

OF ‘DRESSED-UP PETITIONS’ AND ‘FRAGMENTATION ALONG REMEDIAL LINES’: CAN CLAIMS OF MINORITY SHAREHOLDER OPPRESSION BE RESOLVED THROUGH ARBITRATION?

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Abstract

The courts in Singapore have recently considered whether claims of minority oppression can be resolved through arbitration. Some key policy concerns were raised before the courts including that permitting such claims to be resolved through arbitration would lead to fragmentation of the dispute resolution process. The authors discuss the decisions of the courts in Singapore and their conclusions. The authors then contrast these conclusions with those arrived at by the courts in India. Given the increasing emphasis placed by the Government of India on promoting the use of arbitration as a method of dispute resolution, it will be interesting to observe whether courts in India continue to adopt the same position.

I. Introduction

The question that forms the subject matter of this editorial has been discussed in detail by courts in several common-law jurisdictions and raises a number of issues concerning the concept of arbitrability. The approaches adopted by the High Court of Singapore [“**SGHC**”] and the Court of Appeal of Singapore [“**SGCA**”] in *Silica Investors Ltd v. Tomolugen Holdings Ltd and others* [“**Silica v. Tomolugen**”],¹ and *Maniach Pte Ltd v. L Capital Jones Ltd, Jones the Grocer Group Holdings Pte Ltd* [“**Maniach v. L Capital**”],² has led to renewed interest in this question.

In this editorial, the authors first discuss the decisions of the courts in Singapore. Then certain decisions of the courts in India which reflect on the issue of subject matter arbitrability and shareholder disputes are considered. The authors conclude by commenting on the possible standard that may be adopted by courts in the following years when considering this question.

II. The approach adopted by the High Court of Singapore

In *Silica v. Tomolugen*, the dispute arose as the minority shareholder of Auzminerals Resource Group Limited [“**ARGL**”] - Silica Investors Limited, alleged that the affairs of ARGL were being conducted in a manner that was oppressive or unfairly prejudicial to its interests. The minority shareholder had acquired its interest in ARGL from Lionsgate Holdings Pte Ltd [“**Lionsgate**”], a subsidiary of Tomolugen Holdings Limited [“**Tomolugen**”]. The acquisition took place through a share sale agreement with an arbitration clause. Tomolugen was the majority shareholder of ARGL and Lionsgate continued to remain a shareholder. As a result, the court proceedings instituted by the minority shareholder (Silica Investors Limited) in Singapore included as defendants, Tomolugen and Lionsgate along with shareholders and current or former directors of ARGL. The relief requested was wide-ranging and included a share buy-out order, regulation of the conduct of ARGL or in the alternative, an order for the liquidation of ARGL.

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¹ *Silica Investors Ltd v. Tomolugen Holdings Ltd and others*, [2014] 3 SLR 815 (Sing.) [*hereinafter* “*Silica v. Tomolugen*”].

² *Maniach Pte Ltd v. L Capital Jones Ltd, Jones the Grocer Group Holdings Pte Ltd*, [2016] SGHC 65 (Sing.) [*hereinafter* “*Maniach v. L Capital*”].

Lionsgate approached the court requesting a stay of the court proceedings, as part of the dispute fell within the scope of the arbitration clause in the share sale agreement. Lionsgate also submitted that the remainder of the proceedings be stayed to permit appropriate case management. The remaining defendant parties filed similar applications, which were contingent upon the application filed by Lionsgate. The judge identified the essential dispute in the suit as whether the affairs of ARGL had been conducted in an oppressive manner – and concluded that this dispute indeed fell within the widely-drafted arbitration clause contained in the share sale agreement. However, the stay requested by Lionsgate was not granted as the dispute was not arbitrable. The relief sought was of a kind that could not be granted by an arbitral tribunal and the dispute involved parties who were not bound by the arbitration clause in the share sale agreement.

