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Singapore Court Upholds Validity and Enforceability of Sanctions Clause in a Test Case

Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA
[2022] SGHC 213

3 November 2022

LEGAL UPDATE

In this Update

The recent decision of *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 represents the first time a Singapore Court was asked to consider the issue of validity and enforceability of a sanctions clause.

Director Chia Voon Jiet, Associate Director Charlene Wong and Senior Associate Grace Lim successfully acted for JP Morgan in this matter.

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INTRODUCTION

The recent decision of *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 represents the first time a Singapore Court was asked to consider the issue of validity and enforceability of a sanctions clause. In its decision, the General Division of the High Court (“**Court**”) dismissed the action commenced by Kuvera Resources Pte Ltd (“**Kuvera**”) and held that JPMorgan Chase Bank, NA (“**JP Morgan**”) was not in breach of contract and was therefore entitled to refuse to pay Kuvera.

Director Chia Voon Jiet, Associate Director Charlene Wong and Senior Associate Grace Lim successfully acted for JP Morgan in this matter.

BACKGROUND

In 2019, Kuvera entered into a tripartite contract with a seller and buyer of 35,000 metric tons of coal, whereby Kuvera would advance funds to the seller to enable it to purchase the coal which it was on-selling to the buyer. This contract imposed an obligation on the buyer to: (a) pay for the coal by two letters of credit; (b) name Kuvera (rather than the seller) as the beneficiary in both letters of credit; and (c) procure that a major/international bank in Singapore confirm both letters of credit.

The buyer procured a bank in Dubai (“**Issuing Bank**”) to issue the letters of credit in favour of Kuvera. The Issuing Bank asked JP Morgan to act as the advising bank and also allowed JP Morgan to act as the nominated bank for both letters of credit. JP Morgan duly advised both letters of credit to Kuvera. JP Morgan subsequently added its confirmation to both letters of credit. All of JP Morgan’s advices and confirmations contained a clause which, in summary, provides that JP Morgan is not liable for any failure to pay against a complying presentation of documents if the documents involve a vessel subject to the sanctions laws and regulations of the USA (“**Sanctions Clause**”).

In November 2019, Kuvera made a complying presentation of documents to JP Morgan under the letters of credit. The face value of the drafts was USD2.42m. JP Morgan’s standard post-presentation sanctions screening revealed that the coal in the sale contract was shipped on a vessel which was likely to be beneficially owned by a Syrian entity and therefore fell within the scope of US sanctions on Syria. JP Morgan informed Kuvera that it was unable to accommodate the presentation of documents because the transaction did not comply with applicable US sanctions laws or with policies designed to promote compliance with those laws.

Kuvera commenced proceedings for breach of contract to recover the sum of USD2.42m from JP Morgan.

THE HIGH COURT'S DECISION

The Court dismissed Kuvera's action. The Court held that the Sanctions Clause was duly incorporated as a contractual term of JP Morgan's confirmations even though the clause did not appear in the letters of credit issued by the Issuing Bank. The Court also held that the Sanctions Clause, which was valid and enforceable, entitled JP Morgan to refuse to pay Kuvera against a complying presentation because JP Morgan is not a legal entity distinct from its US branches and is subject to US sanctions laws and regulations. Paying Kuvera would have exposed JP Morgan to a penalty for breaching US sanctions laws and regulations.

KEYPOINT

The Sanctions Clause was valid and enforceable, and entitled the bank to refuse to pay the beneficiary notwithstanding a complying presentation under a letter of credit.

First, the Court held that the Sanctions Clause did not contradict the fundamental commercial purpose of a confirmation as JP Morgan remained in substance as alternate paymaster to the Issuing Bank. Even with the Sanctions Clause incorporated as a term of JP Morgan's confirmations, the confirmations continued to give Kuvera rights against JP Morgan which were in substance additional to Kuvera's rights against the Issuing Bank.

Second, the Court held that the Sanctions Clause is not invalid or unenforceable on the ground that it confers on JP Morgan a high level of discretion in deciding whether to pay against a complying presentation based on its internal sanctions policy. In the Court's view, the Sanctions Clause is a narrow sanctions clause which does not go beyond the statutory or regulatory obligations imposed on JP Morgan by US sanctions laws and regulations.

Third, the Court disagreed with Kuvera's submission that the Sanctions Clause is a "non-documentary condition" and is therefore invalid or unenforceable as being inconsistent with the documentary nature of a letter of credit transaction. The Court held that the Sanctions Clause operates post-presentation to permit JP Morgan not to pay Kuvera if the documents involve a vessel subject to US sanctions laws and regulations. While that is a condition of payment, that is not a non-documentary condition of payment. The Sanctions Clause therefore did not come within the scope of the rule prohibiting non-documentary conditions and did not engage the purpose of that rule.

Finally, the Court rejected Kuvera's argument that the Sanctions Clause is worded so broadly as to be unworkable because of the phrase "...all sanctions... laws and regulations of the U.S and of other applicable

jurisdictions to the extent they do not conflict with such U.S laws and regulations”. The Court interpreted the Sanctions Clause with its commercial purpose in mind and held that there are only two applicable sanctions laws, namely, the US sanctions laws and regulations because JP Morgan is a bank incorporated and regulated in the US, and Singapore sanctions laws and regulations because it is JP Morgan’s Singapore branch which confirmed the letters of credit.

Kuvera has appealed against this decision, and the appeal is pending.

COMMENTARY

The case is significant because it marks the first time a Singapore court considered the validity and enforceability of a sanctions clause, and provides important and timely guidance on the use and drafting of such clauses.

It recognises that a bank operating in multiple jurisdictions may be subject to a variety of sanctions laws and regulations which could affect its ability to perform its contractual obligations. In order to avoid breaching such laws, a bank is entitled to incorporate a sanctions clause in its advice and confirmation of a letter of credit.

That said, care should be exercised in the drafting of such clauses, and legal advice should be sought where appropriate.

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