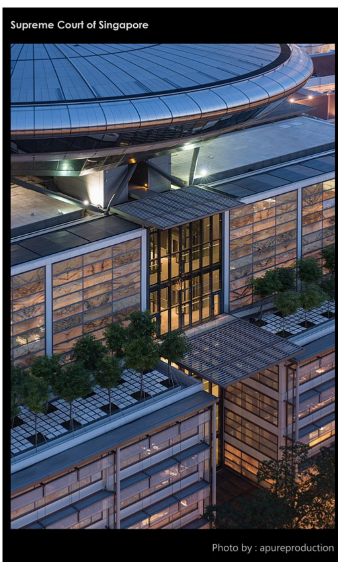
ARBITRATION: AT WHICH POINT OF COURT PROCEEDINGS WOULD AN ARBITRATION AGREEEMENT BE RENDERED INOPERATIVE

***BMO v BMP* [2017] SGHC 127**

IN SUMMARY

This Singapore High Court decision of 26 May 2017 discussed the issue of whether there is a point of no return beyond which a party participating in court proceedings would be held to have either no right to arbitrate or to compel the other party to arbitrate. In the process, the Singapore High Court also gave guidance on how arbitration agreements will be intepreted by Singapore Courts.



FACTS

BMP (the "Defendant") and BMO (the "Plaintiff") were involved in a dispute over their shareholding of a Vietnamese subsidiary of BMP (the "Subsidiary"). The Defendant alleged that the Plaintiff and two individuals were responsible for unauthorised and unlawful share transfers that substantially reduced the Defendant's shareholding in the Subsidiary and allowed the Plaintiff to become a major shareholder. At all material times of this suit, the Defendant was acting through its receivers and managers (the "Receivers"; receivers and managers are people appointed by secured creditors to receive income and manage the business of the company).

Initially, the Defendant served a Statement of Claim to the Plaintiff and two individuals in the British Virgin Islands on 22 July 2014 (the "BVI Litigation"). In addition, the Defendant applied for an interim order restraining the Plaintiff from registering any transfer of shares or dealing with its interests in the Subsidiary (the "Interim Injunction"; an injunction is a judicial order restraining a person from beginning or continuing an action, or compelling a person to carry out a certain act). The Interim Injunction was granted.

Subsequently, the Receivers discovered that there was an arbitration clause in the shareholder's agreement between the Plaintiff and the Defendant (the "Arbitration Agreement"), and commenced arbitration on 12 March 2015 (the "Arbitration").

In its Notice of Arbitration, the Defendant requested the sole arbitrator (the "Tribunal") to rule on the question of the Tribunal's jurisdiction as a preliminary matter. The Defendant also wrote to the Plaintiff proposing that the BVI Litigation be temporarily stayed pending the outcome of the Arbitration. Notwithstanding the Defendant's proposal, the Plaintiff continued to apply to the BVI High Court to strike out the Defendant's claim, and sought to discontinue the Interim Injunction as well.

HOLDING OF THE ARBITRATION TRIBUNAL

In the Tribunal's Decision on Jurisdiction, the Tribunal held that it had jurisdiction and ordered that the Arbitration proceed pursuant to the Arbitration Agreement.

ISSUES BEFORE THE SINGAPORE HIGH COURT:

The Plaintiff appealed against the Tribunal's Decision on Jurisdiction and the main issue to be decided was whether the Defendant's actions in the BVI Litigation rendered the Arbitration Agreement inoperative.

However, the Singapore High Court ("the Court") had to decide on two preliminary issues, namely:

(a) governing law of the arbitration agreement when no express choice was made;

(b) whether the shareholding dispute fell within the scope of the Arbitration Agreement; and

(c) whether the Arbitration Agreement made it mandatory for parties to refer the dispute to arbitration.

HOLDING OF THE SINGAPORE HIGH COURT

For the main issue, the Court upheld the Tribunal's Decision on Jurisdiction and held that the Arbitration Agreement was not rendered inoperative by the BVI Litigation.

With regard to the preliminary issues, the Court held that:

(a) the governing law was determined by the express governing law of the whole agreement;

(b) the shareholding dispute fell within the scope of the Arbitration Agreement; and

(c) the Arbitration Agreement was mandatory.

Preliminary Issue – Governing Law of the Arbitration Agreement when no express choice was made

For this preliminary issue, the Court affirmed the approach adopted in *SulAmérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 (the "*SulAmérica* approach"). In short, the *SulAmérica* approach states that in the absence of an express choice of law for the arbitration agreement, the parties would be presumed to have made an implied choice to follow the expressly chosen law in the substantive contract.

