HCA 667/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO 667 OF 2011

BETWEEN

SECRETARY FOR JUSTICE — Plaintiff

and

HP ENTERPRISE SERVICES (HONG KONG) LIMITED (formerly known as EDS ELECTRONIC DATA SYSTEMS (HONG KONG) LIMITED — Defendant

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Before : Hon Au J in Chambers

Date of Hearing : 23 May 2012

Date of Judgment : 28 August 2012

J U D G M E N T

A. INTRODUCTION

1. This is the defendant's application to stay the proceedings herein for arbitration pursuant to an arbitration agreement. The application is made under s 20 of the Arbitration Ordinance (Cap 609).

2. The dispute in the proceedings arose in the following way.

3. The defendant entered into an agreement dated 1 June 2004 ("the Agreement") with the Government to provide (on a fixed sum price basis) software and services necessary to establish a Client Information System ("CIS") for the Social Welfare Department ("SWD").

4. The Agreement incorporated the terms and conditions provided in, amongst others, the Conditions of Contract ("the Contract Conditions"), Contract Schedules ("Schedules") and the Project Specification ("the Project Specification"), which were part of the tender documents issued by the Government inviting the tenders for the supply of the CIS.

5. On 19 September 2006, the Government gave a written notice ("the Termination Notice") to the defendant terminating the Agreement. It was the Government's case that the defendant had failed to remedy breaches of various terms of the Agreement, or alternatively the defendant was in repudiatory breach of them (which the Government had accepted).

6. By the action herein (issued on 12 April 2011), the Government claims the defendant for breach of the Agreement for damages in the estimated sum of $120 million odd.

7. On 14 December 2011, the defendant took out the present application to stay the action for arbitration.

8. It is common ground that the Agreement contained a valid arbitration clause (set out in the Contract Conditions) ("the arbitration clause").

9. The central contentions in this application are whether the present dispute comes within the ambit of the arbitration clause, and the matter should thus be stayed for arbitration.

10. To put the debate in context, one has to look at the arbitration clause first.

B. THE STAY APPLICATION

B1. The arbitration clause

11. The arbitration clause was set out at clause 47.5 of the Contract Conditions, which provides as follows:

> "47.5 In the event that no settlement is reached:
>
> 47.5.1 *if the dispute shall be of a technical nature concerning the interpretation of the Specification or any similar or related matter then such dispute shall be referred for arbitration* to an arbitrator nominated jointly by the parties failing which such arbitrator shall be nominated by the Hong Kong International Arbitration Centre. The Arbitration Ordinance (Cap 341)(as amended) shall apply to any such arbitration. The arbitrator's decision shall (in the absence of clerical or manifest error) be final and binding on the parties and his fees for so acting shall be borne by the parties in equal shares unless he determines that the conduct of either party is such that such party should bear all of such fees.
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> 47.5.2 in any other case the dispute shall be determined by the courts of Hong Kong and the parties hereby submit to the exclusive jurisdiction of such courts for such purpose." (emphasis added)

12. Thus, under clause 47.5 of the Contract Conditions, not every dispute arising from the Agreement is covered by the arbitration clause. It is only disputes that are of "*a technical nature concerning the interpretation of the Specification*" or dispute that are of "*any similar or related matter*" that shall be referred to arbitration. Any other disputes shall instead be determined by the Hong Kong courts with its exclusive jurisdiction.

13. Specification is defined in the Contract Conditions to mean "*the Project Specification and the specifications set out in Schedule 3 of Part V (Set 2) [of the tender documents] including any specifications published by the Contractor [ie, the defendant] and the manufacturers and others in respect of the [CIS]*".

14. The Projection Specification, as mentioned above, formed part of the tender documents and was annexed to them as Part VII (Set 2). It is a lengthy document with some 90 pages or so.

15. As provided in its introduction under the Project Specification, tenderers were invited to bid for supply and installations of software, implementation, ongoing application support, training and other related services specified in the tender for the commissioning of the CIS of the SWD. All requirements (except expressly provided to be optional) set out in the Project Specification were mandatory. The Project Specification then contained and set out the extensive and detailed technical specifications required for "*the supply and installations of software, implementation, ongoing application support, training and other related services of*" the CIS.

