Kluwer Arbitration Blog

When is Commencement of Court Proceedings a Repudiatory Breach of an Arbitration Agreement?

Andrew Pullen (Fountain Court Chambers) · Wednesday, February 13th, 2019

In *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63, the Singapore Court of Appeal held that an arbitral tribunal had no jurisdiction because the claimant in the arbitration ("Hualon") had repudiated the arbitration agreement[1]. Of most interest, the decision appears to create a presumption in Singapore law that commencing litigation in breach of an arbitration agreement is repudiatory, diverging from English law.

Background

In 2014, Hualon, through a receiver appointed by its creditors (the "Receiver"), commenced proceedings in the BVI courts (the "BVI Action") against its former directors and Marty Ltd ("Marty"), a company owned by the former directors. Hualon claimed that the former directors, in breach of duty, had unlawfully diluted Hualon's shareholding in its Vietnamese subsidiary in favour of Marty. Hualon brought claims for dishonest assistance and unjust enrichment against Marty. The BVI Action was eventually dismissed.

In 2015, following various steps in the BVI Action, but before it was dismissed, Hualon (through the Receiver) commenced an arbitration against Marty, pursuant to an arbitration agreement set out in the Vietnamese subsidiary's company charter (the "Charter"). The claims against Marty were essentially the same as in the BVI Action. Marty unsuccessfully challenged the tribunal's jurisdiction before the tribunal and in the High Court. Those decisions were overturned by the Court of Appeal.

The decision

Repudiation

The Court of Appeal held (at [68] and [80]) that Hualon had repudiated the arbitration by a combination of commencing the BVI Action and contending in its statement of claim that, upon appointment of the Receiver, the former directors lost all authority to bind Hualon. This amounted to a "disavowal" of all documents signed by the former directors after the Receiver's appointment,

including, crucially, the Charter containing the arbitration agreement. The Court observed (at [43]) that an allegation that the entire contract was entered into without authority is a challenge to each and every clause, including the arbitration clause. Hualon did not qualify its position and this, therefore, was sufficient to evince "repudiatory intent".

Acceptance of the repudiation

It is only if a repudiation is accepted by the innocent party that the contract is terminated. The Court of Appeal held (at [89]) that Marty had accepted the repudiation. Where the breach of the arbitration agreement was commencement of litigation, acceptance "*must lie in accepting the court's jurisdiction and engaging it on the merits*" (see [85]). Marty did so when it applied for summary judgment in the BVI Action. In contrast, Marty's challenge to the jurisdiction of the BVI court on *forum non conveniens* grounds, stating that Malaysia or Vietnam were possible alternative fora but without committing to submit to those courts, was not sufficiently clear and unequivocal.

A presumption of repudiation?

The Court of Appeal rested its decision that Hualon repudiated the arbitration agreement on a combination of commencement of the BVI Action and disavowal of the Charter because Marty's counsel accepted that commencement of proceedings did not *per se* amount to a repudiatory breach. However, the Court stated, obiter, (at [66]) that it is:

> "strongly arguable that the commencement of court proceedings per se by a party who is subject to an arbitration agreement is *prima facie* repudiatory of such party's obligations under that agreement" (emphasis in original).

According to the Court, commencement of litigation is *prima facie* repudiatory, but it would be open to the breaching party to furnish an explanation or qualification for having commenced the proceedings which showed objectively that it had no repudiatory intent in doing so. It appears that the explanation would have to be furnished to the other party contemporaneously with the breach. The effect of this is to create something akin to a rebuttable presumption.

Analysis

There are three types of repudiation in Singapore and English law: (i) renunciation of the contract; (ii) self-induced impossibility of performance; and (iii) a sufficiently serious failure to perform in accordance with the terms of the contract.

We are not concerned with impossibility. Nor was the case analysed as a serious failure to perform. That would have required the Court to assess:

(i) whether the obligation not to litigate a dispute had the status of a condition (a term, any breach of which, no matter how trivial, amounts to a repudiation); or

(ii) if not, whether the breach had the effect of depriving the innocent party of substantially

the whole benefit which it was intended it should obtain from the arbitration agreement (the *Hong Kong Fir* test).

