Gaetan Inc v Geneva Investment Group LLC [2015] ARB 010

Claim No: ARB 010/2015

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BEFORE DEPUTY CHIEF JUSTICE SIR DAVID STEEL

BETWEEN

GAETAN INC

Claimant

And

GENEVA INVESTMENT GROUP LLC

Defendant

Hearing: **14 April 2016**

Counsel: Adrian Chadwick and Zarghona Fazal (Hadef & Partners) for the Claimant

Jonathan Taunton and Thomas Wilson (Squire Patton Boggs) for the Defendant

Judgment: **16 May 2016**

JUDGMENT OF DEPUTY CHIEF JUSTICE SIR DAVID STEEL

Summary of Judgment

The Claimants applied to this Court under Article 17 of the Arbitration Law (DIFC Law No. 1 of 2008) for the appointment of an arbitrator. The Defendant contended that the Court had no jurisdiction to make any such order in that no valid arbitration agreement was in existence between the parties. The issue was whether there was any enforceable arbitration agreement under which to make the appointment and it was decided that the Defendant was correct in contending that there was none.
Clause 19 of the agreement entered into by the parties stated that:
"The venue for all dispute resolution activities shall be in Dubai. The rules and procedures of DIFC (the "**Arbitration Centre**") shall apply to all arbitration. The arbitrators shall be appointed DIFC Rules."
The DCJ accepted the Defendant's case that by virtue of Article 6 of Federal law No 18 of 1981 the arbitration clause was invalid. The dispute had properly been referred to the Committee of Commercial Agencies pursuant to Article 28 and was subject to an appeal to the courts of Abu Dhabi.
Even on the assumption that the arbitration clause was valid, DCJ Sir David Steel confirmed the approach taken by CJ Hwang in the case of *Amarjeet Singh Dhir v. Waterfront Property Investment Ltd. CFI-011-2009*, which made clear that a choice of DIFC-LCIA rules does not constitute selection of the relevant procedural law. The relevant law is that of the seat which on any view of the parties intentions was the Emirate of Dubai. The parties had no connection with the DIFC, the contract was not made in the DIFC and the subject matter of the contract was outside of the DIFC. As was stated in *Dhir*; "if the parties want DIFC Arbitration Law to apply and the DIFC Courts to have jurisdiction over an arbitration, they should expressly select the DIFC as the seat in their arbitration agreement", per CJ Hwang at para. 92. It followed that even if there had been a valid and enforceable arbitration clause, this Court would not be the Court of the seat and would have no jurisdiction to appoint an arbitrator. Accordingly, the application for the appointment of an arbitrator was dismissed with costs.

This summary is not part of the Judgment and should not be cited as such

ORDER

UPON reviewing the Claimant's Claim Form and supporting documents dated 24 November 2015 seeking an order appointing an arbitrator

AND UPON reviewing the Defendant's Application Notice ARB-010-2015/1 dated 11 January 2016 contesting the Court's jurisdiction

AND UPON reviewing the Claimant's evidence in answer dated 11 February 2016 and the Defendant's response dated 23 February 2016

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant on 14 April 2016

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1. The Defendant's application contesting the Court's jurisdiction be granted.
2. The Claimant's claim for the appointment of an arbitrator be dismissed.
3.The Claimant shall pay the Defendant its costs of the claim and the application, to be assessed by the Registrar if not agreed.

Issued by:
Mark Beer
Registrar
Date of Issue: 16 May 2016
At: 9am

JUDGMENT

1.The Claimants have made an application under Article 17 of the Arbitration Law (DIFC Law No. 1 of 2008) for the appointment of an arbitrator. The Defendant contends that the Court has no jurisdiction to make any such order in that no valid arbitration agreement is in existence between the parties.

2. The issue arises under a Franchise Agreement dated 2 January 2014. The franchise related to the operation of outlets for the preparation and sale of chocolate under the "Gaetan" brand. The terms of the agreement granted the Defendant as franchisee the exclusive right (except for two specific locations) to use the Claimant's system in no fewer than four locations in the Emirate of Dubai.

