Case Note

Unilateral Arbitration Clauses: When a One-sided Consensus is Actually a Consensus

Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd [2017] 2 SLR 362[1]

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Abstract

One of the cornerstones of arbitration is consensus. Parties must agree to arbitrate. But if the agreement to arbitrate provides only one party with an exclusive right to choose between litigation and arbitration, does that constitute consensus?

In Commonwealth and many common law countries, the answer, apparently, is yes. Wilson v Dyna-Jet *is the most recent authority that upholds the validity of unilateral arbitration clauses or UACs.*

It is the initial agreement to arbitrate that establishes consensus and the characteristic of optionality is not inconsistent with the consensual nature of an arbitration agreement.

When discussing the validity of UACs, the focus is often on mutuality and/or optionality. Of particular interest in this case is whether a dispute can still fall within the scope of the arbitration agreement once the option for litigation has been exercised.

Background

Wilson Taylor Asia Pacific Pte Ltd ('Wilson') entered into a contract with Dyna-Jet Pte Ltd ('Dyna-Jet') to install underwater anodes on the island of Diego Garcia. The contract contained a multi-tiered dispute resolution clause, which provided that if a dispute arose that could not be settled through 'mutual consultation,' then 'at the election of Dyna-Jet, the dispute may be referred to and personally settled

[1] *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 ('*Wilson v Dyna-Jet*').

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by means of arbitration proceedings … conducted under English Law; and held in Singapore' ('Arbitration Agreement').

A dispute arose between the parties, which they failed to resolve amicably. Dyna-Jet commenced legal proceedings against Wilson, electing to refer the dispute to litigation, not arbitration.

Wilson sought to stay the suit pursuant to s 6 of the *International Arbitration Act* ('*IAA*').[3]

Wilson's application for a stay was dismissed by the Assistant Registrar, as was its subsequent appeal to the High Court. Wilson then appealed \ the decision of the High Court Judge to the Court of Appeal, with no more success than in its first two attempts. The Court of Appeal affirmed the decisions of the lower courts, finding that an arbitration agreement conferring an option on only one of the parties to refer a dispute to arbitration is a valid consensual agreement as to the availability of arbitration for future disputes.

The Standard of Review

The Court of Appeal in *Wilson v Dyna-Jet* underscored the importance of the doctrine of *kompetenz-kompetenz* and the arbitral tribunal's jurisdiction to rule on its own jurisdiction, as well as on scope and arbitrability.[4] To respect the spirit of this principle in the context of an application under s 6 of the *IAA*, Singaporean courts should adopt a *prima facie* standard of review, as highlighted by Menon CJ.

In the present case, the most important issue was the timing of the review of the stay application, with respect to the choice of the mode of dispute resolution. The burden of proof to establish that the dispute - *at that time* - fell within the scope of the arbitration agreement rested with the applicant.[5]

In fact, when Wilson filed its application for a stay, Dyna-Jet had already exercised its option to litigate the matter. This led the Court of Appeal to determine that, even on a *prima facie* standard of review, the dispute could not fall within the scope of the Arbitration Agreement, as discussed below.

[3] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed).

[4] *Wilson v Dyna-Jet* (above n 1) 366-7 [12]. Although the decision refers to s 21(1) of the *IAA*, it appears that this is an error and the reference is to s 21 of the (domestic) *Arbitration Act* (Singapore, cap 10, 2002 rev ed).

[5] Ibid 370 [22]. See also *Tomolugen Holdings Ltd & Another v Silica Investors Ltd & Ors* [2016] 1 SLR 373, 23 [48], 33 [64] ('*Tomolugen v Silica*').

Grounds for Granting a Stay

The grounds for granting a stay are elucidated in the *IAA* and in *Tomolugen Holdings Ltd & Another v Silica Investors Ltd & Ors* ('*Tomolugen*').[6]

Sections 6(1) and (2) *IAA* allow a party to apply for a stay of any proceedings 'in respect of any matter which is the subject of the agreement', and that the court may order a stay 'unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed'.

Tomolugen sets out a three-prong test for granting a stay of court proceedings brought in breach of an arbitration agreement, requiring:

(a) valid arbitration agreement;
(b) an arbitrable dispute or one that falls within the scope of the arbitration agreement; and
(c) an arbitration agreement that is not null and void, inoperative, or incapable of being performed.[7]

Mutuality and optionality are the bases most commonly used in determining the validity of asymmetrical or unilateral arbitration agreements.

