Kluwer Arbitration Blog

Unearthing Cryptic Agreements and Cryptocurrency: An Analysis of Beltran v. Terraform Labs

Kartikey Mahajan, Aayushi Singh, Bhavya Chengappa (Khaitan and Co., Singapore) · Wednesday, February 7th, 2024

The General Division of the High Court of the Republic of Singapore ("**SGHC**") in the matter of *Beltran, Julian Morena and another v. Terraform Labs Pte Ltd and others* [2023] SGHC 340 recently dismissed an appeal against an Assistant Registrar's decision denying a stay in favour of arbitration on the basis that the First Defendant had taken steps in the proceedings. This is a significant ruling on (i) what constitutes a "step in the proceedings" amounting to a submission to the Singapore courts' jurisdiction; and (ii) the nature and validity of arbitration clauses "buried" on websites. The SGHC also made some interesting observations on unique issues that arise from arbitration agreements and representative actions.

Background to the Dispute

A class action suit was initiated by Julian Moreno Beltran and Douglas Gan on behalf of 375 individuals ("**Claimants**") who purchased an algorithmic stable cryptocurrency named TerraUSD ("**UST"**) developed by the First Defendant, Terraform Labs, ("**TL**") a Singapore-incorporated company running the Terra blockchain and developing applications for the larger Terra Ecosystem. The other three Defendants were co-founders of TL, Kwon Do Hyeong and Nikolaos Alexandros Platias, and Luna Foundation Guard, an organisation said to be supporting the growth of the Terra ecosystem by building reserves to buttress the stability of UST. One of TL's key projects was the Anchor Protocol, a lending and borrowing platform where users can stake their UST in consideration for promised returns calculated on an annualised yield basis. The Claimants alleged that TL made fraudulent misrepresentations on its website concerning the stability of the UST (*i.e.*, that the UST was pegged to a fiat currency—the U.S. Dollar—and was therefore stable by design), which induced them to purchase UST, stake them on the Anchor Protocol and continue to hold on to them even as their value plummeted. The Claimants claim they incurred substantial losses amounting to nearly US$66 million as a result. TL's and the Anchor Protocol's websites contained clauses providing for disputes to be resolved exclusively by arbitration seated in Singapore and conducted pursuant to the Singapore International Arbitration Centre Rules. TL's Terms of Use also stated that there shall be no authority for any claims to be arbitrated on a class or representative basis.

After the filing of the Defence, the Defendants filed for a stay of the suit. TL sought a stay in

favour of arbitration whereas the other Defendants sought "case management" stays on the basis that the claims in the suit against them were closely related and/or ancillary to the claims against TL. The Assistant Registrar dismissed TL's application for a stay on the ground that it failed to make out a *prima facie* case that a valid arbitration agreement existed between it and the Claimants. In the alternative, the Assistant Registrar held that even if a valid arbitration agreement could be shown to exist *prima facie*, TL had taken multiple steps in the proceedings and so had submitted to the jurisdiction of the court.

Taking a Step in the Proceedings

The SGHC dismissed the Defendants' appeal and found that TL had taken steps in the proceedings amounting to submission to the jurisdiction of the Singapore courts.

Under Section 6(1) of Singapore's International Arbitration Act 1994 ("**IAA**"), any party to an arbitration agreement may seek a stay of proceedings before "delivering any pleading (other than a pleading asserting that the court does not have jurisdiction in the proceedings) or taking any other step in the proceedings" (emphasis added). The question before the SGHC was whether TL had taken steps in the court proceedings within the meaning of Section 6(1) of the IAA which would preclude it from obtaining a stay in favour of arbitration. The SGHC analysed various precedents and noted that in assessing whether an act constitutes a "step in the proceedings," the court should consider the actions of the defendant as a whole and in "a practical and commonsensical way." The SGHC held that while actions contributing to the advancement of a jurisdictional challenge, such as requests for facts and background particulars or document production exclusively for assessing jurisdictional challenges, will not be considered a "step in the proceedings," a defendant who employs court procedures to enable him to defeat or defend the proceedings on their merits or makes requests for particulars or documents that imply an intention to defend court proceedings will be deemed to have taken a "step in the proceedings." Additionally, while applications relating to the propriety of proceedings at the threshold may seem to involve the court's powers, they do not, in certain contexts, contradict a jurisdictional challenge. For example, a striking-out application, as demonstrated in *Maniach Pte Ltd v. L Capital Jones Ltd and another* [2016] 3 SLR 801, may not be considered a "step in the proceedings" if grounded in a preliminary issue that must be resolved before addressing jurisdictional concerns.

TL had filed a Pre-Case Conference Questionnaire and its Defence. Its Defence was not limited to TL's jurisdictional challenge, but included its defence on the merits of the claims as well. Therefore, although the Defence contained an express reservation of rights, the SGHC held that the substantive defence, together with other steps in the proceedings which were clearly unrelated to its jurisdictional challenge, were inconsistent with a jurisdictional challenge.

