant thereto. DSR denies the claims.
2. After hearing the parties, I allowed the claim by DSR. Lamco has now appealed, and I furnish my grounds of decision.

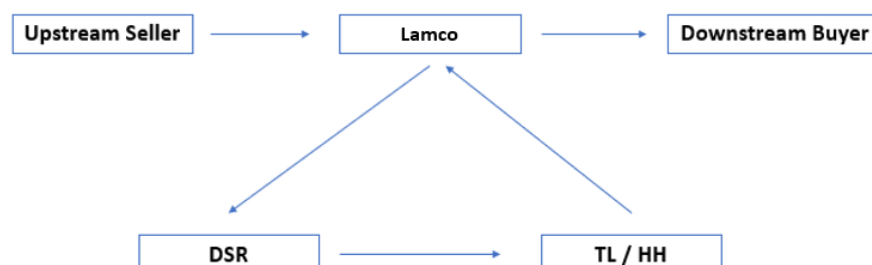
Dramatis Personae

3. Lamco is a company incorporated in Singapore which trades in, inter alia, petrochemical products. Lamco is said to be one of the biggest privately owned oil trading company in Asia, with substantial business links in China and Middle East. Lamco also has very good working relationships with the oil majors and international trading houses, and is often viewed as a trustworthy counterparty to trade with.
4. DSR is a company incorporated in China. DSR is a subsidiary of a China state-owned oil trading company known as Shandong Shen Rong International Co Ltd ("**SSR**"). At its peak, DSR was a major player in the oil and gas industry, and started to invest in other sectors such as land transportation, hospitality and IT. However, all of that has now faded away and DSR is now in liquidation.
5. Tame Lion Co Limited ("**Tame Lion**" or "**TL**") is a company incorporated in Hong Kong in 2010 with paid up capital of HKD 1,000. The sole shareholder and director of TL is one Mick Davis. TL is currently undergoing compulsory winding up.
6. TL is a wholly owned subsidiary of DSR (Hong Kong) Co Limited ("**DSR HK**"), which is in turn wholly owned by DSR. The directors and shareholders of DSR HK are senior employees of DSR.
7. Heng Heng Trading Co., Limited ("**Heng Heng**" or "**HH**") is a company incorporated in Hong Kong in 2016 with paid up capital of HKD 20,000. The sole shareholder and director of HH is Sun Rong Rong, a Chinese national. On 2 July 2019, the Registrar of Companies

published a notice that it would strike off HH from the Companies Register within 3 months. However, this notice was discontinued on 18 October 2019 as the Registry did receive an objection in the meantime. The nature of the objection is unclear as neither party adduced evidence on this point.

The Transactions

8. DSR and Lamco have been trading with each other, albeit sporadically, since 2010. Between 2010 and February 2018, they concluded only around 12 spot transactions, 10 of which DSR was the buyer and 2 of which DSR was the seller. These transactions are not the subject of the present case.
9. Things changed when Mr Peter Xu joined DSR as a senior trader. Mr Xu knew Ms Bo Jin Lai, the Head of Trading of Lamco, as they were both working in a Chinese trading company, Ri Xing Petroleum Co Limited, in or around 2013. Ms Bo left Ri Xing to join Lamco in 2015, and Mr Xu left in late 2017 to join SSR and was later assigned to DSR in 2018.
10. According to Ms Bo, sometime in or around March 2018, Mr Xu approached her with the proposal to “sleeve” DSR (and other companies) into the trading chains involving Lamco. Since then, Lamco and DSR entered into several trades for different types of oil products, including crude oil, fuel oil, gas oil, etc. The structure of these transactions is described below.
11. Lamco would buy the cargo from an oil major or a big international trading house and sell the cargo to its downstream buyer. For ease of reference, I will simply refer to Lamco’s supplier as “upstream seller” and Lamco’s buyer as “downstream buyer”. The cargo would eventually be delivered to the downstream buyer. At around the same time, Lamco would sell the cargo to DSR and buy the same cargo back from a 3rd party company which, according to Lamco, was nominated by DSR, usually Tame Lion or Heng Heng.
12. As far as the transactions involving Tame Lion or Heng Heng were concerned, the sale by Lamco to DSR and the buy back by Lamco from the 3rd party were treated by Lamco as, in substance, a “composite” transaction. Lamco believed (but did not know for a fact at the material time) that this “composite” transaction would be a closed loop, i.e., the title of the cargo will end up back with Lamco to be passed down to the downstream buyer. As such, no cargo or documents were expected to be delivered to either DSR, Tame Lion or Heng Heng. See diagram below.



