WONG PARTNERSHIP

LAW WATCH

SEPTEMBER 2021

In Brief

DEALS

WONGPARTNERSHIP LLP ACTS IN…
The S$21 billion restructuring of CapitaLand

WongPartnership acted for the offeror, CLA Real Estate Holdings Pte. Ltd. ("**CLA**") in connection with the S$21 billion restructuring of CapitaLand Limited ("**CapitaLand**") to demerge its investment management business and privatise its development arm.

The transaction was undertaken by way of a scheme of arrangement ("**Scheme**") pursuant to Section 210 of the Companies Act. In connection with the Scheme, the CapitaLand Group's investment management platforms, as well as its lodging business, were restructured and consolidated under CapitaLand Investment Limited ("**CLI**") which was listed by introduction on the Singapore Exchange. CapitaLand was privatised by CLA and will focus on the real estate development business.

This transaction involved a major restructuring of the CapitaLand Group. The CapitaLand Group owns and manages a global portfolio worth about S$132.5 billion as at 31 December 2020. The CapitaLand Group's portfolio spans diversified real estate classes including commercial, retail; business park, industrial and logistics; integrated development, urban development; and lodging and residential. In connection with the Scheme, there was a consolidation of certain assets and businesses of the CapitaLand Group under CLI. Given the global scope of the CapitaLand Group's business, reviews were undertaken by various counsel overseas and locally to ascertain the approvals that would be required for the Scheme.

This is also the first scheme of arrangement which combines both a privatisation and a listing in the same scheme.

WongPartnership also acted for DBS Bank Ltd., the financial adviser to CLA in respect of the Scheme.

Partners involved in the transaction were Ng Wai King, Andrew Ang, Quak Fi Ling, Audrey Chng and Soong Wen E from the Mergers & Acquisitions Practice; Susan Wong and Felix Lee from the Banking & Finance Practice; Hui Choon Yuen from the Debt Capital Markets Practice; and Ameera Ashraf and Chan Jia Hui from the Antitrust & Competition and Corporate Regulatory and Licensing Practice.

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Connect with WongPartnership.

Other recent matters that WongPartnership was involved in were:

DESCRIPTION	PRACTICE AREAS
Acting in the acquisition and privatisation of Singapore Press Holdings (excluding the newspaper publisher's media business) *via* a S$3.4 billion scheme of arrangement, by the offeror, Keppel Corporation, with JP Morgan (S.E.A.) Limited as its sole financial adviser.	Antitrust & Competition Corporate/Mergers & Acquisitions Corporate Real Estate Debt Capital Markets Financial Services Regulatory Intellectual Property, Technology & Data
Acts as Singapore legal counsel in the US$5.2 billion acquisition of ARA Asset Management by ESR Cayman.	Antitrust & Competition Corporate/Mergers & Acquisitions Financial Services Regulatory
Acted in the US$1 billion acquisition financing granted by BNP Paribas, acting through its Singapore branch, DBS Bank Ltd., The Hongkong and Shanghai Banking Corporation Limited, Singapore Branch, Mizuho Bank, Ltd., Singapore Branch, MUFG Bank, Ltd., Singapore Branch and Standard Chartered Bank (Singapore) Limited as lenders to Olam Holdings B.V. as borrower in relation to the acquisition of Olde Thompson.	Banking & Finance
Acting in the US$1.8 billion merger of PropertyGuru (a subsidiary of KKR) with Bridgetown 2 Holdings, a SPAC backed by Richard Li and Peter Thiel.	Corporate/Mergers and Acquisitions Start-Up / Venture Capital
Advising in the secondary listing by way of introduction of Sri Trang Gloves (Thailand) Public Company Limited ("**STGT**"), on the Main Board of the SGX-ST. STGT has a market capitalisation of approximately S$5.5 billion, based on the closing market price of STGT's shares quoted on the Stock Exchange of Thailand on 7 May 2021.	Equity Capital Markets
Acted in Keppel Infrastructure Trust's update of its Medium Term Note programme to S$2 billion which also involved DBS Bank and Oversea-Chinese Banking Corporation Limited (as arrangers), and DB International Trust (Singapore) Limited (as trustee).	Debt Capital Markets

