

Case Note

THE ARBITRATION AND LITIGATION OF MINORITY SHAREHOLDER DISPUTES

Tomolugen Holdings Ltd v Silica Investors Ltd
[2016] 1 SLR 373

The Court of Appeal has ruled that minority oppression claims are arbitrable, notwithstanding jurisdictional limits on the remedies that an arbitral tribunal may award, and the possibility of having to resolve such disputes across two *fora* – in arbitration and in court. However, is arbitration really suitable for resolving such disputes when: (a) there may be a public interest in such disputes; (b) the interests of parties who are not bound by the arbitration agreement may be affected; and (c) the remedy sought might be beyond the power of the tribunal to grant? These issues are explored in this case note.

Beatrice Mathilda **YEO** Li Hui*
LLB (Hons) (Singapore Management University);
Practice Trainee, Oon & Bazul LLP.

Fiona **CHEW** Yan Bei
LLB (Hons) (Singapore Management University);
Practice Trainee, Drew & Napier LLC.

I. Introduction

1 Parties who sign arbitration agreements may expect to never see the inside of a courtroom. Nonetheless, court proceedings can unfortunately precede, run concurrently with and succeed arbitral proceedings. For instance, parties to an arbitration may turn to the court where they seek to challenge the existence and scope of the arbitration agreement in court, commence parallel court proceedings or apply to court to set aside or to enforce an arbitral award. Arbitration, therefore, requires judicial support; as Paulsson put it, “the great paradox of arbitration is that it seeks the co-operation of the very public authorities

* The authors would like to thank Asst Prof Chen Siyuan and Mr Darius Chan for their helpful comments and suggestions. All errors remain the authors’ own. The views expressed in this article are entirely the authors’ own and should not be construed as representative or in any way reflective of the views of their respective employers.

from which it wants to free itself”.¹ Hardly anywhere is this co-operation stronger than in Singapore, where the “unequivocal judicial policy of facilitating and promoting arbitration”² has been instrumental in the rise of Singapore as one of the top five most preferred seats of arbitration worldwide.³

2 This pro-arbitration judicial policy is evident in the recent Court of Appeal decision of *Tomolugen Holdings Ltd v Silica Investors Ltd*,⁴ a landmark decision where the Court of Appeal rendered a judgment for the first time on issues such as the standard of review for stay applications under s 6 of the International Arbitration Act⁵ (“IAA”), the arbitrability of disputes over minority oppression under s 216 of the Companies Act⁶ (“CA”) and the approach to take when there are potentially overlapping issues to be resolved in court and arbitral proceedings.

3 In essence, the Court of Appeal decided, first, that a *prima facie* standard of review is appropriate when deciding whether to grant stay applications under s 6 of the IAA, as this would cohere better with the principle of *kompetenz-kompetenz*. Next, on the issue of arbitrability, the Court of Appeal again adopted an arbitration-friendly position by finding that disputes over minority oppression or unfairly prejudicial conduct are arbitrable, notwithstanding the jurisdictional limits of arbitral tribunals to grant specific kinds of relief such as winding up, as this section was not introduced to protect or further any public interest. The court then adopted a commonsensical approach in characterising the matter and finding that the arbitration agreement covered part of

1 Jan Paulsson, “Arbitration in Three Dimensions” London School of Economics Legal Studies Working Paper No 2 (2010) at p 2.

2 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28]. See also Andrew Phang Boon Leong, “Alternative Dispute Resolution and Regional Prosperity – A View from Singapore” Speech at the China-ASEAN Justice Forum 2014 at para 5.

3 Michael Pryles, “Singapore: The Hub of Arbitration in Asia” Singapore International Arbitration Centre website <<http://www.siac.org.sg>>; K Shanmugam, “International Dispute Resolution: The Singapore Perspective in an Evolving Landscape” Keynote speech at the 26th LAWASIA Conference 2013 (29 October 2013) at para 9; Sundaresh Menon, Address at the Opening of the Singapore International Mediation Centre (5 November 2014) at para 5; Sundaresh Menon, “International Commercial Courts: Towards an International System of Dispute Resolution” Opening Lecture for the Dubai International Financial Centre Courts Lecture Series 2012 (10 March 2015) at para 23; Indranee Rajah, Keynote Speech at the Litigation Conference 2015 (16 March 2015) at para 14; Queen Mary University of London & White & Case LLP, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (6 October 2015).

4 [2016] 1 SLR 373.

5 Cap 143A, 2002 Rev Ed.

6 Cap 50, 2006 Rev Ed.

the dispute. Finally, the court held that when there are potentially overlapping court and arbitral proceedings, an appropriate balance that ultimately serves the ends of justice must be struck.

4 After setting out the facts and holdings of the case in greater detail, this case note will discuss the following issues that may arise as a result of the Court of Appeal's judgment:

- (a) whether a *prima facie* standard of review should apply even when one party has alleged that no arbitration agreement exists between the parties;
- (b) whether s 216 claims may affect the public interest due to the varied remedies that may be awarded upon a successful s 216 claim;
- (c) how the arbitral tribunal is to decide on the issue of remedies and whether the court would give effect to the tribunal's opinion on remedies;
- (d) whether interpreting the parties' agreement to arbitrate as an agreement to arbitrate first and then obtain their remedy from the court later accords with the commercial sensibilities of rational businessmen; and
- (e) whether parties who never consented to arbitration may be compelled to arbitrate a matter.

II. Facts

5 The plaintiff was Silica Investors, a minority shareholder holding approximately 4.2% of the issued share capital of Auzminerals Resource Group Ltd ("AMRG"), the eighth defendant.

