# Arbitrability of Shareholders' Claims

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The question as to whether a shareholders' petition to wind up a company on the just and equitable ground may be stayed in favour of arbitration was recently considered in the Hong Kong decision of ***Quiksilver Greater China Limited v Quiksilver Glorious Sun JV Limited and Anor*** HCCW 364/2013 (*unrep.*, 25 July 2014), *per* Harris J. The Court held that it was permissible and desirable for the Court to stay the winding-up petitions in question, pending the outcome of the arbitration. In this article, this Hong Kong position will be compared with the approach adopted in other common law jurisdictions, namely the United Kingdom and the BVI on the one hand, and Singapore on the other. It will be seen that the Hong Kong approach is now in line with the "pro-arbitration" stance taken by the English Court of Appeal in ***Fulham Football Club (1987) Ltd v Richards and Anor*** [2012] Ch 333, as well as the position under BVI law.

## The *Fulham* Case

Before an analysis of the Hong Kong position, it is helpful to first consider the ***Fulham*** decision of the English Court of Appeal delivered on 21 July 2011. In the ***Fulham*** case, the Court confirmed that a shareholder's unfair prejudice claim was arbitrable as a matter of English law.

The ***Fulham*** case concerned an unfair prejudice petition brought by Fulham Football Club alleging that Sir David Richards, the Chairman of the Football Association Premier League, had acted in a manner unfairly prejudicial to the interests of Fulham, by facilitating the transfer of a football striker between two of Fulham's rival clubs. Fulham sought injunctive relief against Sir David Richards, and also alternatively sought an order that Sir David Richards be removed as chairman of the Football Association Premier League.

The issues before the Court were whether the arbitration agreements contained in the relevant Football Association rules would be construed as referring the relevant disputes to arbitration, and whether such reference was prohibited by relevant provisions of the English Companies Act 2006, or alternatively on the ground of public policy.

The English Court of Appeal observed that the arbitration agreements were widely drafted to include "*any dispute or difference between any two or more participants*". In this case, Sir David Richards was a "participant" under the arbitration agreement, and it was common ground that he was willing to be joined as a party to arbitration (§§24-25).

The Court noted that there was no express provision in the English Companies Act 2006 or the Arbitration Act 1996 which prohibited arbitration as a means to determine unfair prejudice disputes. As to whether there could be any implicit prohibition or reasons for holding the claim as not arbitrable, it was necessary to consider whether the claim "*attracts a degree of state intervention and public interest such as to make it inappropriate for disposal by anything other than judicial process*" (§50).

In its analysis, the Court then went on to overrule a previous English High Court decision of ***Exeter City Association Football Club Ltd v Football Conference Ltd*** [2004] 1 WLR 2910, which had held that the English statutory provisions provided an inalienable statutory right for shareholders to apply for relief in court (see §§77-78; 88, *per* Patten LJ). The Court further observed that the inherent limitation on the arbitrator's power to make orders affecting non-parties was not necessarily determinative of whether the subject matter of the dispute was itself arbitrable (§40, *per* Patten LJ).

The Court found that an arbitral tribunal was capable of deciding whether a complaint of unfair prejudice could be made out, and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some other remedy. However, the Court observed that an arbitral tribunal could *not* decide whether a winding-up order should be made, which would remain a matter for the Court's determination in subsequent proceedings (§83, *per* Patten LJ). Moreover, the Court further noted that the arbitral tribunal had no power to make orders regulating the affairs of the company, which would bind other shareholders who are not parties to the arbitration (§33, *per* Patten LJ).

As to the public policy ground, the Court found that it was not contrary to public policy for an agreement to refer to arbitration the question of whether a company's affairs had been conducted in an unfairly prejudicial manner to the interest of its members (§§97-103, *per* Longmore LJ). The Court moreover observed that the arbitrator's inability to give a particular remedy was "just an incident of the agreement", and this would not give rise to any reason for treating an arbitration agreement as having no effect (§103, *per* Longmore LJ).

