CASE UPDATE

Singapore High Court Considers the Arbitrability of Shareholder Minority Oppression Claims

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(with thanks to Li Yiling Eden)

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Introduction

1. In the recent decision of *Silica Investors Limited v Tomolugen Holdings Limited and others* [2014] SGHC 101, the High Court considered whether shareholder minority oppression claims were arbitrable (i.e. whether such claims could be resolved through arbitration).

2. On the facts, the High Court decided that the Plaintiff's claims were not arbitrable. The Court upheld the Assistant Registrar's decision to refuse to stay Court proceedings which had been commenced on the basis of section 216 of the Companies Act.

Facts

3. Silica Investors Limited ("the Plaintiff") was a minority shareholder in Auzminerals Resource Group Limited ("AMRG"), the 8th Defendant ("the Defendant"). It held 4.2% of all the shares.

4. The Plaintiff had purchased its shares from the 2nd Defendant pursuant to a Share Sale Agreement ("the Agreement"). Clause 12.3 of the Agreement provided that any dispute arising out of or in connection with this Agreement had to be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("the Arbitration Clause").

5. About three years after becoming a shareholder, the Plaintiff commenced a suit under s 216 of the Companies Act ("CA"). The minority oppression claim was founded on four main allegations: firstly, that a share issuance to the 1st Defendant, purportedly as payment for a debt, had diluted the Plaintiff's shareholding in AMRG by more than 50%; secondly, that the Plaintiff was wrongfully excluded from the management of AMRG; thirdly, that the board of directors of AMRG had, under the control and influence of the 1st, 2nd and/or 7th Defendants, executed guarantees to secure the obligations of an unrelated entity to benefit the above named Defendants at the expense of its own

commercial interests; and fourthly, that the 1st, 2nd and 7th Defendants had exploited AMRG's resources for the benefit of their own business and/or misled the Plaintiff and/or concealed information relating to the affairs of AMRG.

6. The Plaintiff commenced court proceedings and sought relief under s 216 of the CA, including an order for the 1st and/or 2nd Defendant and/or any such other parties as the Court may direct to purchase the Plaintiff's shares in AMRG, and such orders and directions in the interim as the Court thought fit to regulate the conduct of affairs of AMRG. In the alternative, the Plaintiff sought an order that AMRG be placed under liquidation.

7. The 2nd Defendant filed a summons to stay the court proceedings in favour of arbitration, pursuant to s 6(1) of the International Arbitration Act ("IAA"). The 2nd Defendant argued that the Plaintiff's claims ought to be submitted to arbitration, pursuant to the Arbitration Clause.

8. The Assistant Registrar refused to stay the court proceedings and the Defendants appealed to the High Court.

Whether the Plaintiff's claim fell within the scope of the arbitration clause

9. The High Court applied the analytical framework laid out by the Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petropod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414.

10. First, the Court characterised the Plaintiff's claim. Based on the parties' pleadings, it was clear that the essential dispute between the parties was whether the affairs of AMRG were being conducted and managed by the Defendants in an oppressive manner.

11. Next, the Court identified the scope of the Arbitration Clause. The Court found that the Plaintiff and the 2nd Defendant had agreed to have any disputes between them, including statutory claims, resolved by arbitration.

12. Finally, the Court considered whether the factual allegations underlying the Plaintiff's minority oppression claim had arisen out of or were sufficiently closely connected to the Agreement. The Court found such a connection although only the first two allegations supporting the minority oppression claim actually made references to the Agreement.

13. The Court concluded that the Plaintiff's claims in the litigation did fall within the scope of the Arbitration Clause.

Arbitrability of minority oppression claims under s 216 of the CA

14. The Court next considered whether the Plaintiff's claims were arbitrable. These claims were premised on minority oppression under s 216 of the CA.

