

**ARBITRATION: WHETHER MINORITY SHAREHOLDER'S OPPRESSION CLAIM UNDER SECTION 216
COMPANIES ACT IS ARBITRABLE**

SILICA INVESTORS LTD V TOMOLUGEN HOLDINGS LTD AND OTHERS [2014] SGHC 101

In Summary

The Singapore High Court on 29 May 2014 clarified that whether minority shareholder's oppression claims were arbitrable was dependent on the factual circumstances of the case and/or whether the remedies sought by the parties were beyond the general power of the arbitral tribunal such that they would involve third parties.



Facts

The Plaintiff entered into a share sale agreement with the 2nd Defendant containing an arbitration clause. The Plaintiff commenced court proceedings pursuant to Section 216 of the Companies Act (Singapore) ("CA") against the 2nd Defendant for reliefs in the form of a buyout order and an order to regulate the conduct of the 8th Defendant (the company from which the Plaintiff was to buy 4.2% of its shares as per the share sale agreement) and/or the order for the winding up of the 8th Defendant - alleging minority oppression (the issuance of shares as payment for a fictitious debt; the exclusion from participating in management; the execution of guarantees for an unrelated entity; and the improper exploitation of resources).

In response, the Defendants applied to the High Court to stay the court proceedings pursuant to Section 6 of the International Arbitration Act ("IAA") and/or under the inherent jurisdiction of the court.

Section 6 of the IAA mandates the court to stay proceedings that relates to the subject of an arbitration agreement unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

Holding of the Assistant Registrar of the High Court

The Assistant Registrar dismissed the Defendants' application to stay the entire proceedings.

Issues in the Appeal before the Judge of the High Court

In the appeal against the Assistant Registrar's decision of refusing the stay application, the High Court Judge in Chambers considered whether the Plaintiff's claim fell within the scope of the Arbitration clause; and if so whether a claim under Section 216 of the CA is arbitrable.

Holding

The High Court dismissed the appeal against the Assistant Registrar's refusal to grant a stay of arbitration proceedings on the basis that although the Plaintiff's minority oppression claim was within the scope of the Arbitration Clause, it was not arbitrable since it involved relevant parties not parties to the arbitration such as the shareholders of the Defendants and that the statutory remedies sought could not be granted by the arbitral tribunal.

Whether the matter falls within the scope of the Arbitration Clause

The Court in determining whether the proceedings involved matters within the scope of the Arbitration Clause followed the approach taken by the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414 ("Larsen Oil") (in line with the approach adopted by the Australian Courts):

- (1) What is the proper characterisation of the Plaintiff's claim?;
- (2) What is the scope of the Arbitration Clause?; and

- (3) Does the Plaintiff's claim fall within the scope of the Arbitration Clause?

The Court characterised the matter to be determined in reference to the essential dispute between the parties, namely whether the affairs of the company were being conducted and managed by the Defendant in an oppressive manner towards the Plaintiff as a minority shareholder on the following basis:-

- (a) Section 6 of the IAA refers to the essential dispute between parties is guided by (but not be limited to) the claim framed in the pleadings and the underlying basis of the claim, and not the mere issues that are to be determined in the course of the proceedings; and
- (b) the pleadings clearly reflect that the essential dispute between the parties was minority shareholder's oppression.

In taking into account that generally, a matter would fall outside the scope of an arbitration clause if it were unrelated to the contract. On the fact that a close connection would suffice, the Court found that it was unlikely that parties had intended to exclude such claims from the Arbitration Clause because it was widely drafted – "*any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration*", such that that there was no indication of any intention to exclude statutory claims such as claims under Section 216 of the CA.

Furthermore, the Court considered the factual allegations underlying the claim to determine the relationship between the Share Sale Agreement and the matter to establish a close connection.

Despite only two out of the four allegations making reference to the Share Sale Agreement, the Court held that the matter was so closely connected to the Share Sale Agreement and could not be dealt with separately since sufficient parts of the factual allegations underlying the claim related to the contract. On this premise, it could be presumed that the parties intended for their claim to be resolved by the same tribunal.

Despite the close connection, the Court held that in the present circumstances, the claim was non-arbitrable since it involved parties not parties to the arbitration, and also statutory remedies that could not be granted by the arbitral tribunal. The Court, however, stressed that it was not laying down a general rule that Section 216 claims were non-arbitrable -

stating that whether a claim under Section 216 of the CA was arbitrable is dependent on the facts and circumstances of the case.

In many, if not most of the minority oppression claims under Section 216 of the CA, the claims will be non arbitrable since the arbitral tribunal does not have the general power to grant remedies that involve third parties (example granting a winding up order and/or varying transactions that involves third parties); such remedies were solely within the purview of the courts.

Concluding Views

Parties need to appreciate that while minority shareholder's oppression may be arbitrable, if it involves seeking remedies (in this case statutory) that are not within the powers of the tribunal and/or remedies that might involve the interests of parties not parties to the arbitration agreement, such matters are non-arbitrable.

It is therefore important to note that for parties entering into agreements appreciate the appropriate dispute resolution mechanisms available and in the event of adopting arbitration to ensure that the arbitration clause is carefully drafted to take into account parties' needs to be covered by arbitration.

As this matter is up for appeal at the Court of Appeal, the issue of whether Section 216 of the CA is arbitrable may be advanced.

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