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Insights

SINGAPORE HIGH COURT'S RULING ON OVERLAPPING ARBITRATION AND JURISDICTION CLAUSES

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Introduction

A dispute resolution clause specifies the process, usually by way of litigation or arbitration, through which parties wish to resolve a dispute between them. A dispute resolution clause must be drafted with essential clarity and certainty; otherwise parties may have no choice but to argue about the dispute resolution clause itself.

The recent decision of the Singapore High Court in Silverlink Resorts Limited v MS First Capital Insurance Limited [2020] SGHC 251 concerned the ironic situation where one clause in the contract refers disputes to arbitration, while another clause refers to litigation.

We are mindful that this case is a Singapore case and applied Singapore law, and therefore is not directly applicable to courts in Hong Kong. However, in reaching the decision, the Singapore High Court considered authorities from various common law jurisdictions, and the discussion in the judgment is a helpful discussion of how a common law court might approach this type of controversy. This case therefore may provide practitioners in Hong Kong with helpful guidance and insights.

Brief facts

Silverlink Resorts Limited (the "Plaintiff") was the owner of Aman Group, which owned and managed luxury hotels around the world, including the Amanpuri resort in Phuket, Thailand.

The Plaintiff was one of the insured parties under an Industrial All Risks Policy (the "Policy") issued by MS First Capital Insurance Limited (the "Defendant"). Section II of the terms and conditions of the Policy was entitled "Business Interruption" and dealt with the interruption of or interference with the businesses covered by the Policy.

Due to the COVID-19 pandemic, the Plaintiff was affected adversely by the mandatory hotel closure order issued by the Phuket Governor and the suspension of flights to Thailand ordered by the Civil Aviation Authority of Thailand.

These led to the Plaintiff making a claim under the Policy, and when the claim was rejected to issue court proceedings in the Singapore High Court. In response, the Defendant applied to stay the proceedings in favour of arbitration, pursuant to section 6 of the International Arbitration Act of Singapore.

Inconsistency between the Arbitration Clause and the Jurisdiction Clause in the Policy

The Policy, which comprised a renewal certificate and a set of terms and conditions, contained the following provisions:-

- Clause 11 (*Arbitration*) of the general conditions of Policy (the "Arbitration Clause") provided that:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, which is not settled pursuant to the Mediation General Condition within sixty (60) days of commencement of the discussions described in the Mediation General Condition (a) above, shall be referred to arbitration and the parties shall unless otherwise mutually agreed, use the best practice within the jurisdiction of this Policy to have the dispute arbitrated before legal action is commenced." (emphasis added)

- Clause 13 (*Jurisdiction*) of the general conditions of the Policy (the "Jurisdiction Clause") provided that:

"*Should any dispute arise between the Insured and the Insurers regarding the interpretation or the application of this Policy the Insurers will, at the request of the Insured, submit to the jurisdiction of any competent Court in Singapore. Such a dispute shall be determined in accordance with the practical applicable to such Court and in accordance with the laws of Singapore.*" (emphasis added)

- The "Choice of Law Jurisdiction" provision in the renewal certificate (the "Renewal Certificate Jurisdiction Clause") provided that:-

"In the event of any dispute over interpretation of this Policy:
Law: Singapore
Jurisdiction: Courts of Singapore" (emphasis added)

On the face of the provisions above, there was a clear inconsistency between (i) the scope of the Arbitration Clause and (ii) the scope of the Jurisdiction Clause and the Renewal Certificate Jurisdiction Clause.

The issue therefore was whether the Arbitration Clause or the Jurisdiction Clause applied to the parties' dispute.

The carve-out approach

Was it possible to read the Arbitration Clause and the Jurisdiction Clause in such a way as to make sense of the inconsistency? The Singapore High Court achieved this by the "carve-out" approach.

The Court ruled that the Jurisdiction Clause applied to the present dispute, in priority to the Arbitration Clause.

The Court's ruling was that the Jurisdiction Clause was intended to carve out (from the Arbitration Clause) disputes regarding the interpretation or application of the Policy. Therefore, the Court held that the Defendant was not entitled to an order to stay the proceedings in favour of arbitration.

Reason 1: Parties' intention to carve out certain type of disputes

Pursuant to the well-known UK case Fiona Trust & Holding Corp v Privalov [2007] 2 Lloyd's Rep 267, the interpretation of an arbitration clause should be based on the presumed intention of the parties as rational commercial parties. Parties also are presumed to have intended any dispute arising out of the same relationship into which they have entered or purported to enter to be decided by the same tribunal unless the language shows otherwise.