DESCRIPTION	PRACTICE AREAS
Acted in the acquisition by ESR-REIT of the property at 46A Tanjong Penjuru for approximately S$120 million.	Corporate Real Estate
Acted in Singtel Group's first syndicated sustainability-linked financing of S$750 million involving Singtel Group Treasury Pte. Ltd as borrower. The financing is the largest Singapore-dollar denominated sustainability-linked loan in Singapore as at the date of the close of the transaction.	Banking & Finance
Acting in the joint venture between a global investment company and Nanofilm Technologies to undertake the hydrogen energy and hydrogen fuel cell business.	Antitrust & Competition Corporate/Mergers & Acquisitions Intellectual Property, Technology & Data
Acting in the general offer by TSI Metals HK Limited for the 356.54 million issued and paid-up ordinary shares in Dutech Holdings Limited.	Corporate/Mergers & Acquisitions
Acting in the establishment of the Certis & Lendlease Property Trust, which entered into a sale and purchase agreement to acquire Certis Cisco Centre for S$150 million.	Corporate/Mergers & Acquisitions Corporate Real Estate

ARBITRATION

Singapore Court of Appeal Clarifies Law on Section 4(6) of the Arbitration Act

The Singapore Court of Appeal has held that section 4(6) of the Arbitration Act only has the effect of deeming an *existing* arbitration agreement formally valid and therefore effective despite the arbitration agreement not being in writing. The Court clarified that section 4(6) does not have the effect of deeming there to be an arbitration agreement between the parties when such an agreement does not otherwise exist; nor does it deem any such agreement to meet the definition of section 4(1) of the Arbitration Act if it does not otherwise satisfy its requirements: *Cheung Teck Cheong Richard and Ors v LVND Investments Pte Ltd* [2021] SGCA 77.

Our Comments

This update takes a look at the Court of Appeal's decision overruling the High Court's earlier decision to grant a stay of the proceedings on the grounds that, on a proper analysis of the facts, there was no arbitration agreement in existence. The Court of Appeal emphasised that the key issue was one of contract law, specifically contract formation, and although the act of starting an arbitration can be regarded as an offer to arbitrate, there was no unqualified acceptance of this offer, and therefore no valid and binding arbitration agreement was concluded by the parties.

Importantly, the Court of Appeal also held that section 4(6) of the Arbitration Act did not have the effect of deeming the existence of an arbitration agreement when there was none, and was only intended to have the limited effect of preventing a party who had entered into an arbitration agreement which was not in writing from thereafter denying the validity of the agreement because it was not in writing. The Court of Appeal cautioned that deeming provisions should be construed strictly; otherwise, the law could stray too far from reality and arrive at results which are not consistent with the facts or other legal doctrines, such as substantive contract law in this instance.

Background

The respondent was the developer ("**Developer**") of a shopping mall and the 16 plaintiffs ("**Purchasers**") the owners of 12 shop units pursuant to 12 different sale and purchase agreements ("**SPAs**").

Each SPA contained the following clause ("**Clause 20A.1**"):

> **20A. Mediation**
>
> The Vendor and Purchaser agree that before they refer any dispute or difference relating to this Agreement to arbitration or court proceedings, they shall consider resolving the dispute or difference through mediation at the Singapore Mediation Centre in accordance with its prevailing prescribed forms, rules and procedures.

Section 4(1) of the Arbitration Act ("**section 4(1)**") defines an arbitration agreement as an "… *agreement by the parties to submit to arbitration* all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not" (emphasis added).

When disputes arose, the Purchasers' then lawyers ("**Former Solicitors**") viewed Clause 20A.1 as an arbitration agreement and issued a Notice of Arbitration ("**1st NOA**") against the Developer to commence arbitration at the Singapore International Arbitration Centre ("**SIAC**"). The Developer's solicitors issued 12 responses objecting to the proposed arbitration. The SIAC's Court of Arbitration found that the parties had not agreed that the SIAC should administer the arbitrations or that the Arbitration Rules of the SIAC should apply, and terminated the arbitration purportedly commenced by the 1st NOA ("**1st Attempted Arbitration**").

The Former Solicitors subsequently issued a second Notice of Arbitration ("**2nd NOA**") for the disputes to be referred to *ad hoc* arbitration in Singapore and nominated a sole arbitrator. The Developer opposed this attempt to consolidate different arbitrations. The Former Solicitors then sought the appointment of a single arbitrator. The Developer objected, claiming that no *ad hoc* arbitration had been validly commenced as it was a defective attempt to institute a single arbitration. The Purchasers thereafter discontinued the arbitration purportedly commenced by the 2nd NOA ("**2nd Attempted Arbitration**").

