# Silica Investors Limited
# v
# Tomolugen Holdings Limited and others

**[2014] SGHC 101**

High Court — Suit No 560 of 2013 (Registrar's Appeals Nos 334, 336, 337 and 341 of 2013)
Quentin Loh J
30 October 2013

Arbitration — Arbitrability and Public Policy

Arbitration — Stay of Court Proceedings

29 May 2014 Judgment reserved.

**Quentin Loh J:**

## Introduction

1 These registrar's appeals raise several issues on the arbitrability of intra-corporate disputes. First, whether minority oppression claims under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA") are arbitrable under Singapore law. Secondly, what principles, if any, should govern a stay application under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") where only part of the plaintiff's claim falls within the scope of the arbitration agreement. Thirdly, whether the Court can exercise its inherent powers of case management to stay proceedings when only some of the parties before it are parties to the arbitration agreement.

## The facts

### *The parties*

2 The plaintiff, Silica Investors Limited ("the Plaintiff"), is the registered shareholder of 3,750,000 shares (representing about 4.2% of all the shares) in the 8th defendant, Auzminerals Resource Group Limited ("AMRG"), a public company limited by shares and incorporated under the laws of Singapore.[1] The Plaintiff became a shareholder of AMRG in July 2010 when it purchased its shares from the 2nd defendant, Lionsgate Holdings Pte Ltd (formerly known as Tomolugen Pte Ltd) ("the 2nd Defendant"), pursuant to a Share Sale Agreement dated 23 June 2010 ("the Share Sale Agreement") and a Supplemental Agreement dated 5 July 2010 ("the Supplemental Agreement") entered into between the Plaintiff and the 2nd Defendant.[2]

3 The 1st defendant, Tomolugen Holdings Limited ("THL"), holds 49,603,397 shares (representing about 55% of all the shares) in AMRG, and is also the sole shareholder of the 2nd Defendant.[3] The 2nd Defendant holds 8,135,001 shares (representing about 9% of all the shares) in AMRG.[4] Together, THL and the 2nd Defendant are the majority and controlling shareholders of AMRG.[5]

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1 Statement of Claim ("SOC") at paras 1 and 10.

2 SOC at para 17.

3 SOC at paras 2–3.

4 SOC at para 3.

5 SOC at para 4.

4 The 3rd defendant, Lim Sing Hok Mervyn ("Mervyn Lim"), was a director of the 2nd Defendant and of AMRG, as well as of Solar Silicon Resources Group Pte Ltd ("SSRG"), a wholly-owned subsidiary of AMRG, at different periods of time between 2009 and 2012.[6] He is a registered shareholder of 500,000 shares (representing about 0.56% of all the shares) in AMRG.[7] The 4th defendant, Russell Henry Krause ("Russell Krause"), is a director of AMRG and the managing director of SSRG. He holds 1,375,000 shares (representing about 1.5% of all the shares) in AMRG.[8] The 5th defendant, Young Robert Tancuan ("Robert Young"), is a director of the 2nd Defendant, AMRG, and SSRG.[9] He holds 250,000 shares (representing about 0.28% of all the shares) in AMRG.[10] He is also a director and shareholder of two other companies with shareholdings in AMRG amounting to approximately 2.4% and 1.1% of the total share capital.[11] The 6th defendant, Yong Peng, was previously a director of AMRG and SSRG.[12] He holds 250,000 shares (representing about 0.28% of all the shares) in AMRG.[13]

5 Finally, the 7th defendant, Roger Thomas May ("Roger May"), is a director of AMRG who was appointed on 29 May 2013.[14] According to the

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6 SOC at para 5.

7 SOC at para 5.

8 SOC at para 6.

9 SOC at para 7(a).

10 SOC at para 7(a).

11 SOC at paras 7(b), 7(c) and 9(b).

12 SOC at para 8.

13 SOC at para 8.

14 SOC at para 9(a).

Plaintiff, Roger May was at all material times a "shadow and/or *de facto*" director of AMRG representing the interests of THL and the 2nd Defendant on the board of directors of AMRG.[15]

***The Plaintiff's pleaded case***

6 The Plaintiff's action in Suit No 560 of 2013 ("S 560/2013") is a claim under s 216 of the CA. The writ of summons in S 560/2013 was filed on 21 June 2013. The parties do not dispute that the Plaintiff's claim in S 560/2013 is founded on four main allegations. They are as follows:

(a) On 15 September 2010, 53,171,040 shares in AMRG were issued to THL ("the Share Issuance"), purportedly as payment for a debt for the transfer of certain mining licenses and exploration permits in the Far North East of Australia (known as "the Solar Silica Assets") from the predecessor company of the 2nd Defendant and its subsidiaries to SSRG.[16] The Share Issuance had the effect of diluting the Plaintiff's shareholding in AMRG by more than 50%.[17] The Plaintiff alleges that the alleged debt was fictitious and never existed.[18] In the course of the due diligence conducted by the Plaintiff for the purposes of its investment in AMRG in connection with the Share Sale Agreement, the 2nd Defendant and Roger May warranted and/or represented to it that the Solar Silica Assets had been transferred to

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15 SOC at para 9(a).

16 SOC at paras 22–23.

17 SOC at para 23.

18 SOC at para 24.

SSRG and that SSRG owned the Solar Silica Assets free of liabilities.[19] In particular, by Sch 1, cl 8.3 of the Share Sale Agreement, it was warranted that AMRG and its related corporations, including SSRG, had settled or discharged all their current liabilities.[20] Further, by Sch 1, cl 8.2 of the Share Sale Agreement, it was warranted that the accounts provided to the Plaintiff were "a true and fair view of the state of affairs of AMRG [and its related corporations]".[21] I will refer to this part of the claim as "the Share Issuance Issue".

(b) The Plaintiff was wrongfully excluded from participating in the management of AMRG. Under cl 2.5 of the Share Sale Agreement, there was an express or implied understanding between the Plaintiff and the 2nd Defendant and/or a legitimate expectation that the Plaintiff would be involved in the management of AMRG through the appointment of the Plaintiff's nominee or representative to the board of AMRG.[22] I will refer to this part of the claim as "the Management Participation Issue".

(c) Certain guarantees were executed by the board of directors of AMRG, under the control and influence of THL, the 2nd Defendant and/or Roger May, for the purposes of securing the obligations of an unrelated entity, Australian Gold Corporation Pte Ltd.[23] This was

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19 SOC at para 18.

20 SOC at para 18(d).

21 SOC at para 18(e).

22 SOC at paras 31–32.

23 SOC at para 37.

allegedly to further the personal and/or commercial interest of THL and the 2nd Defendant at the expense of AMRG's commercial interests.[24]

(d) THL, the 2nd Defendant and Roger May exploited AMRG's resources for the benefit of their own businesses and/or misled the Plaintiff and/or concealed information as regards the affairs of AMRG.[25]

7 It is also relevant to note that the Plaintiff is seeking the following reliefs:

(a) An order that THL and/or the 2nd Defendant and/or such other parties as the Court may direct, purchase the Plaintiff's shares in AMRG at a value to be determined by a firm of independent accountants or valuers to be appointed by agreement between the parties, failing which, by the Court, with such directions as may be necessary;

(b) Such orders and directions in the interim as the Court thinks fit to regulate the conduct of the affairs of AMRG;

(c) Alternatively, an order that AMRG be placed under liquidation and a private liquidator be appointed to conduct the liquidation of AMRG, with such liquidator to be appointed by agreement between the parties, failing which, by the Court;

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24 SOC at para 38.

25 SOC at paras 41–51.

(d) A declaration that, by virtue of the matters pleaded in the Statement of Claim, Mervyn Lim, Russell Krause, Robert Young, Yong Peng and Roger May are liable for breaching their fiduciary duties and/or statutory duties under s 157(1) of the CA;

(e) An order for costs of the proceedings as well as the valuation of the Plaintiff's shares in AMRG or liquidation of AMRG be borne by THL, the 2nd Defendant, Mervyn Lim, Russell Krause, Robert Young, Yong Peng and Roger May; and

(f) Such further and/or other relief that the Court deems fit.

***The stay applications***

8 On 30 July 2013, the 2nd Defendant filed Summons No 3936 of 2013 ("SUM 3936/2013") for an order that the entire proceedings in S 560/2013 be stayed in favour of arbitration pursuant to s 6(1) of the IAA and/or under the inherent jurisdiction of the Court. The 2nd Defendant referred to cl 12.3 of the Share Sale Agreement ("the Arbitration Clause") which, it argued, was an agreement for any dispute arising out of or in connection with the Share Sale Agreement to be resolved by arbitration with the Singapore International Arbitration Centre. The Arbitration Clause reads as follows:

> **12.3 Dispute Resolution**
>
> Without prejudice to any right of the Parties to apply to any competent court for injunctive relief, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The tribunal shall consist of one arbitrator to

> be appointed by the chairman of the SIAC. The language of the arbitration shall be English.

9 On 29 July 2013, THL and Robert Young filed Summons No 3921 of 2013 ("SUM 3921/2013") for an order that the proceedings against them be stayed pursuant to the inherent jurisdiction of the Court. On the same day, Mervyn Lim filed Summons No 3935 of 2013 ("SUM 3935/2013") seeking the same. On 31 July 2013, AMRG followed suit by filing Summons No 3983 of 2013 ("SUM 3983/2013").

10 These applications were heard by an Assistant Registrar of the High Court and on 26 September 2013, the applications were dismissed with costs. It is from the Assistant Registrar's dismissal of the applications that the appeals before me were brought *vide* Registrar's Appeals Nos 334, 336, 341 and 337 of 2013 ("RA 334/2013", "RA 336/2013", "RA 341/2013" and "RA 337/2013") respectively.

**The issues**

11 Broadly speaking, the parties agree that there are three issues before me:

(a) Whether the Plaintiff's claim falls within the scope of the Arbitration Clause;

(b) If the Plaintiff's claim falls within the scope of the Arbitration Clause, whether a claim under s 216 of the CA is arbitrable; and

(c) If any part of the Plaintiff's claim is stayed in favour arbitration under s 6 of the IAA, whether this Court should exercise its inherent

powers of case management to stay the entire proceedings pending the determination of the arbitration.

## Whether the Plaintiff's claim falls within the scope of the Arbitration Clause

### *The analytical framework*

12 The 2nd Defendant's application for a stay of the present proceedings is based on s 6 of the IAA, which reads:

> **Enforcement of international arbitration agreement**
>
> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

13 The question, therefore, is whether the proceedings in S 560/2013 involve one or more matters which might be the subject of the Arbitration Clause. If so, then, subject to the issue of arbitrability, s 6(2) of the IAA mandates that the Court stay the proceedings, so far as they relate to the matter or matters which might be the subject of the Arbitration Clause, in favour of arbitration.