The UK Commercial Court in *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 was faced with completely incompatible arbitration and jurisdiction clauses in the same agreement. While the arbitration clause required disputes to be settled through arbitration, the jurisdiction clause provided for the exclusive jurisdiction of the courts of England. Steyn J (as he then was) resolved the inconsistency by interpreting the jurisdiction clause as applying to the arbitration itself, i.e. the English courts have supervisory jurisdiction over arbitration. Effectively, disputes under the agreement would be submitted to arbitration and any such arbitration would be supervised by English courts. This solution made both the arbitration and jurisdiction clauses valid and binding.

In this present case, the Court refused to apply *Paul Smith*. The Court distinguished the present case from *Paul Smith* based on the relationship between the arbitration and jurisdiction clauses. Unlike *Paul Smith*, the Arbitration Clause and Jurisdiction Clause were not inconsistent with each other. Instead, the Court ruled, both clauses "*perform entirely separate functions and are independently enforceable*".

The Court recognised that, in the same agreement, parties may intend that some types of disputes to be resolved by arbitration, and others by litigation in court. The Court quoted the following explanation from *Russell on Arbitration*, a classic textbook on English arbitration laws:-

"*Some contracts provide that particular disputes will be resolved by one form of dispute resolution and other types of dispute by some other method…. Some questions of default such as the failure to pay an instalment due, might be more effectively settled by litigation, whose summary procedures have no direct counterparty in arbitration, whilst valuation and/or technical questions in the same contract might be settled more simply by expert determination. Some clauses distinguish*

between resolving disputes as to liability, which fall within the arbitration agreement, and those as to damages, which do not. The key issue when dealing with such provisions is to ensure that it is clear precisely which types of disputes fall to be resolved by each mechanism…".

In this present case, in the Court's view, the Jurisdiction Clause covered specific types of disputes only and thus was narrower in scope than the Arbitration Clauses. The Court favoured the Jurisdiction Clause by interpreting it as having carved out some specific disputes from the scope of the wider Arbitration Clause.

In reaching such conclusion, the Court cited cases from various common law jurisdictions, on how they dealt with overlapping arbitration and jurisdiction clauses, namely *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 by the Singapore High Court, *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29 by the Federal Court of Australia and *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd* [2006] NZHC 1228 by the High Court of New Zealand. None of these three cited cases applied the *Paul Smith* approach.

Reason 2: Commercial sense

The Court said that where the jurisdiction clause covers specific disputes only, the application of the *Paul Smith* approach does not make sound commercial sense.

If the *Paul Smith* approach is adopted, the jurisdiction clause would be interpreted to mean that it provides for the court's supervisory jurisdiction over the arbitration in so far as it relates to the specific disputes that fall within the scope of the jurisdiction clause. For disputes that do not fall within the jurisdiction clause, without agreement between parties, the seat of arbitration will be determined by the arbitral tribunal and the seat will determine the jurisdiction whose courts would exercise supervisory jurisdiction over the arbitration. Depending on whether the issue in dispute falls within the jurisdiction clause, the arbitration arising from an agreement will be subject to the supervisory jurisdiction of different courts. The problem would be exacerbated where the arbitration involves disputes which fall and do not fall within the jurisdiction clause.

The Court took the view that no rational parties could have intended such a chaotic result. Such a result, the Court reasoned, also would be inconsistent with the *Fiona Trust* presumption that parties intend their disputes to be decided by the same tribunal.

Reason 3: Confirmation of the intention of the parties by the Renewal Certificate Jurisdiction Clause

The Renewal Certificate Jurisdiction Clause marked the renewal of the original Policy, which had contained the overlapping Arbitration Clause and Jurisdiction Clause.

The Court found the Renewal Certificate Jurisdiction Clause confirmed the parties' intention that disputes falling within the Jurisdiction Clause were to be resolved through court proceedings rather

than arbitration.

Reason 4: Effective resolution of disputes

The Court held that the disputes relating to the interpretation or the application of the Policy are more likely to be "*resolved effectively, efficaciously and efficiently*" by the court. It made commercial sense for the Jurisdiction Clause to reserve those disputes for the court.

Conclusion

This case is a demonstration of how ambiguous and/or inconsistent dispute resolution clauses can waste time and money of the parties in arguments over the true meaning of these clauses, distracting them from the primary aim of resolving the primary disputes that have arisen between them.

This is an important reminder that parties should take the time to consider properly the dispute resolution and jurisdiction clauses, and ensure that their preferences and intentions are documented with clarity.

RELATED PRACTICE AREAS

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MEET THE TEAM

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