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Key Legal Developments

1. ARBITRATION: Commencement of court proceedings was a *prima facie* repudiation of arbitration agreement

The Court of Appeal in *Marty Limited v Hualon Corporation (Malaysia) Sdn Bhd (Receiver and Manager appointed)* [2018] SGCA 63 examined when a party to an arbitration agreement who commenced court proceedings against the other party could be held to have lost its right to refer the same dispute to arbitration under the agreement. The three main issues in this case were:

a) whether the respondent's commencement of litigation - and continuation of litigation - was considered a repudiatory breach of the arbitration clause; and if so, whether the appellant had accepted the breach;

b) whether the respondent in breach of the arbitration clause had the capacity to waive its right to arbitration; and if so whether it did on the facts; and

c) whether the dispute in question fell within the scope of the arbitration clause.

Just as any other contract, an arbitration agreement can be repudiated, giving the innocent party the option to accept the breach and terminate the contract/agreement. In this case, the appellant argued that the repudiation occurred because the respondent initiated and maintained litigation for 10 months without qualification despite the presence of an arbitration clause.

The Court of Appeal held that in the absence of any explanation or qualification, the commencement of court proceedings in the face of an arbitration clause was sufficient to constitute a *prima facie* repudiation of the arbitration agreement. It declined to follow other cases which found that the commencement of proceedings was insufficient to amount to a repudiatory breach of the arbitration agreement.

Further, the Court of Appeal held that the appellant's challenge of the jurisdiction of the court did not constitute acceptance of the breach, and was in fact the converse. However, the Court of Appeal found that the appellant's application for summary judgment constituted acceptance of the repudiatory breach, and the appellant was therefore not entitled to rely on the arbitration clause.

Comment

The test for determining a repudiation of an arbitration agreement is whether, upon the commencement of litigation, a reasonable person in the innocent party's position would have concluded that the party initiating litigation proceedings no longer intended to abide by the arbitration clause. The commencement of

litigation must also be confirmed by acceptance by the innocent party in order to satisfy repudiation of an arbitration agreement.

Such intention to no longer abide by the arbitration clause can be inferred from a lack of any explanation of actions, and/or acknowledgement of the arbitration clause by the breaching party, which would signal to the reasonable innocent party that the breaching party had repudiated the agreement. Therefore, parties who intend to seek limited relief through commencement of court proceedings notwithstanding the existence of an arbitration agreement should clearly express its intention to uphold the arbitration agreement. Notwithstanding, there may well be instances where the conduct is so fundamentally inconsistent with the existence of an arbitration agreement, that such expression of intention would be insufficient to preserve the right to arbitrate.

Case link: *Marty Limited v Hualon Corporation (Malaysia) Sdn Bhd (Receiver and Manager appointed)* [2018] SGCA 63

2. **CONSTRUCTION**: Singapore Court of Appeal explains the boundaries of the principles of natural justice

The Court of Appeal in *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] SGCA 66 set out the principles applicable to determining whether an adjudicator breached the rules of natural justice in making an adjudication determination.

The Court of Appeal referred to the standards applied in international arbitration, where it is well-established that a party seeking to challenge an award on the ground that the arbitral tribunal breached the rules of natural justice must:

a) identify which rule of natural justice was breached;
b) how it was breached;
c) in what way the breach was connected to the making of the award; and
d) how the breach prejudiced the party's rights.

These principles were held to be equally applicable to challenges to an adjudication determination.

The case turned on two issues - whether the fair hearing rule was breached; and whether the breach, if any, resulted in any prejudice to the respondent. If both were satisfied, then the determination would be set aside.

The Court of Appeal considered whether the adjudicator had breached the principles of natural justice by applying the standard of "beyond reasonable doubt" to ascertain whether the respondent was entitled to make certain deductions from the appellant's payment claim without affording the parties an opportunity to address him on the applicable standard of persuasion. The court was doubtful that the adjudicator, who was not legally trained, had applied the standard “beyond reasonable doubt” in the way a legally trained person would understand. It was more likely that the adjudicator used the term simply to express his views about the insufficiency of the evidence to support the respondent’s claimed entitlement to set off.