14 The question should be approached as follows:

(a) first, what is the proper characterisation of the Plaintiff's claim;

(b) secondly, what is the scope of the Arbitration Clause; and,

(c) thirdly, whether the Plaintiff's claim falls within the scope of the Arbitration Clause.

This was the approach taken by the Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil*") at [7]–[22]. The New South Wales Supreme Court in *ACD Tridon Inc v Tridon Australia Pty Ltd and others* [2002] NSWSC 896 ("*ACD Tridon*") at [99] also followed a similar analytical framework when faced with a similar question under s 7(2)(b) of the International Arbitration Act 1974 (Cth) ("the IAA 1974").

***What is the proper characterisation of the matter in S 560/2013?***

15 I turn first to the proper characterisation of the matter in these proceedings.

16 The Plaintiff contends that its claim should be characterised by reference to the main issue or essential dispute between the parties, that is, whether the affairs of AMRG have been managed by the 2nd Defendant, under the control and influence of Roger May, together with and/or with the assistance of the other defendants in a manner which is unfairly prejudicial to the Plaintiff's interests.[26] The Plaintiff explains that it is relying on the Share

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[26] Plaintiff's Further Submissions at paras 10 and 13(5).

Sale Agreement only insofar as it forms part of the overall factual matrix which supports its claim under s 216 of the CA.[27]

17 In contrast, the 2nd Defendant relies on two of the specific allegations made by the Plaintiff in its statement of claim. In particular, the Share Issuance Issue ([6(a)] above) and the Management Participation Issue ([6(b)] above).[28] The 2nd Defendant accepts that the remaining allegations ([6(c)] and [6(d)] above) do not fall within the scope of the Arbitration Clause, and it is not arguing that these parts of the claim should be stayed under s 6 of the IAA.[29]

*Test to be adopted*

18 In my judgment, the Court is entitled to ascertain the essential dispute between the parties. However, it should not be a mere issue which falls to be decided in the course of the proceedings. To identify the matter in the proceedings, the Court may consider the pleadings and the underlying basis of the claim. The Court is guided by, but not limited to, the way in which the claim has been framed in the pleadings.

19 This is, in essence, the Australian approach. It has been adopted in the United Kingdom. The Canadian courts adopt a similar approach. In my judgment, it should be adopted in Singapore as well. It should be noted that s 7(2)(b) of the IAA 1974 is substantially similar to s 9 of the UK Arbitration

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27 Plaintiff's Further Submissions at paras 13(2) and 13(4).

28 2nd Defendant's Submissions at para 9(a).

29 2nd Defendant's Submissions at para 9(b).

Act 1996 (c 23) ("the UK AA 1996") and s 6 of the IAA. There is much to commend and little to detract from a uniform approach in the construction of similar provisions across jurisdictions in international arbitration.

20 The Australian position can be ascertained from three cases, namely, *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* (1979) 25 ALR 605 ("*Flakt*"), *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 ("*Tanning Research*"), and *Recyclers of Australia Pty Ltd and another v Hettinga Equipment Inc and another* (2000) 175 ALR 725 ("*Recyclers*").

21 In *Flakt*, McLelland J found that the term "matter" in s 7(2)(b) of the IAA 1974 did not cover a *mere* issue (at 613):

> … the word "matter" in s 7(2)(b) denotes *any claim for relief* of a kind proper for determination in a court. *It does not include every issue* which would or might arise for decision in the course of the determination of such a claim. [emphasis added]

22 *Flakt* was affirmed by Deane and Gaudron JJ in *Tanning Research*. Deane and Gaudron JJ further explained that a "matter", unlike a *mere* issue, must be capable of being resolved as a discrete controversy (at 351):

> … the expression "matter … capable of settlement by arbitration" indicates *something more than a mere issue* which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. See Flakt [[1979] 2 NSWLR at 250]. It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is *at least susceptible of settlement as a discrete controversy*. [emphasis added]

23 In *Recyclers*, Merkel J considered that the opinion of Deane and Gaudron JJ in *Tanning Research* stood for the proposition that (at 730):

> … the "matter" to be determined in a proceeding is to be ascertained by reference to the subject matter of the dispute

> in the proceeding and the *substantive, although not necessarily the ultimate, questions for determination* in the proceeding. The scope of the matter is to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including the defence, are based … The manner in which a claim or a defence is pleaded is of importance to, but is not determinative of, the characterisation of the "matter" for the purpose of s 7(2). [emphasis added]

24 These cases were cited with approval by the New South Wales Supreme Court in *ACD Tridon* (at [103]–[106]), where one of the plaintiff's claims was a minority oppression claim. This case will be considered in greater detail later ([38]–[45] below).

25 The gist of the Australian approach is well captured in David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) ("*Jurisdiction and Arbitration Agreements*") at paras 11.15–11.16, where the author explains that:

> … in determining whether the legal proceedings brought fall within the scope of the arbitration agreement, it is suggested that the court should consider the essential nature of the dispute. In an appropriate case this will lead to an examination of the claim and the defences to the claim and the subject of the underlying dispute. …
>
> In the ordinary run of cases it is suggested that the exercise the court is engaged upon is to look at the essential nature of the dispute including defences raised and then stay proceedings in whole or in part insofar as the proceedings are brought in respect of a matter to be referred to arbitration. … Support for construing the words "legal proceedings are brought … in respect of a matter to be referred" [these words are found in s 9 of the UK AA 1996], by reference to the essential underlying dispute can be found in a series of decisions in the Australian courts. …

26 The author of *Jurisdiction and Arbitration Agreements* considered that the Australian approach should be adopted in relation to s 9 of the

UK AA 1996, which is substantially similar to s 7(2) of the IAA 1974. This was later accepted by Blair J in *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm) at [35].

27 It is also noteworthy that the Canadian courts have adopted a similar approach of looking at the pleadings to ascertain if the matter falls within the scope of the arbitration agreement: see *Dalimpex Ltd v Janicki* (2003) 228 DLR (4th) 179 at [41] and [43] and *Kaverit Steel & Crane Ltd v Kone Corp* (1992) 87 DLR (4th) 129 at 135.

28 A similar position is taken in Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa, 2009) ("*Singapore Arbitration Legislation: Annotated*") at 18, where the authors consider that the term "matter" in s 6 of the IAA refers to the "main issue" rather than "individual aspects of the dispute". In support of this proposition, the authors cited the Australian cases, *ACD Tridon* and *Recyclers*.

29 Significantly, the Australian approach appears to be consistent with how the Court of Appeal in *Larsen Oil* characterised the matter in that case with regard to an application to stay proceedings under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA").

30 In *Larsen Oil*, the parties entered into an agreement which provided that the appellant would provide management services to the respondent and its subsidiaries. As a result of the agreement, the appellant gained control over the finances of the respondent and its subsidiaries. Certain payments were made to the appellants. The respondent was placed under liquidation, and the liquidators brought, *inter alia*, avoidance claims under the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the BA") and the CA against the appellant. The

appellant filed a summons applying for a stay under s 6(2) of the AA. At this juncture, it should be noted that while there are some differences between s 6(2) of the AA and s 6(2) of the IAA (*eg*, the discretion to stay proceedings), the differences are not relevant insofar as the question is one of the proper characterisation of the "matter" before the Court.

31 The appellant contended that the respondent's avoidance claims under the BA and CA were founded on the appellant's alleged breach of the management agreement (at [7]). The appellant relied on the fact that the respondent could only establish its claims by relying on the management agreement. As such, the appellant argued that the claims were "intimately connected" to the management agreement and fell within the scope of the arbitration clause. This was rejected by the Court of Appeal. The Court of Appeal pointed out that there was no allegation of breach of the management agreement in the statement of claim and that the avoidance claims were "entirely independent" of the question of breach (at [9]). Rather, the Court of Appeal held that the claims were founded entirely on the avoidance provisions of the BA and CA, and that the management agreement was only relevant insofar as it "provided some evidence" to support the avoidance claims (at [10]).

32 It is apparent that the Court of Appeal in *Larsen Oil* identified the essential dispute between the parties as the avoidance claims (at [10]). In doing so, the Court of Appeal considered, *inter alia*, the pleadings (*ie*, statement of claim) and the underlying basis of the claims (*ie*, statutory provisions in the BA and CA). The Court of Appeal observed that the statement of claim did not reveal any allegations of breach of the management agreement, and that, in addition, the nature of avoidance provisions was such

that they operated "independent of the nature of the relationship between the parties" (at [9]–[10]). It followed that the "matter" in the proceedings could not possibly have been characterised as the breach of the management agreement.

33 Here, the 2nd Defendant's submission that the matters before the Court should be considered by reference to the specific issues, namely, the Share Issuance Issue and the Management Participation Issue, should be rejected for two reasons.

34 First, the 2nd Defendant was wrong to say that the decision in *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] 2 CLC 533 ("*Premium Nafta*") dilutes or contradicts the reasoning of the Australian cases set out above. The House of Lords in *Premium Nafta* was concerned with the construction of the arbitration clause, and not the identification of the matter in the proceedings before the Court.

35 Secondly, the Singapore cases have consistently, albeit implicitly, treated the term "matter" in s 6 of the IAA as referring to the claims in the proceedings (see, *eg*, *Piallo GmbH v Yafriro International Pte Ltd* [2013] SGHC 260 ("*Piallo*") at [16] (claim on dishonoured cheques); *The "Engedi"* [2010] 3 SLR 409 at [16]–[20] (*in rem* claim against the vessel); *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2012] SGHCR 2 at [11] (claim for a debt arising from a foreign judgment); *The "Titan Unity"* [2013] SGHCR 28 at [2] (claim for misdelivery of cargo)). The 2nd Defendant had not cited a single case where the "matter" before the Court was characterised as one of the allegations made in support of a claim.

36 Accordingly, I consider that the Australian approach for the characterisation of a matter in the proceedings is the correct approach and should be adopted in Singapore. It follows that the "matter" in these proceedings, for the purpose of s 6 of the IAA, should be identified by reference to the essential dispute and not the *mere* issues that are to be determined in the course of the proceedings.

*Application to the facts*

37 In the present case, the matter to be determined is whether the affairs of AMRG were being conducted and managed by the defendants in a manner that is oppressive, *ie*, commercially unfair or unfairly prejudicial conduct towards the Plaintiff as a minority shareholder. Looking at the pleadings, it becomes obvious that this is the essential dispute between the parties. Minority oppression claims are often made up of an assortment of diverse allegations and grievances. The Share Issuance Issue and the Management Participation Issue, which are allegations made in support of the minority oppression claim, are *mere* issues to be decided in determining if the Plaintiff's claim is made out. They are not distinct matters before the Court for the purpose of s 6 of the IAA.

