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

Case Number	: Civil Appeal No 71 of 2016 (Suit No 1234 of 2015)
Decision Date	: 26 April 2017
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Judith Prakash JA; Steven Chong JA
Counsel Name(s)	: S Magintharan, Vineetha Gunasekaran, and James Liew Boon Kwee (Essex LLC) for the appellant; Tan Yew Cheng (Leong Partnership) for the respondent.
Parties	: Wilson Taylor Asia Pacific Pte Ltd — Dyna-Jet Pte Ltd

Arbitration – Stay of proceedings

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2017] 3 SLR 267.]

26 April 2017

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 This appeal arises out of an application by the Appellant, made by way of Summons No 6171 of 2015 ("Summons 6171"), to stay the court proceedings commenced by the Respondent in Suit No 1234 of 2015 ("Suit 1234"), in favour of arbitration pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA").

2 Summons 6171 was heard and dismissed by an assistant registrar (the "AR") on 21 January 2016. The Appellant's appeal in Registrar's Appeal No 43 of 2016 ("RA 43") against the AR's decision was dismissed by the High Court judge (the "Judge") on 29 February 2016. The decision of the Judge is reported at *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 (the "GD").

3 Dissatisfied with the outcome of the proceedings before the AR and the Judge, the Appellant appealed against the decision of the Judge in Civil Appeal No 71 of 2016, which we heard and dismissed on 17 April 2017. We gave some brief reasons for our decision at the time and we now elaborate on those reasons.

Facts

4 The Appellant engaged the Respondent to install underwater anodes on the island of Diego Garcia in the Indian Ocean. Amongst the terms of their contract (the "Contract") was a dispute-resolution agreement (the "Clause"), which gave only the Respondent a right to elect to arbitrate a dispute arising in connection with the Contract. The Clause provides:

> Dyna-Jet [which is the Respondent] and the Client [which is the Appellant] 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 Dyna-Jet 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 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.

[Emphasis added]

5 A dispute subsequently arose under the Contract (the "Dispute"). The parties attempted, but failed, to reach a negotiated settlement. The Respondent then commenced Suit 1234 against the Appellant. By doing so, the Respondent in effect elected *not* to refer the Dispute to arbitration. The Appellant then filed SUM 6171 to have Suit 1234 stayed pursuant to s 6 of the IAA.

6 The AR dismissed the Appellant's application for a stay. She held that although the Clause constituted a valid arbitration agreement within the meaning of s 6 of the IAA, only the Respondent was entitled to elect arbitration thereunder. She went on to hold that since the Respondent had elected to pursue its claims by litigation rather than arbitration, the arbitration agreement had become "inoperative or incapable of being performed" under s 6(2) of the IAA with respect to the Dispute.

7 The Judge dismissed the Appellant's appeal. He observed that the Appellant, as the applicant for the stay under s 6 of the IAA, bore the burden of proving only that the Clause constituted an arbitration agreement within the meaning of s 2A of the IAA and that the Dispute fell within the scope of the Clause. In order to successfully resist the stay, the Respondent had to prove that the Clause was "null and void, inoperative of incapable of being performed" within the meaning of the proviso to s 6(2) of the IAA. In order to meet its burden, the Respondent had to establish that no other conclusion on this issue was arguable (GD at [26]–[27]).

8 The Judge held that the Clause constituted an arbitration agreement despite its asymmetrical nature. After an extensive survey of modern Commonwealth authority, the Judge decided that a contractual dispute-resolution agreement conferring 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 was nevertheless an arbitration agreement (GD at [61(a)]). Thus he dismissed the Respondent's argument that the Clause was not an arbitration agreement because of its "lack of mutuality". The Judge also held that the fact that a contractual dispute-resolution agreement granted a right to elect whether to arbitrate a future dispute was nevertheless an arbitration agreement (GD at [61(b)]). Therefore the characteristic of "optionality" in a dispute-resolution agreement was not inconsistent with the meaning or nature of an arbitration agreement. Summing up these principles, he concluded that a contractual dispute-resolution agreement which confers an asymmetric right to elect whether to arbitrate a future dispute is properly regarded as an arbitration agreement within the meaning of s 2A of the IAA (GD at [61(c)]).

9 The Judge found that given the events that had transpired, the Clause had become "incapable of being performed" within the meaning of s 6(2) of the IAA because the Respondent had, by electing to litigate the Dispute, foreclosed any possibility that the Respondent (or, for that matter, the Appellant) could subsequently choose to have the Dispute referred to arbitration instead (GD at [152]–[161]).

Our decision

10 Section 6(1) and (2) of the IAA provide as follows:

Enforcement of international arbitration agreement

> **6**.—(1) … 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.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

11 In *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [63], we held that s 6 of the IAA required the court to be satisfied that three requirements had been fulfilled, before it granted a stay of the court proceedings said to have been brought in breach of an arbitration agreement:

> (a) first, that there is a valid arbitration agreement between the parties to the court proceedings;
>
> (b) second, that the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
>
> (c) third, that the arbitration agreement is not null and void, inoperative, or incapable of being performed.