The Purchasers filed a suit against the Developer for fraudulent misrepresentation ("**Suit**"). The Developer applied to stay the Suit on the ground that the parties were bound by Clause 20A.1 or, alternatively, that the parties had, by their conduct, entered into an arbitration agreement.

The Assistant Registrar of the High Court found that Clause 20A.1 was not an arbitration agreement, but that the parties had, through their conduct, entered into a separate arbitration agreement, and stayed the Suit under section 6 of the Arbitration Act. The parties filed cross-appeals against the Assistant Registrar's decision.

The High Court's Decision

The High Court dismissed the Developer's appeal, holding that Clause 20A.1 was not an arbitration agreement within the meaning of section 4(1), since the clause "did not objectively evince any intention by the parties to be *bound* to submit their disputes arising from the SPAs to arbitration" (emphasis in original).

The High Court also dismissed the Purchasers' appeal, finding that the parties had concluded a valid independent arbitration agreement by their correspondence. It stated, in *obiter* comments, that, if there is a response to a notice of arbitration and no objection is raised, section 4(6) of the Arbitration Act ("**section 4(6)**") would deem there to be an effective arbitration agreement, even when no such agreement exists. The High Court accordingly upheld the stay.

The Purchasers appealed, arguing that *inter alia*:

(a) they had not entered into a separate arbitration agreement; and

(b) section 4(6) does not deem the existence of an arbitration agreement where there is none.

Our earlier update on the High Court's decision is available here.

The Court of Appeal's Decision

Allowing the appeal, the Court of Appeal found that there was no arbitration agreement between the Purchasers and the Developer and that section 4(6) did not apply as it does not have the effect of deeming there to be an arbitration agreement when none exists.

Clause 20A.1 was not a valid arbitration agreement

The Court of Appeal agreed with the High Court's finding that Clause 20A.1 was not an arbitration agreement noting, *inter alia*, that:

(a) There was no agreement in Clause 20A.1 to submit disputes to arbitration, which is the hallmark of an arbitration agreement (see section 4(1) and *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [37]).

(b) The heading for clause 20A was "Mediation". The Court of Appeal therefore took the view that Clause 20A.1 merely provided that the parties were at liberty to refer any dispute to either arbitration or court proceedings after considering mediation, and remained entirely neutral as to what dispute resolution mechanism was to be used. The options for dispute resolution available to the parties would have been no different if Clause 20A.1 had been omitted, since the clause was designed only to encourage mediation, leaving the exact form of adjudicatory dispute resolution to be decided by the parties. Neither party was conferred any unilateral right to commence arbitration against the other party without that party's concurrence.

The parties did not enter into an arbitration agreement independently of Clause 20A.1

Contrary to the High Court's finding, the Court of Appeal held that, on the facts of this case, the parties had *not* entered into an arbitration agreement independently of Clause 20A.1.

The Court of Appeal found as follows:

(a) The dispute raised the question of whether the parties had: (i) proceeded simply on the basis of what they believed to be a prior arbitration agreement in Clause 20A.1; or (ii) agreed, independently of Clause 20A.1, to submit the disputes to arbitration.

(b) If the parties had believed that they were acting in accordance with an existing contractual obligation to arbitrate, the parties generally could not – by that same conduct – be taken to have intended to enter into a separate contract to arbitrate *unless* the evidence disclosed an intention by the parties to be bound by a separate and independent agreement. The question then would be whether there was sufficient factual basis to conclude that the parties had entered into a separate arbitration agreement *despite* their erroneous belief that there was an arbitration agreement or the absence of such an agreement in the underlying contract.

In the Court of Appeal's view, the evidence showed that the parties had, at all times, acted exclusively on the assumption that Clause 20A.1 was an arbitration agreement and that their conduct was referable only to that assumption; this much was clear from the 1st NOA, the 2nd NOA and the correspondence between the parties following the issuance of the 1st and 2nd NOAs.

While the Court of Appeal also found that the Purchasers did, in the 1st and 2nd NOAs, offer to arbitrate on terms additional to Clause 20A.1, and the 1st and 2nd NOAs could therefore be construed as offers to enter into distinct arbitration agreements, the Court of Appeal noted that those two offers for arbitration were rejected by the Developer, and no separate arbitration agreement was ever formed.

