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Arbitrability of Intra-Company Disputes – an Offshore Perspective

Arbitrability is a question of considerable importance – it is the question of whether a particular issue in dispute is capable of being resolved by arbitration as opposed to litigation – and is therefore a question of jurisdiction. If the matter in question is not arbitrable, the tribunal will have no jurisdiction to resolve that dispute.

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It is also a question that can arise at various stages throughout the arbitral process. The question is often raised at the beginning of the process before an arbitral tribunal which, depending upon the applicable law of the seat, may have the right under the principle of *Kompetenz-Kompetenz* to decide upon the existence and scope of its jurisdiction (and therefore the arbitrability of the dispute in question).[1] The question can also be raised before the national courts post-award where a party is seeking to set aside an award or before the national court before which the successful party is seeking recognition and enforcement of the award. It is therefore essential that questions of arbitrability are considered as early as possible in the process.

This article will look at how the BVI and Cayman courts have approached the question of statutory remedies available in intra-company disputes where there is a valid arbitration agreement in place.

The English Court of Appeal decision in *Fulham Football Club (1987) Ltd v Richard*s [2012] Ch 333 provided useful guidance on the question. In particular, the issue of whether the statutory relief sought protected class rights and secured relief which would be effective to bind third parties.[2] The claimant, Fulham Football Club, contended that its unfair prejudice petition invoked the supervisory jurisdiction of the court and that the subject matter was therefore not arbitrable and/or that arbitration agreements in question should be construed so as to exclude an unfair prejudice dispute. As remarked by Patten LJ, "*the inability of an arbitrator to grant such relief is relevant both to the fundamental issue of whether a*

dispute of this kind is arbitrable at all and to the narrower issue of the construction of arbitration agreements".[3] The rights of shareholders to submit disputes *inter se* to arbitration requires, amongst other things, consideration of whether the matters in dispute engage third party rights or represent an attempt by the parties to delegate to the arbitrators a matter of public interest which cannot be determined within the limitations of a private contractual process.[4] *Fulham Football Club* held that where the dispute in question was between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement, such disputes are essentially a contractual in nature, and do not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefits of third parties, and so are generally arbitrable.

British Virgin Islands

*Ennio Zanotti v Interlog Finance Corp et al BVIHCV 2009/0394 (**Zanotti**)*

In *Zanotti*, Bannister J considered the arbitrability of an unfair prejudice claim whereby the Claimant sought (1) a declaration that the affairs of the Company had been conducted in an unfairly prejudicial manner; and (2) that one or other of the Defendants should buy the Claimant out of the Company.[5] The Defendants applied for a stay on the proceedings under the old BVI Arbitration Act 1976, relying on the arbitration clause contained within the Company's Memorandum and Articles of Association (the ***Articles***).

Bannister J took the view that there was no doubt that the proceedings raised complaints directly against the Company, to which the Articles clearly applied, but there were also potential complaints against the additional Defendants to whom the Articles did not apply (and who were therefore not bound by the arbitration agreement). Bannister J was of the view that, as it was possible to identify the complaints against the Company as opposed to those against the additional Defendants, the fact that there were interlinked disputes in circumstances where not all parties were bound by the arbitration agreement, did not prevent the complaints against the Company from being referred to arbitration.

The main question Bannister J then had to decide was whether the arbitration clause ought to be considered "*null and void*". In analysing this issue, Bannister J considered the English authority of *Exeter Football Club Ltd v Football Conference Ltd* [2004] 1 WLR 2910, a decision of the English High Court which refused to grant a stay in favour of arbitration on the basis that a contractual agreement could not oust the statutory right of a member to apply to court for an order to regulate the affairs of the defendant under the unfair prejudice regime in the English Companies Act 1985 (*Exeter*). Bannister J held that the *Exeter* decision was "*not good law and should not be followed in [the] jurisdiction*".[6]

In particular, Bannister J held that Judge Weeks QC in *Exeter* had erred in deciding that there was no difference between proceedings to appoint liquidators and claims for unfair prejudice. Bannister J saw no basis to suggest that the arbitration agreement was inoperative or incapable of being performed and so went on to find that the only remaining circumstances in which he could refuse to order a stay under section 6 of the old BVI Arbitration Act 1976 was where the particular effect of the arbitration agreement was illegal or contrary to public policy. Bannister J held that the arbitration agreement was "plainly not illegal." Accordingly, the refusal of a stay would only be appropriate if the arbitration agreement was contrary to the public policy of the BVI. Bannister J in ordering the stay held that the unfair prejudice regime in the BVI is a statutory remedy designed to facilitate the resolution of domestic disputes arising between the members of a company without the drastic remedy of appointing liquidators. The learned judge noted that in unfair prejudice proceedings, no third party rights fall to be protected or adjusted and accordingly there was no public element such as to make court involvement necessary or to render its exclusion from the resolution of such internal differences obnoxious on public policy grounds.

