IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 26

Originating Claim No 135 of 2022
(Registrar's Appeal No 340 of 2022)

Between

Tsudakoma Corp

… *Claimant*

And

Global Trade Well Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure — Stay of proceedings]
[Conflict Of Laws — Choice of jurisdiction — Exclusive]

Tsudakoma Corp
v
Global Trade Well Pte Ltd

[2023] SGHC 26

General Division of the High Court — Originating Claim No 135 of 2022
(Registrar's Appeal No 340 of 2022)
Choo Han Teck J
27 January 2023

3 February 2023 Judgment reserved.

Choo Han Teck J:

1 This is an appeal against an order dismissing the application in HC/SUM 3436/2022 for a stay of proceedings in Singapore. The appellant, Global Trade Well Pte Ltd ("GTW"), is the defendant in this action. It is a company incorporated in Singapore and carries on the business of international commodity trading. Tsudakoma Corp ("Tsudakoma") is the respondent (claimant). It is a company incorporated in Japan, engaged in the business of manufacturing textile machines and related parts.

2 In 2017, Parties entered into a Memorandum of Understanding (the "2017 MOU") where it was agreed that GTW would be appointed as a Dealer for certain products manufactured by Tsudakoma. When the 2017 MOU expired in 2018, they signed another Memorandum of Understanding (the "2018 MOU"). The 2018 MOU in effect extended the 2017 MOU and GTW's

appointment as Tsudakoma's dealer for certain specified products. The relevant term in the 2018 MOU reads as follows:

> "It is agreed between the parties that the company shall appoint Global Trade Well Pte Ltd as one of the Dealer for the products manufactured by the company I e Air jet looms and Preparatory m /cs for specialised applications to weave very heavy fabrics including industrial fabrics and the said Global Trade Well Pte Ltd have agreed to act as the Dealer for the company up to March 31st 2022, keeping all the terms and conditions of agreement as same as previous MOU."

3 Essentially, the terms of the 2017 MOU were incorporated by reference into the 2018 MOU. The relevant clause in this appeal is Clause (v) of the 2017 MOU under the section with the heading "The parties hereto hereby agree as under…", which GTW says is an exclusive jurisdiction clause (the "Alleged EJC"). Clause (v) reads:

> "That the sole and exclusive jurisdiction to decide the issues in dispute between the parties the parties hereto will be Japan."

4 Subsequently, sales of the relevant products were made by Tsudakoma to GTW on three separate occasions as envisioned by the 2018 MOU. For each of these three sales, Tsudakoma would issue a Proforma Invoice to GTW and GTW would then cause a corresponding Letter of Credit ("LC") to be issued in accordance with the Proforma Invoice. The Proforma Invoice contained terms relating to, *inter alia*, the mode of payment, conditions to be included in the LC, and an itemised inventory of products sold. The Proforma Invoice also contained an appendix with terms pertaining to product warranty, provision of technical service, safety instructions and certain cautions when operating the sold products.

5 All three of the LCs issued by GTW to Tsudakoma as payment for the sales were void. Consequently, GTW sent a letter to Tsudakoma dated

29 September 2021 (the "29 September Letter"). The letter contained six key sections – the total pending payment, payment terms, payment amount and due date, Tsudakoma's bank details, GTW's bank details and other conditions. The introduction of the 29 September Letter reads:

> GLOBAL TRADE WELL PTE LTD hereby confirm and settle for the pending payment with interest on the terms and conditions hereinafter set forth:

6 As GTW still did not pay, Tsudakoma commenced HC/OC 135/2022 to recover the unpaid amount. Tsudakoma's case in its statement of claim was that the 29 September Letter constituted a settlement agreement which GTW had breached, thereby entitling Tsudakoma to damages arising from breach of contract. GTW pleaded the Alleged EJC in its defence, taking the position that the High Court did not have jurisdiction. GTW did not file a defence on the merits to avoid being taken to have submitted to jurisdiction. GTW then commenced HC/SUM 3436/2022, for a stay of proceedings on the basis of the Alleged EJC, and *forum non conveniens*. GTW's application was dismissed. GTW appeals only on the Alleged EJC and has abandoned its *forum non conveniens* argument.