16. The Project Specification is in any view a highly technical document.

B2. The Government's claim

17. In the Statement of Claim filed in this action, the Government claims that:

(1) In breach of clause 13.1.1.1 of the Contract Conditions, the defendant failed to submit the CIS for function test on or before 22 May 2006 as provided in the Schedule.

(2) The defendant by submitting its Project Issue Report 4 ("PIR 4") had evinced an intention not to be bound by the Contract Conditions in seeking approval for further and substantial variations to the Contract Conditions, and by indicating therein that it would blame the Government for its inability to deliver the CIS as agreed.

(3) The Government however rejected the PIR 4, and reminded the defendant its obligation under the Contract Conditions and to remedy its breach under clause 13.1.1.1 within one month.

(4) Further, in breach of clause 15.1 of the Contract Conditions, the defendant also failed to provide the CIS ready for use on or before the completion date ("the Completion Date").

(5) Alternatively, the defendant further evinced an intention not to be bound by the Contract Conditions, as there was no reasonable prospect for it to provide the CIS ready for us

within 6 weeks as provided under clause 15.3 of the Contract Conditions.

18. It is on the above bases that the Government says the defendant was in breach or in repudiatory breach of the Contract Conditions. By the Termination Notice, the Government gave notice to terminate the Agreement.

B3. The defendant's proposed defence and counterclaims

19. The defendant has not filed a defence and counterclaim in this action, which is not uncommon for a defendant seeking to stay an action for arbitration.

20. On other hand, in support of the stay application, the defendant put in evidence its draft "Statement of Case", which sets out its case against the Government. As set out in the draft "Statement of Case of EDS", it is the defendant's position that the delay with the progress with the implementation of the CIS and the non-completion of the CIS by the Completion Date was caused by the Government's breach of the Contract in various ways.

21. Relevant for the present purposes, the salient breaches of the Contract Conditions by the Government as alleged by the defendant pleaded in the draft Statement of Case[1] are:

(1) Demanding for and/or *insisting* on functionality, requirements and specifications which went beyond the scope of the

[1] At paragraph 18.

specifications of the CIS, as defined in the Project Specifications to be incorporated into the CIS.

(2) Failing and refusing to recognize and accept that such functionality, requirements and/or specifications were beyond the scope of the specifications of the CIS and/or were unreasonable under the Contract Conditions, and *insisting* on such functionality, requirements and/or specifications to be incorporated into the CIS.

(3) Giving changing, and at times conflicting and/or irreconcilable, instructions on functionality, requirements and/or specifications of the CIS, and *insisting* on such instructions being followed in the implementation of the CIS.

(4) Failing and/or refusing to allow reasonable extension of time of the Completion Date to allow extra time for:

(a) CIS with functionality, requirements and/or specifications which were beyond the scope of the specifications of the CIS as defined in the Project Specifications but *insisted* upon by SWD to be completed; and

(b) The new changed instructions on functionality, requirements and/or specifications *insisted* upon by SWD to be incorporated into the CIS.

(5) Failing and refusing to approve and accept PIR 4 submitted by the defendant and/or the reasonable recommended actions proposed by the defendant in respect of:

(a) The functionality, requirements and/or specifications that were beyond the scope of the specifications of the CIS and/or were unreasonable under the Contract Conditions; and

(b) The changing, and at times conflicting and/or irreconcilable, instructions on functionality, requirements and/or specifications given by the Government (including SWD) for the CIS.

(6) By so doing, hindering and preventing the defendant from performing the Agreement.

22. It is further pleaded[2] and alleged by the defendant that, the Government's above breaches had:

(1) Caused delay in the implementation of the CIS project, rendering it impossible for the CIS project to be implemented in accordance with its schedules;

(2) Rendered it impossible for the CIS project to be completed by the Completion Date (of 18 September 2006), despite all due efforts having been made by the defendant for the performance of the agreement.

