THE VALIDITY OF A "UNILATERAL / OPTIONAL" ARBITRATION CLAUSE

SINGAPORE COURT OF APPEAL DECISION IN WILSON TAYLOR ASIA PACIFIC PTE LTD v DYNA JET PTE LTD [2017] SGCA 32

With the increasing use of arbitration clauses in contractual relationships, there has been a shift away from the use of model clauses offered by arbitral institutions to the use of bespoke clauses, and it is not uncommon to have parties in a better bargaining position attempt to draft into their arbitration clause – a more generous set of options for themselves whilst trying to restrict the options open to their contractual counterparts.

One such clause came to be considered by the Singapore Court of Appeal in the decision of Wilson Taylor Asia Pte Ltd v Dyna Jet Pte Ltd [2017] SGCA 32. This clause was one which gave only the Respondent the right to refer a dispute to arbitration, and it provided:-

> "[The parties] agree to cooperate in good faith to resolve any disputes arising in connection with the interpretation, implementation and operation of the Contract. Disputes relating to services performed under the Contract shall be noted to [the Respondent] within three (3) days of the issue arising, thereafter the period for raising such dispute shall expire.
>
> Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of [the Respondent], the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law; and held in Singapore[1]."

A dispute had arisen between the parties and having failed to reach a negotiated settlement, the Respondent then commenced litigation against the Appellant in the Singapore High Court. The Appellant then sought to have the litigation stayed under section 6 of the International Arbitration Act (Cap 143A)[2]. The Assistant Registrar (hearing the application at first instance) and High Court Judge (on appeal) having dismissed the application and the Appellant then procured an escalation to the Court of Appeal.

In its consideration of whether such a clause could constitute a valid arbitration agreement between the parties, the Singapore Court of Appeal affirmed the High Court's finding that it was immaterial that the Respondent was the only party which was able to commence arbitration[3], and that it was equally immaterial that the Respondent was not compelled to select arbitration, but rather, had this left as an option open to it[4].

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[1] Wilson Taylor Asia Pte Ltd v Dyna Jet Pte Ltd [2017] SGCA 32 at [4].

[2] Section 6(1) of the International Arbitration Act (Cap 143A) reads: "Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter."

[3] Wilson Taylor Asia Pte Ltd v Dyna Jet Pte Ltd [2017] SGCA 32 at [13].

[4] Wilson Taylor Asia Pte Ltd v Dyna Jet Pte Ltd [2017] SGCA 32 at [13].

In the High Court, this conclusion reached was on the basis that there is an overwhelming weight of modern Commonwealth authority from which, *inter alia,* the following propositions might be drawn:-

1. "A contractual dispute-resolution agreement which operates asymmetrically is nevertheless an arbitration agreement"[5];

2. "A contractual dispute-resolution agreement which grants a right to elect whether to arbitrate a future dispute is nevertheless an arbitration agreement"[6];

3. "A contractual dispute-resolution agreement which confers an asymmetric right to elect whether to arbitrate a future dispute is nevertheless an arbitration agreement"[7];

4. "A contractual dispute-resolution agreement which confers a right to elect to arbitrate a future dispute, whether symmetric or asymmetric, is an arbitration agreement from the moment the parties enter into it contractually. When the right of election is exercised actually to refer a specific dispute to arbitration, the dispute-resolution agreement gives rise to a specific arbitration agreement for that specific dispute. But the underlying dispute-resolution agreement is nevertheless from the outset an arbitration agreement, and, even after the right of election comprised in it is exercised, continues into the future to be an arbitration agreement, capable of being invoked by election in relation to other disputes"[8]; and

5. "Where an arbitration agreement confers a right to elect to arbitrate future disputes, whether symmetric or asymmetric, it is a question to be determined on the proper construction of that agreement whether a party who has a right to elect to arbitrate (a) who does not make that election remains entitled to commence litigation against its counterparty; and (b) who does elect to arbitrate can stay litigation brought by the counterparty".[9]

For arbitration practitioners, the practical implication of this decision lies not only in applications to stay litigation proceedings before the Singapore court, but also in the arena of jurisdictional challenges. Jurisdictional challenges premised on there being a defect or pathology inherent in arbitration clause are at times used by creative practitioners as a tactic to avoid or delay proceedings.

While this decision does not perhaps go as far as to say that all clauses containing unilateral and/or optional elements will be upheld as valid clauses, its value-add is in providing welcome clarity as to the issues to be considered as well as the analytical framework to be adopted when Tribunals are tasked to consider clauses importing such elements through the lens of Singapore law.

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[5] Dyna-Jet Pte Ltd *v* Wilson Taylor Asia Pacific Pte Ltd [2017] 3 SLR 267 at [61(a)].

[6] Dyna-Jet Pte Ltd *v* Wilson Taylor Asia Pacific Pte Ltd [2017] 3 SLR 267 at [61(b)].

[7] Dyna-Jet Pte Ltd *v* Wilson Taylor Asia Pacific Pte Ltd [2017] 3 SLR 267 at [61(c)].

[8] Dyna-Jet Pte Ltd *v* Wilson Taylor Asia Pacific Pte Ltd [2017] 3 SLR 267 at [61(d)].

[9] Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd [2017] 3 SLR 267 at [61(e)].