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Enforceability of Multi-tiered Dispute Resolution Mechanisms – the Singapore Judiciary's Promotion of Consensus as a Cultural Value

Darius Chan (Norton Rose Fulbright) · Tuesday, January 8th, 2013 · YSIAC

In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd [2012] SGHC 226* (*per* Chan Seng Onn J) ("*International Research*"), the Singapore High Court addressed the issue of whether an arbitration clause contained in one contract between two parties binds a third party who subsequently enters into a supplemental agreement with the original two parties. In finding that the third party was indeed bound by the arbitration agreement, the High Court made important observations concerning the enforceability of multi-tiered dispute resolution clauses requiring parties to negotiate or mediate before resorting to arbitration. Those observations are noteworthy because they reflect the Singapore judiciary's recognition that the promotion of consensus was a cultural value worthy of promulgation. The Singaporean approach can be usefully contrasted against the English approach most recently demonstrated by *Wah (Aka Alan Tang) & Another v Grant Thornton International Ltd & Others [2012] EWHC 3198 (Ch).*

The contractual arrangements in *International Research* involve Lufthansa Systems Asia Pacific Pte Ltd ("Lufthansa"), Datamat Public Company Ltd ("Datamat") and the International Research Corporation Public Company Ltd ("IRCP"). Under a Cooperation Agreement, Lufthansa agreed to supply services and an IT system to Datamat. The system was a component of a larger system Datamat had agreed to provide to Thai Airways. Datamat then entered into a Sale and Purchase agreement with IRCP for IRCP to, *inter alia*, pay Lufthansa for the goods and services Lufthansa was providing under the Cooperation Agreement. Datamat assigned its right to receive payment from Thai Airways to Siam Commercial Bank Public Company Ltd.

Because Datamat ran into financial difficulties, Lufthansa, Datamat and IRCP entered into Supplemental Agreement No. 1. Under this Agreement, Datamat was obliged to transfer to IRCP monies received from Thair Airways. Upon receiving these monies, IRCP would pay Lufthansa for the works and services rendered by Lufthansa. The parties subsequently entered into Supplemental Agreement No. 2. Under this Agreement, IRCP would pay Lufthansa for the sums payable by Datamat under the Cooperation Agreement directly. IRCP would do so only after it receives from Datamat payments from Thai Airways.

Clause 37.2 of the Cooperation Agreement contained a multi-tiered dispute resolution mechanism which involved a so-called escalation clause. It provided that:

> Any dispute between the Parties relating to or in connection with this Cooperation Agreement or a Statement of Works shall be referred:
>
> 37.2.1 first, to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);
>
> 37.2.2 second, to a committee consisting of Datamat's designee and Lufthansa Systems' Director Customer Relations; and (if the matter remains unresolved);
>
> 37.2.3 third, to a committee consisting of Datamat's designee and Lufthansa Systems' Managing Director for resolution by them, and (if the matter remains unresolved);
>
> 37.2.4 fourth, the dispute may be referred to arbitration as specified in Clause 36.3 [sic] hereto.

Clause 37.3 provided that in the event that any dispute could not be settled by "mediation" pursuant to Clause 37.2, such dispute should then be settled by SIAC arbitration instead.

Lufthansa initiated SIAC arbitration against IRCP and Datamat. IRCP resisted the tribunal's jurisdiction on the basis that it was not a party to the arbitration agreement in the Cooperation Agreement, and even if it were a party, Lufthansa had failed to comply with the preconditions for the commencement of arbitration proceedings.

The Tribunal dismissed ICRP's objections on jurisdiction on the ground that the Cooperation Agreement and the Supplemental Agreements were to be treated as one composite agreement between Lufthansa, Datamat and IRCP. On whether the requirements in Clause 37.2 had been fulfilled, the Tribunal held that the requirements were too uncertain to be enforceable. IRCP then brought an action before the Singapore High Court to challenge the Tribunal's ruling on jurisdiction.