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[2] At paragraph 19.

(3) Made it impossible for the defendant, without any fault on their part in the performance of the Agreement, to have the CIS project completed by the scheduled Completion Date;

(4) Rendered it technically impossible to have the CIS project completed at all, with the CIS incorporating:

(a) such functionality, requirements and/or specifications that were beyond the scope of the specifications of the CIS and/or were unreasonable under the Contract Conditions, but *insisted* upon by the Government (including SWD); and

(b) such conflicting and/or irreconcilable, instructions on functionality, requirements and/or specifications given by the Government (including SWD).

23. In light of the disputes formed by pleaded case[3], the defendant therefore says that the disputes focused on whether the works insisted on by SWD to be carried out before the termination of the Agreement were within or without (as contended by the defendant) the scope of the Specification (including the Project Specification). If the defendant is right, the Government was first in breach of the Agreement and the defendant has a defence to her claims and a good counterclaim. These disputes (the defendant further submits) would invariably involve the determination of (a) the proper scope of the Specification (a highly

[3] In support of the application, the defendant has also in its supporting affirmation and the draft Statement of Case made various references to the contemporaneous evidence to support its pleaded case. I would in later part of this judgment refer to some of this evidence as when necessary.

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technical area) and (b) whether the disputed works required by SWD to be carried out at the material times fell within that determined scope. These questions are clearly technical in nature and related to and concerned with the interpretation of the Specification. They therefore (further said the defendant) fall within the ambit of the arbitration clause and the action should be stayed for arbitration.

24. Mr Beresford for the Government however opposes the application on principally three bases.

25. I would look at them in turn as follows.

B4. Construction of the scope of the arbitration clause

26. Mr Beresford's first point is on the construction of the scope of the arbitration clause.

27. In gist, the counsel says the arbitration clause only covers dispute on the technical *interpretation* of Specification. Once the interpretation of the disputed *technical terms* (which have to be identified first in the disputes) of the Specification is resolved under arbitration, any disputes say on whether certain works have been carried out were in accordance with the Specification should be litigated in the courts under clause 47.5.2 of the Contract Conditions.

28. As far as I can understand it, the arguments advanced by Mr Beresford run as follows.

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(1) As provided therein, the arbitration clause only covers disputes "*of a technical nature concerning the interpretation of the Specification or any similar or related matter*".

(2) As the subject matter in the clause is "*the interpretation of the Specification*", the words "*any similar or related matter*" are subordinate to the words "*the Specification*" because they cannot stand as a co-ordinate clause or sub-sentence on their own. The words "*the Specification or any similar or related matter*" are simply a list of individual alternatives conjoined by the word "*or*".

(3) Paraphrasing these, the arbitration clause contemplates only (a) a technical dispute concerning the *interpretation* of the Specification, or (b) a technical dispute concerning the *interpretation* of any similar matter [to the Specification], or (c) a technical dispute concerning the *interpretation* of any related matter [to the Specification].

(4) The arbitration agreement is therefore concerned only with the problems of *technical interpretation*. It does not contemplate *all* disputes of a technical nature.

(5) The arbitration clause therefore does not include disputes (however technical) that are merely related to the interpretation of the specifications under the Contract Conditions. It includes only disputes of a technical nature about the *interpretation* of the matters specified. Its purpose

is simply to reduce the need to adduce evidence of the meaning of the technical terms.

(6) This interpretation is consistent with the parties choosing a bifurcated clause with some disputes going to arbitration and some disputes being reserved to the exclusive jurisdiction of court (under clause 47.5.2 of the Contract Conditions). The parties could then have a quick and efficient adjudication on interpretation disputes.

29. In the premises, if the above construction is accepted, even taking the defendant's case to the highest, the disputes arising between the parties (Mr Beresford further says) do not relate solely to the interpretation of the Specification. There is thus no basis to stay the entire action for arbitration. Furthermore, it is for the defendant to show which parts of the Specification the technical interpretation of which is disputed. This it has not done, and there is also no question that part of the disputes be stayed for arbitration. It has therefore not been demonstrated that the disputes fall within the ambit of the arbitration clause, and the action should not be stayed.