13. Initially, DSR would “nominate” Tame Lion to be the 3rd party company. However, this was later changed to Heng Heng. According to Lamco, the change was due to Lamco’s internal company regulations, which did not allow a party related to DSR to be the 3rd party which “sells back” the cargo to Lamco. Later, DSR stopped “nominating” Heng Heng, but Lamco would just assume (rightly) that Heng Heng would be involved as the 3rd party company

from whom Lamco would “buy back” the cargo from. In other words, Heng Heng simply became the *default* 3rd party company for this type of transactions between Lamco and DSR.

14. None of the “nominations” either of Tame Lion or Heng Heng were done in writing. According to Ms Bo, it was always done over the phone between the traders. DSR did not adduce any evidence to contradict this point. Indeed, the contemporaneous evidence is consistent with Ms Bo’s evidence on this point. In this regard, Lamco tendered evidence to show DSR providing the corporate details of Tame Lion as well as Heng Heng to Lamco for its usual KYC and due diligence purposes. Ms Bo explained that since Lamco had never traded with Tame Lion or Heng Heng before, the company’s internal policy required her to submit their corporate details for the risk department’s approval. She therefore asked DSR for the corporate details and was accordingly provided with them.
15. All of the transactions in this case involved Heng Heng as the 3rd party selling the cargo back to Lamco. However, the relationship between Heng Heng and DSR was unclear. At least in relation to the first three transactions involving Heng Heng, DSR’s operations personnel were copied in the emails between Heng Heng and Lamco in respect of the Lamco-Heng Heng contracts.
16. The following documents were relied upon by Lamco as evidence that the sale from Lamco to DSR, DSR to Heng Heng and from Heng Heng back to Lamco related to the same cargo and were duly performed:-
 - (a) letters from Heng Heng to DSR confirming that the trade has been “completed”;
 - (b) cargo receipts from Heng Heng to DSR indicating that the cargo had been “received”;
 - (c) emails between Lamco and Heng Heng indicating that Heng Heng would only be paid once Lamco had received the letter of credit issued on behalf of DSR;
 - (d) email correspondence whereby Lamco nominated performing vessels to DSR and the same vessel nominations were later “received” from Heng Heng; and
 - (e) contractual documents for the transactions between the parties, including contract, LOI, and remittance advices (in relation to the Lamco-DSR and Lamco-Heng Heng transactions).
17. It was not disputed by Lamco that DSR did not receive payment for some of these transactions from Heng Heng – out of the total contract price of USD 200,126,654.11, DSR only received USD 130,112,045.34 from Heng Heng.
18. Unfortunately, no one from DSR or Heng Heng were called as witnesses at the trial. According to counsel for DSR (who, I note, was engaged by the liquidators of DSR), all of the former employees of DSR and Heng Heng were nowhere to be found and/or refused to participate in the proceedings. The only evidence that DSR was able to rely on were the records that the liquidators were able to find. As such, there was no clear evidence on the reasons for Heng Heng’s failure to pay DSR for those trades, and whether DSR has taken any steps to recover the non-payments from Heng Heng. Lamco, on the other hand, had paid Heng Heng for all of the cargo sold by Heng Heng to Lamco - this was not disputed by DSR.