12 We also held in *Tomolugen* at [63] that in considering these matters in the context of an application under s 6 of the IAA, the court should adopt a *prima facie* standard of review. This is a function of the doctrine of *kompetenz-kompetenz*, which provides that an arbitral tribunal has jurisdiction to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, and which requires that the parties refer any relevant objections to the arbitral tribunal in the first instance: see s 21(1) of the IAA and *Sim Chay Koon and others v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 at [4]–[5].

13 In respect of the first of the three requirements outlined at [11] above, we agreed with the Judge and also the Appellant that the Clause constituted a valid arbitration agreement between the Appellant and the Respondent. It was immaterial for this purpose that the Clause: (a) entitled only the Respondent (but not the Appellant) to compel its counterparty to arbitrate a dispute (the "lack of mutuality" characteristic); and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate their disputes (the "optionality" characteristic). On the weight of modern Commonwealth authority, which the Judge considered, neither of these features prevented the court from finding that there was a valid arbitration agreement between the present parties. And before us, neither party contended otherwise.

14 We turn to the second of the three requirements outlined at [11] above. The Judge appeared to have assumed that the Dispute, which formed the subject-matter of Suit 1234, fell within the scope of the arbitration agreement in the Clause. He held as follows (GD at [23]):

> It is common ground that, if the parties' dispute-resolution agreement is found to be an arbitration agreement, the dispute which is the subject-matter of this action is "the subject of the agreement" within the meaning of s 6(1) [of the IAA]. In other words, there is no dispute that the subject-matter of this action falls within the meaning of the phrase "[a]ny claim or

dispute or breach of terms of the Contract" in the parties' dispute-resolution agreement …

15 With respect, we disagree. In our judgment, the Judge was led into error by the common but mistaken position the parties took on this point. The fact that the court is to apply a *prima facie* standard of review in relation to the three requirements we have referred to at [11] above when considering an application for a stay under s 6 of the IAA does not mean that it must turn a blind eye to obvious drawbacks in the case put forward by an applicant, which drawbacks would not pass muster even applying an attenuated standard of review. It is also important to bear in mind that this review is to be undertaken as of the time when the stay application was filed. In the present case, it was clear to us that even on a *prima facie* standard of review, at the time the stay application was filed, the Dispute could not possibly be said to fall within the scope of the arbitration agreement that was contained in the Clause.

16 It is not controversial that an arbitration agreement must be construed and applied in accordance with its terms, and counsel for the Appellant, Mr Magintharan, did not dispute this. The critical words in the Clause are "at the election of Dyna-Jet" (see [4] above). The specific question raised is whether these words meant that arbitration, as a dispute-resolution method, was something that existed only as an *option* that the Respondent alone could choose to invoke or whether these words meant something else.

17 Mr Magintharan submitted that they meant something else. He submitted that those words should be construed as giving rise to an *obligation* to arbitrate, which either party could invoke against the other. With respect, this seemed an implausible submission, but he made it, apparently, on the strength of the decisions of the Courts of Appeal of England and Wales and of Hong Kong respectively in *Pittalis v Sherefettin* [1986] 1 QB 868 ("*Pittalis*") and *China Merchants Heavy Industry Co Ltd v JGC Corp* [2001] 3 HKC 580 ("*China Merchants*"). However, a brief look at both these decisions will reveal that they concerned dispute-resolution clauses of a particular sort because the only disputes that were contemplated in those cases were of that particular sort. Consequently, they had no application at all to the facts before us. Specifically, they were of the sort where one party (the defendant) would make a *decision* affecting its counterparty (the plaintiff) and the *only* dispute that would arise would be one where the plaintiff wished to challenge that decision. In that context, the dispute-resolution clauses did not provide for the arbitration of disputes arising *generally* in connection with the contract between the parties. Rather, the dispute-resolution clauses permitted the plaintiff to challenge only the *decision* made by its counterparty *in a specific regard* and to do this *only by way of arbitration*.

18 Turning first to *Pittalis*, this case involved a rent-review clause within a lease that provided that the rent payable was to be a sum notified by the landlord, subject to the right of the tenant to have that sum reviewed and determined by arbitration before an independent surveyor. After the landlord notified the tenant of the intended rent, the tenant failed to give notice within time, as required under the rent-review clause, to challenge the rent and have it determined by arbitration. The landlord sued for possession. The tenant then applied for an extension of time to refer the matter to arbitration. A preliminary objection was raised as to whether the rent-review clause was an arbitration clause at all, given that the clause contemplated that *only one but not both* parties could refer the matter to arbitration. In that context, Fox LJ held (at p 875E-G):

> … I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exerciseable by one of the parties only seems to me to be irrelevant. The arrangement suits both parties. The reason why that is so in cases such as the present and in the *Tote*

Bookmakers case [1985] Ch. 261 is because *the landlord is protected, if there is no arbitration, by his own assessment of the rent* as stated in his notice; and *the tenant is protected, if he is dissatisfied with the landlord's assessment of the rent, by his right to refer the matter to arbitration*. Both sides, therefore, have accepted the arrangement and there is no question of any lack of mutuality. [Emphasis added]

19 This was undoubtedly correct but it did not help the Appellant for the following reasons:

(a) First, unlike the position in *Pittalis*, the Clause (and the Contract) was not one where the only disputes that would arise were going to involve one party seeking to challenge the decision of its counterparty.

