Intour S.R.L. v Emerald Cove
(2000) SLR 21

Pesi Pardiwalla for the applicant
Nichol Tirant for the respondent

Ruling delivered on 10 February 2000 by:

JUDDOO J: The applicant, Intour S.R.L has moved this court for the issue of a writ habere facias possessionem against the respondent to leave and vacate the premises of Emerald Cove Hotel at Anse La Farine, Praslin.

The respondent has raised a plea in limine litis as follows:

1. The Supreme Court of Seychelles does not have jurisdiction to hear this application on the grounds that such jurisdiction of the court is deliberately ousted by a bilateral agreement between the parties contained in clause 5 of the agreement entitled "ARBITRATION", which clause specifically states that "all disputes or differences whatsoever ... shall be referred to an arbitral tribunal" to be held in BERGAMO, ITALY and that the agreement shall be governed by Italian Civil Law.

2. The Supreme Court has no jurisdiction to evict the respondent who is legally in occupation of the premises and is considered as a tenant under the Control of Rent and Tenancy Agreements Act and eviction can only be ordered by the Rent Board.

In a prior ruling, delivered on 14 October 1999 it was held that the second ground of objection would have to be determined at the merits stage of the instant application. I shall therefore determine the remaining first ground of objection which relates to the arbitration clause. The arbitration clause in the agreement reads as follows:

> 5. ARBITRATION
> (i) All disputes or differences whatsoever which shall at any time hereafter whether during the continuance in effect of this Agreement or upon or after its discharge or determination arise between the parties hereto touching or concerning this Agreement or its construction or effect as to the rights, duties and liabilities of the parties hereto or either of them under or by virtue of this Agreement or otherwise or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement shall be referred to an arbitral tribunal composed of 3 members. Arbitration shall be held in Bergamo, Italy and shall be, governed by Italian Civil Law.

(ii) Each party shall appoint one member and the third member (the Chairman) shall be appointed by the two members. In case of disagreement the Chairman shall be appointed by The President of the Court of Bergamo, Italy.

In reply to this ground of the plea in. limine litis, counsel for the applicant, Mr. Pardiwalla, has submitted that:

1) By virtue of the operation of clause 6 of the agreement, the contract has been rescinded between the parties and, there is no valid, arbitration clause, which can be relied upon,

2) Alternatively, the arbitration clause is a clause compromissoire which in the absence of proof as to its validity under the foreign law is invalid under the law of Seychelles and does not oust the jurisdiction of this court.

3) The respondent has to apply for a stay of the instant proceedings and submit itself to the foreign jurisdiction to be able to rely on the arbitration clause

Clause 6 of the agreement, referred above, reads as follows:

6. MANAGEMENT FEES

The fees to be paid by the Operator to the Lessee shall be:

(a) For the first year 15% of the income of the hotel.

(b) From the second to the sixth year the sum of Italian Liras 650 million.

(c) For the seventh year the sum of Italian Liras 700 million.

(d) For the eighth year the sum Italian Liras 730 million,

(e) For the ninth year the sum of Italian Liras 770 million.

The above amounts shall be paid by equal three monthly installments, by the tenth of the month (expiry date).

Should the three monthly installments be delayed, interest at 1% per month shall start to run after 20 days from expiry date.

Should the three monthly installments be delayed by more than 60 days from the expiry date, the Lessee shall be entitled to treat this Agreement as rescinded by operation of law.

It is agreed between the parties that the document which regulates their contractual relationship is the one made on 18 April 1996, a copy of which has been attached to the application and labeled as Exhibit 1. The applicant, Intour S.R.L., is represented by its director Paulo Chionni of Anse La Farine, Praslin. It is not disclosed in the application or the agreement (Exhibit 1), whether the applicant company is a local or foreign company. However, Exhibits 2 and 6, attached to the application, disclose that the address of the applicant company is "Via Frizonni n.24, 24121 BERGAMO". There is also no indication in the agreement or affidavit filed whether the respondent company, Emerald Cove Ltd, is a foreign or local company. The agreement between the parties is for the management of a hotel situated on the island of Praslin, Seychelles. The payments to be made by the respondent to the applicant under the terms of the contract are in foreign currency (Italian Liras) and there is evidence to show that one such payment was made to a bank account in the United Kingdom (Exhibit 7 attached to the application). More importantly, the parties have contracted, by virtue of clause 5 of the agreement (the Arbitration Clause) that, "all disputes or differences whatsoever...shall be referred to an arbitral tribunal composed of three members. Arbitration shall be held in Bergamo, Italy and shall be governed by Italian Civil Law."

