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Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd: A Commentary on Its Significance for Arbitration in Singapore

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Introduction

On 10 October 2018, the Singapore Court of Appeal ("Court of Appeal") issued its decision on the case of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63 ("*Marty v Hualon*") which concerned a dispute over the repudiation of an arbitration agreement. While the case contained a number of interesting issues, this case commentary will focus on the Court of Appeal's decision that the commencement of court proceedings is *prima facie* a repudiation of the arbitration agreement.

Background Facts

On 22 July 2014, the receiver and manager ("Receiver") of Hualon Corporation (Malaysia) Sdn Bhd ("Hualon") commenced litigation proceedings, on behalf of Hualon, in the courts of the British Virgin Islands ("BVI") against Marty Ltd ("Marty") for the wrongful deprivation of Hualon's shareholding in a Vietnamese subsidiary, in breach of the arbitration agreement that was inserted into Hualon's company charter when it was re-registered in February 2008 (the "Revised Charter").

According to the Receiver, it was only at the end of February 2015 (some 7 months after the commencement of the BVI proceedings) that it discovered the presence of the arbitration agreement. On 10 March 2015, Hualon filed a Notice of Arbitration with SIAC.

On 26 March 2015, Marty applied to the BVI court for summary judgment to strike out the BVI action by the Receiver.

On 20 April 2015, more than one month after the Notice of Arbitration was filed, Hualon applied to the BVI court to stay the BVI proceedings in favour of arbitration. At this point in time, the BVI proceedings had been running concurrently with the arbitration proceedings.

On 19 June 2015, the arbitral tribunal was constituted. In the arbitration, Marty challenged the arbitral tribunal's jurisdiction but the arbitral tribunal rejected Marty's challenge and ruled in April 2016 that it had jurisdiction over the dispute.

In May 2016, Marty then commenced proceedings in the Singapore High Court to challenge the arbitral tribunal's decision, arguing among other things that Hualon's conduct of commencing the BVI litigation proceedings and taking further steps in the litigation after the commencement of the arbitration meant that Hualon had repudiated the arbitration agreement.

The High Court Judge found *inter alia* that the BVI action was not a breach as Hualon was unaware of the arbitration agreement and therefore did not have the necessary repudiatory intent. Marty then appealed to the Court of Appeal. The quorum consisting of Chief Justice Sundaresh Menon, Justice of Appeal Judith Prakash (who delivered the judgment of the court), and Justice of Appeal Tay Yong Kwang, issued a landmark decision which made the legal observations discussed below.

The Court of Appeal's decision

- The commencement of court proceedings without any accompanying qualification or explanation by a party bound by an arbitration agreement will be regarded as a prima facie repudiation of the arbitration agreement. This is because parties who enter into a contract containing an arbitration clause are entitled to expect that disputes arising out of the contract would be resolved by arbitration and not litigation. ([60] of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63)
- In this case, the fact that Hualon had sought substantive relief in the BVI proceedings which would resolve the dispute would have led a reasonable person in Marty's position to conclude that Hualon no longer intended to abide by the arbitration agreement and was repudiating the agreement. ([66] of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63)
- However, this prima facie conclusion can be displaced by furnishing an explanation for the commencement of the court proceedings, either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started which showed objectively that there was no repudiatory intent in doing so. ([68] of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63)
- The assessment of repudiation is an objective inquiry. The breaching party cannot justify the repudiatory breach if the reason was a purely subjective one that was not communicated to the innocent party. In this case, Hualon submitted that it was not aware of the arbitration agreement, which the Court considered would have been impossible for Marty, the innocent party, to discern from the actions of Hualon in commencing litigation proceedings. ([74] of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63)
- The Court of Appeal thus held that Hualon had repudiated the arbitration agreement by commencing and maintaining court proceedings in the BVI for ten months without reserving its right to arbitration. The fact that Hualon did not have actual knowledge of the arbitration agreement was rejected as the Court of Appeal ruled that parties were in any event deemed to know all of the contractual terms (including the arbitration agreement) of the relevant contractual documents they enter into.
- In addition, it also found that the repudiation was accepted by Marty on 26 March 2015 when it engaged the jurisdiction of the BVI court by requesting for a summary judgment. As this would have disposed of the dispute, the Court of Appeal found this to be an unequivocal indication of Marty's intention to accept the repudiation.

