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The interaction between arbitration clauses and applications under companies acts and related legislation offshore

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Corporate applications ('CAs') are formal proceedings (such as winding-up petitions and unfair prejudice claims) filed pursuant to specific legislation in order to resolve corporate disputes or compel action involving or relating to a company. A respondent may apply to stay or strike out such CAs on the grounds that the action has been brought in a matter that is the subject of an arbitration agreement. [1]

The increased use of arbitration clauses, coupled with pro-arbitration public policy [2], have broadened the circumstances in which CAs may be stayed in favour of arbitration.

Where a potentially relevant arbitration agreement exists, in order to avoid the unnecessary expenditure of resources, an applicant intending to file a CA will need to consider the risk of the CA being stayed and the parties compelled to arbitrate.

With any CA, the initial assessment of risk requires an applicant to undertake a two stage test:

- First, a determination as to whether the CA constitutes an 'action' or raises 'matters' that fall within the scope of the arbitration clause; and
- Secondly, a determination whether the matters raised or reliefs sought are precluded from arbitration either by statute or public policy.

With respect to the first part of the test, in the case of Sian Participation Corp (in liquidation) v Halimeda International Ltd [2024] UKPC 16, the Privy Council (on an appeal from BVI) emphasised that arbitration exists to resolve disputes over rights and obligations. [3]

The terms 'actions' or 'legal proceedings' tend to cover processes that determine disputes. For that reason, because a creditor's petition for the winding-up of a company on the grounds of insolvency decides no rights nor obligation, but rather initiates a class remedy to distribute assets amongst creditors [4], the Board concluded that it was not an 'action' [5]. This contrasts with a petition for the winding-up of a company on 'just and equitable' grounds, which would usually require determination of parties' rights and which can, therefore, trigger a stay in favour of arbitration.

In a recent decision of the BVI Commercial Court [6] it has also been suggested that a neutral CA, which avoids deciding any rights (eg an application for a declaration as to the interpretation of a company's M&As [7]), may not constitute an action. As most CAs are filed to establish a right, however, it is unlikely that they can escape being classed as an action on these grounds.

Similarly, the broad scope of what can qualify as a ‘matter’ favours CAs being stayed in favour of arbitration. A 'matter' [8] is not limited to a cause of action but includes any essential element of the claim or of a relevant defence that is susceptible to be determined by a tribunal as a discrete dispute [9]. This is a practical, rather than formulistic or academic, task that involves looking at the overall nature of the CA [10].

Consequently, where a potentially relevant arbitration agreement exists, there will be few CAs that do not constitute an action or require determination of a matter and which therefore fail to meet the first part of the test.
The second part of the test is whether the matter and/or the relief sought is arbitrable.

Issues which affect the rights of non-parties [11] or which are reserved for a regulatory body are usually not arbitrable. An applicant for a CA should comprehensively review the legislative provisions to decide if arbitration is expressly prohibited or precluded by public policy. [12] Applications for the winding up or restoration of companies are not arbitrable because they affect the status of the company with consequences for all who have dealt with it and go beyond private disputes. [13]

Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855 and subsequent cases show, however, that even if the arbitration tribunal cannot grant the relief, parties can be compelled to arbitrate the underlying disputes.
The Privy Council in FamilyMart China Holding Co Ltd v Ting Chuan [2023] UKPC 33 held that the question of whether it was just and equitable for the company to be wound up (or alternatively whether there should be a buy out of the applicant's shares) was not arbitrable, being relief that only the Court could grant.

The underlying dispute as to whether there was a breakdown in trust and confidence between the parties was, however, arbitrable. This led the Board to grant a mandatory stay in favour of arbitration of the underlying dispute, and a discretionary stay in respect of the relief being sought, pending determination of the arbitration.

FamilyMart demonstrates that, if the underlying dispute is determined in the CA applicant's favour by the arbitration tribunal, the applicant will then be required to ensure the stay is lifted so that the Court can consider whether the relief, such as a winding-up or buy-out order, [14] should be granted under its statutory jurisdiction. [15]

It should be noted that, in certain circumstances (for example where the rights of non-parties to the arbitration would be affected by the Court granting relief on the basis of the arbitration award), in determining what relief should be granted, the Court cannot be bound by the findings of the arbitration tribunal. Therefore, even after the CA applicant submits to arbitration and obtains a favourable award, the Court may not grant the relief sought, at least without further enquiry. The Courts have retained the discretion to carry out a wide ranging enquiry and evaluation of the evidence including such rights to decide whether to grant the relief sought. [16]

Greater clarity on the above question may soon be provided by the Privy Council when it hears the appeal in the BVI case of Siong Beng Seng and ors v Caldicott Worldwide Ltd BVIHCMAP 2023/0009 and BVIHCMAP 2021/0007.

This case involves an unfair prejudice claim by a member against both the company and other shareholders for withholding dividends. As disputes between the company and its members appeared to be governed by an arbitration clause in the company's constitutional documents, the Court of Appeal granted a stay of that aspect of the claim in favour of arbitration. The Privy Council has been asked to determine the follow-on question of whether the factual basis of the shareholder-

shareholder unfair prejudice claim is also required to be stayed pending determination of the company-shareholder arbitration. [17]

As can be seen from the above, the interplay between CAs and arbitration has been a common topic in offshore cases over recent years. Recent authorities confirm that, where a potentially relevant arbitration agreement exists, a stay of a CA in favour of arbitration is likely, but not inevitable in all circumstances.

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[1] Arbitration Act 2014, s.18 (BVI); Arbitration Act 2012, s.9 (Cayman Islands); Arbitration Act 1996, s.9 (England & Wales); Bermuda has incorporated the UNCITRAL Model Law (and Article 8 thereof governing stays in favour of arbitration) in respect of international arbitration in the Bermuda International Conciliation and Arbitration Act 1993, s.23.

[2] G Born International Commercial Arbitration (2nd ed, 2014) 1403, as cited with approval in Enka Insaat ve Sanayi AS v OOO 'Insurance Co Chubb [2020] UKSC 38; FamilyMart China Holding Co Ltd v Ting Chuan [2023] UKPC 33; and Sian Participation Corp (in liquidation) v Halimeda International Ltd [2024] UKPC 16.

[3] Sian at [57]-[60].

[4] Ibid at [32]-[35].

[5] As with any petition for the winding up of a company on the grounds of insolvency, the question for the Court is whether the debt is genuinely disputed on substantial grounds: if it is so disputed, then the winding-up petition will be dismissed, and the dispute over the debt will have to be determined in accordance with the relevant dispute resolution provisions which govern the debt.

[6] Welltech Group Limited v Techmix Limited BVIHCM 2025/0209, 05/12/25 at [57]-[61].

[7] Pursuant to s.246, BVI Business Companies Act, 2003.

[8] FamilyMart and Republic of Mozambique v Prinvest Shipbuilding SAL (Holding) [2023] UKPC 32.

[9] FamilyMart at [61].

[10] Ibid at [42]. See also Mustill & Boyd Commercial and Investor State Arbitration (3rd ed, 2024) at 3.194.

[11] Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Co) [2021] 2 All ER (Comm) 1121 at [87].

[12] Mustill & Boyd at 3.174-176.

[13] Ibid at 3.188-189.

[14] NDK Ltd v HUO Holding Ltd and another [2023] 1 All ER (Comm) 603 at [61] and [69]-[73].

[15] Mustill & Boyd at 3.192.

[16] FamilyMart at [81].

[17] Siong Beng Seng and ors v Caldicott Worldwide Ltd BVIHCMAP 2023/0009, 17/10/25 at [43]-[47].

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