In Dalloz *Encyclopedie Droit International*, Tome 1, 1968, Verbo Arbitrage, the author commented that:

> Le caractère étranger ou international d'un arbitrage pourrait théoriquement résulter:-
>
> 1° de la nationalité des arbitres;
> 2° de la nationalité ou du domicile des parties:
> 3° du lieu de l' arbitrage;
> 4° de la loi applicable d la procédure d'arbitrage…..

Accordingly, the above foreign elements, comprised in the contract, give rise to a conflict of jurisdiction which is to be determined by reference to principles of private international law.

In *Pillay v Pillay* (1973) SLR 307 on appeal from the Supreme Court of Seychelles, the Court of Civil Appeal in Mauritius laid down the guidelines which are to be followed when an agreement between two parties gives rise to a conflict of jurisdiction. In that case the parties were both citizens of India and they had bound themselves by an arbitration clause to submit any dispute to foreign authorities and to the laws and Court of India. The court (Garrioch and Ramphul JJ) observed that:

> ...The jurisdiction of the Supreme Court of Seychelles when adjudicating upon civil rights and obligations is not dissimilar from that of the Supreme Court of Mauritius. Just as the Seychelles Court, this Court is vested, with the powers, privileges, authority and jurisdiction of the High Court of Justice in England...But it does not follow that when confronted with a

> conflict of laws this Court should and will necessarily turn to its English counterpart for guidance. The standpoint of this Court was thus defined in Austin v Bailey (1962) MR 113 at pages 115, 116-
>
> Since the rules of private international law in any country must necessarily have their foundation in the internal law of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French, so that, subject to any exceptions which may arise through certain different statutory" 'enactments and treaty obligation,, we must be guided by the French rules of private international law (See Valery, Manuel de Droit International Prive. p. 6 para, 3; Graveson, The. Conflict of Laws, 4th Ed., pp. 30-32: *D'Arifat & ors. v Lesueur*, 1949 MR; de *Chazal v de Chazal*, 1961 MR 5

The guidelines laid down in *Pillay v Pillay* were delivered before the coming into force of the Commercial Code of Seychelles Act, 1976, which brought about, under Title IX, legislation pertaining to arbitration. However, the basic law pertaining to contractual relationships remain governed by the principles enacted under the Civil Code as recognized under article 8 of Ordinance 5 of 1976 (which provided for the application of the Commercial Code of Seychelles) and which reads:

> ... any inconsistency between the Commercial Code of Seychelles and the Civil Code of Seychelles shall not operate to invalidate the latter which shall continue to apply to all maters dealt with thereunder.

At this stage, it is necessary to examine the argument by counsel for the applicant that by virtue of the operation of clause 6 of the agreement the contract has been rescinded and there is no valid arbitration clause which can be relied on by the parties.

The law governing the rescission of a contract is found in article 1184 of the Civil Code of Seychelles (Cap 32). The general rule is that rescission must be obtained through proceedings whereby the court is empowered to intervene arid decide whether the contract shall be rescinded or whether it may be confirmed subject to the payment of damages to the extent of the partial failure of performance. The exception to this general rule is provided for under the last sentence of the first paragraph to article 1184 which reads as follows:

> Rescission shall only be effected by operation of law if the parties have inserted a term in the contract providing for recession. It shall operate only in favour of the party willing to perform.

The above two types of rescission within article 1184 are commonly known as ''Resolution Judiciaire'' and "Resolution de plein droit" respectively.

In Encyclopedic Dalloz, *Repertoire de Droit Civil*. Tome III. 1976, Chapter 'Contrats et

Conventions' the author comments that:

> Note 238 - L'article 1134 ... du Code Civil, a prévu la nécessité d'une décision de justice pour prononcer la résolution, c'est la résolution Judiciaire; mais les parties peuvent vouloir éviter les inconvénients d'une procédure; de la ires souvent des clauses conventionnelles prévoyant la résolution de plein droit...
>
> note 257 - Très souvent les parties insèrent dans leur accord une clause résolutoire expresse selon laquelle l' inexécution d'une des parties entrainera par elle-même la destruction du contrat.

