

SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
CS118/2019

In the matter between:

OLDYPAK CAPITAL LP **1st Plaintiff**

GV HOLDINGS LTD (Cyprus) **2nd Plaintiff**
(rep. by Serge Rouillon)

and

TEMPOX HOLDINGS LIMITED **1st Defendant**
(Formerly Tradologic HK Ltd)

ILAN TZORYA **2nd Defendant**

DTI GROUP INC **3rd Defendant**
(Unpresented)

Neutral Citation: *Oldypak Capital LP & Anor v Tempox Holdings Ltd & Ors* (CS118/2019)
[2022] SCSC (10th March 2022)

Before: Burhan J

Summary: Breach of Shareholders Agreement, supremacy clause, applicable law

Heard: 22nd November 2021

Delivered: 10th March 2022

JUDGMENT

BURHAN J

[1] The 1st Plaintiff Oldypak Capital LP (“Oldypak”) is a limited partnership incorporated under the laws of Scotland and the 2nd Plaintiff is GV Holdings Limited (“GV Holdings”), a company incorporated under the laws of Cyprus (collectively referred to as

“Plaintiff”). According to Exhibits P3 and P7, the beneficial owner of both companies is a Russian citizen Mr. Vladislav Smirnov.

- [2] The 1st Defendant is Tempox Holdings Limited, formerly Tradologic HK Limited (“Tempox”), a company incorporated under the laws of Hong Kong. The 2nd Defendant is Mr. Ilan Tzorya, a citizen of Israel residing in Bulgaria.
- [3] The 3rd Defendant is DTI Group Inc (“DTI Group”), an International Business Company (“IBC”) registered in Seychelles.

BACKGROUND

- [4] It is averred that Mr. Tzorya has set up DTI Group, Seychelles IBC, as a holding company of several IT projects all over the world; and that company had a nominee director and shareholder Ms Molly Roselie and Mr. Tzorya was the beneficial owner.
- [5] With intention to develop business relations and join investment projects, the Plaintiff entered into several Agreements with the Defendants. Oldypak has initially entered into the Loan Agreement for EUR1,130,000 with DTI Group (Exhibit P10, dated 31st July 2015, Oldypak being the Lender, DTI being the Borrower).
- [6] Thereafter, the parties entered into Investment Agreement (Exhibit P11, dated 30th October 2015) for the purpose of joint investment project, whereby Oldypak agreed to contribute EUR1,130,000 for the realisation of the project and in consideration Oldypak was entitled to 60% of the DTI Group shares. The parties also agreed that EUR250,000 has been already contributed by Oldypak and that second round of investment into DTI was to be made thereafter upon DTI reaching specified revenues.
- [7] Thereafter in 2016, the parties entered into Assignment Agreement (Exhibit P12, dated 30th September 2016) where Oldypak has assigned its rights and obligations under the earlier Loan Agreement to GV Holdings. Further Novation Agreement was made between GV Holdings and DTI Group (Exhibit P13, dated 30th September 2016) whereby the parties agreed that as means of payment of the debt under the Loan Agreement the

DTI Group shall issue shares in favour of the GV Holdings in the amount that will represent 60% of the share capital and voting rights of DTI Group.

- [8]** On the same date GV Holdings, DTI Group and Mr. Tzorya entered into the Delegation Agreement (Exhibit P14, dated 30th September 2016) under which Mr. Tzorya agreed to transfer 60% of its own shares (which was 100% of share capital) instead of issuing the new shares for consideration of further EUR368,000.
- [9]** On or around the same date, 27th or 30th September 2016, GV Holdings, Mr. Tzorya and DTI entered into a Shareholders' Agreement (Exhibit P15, title page date – 30th September 2016, page 2 and 'effective date' at page 3 – 27th September 2016), which is the agreement that later was allegedly breached.
- [10]** On the 10th October 2016 the share transfer was effected and GV Holdings became owner of 60% shares. According to the Register of Shareholders (page 3 of Exhibit P17) the remaining 40% of shares on 10th October 2016 were held by Ms Molly Rita Roselie. As averred by the Plaintiff, Ms Roselie was nominee shareholder holding shares for Mr. Tzorya.
- [11]** On the 28 March 2017 Ms Roselie transferred all 40% of shares to Tempox, formerly Tradologic HK Limited. A year later, on the 28 March 2018, Tempox, formerly Tradologic transferred the shares to Mr Michael Eluashvily, whose relation to the DTI Group Inc prior to the transfer is not known.
- [12]** The Plaintiff avers that both transfers were in breach of the Shareholders' Agreement (SHA). The Plaintiff asks the court to (i) rescind and cancel the transfer to Mr Eluashvily and allow GV Holdings to purchase the said shares for the amount and on terms and conditions not less favourable as for Mr Eluashvily under Clause 9.2(i) of the SHA; (ii) allow GV Holdings to exercise the right to be registered as owner of and get full control over 100% shares of DTI; and costs.
- [13]** Learned Counsel for the Plaintiff states that all the Defendants were served as per the returns of service in the form of actual physical service in the case of the 3rd Defendant. The service upon the 2nd Defendant was eventually done by the publication in the

newspaper in Bulgaria. With regards to the service upon the 1st Defendant that too was eventually done by publication in the newspaper in Hong Kong.

