CASE UPDATE

LEE & LEE

Validity of a dispute resolution clause which grants one party the right to elect to arbitrate

9 November 2016

Introduction

1. In *Dyna-Jet v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 238 ("***Dyna-Jet***"), the Singapore High Court (the "**SHC**") decided that **a clause which grants one party the right to arbitrate disputes constituted a valid "arbitration agreement" for the purpose of Section 2A of the International Arbitration Act**.

2. On the facts of the case, the Court also decided that if the party, having the benefit of the right to elect whether to arbitrate, elects to commence court proceedings in relation to a dispute (instead of arbitration), that party would be entitled to litigate that specific dispute in Court.

Facts

3. The case revolved around a dispute resolution clause in a contract between Dyna-Jet Pte Ltd (the "**Plaintiff**") and Wilson Taylor Asia Pacific Pte Ltd (the "**Defendant**"). In April 2015, the Defendant contracted the Plaintiff for certain underwater installation services. The parties' contract, which included the Plaintiff's standard terms and conditions, featured the following dispute resolution provision (the "**Disputes Clause**"):

   "***Resolution of Disputes and Complaints***

   …

   *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 Dyna-Jet,** 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."*

4. In September 2015, a dispute arose between the parties. In December 2015, following the failure of negotiations to resolve the dispute, the Plaintiff (having the benefit of the right to elect to refer the dispute to arbitration) elected to commence an action in court. Subsequently, the Defendant applied for an order to stay the Plaintiff's action permanently, and to compel the Plaintiff to arbitrate the dispute. The Defendant based its application on the ground that there was a valid and operative arbitration agreement between the parties.

For any queries relating to this article, please contact:

Christopher Tan
christophertan@leenlee.com.sg

Authors:

Christopher Tan
Lee Kok Thong

Lee & Lee
50 Raffles Place, #06-00
Singapore Land Tower,
Singapore 048623
T : (65) 6220 0666

For more legal updates, please visit the News & Publication Section of Lee & Lee's website at www.leenlee.com.sg.

Disclaimer: The copyright in this document is owned by Lee & Lee. No part of this document may be reproduced without our prior written permission. The information in this update does not constitute legal advice and should not form the basis of your decision as to any course of action.

© 2016 Lee & Lee. All Rights Reserved

Issues on appeal

5. In the SHC, Justice Vinodh Coomaraswamy (the "**Judge**") was faced with the following issues (among others):

   (a) First, whether the Disputes Clause was an "arbitration agreement" within the meaning of Section 2A of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "**IAA**"); and

   (b) Second, whether the Disputes Clause was "null and void, inoperative or incapable of being performed" within the meaning of the proviso to Section 6(2) of the IAA.

Holding

Overview of the Judge's holding

6. The Judge eventually dismissed the Defendant's appeal, holding that the Plaintiff's action was not to be stayed. The Judge's ruling meant that the parties' dispute would now be resolved by the Singapore courts, rather than by an arbitrator.

7. The Judge's holding was based on the following reasons:

   (a) First, the Disputes Clause, which gave only one party to right to elect whether or not to arbitrate the dispute (without the consent or involvement of any other party), was a valid arbitration agreement.

   (b) Second, in commencing an action in the courts, the Plaintiff had elected not to arbitrate the dispute. Consequently, the Plaintiff's election rendered the parties' arbitration agreement "incapable of being performed".

Elaboration on the first issue: The Disputes Clause was a valid arbitration agreement

8. In reaching his first holding, the Judge comprehensively analysed cases from various Commonwealth jurisdictions, including those from Australia, UK, Hong Kong, and Singapore. Following from his analysis, the Judge set out the following principles as the present state of the law in Singapore:

   (a) **A contractual dispute-resolution agreement that gives only one party a right to elect whether or not to arbitrate a dispute was an arbitration agreement.** Hence, for an arbitration agreement to exist, there was no need for both parties to have the same, mutual right to elect to arbitrate their dispute. The only element of mutuality required for a valid arbitration agreement was the mutual consent of the parties when they entered into a dispute resolution agreement.

   The Judge also stated that the principle above (*viz.*, that there is no need for both parties to have mutual rights in the arbitration agreement) applied to all arbitration agreements as long as such agreements reflected a mutual intent to resort to arbitration. It would not, however, matter if such mutual intent was conditional or not, or if the intent to arbitrate was expressed as a positive obligation, or as an exception to an obligation to litigate.

