IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
(COMMERCIAL COURT)
2009: 64

BETWEEN:

CAPE VENTURES SAC LIMITED
On Behalf of Cape Six Segregated Account

Plaintiff

-and-

C C PRIVATE EQUITY PARTNERS LTD

Defendant

RULING ON STAY APPLICATION

Date of Hearing: October 26, 2009
Date of Ruling: November 3, 2009

Mr. Craig Rothwell, Cox Hallett & Wilkinson, for the Applicant/Defendant
Mr. John Wasty, Appleby, for the Respondent/Plaintiff

Introductory

1. The Applicant applies by Summons dated May 13, 2009 to stay the action commenced by the Respondent by Writ dated March 17, 2009. The Summons seeks an Order that:

> "*1.The proceedings be stayed on the grounds that the Plaintiff and the Defendant have agreed that the Swiss courts have exclusive jurisdiction to rule on the claim made by the Plaintiff.*"

2. The relevant jurisdiction clause is contained in an agreement between the Applicant as buyer and the Respondent as seller dated February 9, 2009 ("the Agreement"). Under the Agreement, which is governed by Swiss law, the Applicant agreed to purchase from the Respondent shares in a Swiss company, HeiQ Materials ("HeiQ"). The parties have filed expert evidence as to Swiss law to assist the Court to decide whether the exclusive jurisdiction clause is valid. It was agreed prior to the hearing that the central question to be determined was whether or not the clause was valid under the Swiss Private International Law Act ("SPILA"). The clause was challenged on the grounds that it failed to specify which Swiss court the parties had chosen.

3. The Applicant's expert Dr. Lustenberger opined that although Swiss law required the parties to an exclusive jurisdiction agreement to specify a particular court, the court selected by the parties could be ascertained from sources extraneous to the clause itself. The Respondent's expert Professor Girsberger opined that unless the clause referred at least to a specific canton, a Swiss Court would hold that the selection of "the Swiss Courts" would be invalid and decline to exercise jurisdiction. Both parties are Bermuda exempted companies.

The Agreement

4. It is common ground that the Agreement, which is written in English and appears to have been drafted in what might be described in typical Anglo-American style, provides in material part as follows:

> "**10. GOVERNING LAW AND JURISDICTION**
>
> *10.1 This Agreement is governed by Swiss law.*
>
> *10.2 The Swiss courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement.*
>
> *10.3 The parties waive any objection to the Swiss courts on grounds that they are an inconvenient or inappropriate forum to settle any such dispute…*"

5. Clause 9 is a whole agreement clause. Recital (A) defines the "*HeiQ Shares*" and the "*Company*" "*with its office situated at Zurcherstrasser, 42, CH-5330 Bad Zurach, Switzerland.*" The subject-matter of the Agreement is shares in a Swiss company with an identified registered office in a particular part of Switzerland.

6. From a Bermudian law perspective, it would appear at first blush that the parties to an agreement for the sale and purchase of shares in a company have chosen the law which governs the shares to govern the sale and purchase agreement as well.

Swiss law expert opinions

7. Professor Girsberger is a professor of Swiss, private international, business, procedural and comparative law at the University of Lucerne. Private international law is one of his main areas of interest, in terms of both writing and the provision of expert opinions. He is also a partner in a law firm in Zurich.

8. He states in his May 23, 2009 Opinion that Article 5(1) of SPILA governs contractual jurisdiction clauses:

> "*For an existing or future dispute of financial interest arising from a specific legal relationship, the parties may agree on a place of jurisdiction…*"

9. The Professor concedes that the term "place of jurisdiction", unofficially translated into English, like the German and Italian phrases "Gerichtsstand" and "Foro", respectively, in two of the three official texts, "*leaves room for interpretation*". However, the French text clearly suggests that a specific court must be identified: "*les parties peuvent convenir du tribunal appelé a trancher un différend*".