7 Both parties referred me to *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*") which concerned a stay application based on an exclusive jurisdiction clause. Parties accepted that GTW bears the burden of showing a good arguable case that the Alleged EJC governs the dispute. If GTW succeeds, the burden shifts to Tsudakoma to show strong cause to refuse a stay.

8 Preliminarily, Tsudakoma argues that there cannot be a good arguable case because the Alleged EJC itself is not applicable. Counsel for Tsudakoma made three submissions. First, the Alleged EJC is of no legal effect because the

2018 MOU was not a legally binding contract. Second, the Alleged EJC is too vague to be of any effect. Lastly, the 29 September Letter constituted a settlement agreement which did not incorporate the Alleged EJC. I do not agree with counsel for Tsudakoma.

9 First, I am of the view that the 2018 MOU applies. Tsudakoma's counsel referred me to numerous authorities where the memoranda of understanding were found to be of no legal effect and invited me to conclude the same about the 2018 MOU. He submitted that the parties never intended to create legal relations and that the 2018 MOU was entered into subject to contract — that final contract being the Proforma Invoices which counsel says is sufficient to constitute a contract.

10 I do not think that those authorities assist counsel. Of all the documents in the parties' affidavits, the 2018 MOU was the only document with both parties' signatures — it was the most formal of any agreement between parties. Formalities aside, one must ask what in substance the 2018 MOU was for — and one need only look to the first term after the recitals for the answer. The 2018 MOU appointed GTW as a dealer of Tsudakoma. I do not quite see how a clear intention to appoint GTW as a dealer of Tsudakoma can be said to be devoid of any intention to create legal relations. Furthermore, if the 2018 MOU was truly subject to contract, being the forerunner of a dealership agreement to come, where is that subsequent formal dealership agreement? Tsudakoma produced no such agreement. Instead, it points to the Proforma Invoices, which I accept are evidence of contracts for the sale of certain products. But they are not the dealership agreement. Rather, the fact that Tsudakoma issued those Proforma Invoices is evidence that they recognise GTW as an appointed dealer — which can only mean that the 2018 MOU was the dealership agreement under which these sales were made. Clause (v) of the 2017 MOU, under the section

"The Dealer hereby covenant", provides precisely that "[Tsudakoma] will be entitled to issue reasonable directions and instructions to [GTW] relating to the sale of [Tsudakoma's] product …". In my view, not only did the 2018 MOU constitute a binding contract, it was the document that formed the basis of the entire business relationship between GTW and Tsudakoma.

11 I also do not accept the argument that the Alleged EJC was too vague to be given effect to. Counsel for Tsudakoma says that the lack of a stipulated forum is fatal to the validity of the Alleged EJC because it is "far too ambiguous" and thereby inoperable. I disagree. The Alleged EJC is clear: whether parties eventually go to arbitration or court, or whether they choose to litigate in Tokyo or Osaka is immaterial. The Alleged EJC operates to ensure parties resolve any dispute arising in relation to this dealership agreement in Japan, and nowhere else. This is relevant because a stay application is concerned with the question of whether the Singapore proceedings should proceed, and not just which forum parties should resolve their dispute. Notably, the MOU bears the letterhead of Tsudakoma. It was argued by GTW, and not rebutted, that Tsudakoma drafted the MOU. It should not lie now in the mouth of Tsudakoma to assert that the term should not be enforced.

