The Validity of Asymmetrical Arbitration Clauses

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In the recent case of *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd [2017] 2 SLR 362; [2017] SGCA 32* ("**Wilson**"), the Court of Appeal was invited to consider the validity of an arbitration agreement that only provided for one party to commence arbitration.

In *Wilson*, there was a contract between the Appellants and the Respondents which provided that disputes under the agreement could be referred to arbitration "at the election" of the Respondent (the "**Arbitration Clause**"). A dispute subsequently arose, for which the Respondent commenced litigation proceedings instead of exercising its right to refer it to arbitration. The Appellants applied to court for a stay of proceedings in favour of arbitration under section 6 of the International Arbitration Act (Cap 143A), arguing that the Arbitration Clause was invalid for lack of mutuality.

The Court of Appeal held that an Arbitration Clause is valid even if:

(a) The right to elect for arbitration is not mutual, conferring on one party the exclusive right to commence arbitration (the "mutuality" requirement); and

(b) The parties are not bound to arbitrate future disputes, but reserve the option to elect for arbitration at a later time (the "optionality" requirement).

There are practical consequences for such a decision. Parties who seek to govern their future disputes through arbitration provisions can now incorporate such asymmetrical terms with a measure of certainty. Furthermore, contracting parties can now ensure that they preserve their ability to decide at a suitable time if arbitration or litigation will best fit the situation and nature of the dispute.

On a broader level, the acceptance of future "optionality" and waiver of mutual reciprocity in arbitration agreements seems to signal an intention of courts to give greater effect to the ability of negotiating parties to vary and settle upon their rights and obligations. This inherent flexibility has been a hallmark of arbitration agreements, and this decision in *Wilson* should provide a positive sign for parties seeking to craft arbitration agreements to suit their needs.

However, caution should also be used in exercising this freedom, since the courts will closely adhere to the general principles of contractual interpretation and construction in determining the effect of the wording used. It would therefore be prudent for parties to give careful thought to the final composition of the clause, to prevent any future ambiguity or avoid contingent disputes.

From a policy perspective, this decision also underscores the pro-choice stance that the Singapore judiciary takes to dispute resolution, where parties are free to elect and make provisions to determine which forum might be best suited to resolve the dispute.

Taken as a whole, *Wilson* is a good example of a recent case where the Court continues to explore and define the scope and validity of arbitration clauses.

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