3. There was a law and forum clause in the agreement which read as follows:

> **19. APPLICABLE LAW AND FORUM**
>
> The validity and effect of this Agreement, and all matters relating to the relationship between the parties hereto, shall be governed by and construed and enforced in accordance with the laws of Ontario and Canada.
>
> The Parties agree that any action brought by either party against the other party in connection with any rights or obligations arising out of this Agreement, or relating in any way to the relationship of the parties hereto, shall be resolved through arbitration, not mediation or reconciliation, by three arbitrators in the English language. The venue for all dispute resolution activities shall be in Dubai. The rules and procedures of DIFC (the "**Arbitration Centre**") shall apply to all arbitration. The arbitrators shall be appointed DIFC Rules. Decisions of the arbitrators shall be final, binding, and conclusive for both parties. The costs of the arbitration shall be borne by the non-prevailing party. This provision shall not prevent or prohibit Franchisor and Franchisee from seeking and obtaining injunctive or any other relief in any court of competent jurisdiction.

4. On 4 May 2015, the Defendant registered the agreement with the Commercial Agency Department of the Ministry of Economy. Thereafter a dispute arose between the parties when the Claimants sought to terminate the agreement on the grounds of dilatory performance on the part of the Defendant.

5. On 22 September 2015, the Claimant gave notice of their appointment of Mr E as their arbitrator pursuant to Clause 19 of the agreement. The response was to the effect that the Defendant was not bound by the clause. For this purpose the Defendant relied upon Federal Law No. 18 of 1981 Concerning Organising Trade Agencies. The relevant articles are as follows:

"**Article (3)**

Trade agency activities are not permitted to be practiced inside the state except by such commercial agents registered in the Specified register maintained for this purpose by the ministry. Any trade agency not registered in the above register shall not be considered, nor legal cases there for shall be heard.

Article (4)

For valid agency at the time of registration, the agent shall be directly bound with the principal by a written and notarized contract.

…

Article (6)

The Trade Agency Agreement shall be deemed to be for the joint interest of the Contracting Parties and the State's Courts shall rule in any disputes that may arise between the Principal and the Agent due to its implementation. Other agreements contrary to this shall not be acknowledged.

…

Article (10)

Applications for registration in the Register of Trade Agencies must be submitted to the Ministry on the prescribed forms. Such applications must include names, nationalities and addresses of both Principal and Agent, commodities and services subject of the Trade agency, territory of agent's activities and commencement and expire dates of the agency agreement.

Should the Trade Agent be a Trading company, application for registration shall include details provided for in the above proceeding paragraph of article hereof in addition to Company's name, kind capital and addresses of main offices and branches thereof in the States. Application for registration must be accompanies by supporting documents, especially the following:

1) The Trade License of the Agent and a certificate of registration in the Trade Register issued by the Pertinent Local Authorities in the Emirate concerned and copies thereof.

2) A Trade Agency Agreement attested and approved officially along with a copy thereof. Original documents shall be returned to applicant concerned after having been examined and original documents and copies thereof have been compared.

…

Article (28)

The Committee shall be competent to hear any dispute arising from the commercial agency registered with the Ministry. Parties may not bring the claim before the court until after the issue is referred to the Committee of Commercial Agencies. The Committee shall hear the dispute within sixty (60) days from the date of the request for hearing the dispute (in the event that the request meets required formalities) or from the date on which the required documents are duly completed. The Committee may seek the help of any person it deems fit in order to fulfil the duties assigned thereto.

The Committee's decision may be challenged before the competent court within thirty (30) days from the date on which the Committee's decision is notified; otherwise the Committee's decision shall be final and not subject to further challenge."

6. On 24 November 2015 the Claimant issued its application to this Court for the appointment of an arbitrator. The following day, a complaint was filed by the Defendant with the Committee of Commercial Agencies pursuant to Article 28. The Ministry confirmed registration of the agreement on 15 December 2016.

7. On 11 January 2016, the Defendant issued its application challenging this Court's jurisdiction to appoint an arbitrator under the agreement. On 7 February 2016, the Claimant filed an application before the Committee seeking deregistration on two grounds: first that the agreement was not an agency agreement within the scope of Federal Law 18 and second that the agreement was not properly notarised.

18. In a decision dated 16 March 2016, the Committee found in favour of the Defendant. In particular the Committee concluded:

(a) That the agreement was an agency contract

(b) That it had been properly registered with the Ministry

(c) That the Defendant had fully performed its obligations

(d) That the application for termination of the agreement by the Claimant was to be dismissed.

19. The Claimant thereafter issued an appeal against the decision of the Committee before the Court of First Instance in Abu Dhabi on 10 April 2016. The terms of the notice of appeal focus on an allegation that the Defendant had fraudulently obtained notarization of the agreement. This contention is probably behind the application to call oral evidence at this hearing which I refused.