[14] The Plaintiff avers that both Oldypak and GV Holdings are represented by Ilya Kirian authorised by the Power of Attorney given to him by both companies (Exhibit P1 and P4). The Defendants were not present in court.

[15] The main issue of the case is in relation to the Shareholders' Agreement (SHA) and transfer of shares which as averred was in breach of the SHA.

[16] Clause 2 "Supremacy of Agreement" of the SHA states:

“2.1 In the event of any inconsistencies between the provisions of this Agreement and the Articles of the Company, the provisions of this Agreement shall prevail and supersede the Articles of the Company as between the Shareholders and no Shareholder can or shall challenge the validity of this Agreement on the basis of any such inconsistency. The Shareholders shall exercise all voting and other rights and powers available to them to give effect to the provisions of this Agreement alone, and ensure that, subject to Applicable law, necessary amendments are made to the Articles to make them always consistent with this Agreement.”

[17] Clause 2.2 further states that the Company shall not be bound by any provision of the SHA to the extent that it constitutes an unlawful restriction on any rights given under Applicable law, but this shall not affect the validity of the relevant provisions as between the Shareholders in the absence of illegality under Applicable law. As it appears from the provided documents, Articles of the Company were not amended. Articles of the Company that were provided do not contain provisions restricting transfer of shares as under the SHA.

[18] According to the Plaintiff, the case appears to be straight forward – one of the shareholders allegedly breached the SHA by selling the shares to the third party and the SHA supersedes the Articles.

[19] Learned Counsel for the Plaintiff, however, does not mention that under Clauses 1 and 19 of the SHA the Applicable law of the SHA is laws of Czech Republic; and that under Dispute Resolution Clause 8 in case of a dispute, the parties have right to recourse to

arbitration which shall be settled in Czech Republic. The relevant clauses are set down below:

“1. DEFINITIONS AND INTERPRETATION

1.1. . . .

(i) "Applicable Law" means any applicable law, statute, ordinance, code, rule, regulation, order, injunction, decree, ruling, determination, award, standard, permit or variance having the force of law of any Government Authority of the Czech Republic, or any binding agreement with any Government Body of the Czech Republic;

(ii) "Articles" means the Memorandum and Articles of Association of the Company and any other constitutional or corporate governance documents as required by the law of the Seychelles and/ or Applicable Law as amended from time to time in accordance with the provisions of this Agreement.”

“19. APPLICABLE LAW

19.1. The validity, performance and extent of this Agreement (together with any dispute or claim (contractual or otherwise) arising out of or in connection with it) shall be governed by and construed in accordance with the laws of the Czech Republic.”

“8. DISPUTE RESOLUTION

8.1. Should the Parties fail to amicably settle a dispute between them within 21 (twenty one) Business Days from the day when such dispute has arisen, any Party to this Agreement shall have the right to have recourse to arbitration as regards this Agreement and such dispute shall be settled in Czech Republic. The place of the arbitration shall be the Czech Republic. The language of the arbitration shall be English.”

[20] It is clear that under the Clause 1 and 19 of the SHA the applicable law is Czech Republic Law. Further the SHA Dispute Resolution Clause 8 clearly states in case of a dispute, the parties have right to recourse to arbitration which shall be settled in Czech Republic.

[21] These important issues were never addressed nor brought to the notice of court by learned Counsel for the plaintiff.

[22] It is to be noted further that there were two transfers of shares which were allegedly in breach of the SHA: to the Tradologic (Tempox) and to Mr Eluashvily. The Plaintiff is

asking the Court to only cancel the transfer to Mr Eluashvily. Tradologic, even though owned by Mr Tzorya, was never part to the SHA between DTI, Mr Tzorya and the Plaintiff. Therefore, it is not clear on which basis the Plaintiff alleges breach of SHA by the Tradologic (Tempox).

[23] Therefore, on the basis of the above analysis, this Court finds, firstly, that the SHA states that applicable law is law of Czech Republic, not Seychelles and the Plaintiff's Counsel does not address issue of foreign law. Secondly, the Plaintiff asks the Court to cancel the share transfer done by Tradologic (Tempox) and does not submit on which basis the transfer done in alleged breach of SHA by a company not party to the said SHA shall be cancelled.

[24] I therefore proceed to dismiss the said plaint. No order is made in respect of costs.

Signed, dated and delivered at Ile du Port on 10th March 2022

M Burhan J