

Cordells Rompotis

Case Note - August 2012

A Double Barreled Arbitration Clause

Arbitration clauses come in all shapes and sizes. An interesting example arose in *Secretary for Justice v HP Enterprise Services (Hong Kong) Ltd* [2012] HKCFI 1328, a decision of Au J. in the Court of First Instance, delivered on 28th August 2012.

The facts are relatively straightforward. HP Enterprise Services (Hong Kong) Ltd ("HP") agreed to supply, install and maintain software and services to a Hong Kong Government Department. The agreement contained a Specification which HP was required to comply with. In late 2006, the Government terminated the agreement alleging various breaches, including a failure by HP to submit the software for testing within the time specified in the agreement, a failure by HP to provide the software by the completion date and, by seeking substantial variations to the agreement that would result in an inability to deliver the software as agreed, actions evincing an intention not to be bound by the agreement.

Government commenced court proceedings against HP seeking damages estimated at HK\$120m. HP sought to stay the action to arbitration.

There was no dispute that the agreement contained a valid arbitration clause. However, the arbitration clause provided that only disputes that were of "a *technical nature concerning the interpretation of the Specification*" or disputes that were of "any *similar or related matter*" should be referred to arbitration; any other dispute was to be determined by the Hong Kong courts. The issue was, therefore, whether the disputes that arose fell within the scope of the arbitration clause.

The Government argued as follows:

a. The arbitration clause did not contemplate all disputes of a technical nature, rather only covered disputes on the technical interpretation of the Specification. In other words, once the interpretation of the disputed technical terms of the Specification were resolved in arbitration, any disputes on whether

certain works that had been carried out were in accordance with the Specification should be litigated in the courts.

- b. Even if the arbitration clause was wider than argued, the present disputes did not fall within it because the Court should look only at the Government's claim as pleaded in the Statement of Claim, which did not contain a technical dispute concerning the interpretation of the Specification. Reliance was placed on *Tommy C P Sze v Li & Fung* [2003] 1 HKC 418.
- c. Even if HP's case was examined, it only amounted to HP saying that the disputed works it had been asked to carry out went outside the scope of the Specification.
- d. The quantum part of Government's claim was not technical in nature and did not involve an interpretation of the Specification.

In a draft document setting out its case against Government, HP alleged that its non-completion of the software by the completion date was caused by the Government's breach of the Contract including demanding and insisting on additional functionality that went beyond the scope of the project specification, failing to allow a reasonable extension of time for completion, and hindering or preventing HP from performing the agreement. HP argued that the works insisted upon by Government were within the scope of the Specification (which was clearly technical in nature) and, if so, the proceedings should be stayed as the subject matter fell within the arbitration clause.

The Court agreed with HP, rejecting all of the Government's arguments. Principally, it found that the Specification was technical in nature and that on a proper construction, the arbitration clause covered any dispute of a technical nature that related to, referred to, or had a bearing on the interpretation of the Specification. The Court also found that it covered any matters similar to or related to such disputes.

In respect of Government's alternative arguments:

- a. The Court doubted that *Tommy C P Sze* lay down a general principle that, in determining whether a "dispute" falls within a particular arbitration agreement, one should never look at the defence at all. It was highly relevant, in the Court's view, to look at HP's draft statement to determine whether the true nature of the disputes between the parties came within the scope of the arbitration clause.
- b. Looked at objectively and practically, it must be part of the Government's position that the disputed works fell within the scope of the Contact Conditions and the Specification. The determination of these disputes involved the determination of the scope of the Specification through its interpretation and whether the disputed works fell within that scope of the Specification. These disputes and their determinations were clearly highly technical in nature and fell within the scope of the arbitration clause.
- c. Referring to Government's decision to award the contract to another software developer and claim various costs from HP, the Court held that the determination of the reasonableness of the costs to Government for completing this highly technical project must involve references to the scope and interpretation of the Specification and expert evidence concerning the carrying out of such works. Accordingly, the issue of quantum was technical in nature, and related to the interpretation of the Specification.

As a result, the Court ordered that all further proceedings in the action be stayed to arbitration pursuant to the arbitration clause with a cost order against the Government.

Arbitration clauses are usually drafted to ensure that any and all disputes arising in the underlying agreement are referred to arbitration. While there are circumstances where it may be desirable to fragment a dispute resolution clause with the aim of submitting only some disputes to arbitration and others to some other forum (for example, expert determination), drafting such clauses poses obvious challenges and parties should give careful consideration prior to agreeing such a course.

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