Thus, in 2014, the SGHC concluded that the question of whether an action arising out of a minority oppression action would be arbitrable depended on the facts and circumstances of each case, and stated:

“The nature of a minority oppression claim and the broad powers of the court under s 216(2) of the CA would mean that a minority oppression claim is one that may straddle the line between arbitrability and non-arbitrability. It would not be desirable therefore to lay down a general rule that all minority oppression claims under s 216 of the CA are non-arbitrable. It will depend on all the facts and circumstances of the case. No single factor should be looked at alone. Nor should the remedy or relief asked for assume overriding importance, as that would enable litigants to manipulate the process and evade otherwise binding obligations to refer their disputes to arbitration. [...] That said, except for those cases where all the shareholders are bound by the arbitration agreement, or where there are unique facts [...], and the court is satisfied that, first, all the relevant parties (including third parties whose interests may be affected) are parties to the arbitration and, secondly, the remedy or relief sought is one that only affects the parties to the arbitration, many if not most of the minority oppression claims under s 216 of the CA claims will be non-arbitrable.”³(Emphasis added).

In reaching its conclusion on whether claims of minority oppression were arbitrable, the SGHC also considered the approaches adopted by certain other jurisdictions – England,⁴ Australia,⁵ and Canada⁶. Lionsgate and the other related parties thereafter filed an appeal before the SGCA.

Similarly, in *Maniach v. L Capital*, a dispute arose between Maniach Pte Ltd [“**Maniach**”] and L Capital Jones Ltd [“**L Capital**”], the two shareholders of Jones the Grocer Group Holdings Pte Ltd

³ *Silica v. Tomolugen*, [2014] 3 SLR 815 (Sing.), ¶¶ 141, 142.

⁴ *Id.* ¶¶ 62-74, to identify the current position under English law, the Singapore High Court referred to the decision of the English Court of Appeal in *Fulham Football Club (1987) Ltd. v. Richards and another*, [2011] EWCA (Civ.) 855 (Eng.), where it was held that a minority shareholder claim under English law would be arbitrable (even though an arbitral tribunal would be unable to grant certain statutory remedies, such as an order for winding up). The Singapore High Court also noted that the earlier decision of the English High Court in *Exeter City Association Football Club Ltd. v. Football Conference Ltd.*, [2004] 1 WLR 2910 (UK), which held that a claim of minority shareholder oppression based on statute (English company law) would not be arbitrable, had since been overruled.

⁵ *Id.* ¶¶ 75-84, the current position in Australia is described by the Singapore High Court as minority oppression claims being arbitrable, to the extent that the remedies sought are “*inter partes and not in rem*”.

⁶ *Id.* ¶¶ 85-93, the current position in Canada is described by the Singapore High Court as being divided between courts, with some finding such disputes to be arbitrable while others relied on a two-stage procedure where the court allows a tribunal to decide on the issue of oppression, which if upheld, is then remitted back to the courts.

[“**Jones Pte Ltd**”]. Maniach filed a suit claiming minority oppression in February, 2015 on three grounds namely: its exclusion from the management of Jones Pte Ltd by L Capital in breach of a common understanding, the transfer of the only asset of Jones Pte Ltd at an undervalue, and abuse of voting power. The relief sought included a share buy-out order and a rescission of any transfer of the shares of an Australian subsidiary of Jones Pte Ltd to a third party.

Almost a month after Maniach commenced court proceedings, L Capital issued a notice of arbitration seeking relief against Maniach and John Manos (its sole shareholder), for breach of a shareholders’ agreement. On the question of whether the disputes fell within the scope of the arbitration agreement, L Capital advanced two arguments before the courts: (i) that Maniach’s claim amounted to an abuse of process as it was a contractual claim for breach of a shareholders’ agreement, which had been disguised as an action of minority oppression in order to evade the arbitration agreement between the parties; and (ii) even if the dispute was genuinely a minority oppression action, the arbitration agreement was wide enough to encompass it.