38 This conclusion is consistent with the position taken by the Australian and Northern Ireland courts in similar cases (see *ACD Tridon* and *Re Wine Inns Ltd and other matters* [2000] NIJB 343 ("*Wine Inns*")).

39 In *ACD Tridon*, the New South Wales Supreme Court had to decide, *inter alia*, whether a minority oppression claim which was based partly on the provisions of a shareholders' agreement between parties would constitute a matter that should be stayed for arbitration under s 7(2) of the IAA.

40 The plaintiff, ACD Tridon ("Tridon"), and the second defendant, Richard Lennox ("Mr Lennox"), were shareholders of the first defendant, Tridon Australia Pty Ltd ("TAPL"). Mr Lennox bought two-thirds of the shares in TAPL from Tridon, and they entered into a shareholders' agreement, which contained an arbitration clause, and purported to regulate the conduct of TAPL's affairs for the future. The board of directors of TAPL consisted of Mr and Mrs Lennox, and a nominee of Tridon. Tridon had granted TAPL and its subsidiary, Tridon New Zealand Ltd ("TNZL"), exclusive rights to distribute its products under a distributorship agreement. The distributorship agreement also contained an arbitration clause. The relationship between the parties soured when Tridon amalgamated with a company which had subsidiaries that were in direct competition with TAPL and TNZL. Tridon commenced court proceedings against TAPL, TNZL, and Mr and Mrs Lennox for a number of claims. For the present purposes, I only need to consider the following claims:

(a) claims for access to documents of TAPL ("the Document Access Claims");

(b) claims that Mr and Mrs Lennox had caused TAPL and TNZL to enter into various transactions which were not in the best interests of TAPL and TNZL, and were designed to further their personal interests ("the Directors' Misconduct Claims"); and

(c) claims of further conduct amounting to oppression entitling relief under s 233 of the Corporations Act 2001 (Cth) ("the Further Oppression Claims").

41 According to Tridon, the Document Access Claims were made pursuant to, *inter alia*, the provisions of the shareholders' agreement *and*

s 233(1)(j) of the Corporations Act 2001 on the basis that the failure to allow Tridon to access the records of TAPL was oppressive (at [20]). Likewise, the Directors' Misconduct Claims were said to amount to breaches of the provisions of the shareholders' agreement *and* conduct oppressive of Tridon's interests as a shareholder of TAPL (at [20]). On the other hand, Tridon considered that the Further Oppression Claims were "purely statutory" and not based on the shareholders' agreement (at [20]). The defendants applied for the proceedings to be stayed in favour of arbitration pursuant to s 7(2) of the IAA 1974.

42 For the Further Oppression Claims, Tridon alleged that (a) TNZL, and consequently TAPL, had failed to pay dividends and (b) Mr Lennox caused TAPL to act oppressively in the conduct of the legal proceedings. Unlike the other claims, Tridon considered that these claims were "purely statutory" (at [20]). Austin J disagreed. He noted that cl 11 of the shareholders' agreement, which was headed "dividend policy", authorised the retention of certain profits. This, in his view, arguably implied that, except to the extent that retention was authorised, there was a contractual duty upon Mr Lennox and Tridon to cause TAPL to distribute its profits by way of dividends. Hence, Austin J held that there were two discrete matters before the Court, namely, the claim based on the rights and liabilities created by the shareholders' agreement (*ie*, breach of contract), and the claim based on the rights and liabilities under the Corporations Act 2001 (*ie*, minority oppression).

43 I pause to note that there is some controversy on whether separate claims arising out of the same facts should be considered as one matter or two distinct matters (contrast *Recyclers* at [21] with *Metrocall Inc v Electronic Tracking Systems Pty Ltd* [2000] NSWLR 1 at [54] and *ACD Tridon* at [176]).

However, this does not arise in the present case. What is important for the present case is that Austin J (in *ACD Tridon*) identified the matters by reference to the claims (*ie*, minority oppression and breach of contract) and not the allegations made in support of the claim (*ie*, withholding of dividends).

44 In the Northern Ireland Court of Appeal case of *Wine Inns*, Carswell LCJ rejected the characterisation of the "matter" before the Court as the series of discrete disputes set out in the petition (at 359). Instead, he considered that there were only two matters, namely, whether it was just and equitable for the company to be wound up under art 102(g) of the Insolvency (Northern Ireland) Order 1989 (SI 1989/2405), and whether the company's affairs had been conducted in a manner that was unfairly prejudicial to the interests of the respondent, entitling him to the remedies specified in art 454 of the Companies (Northern Ireland) Order 1986 (SI 1986/1032).

45 In both *ACD Tridon* and *Wine Inns*, the matter before the Court was characterised as the minority oppression claim rather than the specific allegations made in support of the claim.

46 Based on the approach of the above cases, the "matter" in this case is properly characterised as follows: whether the affairs of AMRG were being conducted and managed by the Defendants in a manner that is oppressive to the Plaintiff as a minority shareholder.

***What is the scope of the Arbitration Clause?***

47 What then is the scope of the Arbitration Clause? The proper approach to interpret arbitration clauses was laid down by the Court of Appeal in *Larsen Oil*. In its view, the scope of an arbitration clause depends on the intention of

the parties and it is conceivable that the parties to a contract may agree that all disputes between them should fall within the scope of the arbitration clause (at [11]). Having examined the approaches from various jurisdictions, the Court of Appeal concluded (at [19]) that:

> … the preponderance of authority favours the view that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory should be regarded as falling within their scope unless there is good reason to conclude otherwise.

I should note that by "statutory claims", the Court of Appeal in *Larsen Oil* was referring only to "private remedial claims" (see *Larsen Oil* at [20]–[21]).

48 The Court of Appeal endorsed the view of Lord Hoffmann in *Premium Nafta* on the starting point when it comes to the construction of arbitration clauses (at [13]):

> [T]he construction of an arbitration clause should *start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.* The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. [emphasis added]

49 In the present case, the Arbitration Clause was very widely drafted. It provides that "any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration…" There is no indication that the parties have intended to exclude statutory claims, specifically, claims under s 216 of the CA.

50 The scope of the Arbitration Clause must be determined in the context of the Share Sale Agreement as a whole. The Share Sale Agreement addresses the role of the Plaintiff in the management of AMRG (Cl 2.5(a) of the Share Sale Agreement), and provides for the listing of SSRG on a recognised stock exchange (Cll 6.3 and 6.4 of the Share Sale Agreement) and exit provisions in the form of "tag along rights" and "drag along rights" if the listing fails (Cl 6A of the Supplemental Agreement). These clauses indicate that the Share Sale Agreement governs not only the transaction of the shares in AMRG, but also, to some extent, the relationship between the Plaintiff and the 2nd Defendant as shareholders of AMRG. It is in this context that the Plaintiff and the 2nd Defendant agreed to have any disputes between them resolved by arbitration.

***Whether the matter in S 560/2013 falls within the scope of the Arbitration Clause***

51 Bearing in mind the "matter" in these proceedings and the scope of the Arbitration Clause, I turn to the last step.

52 To determine if a matter falls within the scope of an arbitration clause, the Court must consider whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim (see *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* (1985) 473 US 614 at 622; *JJ Ryan & Sons v Rhone Poulenc Textile SA* (1988) 863 F2d 315 at 319; *Hinson v Jusco Co Ltd* (1994) 868 F Supp 145 at 149–150). This must be correct. To say otherwise would imply that non-contractual claims, like a claim in tort or statute, can never be related to the contract and would never fall within the scope of the arbitration clause.

53 To determine if the factual allegations underlying the claim are *within* the scope of the arbitration clause, the Court must ascertain the relationship between the factual allegations underlying the claim and the contract that incorporates the arbitration clause. In the present case, the question is whether the factual allegations made in support of the minority oppression claim *arise out of or are in connection with* the Share Sale Agreement.

54 According to the Court of Appeal, a matter would fall *outside* the scope of the arbitration clause only if it was *unrelated* to the contract that contained the arbitration clause (see *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [22]–[23] and [69]). However, this does not necessarily mean that the matter would fall *within* the scope of the arbitration clause if it was *in any way related* to the contract which contained the arbitration clause. The deeper question, which the Court of Appeal did not elaborate upon in *Tjong Very Sumito*, is the closeness of the relationship that must be present. Would it be sufficient if the substantive rights and liabilities of the parties under the contract are not invoked *per se*, but are relied upon as the basis for a claim in tort or statute? What if only part of the claim makes reference to the provisions of the contract?

55 In the present case, the Plaintiff has referred to some of the provisions in the Share Sale Agreement to establish the extent of his reasonable expectations in asserting the minority oppression claim. Yet, only two out of the four allegations, namely the Share Issuance Issue and the Management Participation Issue, make reference to the provisions in the Share Sale Agreement. Be that as it may, I am of the view that the matter has a

sufficiently close connection to the Share Sale Agreement such that it would fall within the scope of the Arbitration Clause.

56 It is quite clear that the Plaintiff's claim would fall within the scope of the Arbitration Clause if it was based solely on the Share Issuance Issue and the Management Participation Issue. The fact that the other allegations do not wholly relate to the Share Sale Agreement should not detract from this conclusion. If a sufficient part of the factual allegations underlying the claim relates to the contract, then the entire claim must be treated as falling within the arbitration clause in the contract. This is because "the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" (see *Premium Nafta* at [13], cited with approval in *Larsen Oil* at [13]).

57 This conclusion is supported, to some extent, by the reasoning in *Piallo* that parties would have intended to have two separate claims arising out of the "same incident" resolved by the same tribunal, especially if they were so closely connected that the resolution of one would affect the other (at [37]–[49]).

58 In the present case, the factual allegations underlying the Plaintiff's minority oppression claim are so interrelated that they cannot be dealt with separately. It is not difficult to accept that parties must have intended for their claim to be resolved by the same tribunal, even if the claim relies partly on factual allegations that might not be directly related to the contract which contains the arbitration clause.

59 Accordingly, I find that the matter in S 560/2013 rightly falls within the scope of the Arbitration Clause.

**Is a claim under s 216 of the CA arbitrable?**

***Introduction***

60 This matter does not end at the finding that the Plaintiff's minority oppression claim falls within the scope of the Arbitration Clause. Although s 6(2) of the IAA mandates that the proceedings be stayed in favour of arbitration, the Court is not required to grant a stay of proceedings if the proceedings involve a non-arbitrable claim. In *Larsen Oil*, the Court of Appeal accepted that the arbitrability of the claim had to be taken into consideration when determining whether to grant a stay under s 6(2) of the AA. Although the view was expressed in relation to the AA, the two reasons given (at [25]–[26]) are equally applicable to the IAA. Looking at s 11(1) of the IAA and Art 34(2)(*b*)(i) of the UNICTRAL Model Law on International Commercial Arbitration, it is clear that a stay of proceedings under s 6(2) of the IAA cannot be granted in the case of a non-arbitrable claim.