In other words, even if the chosen country of arbitration is Singapore, the Court will deem the parties to have chosen to follow the expressly chosen law governing the substantive parts of the contract, rather than the law of the chosen country of arbitration.

On the facts of this case however, there was no express choice of governing law for the whole agreement, but the Arbitration Agreement mentioned that disputes shall be submitted to Singapore International Arbitration Centre ("SIAC").

Notwithstanding that, the Court noted that there were references to Vietnamese law in various provisions within the shareholder's agreement. While the Court recognised that these provisions did not operate as an express choice of law for the entire agreement, the Court held that the parties were unlikely to intend for different laws to govern different parts of the contract.

Accordingly, the Court held that the parties impliedly chose Vietnamese law for the shareholder's agreement and for the Arbitration Agreement.

Preliminary Issue – Whether the shareholding dispute fell within the scope of the arbitration clause

For this preliminary issue, the Court affirmed its decision in *Larsen Oil and Gas v Petroprod Ltd* [2011] 3 SLR 414 and reiterated that Singapore courts will interpret arbitration clauses generously such that all types of claims are regarded as falling within their scope unless there is good reason to conclude otherwise.

On the facts of this case, the phrase used in the Arbitration Agreement was "all arising disputes". Thus, the Court held that the Arbitration Agreement should be liberally understood to include every dispute except disputes relating to whether there was even a contract. Accordingly, the Court held that the shareholding disputes between the parties fell within the purview of the Arbitration Agreement, even if the share transfers involved pre-dated the shareholder's agreement.

Preliminary Issue – Whether the Arbitration Agreement made it mandatory for parties to refer the dispute to arbitration

For this issue, the Court first considered translations of the Arbitration Agreement provided by each party. The Court accepted the Plaintiff's translation, which stated that "disputes *shall* be submitted by any Party for final settlement to SIAC".

The Court then followed *Anzen Limited v Hermes One Limited* [2016] UKPC 1 and held that the word "*shall*" indicated that "*neither party will seek any relief in respect of such disputes in any other forum*". Consequently, the Court held that the Defendant had breach the Arbitration Agreement when it commenced BVI Litigation.

Did the BVI Litigation render the Arbitration Agreement inoperative?

For the main issue, the Plaintiff argued that the Arbitration Agreement was rendered inoperative because of the following:

(a) the Defendant had waived its right to arbitrate when it elected to commence BVI Litigation (the "Waiver by Election ground")

(b) the Defendant had repudiated the Arbitration Agreement (i.e. Defendant had demonstrated an intention to renounce the Arbitration Agreement) (the "Repudiation ground")

(c) the Defendant was estopped (or precluded) from pursuing arbitration having previously litigated the matter in the BVI High Court (the "Estoppel ground").

Accordingly, the Court dealt with each of the reasons cited by the Plaintiff.

(a) Waiver by Election ground

The Court observed that a waiver by election is, strictly speaking, a *response*. In other words, the waiving party must have been put to election (i.e. given a choice) by a set of circumstances (typically through a breach of contract). The Court then reasoned that a waiver by election is only available to the innocent party who has to choose how to *respond* to a breach of an Arbitration Agreement, and not the party in breach.

On the facts of this case, the Court held that there was no waiver by election available to the Defendant, since the Defendant was the one who breached the Arbitration Agreement. Therefore, the Waiver by Election ground did not succeed.

(b) Repudiation ground

The Court observed that commencing court proceedings do not automatically amount to a repudiation of an arbitration agreement. Instead, the Court held that for repudiation to be established, it must be shown that the party in breach no longer intends to be bound by the agreement to arbitrate, and the other party has accepted this renouncement.

Additionally, the Court reckoned that it was entitled to look at conduct beyond commencement of arbitration to examine whether there was an intention to renounce the Arbitration Agreement. The Court explained that an intention to deny the arbitration agreement can still exist if the party in breach demonstrated an intention to continue proceedings in court and remain in breach of the arbitration agreement.

On the facts of this case, the Court accepted the Defendant's explanation that it was simply not aware of its obligation to arbitrate. The Court also noted that it was the Plaintiff who took active steps to continue the BVI Litigation even after the Defendant sought to honour the Arbitration Agreement.

Accordingly, the Court held that the Repudiation ground was not made out, notwithstanding the fact that the BVI Litigation was not halted after arbitration proceedings had commenced.

(c) Estoppel ground

The Court observed that for the Estoppel ground to succeed, the Defendant must have made a promise not to enforce its *legal rights*, and the Plaintiff must have relied on this promise to his detriment.

On the facts of this case, the Court reasoned that the Defendant was the party in breach of the Arbitration Agreement, and did not have any legal rights to enforce. Therefore, the Defendant could not have made a promise not to enforce its *legal rights*.