30. With respect, I am unable to accept Mr Beresford's above contentions of the scope of the arbitration clause. My reasons are as follows.

31. As a start, the Government's above narrow construction of the arbitration clause has disregarded the use of the words "*concerning*", "*similar*" and "*related* " in it.

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32. As matter of ordinary and usual understanding, the word "*concerning*" means "*having a relation or reference to*" or "*having a bearing on*"[4]. These are wide in nature and enough to cover matters that are related to or have a bearing on the subject matter, ie, the interpretation of the Specification.

33. Thus, when the arbitration clause provides for disputes of a "*technical nature concerning the interpretation of the Specification*", it includes anything (of a technical nature) that has a relation or reference to, or a bearing on the interpretation of the Specification. In other words, it covers technical disputes that arise from, consequent upon and have a reference to the interpretation of the Specification. It does not limit to matters only *of* interpretation themselves.

34. Once so understood, the words "*or any similar or related matter*" further add to the scope of the arbitration clause to cover *other matters* that are similar or related to technical disputes that concern (as understood above) the interpretation of the Specification.

35. I accept that these matters do not mean to cover *all* technical disputes *generally* under the Contract Conditions, and they must still have a reference or relation to matters concerning the interpretation of the Specification. However, these are matters not *only of interpretation*, but could include technical matters that say result from a technical interpretation of the Specification or arise from such an interpretation.

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[4] See: *Shorter Oxford Dictionary*. Cf also: *Mustill & Boyd: Commercial Arbitration* (2nd ed), pp 119-120; *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595, at paragraph 16; *Tweeddale & Tweeddale, Arbitration of Commercial Disputes*, paragraph 5.7 - 5.71.

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36. For example, after a technical interpretation of the Specification or any parts thereof is reached, a parallel dispute as to whether certain events, steps or matters fall *technically* within that interpretation would be a dispute *concerning* the interpretation of the Specification. Alternatively, it is also a matter which is similar or related to a dispute of a technical nature "*concerning*" the interpretation of the Specification.

37. Such disputes would in my view fall within the scope of the arbitration clause.

38. This wider construction of the scope of the arbitration clause is also consistent with the bifurcated choice of the dispute resolution under the Contract Conditions. It is not unusual that whether certain activities, works or completed tasks fall within the technical meaning of the Specification or parts of it would still be of a matter of a highly technical nature, which require resolution based on expert evidence. The intention to have an (and one) arbitration to deal with such technical matters *as a whole* is in my view more objectively and commercially sound than the Government's narrower construction of the arbitration clause. Disputes on the interpretation of certain clauses in a contract, or say in the present case the Specification, in practice arise usually not in vacuum but in the context as to whether certain performances or events fall within the proper meaning of that clause. In other words, an interpretation issue of a contractual provision arises often (if not always) when there is a dispute as to whether factually there is a breach of that clause by one of the parties.

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39. There may of course well be situations where, once the dispute on proper interpretation is resolved, there is no more dispute as to whether the concerned acts factually fall within that interpretation.

40. However, there may also well be situations where, even after the dispute on proper interpretation of the Specification is resolved by way of arbitration, there continues to be a dispute on whether the concerned acts fall within that definition. And the determination of that also involves technical evidence and determination, with say the use of expert evidence. In those situations, if one adopts the Government's construction, after an interpretation of the Specification is resolved by arbitration, the factual matter (even if it is further of a technical nature) as to whether there is a breach of that part of the Specification of the concerned party, would have to referred back to the court for determination, following the court and evidence procedures. That is cumbersome, time and costs consuming. That, in my view, cannot be the objective intention of the parties entering into the arbitration clause.

41. To the contrary, the wider construction of the arbitration clause above would also cover all these situations and enable the arbitrator to deal with the disputes as a whole efficiently and effectively. Such a construction of the arbitration clause is not consistent with the ordinary meaning of its words (as explained above), but also objectively consistent with the commercial reality and common sense.