12 Finally, Tsudakoma argues that the 29 September Letter constitutes a settlement agreement which it now sues under. Counsel for Tsudakoma says that the Alleged EJC, even if in existence, was not incorporated into the aforesaid settlement agreement which Tsudakoma now sues under. I do not see how the 29 September Letter constitutes a settlement agreement. The mere fact that the word "settle" appears in the letter does not make a document a settlement agreement. At the hearing, I asked counsel for Tsudakoma whether the 29 September letter was evidence of a settlement (which perhaps was entered into orally) and subsequently confirmed in writing instead of being the

actual settlement agreement itself. Counsel emphatically pointed to the 29 September Letter and said that "this was it" (referring to the 29 September Letter as the settlement agreement). The 29 September Letter at best constitutes an acknowledgment of debt owed by GTW, and a variation to the terms of payment contained within the Proforma Invoices. Insofar as it was a recurring theme in submissions that clauses and documents did not look as they should, it is ironic that counsel for Tsudakoma previously argued that the Alleged EJC looks nothing like a boilerplate EJC (see above at [11]), but now invites me to hold that a mere letter varying the terms of payment constitutes a full-fledged settlement agreement which extinguishes all other claims accruing before it.

13 The question remains whether there is a good arguable case that it would apply to the dispute in question. As the 29 September Letter, in my view, is not a settlement agreement but a variation to the Proforma Invoices, it means that the question is whether the Alleged EJC applies to the disputes arising out of the Proforma Invoices in question.

14 Although the Proforma Invoices do not include an express term concerning the Alleged EJC, I accept that it has been incorporated by course of dealing (see *Vinmar* at [53]-[58]). Flowing from my finding above that the 2018 MOU governs the business relationship between the parties in relation to the sale of the stipulated products, the higher threshold for the incorporation by course of dealing of the Alleged EJC as part of the Proforma Invoice is met. All three sales of Tsudakoma's products took place within the validity period of the 2018 MOU, and these products were the products envisioned in the 2018 MOU. A reasonable man looking at the 2018 MOU as a dealership agreement, and the Proforma Invoices as the sales contract pursuant to that dealership agreement would accept that the Alleged EJC should apply to any dispute arising out of the Proforma Invoices.

15 I thus find that a good arguable case exists that the Alleged EJC applies to the Proforma Invoices and now consider if there is strong cause to refuse a stay. Of the relevant factors (*Vinmar* at [112]), Tsudakoma singles out abuse of process and says that GTW is acting abusively in applying for a stay because GTW's affidavit dated 15 September 2022 admits every material allegation in Tsudakoma's statement of claim. Tsudakoma therefore says that there is no dispute in this case, and that this case is identical to the hypothetical example of abuse of process given by the Court of Appeal in *Vinmar* (at [131]):

> "One example that we raised during the hearing was that of an applicant who has clearly admitted to the claim as regards *both* liability and quantum, but seeks a stay for no reason other than its alleged inability to pay"
>
> [emphasis in original]

16 Even if I were to accept that GTW's affidavit admits to every material particular in its statement of claim, GTW would have at best only admitted to non-payment and a prima facie breach of contract. It cannot be taken to have admitted on final liability, simply because it has not even filed a defence on the merits. Thus, I am not satisfied that GTW's conduct meets the threshold required for abusive conduct (*Vinmar* at [131]).

17 Furthermore, the merits of the defence is no longer a relevant factor when showing strong cause to refuse a stay application (*Vinmar* at [113(a)]). This is because an exclusive jurisdiction clause such as the Alleged EJC "express[es], at the time of contracting, a desire for trial in the agreed forum, regardless of the merits of the disputes that may arise" (*Vinmar* at [121]). Thus, the appropriate court is the one in Japan.

18 Since I reject Tsudakoma's only argued ground of abusive conduct, Tsudakoma has accordingly not discharged its burden to show strong cause for

refusing the stay. Accordingly, I allow the appeal and grant a stay of the Singapore proceedings.

19 I will hear parties on costs at a later date.

- Sgd -
Choo Han Teck
Judge of the High Court

Lim Ying Sin Daniel (Joyce A. Tan & Partners LLC) for the claimant;
Prakaash s/o Paniar Silvam, Levin Lin Lok Yan and Esther Yong (Oon & Bazul LLP) for the defendant.