Squaring the Circle? The Arbitrability of Shareholder Claims for Just and Equitable Winding Up

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The BVI Commercial Court, consistent with its reputation as a world-class centre of dispute resolution, has long shown itself to be arbitration-friendly. That reputation stands only to be enhanced following the appointment of Barry Leon, well known as an international arbitrator, as the Commercial Court Judge earlier this year, the introduction of the BVI Arbitration Act, 2013 (the “Arbitration Act”) modelled on the UNCITRAL model law (the “Model Law”) and the launch of the BVI International Arbitration Centre.

Section 18 of the Arbitration Act introduces Article 8 of the Model Law into BVI law. Article 8 provides that -

“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

It is to be noted that the provisions of Article 8 are in mandatory terms, (the “court…shall”), so that if a party requests that a dispute be referred to arbitration and the Court is satisfied that the dispute before it falls within the scope of an arbitration agreement, the Court has no discretion. In those circumstances, the Court must give effect to the arbitration agreement and refer the parties to arbitration unless it also finds that the arbitration clause is “null and void, inoperative or incapable of being performed”.

The words “null and void” and “inoperative” have been held to allow for considerations of public policy by which certain claims are deemed to be non-arbitrable. Because issues of public policy are involved, the question of arbitrability is to be determined by reference to the policy of the relevant state at the relevant time and that policy may be subject to change. However, many of the categories of claim considered non-arbitrable involve a public element, for example, disputes as to the grant or validity of a patent or trademark, or claims based on criminal acts, or claims which may affect the rights or interests of a class of persons beyond those who may be party to the arbitration.

1 See Ennio Zanotti v Interlog Finance Corp. & Ors BVIHCV 2009/0394, per Bannister J at para.11. Although the Zanotti case was considered under the provisions of the BVI Arbitration Act 1976, the relevant clause of that statute was in similar mandatory terms to Article 8 and, in particular, used the words “null and void, inoperative or incapable of being performed”.

A creditor’s claim to wind up a company on the grounds of insolvency has classically been considered non-arbitrable on the grounds of public policy. This is on the basis that the statutory regime which governs the winding up of companies engages a collective process affecting the rights of third parties beyond those of the petitioning creditor and the company and as such involves a public element. In the public interest, therefore, it is not desirable that private individuals be enabled to contract out of the statutory regime.

It is not clear that the same considerations of public policy apply to a contributory’s claim to wind up on the just and equitable grounds. In Ennio Zanotti -v- Interlog Finance Corp. & Ors (“Zanotti”), Bannister J sitting in the BVI Commercial Court assumed (obiter) that the same principles of public policy would apply in such a case so that an arbitration clause which purported to displace the Court’s jurisdiction in favour of arbitration would be null and void on public policy grounds.

Since the introduction of Sections 184A-I into the BVI Business Companies Act in 2006, disgruntled shareholders in a BVI company have a raft of remedies available to them, including the unfair prejudice/oppression remedy afforded by Section 184I. However, a winding up order is often included as an alternative head of relief within an application under Section 184I and an application to wind up on the just and equitable ground is not infrequently the only remedy available to a shareholder in a BVI company. The question of arbitrability therefore remains of importance in such cases where the shareholders have entered into an agreement to regulate their affairs which contains an arbitration agreement.

Whilst it is clear that the Courts retain the exclusive jurisdiction to order the winding up of companies, more recent international case law suggests that there are good arguments to support the case that a contributory’s claim is not automatically to be deemed non-arbitrable.

First, a distinction may be drawn between the relief which is sought and the grounds upon which such relief may be sought. In Salford estates (No 2) Ltd -v- Altomart Ltd the English Court of Appeal considered an application to stay a petition to wind up a company on the grounds of its inability to pay its debts. The debt on which the petition was based was disputed by the company concerned. That debt arose out of a contract which contained an arbitration clause. The Court of Appeal held that the petition to wind up was not a “claim” within the scope of the relevant provision of the UK Arbitration Act, 1996 so that the question of a mandatory stay did not arise. However, the Court upheld the Judge’s exercise of his discretionary power staying the winding up Petition so as to compel the parties to resolve their dispute as to the debt by means of their chosen method of dispute resolution.