The Court of Appeal commented that even if the adjudicator applied the standard of “beyond reasonable doubt” in the way a legally trained person would

understand, this was not breach of natural justice. A breach of natural justice would be made out if a decision-maker determined a dispute on a point that the parties did not have a reasonable opportunity to address. However, in situations where the parties could have reasonably foreseen that an issue would form an important part of the decision-maker's determination, but chose not to address the decision-maker on that issue, they could not complain that they had been denied a reasonable opportunity to be heard.

In this case, the court found that the parties should have reasonably foreseen that the adjudicator was required to apply the standard of persuasion to determine the dispute particularly since they had taken opposing positions on the sufficiency of the evidence in the adjudication proceedings. The parties should have recognised that the standard of persuasion to be met was an issue of decisive importance but chose not to address the adjudicator on the applicable standard. Therefore, the court was of the view that the parties could not complain that they had been deprived of a fair hearing.

The Court of Appeal explained that even if there had been any breach of natural justice, it did not cause prejudice to the respondent. If the adjudicator had invited submissions from the parties, he would likely have found that the applicable standard of persuasion was that of a prima facie case. If the adjudicator had applied this lower standard of persuasion, it still would have made no difference to his decision because the overall tenor of the adjudication determination suggested that he saw no evidential basis for the respondent's claimed entitlement to a set-off whatsoever.

Comment

This decision now places greater importance and responsibility on parties to properly and comprehensively identify and address every issue in adjudication proceedings that may be of decisive importance. If parties ought to have recognised any issue(s) of decisive importance but yet choose not to address the adjudicator on such issue(s), the courts may decide that there had been no deprivation of a fair hearing in the adjudication.

Case link: *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] SGCA 66

3. **COMMERCIAL LITIGATION**: Court of Appeal restates law on stay of proceedings based on exclusive jurisdiction application

The Court of Appeal overruled the principle established in *The Jian He* [1999] 3 SLR(R) 432 and held that the absence of a meritorious defence would no longer be sufficient to establish "strong cause" to refuse a stay of proceedings on the basis of an exclusive jurisdiction clause.

This was an appeal by Vinmar Overseas (Singapore) Pte Ltd (the appellant) against the decision of the Singapore High Court, which affirmed the decision of the assistant registrar to refuse to grant a stay of proceedings to give effect to an exclusive jurisdiction clause (EJC).

The appellant (i.e. the defendant in the proceeding) had applied for a stay of proceedings on the basis that the parties had agreed to refer the dispute to the High Court of England. The assistant registrar and the High Court found that the EJC was a term of the contract but refused to grant a stay as the appellant did not have a genuine defence to the respondent's claim. The High Court relied on a

long line of Court of Appeal authorities for the proposition that the lack of a genuine defence would amount to strong cause to refuse a stay.

However, the Court of Appeal allowed the appeal. It considered three main issues;

a) whether the appellant established a good arguable case that the EJC governed the dispute;

b) whether the court should depart from previous case law; and

c) if so, whether the previous rule should be overruled prospectively.

It first held that the appellant had established a good arguable case that the EJC was incorporated into the contract. However, when considering the relevance of the merits of the defence that an applicant in an EJC application would raise, the Court of Appeal felt that "the time had come to depart from the rule in *The Jian He* [1999] 3 SLR(R) 432" - that the absence of a meritorious defence would suffice to establish strong cause to refuse a stay.

Instead, the Court of Appeal recognised two general grounds upon which a stay might be refused in an EJC application where only the parties involved in the dispute were the parties to the jurisdiction agreement, namely, abuse of process and denial of justice.

The Court of Appeal further held that the rule should be overruled with retrospective effect. The Court of Appeal noted that the respondent would suffer some prejudice from the court's departure from the rule in *The Jian He* since it would have had a legitimate expectation that the rule would apply when it resisted the stay. However, the Court of Appeal addressed this by making no order as to costs of the appeal.

Comment

The court restated the law governing an application for a stay of proceedings based on an exclusive jurisdiction, and has departed from *The Jian He* and cases following that authority in holding that the merits of an applicant's defence are irrelevant in an EJC application. In light of this decision, the court has set the grounds on which a stay might be refused in favour of an EJC, if there was an abuse of process or a denial of justice.

