

Right to submit dispute to Court may not be unfettered where there is related dispute that is to be submitted to arbitration

5 May 2016

Introduction

1. In *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and anor* [2016] SGHC 68 ("**Lim Keng Yong**"), the Singapore High Court (the "**HC**") faced related claims under related contracts that contained different dispute resolution provisions. One contract contained an arbitration clause, while a second (related) contract contained a clause submitting to the non-exclusive jurisdiction of the Singapore Courts ("**the NEJC**").
2. On the facts, the HC judge ("**the Judge**") decided to stay court proceedings (which was relevant to one of the contracts), pending the outcome of the other claim (arising under the other contract) that was to be submitted to arbitration. The HC achieved this by exercising its powers to efficiently manage the court litigation, while simultaneously giving effect to the arbitration clause in the related contract (instead of displacing the arbitration clause).
3. The decision is a timely reminder of the importance of ensuring that related contractual documents have consistent dispute resolution clauses. Otherwise, parties' expectations as to which forum they wish to have their dispute heard in may not be fulfilled.
4. The result of the HC's decision, on the facts, is that the NEJC in favour of the Singapore Courts was, practically speaking, not fully given effect to.

Facts

5. This case involved a bank (the "**Appellant**") bringing an action against the 1st and 2nd Respondents. The 1st Respondent was the wife and client of the 2nd Respondent.
6. The Appellant's claims were brought in respect of two contracts, one against each Respondent. The contract with the 1st Respondent was an agreement that provided for the trading of certain derivatives. The contract with the 2nd Respondent was a remisier's agreement, which provided an indemnity ("**the Indemnity**") in favour of the Appellant.
7. **Significantly, these commercial contracts were subject to different dispute resolution clauses.** The Appellant's contract with the 1st Respondent provided for arbitration in Singapore under the Arbitration Act ("**AA**"). On the other hand, the Appellant's contract with the 2nd Respondent contained a NEJC in favour of the Singapore courts.

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8. Ultimately, disputes arose as a result of trading losses. The Appellant brought separate claims against the two Respondents in the HC. This was on the basis that the latter parties had allegedly authorised transactions that resulted in the trading losses. Conversely, and significantly, the Respondents argued that the transactions had been made without their authorisation.
9. Subsequently, however, the Appellant took the strategic move of discontinuing its suit against the 1st Respondent. On that basis, the Appellant argued at the appeal that there was no need for a stay as there would *not* be a multiplicity of proceedings. The 1st Respondent, however, informed the court that it *still* intended to commence arbitration proceedings against the Appellant. Thus, the prospect of multiplicity of proceedings remained a live concern.

Appeal to the HC

10. Having failed to convince the Assistant Registrar (“**AR**”) that its two claims should not be stayed, the Appellant argued at the appeal that:
 - (a) First, the 2nd Respondent’s liability as principle debtor under the Indemnity was independent from the Appellant’s original claim against the 1st Respondent. Thus, both claims could be heard independently from each other. The court thus need not stay court proceedings pending the outcome of the claim being arbitrated.
 - (b) Second, by virtue of the NEJC, the Appellant had a contractual bargain with the 2nd Respondent to bring a suit against the latter in the event of a dispute. A stay would undermine this bargain and prejudice the Appellant’s right to apply for summary judgment.

Issues before the HC

11. The Judge was of the view that the following issues had to be decided:
 - (a) Would the powers enunciated in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (“**Tomolugen**”) to stay proceedings in the interests of case management extend to cases where the relevant arbitration agreement was governed by the Arbitration Act (Cap 10, 2002 Rev Ed) (“**AA**”)?

In *Tomolugen*, the Singapore Court of Appeal (the “**CA**”) had exercised its case management powers in the context of a related arbitration under the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“**IAA**”).

Further, if such powers did extend to the AA, how should the principles governing these case management powers apply?
 - (b) Was the Appellant’s claim against the 2nd Respondent under the Indemnity independent of the former’s claim against the 1st Respondent under the other contract, such that the determination of the claim in arbitration would be irrelevant to the suit against the 2nd Respondent?
 - (c) If the answer to (b) is no, should the court then exercise its inherent powers of case management to stay proceedings against the 2nd Respondent?

Holding

The principles in Tomolugen

12. The Judge began by citing the key principles enunciated in *Tomolugen*:
 - (a) **The procedural facts and holding of Tomolugen.** In *Tomolugen*, the CA had to decide on claims for minority oppression against multiple defendants. Out of four issues in dispute, one fell within an arbitration agreement governed by the IAA.

