CASE UPDATE

Arbitration Agreement in Shareholders' Agreement does not extend to Disputes concerning Company's Articles of Association

2 January 2019

Introduction

1. In *BTY v BUA and other matters* [2018] SGHC 213, the High Court decided that an arbitration clause in a Shareholders' Agreement ("**the Agreement**") did not extend to disputes which pertain to the Articles of Association ("**the Articles**"). This was the case even though the Agreement contained an obligation which was reproduced in the Articles, and the Plaintiff alleged that such an obligation in the Articles had been breached by the Defendant.

2. The Court decided that:

    a. The Agreement and the Articles gave rise to two distinct and different legal relationships operating on separate planes;

    b. As such, disputes under the Articles were not within the scope of the arbitration clause in the Agreement but were governed by the courts in accordance with ordinary principles of common law.

Facts

3. The Plaintiff was the minority shareholder of the Defendant. The Defendant company was a joint-venture company which had two shareholders, the Plaintiff, and a majority shareholder.

4. A Shareholders' Agreement ("**the Agreement**") was signed between the Defendant company and its shareholders, and a clause in it provided that "*adopting or approving the annual accounts*" of the defendant is a "*matter requiring consent*". The Agreement imposed an obligation on the Defendant company to seek the approval of both shareholders before performing matters requiring consent.

5. The Agreement bound the parties to enter into a new Articles of Association ("**the Articles**") for the Defendant company. The parties did so. The Articles also similarly specified that the adoption or approval of annual accounts was a "*matter requiring consent*", and that the Defendant company had to seek both shareholders' approval before performing such matters.

6. The 2015 annual accounts ("**the 2015 accounts**") were presented for adoption at a board meeting of the Defendant company. A majority of the board (the three appointees of the majority shareholder voted to adopt it. However, the remaining two board members (who were appointees of the Plaintiff, the minority shareholder), refused to adopt it.

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7. The Defendant company then asked shareholders to receive and consider the 2015 accounts at an Annual General Meeting ("**AGM**"), and to adopt it if they thought fit.

8. The Agreement contained an arbitration clause at Clause 29.2, which provided that any dispute arising out of or in connection with the Agreement was to be resolved by arbitration. Clause 29.2 of the Agreement was **not** reproduced in the Articles.

9. The Plaintiff alleged the Defendant company's action in asking shareholders to adopt 2015 accounts at an AGM if they thought fit, breached its obligation under the Articles to seek both shareholders' approval before adopting or approving annual accounts. As such, the Plaintiff commenced court proceedings. However, the Defendant company sought to stay the litigation, relying on the arbitration clause at Clause 29.2 of the Agreement in seeking to invoke S 6 of the International Arbitration Act ("**IAA**").

10. The Dispute was first heard by an assistant registrar, who stayed the litigation. .

11. The Plaintiff appealed to the High Court. The sole issue was whether any part of the dispute in this litigation fell within the scope of the parties' arbitration agreement.

Analysis

12. The Court adopted the two-step test stated in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("***Tomolugen***") to determine whether the dispute fell within the scope of the parties' arbitration agreement. The steps in the test were:

    a. What is the "matter" in respect of which this litigation has been brought?

    b. Is that matter the "subject" of the parties' arbitration agreement?

Issue 1: What is the "matter" in respect of which this litigation has been brought?

13. The Court stated that this issue required the Court to identify what the substance of the controversy in this litigation was. Following *Tomolugen*, the "matter" in any given litigation for a stay application would encompass the claims made in the litigation.

14. The Court found it significant that a breach of the Articles was a necessary condition in each of the Plaintiff's claims for relief. As such, the Court found that the "*matter*" in this litigation was simply whether the defendant had adopted or approved the 2015 accounts.

Issue 2: Is that matter the "subject" of the parties' arbitration agreement?

15. The Court noted that with regard to Issue 2, there were two questions to be asked:

    a. What does the words "*this Agreement*" in the arbitration clause of the Agreement mean?

    b. Is a dispute over whether the 2015 accounts were adopted or approved in breach of the Articles a dispute "*arising out of or in connection with this Agreement*" within the meaning of

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Cl 29.2 of the Agreement (the arbitration clause)?

16. The Court found that the Agreement and the Articles created two separate legal relationships operating on separate planes. This was because the Agreement was a private contract deriving its force from the private law of obligations. In contrast, the Articles were a component of the Defendant company's constitution which derived its contractual force from company law, not private law; and were given binding force by a public Act of Parliament, not a private act of parties.

17. Furthermore, the Court observed that any obligation which a company or a shareholder undertakes privately in a shareholders' agreement which is contrary to a mandatory provision of company law, is subordinate to company law and must yield to company law. This principle applies even if the shareholders' agreement precedes the company's constitution in time and even if obligations in the shareholders' agreement are the source, whether factually or contractually, of the obligations in the constitution.

18. On the facts of this case, the Court found that the Agreement expressly recognised that it operated on a plane separate to company law and that it is subordinate to company law. The Court further found that since the Agreement and Articles created two separate legal relationships between the parties operating on two separate planes, a reasonable person in the position of the parties would thus not have understood the arbitration clause in the Agreement, without more, as extending to disputes arising under the Articles.

19. As such, the Court decided that as the dispute in this case (as framed by the Plaintiff) arose under the Articles, it did not fall within the scope of the arbitration clause in the Agreement.

20. Consequently, the Court dismissed the Defendant company's stay application, and allowed the litigation to continue.

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