The arbitration clause was widely drafted, similar to the clause in *Silica v. Tomolugen*. As a result, *Silica v. Tomolugen* is discussed at length in *Maniach v. L Capital*, including the grounds on which the minority oppression claim had been raised. The court found that L Capital had failed to establish a *prima facie* case that any of the grounds raised by Maniach arose under the shareholders’ agreement and therefore fell within the parties’ arbitration agreement. However, as the subject matter of the action instituted by Maniach before the courts fell within the scope of the parties’ arbitration agreement, the question of whether Maniach’s claim was arbitrable was considered. The court noted that the ‘all or nothing’ approach adopted by the English courts to the arbitrability of statutory minority oppression claims was in contrast with the approach in *Silica v. Tomolugen*, where a middle path had been found to be appropriate.⁷

The SGHC concluded in *Maniach v. L Capital* that commercial certainty would be undermined by a ‘case-by-case’ approach, as predicting the outcome of an inquiry into arbitrability would not be possible. Therefore, either all claims of minority oppression would be arbitrable or no claims would be arbitrable. However, an arbitrator would be unable to grant the most useful remedies for an oppressed minority shareholder – namely, “*those that are coercive, operate in rem or which bind non-parties to the dispute*”.⁸ Thus, the court accepted Maniach’s submissions that the claim of minority shareholder oppression was not arbitrable and should be continued before the courts.

Two policy aspects of the conclusions reached by the court in *Maniach v. L Capital* might interest the readers. First, the court discussed how permitting statutory minority oppression claims to be resolved by arbitration would lead to the fragmentation of the dispute resolution process on the basis of the remedies available. The court noted that if an arbitral tribunal were to find that a minority shareholder had suffered oppression, determine the appropriate relief but not be able to grant it, eventually having to refer the matter to the court– an administrative act would be required

⁷ Maniach v. L Capital, [2016] SGHC 65 (Sing.), ¶ 150.

⁸ *Id.* ¶ 169.

to be carried out without the exercise of judicial power. Secondly, there would be a fragmentation on issues, such as those relating to the breach of contract between the parties and others relating to the contraventions of applicable legislation (such as the Singapore Companies Act or other law) - as an action of shareholder oppression would rely on a combination of a broad range of matters. In particular, Maniach's case rested on grounds that did not *prima facie* arise from the shareholders' agreement but were all connected to it. The court concluded that given the "*desirability for one-stop dispute resolution*", it could not realistically be accepted that it was the intent of the parties to have issues and sub-issues allocated between arbitration and litigation.⁹

On September 3, 2015, L Capital filed a notice of appeal against the decision of the SGHC to refuse a stay of the lawsuit in favour of arbitration (the court had found in favour of L Capital on the other points of dispute).

III. Findings of the SGCA: The Solid Core of Arbitrability

A few weeks after the SGHC ruling in *Maniach v. L Capital*, the SGCA adopted a different rationale while discussing arbitrability during the appeal from *Silica v. Tomolugen*. On October 26, 2015, the SGCA, in *Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals* [**"Tomolugen Appeal"**],¹⁰ held that despite the procedural difficulties, minority oppression or unfairly prejudicial conduct was indeed arbitrable, even when the full range of reliefs cannot be granted by an arbitral tribunal. The SGCA stated that arbitrability has a "*reasonably solid core*" but that the "*outer limits of its sphere of application are less clear*".¹¹ It noted that a dispute over oppressive or unfairly prejudicial conduct towards minority shareholders had been held to be arbitrable in New South Wales and Victoria in Australia, the British Virgin Islands and British Columbia in Canada. However, examples of jurisdictions where such disputes were held to be non-arbitrable were not provided.¹²

The SGCA did not agree with the proposition that "*the arbitrability of the remedy sought could affect the arbitrability of the claim*".¹³ Thus, merely because the relief sought in the circumstances was beyond the power of an arbitral tribunal to grant – it would not, in and of itself, make the subject matter of the dispute nonarbitrable. The court accepted that "*there will be a measure of procedural complexity whenever a dispute involving some common parties and issues has to be resolved before two different fora by virtue of the fact that only part of the dispute falls within the scope of the applicable arbitration clause*".¹⁴ It concluded that procedural difficulties did not meet the statutory criterion for non-arbitrability, which would amount to finding that enforcing the obligation to arbitrate would be contrary to public policy, given the subject matter of the *Tomolugen Appeal*.