Section 4(6) of the Arbitration Act did not apply

Section 4(6) (which is *in pari materia* with section 2A(6) of the International Arbitration Act) reads as follows:

> Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings.

The Court of Appeal noted that there are three requirements for section 4(6) to apply:

(a) First, as a threshold requirement, section 4(6) only applies in the context of "any arbitral or legal proceedings";

(b) Second, there must be an assertion of the existence of an arbitration agreement in a pleading, statement of case, or any other document in circumstances in which the assertion calls for a reply; and

(c) Third, the assertion must not be denied by the other party.

It is only if these three requirements are met that there would be "deemed to be an effective arbitration agreement as between the parties to the proceedings".

The Court of Appeal found that section 4(6) could not apply in this case because:

(a) The threshold requirement (i.e., that there must be "arbitral or legal proceedings") was not satisfied. Even if the phrase were not restricted to valid proceedings, it was clear, on the facts of this case, that there were *no* arbitration proceedings to speak of, valid or otherwise. In both the 1st and 2nd Attempted Arbitrations, no substantive steps were taken and the matters ended with both parties at loggerheads over whether arbitration had even been validly commenced.

(b) Further, there was never an assertion of an arbitration agreement as defined in section 4(1), given that Clause 20A.1 was not an arbitration agreement. The fact that the parties, at various times, referred to Clause 20A.1 as though it was an arbitration agreement was irrelevant.

If, however, the arbitration proceedings had commenced and if the existence of an arbitration agreement had been asserted, the Court of Appeal expressed its tentative view that:

(a) Assertions in notices of arbitration generally would be sufficient to trigger the application of section 4(6). The express language of section 4(6) clearly takes a broad view of the documents that would suffice, expanding beyond "statement of claim" to "pleading, statement of case or any other document". Thus, the Court of Appeal agreed with the High Court that, given the characteristics of a "pleading" and "statement of case", a notice of arbitration (if it is taken up and the arbitration proceeds) would fall within the category of "any other document".

(b) There was a distinction between a situation where the respondent in arbitration proceedings responds to the notice of arbitration and when it does not, such a distinction being drawn from the phrase "in circumstances in which the assertion calls for a reply". A respondent does not have a duty to reply to a notice of arbitration. However, if it chooses to reply but does not deny the assertion of

an arbitration agreement, and if the arbitration proceedings proceed, then the assertion of an arbitration agreement in the notice of arbitration and the non-denial of that assertion would be sufficient for section 4(6) to apply.

Section 4(6) of the Arbitration Act does not deem there to be an arbitration agreement where there is none

Adopting a purposive and strict approach in construing deeming provisions, the Court of Appeal found that section 4(6) cannot deem the existence of an "effective arbitration agreement" where there is none. The potential ambiguity which the Court of Appeal had to resolve was whether section 4(6), which provided that there would be deemed to be an "effective arbitration agreement", had the legislative purpose or object of expanding the scope of the broadly equivalent deeming provision in the 1985 Model Law on which it was based. In answering this question in the negative, the Court of Appeal observed that:

(a) Section 4(6) is found in a series of sub-sections which deal only with the issue of whether an agreement is *in writing* and focuses the later parts of section 4 of the Arbitration Act on the writing requirement for an arbitration agreement. The words "effective arbitration agreement" in section 4(6) should similarly be interpreted in like manner, i.e., the word "effective" in section 4(6) appears to be limited to the writing requirement.

(b) Section 4(6) is situated in section 4 of the Arbitration Act which is a definition provision and opens with the heading "Definition and form of arbitration agreement". The Court of Appeal took the view that it would be surprising if a definition section should be interpreted to create substantive rights, which would be the consequence if it were to find that section 4(6) can be used to deem the existence of an arbitration agreement despite the court's finding that none exists as a matter of fact.

(c) The specific purpose of section 4(6) is to ensure that an arbitration agreement would be treated as effective for the purposes of the Arbitration Act even if the writing requirement is not met. Put another way, the specific purpose of section 4(6) is to prevent a party who has not denied the existence of the arbitration agreement in circumstances in which the assertion of the existence of an arbitration agreement in a pleading, statement of case or any other document calls for a reply, from arguing that the agreement (whether pre-existing or arising in the course of the assertion and non-denial) is not in writing and is hence formally invalid in order to escape the consequences of that agreement.