As in *Fulham Football Club*, Bannister J took a definite pro-arbitration stance in relation to the arbitrability of shareholder disputes. *Zanotti* highlighted the difference between a petition for the winding up of a company and one for an unfair prejudice claim and stated that so long as the arbitration clause was not "*null and void,*" then an unfair prejudice claim was capable of being arbitrated. It was also noted in *Zanotti*, in line with *Fulham Football Club*, that should the result of the arbitration be that a winding up order should be made, the relevant party was then able to apply to the court for such an order.[7]

While Zanotti was decided before *Fulham Football Club,* the approach taken is consistent with the English Court of Appeal's decision.

*Artemis Trustees Ltd and others v KPC Partners LP and others BVIHC(COM) 137 of 2012 (**Artemis Trust**)*

The Claimants in this BVI case sought the winding up and dissolution of the First and Second Defendants (together, the ***Partnerships***) and the appointment of a liquidator over each of them. The first three Defendants applied for a stay in favour of arbitration. The claim for the appointment of liquidators was brought because (1) the Partnerships had been terminated within the meaning of their respective Articles and therefore it was said that it was just and equitable that a liquidator be appointed to wind up the Partnerships; and (2) there were allegations of mismanagement on the part of the Fourth Defendant. The agreements in place between the parties contained arbitration agreements and it was not disputed that if the dispute made out in the challenged allegations in the statement of claim fell within the arbitration clauses, the Court had no discretion but to stay the claim.

The Claimants submitted that the claim made within the statement of claim did not fall within the scope of the arbitration provision as there was no dispute arising out of or connected with the Partnership articles. Rather, the Claimants contended that they were seeking to put an end to the parties' relationships by way of a court order, and the complaints to which they referred were merely the evidence upon which they rely in justifying the making of such an order. [8]

Bannister J noted that whilst it was well established that an arbitrator cannot make an award winding up a limited company, following *Zanotti* and *Fulham Football Club*, an arbitrator may grant relief in unfair prejudice proceedings, albeit that if it is concluded that winding up is the appropriate remedy, it will be necessary for an application to be made to the Court for it to make the actual order. Further, Bannister J held that the question of whether or not particular relief should be awarded by an arbitrator (assuming he is empowered to award such relief) cannot logically answer the question which should be asked beforehand, namely, what is the scope of the arbitration agreement itself, because the arbitration agreement itself defines the scope of what disputes fall within its terms, not the nature of the relief or entitlement which a party establishes at the end of the process.

The Claimants submitted that the dispute about whether the Partnerships should be wound up was not capable of being arbitrated. Bannister J disagreed holding that there was no statutory scheme in the BVI for the winding up of a partnership, general or limited, by the Court and that it seemed to him impossible to extract any indication that a limited partnership had any separate existence apart from those of its constituent members. Therefore an award dissolving a limited partnership would take effect by doing no more than dissolving the contractual and equitable bond which binds its members. Bannister J further held that there was no such difficulty in such an award being made by an arbitrator, any more than there is in an arbitrator making any other arbitral award affecting a contractual or equitable relationship.

Bannister J's judgment also recognised that the long standing objection to arbitrators purporting to wind up limited companies was not merely based upon a private individual's inability to dissolve an entity that was essentially a creature of statute. Rather, it is firmly based upon the inability of a private individual, acting as an arbitrator, to make an order which binds third parties who are not parties to the arbitration agreement. The

appointment of liquidators over a company affects the rights of third parties, whereas an award dissolving a limited partnership had no such effect on the rights and interests of third parties. Therefore, there was no legal obstacle to an arbitrator making an award of dissolution or winding up in respect of a limited partnership. As the disputes did fall within the parameters of the arbitration clause, the proceedings were stayed in favour of arbitration.

This case is in line with both *Fulham Football Club* and *Zanotti* in that it recognises that the potential outcome of an arbitration does not prevent a dispute from being arbitrable. The real question is whether the dispute which has been referred to arbitration properly falls within the scope of the arbitration agreement itself. If it does, and the appropriate remedy is something the arbitrator is not empowered to award, the respective party can apply to the court for such an order.

