HARNEYS

FamilyMart Privy Council decision

Just & equitable petitions susceptible to arbitration "hive off"

Written by **GRÁINNE KING** and **CATIE WANG**

In a recent decision of the Privy Council in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding*, on appeal from the Cayman Islands, the effect of an arbitration clause on the court's jurisdiction to wind up on the just and equitable ground was considered.

This decision concerns a long running dispute between FamilyMart China Holding Co. Ltd. and Ting Chuan (Cayman Islands) Holding, who were the shareholders in China CVS (Cayman Islands) Holding Corp. The shareholders developed and operated FamilyMart convenience stores in mainland China. The business was successful, however, the relationship between the shareholders deteriorated. The applicant petitioned to wind up China CVS in the Cayman Islands Grand Court on the just and equitable ground alleging misconduct in management and breach of directors' duties - with consequent loss of trust and confidence. The applicant also sought an order that the respondent be required to sell its shares to FMCH.

However, the parties' relationship was governed by a shareholders' agreement which provided that "any and all disputes in connection with or arising out of [the SHA shall be] submitted for arbitration". The respondent applied to strike out the winding up petition or, alternatively, for an order staying the petition under section 4 of the Foreign Arbitral Awards Enforcement Act.

At first instance, the Grand Court granted the stay in favour of arbitration. The Cayman Islands Court of Appeal overturned that decision, holding that the court had exclusive jurisdiction to determine whether a company should be wound up on the just and equitable ground. It held that it was only in cases where discrete issues could be "hived off" to arbitration that the court might stay a winding up petition, however in the case of *FamilyMart* no part of the winding up petition was susceptible to arbitration; it held that the petition involved an indivisible factual evaluation and declined to grant a stay. The decision was appealed to the Privy Council.

The Privy Council agreed with some of the Court of Appeal's analysis but held that, similar to the agreed facts and parties' admissions, there was no reason in principle why the court should not be bound by the determination of an arbitral tribunal. It held that although a winding up of a company lies exclusively within the jurisdiction of the courts, there may be issues in winding up proceedings, for example, breach of a shareholders' agreement, which can be referred to arbitration, notwithstanding that only the court can make a winding up order or a buyout order.

The Privy Council also held that in considering whether a matter should be referred to arbitration, the court must first determine what matters are raised in the court proceeding, and then determine

in relation to each such matter, whether it falls within the scope of the arbitration agreement. The court should also follow the following principles: (i) the court must ascertain the substance of the dispute, (ii) a stay may be granted in relation to parts of the court proceedings, (iii) a matter requiring a stay must be a substantial issue that is legally relevant to a claim or defence and susceptible to determination by an arbitrator as a discrete dispute; it does not extend to peripheral or tangential issues (iv) the test entails a matter of judgement and common sense. While this approach may involve the fragmentation of the dispute, the Privy Council considered that this can be mitigated by effective case management by the court and the arbitral tribunal.

In this case, the Privy Council found that the issues of loss of trust and confidence and the irretrievable breaking-down of the relationship between the parties fell within the scope of the arbitration agreement, and therefore a mandatory stay was granted in respect of these issues under the Foreign Arbitral Awards Enforcement Act. It further found that these issues were an essential precursor to the determination of the petition; therefore, the Privy Council granted a stay of the petition under section 95(1)(d) of the Companies Act which provides that the court may make "any other order that it thinks fit''.

This decision provides important clarity on the interplay between a contractual agreement to arbitrate and the shareholders' statutory right to petition to wind up a company on the just and equitable ground.

About the authors

Gráinne King – Partner

Gráinne King is a member of Harneys' Litigation & Insolvency practice group in the Cayman Islands.

Gráinne has been practising in the Cayman Islands since she joined Harneys in 2015. Prior to joining the firm, Gráinne was an associate in the Restructuring and Insolvency team at A&L Goodbody in Dublin. Her expertise includes advising insolvency practitioners and other stakeholders in relation to liquidations, restructurings, receiverships and commercial disputes. Gráinne also has experience in the area of fraud and asset tracing, appraisal litigation under s238 of the Companies Act and regulatory litigation. Prior to practising in the Cayman Islands, Gráinne acted for high-profile lending institutions in relation to the appointment of receivers, summary proceedings, implementation of consensual workouts with debtors and defence of injunctions, mis-selling and negligence claims. Gráinne is also a board member of the IWIRC International Board.

Catie Wang – Senior Associate

Catie Wang is a member of Harneys Litigation & Insolvency team in the Cayman Islands office. She has broad experience in multi-jurisdictional litigation concerning offshore companies operated in Asia, including just and equitable winding up, unfair prejudice claims, derivate claims, fair value appraisal litigation, and cross-border interim injunctions.

Before joining Harneys, Catie worked at two other leading offshore law firms in Hong Kong. Prior to that, she worked in an international law firm in Singapore and a family office in Sydney.