

SINGAPORE HIGH COURT DISMISSES STAY APPLICATIONS ON BASIS OF REPUDIATORY BREACH OF MED-ARB AGREEMENT

By Alastair Henderson and Noe Minamikata

In *Heartronics Corporation v EPI Life Pte Ltd and Others* [2017] SGHCR 17, the Singapore High Court considered applications to stay proceedings pursuant to arb-med-arb clauses in the relevant agreements. The defendant had argued that even if attempts at mediation had failed, the arbitration agreement nevertheless remained separate and enforceable. This decision – which rejected the stay application after finding a repudiatory breach of an integrated med-arb procedure – highlights the unitary nature of certain multi-tiered dispute resolution clauses, and provides helpful guidance on the circumstances in which an arbitration agreement may be rendered inoperative or incapable of being performed.

Background

Heartronics Corporation (“**Heartronics**”) sued EPI Life Pte Ltd, its sole shareholder and the latter’s two directors (“**EPI**”) in respect of a licensing agreement and a distribution agreement for medical devices (“**Agreements**”).

Heartronics claimed that it had been induced into entering the **Agreements** as a result of **EPI**’s false representations, in reliance upon which Heartronics also entered into downstream distribution agreements with third parties to distribute the devices in France and India. It transpired that the devices could not be marketed in either jurisdiction, and Heartronics sought damages and rescission of the **Agreements**.

The **Agreements** contained virtually identical dispute resolution clauses (“**ADR Clauses**”) requiring the parties to submit to the Singapore Mediation Centre (“**SMC**”) and Singapore International Arbitration Centre (“**SIAC**”) for resolution by mediation-arbitration (“**med-arb**”). Heartronics attempted to initiate

med-arb proceedings in the **SMC**, but **EPI** persistently refused to agree on a date for mediation or to pay the requisite fees. Heartronics eventually commenced proceedings in the Singapore Courts on the basis that the **ADR Clauses** had been discharged due to repudiatory breaches by **EPI**.

In response, **EPI** sought a stay of the proceedings pending the outcome of any med-arb proceedings between Heartronics and **EPI**, pursuant to section 6 of the International Arbitration Act (“**IAA**”). In support of its applications, **EPI** submitted that the **ADR Clauses** contained not one, but two separate dispute resolution agreements, comprising a mediation agreement and a separate agreement to arbitrate (if mediation failed). Accordingly, even if **EPI** had committed repudiatory breaches of the **ADR Clauses**, such breaches only entitled Heartronics to treat the mediation agreement as having been discharged. The arbitration agreement remained operative, and as such, court proceedings should be stayed in favour of arbitration.



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Accordingly, the Court found that the obligations to mediate and arbitrate contained within the ADR Clauses constituted a unitary dispute resolution mechanism, the entirety of which needed to be considered as the "arbitration agreement" for the purposes of the IAA.

Arbitration agreement was inoperative

In deciding whether the "arbitration agreement" was inoperative, the Court noted that – in principle – an arbitration agreement would be considered inoperative where a party has committed a repudiatory breach of the arbitration agreement and that repudiation has been accepted by the innocent party.

In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] SGCA 39 the Court of Appeal described the situations in which an innocent party to a contract may elect to treat a contract as having been discharged by the other party's breach. Two such grounds were relied on in this case, namely (1) that the defendant, by its words and conduct, had renounced the contract (specifically, the arbitration agreement) by clearly conveying to the claimant that it would not perform its obligations at all; and (2) that the defendant's breach deprived the claimant of substantially the whole benefit which it was intended to obtain from the contract (specifically, the arbitration agreement).