Comments

The Singapore Court of Appeal's decision that a commencement of litigation proceedings is prima facie a repudiation of the arbitration agreement is significant in several ways.

A different approach

First, this decision is noteworthy as it departs from the established common law jurisprudence on this issue. Until this decision by the Singapore Court of Appeal, there was a clear consensus in case law that the mere commencement of litigation proceedings on its own was insufficient to constitute a prima facie repudiation of the arbitration agreement. Even Marty's counsel (who was arguing for repudiation) had accepted it to be the rule and the Singapore Court of Appeal had also acknowledged the number of authorities supporting this view. ([54] and [56] of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63)

Indeed, the only authority which the Singapore Court of Appeal had relied on in support of its new approach was the English Commercial Court case of *Sadruddin Haswani v Nurdin Jivraj* [2015] EWHC 998 (Comm). While this case had a different factual matrix (it was about the repudiation of one arbitration agreement in favour of another arbitration agreement), the Court of Appeal was able to distill the following principle:

> "*Where a party has two methods of dispute resolution open to him, his reliance on one to resolve a dispute on the merits signifies that he does not intend to rely on the other to resolve the same dispute"* ([55] of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63)

The difference between the Singapore Court of Appeal's approach and the approach taken in previous jurisprudence such as *Rederi Kommanditselskaabet Merc-Scandia IV v Couniniotis SA (The "Mercanaut")* [1980] 2 Lloyd's Rep 183 is a matter of degree: the Singapore Court of Appeal opined that commencement of court proceedings in the presence of an arbitration agreement is a prima facie repudiation, while Lloyd J in *The Mercanaut* was of the view that the commencement of court proceedings is insufficient to show that there was an unequivocal intention to repudiate the arbitration agreement.

While the statements made by the Singapore Court of Appeal are *obiter dicta* and therefore have no binding effect under the common law doctrine of *stare decisis,* it nevertheless remains a highly persuasive legal authority for future cases heard in the Singapore courts.

The effect on parties with arbitrations seated in Singapore

Secondly, this decision is important as it will have consequences for parties with arbitrations seated in Singapore. For example, a party commencing litigation proceedings for the tactical reason of applying more pressure onto the opposing party may find itself foreclosed of the option to arbitrate if the opposing party engages in the litigation proceedings. The responding party will likewise be affected if it decides to engage in the litigation proceedings (thereby accepting the repudiation) to defend itself instead of requesting for a stay of proceedings in favour of arbitration. However, parties can provide a disclaimer or explanation in the proceedings to displace the prima facie presumption of a repudiation of the arbitration agreement.

The practical effect of the decision is that parties must give careful thought to which form of dispute resolution it intends to use and what course of action they intend to take instead of doing so in a haphazard manner which will result in concurrent court proceedings and arbitration. There will also be greater efficiency for the parties who choose arbitration or litigation, as it ensures that there is no unnecessary and messy overlap between the two forms of dispute resolution which will save time and costs for the parties and in some instances, free up court resources.

Conclusion

The Singapore Court of Appeal decision of *Marty v Hualon* is a landmark case which held that the commencement of court proceedings is a prima facie repudiation of the arbitration agreement. Given that it departs from established case law, it is important for parties to be aware of its implications. In particular, parties who intend to resolve their disputes through arbitration should be careful with commencing or engaging in court proceedings without proper disclaimer as that will constitute a prima facie repudiation of the arbitration agreement. This decision should thus be welcomed as it will save time and costs for the parties and, as a result, reduce wastage of court resources.

This entry was posted on Saturday, December 15th, 2018 at 6:27 am and is filed under Arbitration Agreement, Arbitration institution, Courts, SIAC, Singapore
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