

RWANDA / JUDGMENT

GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD_144385_en

RLR V.2-2016

COURT

Supreme Court

DECIDED

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Text

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GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD [Rwanda SUPREME COURT – RCOMA0162/12/CS (Nyirinkwaya, P.J., Mukandamage and Kanyange, J.) June 12, 2015] Law determining jurisdiction of courts – Carriage contract – Jurisdiction of the court where it was agreed to give exclusive jurisdiction to a foreign court to hear any contractual dispute – The fact that in their carriage contract, both parties have agreed that London Court shall have exclusive jurisdiction to hear any dispute between them cannot be considered because they do not prove whether that Court has material jurisdiction to hear the case nor that it is more convenient for them than being heard by Rwandan courts account taken of the court proceedings' costs and the value of the subject matter – Organic Law N°51/2008 of 09/09/2008 governing organization, functioning and jurisdiction of courts, article 121. Law of contracts – Business interests and for delay – One of parties to the contract cannot argue the contract has not provided for interests for delay and that those claimed by the other party are excessive while both parties have agreed on the method of payment of interests for delay in case of breach of the contract – Law N°21/2012 of

14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 168.

Facts: DAMCO TANZANIA Ltd sued GREAT LAKES CEMENT Ltd before the Commercial High Court praying to be paid the balance of 85,805USD on the freight of its goods it transported from China to Musanze in Rwanda and various damages plus the penalty forcing execution.

Immediately, GREAT LAKES CEMENT Ltd has also raised the objection for inadmissibility of the claim of DAMCO TANZANIA Ltd, arguing the latter should pay security deposit furnished by foreigners who are parties to the case before Rwandan courts and requested damages because DAMCO TANZANIA Ltd has caused loss to it by its failure to transport all its goods and its manager was summoned by the Police as well. It further argues that this court lacks jurisdiction to hear this case because both parties agreed in their carriage contract that it shall be subject to the exclusive jurisdiction of London High Court of Justice. The Court ruled that DAMCO TANZANIA Ltd must not pay the security deposit furnished by foreigners because it is a registered company in one of East African Community member States. In respect to lack of jurisdiction of Rwandan courts, the Court ruled that this cannot be considered as none of the parties has proved to be of English national nor have they proved that the goods originated from that country. The Court held that Great Lakes should not be awarded damages since it is the one that should pay them to DAMCO TANZANIA Ltd. GREAT LAKES CEMENT Ltd appealed to the Supreme Court submitting that the Commercial High Court lacks jurisdiction to hear this case because the competent court is London High Court of Justice which is likely to be impartial as agreed upon in the contract. On its side, DAMCO TANZANIA Ltd argues that the ground of appeal of GREAT LAKES CEMENT Ltd is without merit because its claim did not relate to the breach of the contract; rather, it was based on documents written in Rwanda where the Managing Director of GREAT LAKES CEMENT Ltd wrote documents showing the outstanding debt towards DAMCO TANZANIA Ltd. He further argues that this case has no connection with English courts because the dispute arose in Rwanda where the defendant resides as well.

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Held: 1. The fact that the parties have agreed in their carriage contract that any dispute between them shall be referred to the exclusive jurisdiction of London High Court of Justice cannot be considered as long as parties do not prove that it has material jurisdiction to try this case nor that it is more convenient for them than being heard by Rwandan courts, account taken of the court proceedings' costs and the value of the subject matter.

2. One of parties to the contract cannot argue the contract has not provided for interests for delay and that those claimed by the other party are excessive while both parties have agreed on their method of payment in case of breach of the contract. Therefore, the appellant must pay interests amounting to 12% computed from July 2010 until the day of the judgment delivery. Appeal is without merit. Cross appeal has merit in part. Court fees to the appellant. Statutes and statutory instruments referred to: Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative, article 168. Organic Law N°51/2008 of 09/09/2008 governing organization, functioning and jurisdiction of courts, article 121. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] DAMCO TANZANIA Ltd sued GREAT LAKES CEMENT Ltd before the Commercial High Court praying to be repaid the balance amounting to 85,805USD left from the cost of the freight for its goods it transported from China to Musanze in Rwanda, commercial interests of 25% per year, 19% of interests for delay per year, procedural and advocate's fees, penalty forcing execution and provisional judgment execution. [2] In that case, GREAT LAKES CEMENT Ltd raised the objections for inadmissibility of the claim of DAMCO TANZANIA Ltd including the objection relating to security deposit furnished by foreigners who are parties to case before Rwandan courts and the objection of lack of jurisdiction and requested damages for procedural and advocate's fees and moral damages as well damages for the incurred loss from the failure by DAMCO TANZANIA Ltd to transport all its goods and the fact that its manager was summoned by the Police. [3] The Commercial High Court held that DAMCO TANZANIA Ltd must not pay the security deposit furnished by foreigners because it is a registered company from East African Community. [4] In respect to the jurisdiction of the court, the Court found that the argument of GREAT LAKES CEMENT Ltd that Rwandan courts lack jurisdiction to hear this case because in their carriage contract both parties agreed that London High Court of Justice shall have jurisdiction to try the case is without merit since none of litigants proves to be an