The court has confirmed that the threshold for abuse of process is "very high" making it a difficult threshold to fulfil in circumstances where a party might seek to obtain a stay on this ground. However, a party that seeks to stay proceedings on the ground of denial of justice might be made out in circumstances where the agreed court had been dissolved by the time the dispute arose, the court was not available to determine the dispute or there may be some *very* exceptional case where a trial in the agreed court would be overwhelmingly difficult or inconvenient that a stay would effectively deny the plaintiff access to justice.

Case link: *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65

4. **RESTRUCTURING & INSOLVENCY**: Singapore High Court grants an extension of moratorium

This is the first reported decision on the scope and interpretation of Section 211B of the Companies Act on a pre-scheme moratorium. Importantly, the High Court clarified the requirements for a Section 211B application, and clarified that a Section 211B moratorium extended to arbitral as well as court proceedings.

In *Re IM Skaugen SE and other matters* [2018] SGHC 259, the applicants in this case sought moratorium relief under section 211B(1) of the Companies Act to propose a compromise/arrangement to their creditors. However, one of the creditors opposed the application claiming that the application was a tactic to avoid enforcement of an award it had obtained against the applicant.

After a comprehensive review of the purpose behind the changes in the new restructuring legislation in the Companies Act, the court concluded that a moratorium under Section 211B was primarily to allow the applicant to "*develop and propose a restructuring plan, or … to refine and mature it based on engagement with the relevant creditor community*". The court also elaborated on the statutory conditions the applicant must satisfy when applying for a stay, which is addressed in sections 211B(4)(a) and (b). These sections clarify that where an applicant has already proposed a compromise/arrangement it must show evidence of support from creditors and an explanation of how such support is important for the success of the compromise/arrangement. If it has not proposed a compromise/arrangement then it must provide a brief description of the intended compromise/arrangement as well as evidence of creditor support. However, in this case, since a compromise/arrangement had not yet been proposed, what the applicant had to show was evidence of support for the moratorium application instead.

The court considered what the test was to determine whether to grant the moratorium in light of support and objections from various creditors. It determined that the general test was whether, on a broad assessment, there was sufficient evidence for the court to determine that there was a reasonable prospect of the compromise or arrangement working and being acceptable to the general run of creditors. It also highlighted that creditors opposing the moratorium was not necessarily an insurmountable obstacle that would render any attempt at restructuring futile. Generally, opposition to the moratorium by a minority would not always be fatal to the section 211B(1) application.

The court allowed the applicant an extended moratorium for 3 months, ruling that the applicant had demonstrated the creditor support necessary for the extension. Although one creditor was not supportive, the court found that the creditor did not appear to be the majority creditor and that there were other legitimate creditors that were supportive of the applicant's plans. The court stated that if the biggest creditors of the group as a whole are behind the group restructuring efforts, that points to the conclusion that the efforts have a reasonable prospect of working and being acceptable to the creditors. The court also clarified that the moratorium extended to arbitral as well as court proceedings.

Comment

This case provides useful guidance on how the law on insolvency and restructuring in Singapore is developing. It highlights the approach a court will take when dealing with moratorium applications under section 211B(1) in particular how it will weigh evidence of creditor support and resistance as required under sections 211B(4)(a) and (b) to determine moratorium applications. Parties should take note that whether a party has a proposed compromise or arrangement or shows an intention to make a proposed compromise or arrangement, the party must provide a sufficient level of evidence of creditor support. What is material to the courts consideration is the quality of the creditor support particularly if significant or crucial creditors are supportive of the proposal.

Case link: *Re IM Skaugen SE and other matters* [2018] SGHC 259

5. Reforms to Singapore's civil justice system

The Ministry of Law has proposed changes to Singapore's civil justice system based on the recommendations of the Civil Justice Review Committee. We highlight some of the key proposed changes below:

1. Enhanced judicial involvement in civil proceedings

   a. The Chief Justice will be empowered to determine the extent to which the Rules of Court apply to certain categories of cases. For instance, certain rules may be disapplied for smaller value claims.

   b. When a case comes to trial, there will be increased judicial involvement to allow judges to take greater control of the conduct of the trial and avoid excessive time and costs being expended on lengthy trials.