© 2016 Lee & Lee. All Rights Reserved

(b) A contractual dispute-resolution agreement that granted a party the right to decide whether to arbitrate a dispute in the future would also constitute a valid arbitration agreement.

(c) Reading points (a) and (b) together, a contractual dispute resolution agreement that conferred only on one party the right to elect whether to arbitrate a future dispute would constitute a valid arbitration agreement. This position is consistent with Section 2A of the IAA, which does not require an arbitration agreement to refer *all* future disputes to arbitration, or to do so *unconditionally*.

(d) Further, such a dispute resolution agreement would constitute an arbitration agreement from the moment parties entered into it contractually. Subsequently, when the right to elect to arbitrate in relation to one dispute is exercised, a specific (and separate) arbitration agreement would be created in relation to that dispute. The underlying arbitration agreement, however, would continue to exist, and could still be invoked by election in relation to other disputes.

(e) In relation to the party who has the right to elect to arbitrate, it remains a question of construction of that agreement:

(i) Whether, if that party does not elect to arbitrate, that party remains entitled to commence litigation; or

(ii) Conversely, whether, if that party elects to arbitrate, that party can stay any litigation brought by the counterparty.

9. Applying these principles to the present case, the Judge found that the Dispute Clause *was* an arbitration agreement within the meaning of Section 2A of the IAA. This was even though the Disputes Clause made arbitration subject to the Plaintiff's right of election, and such a right was not available to the Defendant.

Elaboration on the second issue: The Disputes Clause was incapable of being performed

10. Turning to the second issue, the Judge held that **the proviso "incapable of being performed" in Section 6(2) of the IAA referred to situations where a contingency had arisen that prevented the arbitration from being set in motion.** The Judge also held that the proviso covered contingencies that had either been foreseen (and catered for) by the parties, or was unforeseen.

11. On the facts, the Judge observed that the Plaintiff's right to elect arbitration, though unfettered, could only be exercised once, and only in respect of a specific dispute. The upshot of the Judge's observation was that **once the Plaintiff had exercised its right to elect arbitration (or declined to arbitrate) in respect of any dispute, the Plaintiff's right would be spent for that dispute, and could not be exercised again.**

12. In the Judge's view, the fact that the Plaintiff's right to elect had been spent meant that the parties' arbitration agreement was incapable of being performed. This is because the Plaintiff can now no longer elect to arbitrate for this dispute. Accordingly, the arbitration agreement was "*subject to a contingency which can never now be fulfilled*".

© 2016 Lee & Lee. All Rights Reserved

13. Nevertheless, the Judge clarified that the parties' arbitration agreement was not entirely incapable of being performed. The parties would still be bound to arbitrate if a dispute distinct from the present dispute arose, and the Plaintiff elected to arbitrate that dispute.

14. Given that the parties' (valid) arbitration agreement (in the Disputes Clause) was now incapable of being performed in respect of the present dispute, the Judge declined to grant a stay of court proceedings, and dismissed the appeal in favour of the Plaintiff.

Concluding remarks

15. The SHC's judgment provides clarity on two areas in Singapore's arbitration law. First, the judgment clarifies that dispute resolution provisions that grant only one party certain rights of election in choosing how to resolve a dispute could still constitute a valid arbitration agreement. Second, the judgment clarifies the proviso "incapable of being performed" in Section 6(2) of the IAA.

16. It should be noted that the Judge granted the Defendant leave to appeal to the Court of Appeal.

About Lee & Lee

Lee & Lee is one of Singapore's leading law firms being continuously rated over the years amongst the top law firms in Singapore. Lee & Lee remains committed to serving its clients' best interests, and continuing its tradition of excellence and integrity. The firm provides a comprehensive range of legal services to serve the differing needs of corporates, financial institutions and individuals. For more information: visit www.leenlee.com.sg.

The following partners lead our departments:

Kwa Kim Li Managing Partner kwakimli@leenlee.com.sg	Quek Mong Hua Litigation & Dispute Resolution quekmonghua@leenlee.com.sg	Owyong Thian Soo Real Estate owyongthiansoo@leenlee.com.sg
Tan Tee Jim, S.C. Intellectual Property tanteejim@leenlee.com.sg	Adrian Chan Corporate adrianchan@leenlee.com.sg	Louise Tan Banking louisetan@leenlee.com.sg

© 2016 Lee & Lee. All Rights Reserved