SOCIETE KOENIG FRERES v LES SALINES IRS CO LTD & ANORS

2009 SCJ 104
SN 924/08

IN THE SUPREME COURT OF MAURITIUS
(In Chambers)

In the matter of:

SOCIETE KOENIG FRERES

Applicant

V

LES SALINES IRS Co. Ltd
THE PERMANENT SECRETARY MCCI
RAVINDRA CHETTY

Respondents

Judgment

The applicant (SKF) moves for an injunction, inter alia, to abort arbitration proceedings initiated by respondent no. 1 (Les Salines), to prevent respondent no. 3 (Chairperson) from making any award therein and to restrain respondent no. 2 (PSMCCI) from acting on any request made by Les Salines for arbitration.

On December 9, 2005 an agreement was reached between SKF and Les Salines for the acquisition by Les Salines of a portion of freehold land of an approximate extent of 167.7785 hectares in Black River and for all the issued shares in the company Les Salines Development Ltd.

The agreement also obligated Les Salines to pay to SKF the purchase price for the above property in five instalments as follows:

(i) £ 500,000 on December 16, 2005;
(ii) £1,000,000 3 months after the receipt of the letter of intent in respect of the application for the IRS status made by Les Salines:
(iii) Rs 25,000,000 plus registration duty upon the claims by the Government in respect of the TDF and registration of the lease.
(iv) £ 8,500,000 within 6 months of the issue to Les Salines of the investment certificate in respect of the application for the IRS status; and

(v) a deferred consideration of a minimum of £ 5,000,000 and a maximum of £ 6,250,000 on a sliding scale.

As per Clause 2.1 of the agreement, the above mentioned payments were made a condition precedent and it was also provided that in the event any of the conditions precedent was not fulfilled, it was open to SKF, in its sole discretion, by simple letter, to terminate with immediate effect the agreement, without indemnity, and all sums paid would thereafter be forfeited.

Les Salines began to drag its feet in the payment obligations. By letter dated December 12 and 14, 2007, SKF informed Les Salines that there was a shortfall of Rs 26,240,830 on its payments obligations and formally requested Les Salines to pay to SKF the sum Rs 26,240, 830 together with interest at legal rate to date of final payment. SKF followed this letter by a "summation", served on February 12,2008 requiring Les Salines to pay the sum of £ 8,500,000 and Rs 26,240,830 together with interest due.

Les Salines failed to comply and advanced a number of reasons for not doing so. SKF proceeded to act on clause 2.1. of the agreement. Thereupon, Les Salines rushed to the Judge in Chambers and successfully obtained an interim order to forestall that move of SKF. Soon after obtaining the interim order, it initiated arbitral proceedings through the PSMCC.

After an exchange of affidavits and arguments, however, on the issues raised in the application in Chambers, the Judge discharged the interim order on March 7, 2008 and set aside the application of injunction lodged by Les Salines. The parties, consequently, were back to the status quo ante, i.e. prior to the position they were prior to the point in time when the interim order was made.

The argument of SKF before me is that since there is no agreement subsisting any more, the substratum of the arbitral clause has fallen and respondents are precluded from arbitrating any issue in the relationship between the parties.

On the other hand, Les Salines argued before me, relying on one of my decisions, namely, **Mauritius Estate Development Corporation Ltd v. Systems Building Ltd [2008 SCJ 69]** which itself aligned itself to the decision of **Tamil Naidu**

Electricity Board v. ST-CMS Electric Co. Private Ltd [2007] 2 All ER 701, that the doctrine of separability applies. By the application of this doctrine, an arbitral clause even if an emanation of the agreement itself is independent of the agreement so that, even if the agreement were terminated, the arbitration clause would survive to determine the issues in dispute between the parties: see also **Brink's France Holdings SAS v. Societe des Oliviers and Marie Jacques Ribet [2008 SCJ 101].**

I have followed the arguments of learned counsel for the applicant who took a classical view of the matter. Learned counsel for respondents took the neo-classical view and referred to a host of authorities on the matter. I am grateful to them for the additional materials they have provided me on the matter.

I decline to grant the orders prayed for. My reasons are as follows.

First, the facts as borne out by the affidavit evidence do not suggest to me that the agreement was void *ab initio* as SKF seems to suggest. The very term used by the SKF to state its position in law under Clause 2.1 of the agreement is that it was a "termination," following alleged breaches by Les Salines. That is very different from arguing that the circumstances warranted an "avoidance" as such of the agreement.

Second, as anticipated from the cases of **Mauritius Estate Development Corporation Ltd v. Systems Building Ltd** and **Brink's France Holdings SAS v. Société des Oliviers and Marie Jacques Ribet [2008 SCJ 101]**, Mauritian law would do well to adopt and recognize the doctrine of separability with respect to arbitral proceedings.