There was no such assessment.

The discussion of whether Hualon had manifested "repudiatory intent" by its actions makes clear that the Court analysed the case in terms of renunciation, i.e. where a party "*expressly or implicitly refuses to perform in accordance with the terms of the contract*". However, a refusal to perform will amount to a renunciation only if it is a refusal to perform (i) all obligations under the contract, (ii) a condition, or (iii) where the consequent breach would satisfy the *Hong Kong Fir* test[2)].

The obligation not to litigate cannot have the status of a condition, because that would mean that commencement of litigation would always be repudiatory, no matter what explanation was provided.

The Court of Appeal did not mention the *Hong Kong Fir* test.

The Court therefore appears to regard commencement of court proceedings as a refusal to perform all obligations under the arbitration agreement. One can see why the BVI Action evinced such a refusal: it was combined with a disavowal of the arbitration agreement.

But that will not be the same in every case. By commencing litigation in respect of a claim, a party may evince a refusal to arbitrate that claim. But even without a specific qualification of the sort which the Court of Appeal suggested would be necessary to rebut the presumption, there are circumstances in which it would not be clear that it was refusing to arbitrate every claim falling under the arbitration agreement. Such circumstances might include the following:

- the litigation concerns one claim, but the parties are already arbitrating a different claim under the same contract and the party commencing the litigation gives no indication that it wishes to abandon the arbitration;
- the claim in the litigation is limited in scope, in the context of much broader contract which could give rise to multiple disputes e.g. a small debt claim arising under a 30-year licensing agreement covering a suite of products;
- there is (objectively) legitimate doubt as to whether the claim in the litigation falls within the scope of the arbitration agreement (even if it is later held to do so) e.g. a non-contractual claim relating to a transaction involving multiple contracts, some containing arbitration clauses, others containing jurisdiction clauses.

Beyond the above examples, it is not unknown for parties simply to make mistakes and overlook an arbitration agreement. However, such a mistake will not negate repudiatory intent because the test is objective. Hualon claimed it was unaware of the arbitration agreement when it commenced the BVI Action, but Hualon was not entitled to rely on its own alleged ignorance because it was not communicated to Marty. That was a purely subjective reason for its conduct and could not negate the repudiatory intent which a reasonable person would infer (see [52] and [74]). The Court of Appeal's view would therefore create something of a hair trigger, since commencement of the litigation is said to be *prima facie* repudiatory, not continuation of proceedings after the breach of the arbitration agreement has been pointed out.

The Court of Appeal's presumption, albeit obiter, appears to put Singapore arbitration law onto a

different footing from English arbitration law. The Court departed from earlier Singapore and English authorities (describing the reasoning in the leading English case, *Rederi Kommanditselskaabet Merc-Scandia IV v Couniniotis SA (The "Mercanaut")* [1980] 2 Lloyds Rep 183, as "*thin*"), and from the views expressed in the leading (English) textbooks *Chitty on Contracts,* which states that "*resort to legal proceedings of itself [does not] constitute a repudiation of the arbitration agreement*" (33rd edition, para 32-051) and *Russell on Arbitration*, which states (24th edition, para 2-137) that:

> "A party may repudiate the arbitration agreement by commencement of proceedings in court in breach of its terms, but such breach will only be repudiatory if done in circumstances that show the party in question no longer intends to be bound by the agreement to arbitrate".

The view in *Chitty* may be too lenient on the breaching party, but for the reasons explained above it is suggested that the Court of Appeal's presumption goes too far and requires qualification. The position described in *Russell* allows an appreciation of the facts of the particular case and may be preferable. In any event, the Court of Appeal's presumption requires further consideration when next before the Court.

References

?1 See here another discussion of this case from the Singapore law perspective

?2 *The Law of Contract in Singapore*, Andrew Phang Boon Leong, Gen Ed, para 17.003, 17.031 and 17.048; *Chitty on Contracts*, 33rd edition, para 24-018

This entry was posted on Wednesday, February 13th, 2019 at 4:00 am and is filed under Arbitration Agreement, Repudiation, Singapore, Singapore Court of Appeal
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.