Cayman Islands

*Re Cybernaut Growth Fund LP (Unreported, Jones J, Grand Court, 23 July 2013) (**Re Cybernaut**)*

Cybernaut Growth Fund LP (the ***Partnership***) was registered in the Cayman Islands as a limited partnership. Five of the limited partners (the ***Petitioners***) presented a winding up petition against the Partnership on just and equitable grounds. In response to the petition, the general partner (***GP***) and remaining limited partner, Oriental Financial Holding Corporation (***Oriental***) sought to have the petition struck out as an abuse of process on the basis that (1) it has been presented in breach of valid and binding arbitration agreement; (2) an alternative remedy, namely arbitration, was available, and the Petitioners were acting unreasonably in not pursuing it; and (3) on a true construction of the Limited Partnership Agreement (***LPA***), the Petitioners had contracted out of their right to present a winding up petition or application to the Court for the appointment of an independent liquidator. Alternatively, Oriental and the GP sought a stay of the petition pending the outcome of the arbitration.

Jones J first considered whether the Petitioners had contracted out of their statutory right to present a winding up petition. Upon reviewing the relevant clause of the LPA, it was held that this argument was untenable, and the words of the clause could not be constructed so as to have this meaning. Next, the learned judge considered whether the dispute between the parties was capable of being arbitrated and it was during this analysis that *Fulham Football Club* was considered. It was again highlighted that it was for the court to determine whether there was any rule of public policy or statutory ground which rendered the arbitration agreement null and void, or inoperative or incapable of being performed.

The Petitioners challenged the strike out and stay applications on the basis that the only relief sought was a winding up order and the appointment of liquidators. Jones J held the view that this type of dispute was not arbitrable for two reasons:

1 "*A winding up order is an order in rem which is capable of affecting third parties. Because the source of an arbitral tribunal's power is contractual, its scope is necessarily limited to making orders which will be binding only upon the contracting parties."*[9]

2 "*Any dispute about who should be appointed as a liquidator of a company or exempted limited partnership is matter involving public interest… which is not suitable for determination in private by an arbitral tribunal*".[10] Jones J stated that he regarded winding up orders, and orders relating to liquidators, as class remedies which therefore made them subject to the exclusive jurisdiction of the court.

Jones J distinguished *Re Cybernaut* from *Fulham Football Club* as the only remedy sought by the Petitioners was a winding up order and the appointment of qualified insolvency practitioners as official liquidators. They were

not claiming for breaches of contract or injunctions to restrain future breaches, which would have been arbitrable. Jones J stated "*it is not open to me to delegate the trial of the petition to an arbitral tribunal on the basis that I will then decide whether to make a winding up order in the light of the arbitrators' findings and recommendations*".[11]

Following the conclusion that (1) the Petitioners had not contracted out of their ability to apply to the Court for a winding up order, and (2) the issued raised on the winding up petition were not arbitrable, the presentation of the petition was not a breach of the arbitration agreement. If, on its true construction, the arbitration agreement extended to a disputed application for a winding up order, then it was null and void, inoperative and incapable of being performed. The GP and Oriental were therefore not entitled to a stay of the proceedings.

The Grand Court of the Cayman Islands appears to have taken the position that the remedy sought goes to the arbitrability of a dispute. Accordingly, in matters where the *sole* remedy sought is a winding up order and the appointment of qualified insolvency practitioners as official liquidators, the dispute between the parties may not be contractual in nature, especially where other remedies are not sought. Jones J held that the matter before him was not a case about breach of contract but rather about the identity of the liquidator given that the parties all agreed that the Partnership should be wound up. In those circumstances he was not prepared to find that the issue raised on the petition was arbitrable.

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1 Section 32(1) of the BVI Arbitration Act 2013 incorporates Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration which provides that the arbitral tribunal may rule on its own jurisdiction, though the tribunal's decision can be challenged by a party before the BVI courts within 30 days.

2 The relief sought was an injunction prohibiting the defendant, Sir David Richards, from acting as unauthorised agent in the future and alternatively requesting the removal of Sir Richards as chairman of the Football Association Premier League, brought under section 996 English Companies Act 2006 (the provision dealing with unfair prejudice under the English companies legislation).

3 Patten LJ [at 15].

4 Patten LJ [at 40].

5 Bannister J [at 6].

6 [At 27]. The *Exeter* decision was overturned by the Court of Appeal in *Fulham Football Club*.

7 [At 23].

8 [At 14].

9 [At 7].

10 [At 7].

11 [At 11].