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Singapore Court of Appeal: Prima Facie Standard for Stay in Favour of Arbitration and Arbitrability of Minority Oppression Claims

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Singapore's highest court, the Court of Appeal (the "*SGCA*"), has held in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] 1 SLR 373, that:

• The *prima facie* standard applies for obtaining a stay of court proceedings in favour of arbitration under the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "*IAA*"); and
• Minority oppression claims under Section 216 of Singapore's Companies Act (Cap 50, 2006 Rev Ed) (the "*Companies Act*") are arbitrable.

In a judgment delivered by Chief Justice Sundaresh Menon, the SGCA adopted the *prima facie* standard of review in deciding whether a stay should be granted, departing from the English position. The SGCA also held that minority oppression claims are arbitrable under the IAA. In particular, it decoupled the issues of remedial jurisdiction and arbitrability, holding that a dispute may be arbitrable even if a tribunal cannot award the relief sought: a tribunal may resolve the underlying dispute with parties subsequently applying to court for the relief if necessary.

Facts of the case

The dispute arose out of a share sale agreement (the "*Share Sale Agreement*") that the plaintiff, Silica Investors Limited, entered into with the second defendant, Lionsgate Holdings Pte Ltd ("*Lionsgate*"), to purchase approximately 4.2% of the shareholding in the eighth defendant, Auzminerals Resource Group Limited ("*AMRG*"). The Share Sale Agreement contained an arbitration clause.

The first and second defendants were together the majority and controlling shareholders of AMRG; the third to seventh defendants were the directors and/or shareholders of AMRG.

The plaintiff alleged that it had been oppressed as a minority shareholder, as AMRG's affairs were conducted in a manner oppressive or unfairly prejudicial towards it as a minority shareholder. It commenced a minority oppression claim based on:

(a) The issuance of shares as payment for a fictitious debt that diluted the plaintiff's shareholding (the "*Share Issuance Allegation*");
(b) The exclusion from participating in management (the "*Management Participation Allegation*");

(c) The execution of guarantees for an unrelated entity (the "*Guarantees Allegation*"); and
(d) The improper exploitation of resources) pursuant to Section 216 of the Companies Act against the defendants (the "*Asset Exploitation Allegation*").

The plaintiff sought various reliefs, including a buyout order, an order to regulate the conduct of AMRG, and/or an order for the winding up of AMRG.

Some of the defendants applied to stay proceedings under Section 6 of the IAA and/or the inherent jurisdiction of the court. The assistant registrar refused the stay application; these defendants appealed to the High Court, which dismissed their appeal. They appealed again to the SGCA.

Decision of the SGCA

At the outset, the SGCA held that under Section 6 of the IAA a court hearing an application for a stay should grant it, deferring the actual determination of the tribunal's jurisdiction to the tribunal, if the applicant is able to establish a *prima facie* case that:

(a) there is a valid arbitration agreement between the parties to the court proceedings;
(b) the dispute in the court proceedings falls within the scope of the arbitration agreement; and
(c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

The SGCA then proceeded to consider whether minority oppression claims under Section 216 of the Companies Act were arbitrable. It observed that a claim for relief under Section 216 engages different public policy considerations from claims associated with liquidation of a company. Further, Section 216 does not suggest arbitration of a Section 216 claim is contrary to public policy. It also noted English decisions that had held disputes over oppressive or unfairly prejudicial conduct towards minority shareholders were arbitrable.

The SGCA held that the plaintiff's Section 216 claims were arbitrable, disagreeing with the High Court that jurisdictional limitations on the relief a tribunal can grant are relevant to arbitrability. Instead, it stated that tribunals have broad remedial powers under the IAA, and parties may agree to add to these powers. Moreover, the SGCA found, with reference to decisions from England and Hong Kong, that there is nothing, in principle, precluding a tribunal from resolving the underlying dispute with parties subsequently applying to court for relief that the tribunal cannot award. It also held that potential procedural complexity was insufficient reason to render a dispute non-arbitrable.