42. In the premises, I conclude that the arbitration clause, on a proper construction, covers any disputes of a technical nature that relate to, refer to, or have a bearing on the interpretation of the Specification. It also covers any matters similar to or related to such disputes. In other

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words, the ambit of arbitration clause *includes* any disputes (of a technical nature) which consequent upon, arise from or have a reference to a dispute of a technical nature on the interpretation of the Specification.

B5. The dispute does not fall within the scope of the arbitration clause

43. Mr Beresford further contends that, even if the wider construction of the scope of the arbitration clause is adopted, the present disputes still do not fall within it. There are two principal limbs under his arguments.

44. First, he says in determining whether the dispute falls within the scope of the arbitration clause, the general principle is that one *only* looks at the plaintiff's claim and the defendant's defence is irrelevant. As such, he says only looking at the Government's claim as pleaded in the Statement of Claim in this action, there are no issues of a technical dispute that concern the interpretation of the Specification.

45. In support of his contentions, counsel relies on the authority of *Tommy C P Sze v Li & Fung*[5], where (in dealing with the question of whether the dispute between the parties was within the ambit of the arbitration agreement in that case) Ma J (as the learned Chief Justice then was) said at paragraph 59 as follows:

> "59. In deciding whether or not a dispute or difference comes within the ambit of an arbitration agreement (and therefore whether it should be referred to arbitration), the court adopts the following approach :

[5] [2003] 1 HKC 418.

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> (1) As stated above, it must first construe the arbitration agreement itself.
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> (2) Next, it must analyse the nature of the dispute or difference by reference to the claim which is made. The nature of the claim will enable the court to decide the question whether or not the dispute or difference is one that is covered by the arbitration agreement. For example, where the arbitration agreement stipulates that all disputes or differences in connection with a contract should be referred to arbitration, the court will look at the claim that is made to see whether or not it is covered by these words.
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> (3) What then of Mr Chan's point of principle that one must look also to the defence in determining whether or not the dispute or difference comes within the ambit of the arbitration agreement? In my view, the content of the defence is generally irrelevant to this question. Whatever the nature of the defence, the claim still remains the same. In the example referred to in subparagraph (2) above, a defence that the relevant contract is void or non-existent or that other contracts have to be taken into account (not containing an arbitration agreement) does not change the nature of the claim that is in dispute, namely, one that is connected with the relevant contract covered by the arbitration agreement. Afterall, in determining whether or not a dispute or difference exists, the court does not look at the contents of the defence to the claim at all : as stated above, a dispute or difference simply exists unless there is a clear and unequivocal admission, both of liability and quantum. I should perhaps add here that a defence along the lines that the relevant contract or arbitration agreement is non-existent or invalid does not deprive an arbitral tribunal of jurisdiction : see section 13B of the Ordinance and Article 16 of the Model Law.
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> (4) I have said that the content of the defence is generally irrelevant to the question of whether or not a dispute or difference is within the ambit of the arbitration agreement in question. Where it is relevant, though, is where a true counterclaim is made consisting of claims that do not come within the ambit of the arbitration agreement. In most cases, they will, but in the case where an entirely new claim is made in the counterclaim, unrelated to the contract in question, the disputes based on such a claim would not be covered by the arbitration agreement."

46. Mr Beresford says reading paragraph 59(2) and (3) of the judgment in *Tommy C P Sze*, it is clear that Ma J is stating a general principle that, what is pleaded in a defence is *irrelevant* to the question of

whether a dispute comes within the ambit of the relevant arbitration agreement.

47. I disagree with the above reading of Ma J's analysis at paragraph 59. That part of the judgment must be read in the context of that case.

48. In *Tommy CP Sze*, the plaintiff claimed against the 1st defendant (together with the other 6 defendants) for various liabilities said to have arisen from the defendants' breaches of the subject matter contract. The 1st defendant took out an application to stay the action for arbitration on the basis that there was an arbitration agreement in the contract. The relevant arbitration agreement provided that "*[a]ll disputes [between the plaintiff and the defendants] ... as to the performance of the [contract] ...or in any way connected therewith…*]" shall be referred to arbitration.

