

CASE UPDATE



1 November 2017

Singapore Court provides guidance on what constitutes repudiatory conduct in relation to Arbitration Agreements

Introduction

1. In the recent decision of *Heartronics Corporation v EPI Life Pte Ltd* [2017] SGHCR 17, the Singapore High Court decided that one party had repudiated a mediation-arbitration (“**med-arb**”) clause, thereby rendering the arbitration agreement inoperative.
2. Consequently, the opposite party was entitled to treat the arbitration agreement as being discharged and the Court declined to stay the court proceedings commenced by the opposite party.

Background facts

3. The Plaintiff, Heartronics Corporation, was a distributor of medical devices. The 1st Defendant, EPI Life Pte Ltd, carried on the business as a wholesaler and distributor of medical devices.
4. The 2nd Defendant was the sole shareholder of the 1st Defendant. The 3rd Defendant was at all material times a director of both the 1st and 2nd Defendants, while the 4th Defendant was at all material times a director of the 2nd Defendant.
5. The Plaintiff commenced court proceedings against the 1st to 4th Defendants, seeking damages and a rescission of a Licence Agreement dated 7 October 2010 (the “**Licence Agreement**”) and a Distribution Agreement dated 9 November 2010 (the “**Distribution Agreement**”) (collectively, the “**Agreements**”), both of which were entered into between the Plaintiff and 1st Defendant.
6. In response, the 1st Defendant sought a stay of the court proceedings pursuant to section 6 of the International Arbitration Act (“**IAA**”).

Identifying the Arbitration Agreement

7. The Court had to identify what provisions constituted the “arbitration agreements” for purposes of section 6 of the IAA.

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8. The relevant provisions in the Agreements were broadly identical, and mandated that *“all disputes, controversies or differences arising out of or in connection with the Agreements be submitted to the Singapore Mediation Centre (“SMC”) and Singapore International Arbitration Centre (“SIAC”) for resolution by med-arb in accordance with the SMC-SIAC Med-Arb Procedure for the time being in force.”*
9. The SMC-SIAC Med-Arb procedure was also deemed incorporated by reference into the relevant provisions.
10. The SMC-SIAC Med-Arb Procedure envisions the commencement of both mediation and arbitration at the same time. However, the arbitration is stayed pending the outcome of the mediation. Under the Procedure, parties are not given the option of proceeding directly to arbitration without attempting mediation.
11. The Court decided that the relevant provisions (incorporating the SMC-SIAC Procedure) were a unitary dispute resolution mechanism. That is to say, that the entirety of the provisions must be considered to be the “arbitration agreement”.
12. The 1st Defendant argued that the relevant provisions contained two separate dispute resolution agreements: (a) an agreement to mediate; and (b) a separate agreement to arbitrate. The 1st Defendant further argued that they could only be considered to have committed repudiatory breaches (described below in this article) of the agreement to mediate, but not the (separate) agreement to arbitrate. The Court rejected these arguments.
13. The Court preferred the view that the relevant provisions were a unitary and holistic dispute resolution mechanism. In other words, the respective mediation and arbitration proceedings commenced pursuant to the med-arb procedure (set out in the relevant provisions) were closely intertwined, and parties could not proceed directly to arbitration without first attempting mediation.

Whether the arbitration agreement was inoperative

14. The next question that the Court addressed, was whether the arbitration agreement was inoperative due to its repudiation by the 1st Defendant.
15. The Court considered two of the situations where an innocent party may elect to treat the contract as having been discharged, as set out in the case of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] SGCA 39. Namely, (a) whether the 1st Defendant’s conduct deprived the Plaintiff of substantially the whole benefit of the contract (the arbitration agreement); and (b) whether the 1st Defendant had renounced the contract (the arbitration agreement).