(d) Section 4(6) does not have the effect of deeming there to be an agreement between the parties when no such agreement otherwise exists, nor does it deem any such agreement to meet the definition of section 4(1) if it does not otherwise satisfy the requirements in section 4(1).

For completeness, we note that the Court of Appeal also provisionally observed that section 2A(6) of the International Arbitration Act, which is *in pari materia* with section 4(6) of the Arbitration Act, should likewise be interpreted to have only the limited effect of deeming an arbitration agreement to be effective even if it was not in writing.

The Purchasers were not estopped from denying the existence of an arbitration agreement

The Court of Appeal also found that the Purchasers were not estopped from denying the existence of an arbitration agreement:

(a) The only representation or assumption made in the course of the 1st and 2nd Attempted Arbitrations was that Clause 20A.1 was a valid arbitration agreement and not, more generally, that the parties had a valid arbitration agreement irrespective of its source.

(b) At the highest, any estoppel would only have prevented the Purchasers from denying that Clause 20A.1 was not an arbitration agreement, and this was not an estoppel relevant to this appeal.

(c) In any event, no detrimental reliance had been proved and it was not unconscionable for the Purchasers to be allowed to resile from any representation that there was a valid arbitration agreement. No steps were ever taken in any purported arbitration. If anything, the Developer had refused to act in reliance on the representation and was in fact successful in doing so.

The Court of Appeal therefore held that there was no basis for a stay of the Suit under section 6(1) of the Arbitration Act and lifted the stay.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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CONTRACTS

Section 2(1)(b) of the Contracts (Rights of Third Parties) Act Inapplicable to Exclusive Jurisdiction Clauses, Singapore Court of Appeal Rules

The Singapore Court of Appeal has held that section 2(1)(b) of the Contracts (Rights of Third Parties) Act ("**CRTPA**") does not apply to exclusive jurisdiction clauses: *VKC v VJZ & Anor* [2021] SGCA 72 ("***VKC v VJZ***").

Our Comments

VKC v VJZ is the latest decision of the Singapore courts discussing the availability of anti-suit injunctions to a non-party to a contract. Prior to this, the principle as espoused by the Singapore High Court in the novel decision of *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 was that a non-party to a contract which contains an exclusive jurisdiction clause or arbitration clause can obtain an anti-suit injunction against a respondent that had commenced foreign proceedings against him.

VKC v VJZ is a significant development in this area of law, as it clarifies that a non-party to a contract cannot rely on the CRTPA to avail himself of the terms of an exclusive jurisdiction clause in that contract, and to obtain an anti-suit injunction on that basis, unless the contract itself expressly provides to the contrary. This stands in contrast to arbitration agreements, as the CRTPA specifically confers on third parties the benefit of being able to enforce arbitration agreements.

An anti-suit injunction is a vital tool by which one can restrain concurrent proceedings commenced by a counter-party in multiple forums and jurisdictions in breach of an arbitration agreement or exclusive jurisdiction clause.

While the law of anti-suit injunctions remains (as observed by both the High Court and Court of Appeal) a complex and developing area in which the boundaries of the effect of exclusive forum clauses on non-parties are being tested, this case demonstrates the importance of ensuring that a third party's right to take the benefit of an exclusive jurisdiction clause is expressly provided for in the contract.

Background

The facts relevant to the issues canvassed in this update may be summarised as follows.

The appellant was one of 15 beneficiaries of an estate. The respondents were the former joint administrators of the estate.

The estate became enmeshed in conflict among the beneficiaries who commenced litigation in various jurisdictions such as Indonesia and Singapore.

In the course of the Singapore proceedings, the beneficiaries participated in mediation on 16 and 17 April 2018, following which they reached a mediation settlement. On 18 April 2018, a settlement agreement ("**Settlement Agreement**") was executed by all 15 beneficiaries.

Clause 19 of the Settlement Agreement provided for Singapore law and exclusive jurisdiction in these terms:

> The Parties hereby submit to the exclusive jurisdiction of the Courts of Singapore. The Parties agree that in respect of all disputes, controversies, claims or disagreements arising out of or in connection with this Agreement, including but not limited to its existence, validity, breach and enforcement, shall be first submitted to mediation at the Singapore International Mediation Centre and the mediator shall be Mr [xxx]. The Parties further agree that only if the Parties have in good faith carried out the mediation and they have not been able to resolve their dispute, controversy, claim and/or disagreement, then, and in that event only, the Parties shall commence legal proceedings in Singapore.