19. According to the evidence of Ms Cai Ying Fang, an experienced Chinese lawyer from Wangda Law Firm who was called as an expert witness by Lamco, it is illegal under Chinese law to deliberately structure a 'closed loop' where no physical cargo would be delivered through the trading chain. However, Ms Cai could not point to any particular laws or regulations in China, but instead, referred to an unofficial interview by a high ranking Chinese official that condemned circular trades, especially when it did not involve any physical cargo at all. DSR did not call any expert witness on this issue, but the counsel for DSR made it very clear that DSR's position was that there was nothing illegal about the transactions in question as there was a physical cargo involved.
20. It was alleged by Lamco that the reason DSR proposed this business structure to Lamco, i.e. "sleeving" DSR in a trading chain, as it became later apparent to Lamco (but not at the material time), was to allow DSR to obtain cheaper "credit" from Lamco's financiers. How it worked is as follows:-
- (a) DSR would open a LC for, say, 90 days on the back of the purchase contract with Lamco.
 - (b) Within 5 to 7 days of receiving the LC, Lamco would discount the payment under the LC and pay Heng Heng by way of TT.
 - (c) The money received by Heng Heng is then used to pay DSR which would then have had the use of the money until the expiry date of the 90 days' credit.
 - (d) Before the expiry date of the LC, DSR would "create" another of such loop and open another LC, so the credit line is "extended", by using money drawn under the second LC to repay the first LC.
21. There was no evidence to show that this purpose was specifically discussed with Lamco at the time, but this was the primary reason why such structures were set up at the time by many Chinese parties. It is said that such a practice is very common in the market at that point in time.
22. Ms Bo accepted that it was very common at that time, but she was very firm when she said that she did not know about DSR's intention. Indeed, she candidly admitted on the stand that she did not really care what DSR's intention was. To her mind, she was just adding two more parties into the trading chain, that is, selling and buying on back-to-back terms save for payment terms and price. This, according to her, was common practice in the industry.
23. Ms Bo also gave evidence that one of the benefits of such transactions, apart from the profit margin that Lamco was making which range between USD 30,000 to 60,000 per transaction, was to boost the trading volume of the parties involved, including Lamco. With a higher trading volume (and hence higher revenue), the banks would generally be more willing to extend credit.
24. When asked by counsel for DSR why Lamco agreed to enter into contracts worth millions with Heng Heng, an unknown company with paid up capital of only HKD 20,000, Ms Bo explained that there was no reason to be concerned as the understanding was that Lamco would only pay Heng Heng *after* receiving the irrevocable LC from DSR and have received payment from the discounting bank. As it turned out, this was always the case for all 38 transactions. The contemporaneous emails showed that in at least two of the transactions when there was a delay in the issuance of the LC by DSR, Lamco would withhold payment to Heng Heng (with no objections from Heng Heng at all) until the LC was issued and

Lamco received payment from the discounting bank. In other words, Lamco was never “out of pocket” when paying Heng Heng.

25. For completeness, I should also mention that DSR and Lamco concluded a small number of “normal” transactions (i.e., DSR sells to Lamco or Lamco sells to DSR) between March 2018 and January 2019, but as those transactions have nothing to do with the present case, I will say no more about them.

Contracts between Lamco and DSR

26. The contracts between Lamco and DSR (which are governed by Singapore law) were concluded on different Incoterms – with a mix of CIF, CFR, FOB and DES. It would depend on the Incoterms applicable in Lamco’s purchase contract from the upstream seller. However, in all of the contracts, title and risk would pass at the delivery point in accordance with the applicable Incoterms.

27. The contracts between Lamco and DSR would provide, among other things, that:

“Payment shall be made by an irrevocable letter of credit issued by a first-class international bank and in a format acceptable to the Seller, to be payable in USD Dollar without discount, set off, counterclaim or deduction at 90 days from Bill of Lading date [or Notice of Readiness date] against presentation of the Bill of Lading and other usual shipping documents. In the event that the original shipping documents are not available at the time of presentation, the payment shall be made by the Buyer against the presentation of Seller’s original commercial invoice and letter of indemnity in Seller’s format acceptable to Buyer. ...”

28. In all of the transactions, Lamco would discount the letter of credit and tender the original commercial invoice and letter of indemnity in lieu of the original bills of lading (“OBL”) to obtain payment from the discounting bank.

29. The letter of indemnity (“LOI”) (governed by Singapore law) states, inter alia:

“Although we, Lamco Energy Trading Pte Ltd, have sold and transferred title of said cargo to you, we have been unable to provide you with the original bills of lading and other shipping documents.

In consideration of your paying us full purchase price of USD ____ when the original bills of lading and other said shipping documents were not delivered to you, we expressly warrant that we have full title to such cargo which would be transferred to you in accordance with the contract, free and clear of any lien or encumbrance, and that we have full right and authority to effect delivery of the cargo to you.

We agree to make all reasonable efforts to obtain and surrender to you as soon as possible the original bills of lading and other said shipping documents.

We irrevocably and unconditionally undertake to protect, indemnify and save you harmless from and against any and all damages, costs and expense (including reasonable attorney fees) which you may suffer by reason of the original bills of lading and other said shipping documents remaining outstanding or breach of the warranties given above, including but not limited to, any claims and demands which may be made by a holder or transferee of the original bills of lading and other usual shipping

documents, or by any other third party claiming an interest in or lien on the cargo or proceeds thereof.

