

# SINGAPORE COURT OF APPEAL RULES ON ARBITRABILITY

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In *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, the Singapore Court of Appeal affirmed that, when faced with a stay application, the Singapore Courts would only undertake a prima facie review of the validity of an arbitration clause and defer the ultimate question of jurisdiction to the arbitral tribunal.

## Background

Silica Investors Ltd ("Silica") was a minority shareholder in a mining exploration company known as AMRG. The majority shareholder in AMRG was Tomolugen Holdings Ltd ("Tomolugen"). In June 2010, Silica purchased its 4.2% stake in AMRG from a subsidiary of Tomolugen through a share sale agreement.

Amongst other things, the share sale agreement entitled Silica to appoint a director to AMRG's board and warranted that AMRG's liabilities would be discharged before completion of the sale. The agreement also contained an arbitration clause, which provided for a SIAC arbitration in relation to "any dispute arising out of or in connection with [it]."

In June of 2013, Silica commenced suit before the Singapore Courts alleging that Tomolugen had conducted the affairs of AMRG in a manner which was oppressive towards it as a minority shareholder of AMRG. Specifically, Silica alleged that AMRG had issued new shares to dilute Silica's stake, and that AMRG had taken actions to frustrate Silica's attempts to participate in the management of AMRG. Silica also claimed that AMRG had executed guarantees and acquired assets for the benefit of Tomolugen and the latter's subsidiaries. Silica sought a host of remedies under section

216 of the Companies Act, including a share buy-out or liquidation of AMRG.

Tomolugen and the other defendants applied for a stay of the court proceedings in favour of arbitration. It argued that a part of Silica's claim was covered by the arbitration clause in the share sale agreement and should be referred to arbitration, and it sought to stay the rest of Silica's claim pending the conclusion of the arbitration.

The High Court had earlier denied the stay application, and Tomolugen appealed.

The Court of Appeal's judgment dealt with three issues.

## 1. Arbitrability of shareholder oppression dispute

The Court first had to decide whether the shareholder oppression dispute was arbitrable. It began by noting that there will ordinarily be a presumption of arbitrability whenever a dispute falls within the scope of an arbitration clause. A notable exception to this presumption is a dispute involving an insolvent company.

However, the Court held that the shareholder oppression dispute between the parties was essentially about upholding a commercial agreement, and hence was clearly arbitrable. Even though some of the remedies sought by the plaintiff were beyond the powers of an arbitrator to grant, this would not preclude the parties from arbitrating the merits of the dispute and then applying to the Court for specific statutory remedies.

## 2. Scope of the arbitration clause

Next, the Court had to decide whether to undertake only a prima facie review of the existence and scope of the arbitration clause or to conclusively resolve the issue. The Court decided that Singapore would adopt the prima facie approach. A party applying for a stay of proceedings in favour of arbitration need only establish a prima facie case that the dispute is subject to a valid arbitration clause. It is then up to the party resisting the stay to present clear evidence refuting the validity of the arbitration clause.

In the Court's view, the prima facie approach better adheres to the purpose behind the Model Law and the kompetenz-kompetenz principle. On the facts of the case at hand, the Court concluded that only Silica's allegation that it had been shut out of the management of AMRG stemmed from the share sale agreement and therefore had to be referred to arbitration. The rest of Silica's claims could be litigated. Notably, the Court's decision departs from the English approach, whose courts may actually decide the issue of the validity of the arbitration clause when faced with a stay application.

## 3. Overlap between litigation and arbitration claims

Given that only one of Silica's claims (and against only one of the eight defendants) had to be arbitrated, the Court had to consider whether to stay some or all of the court proceedings initiated by Silica. Allowing concurrent litigation and arbitration on the one hand could lead to Silica's circumvention of the arbitration clause and/or a duplication of resources. On the other hand, staying the entire court proceedings may allow the defendants to re-litigate the claim that was subject to arbitration.

In the end, the Court decided to stay the entire court proceeding in the interest of efficient case management. However, it noted that any attempt by the defendants to subsequently re-litigate the issues raised in arbitration would be deemed an abuse of process.

## Conclusion

This decision demonstrates the willingness of Singapore courts to give full effect to the parties' agreement to arbitrate. It also provides insight into how the Singapore courts will exercise their jurisdiction to stay court proceedings in favor of arbitration when faced with remedial inadequacy and procedural complexity. Notably, the fact that the relief being sought is beyond the power of the tribunal is unlikely to justify refusing a stay of court proceedings.

### AUTHOR PROFILE

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