2. A duty will be imposed on parties to proceedings to consider amicable resolution of the dispute before commencing any action or appeal. If the court is of the view that this duty has not been discharged properly, the court will be empowered to order parties to attend alternative dispute resolution.

3. Greater flexibility and autonomy to manage cases during Case Conferences.

   a. Parties will be required to file a list of issues prior to the first Case Conference.

   b. Parties may be directed to exchange Affidavits of Evidence-in-Chief (AEIC) of all or some of the witnesses before any exchange of documents.

   c. The court will control the number of and the period within which interlocutory applications may be filed by determining the applications which are required and ordering each party to file a single application as far as possible.

d. Parties will be required to submit a case note to the court at the pre-trial stage, preferably before directions on evidence are given.

e. The court will not allow pleadings to be amended within 14 days before trial. The court may draw appropriate inferences if material facts in the pleadings are amended. This is to eliminate parties seeking to amend pleadings close to the trial date or even on the first day of trial. However, exceptions can be made for special cases.

Comment

The proposed reforms to the civil justice system are intended to simplify rules and eliminate time-consuming or expensive procedural steps. These advancements in the rules are intended to ensure fairness to all parties in civil proceedings where disputes will be resolved and further expedited based on the factual and legal merits of the matter while ensuring costs are maintained at reasonable levels.

You can find more details on the proposed changes in the Public Consultation Paper (here), and in the Report of the Civil Justice Review Committee (here).

Upcoming Events

– **23 January 2019: Dispute Resolution Annual Legal Update 2019 (Singapore)**

We will be holding our Dispute Resolution Annual Legal Update on 23 January 2019, where we will discuss the prominent developments and trends in 2018 that cut across multiple facets of legal practice.

As we will be sharing further details of the event soon, please feel free to also indicate your interest in attending the Dispute Resolution Annual Legal Update 2019 by contacting us here.

– **13 March 2019: 3rd Annual Global Renewable Energy Conference (Hong Kong)**

The conference will bring together some of the world's leading industry experts and leaders to discuss topics of critical importance such as renewables disruption; trends in offshore wind in Europe and Asia; distributed generation, Smart Grids, EVs and storage technologies; policy and regulatory risks; corporate PPAs; and the appetite for institutional investment. The conference will have a particular focus on the opportunities in Asia and for Asian investors looking at markets overseas. This is a non-commercial, invitation-only event, which provides an opportunity for open dialogue and direct engagement with participants from across the new energy space, including investors and developers, corporate buyers of power, IT companies and financial institutions.

We look forward to welcoming you so please watch for additional information

to follow very shortly. In the meantime, you may RSVP here and contact us for more information.

Key Resources

- We have published the third edition of our **Global Privilege Handbook**, which outlines the current law on privilege in over 30 key jurisdictions. It features expanded coverage on privilege issues in regulatory and investigatory situations, together with guidance on common high risk areas such as interview notes made during an investigation. You can download a copy of the handbook here.
- We have revised and updated our **5 Essential Elements of Corporate Compliance** publication, which provides fresh expert insight on effectively managing corporate compliance efforts in today's evolving regulatory and enforcement environments. While the *5 Essential Elements of Corporate Compliance* spotlights the area of anti-corruption compliance and surveys key jurisdictions with notably active or burgeoning legal and enforcement systems, its content cuts across compliance subject areas and national boundaries by integrating best practice guidance from a variety of influential global regulators and international organizations. You can find a copy of the publication here.
- The Ministry of Law has launched a new **Singapore Infrastructure Dispute-Management Protocol** to help parties involved in mega infrastructure projects manage disputes and minimise the risks of time and cost overrun. Under the protocol, parties will appoint a Dispute Board (DB) from the start of a project, which will comprise of up to three neutral professionals who are experts in relevant fields such as engineering, quantity surveying and law. The DB will follow the project from start to finish and proactively help to manage issues that may arise, through a range of customised dispute avoidance and resolution processes.

  A copy of the Protocol can be found here. If you would like to know more about the Protocol and its implementation, please contact one our lawyers.

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