Validity of Arbitration Agreements in Buried Hyperlinks

Another key issue considered by the SGHC was whether TL demonstrated a *prima facie* case of the existence of valid arbitration agreements between it and the Claimants.

The Claimants contended that the hyperlinks on the websites which specifically contained terms providing for arbitration were relatively obscure and/or lacked prominence, and they lacked

reasonable notice prior to entering into a contract with TL. However, the court considered the "pop-up" notice on the Anchor Protocol's website as evidence that the Claimants had notice and took cognizance of the same before staking UST on the Anchor Protocol.

The Claimants also argued that the Terra Terms of Use fell within the "browse-wrap" category, since users were not required to assent to the Terra Terms of Use before using the Terra Website. A "browse-wrap" agreement is where a website displays a notice or a banner notifying the user that they agree to the site's terms of use by using the site. The SGHC held that the question of whether a *prima facie* case could be made out that the arbitration clause found in the Terra Terms of Use was incorporated via the "browse-wrap" analysis depends on whether a *prima facie* case could be established that the Claimants had actual or constructive notice of the arbitration clause. The SGHC found that on the facts, it could.

Intersection of Class Actions and Arbitration Agreements

In obiter remarks, the SGHC also examined the intricate intersection of class actions and arbitration agreements, primarily within the United States legal landscape. In the U.S., courts determine these issues through a lens of class certification, a crucial step in determining whether a class action can proceed. The SGHC noted that the prevailing trend appears to be the denial of class certification when it appears that some class members may be bound by arbitration agreements.

The reasons behind denying certification are multifaceted and relate to the challenges posed by the incompatibility of collective proceedings and arbitration agreements. U.S. courts typically cite a lack of commonality of interests among claimants where some claimants are subject to arbitration agreements, or find that the representative lacks standing to address whether the putative class members are subject to applicable arbitration agreements.

Singapore, on the other hand, does not have a certification process for representative actions. The propriety of such actions is only assessed when challenged by a defendant, introducing a distinctive dynamic. The SGHC's ruling underscores a critical scenario: when representative claimants themselves are subject to *prima facie* arbitration agreements, they would not be capable of representing other claimants in the action.

The Doctrine of Unconscionability

In this context, the SGHC also examined the Canadian courts' approach when faced with the situation of some class action claimants being subject to an arbitration agreement. Here, the SGHC observed that the Canadian courts have struck down arbitration agreements on the basis that the arbitration agreements impede accessibility, as seen in *Uber Technologies Inc v. Heller* (2020) SCC 16 ("***Uber***"). In *Uber*, the court found that the arbitration agreement was unenforceable because of unconscionability as (i) there was clearly inequality of bargaining power between the defendant and the representative claimant in entering into the arbitration agreement; (ii) the bargain concluded unduly advantaged the stronger party and unduly disadvantaged the vulnerable party; and (iii) the arbitration agreement violated the claimant's reasonable expectations by depriving him of remedies. It bears mentioning that two weeks after the SGHC's decision, the Ontario Superior

Court of Justice applied *Uber* to the cryptocurrency context and found an arbitration agreement to be unconscionable (and unenforceable on public policy grounds) in *Lochan. v. Binance Holdings Limited*, 2023 ONSC 6714.

However, the SGHC noted that the approach taken in *Uber* appears to significantly extend the doctrine of unconscionability and is inconsistent with Singapore's prevailing pro-arbitration stance, which prioritises party autonomy and giving effect to the parties' agreed method of dispute resolution.

However, in the authors' view, there is a place for the doctrine of unconscionability in Singapore especially in the context of the widespread usage of "browse-wrap" agreements on websites. In "browse-wrap" agreements containing arbitration clauses, there is a notable imbalance in bargaining power since users are often not compelled to click a button or take any affirmative action to signify their acceptance of the terms. Notably, in numerous instances, users agree to mandatory arbitration without being cognizant of this reality.

Furthermore, the inclusion of mandatory arbitration clauses fundamentally alters the essence of arbitration. In such cases, party autonomy is absent, and a singular entity—the corporation—typically unilaterally determines crucial terms, including the seat of arbitration. Users find themselves with no practical alternative but to acquiesce to the company's terms if they wish to access the site. This absence of choice undermines the foundational principle that arbitration is a consensual and mutually agreed-upon method of dispute resolution.

Therefore, the application of doctrine of unconscionability is arguably necessary to promote fairness and equity.

Concluding Comments

Given the SGHC's refusal to stay the proceedings, it will be interesting to see how the matter progresses in unchartered territory as parties approach the discovery stage, particularly since TL is also facing legal action from the U.S. Securities and Exchange Commission.

This entry was posted on Wednesday, February 7th, 2024 at 8:37 am and is filed under Arbitration Agreements, Class arbitration, Cryptocurrency, Singapore, Stay of Proceedings
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.