Furthermore, the Court held that the Plaintiff did not appear to change its position during the course of BVI Litigation. Thus, the Court did not regard the Plaintiff's subsequent conduct in the BVI Litigation as a form of detrimental reliance.

As such, the Estoppel ground was not made out due to reasons similar to the Waiver by Election ground.

Given that the Plaintiff's three grounds in this main issue were not made out, the Court upheld the Tribunal's Decision on Jurisdiction and held that the Arbitration Agreement was still operative.

Concluding Views

This case provides a useful reminder that Singapore courts will interpret arbitration agreements generously and will not easily render them inoperative or inapplicable. This case shows that when parties were unaware of the arbitration agreement, courts are willing to suspend pre-existing legal proceedings and let parties explore arbitration instead upon discovery of an arbitration agreement.

Implicitly, this case suggests that courts will be slow to conclude that parties had renounced arbitration agreements, and will examine surrounding circumstances before making such conclusions. The mere commencement of court action by a party to an arbitration agreement could be for purposes other than in pursuit of its claim on the merits and therby an abandonment of its right to arbitrate.

Therefore, when entering into contractual agreements, parties are advised to pay close attention to arbitration agreements, and be mindful of the following:

(a) whether there is a mandatory obligation imposed on parties to arbitrate before bringing matters to court (examine whether words like "must" and "shall" are used). If there are such mandatory obligations, failure to refer the matter to arbitration first will amount to a breach of contract;

(b) the scope of the arbitration agreement (examine whether the arbitration agreement only applies to specific types of disputes). As long as the arbitration agreement is phrased broadly, courts will interpret it to cover any type of dispute; and

(c) the governing law of the arbitration agreement (examine whether the arbitration agreement specifies the governing law for arbitration proceedings). Parties are advised to specify this expressly to avoid uncertainty.

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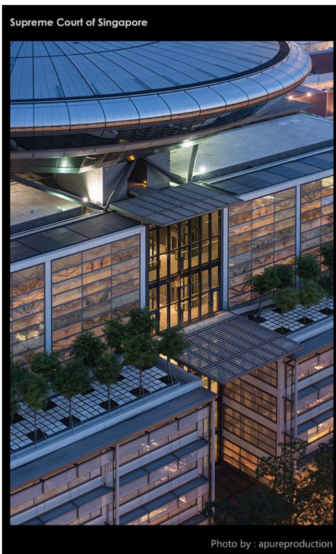
ARBITRATION: HOW COURTS DEAL WITH ONE-SIDED OPTIONAL ARBITRATION CLAUSES

***Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32**

IN SUMMARY

This Singapore Court of Appeal decision of 26 April 2017 discussed how the Singapore courts will interpret and enforce arbitration agreements that only give one of the parties the right to elect to arbitrate a dispute. Specifically, it examined whether the other party not given the right may enforce the arbitration agreement.



FACTS

Wilson Taylor Asia Pacific Pte Ltd ("Wilson Taylor") engaged the services of Dyna-Jet Pte Ltd ("Dyna-Jet"). Amongst the terms of their contract was a dispute-resolution agreement which gave only Dyna-Jet a right to elect to arbitrate a dispute arising in connection with the contract (the "Arbitration Agreement").

A dispute under the contract (the "Dispute") subsequently arose. The parties were unable to reach a negotiated settlement, and Dyna-Jet commenced legal proceedings against Wilson Taylor. By doing so, Dyna-Jet had effectively elected *not* to refer the Dispute to arbitration.

In response, Wilson Taylor sought to rely on *Section 6* of the *Singapore International Arbitration Act* (the "*IAA*") to ask the High Court to stay (temporarily suspend) the legal proceedings so that it could refer the matter to arbitration.

HOLDING OF THE SINGAPORE HIGH COURT

The High Court declined to stay the legal proceedings pursuant to *Section 6* of the *IAA*. The High Court held that the Arbitration Agreement was valid, even though it only gave Dyna-Jet the right to refer the matter to arbitration. The High Court also held that the Arbitration Agreement was "incapable of being performed" because Dyna-Jet had already initiated legal proceedings. In doing so, Dyna-Jet had chosen not to arbitrate the dispute, making it impossible for either party to refer the matter to arbitration afterwards. Accordingly, the High Court did not grant the stay of legal proceedings.

ISSUES BEFORE THE SINGAPORE COURT OF APPEAL:

(a) whether there was a valid arbitration agreement;

(b) whether the Dispute fell within the scope of the Arbitration Agreement; and

(c) whether the Arbitration Agreement was null and void, inoperative, or incapable of being performed.