61 As this issue has not been addressed before in Singapore, it will be useful to consider the approaches adopted by the English, Australian and Canadian courts.

***The approaches adopted in the other jurisdictions***

*England*

62 The current position in England is that a claim under s 994 of the Companies Act 1996 (c 46) (the equivalent of s 216 of the CA) is arbitrable.

63 The leading case in England on this issue is *Fulham Football Club (1987) Ltd v Richards and another* [2012] Ch 333 ("*Fulham*"). The plaintiff, a member of the Football Association Premier League Limited ("FAPL"), alleged that the first defendant, Sir David Richards, the chairman of FAPL, had acted in such a way as to unfairly prejudice the interest of the plaintiff as a member of FAPL. Under the rules of FAPL, the parties are required to have disputes *inter se* referred to arbitration. Notwithstanding that, the plaintiff brought a claim under s 994 of the Companies Act 1996 in the courts, seeking an injunction restraining the defendant and in the alternative, an order that the defendant should cease to be the chairman FAPL, as well as such other relief "as the Court thinks fit". The trial judge granted a stay and the plaintiff appealed.

64 The English Court of Appeal (comprising Rix, Longmore and Patten LJJ) dismissed the appeal. Both Rix and Longmore LJJ agreed with the leading judgment delivered by Patten LJ. The plaintiff unsuccessfully applied to the Supreme Court for leave to appeal.

65 Before the English Court of Appeal, the plaintiff argued that arbitration was a consensual dispute resolution process and would not be suitable in a "dispute in which the interests and representations of third parties need to be taken into account or where the appropriate relief is an order which creates rights *in rem* or affects the public at large" (at [39]). In particular, it argued that a minority oppression claim was a "class remedy which requires the Court to have regard to the interests of other shareholders and perhaps even creditors particularly in formulating the relief to be granted", analogous to winding up (at [51]).

66 However, this was not accepted by the English Court of Appeal. In particular, Patten LJ considered that the limit on the power of the arbitrator to make orders affecting non-parties was not necessarily determinative of whether the subject matter of the dispute was itself arbitrable (at [40]). It was necessary, in his view, to ascertain in each case whether the matter engaged third party rights or involved public interest such that it could not be determined by arbitration.

67 It is noteworthy that the relief sought in *Fulham* was limited, *ie*, an injunction or order for the defendant to resign. Even though the claim included the prayer for "relief as the court shall think fit", there was no possibility of a buy-out or winding up orders on the facts of the case (at [46]–[48]). It followed, Patten LJ reasoned, that the plaintiff's argument could not turn on the precise relief sought. Rather, he found that "any unfair prejudice claim under s 944 attracts a degree of state intervention and public interest such as to make it inappropriate for disposal by anything other than judicial process" (at [50]).

68 In determining the extent to which an unfair prejudice claim was arbitrable, Patten LJ distinguished between the underlying issue in the dispute and the remedy sought. He considered that (at [77]):

> *The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator* and it is common ground that an arbitral tribunal constituted under the FAPL or the FA Rules would have the power to grant the specific relief sought by Fulham in its s.994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. *Nor does the determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction. A dispute*

> *between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties.* The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and FAPL Rules in relation to the transfer of a Premier League player. [emphasis added]

69 Further, Patten LJ explained that (at [61]):

> I accept, of course, that some of the relief which can be granted under s.996 is capable of affecting third parties: e.g. orders for the regulation of the company's affairs or restraints upon its power to make alterations in its articles. Orders of this kind will inevitably impact on other shareholders who can be joined to court proceedings for the purpose of being bound by any order. But that does not make a s.994 petition an application for a class remedy. *What it may, however, do is to impose limitations on the scope of relief obtainable in arbitral proceedings.* [emphasis added]

70 Patten LJ went on further to say, in *obiter dicta*, that the arbitration agreement would "operate as an agreement not to present a winding up petition unless and until the underlying dispute has been determined in the arbitration" (at [83]). In his view, the arbitrator could "decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy" and even "give directions for the conduct of the company's affairs" (at [83]). In such instances, the party would then be entitled to seek such relief from the Court under s 994. He also suggested that it would be possible for non-parties (who might be affected by the relief granted) to air their views before the arbitrators (at [83]). Ultimately, he found, these "jurisdictional limitations" were no more

than "practical consequences" of choosing arbitration, and did not influence whether the subject-matter is arbitrable (at [84]).

71 I should also address the earlier decision of *Exeter City Association Football Club Ltd v Football Conference Ltd and another* [2004] 1 WLR 2910 ("*Exeter City*"), where the judge came to a different conclusion on this issue.

72 In *Exeter City*, the petitioner, Exeter City AFC Ltd, filed a petition for relief under s 459 of the Companies Act 1985 (the equivalent of s 216 of the CA) alleging that the affairs of the first respondent, Football Conference Ltd (in which it was a shareholder), were being conducted in a manner unfairly prejudicial to it. The first respondent applied for a stay of the proceedings under s 9 of the UK AA 1996 by reason of the arbitration clause in r K of the Rules of the Association to which both parties were members and by which both have agreed to be bound. The stay application before HHJ Weeks QC (sitting as a Judge of the High Court) raised the question of whether an action for unfair prejudice under s 459 of the Companies Act 1985 was arbitrable. HHJ Weeks QC held that it was not.

73 HHJ Weeks QC considered that the right to apply for relief under s 459 was an inalienable right. He explained (at [21]–[23]):

> 21 As to section 9, it is common ground that there are some disputes which are not susceptible to arbitration and that section 9 does not apply to such disputes. There is a tension here between reserving matters of public interest to the courts and the public interest in the encouragement of arbitration. In *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [[1999] VSC 170], Judge Warren held that the right of a contributory to apply to the court for a winding up order could not be limited by agreement and refused to stay a winding up petition because it did not fall within the scope of the discretionary provisions of section 53 of the Commercial Arbitrations Act 1984.

> 22 I find her reasoning compelling and I can see no difference in principle for this purpose between a winding up petition and a petition under section 459. If the right to petition to wind up conferred on every single shareholder is a condition of incorporation under the Companies Act 1985, then so in my judgment is the right to petition for relief for unfair prejudice. In *Re Magi Capital Partners LLP* [2003] EWHC 2790 (Ch), leading counsel, probably with the Australian authority in mind, conceded that a limited liability partnership was a creature of statute and that it was not possible to exclude the statutory right to apply to have the statutory entity wound up by the court. The Companies Court has jurisdiction to wind up a company or limited liability partnership, and *the same court has supervisory powers, designed to give protection to shareholders by enabling them to apply to the court for special relief. In effect, the court controls by statute the creation and extinction of the company, and it also attends to it during midlife crises*.
>
> 23 The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise. …
>
> [emphasis added]

74 However, Patten LJ did not agree with the reasoning of HHJ Weeks QC, and *Exeter City* was overruled in *Fulham* (at [78]). I note that *Exeter City* was cited by the Court of Appeal in *Larsen Oil* (at [39]). The Court of Appeal did not comment on the position taken by HHJ Weeks QC as it was not in issue there, but merely opined that *Exeter City* was not a useful case for its purposes because it did not provide guidelines as to how the determination of whether a claim was arbitrable should be made.

*Australia*

75 The current position in Australia is that a minority oppression claim is arbitrable, insofar as the remedies sought are *inter partes* and not *in rem*.

76 To appreciate the Australian position on the arbitrability of a minority oppression claim, it would be pertinent to first consider the decision of *A Best*

*Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 ("*Skyer*"), where the Victoria Supreme Court held that the issue of winding up was not arbitrable.

77 The parties, A Best Floor Sanding Pty Ltd ("ABFS") and Skyer Australia Pty Ltd ("SAPL"), entered into a joint venture to merge their businesses. A new corporate entity, Harvest Building Products ("HBP"), was formed as a result. Some disputes arose and SAPL issued an application for a contributory's winding up of HBP. ABFS then applied to have the winding up application stayed on the ground that the dispute between the parties was subject to the arbitration clause in the joint venture agreement.

78 Warran J refused to grant the stay on the basis that the arbitration clause in the joint venture agreement was "null and void" because it had the effect of obviating the statutory regime for the winding up of a company. In particular, Warran J stated (at [13]) that:

> The Corporations Law controls by statutory force the creation and demise of the company; it oversees the birth, the life and death of the company. Such matters cannot and ought not be subject to private contractual arrangement.

79 Further, he highlighted (at [15]) that:

> … there exists a statutory structure setting out the manner in which applications for the winding up of a company are to be made, the persons or parties who are permitted under the Law to make an application for the winding up of a company and, most significantly, the effect of a winding up order on creditors and contributories. …

80 This approach taken by Warran J was doubted by the New South Wales Supreme Court in *ACD Tridon* where Austin J concluded that, as a matter of construction, the minority oppression claims fell outside the scope of

the arbitration clauses. However, he went on to make several observations on the arbitrability of minority oppression claims.

81 Austin J accepted that the position in Australia was that statutory claims might be arbitrable (at [181]). However, the arbitrability of statutory claims was subject to limitations. One of the limitations was identified as the types of remedies that an arbitrator can award. Austin J cited Sir Michael Mustill and Stewart Boyd, *Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Mustill & Boyd*") for this proposition (at pp 149–150):

> Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. …

82 Austin J opined that the decision in *Skyer* was "partly based on public policy considerations surrounding the process of winding up a company pursuant to court order", supported by the fact that "a winding up order operates to affect the rights of third parties, not merely the rights of the parties to the arbitration clause" (at [191]).

83 However, Austin J did not think that it necessarily followed that all questions arising out of the Corporations Act would be non-arbitrable. He pointed out that the statutory powers of the Court under the Corporations Act were comparable to the powers of the Court under general law, except for the power to order winding up (at [193]).

84 Significantly, Austin J went on to say in *obiter dicta* that (at [194]):

> Specifically, the public policy considerations held by Warran J to be applicable to a disputed claim to wind up a company *do not seem to me to prevent the parties from referring to*

> *arbitration a claim for some merely inter partes relief under the oppression provisions of the Corporations Act*, or for access to corporate information under s 247A. However, the 'in rem' nature of an order for rectification of the share register of a company may prevent reference of that power to an arbitrator. [emphasis added]

Austin J was thus drawing a distinction between *inter partes* and *in rem* remedies (see also Perry Herzfeld, "Prudent Anticipation? The Arbitration of Public Company Shareholder Disputes" (2008) 24 Arbitration International 297 ("*Prudent Anticipation*") at p 324). I agree that a distinction must be drawn and will comment on this in greater detail below.