Hence, it can be seen that the Court in ***Fulham*** was in favour of a "pro-arbitration" stance in relation to minority shareholder's claims. Essentially, the Court drew a distinction between the subject matter of the claim, and the remedies which may be sought under the claim. It is clear that there are certain remedies which the arbitral tribunal not be empowered to award, including an order for the winding-up of a company. However, this does not alter the position that, where the subject matter of the claim relates to allegations of unfair prejudice, such a claim would generally be arbitrable under English law.

## The BVI Position - *Ennio Zanetti*

The approach of ***Fulham*** was in fact consistent with an earlier BVI decision of handed down by the Eastern Caribbean Supreme Court, namely that of ***Ennio Zanetti v Interlog Finance Corp*** BVIHCV 2009/0394, *per* Bannister J. In ***Ennio Zannetti***, the Court considered *inter alia* the arbitrability of an unfair prejudice claim, under which the claimant sought a declaration that the affairs of the company had been conducted in an unfairly prejudicial manner, and an order that one of the defendants should buy out the claimant's shares in the company.

The main question was whether a relevant clause under the company's Articles of Association, which referred the parties' dispute to arbitration, ought to be considered as "null and void". Similarly to the reasoning in ***Fulham***, the Court observed that ***Exeter City*** was not good law and should not be followed in the jurisdiction. This was because the English Court in ***Exeter City*** had failed to recognize the difference between proceedings to appoint liquidators on the one hand, and claims for unfair prejudice on the other (§21). For the former case, the BVI Court recognized that the parties cannot contract out of the statutory regime governing the winding-up of corporations. However, it was observed that different considerations would apply for unfair preference proceedings, and that the Court should give effect to the arbitration agreement unless the agreement was illegal or contrary to public policy (§22).

On the facts of ***Ennio Zanetti***, the Court found that there were no grounds of public policy which would deny the parties from settling their disputes through arbitration, because "*no third party rights fell to be protected or adjusted*" (§22). On the contrary, the Court recognized that "public policy encourages arbitration" (§22). Accordingly, the Court found that the relevant arbitration clause in the Company's Articles was not null and void, and hence the proceedings against the company ought to be stayed in favour of arbitration.

## A narrower approach: *Silica Investors Ltd*

However, the approach in ***Fulham*** was not followed in the Singapore High Court case of ***Silica Investors Ltd v Tomolugen Holdings Ltd*** [2014] SGHC 101, delivered on 29 May 2014. In ***Silica Investors***, the claimant was a minority shareholder in a Singapore company, who had purchased the shares in the company from one of the defendants (*i.e.* Lionsgate) pursuant to a share sale agreement. The share sale agreement provided a widely-drafted arbitration clause. The claimant brought minority oppression claims against the company, Lionsgate, the majority shareholder of the company (*i.e.* Tomolugen Holdings Ltd), and six directors and shareholders of the company. The claimant sought *inter alia* relief for the purchase in the

claimant's shares, and alternatively for the company to be placed in liquidation. The Court considered whether the entire proceedings ought to be stayed in favour of arbitration.

The Court found that the scope of the arbitration clause was wide enough to cover the disputes in the case. Hence, the pertinent issue was that in relation to the arbitrability of the minority oppression claims.

The Court highlighted the inherent consensual and confidential nature of arbitration, and that an arbitral tribunal had no power to make awards *in rem* or orders that bind third parties (§§94-111). The Court then analysed the various approaches adopted across different jurisdictions. In particular, it distinguished the ***Fulham*** case as one with a "unique set of facts", and that in the case there was "no possibility of a buy-out or winding up orders" (§126). The Court expressly rejected a broad application of the ***Fulham*** case, as it could lead to problems such as multiplicity of proceedings, and adverse consequences where the Court disagrees with the findings of the arbitral tribunal (§§124-125).