⁹ *Id.* ¶ 170.

¹⁰ *Tomolugen Holdings Ltd. and another v. Silica Investors Ltd. and other appeals*, [2015] SGCA 57 (Sing.) [*hereinafter* "Tomolugen Appeal"].

¹¹ *Id.* ¶ 71.

¹² *Id.* ¶ 94.

¹³ *Id.* ¶ 100.

¹⁴ *Id.* ¶ 105.

In *L Capital Jones Ltd and another v. Maniach Pte Ltd* [“**Maniach Appeal**”],¹⁵ L Capital had appealed the finding by the SGHC that minority oppression claims were not arbitrable. On the other hand, Maniach sought to differentiate between the issues raised in the *Maniach Appeal* from the *Tomolugen Appeal*. Maniach accepted that the *Tomolugen Appeal* had settled the position on the arbitrability of minority oppression claims in favour of them being arbitrable. Consequently, the decision of the SGHC in *Maniach v. L Capital* was inconsistent to this extent. However, Maniach contended that L Capital’s claim raised specific issues of public policy. The importance of protecting the integrity of the judicial process and the need to prevent an abuse of the process meant that the specific issues were not arbitrable.

The SGCA noted that the *Maniach Appeal* provided an opportunity to reconsider the general rule that minority oppression claims are arbitrable. The reconsideration was through the lens of the public policy exception. Whether an exception existed to the general rule that had been crystallised by way of the *Tomolugen Appeal*, could also be clarified.¹⁶

The SGCA used the *Maniach Appeal* to elucidate that while generally minority oppression claims “*did not raise public policy considerations against arbitration*”,¹⁷ particular facts of certain claims might raise public policy concerns. For instance, if a court or tribunal adjudicating a dispute were to find that there had been an abuse of process, the finding would only be incidental to the resolution of the dispute pertaining to minority oppression.¹⁸

While the SGCA may have eventually refused a stay of court proceedings in favour of arbitration due to certain actions by L Capital – on the question of arbitrability, the SGCA followed the *Tomolugen Appeal* and found that there was no basis for the minority oppression claim to be held to be non-arbitrable.¹⁹ Thus, courts in Singapore may be likely to permit claims of minority oppression to be resolved by arbitration – unless the facts raise particular public policy concerns which would not be in favour of the claim being resolved by arbitration.

IV. Decisions of the courts in India

There are three decisions of particular interest when considering subject matter arbitrability and shareholder disputes from an Indian law perspective. These are *Sidharth Gupta & Ors v. Getit Infoservices Private Limited and Ors* [“**Gupta v. Getit**”],²⁰ *Rakesh Malhotra v. Rajinder Kumar Malhotra* [“**Malhotra v. Malhotra**”],²¹ and *McDonald’s India Private Limited v. Vikram Bakshi and Ors* [“**McDonald’s v. Bakshi**”].²²

¹⁵ *L Capital Jones Ltd and another v. Maniach Pte Ltd*, [2017] SGCA 03 (Sing.) [*hereinafter* “Maniach Appeal”].

¹⁶ *Id.* ¶ 3.

¹⁷ *Id.* ¶ 26.

¹⁸ *Id.* ¶ 29.

¹⁹ *Id.* ¶ 32.

²⁰ *Sidharth Gupta and Ors v. Getit Infoservices Private Limited and Ors*, Company Law Board (New Delhi Bench), CA 128/ C – II/ 2014 in CP 64 (ND) 2014 (Decided on Feb. 23, 2016) (India).

²¹ *Rakesh Malhotra v. Rajinder Kumar Malhotra*, (2015) 192 CompCas (Bom) 516 (India).

²² *McDonald’s India Private Limited v. Vikram Bakshi and Ors*, (2016) 232 DLT 394 (India).

