Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd [2017]

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A recent decision by the Singapore Court of Appeal in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32, confirmed that the Singapore courts will enforce a unilateral or 'one-way' arbitration agreement which gives only one party the option to arbitrate.

Singapore High Court confirms validity of unilateral arbitration clause

Background

Wilson Taylor had engaged Dyna-Jet in April 2015 to install underwater anodes on the island of Diego Garcia in the Indian Ocean. A dispute arose in 2015, after which Dyna-Jet suspended work and recalled its divers to Singapore. That, in turn, led to Wilson Taylor engaging another contractor to replace Dyna-Jet and complete the installation.

The two companies had included a dispute resolution provision in their Contract providing that only Dyna-Jet could decide whether to refer any disputes to arbitration. Dyna-Jet elected not to refer the dispute to arbitration and commenced proceedings in the Singapore High Court instead. Wilson Taylor then applied for a stay of the court proceedings to compel Dyna-Jet to submit the matter to arbitration in accordance with the dispute resolution clause.

At first instance, the application was dismissed by an assistant registrar on the basis that the dispute resolution agreement was an arbitration agreement and since Dyna-Jet had not elected to arbitrate the dispute, the arbitration agreement was incapable of being performed.

In the Singapore High Court, Justice Vinodh Cooramaswamy upheld the assistant registrar's decision and dismissed the appeal. After an extensive survey of modern Commonwealth authority, the Judge accepted that a dispute resolution agreement which confers which confers an asymmetric right (in other words, a right enjoyed by only one party to the agreement but not by the other) to elect whether to arbitrate a future dispute is properly regarded as an arbitration agreement. His Honour observed that there was no requirement for mutuality in respect of election to arbitrate and the only element of mutuality required for a valid arbitration agreement was the mutual consent of the parties at the point when they entered into the dispute resolution agreement.

Dissatisfied with the outcome of the High Court proceedings, Wilson Taylor appealed the decision in the Singapore Court of Appeal. The court rejected Wilson Taylor's appeal and its application for a stay of Dyna-Jet's court proceedings in favour of arbitration under Section 6 of Singapore's International Arbitration Act (**IAA**).

Citing its previous decision in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 the Court of Appeal held that three conditions would have to be satisfied before a court would grant a stay under section 6(2) of the IAA namely:

- a valid arbitration agreement exists between the parties to the court proceedings;
- the dispute in the court proceedings falls within the scope of the arbitration agreement; and
- the arbitration agreement is not null and void, inoperative, or incapable of being performed.

The Court of Appeal agreed with the High Court that the disputes clause constituted a valid arbitration clause and held that, *on the weight of modern Commonwealth authority*, neither the fact that the clause was asymmetrical, nor the fact that it made arbitration of a future dispute entirely optional instead of placing the parties under an immediate obligation to arbitrate, prevented the court from arriving at this decision.

Because the dispute-resolution agreement that the parties had signed gave only Dyna-Jet the election to arbitrate, the court found that Dyna-Jet's court proceedings fell outside the scope of the agreement. Justice Sundaresh Menon, writing for the three-judge panel (including JJ Judith Prakash and Steven Chong Chief) held that the optional nature of the clause meant that it *did not place the parties under a present obligation to arbitrate but it would give rise to an arbitration agreement only if and when [Dyna-Jet] elected to arbitrate a specific dispute in the future. On this basis, the Dispute could have fallen within the scope of the Clause only if [Dyna-Jet] had so elected. In the absence of such an election, in the words of s 6(1) of the IAA, the dispute in the present circumstances was not a "matter which is the subject of the agreement".*

Comment

The Court found that it was plain that *the Respondent never elected to arbitrate the Dispute. On the contrary, by the time the Appellant applied to stay the proceedings, the Respondent had already elected otherwise by commencing the present proceedings.*

The decision confirms that in Singapore, along with many other major common law and civil law jurisdictions, a properly drafted arbitration clause conferring an asymmetric right on one party to elect whether to arbitrate a future dispute and thus compel its counterparty to arbitrate, is nevertheless a valid arbitration agreement.