*Canada*

85 The case law in Canada is split on whether a minority oppression claim is arbitrable.

86 On the one hand, there are cases where the courts have considered that minority oppression claims were arbitrable and that the arbitral tribunals had the power to grant all the remedy or relief available to the courts (see *Kints v Kints* [1998] OJ No 3244 ("*Kints*") and *Tremblay v Acier Leroux* [2004] RJQ 839 ("*Tremblay*")).

87 In *Kints*, a decision of the Ontario Court of Justice, the issue was whether a stay should be granted in favour of arbitration with regard to the minority oppression claim. Heeney J held that the minority oppression claim fell within the scope of the arbitration clause. Significantly, he opined that the applicant was not prejudiced by the decision to grant a stay of proceedings as "arbitration is a level playing field, and the arbitrator has the power to make virtually any award that this Court could make" (at [26]).

88 A similar conclusion was reached in the Quebec Court of Appeal decision of *Tremblay*. The Court faced the issue of whether an arbitration clause in a shareholders' agreement had the effect of ousting the jurisdiction of the Court to decide a minority oppression claim seeking injunctive relief and damages. It held that a minority oppression claim was arbitrable. In arriving at this outcome, the Court relied on the decision of *Desputeaux v Éditions Chouette (1987) Inc* [2003] 1 SCR 178 ("*Desputeaux*"), where LaBel J analysed the approach that courts should take in determining whether a particular subject matter was one of public order which would preclude it from being arbitrable. LaBel J, in *Desputeaux*, observed (at [51]) that non-arbitrability was based on the objective of preserving "certain values that are considered to be fundamental in a legal system". Applying *Desputeaux*, the Court in *Tremblay* concluded that a minority oppression claim was arbitrable (at [35]) as:

> … a shareholder's oppression remedy is not one that it is necessary to have adjudicated by a court, to use his words, in order 'to preserve certain values that are fundamental in a legal system'. The mere fact that there are allegations of fraud or bad faith in an oppression remedy is not enough to engage issues of fundamental values that are comparable to the legal status of persons.

89 For the reasons that I will explain later, I do not agree that arbitral tribunals have the power to grant all the remedies or reliefs that are available to the courts. It follows that this approach cannot be adopted in Singapore.

90 On the other hand, there are courts in Canada that have adopted a two-stage procedure whereby the Court would allow the tribunal to first decide on the question of oppression, and if the tribunal found there was oppression, then the case could be taken back to Court (see *ABOP LLC v Qtrade Canada Inc*

(2007) 284 DLR (4th) 171 ("*ABOP*")) This is, to some extent, similar to the approach in *Fulham*.

91 In *ABOP*, the British Columbia Court of Appeal agreed with the trial judge that the dispute should be dealt with by arbitration. This was notwithstanding that both the trial judge and Court of Appeal agreed that the minority oppression claim was a "court matter" and "within the exclusive jurisdiction of the court" (at [12] and [26]). In order to do so, the British Columbia Court of Appeal accepted that:

> The arbitrator will make all the necessary findings of fact and come to a decision on the issues before him. If he finds in favour of Qtrade then there will be no foundation for an oppression action. If he finds in favour of ABOP it can carry on with the oppression petition to the court.

92 It is interesting to note that the British Columbia Court of Appeal did not adequately address the observations of the Northern Ireland Court of Appeal in *Wines Inn* that there would be "complexity and inconvenience" in following such a procedure. The British Columbia Court of Appeal merely stated that procedural complexity "cannot form the basis for the determination of this case" and there was no reason not to give effect to the parties' wishes to arbitrate their disputes (at [24]). In its view, the involvement of the Court might be delayed, but its jurisdiction would not be ousted.

93 *ABOP* had since been followed by Myers J in *1462560 Ontario Inc v 636381 BC Ltd* (2011) BCSC 886 at [10]–[13].

***The approach in Singapore***

*Arbitrability of statutory claims and remedies*

94 The inherent consensual nature of arbitration, resting on an agreement between the parties, necessarily limits its application to third parties. Consistent with this theory is the confidential nature of arbitration – it only involves the parties to the agreement; the public and third parties are not entitled to witness the proceedings nor are they, subject to certain exceptions, entitled to the documents generated by the process. In theory, the decision of the arbitral tribunal can only bind the parties to the arbitration agreement. In practice, however, the effects and ramifications of arbitral awards can affect third parties but that occurs incidentally as a result of the effect of the award on the parties to the arbitration agreement. What an arbitral tribunal has no power to do is to make orders that are binding on "third parties", putting to one side the grey area in *Dallah*-type situations (*Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 was a case where an arbitral tribunal, sitting in Paris, found that the respondent, the Government of Pakistan, was a "true party" to an arbitration agreement notwithstanding that it was within an agreement made between the appellant and the Awami Hajj Trust. The appellant failed to obtain enforcement of the award before the English High Court, Court of Appeal and the Supreme Court).

95 Unlike an order for damages, which is essentially *inter partes* and can be granted by the arbitral tribunal pursuant to its power derived from the consent of the parties to the arbitration, there are some statute-based reliefs that would invariably affect third parties or the public at large such that they can only be granted by the courts in the exercise of their powers conferred

upon them by the state. Examples include a judgment *in rem* against a vessel under the admiralty jurisdiction of the Court and an order to wind up a company under the CA.

96 The decisions *in rem* have always been within the remit of the national courts, resting on constitutional or statutory powers and backed by coercive powers, and they take effect, with rare exceptions, within the jurisdiction of the national courts and not extra-territorially. In the *Review of Arbitration Laws, LRRD No 3/2001* by the Review of Arbitration Act Committee, which was set up in 1997, section 2.37.17 states:

> … Subject matter arbitrability has a direct impact on the jurisdiction of the tribunal and is also arguably a matter of public policy as to which subject matters are incapable of arbitral resolution. It is generally accepted that issues, which may have public interest elements, may not be arbitrable, e.g., citizenship or legitimacy of marriage, grants of statutory licences, validity of registration or trade marks or patents, copyrights, winding-up of companies, bankruptcies of debtors, administration of estates.

97 In *Larsen Oil*, as I have noted earlier ([30]–[31] above), the liquidator sought to avoid certain payments made under insolvency based on the avoidance provisions. It was argued that the avoidance claims should have been stayed in favour of arbitration given that there was an arbitration agreement between the parties. The Court of Appeal refused to grant the stay of proceedings under s 6 of the IAA. In this regard, the Court of Appeal opined (at [46]) that:

> … the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. *The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable even if the*

> *parties expressly included them within the scope of the arbitration agreement.* [emphasis added]

This is because the focus of avoidance provisions was to address situations which adversely impacted the interests of third parties, *ie*, creditors, which had to be protected. The Court of Appeal stated (at [30]) that insolvency and bankruptcy law were areas replete with public policy considerations that were too important to be settled by parties privately through the arbitral process.

98 However, the Court of Appeal in *Larsen Oil* drew a distinction between claims that arose only upon the onset of insolvency and disputes that stemmed from pre-insolvency rights and obligations; the latter were generally suitable for the arbitral process. For instance, the amount due to a party from the subsequently insolvent company could be determined by arbitration as the proof of debt process did not create new rights in the creditors or destroy old ones (see *Larsen Oil* at [51], citing *Wight and others v Eckhardt Marine GmbH* [2004] 1 AC 147).

99 The Court of Appeal in *Larsen Oil* pointed out that the concept of arbitrability was dealt with in ss 11 and 31(4) of the IAA and in s 48(1)(*b*)(i) of the AA, and noted that the drafters of the IAA and AA regarded the question of arbitrability as being subject to public interest considerations. However, the Court of Appeal noted that these provisions did not provide any guideline as to the type of claims that were or were not arbitrable. In the words of the Court of Appeal in *Larsen Oil* (at [44]):

> The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, *unless it is shown that*

> *parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.* [emphasis added]

The Court held it was ultimately for the "courts to shape the contours of the arbitrability exception" (at [24]).

100 The Court of Appeal in an earlier decision had also confirmed, albeit *obiter*, that an arbitral tribunal had no power to grant an order for winding up; in its view, winding up was a relief that could only be granted by the courts (see *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR(R) 382 ("*Four Pillars*") at [23]). In a case commentary, Michael Hwang SC and Rajesh Muttath, "The Singapore Court of Appeal refuses to stay winding up proceedings in favour of arbitration" (2001) 19 ASA Bulletin 380, the authors referred to the inherent limits of an arbitrator's power and observed that:

> Winding up is essentially a class remedy, and it almost invariably affects the rights of persons other than the parties to the arbitration agreement. For instance, all the creditors of the company will be affected by a winding up order, and it is not usual to have an arbitration agreement to which all the creditors are parties, or a situation where the parties to an arbitration agreement are the only creditors of the company. On the other hand, *arbitrators are not generally allowed to make a decision binding on third parties (e.g. in rem decisions) since they are appointed by the parties (and not by the sovereign) and their authority derives from the arbitration agreement.* The non-arbitrability of winding up may be attributed to this conceptual and practical difficulty. [emphasis added]

101 This view is well supported by other academic commentators. According to the authors of *Mustill & Boyd* (at pp 149–150):

> The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award, is capable of being settled by arbitration. This principle must be understood, however, subject to certain reservations… *Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state*. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affect the public at large, such as a judgement in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order or a decision that an agreement is exempt from the competition rules of the EEC under article 85(3) of the Treaty of Rome. It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration: indeed, examples of each of these types of dispute being referred to arbitration are to be found in the reported cases. [emphasis added]

102 Similarly, Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2009) ("*International Commercial Arbitration*") at p 768 states that:

> … the types of claims that are non-arbitrable differ from nation to nation. Among other things, classic examples of non-arbitrable subjects include certain disputes concerning consumer claims; criminal offences; labour or employment grievances; intellectual property; and domestic relations. The types of disputes which are non-arbitrable nonetheless almost always arise from a common set of considerations. *The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect.* [emphasis added]

103 Whilst I completely agree with the *obiter dicta* of the Court of Appeal (in *Four Pillars*) and the views expressed by the academic commentators, I notice that the oft-overlooked s 12(5) of the IAA appears to point in another direction. Specifically, s 12(5) of the IAA provides that the arbitral tribunal "may award *any remedy or relief that could have been ordered by the High*

*Court* if the dispute had been the subject of civil proceedings in that Court" [emphasis added].

104 Unfortunately, the Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Sub-Committee on Review of Arbitration Laws* (August 1993) (Chairman: Thean Lip Ping) ("1993 Report") does not assist in the interpretation of s 12(5) of the IAA. The 1993 Report recommended that "the power of arbitrators to grant civil reliefs based on certain statutes" should not be characterised as contrary to public policy (at [28]). This was reflected as s 11(1) of the Draft International Arbitration Bill ("Draft Bill"), which read:

> For the purposes of interpreting Article 34(2)(*b*)(ii) of the Model Law, it is declared that reliefs granted by an arbitrator based on specific statutes empowering a court or relevant authority to do so is not contrary to public policy.

