Casting a wide net- The scope of an Arbitration Clause

TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2009] VSC 553

A recent decision of the Victorian Supreme Court represents a departure from the generally accepted presumption of arbitrability.

Facts

The Plaintiff, TCL, a Chinese Company entered into a distribution agreement with Australian Company, Castel, to grant Castel the exclusive right to sell TCL airconditioners in Australia. A dispute arose when Castel claimed that TCL had breached terms of both the distribution agreement and the terms of individual sale contracts made between the parties under to the distribution agreement.

The Distribution Agreement contained an Arbitration clause which provided the following:

"In case there is any breach of the provisions under this Agreement by either party…matters will be referred to arbitration…for resolution".

TCL sought to avoid the operation of the arbitration clause contained in the Distribution Agreement on the basis that many of the claims made fell outside the scope of the distribution agreement. The question for the court was to determine whether the scope of the arbitration clause covered both (a) claims arising out of breaches of the Distribution Agreement and (b) claims arising out of breaches of individual sale agreements made pursuant to the Distribution Agreement.

General Principles

There is a general principle established by a number of cases that where the words of an arbitration clause are sufficiently elastic and general, or capable of a broad and flexible meaning, they should be given a liberal construction. This approach is said to be underpinned by the presumption that it would not ordinarily be the intention of commercial parties to have disputes arising out of the same agreement resolved in two different forums, particularly so where the contracting parties are international parties. However the cases also acknowledge that there is no justification for applying such a broad interpretation to give words a meaning which they do not bear. However Hargrave J, in the present case declined to find that even against the background of the principles set out above, there could be said to be a general presumption of arbitrability.

Construction of the Present Clause

Hargrave J reasoned that in order to determine the scope of the arbitration clause it was necessary to construe what was meant by the words 'breaches of provisions under this agreement'. The submissions made by Castel that the word "under" meant "*governed, controlled, bound by, or in accordance with"* were accepted.

However, by inserting these above words into the clause, Hargrave J could not see that the clause permitted an interpretation whereby, "breaches of provisions *under* the agreement" could extend to include breaches of the terms of individual sale contracts which were negotiated and effected under the umbrella of the distribution agreement but not specifically referred to in the agreement.

The arbitration clause was limited in operation to circumstances where one party contended that the other was in breach of a provision of the distribution agreement or an agreement specifically referred to in the distribution agreement. It also followed that any claims made not in relation to a breach of the agreement but for example under section 52 of the Trade Practices Act would also not be covered by the arbitration clause.

Summary

In order to ensure broad applicability of arbitration clauses, it is important to use words that can encompass every breach of agreement or dispute contemplated by the parties.

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