MAPLES GROUP

UPDATE

Privy Council Upholds Shareholder Arbitration Agreement and Stays Just and Equitable Winding Up Petition

In *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation,*[1] the Judicial Committee of the Privy Council (the "Privy Council") held that a minority shareholder's complaints must be arbitrated pursuant to the terms of a shareholders' agreement, and stayed a just and equitable winding up petition filed in the Grand Court of the Cayman Islands. The Maples Group represented the successful party.

The judgment addresses the interplay between s.92(e) of the Companies Act (2022 Revision) ("Companies Act"), which permits shareholders to file a winding up petition based on any just and equitable ground[2], and s.4 of the Foreign Arbitral Awards Enforcement Act ("FAAEA"). Section 4 gives effect to the New York Convention and provides, in respect of foreign arbitrations, that the court shall, on the application of any party to an arbitration agreement, stay any legal proceedings commenced in respect of any matter to be referred to arbitration, unless satisfied that the agreement is inoperative.

The upshot is that factual disputes between shareholders, including about whether trust and confidence has been lost, may fall within the scope of a broadly drafted arbitration agreement, and in such a case any winding up petition commenced is liable to be stayed pending determination of an arbitration of that matter. This result further reinforces the Cayman Islands' status as an arbitration-friendly jurisdiction, giving broader and more certain effect to the parties' agreed choice of dispute resolution.

Background

The two shareholders of a Cayman Islands company, CVS (Cayman Islands) Holding Corporation ("Company") were parties to a shareholder's agreement ("SHA") which contained a broadly drafted arbitration clause, i.e. "*any and all disputes in connection with or arising out of this Agreement [shall be] submitted for arbitration*".

The Company's minority shareholder filed a petition to wind up the Company on the just and equitable ground ("Petition") based on complaints about alleged conduct of the majority shareholder, which it alleged had caused it to lose trust and confidence in the management of the Company's business such that there was an irretrievable breakdown in the shareholder relationship.

The majority shareholder sought a mandatory stay of the Petition pursuant to s.4 of the FAAEA,

[1] [2023] UKPC 33, released 20 September 2023 and accessible at https://www.jcpc.uk/cases/docs/jcpc-2020-0055-judgment.pdf.

[2] There is no unfair prejudice remedy available under the Companies Act.

and / or a discretionary stay on case management grounds.

At first instance, the Grand Court granted a mandatory stay pursuant to s.4 of the FAAEA, relying in part on the *dicta* of Lord Justice Patten in *Fulham Football Club (1987) Ltd v Richards*[3].

This decision was reversed upon the minority shareholder's appeal. The Cayman Islands Court of Appeal holding that none of the matters raised in the Petition were arbitrable, as only the Court had the power to issue a winding up order. On that basis, the arbitration agreement in the SHA was found to be inoperative, and the mandatory stay was overturned.

The majority shareholder, represented by the Maples Group, successfully appealed to the Privy Council. The Privy Council (Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Briggs, and Lord Kitchin) heard the appeal while sitting for the first time in the Cayman Islands.

Decision

The majority shareholder argued that:

a) The minority shareholder was a party to an arbitration agreement in the SHA;

b) The Petition, which was an *inter partes* dispute between the shareholders, was a legal proceeding which had been commenced against it;

c) The Petition involved matters agreed to be referred to arbitration pursuant to the SHA; and

d) Accordingly, it was entitled to a mandatory stay of the Petition under s.4 of the FAAEA unless all of the matters in the Petition were non-arbitrable.

The Petition raised the five matters in total:

1) Matter 1: Whether the minority shareholder had lost trust and confidence in the majority shareholder and in the conduct and management of the Company's affairs;

2) Matter 2: Whether the fundamental relationship between the shareholders had irretrievably broken down;

3) Matter 3: Whether it was just and equitable that the Company should be wound up;

4) Matter 4: Whether the minority shareholder should be granted its preferred relief of a buy-out of the majority shareholding under s.95 (3)(d) of the Companies Act; and

5) Matter 5: Whether, if such alternative relief was not appropriate, an order winding up the Company should be made.

The Privy Council held that:

a) Matters 1 and 2 were both within the scope of the arbitration agreement, and arbitrable. They were controversies relating to legal or equitable rights which were of substance, which lay at the heart of the legal proceedings. There was no reason of public policy to prevent an arbitral tribunal from determining them, and there would a mandatory stay of the Petition under s.4 of the FAAEA.

b) Matters 3, 4 and 5 were non-arbitrable, as only the Cayman Islands court had the power to grant a winding up order, or alternative relief. However, an arbitrator's determination of matters 1 and 2 would be an essential precursor to the Court's formation of its opinion as to whether it was

[3] [2012] Ch 333.

just and equitable to wind up the Company (which is itself the gateway for an order of alternative relief (e.g. a buy-out order) under s.95 (3) of the Companies Act). There would therefore be a discretionary stay granted of the Petition on case management grounds.

