Can Directors Rely on their Companies' Arbitration Agreements?

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Joint venture agreements increasingly provide for arbitration, allowing the JV partners to resolve matters privately. Where a director of a JV company (or JV partners) is sued in his capacity as a director in relation to matters arising out of the joint venture agreement, can he also rely on the arbitration agreement in the joint venture agreement? Or, must he be left to contend with the public scrutiny of litigation?

Unsurprisingly for a legal problem, the answer is "*it depends*". It depends, according to the Singapore High Court in ***A co and others v D and another*** **[2018] SGHCR 9**, on objective intentions of signatories to the arbitration agreement. As a general proposition, this is uncontroversial. Its application however is instructive, indeed cautionary, for directors wishing to avoid litigation, who might otherwise be lulled into an assurance of confidentiality based on arbitration agreements signed by their companies.

The Court clarified that just because a director may be acting in his capacity as a director cannot justify his reliance on his company's arbitration agreement, even if it is broadly drafted (as most arbitration agreements now are). Something more is required. Seemingly, a lot more is required – nothing short of an express statement covering claims against a director might suffice.

Facts

Company A was incorporated pursuant to a joint venture between companies F and G. The relationship between parties to the joint venture was governed by an investment agreement concluded between, among others, companies A, F and G ("**IA**").

The incorporated JV, Company A, was the holding company of Companies B and C, and B in turn was the parent company of Company H. D was the executive chairman and CEO of Company G, and his son, E, was the managing director of Company C. D and E were also directors of Company A.

Various persons and entities connected with the IA were embroiled in a string of acrimonious proceedings, which included 4 litigations and 1 arbitration. The latest salvo in this series was a Court action by Company F against D and E. In this suit, Company F, acting on behalf of Companies A, H and C ("**Companies**"), alleged that D and E were in breach of their fiduciary duties to the Companies.

D and E applied to stay the suit in favour of arbitration under section 6 of Singapore's International Arbitration Act ("**IAA**"), on the basis that the arbitration agreement in the IA applied to them, even

though they had not signed it. They emphasised the breadth of the arbitration agreement, which applied to "*any dispute, controversy or conflict arising out of or in connection with*" the IA. This, they argued, on a "*holistic*" reading of the IA, included claims brought by "*Group Companies*" (as defined in the IA, to include the Companies) against "*Affiliates*" (which included D and E).

Alternatively, relying on the "*agency principle*" from American jurisprudence, they contended that they could compel the Companies to arbitrate simply because the Companies' claims concerned D and E's conduct as directors of companies which were governed by the IA.

The Decision

The High Court declined the stay application. There appears to have been no serious argument on whether the subject matter of the suit was indeed connected with the IA. The issue was instead framed as whether D and E were parties to the arbitration agreement, which they had not signed.

Objectively, the arbitration agreement did not apply to D and E

Importantly, the Court held that the mere wording of the arbitration agreement, wide though it was, was insufficient to imply that it covered the Companies' claims against D and E. It was significant to the Court that the arbitration agreement had on a separate occasion been expressly incorporated into a deed (which was unrelated to this dispute). This, the Court held, demonstrated that if parties intended to arbitrate disputes between the Companies and D and E, they could similarly have made an express provision to that end.

The Court concluded that nothing in the IA demonstrated the necessary objective intention to arbitrate the Companies' claims against D and E, and in the absence of any other supporting circumstances or parties' conduct, such intention simply was not there. A clause in the IA, which provided that claims by Company A against D and E (as "*Affiliates*") shall be prosecuted on behalf of Company A by directors of company F was found to be irrelevant, as it dealt only with who has the authority to prosecute, not with the mode of the dispute resolution.

Directors cannot rely on "agency principle" to compel arbitration

D and E also argued that they could compel the Companies to arbitrate simply because their allegations concerned D and E's conduct as directors of companies which were governed by the IA. This was based on the "agency principle" espoused in a 2011 American decision, *Kiskadee Communications v Philip Father* 2011 US Dist Lexis 34974 (N. Cal. 2011), which allows an agent to benefit from an arbitration agreement if claims against him (i) concern acts done in his capacity as an agent, and (ii) arise out of or relate to the contract containing the arbitration agreement.

The Court declined to import this "novel" point to Singapore law for a number of reasons, of which the most compelling appears to be the criticism of the "agency principle" (even within American jurisprudence) for its potential to offend parties' objective intentions, i.e. by allowing an "agent" to invoke an arbitration agreement when objectively, parties may not have intended such an outcome.

Company F's submissions about the differences between the tests for stay under American and Singapore legislation also found favour with the Court in reaching this conclusion. The Court accepted that section 3 of the Federal Arbitration Act did not require the party seeking the stay to be a party to the arbitration agreement; all that was required was "*an issue referable to arbitration under an agreement in writing for such arbitration*". On the other hand, section 6 of Singapore's IAA only allows a party to the arbitration agreement to make an application for stay.

This difference however, appears more apparent than real. Singapore's IAA does not define "party",

and where an "agent" seeks to rely on an arbitration agreement, his party status is the very question that needs to be decided. Further, section 9 of Singapore's Contract (Rights of Third Parties) Act allows third-party beneficiaries of arbitration agreements to invoke them in prescribed circumstances, thus expressly allowing non-parties to rely on them. On the other hand, it is highly doubtful whether the American Federal Arbitration Act allows anyone other than a party to (or a third-party beneficiary of) an arbitration agreement to stay court proceedings in favour of arbitration. It requires an issue referable to arbitration "*under an agreement*", and an agreement can only be invoked by those who agree to it or are otherwise intended to be its beneficiaries.

Third party rights under Contract (Rights of Third Parties) Act ("CRTPA")

Although D and E did not seek to rely on the CRTPA, the Court affirmed the theoretical possibility of a non-signatory invoking an arbitration agreement in his capacity as an intended third-party beneficiary of the arbitration agreement, provided:

1. the arbitration agreement purports to confer a benefit on him, such that the benefit is intended (not merely incidental); and
2. parties intended to entitle him to enforce the arbitration agreement.

Comment

The key take-away for directors (or other corporate officers and agents) wishing to rely on arbitration agreements signed by their companies is to say so in writing. Otherwise, they face the uphill task of convincing the court that the signatory companies also objectively intended to make the directors parties to the companies' arbitration agreement.

This is not easy, and as ***A v D*** demonstrates, arguments based on the interpretation of the underlying contract and the scope of disputes it envisages will likely not pass muster. The CRTPA will also be of little, if any, assistance to a director in this predicament, as it too requires demonstration of parties' intention to benefit a third party, and to allow him to enforce the arbitration agreement. The safest course is to spell out the parties and the disputes that the arbitration agreement is to cover.