HOLDING OF THE SINGAPORE COURT OF APPEAL

Whether there was a valid arbitration agreement

The Court of Appeal agreed with the High Court and held that there was a valid arbitration agreement. The Court of Appeal noted that the Arbitration Agreement only gave Dyna-Jet (as opposed to both parties) the right to compel Wilson Taylor to arbitrate the dispute, and that the Arbitration Agreement did not obligate Dyna-Jet to arbitrate the dispute (i.e. Dyna-Jet could choose whether to arbitrate the dispute).

Nevertheless, the Court of Appeal held that these features did not prevent Singapore courts from concluding that the Arbitration Agreement was a valid one.

Whether the Dispute fell within the scope of the Arbitration Agreement

The Court of Appeal disagreed with the High Court for this issue, and held that the Dispute did not fall within the scope of the Arbitration Agreement.

The Court of Appeal first reiterated the general principle that an arbitration agreement must be construed and applied in accordance with its terms.

Applying this principle to the facts of this case, the Court of Appeal noted that the critical words of the Arbitration Agreement was that the dispute may be arbitrated "at the election of Dyna-Jet". The Court of Appeal held that the only plausible way to construe this phrase was that it gave Dyna-Jet *alone* the option to choose whether any disputes were to be resolved either by arbitration or by litigation.

Since Dyna-Jet had already chosen to refer the Dispute to litigation by commencing legal proceedings, the Court of Appeal held that the Dispute never fell within the scope of the Arbitration Agreement.

On this basis, the Court of Appeal did not grant a stay in legal proceedings pursuant to *Section 6* of the *IAA*.

Whether the Arbitration Agreement was null and void, inoperative ot incapable of being performed

Given its holding on the previous issue, the Court of Appeal did not examine this issue.

Concluding Views

This is the first case in which the Singapore Court of Appeal has the opportunity to rule on the "unilateral" right to arbitrate and strongly upheld such clauses. This case provides a useful reminder that Singapore courts will enforce properly drated one-sided arbitration agreements, and will not invalidate them just because there is a "lack of mutuality". This is consistent with party autonomy.

On a broader note, this case reflects that Singapore courts will generally give precedence to what is drafted in arbitration agreements, rather than intervene and substitute express words in arbitration agreements with interpretations that appear more fair or favourable. Readers are thus advised to be mindful of arbitration agreements that they may enter into.

In particular, parties should be aware of whether their arbitration agreements are mandatory in nature, and whether such arbitration agreements confer rights and obligations to both parties or just one party.

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THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION'S ("KLRCA") UPDATED *ARBITRATION RULES 2017*

The KLRCA published its updated Arbitration Rules (the "KLRCA Rules 2017") on 1st June 2017. The KLRCA Rules 2017 replace the previous version of the rules which were last revised in 2013 and will apply to all KLRCA arbitrations, including emergency arbitrations commenced after 1st June 2017, unless parties agree otherwise.

The KLRCA Rules 2017 were designed to increase efficiency and quality in KLRCA-administered arbitrations.

KEY CHANGES

Some of the key changes introduced by the KLRCA Rules 2017 include:

(a) new provisions in *Rule 9* on the Joinder of Additional Parties, allowing for third parties to be joined to the arbitration provided that all parties (including the third party) agree, or the third party is prima facie bound by the arbitration agreement;

(b) improved provisions in *Rule 10* on Consolidation of Proceedings, allowing the Director of the KLRCA to consolidate two or more arbitrations into one arbitration if the Director deems it appropriate, despite parties not having agreed to consolidation or making a request to consolidate, where previously, only the arbitral tribunal had the power to order consolidation and only if the parties agreed to confer such power on the arbitral tribunal;

(c) new detailed provisions in *Rule 12* for the Technical Review of Awards, whereby the Director of the KLRCA will review draft awards and draw to the attention of the arbitral tribunals "*any perceived irregularity as to the form of the award and any errors in the calculation of interest and costs*", before the awards are issued to the parties as final awards; and

(d) a Model Arbitration Clause and Submission Agreement for disputes to be administered under the KLRCA Rules 2017, providing an option for parties to seek amicable settlement of a dispute by mediation in accordance with the *KLRCA Mediation Rules* before referring the dispute to Arbitration.

Concluding Remarks

The changes implemented bring the KLRCA Rules 2017 in line with the arbitration rules of other institutions such as the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC), especially with respect to regulating multi-party arbitration.

It is also interesting to note that the Model Arbitration Clause encourages parties to seek an amicable settlement by mediation before referring the dispute to arbitration. This is consistent with the KLRCA's aim of promoting Malaysia as a hub for Alternative Dispute Resolution.

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If you would like more information on this or any other area of law, you may wish to contact us.

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