In *Jurisclasseur Civil*, 1979, Verbo 'Contrat et Obligation - article 1184 notes B 19 & 20 the author comments that:-

> Des Lors que le créancier de l' obligation inexécutée, entend se prévaloir de la résolution de plein droit, il n'a pas besoin d'intenter une action en résolution. Si le tribunal est parfois amené a intervenir son rôle se borne a constater une résolution qui s'est effectue en dehors de lui et a laquelle il ne pourrait faire obstacle ...
>
> Le Juge n'a aucun pouvoir pour empêcher ou retarder la rupture du contrat quand se trouvent réunis les conditions prévus par une clause résolutoire licite dont les lerm.es son clairs et précis; si rigoureux qu'en soit les effets pour le débiteur, il ne peut donc se refuser a déclarer le contrat résolu ...
>
> Cette clause ... a normalement pour conséquence de retirer an Juge le pouvoir de prononcer la résolution, la, destruction du contrat résultant de simple fait de l'inexécution; s'il vient a être saisi, le Juge doit seulement constater que, la résolution a eu lieu sans pouvoir accorder aucun délai, ni, faire revivre un contrat déjà résolu en dehors de lui.

Counsel for the applicant submitted that the fact that the contract was rescinded by operation of law under clause 6 of the agreement brings about a situation where there is no valid contract between the parties and, as a result, the respondent cannot rely on the arbitration clause. As a general rule, the operation of a "condition resolutoire" rescinds the existing obligations between the parties under the agreement and restore the things in the same state as they would have been if the obligation had never existed. This general rule is confirmed under article 1183 of the Seychelles Civil Code which reads:

> A condition subsequent is the condition which when fulfilled, rescinds the obligation and restores the things in the same state as they would have been if the obligation had never existed.

However, this general rule is subject to some important exceptions which are relevant to

the instant determination.

In *Jurisclasseur Civil III*, Art. *1156 à* 1264, 1979, Fasc *49*-1, Verbo Contrats et Obligations, under the heading 'Effet*s* De La Resolution Judiciaire" the author comments as follows:

> note 76 - La résolution prononcée par le juge (résolution judiciaire) produit les mêmes effets que l' accomplissement d'une condition résolutoire expresse (résolution de plein droit). La condition décompile a un effet rétroactif au jour ou l' engagement a été contracte (Art. 1179) la condition résolutoire est celle qui, lorsqu'elle s'accomplit, opère la révocation de l'obligation, et qui remet les choses au même état que si {l'obligation n'avait pas existe (Art. 1183)...
>
> note 77 - Le contrat résolu cesse de produire effet dans l' avenir. Si le créancier n'a pas encore exécute sa propre obligation, il ne peut plus y être contraint. ... La résolution judiciaire fait tomber toutes les dispositions du contrat qui n'étaient intervenues que pour son exécution...
>
> note 78 - Mais, par contre, certaines des clauses du contrat qui avaient prévue éventualité de son inexécution conservent leurs effet âpres la résolution. II eu est ainsi lorsque les parties out insère dans le contrat une clause compromissoire: celle-ci reçoit application malgré la résolution (Cass. Com. 12 nov. 1968: Bull. Civ. IV. N. 316). De même une clause attributive de compétence permet de soumettre au tribunal choisi par les parties les difficultés entrainées par l'inexécution du contrat (Cass. Civ. II, 11 janv. 1978: Bull. Civ. II, n. 13).
> On ne peut pas soutenir que, le contrat devenant dépouru d'effets par suite de la resolution, la clause attributive de competence ne doit plus receuoir application (Cass. Com. 23 ort, 1978: Bull Civ IV. N. 233). Ces clauses conservent leur ultilité pour liquider les séquelles d'un echec contractuel; tant qu'elles n'y out pas renonce, les parties out le droit de s'y referer pour faire trancher les litiges issus du contrat, meme ceux survenus apres resolution (Cass. Civ. II, 25 nov, 1966: D.S. 1.967, 359, note J. Robert).

Under the local law, section 110(5) of the Commercial Code Act (Cap 38), statutory recognition is expressly given to the above principle in the context of an international contract. It reads as follows:

> If an agreement containing an arbitration clause is judicially declared to be void, the arbitration clause therein shall also be void. However, an arbitration clause is an international agreement shall not be ipso facto void by reason only of the invalidity of such agreement,

Furthermore, the arbitration clause makes express reference to its application to

"*disputes or differences whatsoever ... whether during the continuance of this Agreement or upon or after its discharge or determination arise between the parties*..."