(b) Second, unlike the position in the present case, the tenant in *Pittalis* was seeking to invoke the right vested in *itself* alone to take the landlord's decision to arbitration. By contrast, in the present case, the *Appellant* was seeking to invoke a right vested in the *Respondent* alone to have the matter referred to arbitration. The Appellant could not do this. Even though, on the other hand, had the Appellant commenced litigation against the Respondent, the latter could have invoked its option to stay the litigation and have the matter referred to arbitration, the converse simply did not hold true in the context of the Clause.

20 Likewise, *China Merchants* involved a construction contract containing a dispute-resolution clause which provided that disputes in connection with the contract were to be decided by the main contractor, subject to the right of the sub-contractor to challenge such decisions by referring them to arbitration. It is evident that in each of these cases, only one party (namely, the tenant in *Pittalis* and the sub-contractor in *China Merchants*) could have had an interest in challenging the decisions in question, which would, after all, have been made by its counterparty. In this context, it will be apparent that the party receiving the counterparty's decision did not in fact have a right to choose between arbitration and litigation as a mode for bringing its challenge. Rather, as the Judge explained, the relevant contracts "gave [that party] only the choice between referring a dispute to arbitration and accepting that it was bound by the [counterparty's] decision in writing on that dispute" (GD at [106]).

21 In other words, the references to the "arbitration" of disputes in *Pittalis* and *China Merchants* were references only to the *mechanics* by which the party wishing to challenge its counterparty's decision could mount such a challenge. In neither case did that party's right to challenge the counterparty's decision contain a separate and further entitlement also to choose *whether* to refer its disputes with the counterparty to either litigation or arbitration. That entitlement belonged solely to the counterparty. And, even more importantly, neither case should be read outside of their particular contexts to suggest, as Mr Magintharan did, that whenever there is a right for one party to choose to refer disputes arising under a contract to arbitration, that right can also be invoked by its counterparty.

22 We digress to make a related point. Where a court is considering, on a *prima facie* standard of review, whether a dispute falls within the scope of an arbitration clause, and where the principal argument by the applicant for a stay of proceedings in favour of arbitration turns on a particular construction of the arbitration agreement, it must be incumbent on that applicant to advance the interpretation that would support its contention that the dispute in question could conceivably be brought within the arbitration agreement. The onus lies on the applicant to persuade the court of his preferred interpretation because this is part of his wider burden to establish that the dispute falls within the scope of the arbitration agreement (see *Tomolugen* at [63(b)]).

23 In the present case, the only plausible way to construe the phrase "at the election of Dyna-Jet" in the Clause (see [4] above) was that it gave the Respondent *alone* the option to choose whether any disputes arising in connection with the Contract, whether initiated by the Appellant or the Respondent, were to be resolved either by arbitration or by litigation. We say this because the default position, which is so well established as to require no further affirmation, is that any party can take any dispute arising under any contract to the court, unless there is some agreement to the contrary. Unlike *Pittalis* and *China Merchants*, this was not a case where it was necessary to prescribe in the Contract a right to take a particular type of dispute (or more accurately in the context of those cases, a challenge) to a particular type of dispute-resolution forum. Hence, the phrase in question in the Clause could have meant only that the Respondent alone had the right to choose the particular forum by which the Dispute would be tried. As we pointed out to Mr Magintharan, the nature of the right of election conferred on the Respondent under the Clause was not between commencing proceedings and not commencing proceedings, as it was in *Pittalis* and *China Merchants*, but rather between commencing litigation and commencing arbitration. A similar observation was made by the Judge at [106] of the GD which we have referred to at [20] above. Indeed, were it otherwise, the Appellant would have had no right to commence proceedings at all, and Mr Magintharan agreed that this would have been untenable.

24 Since the Respondent had clearly chosen to refer the Dispute to litigation by commencing Suit 1234, it was plain to us that the Dispute never fell within the scope of the Clause. Indeed, this is a consequence of the characteristic of optionality possessed by the Clause, which, as we have described at [13] above, entails that the Clause did not place the parties under a present obligation to arbitrate but would give rise to an arbitration agreement *only if and when the Respondent 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 the Respondent 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"; it was therefore not open to us to stay Suit 1234 in so far as Suit 1234 related to that "matter". It is 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.

25 Given our conclusion that the Dispute did not fall within the scope of the arbitration agreement in the Clause, we did not reach the third of the three requirements outlined at [11] above, which would have raised the question of whether the Clause was "null and void, inoperative or incapable of being performed" under s 6(2) of the IAA.

26 We therefore dismissed the appeal and awarded costs to the Respondent, which we fixed in the aggregate sum of $30,000, which included the costs of the related applications and also reasonable disbursements. We also made the usual order for the payment out of the security.