As for whether the dispute fell within the scope of the arbitration agreement, the SGCA held that only the Management Participation Allegation did on a *prima facie* basis, and therefore stayed only the proceedings between the plaintiff and Lionsgate in relation to the Management Participation Allegation. It was undisputed that the Guarantees Allegation and the Asset Exploitation Allegation were unrelated to the Share Sale Agreement, and therefore did not fall under the arbitration agreement. As for the Share Issuance Allegation, the SGCA held that it did not arise out of or in connection with the Share Sale Agreement, as it only tangentially implicated the Share Sale Agreement.

The SGCA noted that the Management Participation Allegation ought to be determined between the plaintiff and Lionsgate first. This was a discreet issue concerning the construction of a specific clause, so court proceedings could be stayed pending the outcome of the arbitration. Alternatively, the plaintiff could abandon the Management Participation Allegation; no stay would then be

necessary, and the claims based on the other three allegations could proceed against all the defendants in court.

The SGCA thus gave the plaintiff two weeks to decide whether to pursue the Management Participation Agreement against Lionsgate by arbitration. If the plaintiff decided to do so, all other proceedings (both against Lionsgate and the other defendants) would be stayed pending arbitration. The plaintiff was also to decide whether to offer to arbitrate the Management Participation Allegation with the other defendants. Any arbitration was to proceed expeditiously, with any expedited procedure under the Singapore International Arbitration Centre's arbitration rules being employed.

Commentary

The prima facie approach

First, the SGCA's endorsement of the "*prima facie*" standard of review is noteworthy, particularly as it departed from the English position. The SGCA adopted the *prima facie* approach as:

(a) The *prima facie* approach coheres better with what the SGCA considered the drafters of the IAA envisaged.
(b) Requiring the court hearing a stay application to undertake a full determination of a tribunal's jurisdiction significantly reduces, in practical terms, the effect of the *kompetenz-kompetenz* principle, as opposed to where an action is commenced in arbitration.
(c) Robustly recognizing and enforcing the *kompetenz-kompetenz* principle may deter plaintiffs from commencing proceedings in court where there is an applicable arbitration agreement, and also reduce challenges to a tribunal's decision on its jurisdiction.
(d) The use of the word "*satisfied*" in Section 6(2) of the IAA does not mean the court is required to conduct a full merits review when faced with an application for stay; further, the Model Law is equivocal on the approach to be taken.

The *prima facie* approach had been adopted in three prior decisions of Singapore's courts. However, in light of the contrary English position, the position was not settled. Hence, this latest decision is significant as it clarifies that the Singapore courts will adopt the *prima facie* standard of review. Other jurisdictions, such as Hong Kong, Canada, and France, have done the same.

The adoption of the *prima facie* approach is consistent with the general supportive attitude of Singapore's courts towards arbitration, which minimizes curial interference. In adopting this approach, a court should grant a stay without excessive scrutiny, leaving the tribunal to decide on its jurisdiction, while preserving the ability to intervene at a later stage where provided for under the IAA. This position gives fuller effect to the well-established principle of *kompetenz-kompetenz*.

Pragmatic Approach to Overlapping Proceedings

Second, this case illustrates how the Singapore courts will exercise their case management powers and take a pragmatic approach towards overlapping proceedings. The approach taken will differ depending on the specific claims advanced. In the present case, the Management Participation Allegation could be isolated from the other allegations, allowing it to be arbitrated, while the other allegations were heard in court. Further, the SGCA appeared of the view that the Management Participation Allegation was sufficiently peripheral that the plaintiff might, in the interests of

having all disputes heard in a single forum, decide not to pursue it at all.

In relation to the possibility that the other defendants not party to the arbitration might eventually seek to challenge the outcome of the arbitration, the SGCA specifically noted that since these defendants also sought the stay pending the conclusion of the arbitration, they ought not to subsequently challenge the outcome of the arbitration. Still, it is probably impossible to entirely preclude non-parties to the arbitration agreement from doing so; this is an unavoidable difficulty in a multi-party dispute where not all parties are bound by the same arbitration agreement.

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