15. The Court first made a number of observations concerning the arbitrability of statutory claims and remedies. First, an arbitral tribunal has no power to make orders that are binding on non-parties to the arbitration agreement, or to grant such remedies that would affect these parties' rights. This is due to the inherent consensual nature of arbitration and the fact that non-parties to the arbitration agreement have not consented to arbitration.

16. Second, because the tribunal has no power to bind non-parties, certain claims and/or remedies lie solely within the purview of the courts. These include winding up of a company, granting a judgment *in rem* in admiralty matters, avoidance claims, bankruptcy, matrimonial matters and criminal prosecutions. These remedies, typically those which create rights *in rem*, or affect third parties or the public at large, may only be granted by the courts in the exercise of their powers conferred upon them by the state, and not by arbitral tribunals.

17. Finally, the Court noted that statutory claims could straddle the line between arbitrability and non-arbitrability: for example, where the claim concerns both a company's pre-insolvency state of affairs and its descent into the insolvency regime.

18. However, the Court opined that the mere fact that a claim *may* be remedied by an order that is only available to the courts did not automatically render the claim not arbitrable. Instead, the question of arbitrability would depend on the facts of the case, the manner in which the claim is framed and the remedy or relief sought.

19. To determine which approach Singapore should take in relation to the arbitrability of minority oppression claims under s 216 of the CA, the Court analysed cases from the United Kingdom, Australia and Canada and distilled four possible approaches. Of these, the Court favoured an approach analogous to that taken in *Exeter City Association Football Club Ltd v Football Conference Ltd and another* [2004] 1 WLR 2910 ("*Exeter City*"), which took a position that all minority oppression claims are, as a matter of public policy, non-arbitrable.

20. The Court considered the approach in *Exeter City* a better one in view of the limitations of arbitration in the context of minority oppression claims. From the wording of s 216(2) of the CA, it is clear that the remedy or relief granted must be made with a view of bringing to an end or remedying the matters complained of. Although a tribunal can make findings of fact, award damages or make specific orders *in personam* or *inter partes* that are binding on the parties before it, the tribunal cannot grant other kinds of remedies or reliefs where it would impinge upon the rights of non-parties to the arbitration agreement. Accordingly, the tribunal may not be able to order the variation of any transaction or resolution, a buy-out order, the regulation of the future conduct of the company's affairs or the reduction in the company's capital under a compulsory buy-out.

21. While the Court acknowledged that the *Exeter City* approach was not perfect, the other three approaches identified carried more significant practical and legal difficulties, particularly, an inherent risk that the Court may disagree with the arbitral tribunal's findings of fact and/or recommendations as to the appropriate s 216(2) remedy to bring to an end such oppression. The Court left open the question of how to resolve such disagreements.

22. The Court did not go so far as to lay down a general proposition that *all* claims under s 216 of the CA are not arbitrable. This would depend on all the facts and circumstances of the case, and no single factor should be looked at alone. Particularly, the factor of what remedy is sought should not necessarily be awarded overriding importance.

23. The Court suggested that a claim under s 216 of the CA would be arbitrable where all the shareholders of the company are bound by the arbitration agreement and where the court is satisfied that all the relevant parties, including third parties whose interests may be affected, are parties to the arbitration, and where the remedy or relief sought is one that only affects the parties to the arbitration.

24. However, typically, a minority oppression claim would be non-arbitrable because it would be highly likely that there would be other shareholders who are not parties to the arbitration, or that the arbitral award would directly affect third parties or the general public, or that some claims would fall out of the scope of the arbitration clause, or that there were overtones of insolvency, or that the relief sought is one that an arbitral tribunal is unable to make.

25. In the light of the principles stated above, the Court found that the Plaintiff's minority oppression claim was not arbitrable for two reasons. Firstly, there were many relevant parties who were not parties to the arbitration. Secondly, the Plaintiff had also sought remedies that the arbitral tribunal could not grant, such as winding up. Therefore, the Assistant Registrar was right to refuse a stay of proceedings pursuant to s 6 of the IAA.