The Court held that EPI had committed (and Heartronics had accepted) a repudiatory breach of the arbitration agreement on both bases. EPI's actions deprived Heartronics of substantially the whole benefit that it should have derived from the agreement. In failing to pay the necessary SMC fees and continually seeking to postpone the commencement of arbitration, EPI's actions fell short of what was required for it to participate in good faith in the med-arb process. EPI had prevented Heartronics from proceeding to resolve the dispute in the manner provided for under the ADR Clauses, and these actions had

Decision

In determining whether EPI should be granted a stay, the Court considered the following key issues:

1. Whether the ADR Clauses contained one dispute resolution agreement or two separate dispute resolution agreements.
2. Whether the arbitration agreement in the ADR Clauses had been rendered "inoperative" within the meaning of the IAA due to EPI's conduct.

The Court also considered – briefly – a subsidiary argument that the defendant's cessation of business and admitted impecuniosity separately rendered the arbitration agreement incapable of being performed.

ADR Clause was a unitary agreement

The Court considered the provisions of the SMC-SIAC med-arb procedure, which provided for closely intertwined mediation and arbitration proceedings, and found that to view mediation and arbitration separately would be inconsistent with the commercial intentions of the parties, who had expressly agreed to the hybrid mechanism. Further, if a stay were granted, Heartronics would be compelled to adopt a dispute resolution procedure materially different from that which had been agreed (i.e. the dispute would be referred to arbitration as if the ADR Clauses had not provided for mediation).

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rendered the arbitration agreement inoperative. Similarly, EPI's actions demonstrated a clear intention not to perform its relevant obligations under the agreed (unitary) disputes procedure, which again justified a finding of repudiatory breach.

On the above basis, the Court dismissed EPI's applications for a stay of proceedings.

As a subsidiary argument, Heartronics had asserted that EPI's admitted suspension of business and dormancy since 2015, and its

admitted impecuniosity, rendered the arbitration agreement incapable of being performed as there was no prospect of EPI being able to pay the fees for the agreed procedure. Rejecting this argument, the Court noted that 'incapability of performance' required a permanent impossibility in setting the arbitration in motion, not merely transient obstacles; but ultimately it dismissed the argument for lack of cogent substantiating evidence.

Comment

This decision confirms the Singapore Courts' support for the principle that arbitration is grounded in party autonomy (specifically, that the parties are free to agree how they shall have access to arbitration in the event of a dispute). Parties to (or contemplating) a multi-tiered dispute resolution procedure may take comfort in the fact that the Singapore Courts are unlikely to allow one party to "cherry pick" aspects of an agreed procedure; particularly where to do so would be tantamount to compelling the other party to adopt a procedure that is materially different from that which was agreed.

Further, a hybrid dispute resolution mechanism, or at least a hybrid whose parts are as closely intertwined as the SMC/SIAC med-arb procedure, should be regarded as a unitary mechanism in which all parts function as integrated components of the parties' intended dispute resolution procedure.

It seems clear in this case that egregious delays (and other misconduct) on EPI's part likely played a part in persuading the Court that EPI had committed a repudiatory breach, and should not be entitled to reverse its conduct and insist on arbitration. However, in arriving at its decision, the Court also provided examples of conduct that a court would (or would not) deem to be a repudiatory breach, which should serve as helpful guidance as to the categories of conduct that could render an arbitration agreement inoperative.

The subsidiary issue – whether a party's impecuniosity could render an arbitration agreement incapable of being performed – has been raised occasionally in cases in Europe and the United States. Whilst the Singapore Court did not reach a definitive ruling on the issue as a matter of law, the Court's observations strongly suggest that such factors would not typically be accepted in Singapore as a basis for refusing a stay of proceedings. No matter how dire a party's financial circumstances, they would not ultimately prevent an arbitration from proceeding, if the other party chooses to shoulder the whole cost in order to progress the case.

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Alastair has more than 20 years' experience handling major disputes across many sectors and industries, concerning a wide variety of trade, commercial and financial activities, with particular experience of oil, gas and power, construction and engineering, infrastructure and projects, and major foreign investment. He is very familiar with disputes in or concerning the countries of Southeast Asia, as well as international cases outside the region. His clients include governments and public bodies, state-owned and independent companies, international banks, and other multinational and leading regional companies.



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