In deciding the case, the CA exercised the court's "inherent powers of case management", and ordered that if the plaintiff wished to pursue arbitration, then the rest of the court proceedings would be stayed in the interests of case management.
 - (b) **Principles to be applied.** In its judgment, the CA set out the following principles that were relevant to a situation in which a dispute fell to be resolved partly by arbitration and partly by court proceedings, and there was an overlap of issues and parties in the two proceedings:
 - (i) The court should take the lead to ensure efficient and fair resolution of the dispute.
 - (ii) Whether a court would grant a stay in the interests of case management depended on the balancing of three "higher-order concerns". How the balance would be specifically struck, however, would depend on the contours of each case.
 - (iii) These "higher-order concerns" were, namely, (1) a plaintiff's right to choose whom and where he wants to sue; (2) the court's desire to prevent a plaintiff from circumventing an arbitration clause; and (3) a court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes.

Principles of Tomolugen would apply to cases involving arbitrations under the AA

13. After setting out these principles, the Judge in *Lim Keng Yong* decided that **the principles in Tomolugen, particularly the three "higher-order concerns", would apply whether or not the relevant arbitration agreement was governed by the AA or IAA.**
14. The Judge also noted that while a court did have the discretion to refuse a stay (under Section 6 of the IAA), **the court would only refuse a stay in exceptional cases.** This was because of the desirability in holding the parties to their arbitration agreement, and Singapore's strong policy in favour of arbitration.
15. At the same time, however, the burden would be on the party arguing against a stay of proceedings to show sufficient reason why the matter should not be referred to arbitration. In this regard, it would not be sufficient for the party arguing against the stay to show that there are related actions, some of which were governed by arbitration agreements, and some were not.

Claims against both Respondents “related”

16. The Judge decided that the Appellant’s claims against the two Respondents were related. In this regard, he noted that the relevant question to see if two claims were unrelated was to ask: **Were the two proceedings in fact separate and independent, such that the determination of the claim in the arbitration would be irrelevant to the suit against the second Respondent?** This was different from simply asking whether the two contracts were legally independent.
17. The Judge then proceeded to examine when the 2nd Respondent’s liability under the Indemnity would arise. Looking at the clauses of the Indemnity, he found that liability would only arise where either of the Respondents had expressly or impliedly authorised the loss-making transactions.
18. The conclusion drawn by the Judge was that, if it were determined during the arbitration that there was no such authorisation from either of the Respondents, this would strike at the heart of the Appellant’s court proceeding against the 2nd Respondent. Specifically, the Appellant would have no case against the 2nd Respondent. This is because the 2nd Respondent would not even be liable for any debt to the Appellant.
19. Thus, the dispute between the Appellant and the 1st Respondent (which dealt with whether the 1st Respondent had provided such authority) was unquestionably related to the dispute between the Appellant and the 2nd Respondent. This was a compelling reason for the HC to order a stay, pending the outcome of the related arbitration.

HC’s exercise of case management powers

20. Having decided that both of the Appellant’s claims against the Respondents were related, the next question was how the court would strike the balance of the “higher-order concerns” to see if a stay should be given.
21. The Judge provided the following important guidelines that the court, in striking the balance, should consider:
 - (a) **Whether the right of the party opposing the stay to proceed in the courts would be prejudiced.** In this regard, it had to be remembered that a party’s right to proceed in the courts is not absolute.

In this case, the Judge found that the right of the Appellant to go to court would not be prejudiced because of two reasons. First, the nature of the stay in this case was only temporary. Second, liberty had already been granted to the Appellant for it to apply to reinstate proceedings if the arbitration was not proceeding in a reasonably expeditious manner.

The Court also rejected the Appellant’s argument that, in every occasion when trading losses were incurred and a remisier is involved (thus leading to claims under different contracts), the arbitration clause should invariably be displaced in favour of court proceedings, so as to avoid a multiplicity of proceedings.

- (b) **Whether the claimant had already contracted to arbitrate its related claim against one party.**

The Judge pointed out that this case involved an Appellant who already had an obligation to arbitrate. This diminished the force of the Appellant's objection that the right of timely access to the court was being undermined.

- (c) **Whether, in ensuring the efficient and fair resolution of a dispute, the following factors pointed in favour of a stay:**

- (i) Whether the factual bases underlying the claims in the two proceedings were essentially the same;
- (ii) Whether there were common issues in both claims; and
- (iii) Whether there would be a duplication of witnesses and evidence between both proceedings.

The Judge found that the facts of this case made it even more compelling for the court to exercise its case management powers to order a stay. This is because, compared to *Tomolugen*, where a stay was granted when only *one out of four* claims was subject to arbitration, the main issues in the present case did not only overlap, but were essentially identical.

22. The Judge therefore found the balance in favour of a stay of the court proceedings, pending the resolution of the related arbitration between the Appellant and the 1st Respondent.

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