[...]

The validity of this letter of indemnity shall expire upon our presentation to you of the aforesaid original bills of lading and other said shipping documents or 1 year after Bill of Lading date."

30. Lamco did not obtain and surrender the OBLs and other original shipping documents to DSR. Only copies of the BLs and shipping documents were provided to DSR.
31. In some cases (i.e., 6 out of the 38 transactions), Lamco would present the OBL directly to its downstream buyer. In other cases (i.e., 2 out of the 38 transactions), Lamco would retain possession of the OBL. In most of the cases (i.e., 30 out of the 38 transactions), however, Lamco would simply not receive the OBL from its upstream seller. Since Lamco's downstream buyers did not ask for the OBLs, Lamco also did not ask its upstream sellers for the OBLs.
32. According to the evidence of Ms Loh Xiu Hui, the operations executive with Lamco, DSR never once asked for the OBL and as far as DSR was concerned, once they obtained the LOI, they would consider the trade completed. This appears to be consistent with the contemporaneous correspondence between Lamco and DSR which were adduced as evidence.

Contracts between Heng Heng and Lamco

33. The contracts between Lamco and Heng Heng (governed by Singapore law) would be concluded on the same Incoterms as the corresponding contract with DSR in each particular trade. For example, if the sale to DSR was concluded on FOB terms, then the purchase from Heng Heng would also be concluded on FOB terms.
34. Apart from the payment terms and price, the contracts between Lamco and Heng Heng appear to be on the exact same terms as each corresponding contract with DSR.
35. In all of the contracts between Lamco and Heng Heng, title and risk would pass at the delivery point in accordance with the applicable Incoterms.
36. In relation to the payment terms, the contracts between Lamco and Heng Heng would provide that payment be made by way of telegraphic transfer within a certain number of days (typically substantially shorter than 90 days) from the BL or NOR date against presentation of either the original bills of lading and usual shipping documents or a letter of indemnity and commercial invoice. As mentioned, in all of the cases, payment was made by Lamco against the presentation of the letter of indemnity and commercial invoice issued by Heng Heng.

Contracts between the Upstream Seller and Lamco and between Lamco and the Downstream Buyer

37. The contracts between the upstream sellers and Lamco (in which Lamco buys from the upstream sellers), and the contracts between Lamco and the downstream buyers (in which Lamco sells to the downstream buyer) were concluded on various shipping terms (mix of CIF, CFR, FOB and DES contracts), but they were all on back-to-back basis.

38. In all of the contracts between the upstream sellers and Lamco and between Lamco and the downstream buyers, title and risk would pass at the delivery point in accordance with the Incoterms.

Claim by Liquidators of DSR

39. On 19 January 2021, Lamco received a letter of demand from Arr & Tee Singapore LLP, who were the lawyers for DSR. In the letter, they alleged that Lamco had breached the sale contracts and the LOIs issued thereunder, by failing to deliver cargo and/or the original bills of lading. Lamco, through their lawyers, Aye & Gee LLP, rejected DSR's claim.
40. On 31 January 2021, DSR's liquidators, on behalf of DSR, commenced the present action.

Parties' Arguments

41. Lamco raised a number of arguments, including sham, illegality, agency, estoppel and waiver, no loss and failure to mitigate, and others. To summarise:-

[...]

42. In response, DSR made the following points:-

[...]

My Decision

43. I agreed with Lamco that DSR was time barred under the LOI since this action was commenced more than 1 year after the BL date. However, this was not fatal to DSR's case as they had a separate claim under the sale contracts.
44. In relation to each of the 38 sale contracts, regardless of the applicable Incoterms, Lamco was required to deliver either the documents (including the original bills of lading) and/or the goods to DSR. It was undisputed that Lamco did not deliver the documents (including the original bills of lading) to DSR and that the goods were delivered to Lamco's downstream buyer. In other words, DSR paid the contract price under each of the contracts with Lamco but did not receive the documents and/or goods from Lamco.
45. After carefully considering Lamco's arguments, I was not persuaded by them. I agreed with DSR's arguments entirely.
46. For the reasons above, I found that there is a breach of all 38 sale contracts in failing to deliver the original BLs and/or cargo to DSR, or alternatively, a total failure of consideration. Accordingly, DSR was entitled to recover damages (in the sum of the contract price) from Lamco under each of the 38 sale contracts.