It did not specify if it was intended to cover all statute-based reliefs including those that might have an effect on third parties or the general public. In any event, it was deleted from the final bill as there were concerns that "this sub-clause may overly restrict the power of the court to set aside awards on public policy grounds" (see para 4(b) of the "Supplementary Note on Bill" which prefaces the 1993 Report).

105 It would appear that the wording of s 12(5) of the IAA was inspired by the New Zealand, Law Commission, *Arbitration* (NZLC R20, 1991) (President: Sir Kenneth Keith KBE) ("1991 Report") and that may provide some indication on its purpose and ambit. Section 12(1) of the New Zealand Arbitration Act 1996 (Act No 99 of 1996) ("NZ AA 1996") is similar to s 12(5) of the IAA:

> **12 Powers of arbitral tribunal in deciding disputes**

> (1) An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal
>
> (a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court;
>
> (b) may award interest on the whole or any part of any sum which
>
> (i) is awarded to any party, for the whole or any part of the period up to the date of the award; or
>
> (ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.
>
> …

106 The discussion in the 1991 Report on s 12 of the NZ AA 1996 (which was s 10 of the New Zealand draft Bill) is instructive:

> 252. The spelling out of the powers of an arbitrator in s 10 reflects the reservations of the Law Commission about relying entirely on the proposition that, where New Zealand law is applicable to the substance of a dispute, it is an implied term of the arbitration agreement that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter.
>
> …
>
> 255. To avoid any possible doubt about the powers of the arbitral tribunal where the parties have, in general terms, agreed to submit disputes between them to arbitration, the Law Commission proposes the inclusion of a specific provision in the draft Act. Rather than list specific implied powers of an arbitral tribunal – an approach which is problematic in ensuring that the list is complete, both at the time of its enactment and as later statutes bearing on the powers of the High Court are enacted – the Commission has preferred a more general statement on the lines of the proposition quoted in para 252 above.
>
> …
>
> 258. *Section 10 falls short of completely assimilating the powers of an arbitral tribunal to those of the High Court. Obviously, the power to grant a remedy or relief does not*

> *include the High Court's coercive powers*. Moreover, the question whether an arbitral tribunal may become seized of a particular dispute and may award a particular remedy are *still subject to the overriding considerations of arbitrability and public policy*. This is the reason for the saving provision in subs (3).
>
> 259. Given this safeguard, we consider that the proposed s 10 can safely be relied upon to adapt, where appropriate, references in enactments to the powers of the courts generally, or of the High Court in particular, so as to permit of their application by an arbitral tribunal. Under the present law, specific provision for the exercise of the court's powers by an arbitrator is made in or by the Frustrated Contracts Act 1944, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979 and the Contracts (Privity) Act 1982. But no such provision was included in the Minors' Contracts Act 1969, the Illegal Contracts Act 1970, or the Credit Contracts Act 1981. The question of an adverse inference therefore arises. There are also the problems of keeping references to arbitration in specific Acts up to date and ensuring that they are included as appropriate in new legislation. We accordingly propose the repeal of the references to arbitrators made in or by the four contracts statutes listed above. See s 13(2) and Schedule 4. *The effect of s 10 is that, subject to the agreement of the parties under article 28 of Schedule 1, an arbitral tribunal will be able to apply any provision of any of the contracts statutes or any other relevant enactment conferring powers on the court, except so far as its application by the arbitral tribunal may be excluded by considerations of arbitrability or public policy*.
>
> [emphasis added]

107 Notably, the NZ AA 1996 provides in s 12(2) that "[n]othing in this section affects the application of section 10 or article 34(2)(b) or article 36(1)(b) of Schedule 1." It expressly states that the power of the arbitral tribunal is subject to the restrictions of arbitrability and public policy. While there is no equivalent provision in the IAA, the position in my view must be the same. As noted earlier ([104] above), s 11(1) of the Draft Bill was removed because the Law Reform Commission was concerned with unduly restricting the considerations of arbitrability and public policy.

108 In addition, the judicial pronouncements from New Zealand provide assistance on the construction of s 12(5) of the IAA. Although the power of the arbitral tribunal under s 12(1) of the NZ AA 1996 may be broad, it is not without limitation (see *General Distributors Ltd v Casata Ltd* [2006] 2 NZLR 721 at [49]–[51] and *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh"* [2001] 2 NZLR 801 ("*Raukura Moana*") at [45]–[47]).

109 In particular, Young J in *Raukura Moana* considered (at [45]–[47]) that:

> [45] The fundamental problem in this case is that arbitral tribunals established pursuant to the charter agreements would not have an in rem jurisdiction in respect of the ships. The reason is simple enough: judgments in rem in respect of these vessels would bind parties who are, themselves, not subject to the arbitration agreement. *An arbitral tribunal does not have the power to bind parties who are not subject to the arbitration agreement.*
>
> [46] The parties did not seek to argue otherwise. Nonetheless, and for the avoidance of any doubt, I record that, in reaching this view, I have had regard to ss 10(2) and 12(1)(a) of the Arbitration Act 1996.
>
> [47] *In my view, s 10(2) should be construed as applying only to legislative provisions that apply inter partes* (eg as to an entitlement to claim interest under the Judicature Act 1908 or the particular provisions which may govern contractual rights pursuant to, for instance, the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, and the Contractual Remedies Act 1979). *The same is true of s 12(1)(a).*
>
> [emphasis added]

110 Young J also pointed out the possibility that "the inability of an arbitrator to make an award *in rem* meant that the present claims by the plaintiff were not properly justiciable by way of arbitration" (at [48]–[51]). However, this point was not considered or developed further.

111 In my judgment, s 12(5) of the IAA clearly cannot be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court. It has a more limited purpose, (see [106] above), and an arbitral tribunal clearly cannot exercise the coercive powers of the courts or make awards *in rem* or bind third parties who are not parties to the arbitration agreement.

*Statutory claims that straddle the line between arbitrability and non-arbitrability*

112 From the foregoing authorities, it is clear that some statutory claims and/or remedies are solely within the purview of the courts, *eg*, winding up of a company, granting a judgment *in rem* in admiralty matters, avoidance claims, bankruptcy and matrimonial matters, and criminal prosecutions.

113 However, just because a statutory claim *may* be redressed or remedied by an order that is only available to the courts, that does not mean the claim is automatically rendered non-arbitrable. It may well straddle the line between arbitrability and non-arbitrability depending on the facts of the case, the manner in which the claim is framed, and the remedy or relief sought.

114 This is well-illustrated in *Larsen Oil*, where the Court of Appeal observed, in relation to the claim based on s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("CLPA"), that it "is one that may straddle both a company's pre-insolvency state of affairs, as well as its descent into the insolvency regime" (at [55]). As noted above , the Court of Appeal drew a distinction between "disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency

regime" (at [45]–[46]). It was considered that only the latter is treated as non-arbitrable *per se* (at [46]). It follows that a claim under s 73B of the CLPA is one that may or may not be arbitrable, depending on whether the company was insolvent at the material time. This is apparent from the illustrations given by the Court of Appeal (at [55]–[56]):

> For example, a debtor may try to dissipate its local assets in anticipation of a creditor obtaining judgment against him. The debtor may have other foreign assets such that it remains solvent even after such dissipation, the only problem being the creditor's ability to enforce its judgment debt against the debtor in those foreign jurisdictions. In such a case, a s 73B CLPA claim commenced by the creditor has nothing to do with the insolvency regime.
>
> …
>
> On the other hand, for cases like *Quah Kay Tee*, where the creditor's claim is based on the debtor's conveyance of property despite of (or causing) its insolvency, there is no need for any finding of express fraudulent intention in order to sustain a claim under s 73B of the CLPA. Instead, the essence of the claim is that the debtor has transferred property to another despite (or thereby causing) its insolvent status, to the detriment of the creditor. This makes it similar to a claim based on unfair preference or transaction at undervalue under ss 98 and 99 of the BA respectively, where the prerequisite is that the debtor must be either insolvent at the time of the transaction, or had became insolvent in consequence of it (s 100(2) of the BA). *In our opinion, a s 73B CLPA claim* ***framed in such a manner*** *must be regarded as one that is intimately intertwined with insolvency, since it is entirely contingent on the insolvent status of the debtor.*
>
> [emphasis added in italics and bold italics]

Indeed, the Court of Appeal went on to say (at [57]) that the s 73B CLPA claim by Petroprod was "based on the insolvency" at the material time. On this basis, the Court of Appeal held (at [58]) that the s 73B CLPA claim was "in fact an insolvency claim that is non-arbitrable".

*Minority oppression claims under s 216 of the CA*

115 To ascertain the arbitrability of a minority oppression claim in Singapore, it is necessary to examine, in some detail, ss 216(1) and (2) of the CA:

> **Personal remedies in cases of oppression or injustice**
>
> **216**.—(1) Any member or holder of a debenture of a company … may apply to the Court for an order under this section on the ground —
>
> > (*a*) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
> >
> > (*b*) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of such grounds is established the Court may, *with a view to bringing to an end or remedying the matters complained of*, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —
>
> > (*a*) direct or prohibit any act or cancel or vary any transaction or resolution;
> >
> > (*b*) regulate the conduct of the affairs of the company in future;
> >
> > (*c*) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;
> >
> > (*d*) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

> (*e*) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
>
> (*f*) provide that the company be wound up.
>
> [emphasis added]

116 From a plain reading of s 216(2) of the CA, it is clear that the order must be made "with a view to bringing to an end or remedying the matters complained of". Consequently, the nature and extent of the minority oppression would affect the type of remedy that the Court may impose under s 216 of the CA. In this sense, the remedy or relief to be granted for a minority oppression claim under s 216(2) of the CA is inextricably linked to the claim in s 216(1).

117 This view is consistent with the decision in *Kumagai Gumi Co Ltd v Zenecon Pte Ltd and other appeals* [1995] 2 SLR(R) 304, where the Court of Appeal stated (at [71]) that:

> In our opinion, there is a limitation on the order which the court can make under s 216. The order to be made must be made 'with a view to bringing an end or remedying the matters complained of' and we agree that 'the matters complained of' mean matters rightly complained of. Nevertheless, *subject to this limitation, the jurisdiction* to make an order under that section *is very wide. Much depends on the matters complained of and the circumstances prevailing at the time of hearing.* [emphasis added]

118 Similarly, the Court of Appeal in *Low Peng Boon v Low Janie and others and other appeals* [1999] 1 SLR(R) 337 noted (at [55]) that:

> Each of the remedies enumerated therein ranks equally: *Re Kong Thai Sawmill (Miri) Sdn Bhd* ([43] *supra*) at 233 per Lord Wilberforce and *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 1 SLR(R) 795. The court has *an unfettered discretion to make such order as it thinks most appropriate. Each case has to be considered on its own merits.* [emphasis added]

119 According to *Walter Woon on Company Law* (Tan Cheng Han, SC gen ed) (Sweet & Maxwell Asia, Revised 3rd Ed, 2009) at 5.96, s 216(2) of the CA gives the Court "the power to 'make such order as it thinks fit', a wide discretion that allows the court to tailor the order to remedy the mischief complained of".