49. One of the objections raised by the plaintiff against the stay application was that the dispute did not come within the scope of the arbitration agreement. In this objection, the plaintiff's counsel contended that if one also looked at the defence filed by 4th defendant, which pleaded that the 4th defendant only entered into the contract with the 1st defendant, but not the plaintiff, that was a "dispute" not falling within the ambit of the arbitration agreement as this was not based on the contract itself. He also said the fact that the plaintiff had made claims under the contract was not relevant because the arbitration agreement referred to "disputes", not "claims".

50. It was in such a context that Ma J, in rejecting the plaintiff's arguments, made the observations at paragraph 59 of the judgment quoted above. In particular, at paragraph 59(3), Ma J was specifically referring to the plaintiff's counsel's argument that, for the purpose of that case, one *had* to look at the defence as well.

51. As I read it, Ma J was *not* laying 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*. I doubt very much that the learned judge was intending to lay down such a general rule, as it is commonly understood that an issue or dispute *could* be determined by looking at the case on both sides.

52. As I see it, what Ma J was saying in *Tommy CP Sze* was that there was no fast and fixed rule on this, and the court should take a practical approach to determine whether a dispute fell within an arbitration agreement. As His Lordship emphasised, given (for that purpose) that a dispute still existed even if there was only a claim (unless the defendant admitted liability), the court would and could sometimes only look at the claim itself, respective of what the defence said, to determine whether the relevant dispute fell within the scope of an arbitration agreement. However, in my view, Ma J was *not* in any way excluding (as a matter of principle) an approach that the court could also look at the defence to determine what was the nature of the relevant dispute. It all depends on the facts and contexts of each case.

53. I therefore reject the Government's submissions that, as a general principle, I cannot look at the draft Statement of Case of the defendant in the present case to determine whether the dispute falls within

the arbitration clause. In my view, in the present case, it is highly relevant for me to look at that to see whether the *true nature* of the disputes between the parties comes within the scope of the arbitration clause.

54. That takes me to the second limb of Mr Beresford's arguments.

55. Counsel submits that even if one is to look at the defendant's case, it only amounts to the defendant itself saying that the disputed works it had been asked to carry out went outside the scope of the Specification. That might well be so, but (counsel further says) that only amounts to the defendant further saying that (at the time of the dispute) the contract needed to be varied. There is no suggestion (counsel argues) however that SWD contended that those works did not amount to variations of the original scope of the Contract Conditions. That alone does not give the defendant any excuses of not finishing the works (without the variations) on time. The "defences" also therefore do not amount to constituting disputes on the scope (and thus interpretation) of the Specification.

56. I am also unable to accept Mr Beresford's above contentions.

57. One has to look at the state of events and play objectively and practically.

58. As far as I can see, from the evidence laid before me[6], when the defendant was asked to carry out the disputed works ("the disputed works") as directed by SWD, the defendant said that those were outside the scope of the Contract Conditions and the Project Specification, and unless the Contract Conditions were varied as, say, suggested in the PIR 4, the defendant would not be able to carry them out, and on time in accordance to the Completion Date. It may well be correct that SWD did not on papers (with the evidence so far placed before me) expressly contended with the defendant at that time that the disputed works were within the scope of the contract, but the reality was that SWD required (without agreeing to any variations to the contract as sought) the defendant to finish them as directed on time[7]. When the defendant had failed to do so, the Government terminated the Agreement and later brought the present claim against the defendant for breach of contract, on the basis that the defendant had failed to finish the work under the Agreement on time.

59. When one looks that these in proper context, it must be part of the Government's position that the disputed works fell within the scope of the Contact Conditions and the Specification. That was why the defendant was in breach of the Agreement in failing to complete them.