Accordingly, it cannot be said that the arbitration clause is ipso facto void in the agreement, produced as exhibit 1, by virtue of the operation of rescission under clause 6 of the said agreement.

Counsel for the applicant has submitted, in the alternative, that the arbitration alause is a 'clause compromissoire' which in the absence of proof as to its validity under foreign law is invalid under the laws of Seychelles and does not oust the jurisdiction of this court. He quoted, in support, the decision of this court in *Biestma v Dingjam (1974) SLR 292.*

The 'arbitration clause' in the present application is one by which the parties bind themselves, at a time when no actual difference has yet arisen between them, to submit to arbitration disputes that may arise out of the agreement. This is commonly known as a 'clause compromissoire' and is usually contrasted with what is termed a 'compromis' which arises where the parties agree to refer to arbitration a dispute which has arisen. In Encyclopedie Dalloz, *Civil*, Tome III. 1989, Verbo 'Compromis - Clause Compromissoire' the author *com*ments:

> **65.** La clause compromissoire est la convention par iaquelle les parties a un contrat s'engagent avant toute contestation, a l'arbitage les differends qui viendraieni a s'elever entre elles a I'occasion de ce contrat. La clause compromissoire s'applique done a un litige eventuel et indetermine tandis que la compromis est relatif a, un litige ne.

Under article 110(1) of Title IX of the Commercial Code Act (Cap 38),it is enacted that:

> Any dispute which <u>has arisen or may arise</u> out of a specific legal relationship, and in respect of which it is permissible to resort to arbitration, may be subject to an arbitration agreement. Subject to articles 2044 to 2058 of the Civil Code relating to compromise…

The above quoted enactment applies to a dispute between the parties which "has arisen or may arise". This includes both a 'clause compromissoire' and a 'compromis'.

The Supreme Court decision in *Biestma* v *Dingjam* was expressly made in furtherance of the principles laid down in *Pillay v Pillay* (1973) SLR 307. In the latter case, the Court of Civil Appeal laid down the approach to be followed by the trial court when faced with an arbitration clause which claims that a foreign law is the law of the agreement. It states as follows:

> Having regard to the principles set out...it would, have been incumbent... first to ascertain whether, under the law of India (which, it is agreed, is the proper law of the agreement, and consequently, the law by which the

> validity of the 'Clause Compromissoire' is to be determined) such clause was valid and if he (the Judge) came to the conclusion that it was, to pronounce himself incompetent...

Furthermore, the Court of Civil Appeal added that the validity of the arbitration clause under the foreign law was a fact in issue, proof of which had to be established before the trial court, It stated:

> The law of India, in particular, being a, foreign law is, as such, a matter of fact, the proof of which must be made before the trial court.

In the end result, the case was referred back to the Supreme Court of Seychelles which heard evidence as to the law of India on arbitration - vide: *Pillay v Pillay* (1978) SLR 217. In the present application before this Court, I find that there has been no evidence led as to the validity of the arbitration clause within the agreement signed by the parties (exhibit 1) under the laws of Italy so as to enable this court to pronounce itself incompetent.

Lastly, counsel for the applicant argued that the respondent has to apply for a stay of instant proceedings and submit itself to foreign jurisdiction to be able to rely on the arbitration clause. On this issue, I will approve of the observation made in *Biestma v Dingjan* where the court stated that:

> ...as a matter of procedure the party who asks the court for an order of stay of proceedings must file an affidavit so as to satisfy the court not only that he is, but also that he was at the commencement of the proceedings ready and willing to do everything for the proper conduct of the arbitration.

In the end result and for reasons set out above, I find that:

(i) the arbitration clause in the international agreement (exhibit 1) is not void by virtue of the rescission of the contract by operation of law;

(ii) there has been no proof of the validity of the arbitration clause under Italian laws so as to declare this court incompetent; and

(iii) the respondent has failed to satisfy this court that it is ready and willing to do everything for the conduct of arbitration in order to stay the proceedings before this forum.

Accordingly, the plea in limine litis is dismissed.

Record: Civil Side No 220 of 1998