120 The remedy ordered under s 216(2) of the CA is invariably linked, usually inextricably, to the nature and extent of the commercial unfairness or unfair prejudice itself. It must follow that the arbitrability of the remedy sought could affect the arbitrability of the claim. In light of the broad remedial powers conferred upon the courts under s 216(2) of the CA, some of which cannot be made by the arbitral tribunal, it would appear that the minority oppression claim is one of those statutory claims that straddles the line between arbitrability and non-arbitrability.

*What should the Singapore approach be?*

121 The authorities surveyed above indicate the following approaches to a claim under s 216 of the CA:

(a) first, adopt the two-stage approach in *ABOP* by leaving the arbitral tribunal to make all the necessary findings of fact and whether there has been unfair prejudice or commercial unfairness and where the tribunal finds there was oppression, then the oppressed minority shareholder can carry on with the minority oppression claim before the Court and it is for the Court to make the appropriate orders, including winding up;

(b) secondly, adopt a broad reading of *Fulham* and allow all minority oppression claims to go for arbitration; if the arbitral tribunal is of the view that a winding up or buy-out order is appropriate, then the parties can go to Court to obtain the necessary orders, but if not, the award takes effect in the normal way; in the former case, the Court adopts the findings and remedies proposed by the arbitrator and merely proceeds to enforce the same by making the appropriate orders, *eg*, a winding up or buy-out order or cancel or vary a resolution; and

(c) thirdly, if there are more than two shareholders and only some shareholders are bound by the arbitration agreement, then the Court should allow those shareholders bound by an arbitration agreement to proceed to arbitration and in the exercise of the Court's inherent powers of case management, stay all the proceedings in relation to those shareholders not bound by the arbitration agreement until the award is made and only then proceed with the s 216 claim in Court; and

(d) fourthly, adopt an approach analogous to *Exeter City* that all minority oppression claims under s 216 of the CA are, as a matter of public policy, non-arbitrable.

122 Each one of the above approaches can run into great practical and legal difficulties and result in unsatisfactory outcomes and conflicts.

123 In the first, the *ABOP* approach, there is an inherent risk that the Court might disagree with the arbitral tribunal. This disagreement can operate at two levels: first, disagreement on the findings of fact as to the nature, type and extent of the oppression, and secondly, disagreement with the suggested as to

the appropriate order to remedy or bring to an end such oppression. Where there is disagreement, is the Court entitled to ignore the finding of oppression and/or refuse to grant the remedy recommended by the arbitral tribunal? If the answer is no, then two questions arise: first, should the arbitrator's finding of oppression be considered as an arbitral award such that the Court is obliged to give effect to it under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and secondly, can the courts be disentitled to consider the merits even though they are required to exercise their powers to grant appropriate *in rem* remedies? On the other hand, if the answer is yes, then it might be pointless to let the dispute go to arbitration in the first place as the courts would have to rehear the entire dispute in order to be satisfied that there is oppression and that the *in rem* remedies should be granted. It cannot be the intention of parties to subject themselves to a multiplicity of proceedings; in fact, this approach obviates most of the advantages of arbitration, *eg*, quicker resolution, lower costs and confidentiality. Surely, this cannot be "pro-arbitration" in any sense of the word.

124 In the second approach, a broad reading of *Fulham*, many of the same problems that have been identified above at [123] will also arise. Moreover, there might be other shareholders who are not bound by the arbitration agreement and disagree with the recommendation of the arbitral tribunal to, for example, remove the chairman in *Fulham*. These other shareholders may think that the Sir David is a wonderful chairman and disagree with his removal.

125 *Fulham* thus has its detractors. In Harry McVea, "Section 994 of the Companies Act 2006 and the Primacy of Contract" (2012) 75 MLR 1123 at p 1132, the author writes:

> On the face of it, Patten LJ's approach has a certain degree of intuitive appeal. It is, after all, consistent with the facilitative party autonomy and, in its explicitly pro-arbitration stance, has the advantage of rescuing many disputes from a potentially costly and time-consuming judicial process. *Nevertheless, the practical merits of this approach are undercut to the extent that certain cases will effectively require a two-stage process*: first, a process whereby the arbitrator adjudicates on the dispute itself; and secondly, one by which the matter reverts to the courts in the event that the appropriate remedy is of a type not obtainable in arbitral proceedings (eg, it is a remedy that, in affecting third parties, requires the supervisory jurisdiction of the court). *Regrettably, the Court of Appeal proffered no guidance on the question of how, in the event that a court disagrees with any arbitral finding with regard to remedies, such a difference of opinion is to be resolved.* [emphasis added]

126 I am also not convinced that a broad reading of *Fulham*, given the unique facts of that case, should be applied as a general rule. As I have noted earlier ([67] above), there was no possibility of a buy-out or winding up orders on the facts of *Fulham* nor were they asked for. In Wendy Kennett, "Arbitration of Intra-Corporate Disputes" (2013) 55 Int JLM 333 at p 353, the author observed that:

> Although FAPL is hardly a typical private company, it does have a relatively small number of shareholders (20), and restrictions on the transfer of shares. Relational considerations are therefore comparatively high. Fulham Football Club was seeking an injunction or order to terminate conduct of the chairman that it was considered to be contrary to the rules of the Football Association, so that it could ensure that it was treated fairly in comparison with other clubs. *However, it is less clear that the factors favouring arbitration are present in more typical minority shareholder disputes. In the majority of cases the relationship between the shareholders has completely broken down, the case multiplies accusations, and the principal remedy is a buy-out. What is sought is*

> *compensation and catharsis – not preservation of a relationship*. Furthermore, the specialist determination required. In terms of share valuation to facilitate a buy-out, can be done by means of expert determination rather than arbitration. [emphasis added]

127 Accordingly, with respect, I have serious doubts whether a broad reading of the *Fulham* approach should be adopted in Singapore. That decision was probably correct on its unique facts with the issue being whether the chairman acted in breach of the Football Association and FAPL rules and the remedy sought being the prevention of the chairman from acting in a certain manner or termination of his chairmanship. There was no evidence of the other member clubs intervening in the court proceedings or objecting to the termination of his chairmanship. Further, FAPL was unique, as were its shareholders. In fact, a careful reading of the *Fulham* judgment shows that Patten LJ recognised some limitations (see *Fulham* at [65]–[66] and the excerpts set out at [68] and [69] above). I therefore do not read the ruling in *Fulham* as necessarily endorsing a rule of general application.

128 One of the key difficulties surrounding the arbitrability of minority oppression claims is the non-availability of winding up and the other remedies that only a Court can make. This has been highlighted by academic commentators. In Michael J Duffy, "Shareholders Agreements and Shareholders' Remedies: Contract Versus Statute?" (2008) 20 Bond Law Review 1, the author, having examined both *Skyer* and *ACD Tridon*, noted (at p 11) that:

> … commercial arbitration will be allowable for *inter partes* relief though it may become problematic when the relief involves winding up action. In terms of the common remedies (as discussed below) it thus seems that to the extent that an oppression action seeks winding up as a form of relief there may be doubt as to whether the matter can, in the absence of mutual consent, be kept out of the courts … It seems to follow

> also that a dispute that was wider than that governed by the shareholders agreement and/or which involved other parties (such as the company) would not be required to be dealt with under the commercial arbitration clause.

129 In *Prudent Anticipation*, the author distilled some common threads from the cases that addressed the arbitrability of minority oppression claims (at p 324):

> *First, where the rights asserted will directly affect third parties, i.e. persons who are not parties to the arbitration agreement, it may prove difficult to convince a court to stay proceedings before it in favour of arbitration.* The courts in those circumstances seem to have a fairly strong ground upon which to base a holding that the matter is not capable of settlement by arbitration.
>
> *Secondly, public shareholder claims are particularly susceptible to arguments that it is contrary to the public interest that matters be referred to arbitration. The interaction between large groups of shareholders, directors and companies is complex. Legal rules have been developed to confine and mould those relationships in fairly invasive respects, such as the process requirements associated with derivative and class actions. Courts will likely find it difficult to accept that informal arbitration procedures, which may rely heavily on ad hoc decisions by the arbitral tribunal, can satisfactorily handle these relationships.* They are likely to be comforted greatly if a party which seeks a stay in favour of arbitration can explain to the court, with reference to pre-existing arbitration rules that will govern the proceedings, how the issues will be addressed.
>
> Finally, the views of courts as to what are proper subjects for arbitration change over time… As more such arbitrations take place in these permissive regimes, and as arbitration bodies develop greater expertise and procedural certainty in these areas, the concerns that courts may have are likely to become less compelling.
>
> [emphasis added]

130 As against these views, there are academic commentaries from Canada in support of the view that minority oppression claims should be arbitrable. In

Byron Shaw, "The Arbitrability of Oppression Claims" (2011) 69 The Advocate 21, the author argued (at p 26) that:

> Where all parties to the oppression claim are privy to the arbitration agreement and the dispute falls within the scope of the arbitration clause, the agreement to arbitrate should be enforced… Requiring parties to adjudicate the 'non-oppression' aspects of their dispute and to return to court seems unnecessary and inconsistent with the principle that a multiplicity of proceedings should be avoided at all costs. There is no apparent reason why an arbitrator should lack competence to make findings of oppression or to award a statutory equitable remedy under the BCA [Business Corporations Act].

131 A similar, albeit more balanced view, was expressed in Rebecca Huang, "Shareholder Dispute: Arbitrator's Power to Grant Statutory Oppression Remedy" (2010) 36 The Advocates' Quarterly 457 at p 468:

> … an arbitrator should have as broad as possible of a power to remedy shareholder disputes as long as such disputes are arbitrable and the parties have not expressly excluded statutory oppression remedies from the arbitrator's scope of powers. Court may still retain the narrow residual jurisdiction to intervene where an aggrieved shareholder would be deprived of an ultimate remedy through arbitration.

