International Arbitration Highlights

Celebrating our Win

WongPartnership is pleased to be recognised as "Best Domestic Arbitration Firm of the Year" out of a shortlist of firms from China, Malaysia, Singapore and South Korea at the recent Asialaw & Benchmark Litigation Asia-Pacific Dispute Resolution Awards 2018. Our Arbitration team's work in the US$1.8 billion investment treaty arbitration award against the Kingdom of Lesotho was also recognised as one of the "Matters of the Year" (the only one from Singapore). The Awards celebrate the leading dispute resolution advisers in Asia.

New appointments

We are also pleased to share two of our Partners' most recent contributions to the field of international arbitration.

Koh Swee Yen, Partner in our International Arbitration and Commercial & Corporate Disputes Practices, has been appointed vice chair of the International Bar Association (IBA) Arbitration Committee with effect from 2019. Presently the only Asian representative as a vice chair, Swee Yen is also one of the youngest ever vice chairs to be appointed to the Committee. WongPartnership is also the only Asian firm to have had two members appointed to the Committee throughout its history; the first being Alvin Yeo, Senior Counsel, Chairman and Senior Partner of WongPartnership, who was appointed to the Arbitration Committee in 2011. The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies.

Earlier this year, Smitha Menon, Partner in our International Arbitration, Restructuring & Insolvency and Banking & Financial Disputes Practices, was appointed to the International Chamber of Commerce (ICC) International Court of Arbitration, one of the world's leading arbitral institutions. The Court helps to resolve difficulties in international commercial and business disputes to support trade and investment, and performs an essential role by providing individuals, businesses and governments alike with a variety of customisable services for every stage of their dispute. For the first time in its history, the ICC International Court of Arbitration has achieved gender parity among its membership this year with 88 women and 88 men representing 104 countries.

As we continue to build on our reputation as a leading international arbitration practice, these accolades and appointments reflect the strength of our practice and the firm's focus and dedication towards talent development.

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CaseWatch: Court of Appeal Holds That Commencement of Court Proceedings *Per Se* is *Prima Facie* Repudiation of Arbitration Agreement

The Court of Appeal has, in a landmark decision, held that the commencement of court proceedings *per se* by a party bound by an arbitration agreement is *prima facie* repudiation of the arbitration agreement: *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] SGCA 63.

Our Comments

The Court of Appeal's decision provides clarity on how a party is to navigate concurrent litigation and arbitration proceedings arising out of a similar factual matrix.

First, if court proceedings rather than arbitration proceedings are commenced by a party in order to resolve a dispute, that party would be expected to either furnish an explanation as to why it was commencing court proceedings or qualify the scope of the court proceedings and/or the relief sought. The failure to do so leads to the inference that that party no longer intends to be bound by an arbitration agreement and risks being found to be in repudiatory breach of that arbitration agreement.

Second, when faced with a repudiatory breach of an arbitration agreement, an opposing party must carefully consider whether the steps it takes in ongoing litigation proceedings would amount to an acceptance of the repudiatory breach of an arbitration agreement. If the repudiatory breach of an arbitration agreement is accepted by the other party, an arbitral tribunal would thereafter have no jurisdiction to hear the dispute.

This update takes a closer look at the Court of Appeal's decision.

Background

The key facts relevant to the issues discussed in this update are as follows.

In July 2014, the receiver and manager ("**Receiver**") of Hualon Corporation (Malaysia) Sdn Bhd ("**Hualon**") commenced proceedings in the courts of the British Virgin Islands (the "**BVI**") on behalf of Hualon against Marty Ltd ("**Marty**") and its two shareholders, Mr Oung Da Ming and his brother, Mr Oung Yu-Ming (the "**BVI Action**"). The Oung brothers had once been substantial shareholders and directors of Hualon.

In the BVI Action, Hualon alleged that its shares in a Vietnam subsidiary had, through certain unauthorised share transfers procured by the Oung brothers, been transferred to Marty and that Marty had dishonestly assisted the Oung brothers and knowingly received those shares. In addition, Hualon asserted in its statement of claim that once the Receiver was appointed, "*the powers and authority of the [Oung brothers] to act on behalf of and bind [Hualon] as its directors ceased*".

In February 2015, Hualon discontinued the BVI Action against the Oung brothers and proceeded against only Marty.

According to the Receiver, it was only shortly after this – in end-February 2015 – that it learnt that article 22 of the Vietnam subsidiary's revised charter provided that disputes between members of the Vietnam subsidiary should, failing amicable resolution, be finally settled by the Singapore International Arbitration Centre ("**SIAC**") in accordance with its rules and that the award of the arbitrators would be final and binding ("**Art 22**"). It should be noted that the Vietnam

subsidiary's revised charter was entered into by Mr Oung Da Ming in February 2008, more than a year after the Receiver had been appointed.

On 10 March 2015, Hualon filed a notice of arbitration with the SIAC, taking the same position as it did in the BVI Action.

On 26 March 2015, Marty applied to the BVI court for summary judgment in its favour or to strike out the BVI Action (the "**Summary Judgment Application**") on, among other things, the grounds that the Receiver had no authority to institute the BVI Action and that there was no evidence of the alleged unauthorised share transfers.

It was not until 20 April 2015, more than one month after Hualon had filed its notice of arbitration, that Hualon applied to the BVI court to stay the BVI Action in favour of arbitration. The application was heard by the BVI court on 18 May 2015 and judgment was reserved.