The respondents were not parties to the Settlement Agreement.

On 23 April 2019, the respondents sought from the Singapore High Court orders giving effect to their appointment and indemnification in relation to their administration of the estate in accordance with the terms of the Settlement Agreement, and in respect of various terms in the Settlement Agreement to be performed and discharged by the respondents. These orders of court were the means by which the respondents were to be enabled, and become compelled, to implement the Settlement Agreement, given that they were not party to the Settlement Agreement.

Various orders of court were granted to the respondents on 13 August 2019.

In June 2019, the respondents published notices in two Indonesian newspapers highlighting, among other things, that:

- The deceased had passed away;
- Under orders made by the Singapore High Court, the respondents were joint administrators of the estate;
- Assets of the estate should not be dealt with in any manner without the respondents' sanction; and
- All creditors or next-of-kin having claims against the estate should submit their claims to the respondents.

The appellant commenced proceedings in Indonesia in respect of those notices, claiming that the appellant had a claim based on tort law as it applies in Indonesia and that the respondents' act of publishing those notices was "false and misleading" and "directly affected [the appellant's] rights as a beneficiary of the [e]state in Indonesia".

In March 2020, and on the basis of clause 19 of the Settlement Agreement, the respondents sought from the Singapore High Court an anti-suit injunction to restrain the appellant from taking further steps in relation to the Indonesian proceedings and any appeals or related proceedings arising from them.

The High Court's Decision

The High Court granted the respondents' application.

It found, among other things, that despite not being parties to the Settlement Agreement, the respondents were, by section 2(1)(b) of the CRTPA, entitled to claim the benefit of the exclusive jurisdiction provisions in clause 19 of the Settlement Agreement to obtain an anti-suit injunction against a contracting party.

Sections 2(1) and 2(2) of the CRTPA provide as follows:

> 2.— (1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if —
>
> (a) the contract expressly provides that he may; or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.

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

The Court of Appeal's Decision

Dismissing the appeal, the Court of Appeal upheld the High Court's grant of an anti-suit injunction to restrain the Indonesian proceedings, albeit on different grounds (i.e., on the basis that the Indonesian proceedings were otherwise vexatious or oppressive, as Singapore was clearly the more appropriate forum and that it was necessary for the ends of justice to grant the anti-suit injunction).

However, the Court of Appeal disagreed with the High Court's main ground for the grant of the anti-suit injunction, and especially with its conclusions that the respondents were entitled to the benefit of the exclusive jurisdiction clause in the Settlement Agreement and that the Indonesian proceedings constituted a breach of the exclusive jurisdiction clause.

It found that the policy intention behind the drafting of the CRTPA, as well as the legislative history of the Contracts (Rights of Third Parties) Act 1999 (c 31) (UK) ("**UK Act**") from which the CRTPA was derived, made it clear that section 2(1)(b) of the CRTPA does not apply to exclusive jurisdiction clauses.

In particular, the Court of Appeal noted that:

- It was clear, both from the parliamentary debates and section 2(1)(b) of the CRTPA, that the CRTPA seeks to enable the carrying out of the intention of contracting parties to confer *benefits* on third parties.
- The CRTPA is silent on whether the statute would apply to exclusive jurisdiction clauses.
- In contrast, section 9 of the CRTPA expressly applies where a third party seeks to enforce a contractual term and the contracting parties have agreed that disputes in relation to that term are subject to an arbitration agreement. Unlike the position in respect of arbitration agreements, there is no section conferring the benefit of exclusive jurisdiction clauses on third parties.
- The CRTPA's silence in relation to exclusive jurisdiction clauses calls to mind the canon of construction *expressio unius est exclusio alterius* (i.e., the principle in statutory construction to the

effect that, when one or more things of a class are expressly mentioned, others of the same class are excluded). The Court of Appeal took the view that the statutory silence here was deliberate because Parliament made a conscious determination to exclude exclusive jurisdiction clauses from the ambit of section 2(1)(b) of the CRTPA. The position is similar under the UK Act.