132 I acknowledge the possibility that if there are only two shareholders in a joint venture company with an arbitration agreement, or where all the shareholders are bound by an arbitration clause, then perhaps a minority oppression claim can be hived off to an arbitral tribunal for it to make findings as to whether there was any oppression. This would be in keeping with the "generous" construction of arbitration clauses laid down by the Court of Appeal in *Larsen Oil*. In such an instance, the arbitral tribunal would leave the choice of the remedy or appropriate order to the Court. Even then, there is the problem of whether the arbitral tribunal should also recommend what remedy would, in its view, be most appropriate. As I have discussed earlier ([123]

above), there is a possibility that the Court may disagree with the arbitral tribunal – can the Court then impose the remedy it considers appropriate with a view to bringing to an end or remedying the matters complained of? There might also be other difficulties, eg., a possible impact or concern about the solvency of the company and the interests of creditors that was not surfaced at the arbitration proceedings. Even if these difficulties are put to one side, what exactly is being sought for the purpose of enforcement if the arbitral tribunal had only made recommendations? For the reasons set out above, I have my doubts if an arbitral tribunal can and should make a declaration that the claimant is entitled to ask a Court to wind up the company or order a buy-out upon specified terms.

133 The third approach available to the Court, as set out at [121(c)], also has its problems when applied to the present case. Significantly, the Plaintiff and the 2nd Defendant are the only parties who are bound by the Arbitration Clause. The other defendants, especially the individuals, are implicated in the pleadings as having played a part in oppressing the Plaintiff. In *Fulham*, Patten LJ opined that the other shareholders could also be heard in the arbitration. That may well be in some cases, but it is equally, if not more likely, possible in such situations that the other shareholders would refuse to do so for tactical reasons (I hasten to emphasise that I make no such finding or nor take such a view on the facts of this case but raise this as a general hypothetical possibility). I doubt if these parties can be compelled to attend as witnesses, be asked to state their case, give their evidence (both documentary and oral) and thereafter be bound by the arbitral award. The arbitration may well proceed with only hearing the parties to the arbitration agreement and on that evidence, the arbitral tribunal has to reach a view and make its award. In the meantime, the Court may wish to exercise its inherent powers of case management and

stay proceedings until the arbitral award is made (see *Shanghai Construction (Group) General Co. Singapore Branch v Tan Poo Seng* [2012] SGHCR, citing *Reichhold Norway ASA and another v Goldman Sachs International* [1999] CLC 486, upheld on appeal, [2000] 1 WLR 173). With the benefit of the award, the Court then proceeds to hear the rest of the parties and the full panoply of evidence. What if, on hearing all the witnesses and evidence, some of which was not placed before the arbitral tribunal, the Court comes to a different conclusion either on its finding of oppression or the recommended remedy? It is settled law in Singapore that the courts do not re-open findings of fact of an arbitral tribunal and they can only set aside or refuse to enforce awards on limited grounds.

134 It is possible for the Court to stay the proceedings for the parties with an arbitration agreement and send them off to arbitration, and at the same time, proceed to hear the other parties who are not bound by the arbitration agreement. This will require the plaintiff to proceed on two fronts or coerce the other parties to join in the arbitration. None of these solutions are satisfactory and at an early stage, the Court is unlikely to be able to assess what each party's approach will be as the dispute unfolds and develops.

135 At this juncture, I should mention a useful procedural rule under Part 72 of the Supreme Court Rules 1970 (NSW) ("the NSW SCR 1970"), which we do not have in Singapore.

136 In *ACD Tridon*, Austin J recognised the inconvenience which would be caused by his holding that certain matters in the claim brought by the plaintiff would have to go to arbitration while others remain for the Court to hear – these included what he identified (at [204]) as "strains on the legal resources

of the parties, and a degree of duplication of the processes of information-gathering, evidence and factual determination". In that case, in the light of these potential difficulties, the plaintiff, Tridon, made a sensible proposal of having the Court refer all the matters not subject to the arbitration agreement to Mr Clarke QC, who had been appointed as the arbitrator, to hear as a referee of the Court under Part 72 of the NSW SCR 1970. Austin J held that this would achieve savings in costs by having "one concurrent hearing". Ultimately, it was suggested by Austin J that the best outcome would have been for the parties to withdraw the parts of the claims from arbitration and to have them all referred to Mr Clark QC as a reference from the Court, but it appeared that there was no such consent forthcoming. The reference of the remaining claims not caught by the arbitration agreement to the same person sitting as arbitrator, to hear as a referee of the Court under Part 72 of the NSW SCR 1970 (with the parties' consent), was therefore the most expeditious solution.

137 The 2nd Defendant suggested that I can make similar orders pursuant to the inherent jurisdiction of the Court.[30] Having considered the matter, I do not think this is possible. The power of the New South Wales Supreme Court to refer matters out from the province of the courts to be heard by a referee is made under the express statutory provision in Part 72, r 2(1) of the SCR 1970 which reads:

> **2 Order referring**
>
> (1) The Court may, in any proceedings in the Court, subject to this rule, at any stage of the proceedings, on

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30 2nd Defendant's Submissions at para 53.

> application by a party or of its own motion, make orders for reference to a referee appointed by the Court for inquiry and report by the referee on the whole of the proceedings or any question or questions arising in the proceedings.

The power to make such a rule and the procedure in turn stemmed from primary legislation in the form of the Supreme Court Act 1970 (NSW), s 124(2), which reads as follows:

> **124 Rule-making power**
>
> …
>
> (2) The rules may make provision for or with respect to:
>
> (a) the cases in which the whole of any proceedings or any question or issue arising in any proceedings may be referred by the Court to an arbitrator or referee for determination or for inquiry and report,
>
> …

Part 72 of the SCR 1970 has since been repealed and re-enacted as rr 20.13–20.24 in Div 3 of Part 20 of the Uniform Civil Procedure Rules 2005 (Reg 418 of 2005) (NSW).

138 In the absence of an express statutory provision allowing me to make such orders, I would hesitate to do so. Further, in the absence of a contractual agreement to refer matters to adjudication by a tribunal other than a Court, the Plaintiff is entitled to avail itself of the Court's processes. Under Singapore law, the referral of matters to an arbitrator is a purely consensual process. There is no power for me to otherwise order that the parts of the dispute not caught by the arbitration clause and those against the other defendants not party to it to also be heard at an arbitration or by the arbitrator as part of the Court's process, as was done in *ACD Tridon*.

139 A practical solution in the present case will be for the Plaintiff and all of the defendants to agree to submit their disputes to arbitration. All parties will then be before one tribunal and will be bound by that tribunal's decision. The possible complications which I have set out above may still arise thereafter, but they cannot be avoided and will have to be dealt with at the appropriate stage.

140 At the end of the day, despite the numerous and undeniable advantages of arbitration, it has its limitations in the context of minority oppression claims under s 216. A review of the non-exhaustive list of remedies under s 216(2) of the CA will illustrate these limitations. The arbitral tribunal can make findings and award damages or make specific orders *in personam* and *inter partes* that are binding on the parties before it to do or abstain from doing something. However, the arbitral tribunal will not have the general power to vary any transaction or resolution under s 216(2)(*a*) of the CA, *a fortiori* where it involves third parties, including shareholders who are not party to the arbitration agreement. Also, under s 216(2)(*d*) of the CA, absent any conferment of jurisdiction or power by the consent of the parties under the terms of reference or by a provision within the arbitration agreement or the articles of association or other agreement between the parties, or some other power by the law of the seat or the governing law, I do not think that an arbitral tribunal has the general power to order one shareholder-party to buy out the other shareholder-party on specific terms. *A fortiori* if there are other shareholders in the company who are not parties to the arbitration agreement and are therefore not bound by the arbitral award. Similar difficulties can be envisaged in the remedy contemplated by s 216(2)(*b*) of the CA in making an order regulating the future conduct of the affairs of the company or in s 216(2)(*e*) of the CA which includes the consequential order of providing for

a reduction in the company's capital after a compulsory buy-out. These factors militate towards the fourth approach set out in [121(d)] above.

141 In my judgment, the nature of a minority oppression claim and the broad powers of the Court under s 216(2) of the CA would mean that a minority oppression claim is one that may straddle the line between arbitrability and non-arbitrability. It would not be desirable therefore to lay down a general rule that all minority oppression claims under s 216 of the CA are non-arbitrable. It will depend on all the facts and circumstances of the case. No single factor should be looked at alone. Nor should the remedy or relief asked for assume overriding importance, as that would enable litigants to manipulate the process and evade otherwise binding obligations to refer their disputes to arbitration.

142 That said, except for those cases where all the shareholders are bound by the arbitration agreement, or where there are unique facts like *Fulham*, and the Court is satisfied that, first, all the relevant parties (including third parties whose interests may be affected) are parties to the arbitration and, secondly, the remedy or relief sought is one that only affects the parties to the arbitration, many if not most of the minority oppression claims under s 216 of the CA claims will be non-arbitrable. This will often be in cases where, *eg*, there are other shareholders who are not parties to the arbitration, or the arbitral award will directly affect third parties or the general public, or some claims fall within the scope of the arbitration clause and some do not, or there are overtones of insolvency, or the remedy or relief that is sought is one that an arbitral tribunal is unable to make.

***Application to the facts***

143 Applying these considerations to this case, there is no doubt that the Plaintiff's minority oppression claim against the 2nd Defendant is non-arbitrable. There are relevant parties, including other shareholders, who are not parties to the arbitration. The Plaintiff has also asked for remedies that the arbitral tribunal cannot grant, including winding up ([7] above). These two factors alone are sufficient for me to say that the Plaintiff's minority oppression claim is not arbitrable.

144 Accordingly, I find that the learned Assistant Registrar below was right to refuse a stay of proceedings under s 6 of the IAA.

**If part of the claim is stayed under s 6 of the IAA, should this Court exercise its inherent powers of case management to stay the entire proceedings?**

145 In light of the above, as no part of the claim was stayed, there is no longer any reason for me to address this issue. Also in light of the reasons set out above, this is not a case where I would necessarily have exercised my discretion to stay part of the claim pending the outcome of the arbitral proceedings (see [134] above). Be that as it may, this does not arise on the facts of this case.

**Conclusion**

146 Accordingly, the appeals in RA 334/2013, RA 336/2013, RA 341/2013 and RA 337/2013 are dismissed.

147 Costs should follow the event. The Plaintiff is to have the costs of these appeals to be taxed if not agreed.

Quentin Loh
Judge

Ong Min-Tse Paul (Allen & Gledhill LLP) for the plaintiff;
Palmer Michael Anthony and Chew Kiat Jinn (Quahe Woo & Palmer LLC) for the 1st, 5th and 8th defendants;
Sim Kwan Kiat, Avinash Vinayak Pradhan and Chong Kah Kheng (Rajah & Tann LLP) for the 2nd defendant;
Renganathan Nandakumar and Simren Kaur (RHTLaw Taylor Wessing LLP) for the 3rd defendant.

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