10. He then opines that the two only published cases, including a Swiss Federal Court decision, and the majority of writers agree that a reference to the courts of Switzerland does not comply with Article 5(1)'s concept of "*place of jurisdiction*". The Professor concludes:

> "*Swiss courts would examine the question of jurisdiction in the light of Article 5(1) of SPILA. As the choice of jurisdiction does not relate to a specific place or district but to 'the Swiss courts' in general, Swiss courts would with a very high probability deny their jurisdiction on disputes arising out of the Agreement.*"

11. The cases cited by the Plaintiff's expert are not produced and he does not opine on whether or not a Swiss court would seek to ascertain which court the parties intended to select by looking beyond the narrow parameters of the jurisdiction clause itself. The Professor focuses on the approach a Swiss court would take to interpreting the Swiss statute, and does not address the principles according to which the court would approach interpreting the contractual jurisdiction clause.

12. Dr. Marcel Lustenberger has been qualified to practise in all courts in Switzerland since 1987 and is a partner in a Zurich law firm. His June 17, 2009 Opinion makes it clear that by way background he has considered both the Agreement and the Shareholders Agreement in relation to the HeiQ shares. Like the Plaintiff's expert, the Defendant's expert opines that under SPILA the "*Swiss courts will decline jurisdiction if they come to the conclusion that there is no valid choice of jurisdiction in favour of (any or a specific) Swiss court.*"

13. He then opines as follows:

> "*Under Swiss law, the interpretation of a choice of jurisdiction has to follow the rules for the general interpretation of private declarations of intention. The consideration of the real intent of the parties is decisive…the real intent is respected even though it is not or is not sufficiently clearly expressed in the wording.*"

14. He cites what appear to be a case for the first limb of the above-quoted extracts from his Opinion and a textbook for the second limb. The Defendant's expert then refers to the HeiQ Shareholders Agreement (a German language document which is attached to his Opinion, and points out that this document contains an exclusive jurisdiction clause selecting the Commercial Court of the Canton of Aargau, the same canton where HeiQ's registered office in Bad Zurzach is located. These factors provide "*strong indications that a Swiss court would construe clause 10.2 to mean that any dispute under and in connection with the Agreement (involving the transfer of shares of HeiQ) should be brought to the commercial court of the canton of Aargau in Switzerland.*"

Factual and Legal Findings

15. The present application turns on considerations of expert evidence as to Swiss law which must be assessed as questions of fact for the purposes of Bermuda law. However, the local legal policy backdrop against which this factual analysis takes place is one which strongly favours holding parties to their contractual dispute resolution bargain.

16. Lord Bingham, delivering the leading speech in the House of Lords in *Donoghue –v- Armco* [2002] 1 Lloyds Law Rep 425 at 433 described the net effect of various cases as follows:

> "*Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause.*"

17. All other things being equal, it seems to me that this Court, when faced with a challenge to the validity of an exclusive jurisdiction clause, should err on the side of supporting its efficacy. In the present case, however, the conclusions reached by Dr. Lustenberger are quite clearly to be preferred to those of Professor Girsberger. This is because the Professor has studiously avoided opining on the crucial issue of how a Swiss court would in practical terms approach the task of construing Article 10.2, limiting his opinion to the sole abstract point which fairly assists the Plaintiff. His general analysis is sound, both on its own merits and

because it is common ground that the wording of Article 10.2 is defective in not specifying a particular court. But the conclusion that a Swiss court would decline jurisdiction is simply neither supported by any explicit assertion that such court would not make any attempts to ascertain the true intention of the parties, nor is it supported by an explanation as to why a highly rigid interpretative approach would applied by a Swiss court to the construction of a contractual exclusive jurisdiction clause.