Whether the 1st Defendant's conduct deprived the Plaintiff of substantially the whole benefit of the arbitration agreement

16. With regard to the first situation (a), the Court found that the 1st Defendant's actions amounted to breaches of the "arbitration agreement", found in the relevant provisions.
17. The Court considered the following conduct of the 1st Defendant as amounting to breaches of the "arbitration agreement":
 - a. Failure by the 1st Defendant to make payment of the necessary fees to the Singapore Mediation Centre ("SMC"), despite repeated correspondence from the SMC indicating that such payments had to be made before mediation could proceed; and
 - b. The 1st Defendant's continuous postponement of the commencement of mediation over a sustained period of more than a year, from June 2014 to July 2015.
18. The Court was of the view that because the 1st Defendant failed to participate in mediation in good faith, the Plaintiff was prevented from being able to proceed at all in the manner contemplated for under the "arbitration agreement". As a result, the Plaintiff was deprived of substantially the whole benefit of the "arbitration agreement" – namely, the benefit of having recourse to the med-arb procedure encapsulated in the relevant provisions.
19. For completeness, the Court also distinguished the present case with that of *BDMS Ltd v Rafael Advanced Defence Systems* [2014] All ER (D) 244 ("**BDMS**"), where a failure to make advanced payment in an arbitration was not held as a repudiatory breach of the arbitration agreement.
20. The Court found the following facts in *BDMS* significant:
 - a. The Defendant (the non-paying party) was in fact actively participating in the arbitration, and it was at all times open to the Claimant to proceed with the arbitration.
 - b. The actions of the Defendant were expressly contemplated by and addressed in the arbitration rules agreed upon by the parties, which provided for payment by the plaintiff of the defendant's share. As such, it was at all times open to the claimant to proceed with the arbitration by posting a bank guarantee for the defendant's share.
 - c. The defendant was not disputing its liability to pay the advance on costs per se, but merely refused to do so until the question of security of costs had been disposed of – an issue it sought to be resolved within the framework of the arbitral rules.
21. The Court found these features (allowing the Plaintiff to make payment of the 1st Defendant's share of mediation fees) wholly absent on the facts of the present case:

- a. The "Request for Mediation" form makes reference to a non-refundable filing fee per party.
 - b. SMC's letter to the parties dated 18 October 2014 made it clear that each party was required to pay the filing fee, and that only upon payment from all parties will SMC proceed to make the relevant arrangements for mediation.
 - c. SMC's letter of 19 January 2015 makes reference to fees payable per law firm.
22. Furthermore, the 1st Defendant was not actively participating in the mediation proceedings, and its non-payment of mediation filing fees was not predicated on a preliminary issue it wished to have resolved within the framework of the dispute resolution process agreed to by the parties prior to making payment.
- Whether the 1st Defendant had renounced the arbitration agreement*
23. The Court also found that the 1st Defendant had, through its conduct, clearly renounced the arbitration agreements.
24. The Court highlighted the following conduct of the 1st Defendant:
- a. That the 1st Defendant consistently refused to agree on a date for mediation to take place, or make any payment of the requisite fees over a sustained period of about one year.
 - b. Instead, the 1st Defendant variously suggested methods of dispute resolution that had not been agreed upon, and indicated that the mediation could not take place until various later dates.
 - c. That the 1st Defendant stopped responding to the Plaintiff's solicitors' letters (regarding mediation) altogether.
 - d. The 1st Defendant's non-response altogether to the Plaintiff's letter dated 13 July 2015, wherein the Plaintiff expressly stated that it saw the 1st Defendant's actions as being in repudiatory breach of the ADR Clauses, but offered the 1st Defendant one last opportunity to pursue med-arb if the 1st Defendant responded positively.
25. For completeness, the Court found that the Plaintiff's technical error of not delivering any Notice of Arbitration when it submitted its Request for Mediation to the SMC was not fatal to the Plaintiff's case that it had prepared and did try to implement the med-arb procedures set out in the ADR Clauses.

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26. In any case, the 1st Defendant did not at any point in time state that the reason it was not participating in the dispute resolution process which the Plaintiff was attempting to initiate, was because the Plaintiff was not compliant with the ADR Clauses.

Conclusion

27. In the premises, the Court found that the Plaintiff had discharged its burden of demonstrating that the 1st Defendant did, by its conduct, commit a repudiatory breach of the arbitration agreement, thereby rendering the arbitration agreements inoperative.

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