20. The threshold question here is whether (on the assumption that Clause 19 of the agreement is a DIFC arbitration clause as contended by the Claimant) that arbitration clause can remain valid in the face of Article 6 of Law 18. I am not sure that I understood what position the Claimant took on this. Of course, it may be (but I doubt it) that the Abu Dhabi Court will reverse the decision of the Committee. But the present position is that there is a validly registered agreement in respect of which an arbitration clause "shall not be acknowledged". Furthermore, the Claimant in accordance with Article 28 seeks to challenge the decision of the Committee before a competent court, namely the state court of Abu Dhabi. Perhaps the state court of Dubai would have been equally appropriate but not arbitration.

21. It was faintly suggested that this Court could in some way disregard Law 18 since it was not a DIFC law. I do not follow that. The governing law of the contract was that of Ontario and Canada. It cannot be said that the parties were thereby exempted from compliance with local trading restrictions and registration requirements of the UAE and the Emirate of Dubai. Indeed Article 3 of Law 14 can be viewed as a matter of public order. It is not a matter of jurisdiction. The Court clearly had jurisdiction to appoint an arbitrator under the DIFC Arbitration Law (if applicable). The issue is whether there is any enforceable arbitration agreement under which to make the appointment. The Defendant is correct in contending that there was none.

22. That is really the end of the matter. In their letter dated 7 April 2016 Messrs Squire Patton Boggs (MEA) LLP, counsel for the Defendant, informed the Claimant of the decision of the Committee. The Claimant was invited to withdraw its application for the appointment of an arbitrator. In their response Messrs Hadef & Partners, counsel for the Claimant said this:

> "We refer to the Defendant's letter of 7 April 2016. Our client is still considering the Defendant's invitation to withdraw the case and would like to clarify the Defendant's position in relation to the arbitration clause in the Franchise Agreement before it makes a final decision.
>
> At paragraph 5 of its Memorandum in Support of Defendant's Application for Extension of Time the Defendant states that the "Defendant concedes that the parties' contract includes an arbitration clause specifying arbitration under DIFC procedures, but that clause was invalidated upon registration of the contract with the Commercial Agency Department of the Ministry of Economy."
>
> The Claimant therefore invites the Defendant to confirm by return whether it accepts that the parties intended the reference to DIFC procedures to be a reference to the DIFC as the seat of the arbitration if the Franchise Agreement had not been registered with the Commercial Agencies Department."

23. In their reply counsel for the Defendant maintained that on a true construction of Clause 19 it was not the intention of the parties to name the DIFC as the seat of the arbitration. It was contended that the reference in the agreement to the rules and procedures of DIFC ("Arbitration Centre") is not a reference to the procedural law of the DIFC but probably to the rules and procedures of the DIFC – LCIA Arbitration Courts.

24. I agree with the Defendant. The matter in my judgment is moot but if the arbitration agreement in Clause 19 had been valid the seat would have been Dubai under the supervision of the Dubai Courts and not the

courts of the DIFC. In my judgment the relevant clause is indistinguishable from that considered in ***Amarjeet Singh Dhir v. Waterfront Property Investment Ltd.*** CFI-011-2009 where disputes were to be resolved by the appointment of an arbitrator "conducted in accordance with the DIFC-LCIA rules of arbitration" with the arbitration taking place in the Emirate of Dubai.

25. The first point to make is that the DIFC-LCIA arbitration Centre is the only arbitration centre in the DIFC. The capitalised reference to "Arbitration Centre" is clearly inconsistent with reference to the rules and procedures of the DIFC Courts. Second, it was made clear in ***Dhir*** that a choice of DIFC-LCIA rules does not constitute selection of the relevant procedural law. The relevant law is that of the seat which on any view of the parties intentions was the Emirate of Dubai. The parties have no connection with the DIFC, the contract was not made in the DIFC and the subject matter of the contract is outside the DIFC. As was stated in ***Dhir***; "*if the parties want DIFC Arbitration Law to apply and the DIFC Courts to have jurisdiction over an arbitration, they should expressly select the DIFC as the seat in their arbitration agreement*": per CJ Hwang at para. 92.

26. It follows that even if there had been a valid and enforceable arbitration clause, this Court would not be the Court of the seat and would have no jurisdiction to appoint an arbitrator.

27. The last point raised by the Claimant was a tentative application for a stay pending the outcome of the proceedings in Abu Dhabi. But even if successful (which as I say is very doubtful) it would be of no avail as regards the invocation of this Court's jurisdiction for the reasons set out above.

28. The application for the appointment of an arbitrator is accordingly dismissed with costs.

Issued by:

Mark Beer

Registrar

Date of Issue: 16 May 2016

At: 9am