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English citizen, that those goods are from UK or that they have transited there and none of them has managed to explain to it why they have elected that court without any link with the subject matter or parties or the law they rely on to give that court jurisdiction to try the case; thus pursuant to article 121 of Organic Law N°51/2008 of 09/09/2008 determining organization, functioning and jurisdictions of courts, it ruled that it has jurisdiction to try the case because the defendant resides in Rwanda. [5] With regards to the debt sued over, the Court ordered GREAT LAKES CEMENT Ltd to pay DAMCO TANZANIA Ltd 85,805USD of the balance on the freight, interests thereon amounting to 31,604USD, delay interests equal to 3,718USD and pay 6,500Frw of court fees. The Court held that no penalty forcing execution should be imposed and nor should there be provisional judgment execution. It also held that it should not be awarded moral damages because it is the one that should rather pay DAMCO TANZANIA Ltd and that its manager was not threatened when he was summoned by the Police. [6] In respect to the counterclaim of GREAT LAKES CEMENT Ltd requesting damages for loss suffered because it has not received all its goods, moral damages because its manager was taken to the Police and signed for the debt under threat and advocate's fees, the Court found that it should not award them because it is the one that which is liable to pay. [7] GREAT LAKES CEMENT Ltd appealed to the Supreme Court submitting that the Commercial High Court tried the case while it has no jurisdiction to do so because the competent court to hear any disputes arising out of the contract between the latter and DAMCO TANZANIA Ltd is the London High Court of Justice in UK. [8] In its cross appeal, DAMCO TANZANIA Ltd also requests to update the amount of damages it was awarded and that it was awarded fewer amount of advocate's fees. [9] The case was heard in public on 06/01/2015 and

28/04/2015 where GREAT LAKES CEMENT Ltd was represented by Counsel Bimenyimana Eric whereas DAMCO TANZANIA Ltd was represented by Counsel Nzamwita Toy. II. ANALYSIS OF LEGAL ISSUES

- a. Whether the Commercial High Court had jurisdiction to try the case filed by DAMCO Tanzania. [10] Counsel Bimenyimana representing GREAT LAKES CEMENT Ltd submits that in article 3 of the carriage contract they entered into with DAMCO TANZANIA Ltd on 10/11/2010, both parties agreed that London High Court of Justice has exclusive jurisdiction to settle any dispute that would arise from that contract because they considered it as the impartial court (jurisdiction neutre) rather than referring to Rwandan or Tanzanian courts. He finds that the matter of territorial jurisdiction is not of public policy to the extent that the judge should have chosen for them the competent court. [11] Counsel Nzamwita representing DAMCO TANZANIA Ltd argues that the ground of appeal of Great Lakes Cement has no merit because the claim of DAMCO TANZANIA Ltd did not arise out of the contract because it was terminated by both parties, it was rather based on documents written on 21/3/2011 and 28/04/2011 in Rwanda (payment order and acknowledgment of debt) by Mr. Nemeyebahizi Jean Baptiste who was its Managing

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Director, where he personally wrote a document showing the outstanding debt towards DAMCO TANZANIA Ltd. [12] In addition, he argues that this case has no connection with English court because the dispute arose in Rwanda where the defendant resides as well. THE VIEW OF THE COURT [13] Article 89(1) of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that “the party raising an objection of lack of jurisdiction shall justify it and identify the court to which he/she wants the case to be transferred”. [14] Under article 3 of carriage contract between GREAT LAKES CEMENT Ltd and DAMCO TANZANIA Ltd concluded on 10/11/2010, they agreed that the contract shall be governed by English Law and is subject to the exclusive jurisdiction of High Court of Justice of London and that in case there is any breach of contract the dispute shall be resolved amicably, failure of which, such matter shall be taken to court¹. [15] The Court finds without merit the argument of Counsel for DAMCO TANZANIA Ltd that the claim it filed is not connected to the contract because from the plaintiff's document instituting the proceedings and related court submissions, it is clear that 85,805USD results from carriage contract. [16] In addition, the Court finds that the agreement between GREAT LAKES CEMENT Ltd and DAMCO TANZANIA Ltd to refer the governance of their contract to the law and the disputes likely to arise from its execution to the Court which have no connection with parties nor the contract is a principle recognized in international contracts. However, the Rwandan law is silent therefore does not offer any help to explain this issue of jurisdiction of the court. [17] American Courts have also, in different cases, held that they should respect the right of parties to the international contracts to choose the court with jurisdiction to settle disputes thereof except where the enforcement of such a provision is unreasonable, unjust or where such a provision is invalid because of fraud or it is overreaching. [18] In the case *C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc.*, delivered by Minnesota Court of Appeals in 2009,

it was held that the contractual clause is unfair or unreasonable if the chosen forum is seriously inconvenient, the clause is a contract of adhesion, or the contract is otherwise unreasonable².