The Singapore High Court essentially agreed with the Tribunal had IRCP was bound by the dispute resolution agreement in the Cooperation Agreement. In a scenario involving two separate contracts, the established rule is that clear and express reference to the arbitration agreement in the first contract is required to incorporate it in the second contract. The question in each case is the extent the two contracts are "separate".

Construing the contracts in question, the High Court was of the view that the contracts in the case at hand were not separate contracts, but were really one composite agreement where the obligations were interdependent. The obligations in the Supplemental Agreements were premised on and were an extension of the latter. Consequently, the High Court held that the parties' objective intention was for the dispute resolution mechanism in the Cooperation Agreement to bind all three parties.

In relation to the issue of whether the preconditions for the commencement of arbitration have been satisfied, the High Court held that the mediation procedure in Clause 37.2 was not uncertain and was enforceable. As the mediation procedure in Clause 37.2 was expressed as a condition precedent to arbitration, the Tribunal would not have jurisdiction to resolve the dispute if the

mediation procedure had not been complied with.

International Research cited the recent Singapore Court of Appeal decision of *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd [2012] SGCA 48*.

In that case, the Court of Appeal held that contractual provisions which require contracting parties to negotiate in good faith were enforceable. The Court of Appeal cited with approval an excerpt from an article "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" which merits reproduction below:

> From a traditional Asian perspective, a "confer in good faith" or "friendly negotiation" clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodations – that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies.

The Court of Appeal further commented that:

> We think that the "friendly negotiations" and "confer in good faith" clauses … are consistent with our cultural value of promoting consensus whenever possible. Clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences.

The Singaporean approach can be usefully contrasted against the recent English decision of *Wah (Aka Alan Tang) & Another v Grant Thornton International Ltd & Others [2012] EWHC 3198 (Ch)* ("*Wah*"), a decision of Hildyard J.

In *Wah*, the relevant multi-tiered dispute resolution clause in section 14.3 of the contract between the parties provided that:

> (a) Any dispute or difference as described in Section 14.2 shall in the first instance be referred to the Chief Executive in an attempt to settle such dispute or difference by amicable conciliation or an informal nature. The conciliation provided for in this Section 14.3 shall be applicable notwithstanding that [the defendant] may be a party to the dispute or difference in question.
>
> (b) The Chief Executive shall attempt to resolve the dispute or difference in an amicable fashion. Any party may submit a request for such conciliation regarding any such dispute or difference, and the Chief Executive shall have up to one (1) month after receipt of such request to attempt to resolve it.
>
> (c) If the dispute or difference shall not have been resolved within one (1) month

> following submissions to the Chief Executive, it shall be referred to a Panel of three (3) members of the Board to be selected by the Board, none of whom shall be associated with or in any other way related to the Member Firm or Member Firms who are parties to the dispute or difference. The Panel shall have up to one (1) month to attempt to resolve the dispute or difference.
>
> (d) Until the earlier of (i) such date as the Panel shall determine that it cannot resolve the dispute or difference, or (ii) the date one (1) month after the request for conciliation of the dispute or difference has been referred to it, no party may commence any arbitration procedures in accordance with this Agreement.

This was followed by a standard LCIA arbitration agreement in section 14.4.

After summarising the applicable principles of law, Hildyard J held that the clause at hand was too equivocal in terms of the process required and too nebulous in terms of the content of the parties' respective obligations to be given legal effect as an enforceable condition precedent to arbitration. In particular, Hildyard J was of the view that the omission to give any guidance as to the quality or nature of the attempts to be made to resolve a dispute or difference renders the Court unable to determine or direct compliance with the provisions of the clause.

It could be argued that the multi-tiered dispute resolution clause in *International Research* would not pass muster under Hildyard J's approach. The approach forged by the Singapore courts is therefore noteworthy, not least for its express recognition and embodiment of cultural values.

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