Wilson's argument that the Arbitration Agreement was not valid due to its lack of mutuality was dismissed, as a clause 'conferring an asymmetric right' on one party 'to elect whether to arbitrate a future dispute' constitutes an agreement to arbitrate.[8]

The High Court of Australia has also provided guidance on the interpretation of mutuality in *PMT Partners v Australian National Parks*.[9] It is not a question of whether the parties share equal rights to require arbitration, but rather whether the parties arrived at a consensus as to the availability of arbitration (*i.e.*, the contractual mechanism to invoke arbitration).[10]

[6] [2016] 1 SLR 373.

[7] *Tomolugen v Silica* (above n 5), 32–3 [63]. Ultimately, the Court of Appeal dealt only with the first two prongs in *Wilson v Dyna-Jet*.

[8] *Wilson v Dyna-Jet* (above n 1), 365 [8].

[9] (1995) 184 CLR 301.

[10] Ibid 310.

Likewise, with respect to optionality, in *Wilson v Dyna-Jet* the Court of Appeal held that 'a 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'.[11]

Thus, the words 'at the election of Dyna-Jet' are to be treated as any other contractual clause that provides an option to one party and not the other.[12]

Scope

Although the Court of Appeal upheld the High Court's dismissal of the appeal, it differentiated its decision on the question of whether the dispute fell within the scope of the Arbitration Agreement.[13]

Customarily, the scope of an arbitration agreement refers to the parties' agreement as to what is arbitrable. Scope is generally determined by the wording of the arbitration agreement, primarily, whether the wording is:

(a) broad enough to encompass the matter in controversy;
(b) narrowly defines the category or type of disputes that may be subject to arbitration; or
(c) whether the subject matter of the dispute is caught in or excluded by the arbitration agreement.[14]

This was the interpretation of the High Court, which determined that the dispute 'fell within the scope of the arbitration agreement'.[15]

However, the Court of Appeal took a more novel approach. Menon CJ found that no dispute could fall within the scope of the Arbitration Agreement, since the stay application had been made after court proceedings had commenced (at Dyna-Jet's option).

By electing to litigate, Dyna-Jet foreclosed the possibility of arbitration. Therefore, according to Menon CJ, the dispute could not possibly be said to fall within the scope of the Arbitration Agreement. The only instance in which this dispute – or any dispute between the parties for that matter – would fall

[11] See above n 8.

12 While this is the position in most Commonwealth jurisdictions, such clauses may not be valid under civil law, where the concept of potestativité or similar would disallow a lack of mutuality.

[13] This was the second prong of *Tomolugen.*

[14] Alternatively, statute or public policy considerations may govern arbitrability.

[15] *Wilson v Dyna-Jet* (above n 1) 367 [14].

within the scope of the Arbitration Agreement would be 'only if and when [Dyna-Jet] elected to arbitrate', but not if the election to litigate had already been made.[16]

The Decision and its Ramifications

In its decision, the Court of Appeal held that the Dispute could only have fallen within the scope of the Arbitration Agreement if the respondent had so elected, affirming that '[i]n 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"'.[17]

Chief Justice Menon further opined that the lack of mutuality and the characteristic of optionality were immaterial, and that the clause constituted a valid arbitration agreement.[18]

The fact that the UAC did not create a present obligation on the parties to arbitrate a dispute, but instead enabled the respondent to elect to arbitrate a specific dispute in the future, was found to be a consequence of optionality. This optionality did not, however, preclude the Court of Appeal from holding that the Arbitration Agreement was nonetheless valid.

It is interesting to note that in some respects UACs are more analogous to submission agreements than agreements to arbitrate, as they are entirely optional – albeit with the option at the sole discretion of one party – instead of placing the parties under an immediate obligation to arbitrate their future disputes.

Wilson v Dyna-Jet offers the most recent example in a line of English and Commonwealth cases that underscore 'the weight of modern Commonwealth authority' in favour of UACs.[19] While it is now well-settled law in Singapore that asymmetric arbitration agreements are valid, this matter has yet to come squarely before courts in other jurisdictions, such as Australia. And elsewhere, such as in the United States and civil law countries, such a lack of mutuality may render such a clause invalid.

Thus, when drafting these agreements, parties should take care to ensure that they understand the implications of providing one party with the option to later choose the means of resolving the dispute, irrespective of which party holds the key to exercising that option. This should be a key consideration in both selecting a seat and anticipating in which jurisdictions an award is likely to be enforced.

[16] Ibid 371 [24].

[17] Ibid.

[18] Ibid 367 [13].

[19] Ibid.

Otherwise, parties may be surprised to learn that their agreement, although consensual, might in essence be clearly one-sided.