60. This is underlined by the fact that, when asked by the court, Mr Beresford was not prepared to confirm at the hearing that, if the matter stayed in this action and the defendant pleaded the bases of the defence as now set out in the draft Statement of Case, the Government would *not* take

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[6] For example, the contemporaneous correspondence exchanged between the parties and the various notes and PIR 4, as quoted in the defendant's skeleton submissions at paragraphs 5-9.

[7] That is also what was now pleaded by the defendant in its draft Statement of Case as quoted above.

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the stance that the disputed works did fall within the scope of the Project Specification and Contract.

61. In the circumstances, in all reality and practicality, the principal disputes between the parties (as to who was in breach of the Contract) are whether the disputed works fell within the scope of the Specification. In determining the scope of the Specification and whether the disputed works fell within it, one then has to look at the interpretation of the Specification. I therefore cannot accept the Government's submissions that there are thus no disputes on the interpretation of the Specification.

62. In my view, looking at the Statement of Claim, the draft Statement of Case and the evidence now placed before this court as to what and how the matters were disputed at the material time of the events, the disputes between the parties that required to be determined concern with and are related to the interpretation of the Specification.

63. The determination of these disputes involve at least, first, the determination of the scope of the Specification through its interpretation, and, second, whether the disputed works fell within that scope of the Specification. These disputes and their determinations are also clearly highly technical in nature.

64. The disputes between the parties therefore come within the scope of the arbitration clause.

65. Finally, Mr Beresford contends that insofar as the Government's claim for damages is concerned, the quantum part of it is

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not technical in nature and also does not involve the interpretation of the Specification. This part of the dispute therefore cannot fall within the ambit of the arbitration clause.

66. I also reject this contention.

67. In support of her pleaded damages in the region of HK$120 million, the Government has in the Statement of Claim relied on the "Forensic Accountant's Report" dated 9 July 2010. The report is of some 60-pages long, with another 16 annexes.

68. As expected, one of the fundamental bases of the claims for losses was that the Government (through re-tendering) had awarded the contract for the implementation of the CIS to Azeus Systems Ltd in replacement of the defendant. This has been referred to in the report as the "Azeus Contract". The Government also had to incur extra costs in the implementation of the CIS because of the delay.

69. The items set out under the quantum of losses section of this forensic report are: "*Difference in Contract Sum between EDS [the defendant] Contract and Azeus Contract*", "*Costs of the Contract IT Staff",* *"Costs of the Civil Service Staff*", "*Difference in Costs of Contractor Recommended Hardware and Contractor Recommended Software*", "*Payments for Part of the Contract Sum in respect of the Interface Work between the CIS and the Computerized Social Security System*", "*Difference in Costs of the Interface Work between the CIS and the Long Term Care Services Delivery System*", "*Difference in Costs of the Ongoing Operation and Technical Support Services of the CIS during System Implementation*", "*Loss of Anticipated Cost Savings due to Delay in*

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Implementation of the CIS", "*Additional Accommodation Costs*", and "*Costs incurred by GLD during the Re-tendering Exercise*".

70. Looking at these items, in my view, the determination of the reasonableness (both of liability and amount) of any of these costs for completing this highly technical project must, in my view, involve to various degree and extent references to the scope and interpretation of the Specification and expert evidence concerning the carrying out of such works. The issue of quantum is thus technical in nature, and is a "*related matter*" to the interpretation of the Specification. It therefore also comes within the scope of the arbitration clause.

C. CONCLUSION

71. For the above reasons, I allow the defendant's application, and order that all further proceedings in this action be stayed for arbitration pursuant to the arbitration clause.

72. There is no reason why costs should not follow the event. I further make an order *nisi* that costs of this application be to the defendant, to be taxed if not agreed. The order shall be made absolute 14 days from today unless any of the parties applies to vary it by summons.

(Thomas Au)
Judge of the Court of First Instance
High Court

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Mr Roger Beresford, instructed by the Department of Justice, for the plaintiff

Mr Ambrose Ho, SC leading Mr Lee Tung Ming, instructed by Wilkinson & Grist, for the defendant