[19] With regard to the provision of article 3 of the carriage agreement between GREAT LAKES CEMENT Ltd and DAMCO Tanzania of 10/11/2010, they chose the High Court of Justice of London with the intention to have a neutral court to settle disputes between them. 1 That article provides that: “This Agreement shall be governed by English law, and is subject to the exclusive jurisdiction of High Court of Justice, London. In case there is any breach of contract, any amount outstanding shall be settled by Client. Any dispute shall be resolved in an amicable manner, and in the event of inability to solve things amicably, such matter shall be taken to court”. 2 In the case *C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc.*, it was stated that a “clause is unfair or unreasonable if chosen forum is seriously inconvenient, the clause is [a] contract of adhesion, or agreement is otherwise unreasonable”. 772 N.W.2d 528 (Minn. Ct. App. 2009).

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However, the Court finds that clause unreasonable because it is not enough to choose the court with jurisdiction without taking into account its material jurisdiction and the costs of the lawsuit, if any, in relation to the value of the subject matter. So, Great Lakes Cement that wishes to be heard by that Court does not prove whether it has material jurisdiction to try this case or that it is more convenient for it than being heard by Rwandan courts account taken of the court proceedings costs and the value of the subject matter. It is thus clear that this article is not reasonable for both parties. [20] The Court finds that, as held in its judgment under appeal, the Commercial High Court rather has jurisdiction to try the case as provided for by article 121 of Organic Law N°51/2008 of 09/09/2008 determining organization, functioning and jurisdiction of courts because Great Lakes has its headquarters in Rwanda and this is the place of contract formation.

- b. Cross-appeal of DAMCO Tanzania [21] Counsel Nzamwita representing DAMCO TANZANIA Ltd submits that it raised the cross-appeal praying the Court to update calculation of commercial interests (17% per year) and delay interests (2% per year) from July 2010 as ruled by the previous court until the day of judgment delivery (one year and six months) because GREAT LAKES CEMENT Ltd unreasonably appealed instead of paying the debt and it should thus pay total interests amounting to 85,805USD x 4 years and 6 months x 17% = 65,641,000USD plus delay interests equal to 7,000USD and the advocate's fees equal to 18,169USD because the judge has not ruled over them while there is a contract made with DAMCO TANZANIA Ltd and there are documents proving the amount he has already paid and this amount should also be updated to make 23,650USD. [22] Counsel Bimenyimana representing GREAT LAKES CEMENT Ltd submits that this case is about the claim over which Rwandan courts lack jurisdictions. He adds that the interests DAMCO TANZANIA Ltd requests are excessive as the contract stipulated for the interests of 1% per month that is 12% per year and no delay interests were agreed on. [23] In respect to the advocate's fees, he argues that it should not be awarded in relation to the subject matter because it is illegal and in case DAMCO TANZANIA Ltd loses the case it should pay its advocate. THE VIEW OF THE

COURT [24] Article 168(2) of Law N°21/2012 of 14/06/2012 mentioned above provides that “parties my claim interests, rents and other accessories which were realised since the pronouncement of the judgment and moral damages for the loss suffered from the time the judgment was delivered”. [25] Under article 5 of the aforesaid contract, GREAT LAKES CEMENT Ltd and DAMCO TANZANIA Ltd agreed that in case of failure to pay freight as agreed, it shall be liable for 1% per month, i.e. 12 % per year. [26] The Court finds that GREAT LAKES CEMENT Ltd should pay the interests of 12% on the outstanding debt and interests should be computed from July 2010 until the day of the judgment delivery as follows:

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[27] With respect to advocate’s fees, the Court finds that article 62(2) of Law N°83/2013 of 11/09/2013 establishing the Bar Association in Rwanda and determining its organization and functioning states that an advocate shall not fix fees on the basis of the decision of the court because an advocate has to use all possible means and not to ensure result from the trial, therefore DAMCO TANZANIA Ltd is awarded at Court’s discretion the advocate fees equal to 1,000,000Frw for all levels of trial. [28] The Court finds that the total amount of money GREAT LAKES CEMENT Ltd must pay DAMCO TANZANIA Ltd is 85,805USD of the debt decided by the Commercial High Court + 49,738USD of interests = 135,543USD and 1,000,000Frw for advocate’s fees. III. THE DECISION OF THE COURT [29] The Court decides that the appeal of GREAT LAKES CEMENT Ltd has no merit. [30] The Court decides that the cross appeal of DAMCO TANZANIA Ltd has merit in part. [31] The Court orders Great Lakes Cement to pay DAMCO TANZANIA Ltd 135,543USD of the main debt and interests and 1,000,000Frw of the advocate’s fees. [32] The Court orders GREAT LAKES CEMENT Ltd to pay 100,000Frw of court fees.

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