18. I find the proposition that where an exclusive jurisdiction clause is unclear a Swiss court would seek to ascertain the true intentions of the parties to be inherently credible. The contrary view would suggest that Swiss law is, in the realm of commercial contractual interpretation, highly technical and rigid, a proposition which is completely at odds with the notorious fact that Switzerland is one of the world's leading commercial nations. Moreover, the final sentence of Article 5.1 of SPILA suggests a strong Swiss legal policy in favour of giving effect to contractual jurisdiction clauses, providing (as quoted in English by Professor Girsberger in paragraph 4 of his Opinion): "*Unless otherwise provided by the agreement, the choice of jurisdiction is exclusive.*"

19. It would be curious if the Swiss courts, seeking to construe Article 10.2 of the Agreement, would allow an explicitly exclusive jurisdiction clause to fail in circumstances where it could, in common law parlance, give business efficacy to the agreement by inferring the particular court the parties must have intended to select. The Agreement is a commercial contract relating to shares (a) in a company domiciled in Aargau canton, and (b) held pursuant to a shareholders agreement (to which the parties to the Agreement are also parties) which provides for shareholder disputes to be determined by the Commercial Court in the Canton of Aargau. It is not suggested that the Agreement is more plausibly connected with any other canton in Switzerland or that the parties in fact never reached a meeting of minds on the specific court issue.

20. Mr. Rothwell submitted that even if this Court was in doubt about the issue, the stay could be granted on terms that if the Swiss court declined jurisdiction, the stay could be lifted so that the Plaintiff could continue the action before this Court.

21. To the extent that it is technically objectionable for the Defendant's expert-rather than some other witness- to have addressed the essentially factual (in a non-foreign law sense) matters relating to the HeiQ shareholders agreement, I would have accepted his conclusions in any event based on the implicit linkage which appears on the face of the Agreement itself between the registered office of HeiQ and the Canton of Aargau. I reject the submission that provisions found in the Agreement outside of the exclusive jurisdiction clause itself which are capable of assisting a local or foreign court in giving effect to an exclusive jurisdiction clause fall outside of the proper purview of the role of an expert.

22. At the directions hearing, I expressed the provisional view that it was objectionable for the Defendant's expert to deal with matters of fact, but this view was based on an assumption that the relevant facts were either controversial (which it appears they are not) and not intimately connected with the factual matrix within which the exclusive jurisdiction clause is embedded. It seems obvious that the parties had the courts of Aargau Canton in mind when they entered into the Agreement, because the subject-matter thereof is shares of a company with a registered office in that canton.

Summary

23. It appears that while Switzerland has a federal court structure, like Canada and the USA, it does not have (in the commercial realm at least) a rigid distinction between federal and provincial or state law. In relation to Canada and the US, for instance, a share sale and purchase agreement in relation to shares in a Canadian or US company would have neither a "Canadian law" or "US law" governing law clause nor a "Canadian courts" or "US courts" jurisdiction clause. The references would be to Ontario law and Ontario courts and Delaware law and Delaware courts, respectively. This position appears to be by way of contrast to the Swiss position where it is possible to validly choose "Swiss law" to govern a contract yet impossible to validly refer disputes to the "Swiss courts" without reference to the courts of a specific canton.

24. The defect with Article 10.2 in the present case seems to flow from a simple drafting error on the part of non-Swiss lawyers rather than a substantive failure on the part of the parties themselves (i.e. their Swiss guiding minds) to select the courts of the specific canton which is most obviously jurisdictionally linked to the share sale and purchase Agreement. I accept the evidence of Dr. Lustenberger, the Defendant's expert, to the effect that the relevant Swiss court would seek to give effect to the parties' true intention rather than defeating it by a rigid and literal construction of the incomplete express terms of the exclusive jurisdiction clause. Such an approach would be consistent with the strong legal policy under Bermuda law in favour of enforcing exclusive jurisdiction clauses wherever it is reasonably possible to do so.

25. For these reasons, the Applicant's application for a stay is granted, with liberty to the Respondent to apply to lift the stay in the unlikely event that the Commercial Court in Aargau declines jurisdiction. Unless either party applies within 14 days to be heard as to costs, I would award the costs of the present application to the Applicant/Defendant in any event, to be taxed if not agreed on the standard basis.

Dated this 3rd day of November, 2009

KAWALEY J