The Court concluded that there are limitations on the arbitrability of minority oppression claims, and that this type of claim may "straddle the line between arbitrability and non-arbitrability" (§141). Ultimately, the arbitrability of the claim was an inquiry which would depend on "all the facts and circumstances of the case" (§141). The Court went on to observe that many, if not most, of the minority oppression claims would be non-arbitrable, unless:-

(1) All the shareholders are bound by the agreement, <u>or</u> where there exist unique facts like ***Fulham***; and

(2) All relevant parties (including third parties whose interests may be affected) are parties to the arbitration; and

(3) The remedy or relief sought is one that only affects the parties to the arbitration. (at §142)

On the facts of the case, as there were relevant parties who were not parties to the agreement, and the claimant also sought the remedy of winding-up which an arbitral tribunal could not grant, it was held that the claimant's minority oppression claim was not-arbitrable (§143).

Hence, under the Singapore position, it appears that even a widely drafted arbitration clause would not invariably be upheld in the context of minority shareholder claims. The Court would consider factors such as whether all of the parties had consented to arbitration, and whether the relief sought by the claimant would be that of the type that could be awarded by the arbitral tribunal.

## The Hong Kong position – *Quiksilver*

However, in the recent Hong Kong decision of ***Quiksilver*** handed down on 25 July 2014, the Court adopted the "pro-arbitration" approach laid down in ***Fulham***. In the ***Quiksilver*** case, Quiksilver and Glorious Sun Overseas Company Ltd ("**Glorious Sun**") established two joint ventures, under a joint venture agreement which contained an arbitration clause. Quiksilver issued two winding-up petitions in respect of the two joint ventures. The issue before the Court was whether it was permissible or appropriate to stay a petition issued by a shareholder to wind-up a solvent company on the just and equitable ground, and to require the underlying dispute to be determined in accordance with an arbitration agreement (between the petitioner and the respondent shareholders).

The Court firstly acknowledged that an arbitrator cannot make a winding-up order, as a company is a creature of statute and can only be liquidated or ultimately dissolved through the mechanism provided by under the Companies Ordinance, Cap. 622 (§14). However, a distinction must be made between a winding-up petition issued on the grounds of insolvency, and a just and equitable petition issued by a shareholder (§19). The former petition could not be stayed to arbitration, as the creditor does not seek to recover the sum due under the relevant agreement (containing the arbitration clause), but rather he seeks to put the company into liquidation for the benefit of all creditors (§19). This should be distinguished from a just and equitable petition, in which case a shareholder must demonstrate a "sufficient interest" in the winding up. In the general case of shareholder disputes for which the company is solvent, the "class" interested in the petition would be limited to the two shareholders, both of whom would be parties to the arbitration agreement (§19).

Moreover, in determining the arbitrability of a given claim, it was not a "critical consideration" whether or not a precise relief sought in a petition was available to an arbitrator. The correct approach was to identify the substance of the dispute between the parties, and to ask whether or not that dispute was covered by the arbitration agreement (§22). On the facts of the case, the Court considered that the arbitrators were capable of resolving the underlying issues in dispute (namely as to whether Quiksilver should sell it shares and to grant a new trademark licence, and whether the joint ventures should be wound up) (§23). Hence, the Court made the order that the petitions be stayed, pending the outcome of the arbitration on the underlying disputes. In the event that the arbitrator concludes in favour of Quiksilver, an application could then be made to the Court for winding-up orders (§23). This approach was considered to be both "practical and desirable", as the arbitration had been underway, and it would be undesirable in the circumstances for two sets of proceedings to continue in parallel (§23).

## Conclusion

In conclusion, the Hong Kong position appears to be now in line with the English and the BVI approach, which recognizes that claims brought by minority shareholders would in general be held to be arbitrable. The Hong Kong courts would likely be willing to give wide effect to arbitration clauses, and to allow proceedings to be stayed in favour of arbitration unless it could be shown that third party interests would be affected. This may be contrasted with the Singapore position, which has adopted a narrower view to the arbitrability of the minority oppression claims. It remains to be seen how the Hong Kong courts would resolve the practical difficulties raised by the Singapore courts against the "pro-arbitration" approach endorsed in ***Fulham***, in particular as to the possible duplication of proceedings, and the potential differences in opinion between the Court and the arbitral tribunal.