In *Gupta v. Getit*, a dispute arose out of a shareholders' agreement [“SHA”] entered into by the existing shareholders of Getit Infoservices Private Limited [“Respondent Company”] with an investor. In accordance with the SHA, the investor acquired a shareholding of 50.1% in the Respondent Company.²³ At a subsequent stage, the shareholding of the investor in the Respondent Company increased to 76%. Allegations were made by some of the existing shareholders that the shares had been issued to the investor at a price substantially lower than the true value of the shares. A petition alleging oppression and mismanagement against the Respondent Company and the investor was eventually filed before the Company Law Board. The petitioners further alleged that the dispute could not be referred to arbitration since the reliefs for oppression and mismanagement could only be granted (by a court) under the Companies Act, 1956.

The Company Law Board held that the reliefs sought by the petitioners fell within the scope of the arbitration clause contained in the SHA. Even if the allegations were proved, these would amount merely to contractual violations rather than oppression for the purposes of the Companies Act, 1956. The petition was dismissed, permitting arbitration to proceed. The Company Law Board observed that an attempt to categorise a contractual dispute as an issue of oppression and mismanagement which (unlike a mere breach of contract) could have denied an arbitral tribunal jurisdiction over the dispute, was not justifiable. The key conclusion reached was that a violation of the articles of association would not amount to oppression unless such action or conduct is tainted by malfeasance or malice.

On the other hand, the Bombay High Court in *Malhotra v. Malhotra* held that oppression and mismanagement claims could not be resolved by arbitration – as the relief sought in such claims could not be granted by an arbitral tribunal. The dispute arose out of the restructuring of ownership of an Indian business group.²⁴ As a result of the restructuring, the ownership of the business was concentrated in a holding company. The holding company was largely owned by one individual, who was allegedly misusing its funds. Petitions were filed seeking orders for the removal of directors of the holding company and the appointment of new directors, as well as for setting aside the restructuring. The court determined that winding up being a matter in rem, no agreement between parties could vest an arbitral tribunal with the power of winding up. However, the court also observed that when “dressed-up” petitions were filed before the Company Law Board to avoid arbitration, if such petitions were malafide, vexatious or oppressive, the dispute could be referred to arbitration.

The other interesting decision is *McDonald's v. Bakshi*, a case regarding the validity of anti-arbitration injunctions. The facts leading to the dispute merit some discussion. On March 31, 1995, McDonald's India Private Limited [“MIPL”] and Vikram Bakshi [“VB”] entered into a joint venture agreement. The parties incorporated Connaught Plaza Restaurants Limited [“CPRL”] for this

²³ The SHA contained an arbitration clause providing for disputes to be referred to arbitration administered by the Singapore International Arbitration Centre, with the seat in Singapore.

²⁴ The transaction documentation executed at the time of restructuring contained an arbitration clause providing for disputes to be referred to arbitration administered by the London Court of International Arbitration, with the seat in Geneva.

purpose.²⁵ VB was appointed as the Managing Director of CPRL. On July 17, 2013, the agreement for appointment of VB as the Managing Director of CPRL expired and he was not re-elected. In accordance with the joint venture agreement, MIPL also issued a notice to VB purporting to purchase his shareholding in CPRL. These actions resulted in VB filing a petition before the Company Law Board, claiming oppression and mismanagement.

MIPL filed an application under Section 45²⁶ of the Arbitration and Conciliation Act, 1996, before the Company Law Board, requesting that the parties' dispute be referred to arbitration, in accordance with the provisions of the joint venture agreement. Subsequently, MIPL terminated the joint venture agreement and invoked the arbitration clause; and the dispute was referred to arbitration in London under the LCIA Rules. VB was initially able to obtain an injunction against the international arbitration proceedings. A single judge bench of the Delhi High Court affirmed that in a dispute pertaining to allegations of oppression and mismanagement, the arbitral tribunal would not be the appropriate forum for adjudication of rights. MIPL filed an appeal before a two judge bench of the Delhi High Court [**“Division Bench”**].

