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International Arbitration and Litigation Team

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Clarification of the Approach to Non-Arbitrable Claims - Silica Investors v Tomolugen Holdings (Singapore High Court)

It has long been the case that certain classes of claims and disputes cannot be resolved by way of arbitration.

The non-arbitrability exception is provided for in Article 1(5) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). Likewise, under Article II of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Contracting States are obliged to recognize arbitration agreements which concern "subject matter capable of settlement by arbitration". Article V of the New York Convention and Article 34(2)(b) of the Model Law also provide that recognition and enforcement of arbitral awards may be refused if the subject matter was "not capable of settlement by arbitration…"or "contrary to the public policy…".

Similar provisions also appear in the arbitration legislation of key arbitration centres, such as the Arbitration Act 1996 in England, and the International Arbitration Act (Cap 143A) ('IAA") in Singapore.

Silica Investors Ltd v Tomolugen Holdings Ltd [2014] SGHC 101

In a 63-page decision handed down in end-May 2014, the Singapore High Court examined the approach to whether a minority oppression claim was capable of settlement by arbitration, and declined to order a stay in favour of arbitration in that case.

The case itself relates specifically to oppression claims under section 216 of the Singapore Companies Act (Cap 50), but is of useful guidance generally as the court considered the underlying principles of arbitrability in some detail, and also considered the approaches in other jurisdictions such as England, Australia, New Zealand and Canada.

The facts

In this case the plaintiff Silica Investors was a minority shareholder in Auzminerals Resource Group Limited ("AMRG"), a Singapore-registered company. Silica Investors had purchased the shares from Lionsgate Holdings under a share sale agreement. The agreement provided for arbitration for *"any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination…"*

Lionsgate Holdings was also a shareholder of AMRG, and was in turn a subsidiary of Tomolugen Holdings Limited ("THL"). THL also held the majority stake in AMRG. The oppression action was brought against AMRG, Lionsgate, Tomolugen, and six directors of AMRG who (save for one person) were also direct or indirect shareholders of AMRG.

Silica Investors brought the oppression claim in the Singapore court, and sought, amongst other things, the liquidation of AMRG. In turn, Lionsgate, THL, AMRG and two of the directors applied to stay the court proceedings in favour of arbitration. The stay applications were dismissed, and the dismissals were upheld on appeal.

The holdings

Justice Quentin Loh who heard the appeal found that Silica Investor's claim fell within the scope of the arbitration clause. On the question of arbitrability of oppression claims, Justice Loh first examined the approaches in England, Australia and Canada. He first found that in England oppression claims were arbitrable, the leading case being the Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards [2012] Ch 333). He also found that in Australia a minority oppression claim was arbitrable, insofar as the remedies sought are inter partes and not in rem, whereas the position in Canada was split.

Justice Loh then proceeded to focus on the inherently consensual nature of arbitration, which necessarily limits its application to third parties, and contrasted that with statue-based reliefs which affect third parties:

> *"95. Unlike an order for damages, which is essentially inter partes and can be granted by the arbitral tribunal pursuant to its power derived from the consent of the parties to the arbitration, there are some statute-based reliefs that would invariably affect third parties or the public at large such that they can only be granted by the courts in the exercise of their powers conferred upon them by the state. Examples include a judgment in rem against a vessel under the admiralty jurisdiction of the Court and an order to wind up a company under the CA."*

He also examined the provisions of section 12(5) of the IAA, which provides that a tribunal *'may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court'*, and compared it with the position in New Zealand. He then concluded that such tribunal powers are nevertheless limited, in the following terms:

> *"111. In my judgment, s12(5) of the IAA clearly cannot be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court. It has a more limited purpose, and an arbitral tribunal clearly cannot exercise the coercive powers of the courts or make awards in rem or bind third parties who are not parties to the arbitration agreement."*

Justice Loh recognized that there may be claims which straddle the line between arbitrable and non-arbitrable claims, and found that a nuanced approach was necessary:

> *"113. … just because a statutory claim may be redressed or remedied by an order that is only available to the courts, that does not mean the claim is automatically rendered non-arbitrable. It may well straddle the line between arbitrability and non-arbitrability depending on the facts of the case, the manner in which the claim is framed, and the remedy or relief sought."*

Justice Loh then proceeded to consider four possible approaches that could be applied in an application for stay of an oppression action in favour of arbitration, ranging from staying court action in favour of arbitration until the arbitration came to an end before court action was continued (if necessary) to declining the stay on the basis of non-arbitrability.

He found that each approach could run into significant practical and legal difficulties, and result in unsatisfactory outcomes and conflicts. Amongst other things, he found that

a) the risk of disagreement between the tribunal and the court on both the factual findings and the appropriate remedies,

b) the possibility that the parties could be subject to a multiplicity of proceedings, which would be inconsistent with parties' intentions in agreeing to arbitrate,

c) the impact on other shareholders who are not bound by the arbitration agreement, and

d) the non-availability of winding up and other remedies that only a court can make.

In the circumstances, Justice Loh considered that an oppression claim could be arbitrable if all the parties were bound by an arbitration agreement, but found that the oppression claim in this case was non-arbitrable, in the following terms:

> *"141. In my judgment, the nature of a minority oppression claim and the broad powers of the Court under s 216(2) of the CA would mean that a minority oppression claim is one that may straddle the line between arbitrability and non-arbitrability. It would not be desirable therefore to lay down a general rule that all minority oppression claims under s 216 of the CA are non-arbitrable. It will depend on all the facts and circumstances of the case. No single factor should be looked at alone. Nor should the remedy or relief asked for assume overriding importance, as that would enable litigants to manipulate the process and evade otherwise binding obligations to refer their disputes to arbitration.*

142. That said, except for those cases where all the shareholders are bound by the arbitration agreement, or where there are unique facts like Fulham, and the Court is satisfied that, first, all the relevant parties (including third parties whose interests may be affected) are parties to the arbitration and, secondly, the remedy or relief sought is one that only affects the parties to the arbitration, many if not most of the minority oppression claims under s 216 of the CA claims will be non-arbitrable. This will often be in cases where, eg, there are other shareholders who are not parties to the arbitration, or the arbitral award will directly affect third parties or the general public, or some claims fall within the scope of the arbitration clause and some do not, or there are overtones of insolvency, or the remedy or relief that is sought is one that an arbitral tribunal is unable to make."

Commentary

It is not entirely clear from the judgment if Silica Investors or any of the other parties had commenced arbitration. If they had done so, it would presumably have been open to the tribunal to consider its own jurisdiction to decide the underlying dispute between the parties to the arbitration agreement, which may or may not differ from the court's own analysis.

Nevertheless, the decision in the Silica Investors v Tomolugen Holdings case is a welcome addition to the body of case law relating to the issue of arbitrability. Amongst other things, it illustrates that the categories of arbitrable cases is not immutable, conversely that it is not always a foregone conclusion that a widely drafted arbitration clause in a commercial transaction will invariably be upheld and enforced. Considerations such as whether all the parties consented to arbitration, and whether the relief sought could be given by a tribunal would likely be key factors to the question of arbitrability.

It also remains to be seen if the decision will be appealed, and if so, what the views of the Singapore Court of Appeal might be in that regard.

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