- An exclusive jurisdiction clause is not a substantive right within the meaning of section 2(1)(b) of the CRTPA. Clause 19 of the Settlement Agreement therefore did not confer on the respondents any enforceable substantive right, and the respondents had no right under the Settlement Agreement to insist on the appellant's claims being brought in a particular jurisdiction.
- The legislative history of the UK Act shows a specific omission to address the issue of exclusive jurisdiction clauses, following extensive discussion of the difficulties surrounding it. It was, for example, recognised in the Law Commission Report No. 242 in relation to the UK Act that agreements on jurisdiction "cannot operate satisfactorily unless any entitlement of the third party to enforce the arbitration agreement carries with it a duty on the third party to … comply with the jurisdiction agreement …".

That said, the Court of Appeal observed that, if parties desire to address the issue when drafting a prospective contract, the legal solution could arguably lie in either section 2(1)(a) or section 2(3) of the CRTPA.

Sections 2(1)(a) and 2(3) of the CRTPA provide that, subject to the provisions of the CRTPA, a person who is not a party to a contract (referred to in the CRTPA as a "third party"):

- "may, in his own right, enforce a term of the contract if … the contract expressly provides that he may"; and
- if the third party is "expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into".

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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RECOVERY OF LEGAL COSTS I *MARYANI* RULE

Singapore Court of Appeal Affirms Wide Ambit of Rule that Costs of Prior Proceedings Cannot Be Recovered in Subsequent Claims

In *CGG v CGH* [2021] SGHC (A) 7 ("***CGG***"), the Appellate Division of the High Court ("**Appellate Division**") clarified that the rule laid down by the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("***Maryani***") precludes a party from claiming unrecovered legal costs in previous proceedings even where the claim in subsequent proceedings is for a contractual indemnity.

Our Comments

It is not uncommon for contracts to contain an indemnity which requires one party to indemnify or compensate the other party for loss that arises in a specified event. In *CGG*, the Appellate Division clarified that when the indemnity relates to *legal costs*, the policy considerations articulated in *Maryani* require any claim for costs under a contractual indemnity which has already crystallised to be made before the making of any costs order in those proceedings. This is because the procedural law on costs is against parasitic litigation brought to claim for what is in substance unrecovered legal costs of previous proceedings. The Appellate Division also clarified that the law makes no distinction in principle between a claim for costs as damages and a claim for costs based on a primary payment obligation, and the principle in *Maryani* therefore applies to both types of claims.

This case update examines the Appellate Division's decision.

Background

Following the breakdown of the parties' marriage, the appellant-husband ("**Husband**") and respondent-wife ("**Wife**") entered into a deed of separation ("**Deed**"), pursuant to which divorce proceedings were commenced in the Family Justice Courts ("**FJC**"). The FJC granted an interim judgment which included a consent order in the terms of the Deed ("**Consent Order**"). The Consent Order contained an indemnity provision ("**Indemnity Provision**"), as follows:

> [If] one party seeks to revisit the ancillary matters in these proceedings in breach of the Deed and/or this [Consent Order], that party shall indemnify the other party for any and all legal fees and disbursements incurred in connection with the breach and subsequent enforcement of the Deed.

Subsequently, the Wife applied unsuccessfully to vary certain terms of the Consent Order ("**FJC Summons**") and was ordered by the District Judge ("**DJ**") to pay the Husband costs of $2,000 (inclusive of disbursements) ("**Costs Order**").

The Husband, relying on the Indemnity Provision, brought proceedings against the Wife ("**OS 192**") in the General Division of the High Court ("**General Division**") for the remainder of his legal fees, disbursements and goods and services tax totalling $329,975.45 incurred in defending the FJC Summons.

The General Division's Decision

In the proceedings before the General Division, the Judge dismissed the Husband's claim on the basis that:

- The general rule against recovery of unrecovered legal costs laid down by the Court of Appeal in *Maryani* applied to preclude the Husband's claim in OS 192; and
- Issue estoppel and *res judicata* applied against the Husband.

The Appellate Division's Decision

The Appellate Division affirmed the Judge's decision and dismissed the Husband's appeal.

Scope of the Indemnity Provision

In respect of the Indemnity Provision, the Appellate Division held that:

- On a true construction of the Consent Order, the Indemnity Provision was intended to reserve a party's right to make a contractual claim for costs under the Deed in the event that the other party sought to revisit the ancillary matters in the divorce proceedings in breach of the Deed and/or the Consent Order.
- It was difficult to construe from the language of the Indemnity Provision a full "*debt*" obligation where the payment obligation is for an indeterminable amount and not for a "*fixed sum*" obligation.
- The Husband's right to an indemnity under the Indemnity Provision would arise if: (a) there is a revisiting of ancillary matters; and (b) this revisiting is in breach of the Deed and/or the Consent Order. The FJC Summons constituted a revisiting of the ancillary matters and this was in breach of the Deed and/or Consent Order. The relevant breach occurred when the FJC Summons was filed and the DJ's decision to dismiss the FJC Summons simply confirmed the date of the breach.