Similarly, in Fulham Football Club (1987) Ltd -v- Richards (“Fulham”) the English Court of Appeal distinguished between the question whether a company should be wound up and a dispute as to whether there exist grounds upon such relief may be sought: the former being non-arbitrable, the latter eminently capable of being arbitrated. The Court of Appeal in Fulham considered that the inability of an arbitrator to make an order winding up a company was a purely jurisdictional issue, “no more than the practical consequences of choosing that method of dispute resolution”, and not decisive of whether the subject matter of the dispute is arbitrable.

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3 Contained, in the case of the BVI, in the Insolvency Act 2003
4 Re Crigglestone Coal Co. Ltd [1906] 2 Ch. 327
5 BVIHCV 2009/0394
6 BVIHCV 2009/0394 at para. 23 and 25.
7 BVI Business Companies (Amendment) Act 2005
8 [2014] EWCA Civ. 1575
9 [2012] Ch. 333
10 Patten LJ at 358D, para. 84
In *Quiksilver Greater China Limited -v- Quiksilver Glorious Sun JV Limited & Anor* HCCW 364/2013 ("Quiksilver"), the Hong Kong Court of First Instance (Harris J) adopted a similar approach, distinguishing between the relief which one party sought and the substantive dispute which the parties wished to have resolved\(^\text{11}\). Notably, and in contrast to the position in Zanotti and Fulham where the claims with which the Court were concerned were made on the unfair prejudice grounds and in neither of which was a claim for winding up in fact made, the petitioner in Quiksilver was a contributory whose sole claim to relief was a winding up on the just and equitable grounds. The dispute before the Hong Kong Court fell within the scope of an arbitration agreement\(^\text{12}\) contained in a shareholders agreement to which both the petitioner and the respondent shareholders were party. The Respondents applied to strike out or stay the Petitions pending the outcome of arbitration. It was common ground between the parties that the relief sought in the Petitions, winding up orders, could not be granted by an arbitrator regardless of what the arbitration clause might say.

Harris J stayed the Petitions to arbitration. In so doing, he accepted that as a matter of Hong Kong law\(^\text{13}\) the Petitions themselves did not satisfy the definition of "an action" so as to come within the mandatory provisions of Article 8 of the Model Law. However, as a matter of discretion, the Court had power to stay the petitions pending resolution of the substantive dispute by means of arbitration and exercised its discretion in favour of that process. If the arbitrators ultimately conclude in the Petitioner's favour, then an application could then be made to the Court for winding up orders, with no need for the Court to hear the substantive arguments.

The three cases discussed above do not represent a universal consensus; for example, the High Court of Singapore in *Silica Investors Ltd -v- Tomolugen Holdings Ltd & Ors*\(^\text{14}\) considering an oppression claim under pursuant to Section 216 of the *Companies Act* (Cap 50, 2006 Rev. Ed.) took a contrary view. However, they do illustrate what appears to be a trend in favour of increasing the scope of arbitrable disputes.

Whether the BVI Commercial Court will follow this trend remains to be seen. Whether or not the Commercial Court Judge would be prepared to adopt a similar approach to that of Harris J in Quiksilver will depend on the particular facts of the case in which the issue falls to be determined. However, all current indications suggest that the BVI Commercial Court is broadly in favour of arbitration as an alternative means of dispute resolution, so it can confidently be said that an application to stay a shareholder's just and equitable claim in favour of arbitration would receive a sympathetic hearing.

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\(^\text{11}\) "In my view the correct approach is to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement." HCCW 364/2013 at para. 22

\(^\text{12}\) HCCW 364/2013 at para. 15

\(^\text{13}\) Re Sky Datamann (HK) Ltd [2002] HKCFI 298; HCCW 487/2001

\(^\text{14}\) [2014] 2 SLR 815
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