There is considerable good sense as well as good law in its adoption. English law, at the start, reticent to take that course in the development of its law of arbitration finally espoused it. Common law, continental law and international law on the matter today converge: see **Heyman v. Darwins Ltd [1942] A.C. 356; Bremer Vulkan Schiffbau und Maschinenfabrk v. South India Shipping Corporation [1981] A.C. 909; Szurski, "Arbitration Agreement and Competence of the Arbitral Tribunal" in ICCA Congress Series No. 2: UNCITRAL Project for a Model Law on International Commercial Arbitration (Lausanne 1884); Cas. Dalico c. Khom et El Mergeb, Rev.**

Arb. 1994, p. 116, JDI 1994, p. 432; Cas., Gosser c. Capapell, Rev. Arb. 1963, p. 60, JDI 1964, p. 82; Dalloz, Code Annotées Vo Arbitrage.

There are two legs to the doctrine:

(a) an arbitral cause or "clause compromissoire" is regarded as an autonomous régime autonomous from the rest of the legal obligations binding the parties to a contract so that parties may proceed to arbitral proceedings even if the contract has terminated for one reason or the other;

(b) that autonomy to proceed to arbitration, however, includes the autonomy for the arbitral forum to determine its own competence to decide its competence: that is "*le pouvoir de compétence sur sa compétence*."

On the above, one may conveniently refer to the following comments of jurists following the decision of the Cour de Cassation in the case of **Comité Populaire de la Municipalité de Khoms El Megeb c. Sté Dalico Contractors, 1ère Chambre Civile, 20 déc. 1993,** on the stand taken by the Paris Court of Appeal in the matter:

> *« La jurisprudence de la Cour d'appel de Paris, notamment dans l'arrêt attaqué, continuait de présenter sous la même qualification de 'principe d'autonomie » deux règles qui, en réalité, sont très différentes. »*

The commentator went on to explain that -

> *« La première est celle d'autonomie de la convention d'arbitrage par rapport à la convention de fond. Acquise de longue date, la règle a essentiellement pour fonction d'isoler la convention d'arbitrage des vicissitudes susceptibles d'affecter la convention de fond et, par voie de conséquence, de couper court à l'argumentation s'efforçant de tirer des vices, réels ou supposés, de la convention de fond, un moyen de critiquer la convention d'arbitrage et donc la compétence du tribunal arbitral. Elle ne consacre en revanche nullement l'invulnérabilité de la convention d'arbitrage, celle-ci pouvant parfaitement être entachée de vices qui lui sont propres.*
>
> *Toute autre est la deuxième règle, parfois présentée comme le principe d'autonomie de la convention d'arbitrage « par rapport à toute loi étatique » qui,*

en réalité, constitue un principe d'appréciation de l'existence et de la validité de la convention d'arbitrage en termes de règles matérielles : **see E. Loquin, note sous Cass. 1 reciv., 10 juill. 1990 ; J.D.I. 1992, 168).** *»*

At **Dalloz Encyclopédie Civile, Compromis, Clause Compromissoire, note 65**, one reads :

« La clause compromissoire permet la mise en oeuvre directe de l'arbitrage, sans transit par le compromis. Par ailleurs, il résulte du principe de l'autonomie de la clause compromissoire que son sort n'est pas liée à celui du contrat principal. Ce principe a été affirmé sans conteste en matière internationale depuis 1963 (Cass. 1re civ. 7 mai 1963, Gosset, D. 1963. 545, note J. Robert) *et reconnu également en matière interne* (Cass. 2e civ. 4 avr. 2002 et Cass. Com. 9 avr, 2002, D. 2003. 1117, note L. Degos, Rev. Arb. 2003. 103, note P. Didier)."

Respecting the reasons which have been advanced by the applicant in making this application, one may refer to **Procédure Civil, Dalloz, Arbitrage en Droit Interne, Bertrand Moreau, avril 2008**:

"La nullité ou la caducité du contrat principal dans lequel s'insère la convention d'arbitrage est parfois alléguée par la partie défenderesse pour échapper à l'arbitrage. L'article 1466 du code de procédure civile précise que ce sont les arbitres qui sont seuls habilités à trancher les contestations relatives à la validité ou aux limites de leur investiture.»

I accept the arguments advanced by learned counsel for the respondents. I need also to add that since the arbitration proceedings are already pending, the issue of jurisdiction and competence may well be taken before that forum: see **Brink's France Holdings SAS v. Societe des Oliviers and Marie Jacques Ribet [2008 SCJ 101]**, **Mauritius Estate Development Corporation Ltd. V. Systems Building Ltd [2008 SCJ 69]; Tamil Naidu Electricity Board v. ST-CMS Electric Co. Private Ltd [2007] 2 All ER 701.**

For the reasons given above, I decline to make the order prayed for. With costs. I certify as to counsel.

S. B. Domah
Judge

13 April 2008

For Applicant: Mr I. Collendavelloo, S.C, instructed by Mr Attorney T. Koenig

For Respondents: **Mr G. Glover, Counsel**
Mr S.Mardemootoo, Attorney
Mr R. D'Unienville, Q.C
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