On appeal, the Division Bench found in favour of MIPL and permitted the arbitration seated in London to proceed. The court drew a distinction between the subject matter of proceedings pertaining to oppression and mismanagement (which should be pursued before the Company Law Board) and the subject matter of the dispute before the arbitral tribunal (which relates to the termination of the joint venture agreement and contractual rights). The decision concluded with an observation on the relationship between national courts and arbitral tribunals. It emphasised the need for courts to remind themselves of the trend to minimise interference with arbitration, where it is the forum of choice of the parties. On August 30, 2016, the Supreme Court of India declined to hear a petition filed by VB challenging the decision of the Division Bench – and permitted the international arbitration proceedings to continue.²⁷

As articulated above, the position adopted by the courts in India appears to be that claims of oppression and mismanagement are not capable of being resolved by arbitration. This is different from the position articulated by the SGCA in the *Tomolugen Appeal* and the *Maniach Appeal*. With courts in India continuing to be more accommodating of international arbitration and enforcement of foreign awards,²⁸ it will be interesting to observe if this position changes in the near future. The Government of India has been actively promoting the use of arbitration in India and hopes to

²⁵ The joint venture agreement contained a provision for arbitration administered by the London Court of International Arbitration, with the seat in London.

²⁶ Section 45 deals with the power of judicial authorities to refer parties to arbitration.

²⁷ *Vikram Bakshi and Anr. v. Mcdonald's India Pvt. Ltd. and Ors*, SLP (Civil) No. 024914/2016 (Decided on Aug. 30, 2016) (India).

²⁸ For instance, recent decisions of the Delhi High Court have permitted enforcement of foreign arbitration awards despite the awards requiring payments to be made that appeared to be at odds with the Indian capital controls framework, *see Cruz City 1 Mauritius Holdings v. Unitech Limited*, 239 (2017) DLT 649 (Delhi) and *NTT Docomo Inc. v. Tata Sons Limited*, [2017] 142 SCL 252 (Delhi).

develop India as an international arbitration hub.²⁹ Therefore, at the least, it may be expected that petitions alleging oppression and mismanagement shall be closely scrutinised by the courts in India to ensure that these are not “*dressed-up*” with the intention of avoiding an arbitration forum contractually agreed upon.

V. Conclusion

‘Arbitrability’ has long been a fascinating area for discussion within arbitration communities, both national and international. It has gradually become accepted that, in principle, ‘public policy’ does not require decisions on legal rights to be submitted to national courts, *provided that* the rights and obligations of third parties are not directly affected. This is the *rationale* underlying the 21st century approach to patent and antitrust disputes, where it is now (broadly) acceptable for two (or more) parties to agree that disputes that involve only the ownership (or other proprietary) rights of the parties themselves may be validly submitted to an arbitral tribunal for determination.

The crux of the recent debate before the courts in Singapore has been around the public policy requirement in statutory minority oppression claims, which prevent them from being arbitrated. For now, the SGCA has leaned in favour of arbitrability.

On the other hand, courts in India appear to have settled on the position that arbitral tribunals are not the appropriate forum for adjudication of claims of oppression and mismanagement. However, claims alleging oppression and mismanagement are closely scrutinised by the courts to ensure that these are not being filed in an attempt to avoid arbitration.

Only a judge within the relevant national court system can determine the proprietary rights and obligations of third parties. In general, this seems to be a sensible, pragmatic approach. Nonetheless, it is not an easy approach to apply in many cases involving the rights of minority shareholders in corporate disputes. Given the increasingly challenging nature of shareholder disputes, the global arbitration community may well have to accept that a ‘case-by-case’ approach is inevitable.

²⁹ Narendra Modi, Prime Minister, Republic of India, Valedictory Speech at a Conference hosted by the Government of India in New Delhi: National Initiative towards Strengthening Arbitration and Enforcement in India (Oct. 23, 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=151887> (Last visited on June 30, 2017).