

HONG KONG / JUDGMENT

# INTERACTIVE COMMUNICATIONS SERVICES LTD v. PCCW GLOBAL LTD

## COURT

Court of Final Appeal

## DECIDED

19 April 2007

## CASE / FILE NUMBER

FAMV12/2007

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bjbj FAMV No. 12 of 2007 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 12 OF 2007 (Civil) (ON APPLICATION FOR LEAVE TO APPEAL FROM CACV No. 18 of 2006)

Between: INTERACTIVE COMMUNICATIONS SERVICES LIMITED (formerly known as VECTONE LIMITED) Applicant

- and - PCCW GLOBAL LIMITED (formerly known as BEYOND THE NETWORK, LIMITED)  
Respondent

Appeal Committee: Mr Justice Bokhary PJ, Mr Justice Chan PJ and Mr Justice Ribeiro PJ Date of Hearing: 19 April 2007 Date of Determination: 19 April 2007

## DETERMINATION

Mr Justice Ribeiro PJ: In April 2003, the parties entered into a contract to buy and sell international telephone services from one another, with a net balance periodically billed by the party to whom it was due. In September 2004, the defendant, who is the present applicant, disputed a bill issued by the plaintiff for the net sum of US\$718,999.26. On 14 December 2004, the plaintiff issued a writ claiming that amount. The defendant countered by giving notice requiring arbitration and applying for a stay in favour of arbitration. Reyes J and the Court of Appeal both refused a stay and the applicant now seeks leave to pursue a stay in the Court of Final Appeal. The controversy regarding the applicant's claimed entitlement to a stay arises out of contradictory clauses in the contract regarding the forum where, and the means by which, the parties are to resolve their disputes. Clauses 4.3 and 5 provide for the exclusive jurisdiction of the Hong Kong

courts, applying Hong Kong law. On the other hand, clause 11.2 states that the agreement will be interpreted in accordance with the laws of the State of New York and that any dispute shall be submitted to the courts in that State. Then clause 11.3 provides that either party may require any dispute arising hereunder be settled by binding arbitration in New York. Reyes J adopted a construction giving primacy in the present case to the Hong Kong exclusive jurisdiction clause dealing with billing disputes (clause 4.3), holding (for various reasons) that it had trumped the New York law and jurisdiction clauses as well as the arbitration clause, which were both construed to require the further consent of both parties. Alternatively, his Lordship held that if mutual consent was not required, the arbitration agreement could only be invoked before expiry of a reasonable time, and that it had become too late to do so, the Hong Kong exclusive jurisdiction clause having taken effect. The Court of Appeal arrived at the same result by a different route. It disagreed with the argument that it was too late to invoke clause 11.3. But it held as a matter of construction that clause 4.3 was a self-contained provision on how any dispute or contest over billing should be determined, requiring such disputes to be dealt with exclusively by the Hong Kong court. It is common ground that the decisions below are interlocutory. So leave will not be granted unless the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision. In our view, no questions of such importance arise. The difficult issues of construction faced by the courts below owe their existence entirely to the peculiarities of this particular contract. Mr Sussex SC sought to argue that a suitably important issue arises in relation to the Hong Kong courts approach to Art.8 of the UNCITRAL Model Law. In our view the present case turned on the construction of this particular contract and we do not consider any question concerning Art.8 to be a question involved in the appeal. In any event, discretionary considerations weigh against referring the dispute to the Court for decision. The substantive billing dispute would appear to be largely factual and straightforward. The resources of the Court should not be devoted to a third round of costly satellite litigation which will do nothing to resolve that substantive issue. The application is therefore dismissed with costs. (Kemal Bokhary) Permanent Judge (Patrick Chan) Permanent Judge (R A V Ribeiro) Permanent Judge Mr Charles Sussex SC (instructed by Messrs Holman, Fenwick & Willan) for the applicant Mr Roger Beresford (instructed by Messrs Richards Butler) for the respondent

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