The Maryani rule precluded the Husband from bringing OS 192 to claim his unrecovered legal costs

The Appellate Division found that the *Maryani* rule applied to preclude the Husband from bringing any proceedings subsequent to the FJC Summons to claim any unrecovered legal costs.

The Appellate Division made the following observations on the *Maryani* rule:

- Full recovery of legal costs by the successful party is the exception rather than the norm. This is due to the need to: (a) enhance access to justice; (b) achieve finality in litigation; and (c) suppress parasitic litigation.
- The policy considerations underlying the law on costs inform the substantive law by limiting the *measure* of the plaintiff's costs recovery.

In the context of a contractual indemnity relating to legal costs, the policy considerations articulated in *Maryani* require that the claim for an indemnity be enforced *before* the court makes a ruling on such costs. The law on costs makes no distinction of principle between a claim for costs as damages and an indemnity claim for costs based on a primary payment obligation. That simply goes towards the framing of a particular claim.

Ultimately, the Husband's claim was in substance one for unrecovered legal costs. Hence, the rule in *Maryani* required that the measure of the Husband's claim be subject to the policy considerations underlying the law on costs.

The Appellate Division held that:

- The *Maryani* rule applied to preclude the Husband from bringing any subsequent proceedings to claim his unrecovered legal costs. The Husband's right to invoke the Indemnity Provision had already arisen by the time the DJ was dealing with the costs of the FJC Summons.
- Once the DJ made the Costs Order, that was the end of the matter as far as the Husband's entitlement to costs was concerned. If the Husband wished to enforce his rights under the Indemnity Provision, he ought to have argued his entitlement to costs based on the terms of the Indemnity Provision at the hearing of the FJC Summons before the DJ, who would then determine the scope of the Indemnity Provision and the appropriate costs order. It is the DJ who has to decide whether to exercise his discretion to uphold the agreement on costs – costs are at the discretion of the court and in the exercise of this discretion, a contractual agreement on legal costs may be overridden in order to avoid manifest injustice.
- Notably, during oral costs submissions before the DJ, the Husband chose *not* to rely on the Indemnity Provision. Instead, he sought costs ostensibly on the ordinary principles relating to costs, and the DJ rendered a decision on costs accordingly. Hence, the *Maryani* rule precluded the Husband from recovering the difference between the amount of the Costs Order and the amount of costs recoverable under the Indemnity Provision.
- The DJ did not make reference to the Husband's purported reservation of rights with regard to the Indemnity Provision and eventually rendered a costs decision in respect of the FJC Summons. In the circumstances, the purported reservation could not oust the rule in *Maryani*, which is based on policy considerations. Hence, regardless of any purported attempt by the Husband to reserve his rights, the legal effect of the Costs Order is that the policy considerations underlying the law on costs were fully engaged and precluded any subsequent claim for unrecovered costs. Further, the absence of any objection by the Wife did not create a right to subsequently claim the difference where no such right exists.

Issue estoppel

The Appellate Division agreed with the General Division that the Husband's claim for costs in OS 192 was barred by issue estoppel. In particular, the Appellate Division found that there was identity of subject matter because the same question was being determined in the FJC Summons and OS 192 i.e., how much of the Husband's legal fees and expenses should the Husband be entitled to claim from the Wife. Furthermore, the

issue of the amount of costs the Husband could rightfully claim from the Wife was finally and conclusively determined by the DJ. Hence, the Husband was estopped from raising the same issue again in OS 192.

Abuse of process

In addition, the Appellate Division also agreed with the General Division that the Husband's claim in OS 192 was precluded by the extended doctrine of *res judicata* i.e., abuse of process. The doctrine set out in the English decision in *Henderson v Henderson* (1843) 67 ER 313 precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier proceedings. In this case, the Husband had the opportunity to raise the Indemnity Provision in his costs submissions before the DJ but failed to do so and his reasons for such failure were not compelling.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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