During this time, the arbitration proceedings were running in parallel with the BVI Action. On 19 June 2015, the tribunal was constituted with a sole arbitrator. Marty thereafter challenged the jurisdiction of the tribunal, and in April 2016, the tribunal ruled that it had jurisdiction over the dispute.

In May 2016, Marty commenced proceedings in the Singapore High Court to challenge the tribunal's decision. Marty argued, among other things, that Hualon's conduct in commencing the BVI Action and taking steps in the litigation even after the arbitration was commenced meant that it had repudiated the arbitration agreement.

The High Court's Decision

Dismissing Marty's challenge, the High Court Judge held that the tribunal had jurisdiction over the dispute.

The High Court Judge took the view that the commencement of the BVI Action was not a repudiatory breach, and found that Hualon had commenced litigation only because it was unaware of Art 22 and therefore did not possess the necessary repudiatory intent. The High Court Judge also found that Hualon did not accept the breach because it failed to take any steps in the BVI Action.

Marty appealed to the Court of Appeal against the High Court's decision.

The Court of Appeal's Decision

The Court of Appeal allowed the appeal, holding that Hualon had, when it commenced the BVI Action and took an unequivocal position in its statement of claim as to the Oung brothers' lack of authority to bind it without reserving its right to arbitrate, committed a repudiatory breach of the arbitration agreement which was accepted by Marty.

On the law, the Court of Appeal held that the commencement of the BVI Action **alone** could have constituted a *prima facie* repudiatory breach. In the Court of Appeal's view:

- It is strongly arguable that the commencement of court proceedings *per se* by a party who is subject to an arbitration agreement is *prima facie* repudiation of the arbitration agreement. This is because parties who enter into a contract containing an arbitration clause are entitled to expect that disputes arising out of the contract would be resolved by arbitration and indeed have a contractual obligation to do so. Thus, where court proceedings are commenced without an accompanying explanation or qualification and the relief sought will resolve the dispute on the merits, the defending party in the court proceedings is entitled to infer or take the view that the claimant no longer intends to be bound by the arbitration agreement.

- It would, however, still be open to the claimant to displace this *prima facie* conclusion by giving an explanation for the commencement of court proceedings, either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started which showed objectively that it had no repudiatory intent in doing so. But in the absence of any explanation or qualification, the commencement of court proceedings in the face of an arbitration clause is sufficient to constitute a *prima facie* repudiation of the arbitration agreement.

- Applying this approach to the facts of the case, Hualon was bound to arbitrate all disputes arising from the revised charter by virtue of Art 22. Thus, when such a dispute arose, a reasonable person in Marty's position would have expected Hualon to either commence arbitration proceedings, or commence court proceedings but at the same time make clear its position in relation to the arbitration. For example, Hualon could have stated that it acknowledged the obligation to arbitrate but have taken the view that the dispute did not fall within the scope of Art 22, or that it only commenced court proceedings for ancillary relief in support of arbitration. But it did not do so. Instead, Hualon sought substantive relief in the BVI Action that would have resolved the dispute. In the circumstances, a reasonable person in Marty's position would have concluded that Hualon no longer intended to abide by Art 22.

On the facts, the Court of Appeal found that:

- Hualon evinced the requisite repudiatory intent when it started the BVI Action and contended in its statement of claim that once the Receiver was appointed, "*the powers and authority of the [Oung brothers] to act on behalf of and bind [Hualon] as its directors ceased*".

- To a reasonable person in Marty's position, it would appear that Hualon had disavowed all documents and transactions that the Oung brothers had entered into after the Receiver's appointment, including the revised charter and its arbitration clause, given that, where a party to the arbitration agreement disavows the entire contract that contains the arbitration clause, it can be inferred that the intention was also to disavow the arbitration agreement.

- It was then for Hualon to give a satisfactory explanation as to why it took that course of action and why its actions could not **objectively** be seen as repudiatory. This it failed to do. The Court of Appeal did not accept Hualon's "explanation" that it did not have actual knowledge of Art 22. Not only was that assertion unsubstantiated on the facts of the case; the reason for Hualon's conduct (i.e. its alleged lack of knowledge) was a purely subjective one as its ignorance was not communicated to Marty. There would have been no basis for a reasonable person in Marty's position to have known or concluded that, despite starting the BVI Action and in effect disavowing the contract that contained the arbitration agreement, Hualon did not intend to abandon its right to arbitrate. (In any event, the Court of Appeal was satisfied that Hualon did possess actual knowledge of Art 22 as the actual knowledge of Mr Oung Da Ming of the terms of the revised charter, including Art 22, could be attributed to Hualon.)

- Marty accepted the repudiation by taking out its Summary Judgment Application in the BVI Action. The Summary Judgment Application engaged the jurisdiction of the BVI court because it requested the BVI court to determine the claim on the merits. By that application, Marty unequivocally

communicated to Hualon that it was willing to accept Hualon's invitation to litigate rather than arbitrate the merits of the claim.

The Court of Appeal therefore held that the tribunal did not have jurisdiction over the arbitration and set aside the orders made by the High Court Judge.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or any of the following partners:

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SOME OF OUR OTHER UPDATES

DATE	TITLE
8 October 2018	LawWatch: Issue 2 of 2018
5 October 2018	LegisWatch: Proposed Amendments to the Singapore Employment Act
21 September 2018	CaseWatch: Landmark Court of Appeal decision: Tort of Malicious Prosecution Not Extended to Civil Proceedings and Tort of Abuse of Process Not Recognised in Singapore
18 September 2018	CaseWatch: SFO v ENRC (Part 2): Litigation Privilege in Internal Investigations Clarified

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