The Privy Council's Reasoning

1) The Privy Council emphasised the liberal interpretation of arbitration agreements and the general respect that courts and legislatures across the common law world give to parties to choose how they wish their disputes to be resolved. It accepted that the arbitration agreement should be respected unless it is "*contrary to the public policy of the Islands or there is a rule of law or statutory provision which renders the matters within the scope of the arbitration agreement incapable of resolution by arbitration*" (paragraph 29). No such public policy, rule of law or statutory provision was identified here.

2) The Privy Council identified four key questions in interpreting s.4 of the FAAEA (paragraph 32):

    a. The meaning of "*legal proceedings*" commenced by a party to an arbitration agreement;

    b. The meaning of any "*matter*" which the parties have agreed to refer to arbitration;

    c. Whether a stay of legal proceedings can be a partial stay; and

    d. The meaning of "*inoperative*".

3) With respect to each of these questions, the Privy Council held that:

    a. "Legal proceedings" can include a winding up petition in respect of a company of which the parties to an arbitration agreement are members (paragraph 33);

    b. A matter is a "*substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the matter is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought*". It held that this approach is consistent with the position in many other jurisdictions[4] (paragraphs 61 and 62), and is consistent with the UK Supreme Court's decision in *Mozambique* (paragraph 56), which was handed down on the same day as the Privy Council's judgment;[5]

    c. Legal proceedings can be partially stayed in support of arbitration; and

    d. Regarding the main circumstances in which an arbitration agreement may be inoperative being "remedial non-arbitrability" and "subject matter non-arbitrability": (i) an arbitration agreement is not inoperative *per se* because the arbitral tribunal cannot grant a remedy sought in the court proceedings, i.e. the making a winding up order sought in the Petition (paragraph 78); and (ii) there

[4] The Privy Council referred to the English High Court decision in *Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm), the Hong Kong Court of First Instance decision in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, the Singapore Court of Appeal decision in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, and the Federal Court of Australia decision in WDR *Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164.

[5] *Republic of Mozambique (acting through its Attorney General) v Privinvest Shipbuilding SAL (Holding) & Ors* [2023] UKSC 32.

were no rules of law or statutes rendering these disputes non-arbitrable.

4) The Privy Council then dealt with various arguments made by the minority shareholder in opposition to the appeal, and held as follows:

   a. A matter does not need to be a dispute leading to the arbitral tribunal determining a right or a liability in order to be arbitrable – it is enough that a matter leads to the tribunal making a declaration, i.e. whether one party breached the equitable rights of the other. In this case, matters 1 and 2 were disputes lying at the heart of the Petition, which fell within the scope of the arbitration agreement (paragraphs 94 to 97).

   b. The just and equitable jurisdiction was not indivisible such that only a court could determine facts relevant to its decision of whether it was just and equitable to wind up a company. As per the ICC Rules of Arbitration, the shareholders would be bound by any finding by the arbitral tribunal on matters 1 and 2, so there was no risk of duplication or inconsistent findings between the court proceedings and arbitral proceedings with respect to those matters (paragraphs 92 and 93).

   c. It did not matter that the Company itself was not a party to the arbitration agreement, given that the Company is controlled by the two shareholders who were both parties to the SHA, and (as is common in such circumstances) the Petition has been ruled by the Grand Court to be an *inter partes* proceeding as between the shareholders, in which the Company was the subject matter of the dispute.

   d. However, an agreement to refer disputes within scope to arbitration does not in of itself amount to a contractual prohibition on initiating a petition to wind up a company under s.95 (2) of the Companies Act (paragraphs 91 and 104).

   e. Procedural complexity caused by referring a matter to arbitration does not of itself render a matter non-arbitrable, however it may be grounds for refusing a mandatory stay if the applicant is seeking the stay for an improper purpose (paragraph 64), which was not the case here.

   f. If the parties agree to refer some matters to arbitration, but not all matters raised in the legal proceedings, the resulting fragmentation of the parties' disputes (with some matters being determined through arbitration and others determined by the court) was not grounds for refusing to stay the Petition. Indeed, any such fragmentation could be mitigated through case management by the court and arbitral tribunal (paragraphs 65 and 66).

   g. The risk of complexity and delay caused by any such fragmentation would not render matters 1 and 2 non-arbitrable. Indeed, the invoking of the just and equitable jurisdiction requires clean hands, and regard to a party's contractual obligations, i.e. the obligation to refer disputes within scope to arbitration (paragraphs 88 and 89).

   h. There was no public interest in ensuring that shareholder disputes regarding the conduct of the management of Cayman Islands companies be conducted in open court. There was no evidence that

> such openness was the reason for the Cayman Islands' decision to not introduce a free-standing remedy for oppression or unfairly prejudicial conduct in the management of the company so as to warrant making the Cayman Islands an outlier in international arbitration. In any event, matters 3 to 5 would be determined exclusively by the courts (paragraph 87).

Mac Imrie KC and Ryan Hallett of Maples Group represented the majority shareholder. In the Privy Council, Charles Kimmins KC and Mark Tushingham, barristers of Twenty Essex were instructed. Sidley Austin (Hong Kong) was also part of the team.

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