6 Silica Investors first acquired shares in AMRG from Lionsgate Holdings Pte Ltd ("Lionsgate"), the second defendant, by way of a share sale agreement ("the Share Sale Agreement"). Clause 12.3 of the Share Sale Agreement provided that "any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination" was to be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force.

7 The remaining six defendants were shareholders and current or former directors of Lionsgate, AMRG, or Solar Silicon Resources Group Pte Ltd, a subsidiary wholly owned by AMRG.

8 Silica Investors complained of oppression or unfair prejudice, and supported this with four broad categories of allegations:

(a) The first category, referred to as “the Share Issuance Allegation”, concerned a share issuance on 15 September 2010 that allegedly diluted Silica Investors’ shareholding in AMRG.

(b) The second category, referred to as “the Management Participation Allegation”, concerned Silica Investors’ alleged denial of its entitlement to participate in AMRG’s management.

(c) The third category, referred to as “the Guarantees Allegation”, concerned certain guarantees executed by AMRG on 11 July 2010, which were allegedly not in AMRG’s interest to execute.

(d) The fourth category, referred to as “the Asset Exploitation Allegation”, concerned AMRG’s expending of resources to identify and develop mining assets allegedly for the benefit of its majority shareholder.

9 Lionsgate applied under s 6 of the IAA for a stay of court proceedings against it in favour of arbitration, while the other seven defendants filed stay applications contingent on the success of Lionsgate’s application pursuant to the court’s inherent power of case management.

III. Decision of the Court of Appeal

A. *Threshold question: The standard of review in stay applications under s 6 of the IAA*

10 Before addressing the substantive issues, the Court of Appeal first considered the threshold question as to what standard of review the court should adopt in an application for a stay under s 6 of the IAA.⁷ This section mandates that the court stay proceedings relating to “any matter” covered by an arbitration agreement upon an application for a stay by a party to that agreement, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.⁸ The Court of Appeal noted that there was potential for friction to arise between s 6 of the IAA and the *kompetenz-kompetenz* principle, or the principle that the arbitral tribunal has the jurisdiction

7 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [24]–[70].

8 International Arbitration Act (Cap 143A, 2002 Rev Ed). See also Art 8(1) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006).

to determine its own jurisdiction,⁹ “because any determination made by the court on the existence and scope of the arbitration agreement may well intrude into the remit of the arbitral tribunal’s *kompetenz-kompetenz*”.¹⁰

11 After a detailed consideration of the *travaux préparatoires* of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration¹¹ (“the Model Law”), the positions in other jurisdictions and local case law on the subject, the Court of Appeal held that a *prima facie* standard of review should be adopted by a Singapore court hearing a stay application under s 6 of the IAA.¹² Accordingly, a court hearing a s 6 stay application:¹³

... should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case that:

- (a) there is a valid arbitration agreement between the parties to the court proceedings;
- (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
- (c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

12 Once the applicant has discharged this burden, then the court should grant a stay and “defer the actual determination of the arbitral tribunal’s jurisdiction to the tribunal itself”.¹⁴ Nevertheless, the arbitral tribunal’s determination of its jurisdiction will remain subject to overriding court supervision, as parties may yet appeal against the arbitral tribunal’s jurisdictional ruling, or apply to court to set aside or enforce the award rendered by the arbitral tribunal.¹⁵

9 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [25]–[27].

10 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [28].

11 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

12 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [63].

13 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [63].

14 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [64].

15 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [64]. See also ss 10(3), 24 and 31 of the International Arbitration Act (Cap 143A, 2002 Rev Ed); and Art 34 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006).

13 The Court of Appeal gave four reasons for adopting the *prima facie* approach over the full merits approach preferred in England and some Model Law jurisdictions:¹⁶

(a) First, the *prima facie* approach coheres better with parliamentary intention to empower the tribunal to rule on its own jurisdiction, and to confine the scope of curial intervention.¹⁷

(b) Secondly, the full merits approach “could significantly hollow the *kompetenz-kompetenz* principle of its practical effect” as this approach may subject the arbitral tribunal’s *kompetenz-kompetenz* to the claimant’s strategic choices in a putative arbitration: depending on whether the claimant chooses to pursue its claim by arbitration or by court proceedings, the question of the arbitral tribunal’s jurisdiction will fall to be determined fully by either the arbitral tribunal, or the court. This:¹⁸

... undermines the principles of judicial non-intervention and *kompetenz-kompetenz* which were at the forefront in the drafting of the Model Law and the enactment of the original IAA.

(c) Thirdly, the fear of resource duplication arising from the *prima facie* approach is overstated, as a robust recognition and enforcement of the *kompetenz-kompetenz* principle may deter parties to arbitration agreements from commencing court proceedings. These parties would be well aware that court proceedings would be stayed unless the arbitration clause is clearly invalid or inapplicable, and parties that attempt to protract proceedings by making unmeritorious appeals against an arbitral tribunal’s jurisdictional ruling may also face adverse costs consequences under s 10(7) of the IAA.¹⁹

(d) Finally, the use of the word “satisfied” in s 6(2) of the IAA does not suggest that the court is required to adopt the full merits approach. Instead:²⁰

... [i]f anything, a textual analysis of s 6(2) of the IAA, which replaces the word ‘finds’ in Art 8(1) of the Model Law with

16 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [30] and [48]–[49]. Under the full merits approach, the court undertakes an actual determination of the existence and scope of the arbitration agreement and pronounces with finality on an arbitral tribunal’s jurisdiction in the first instance rather than deferring the question to the arbitral tribunal.

17 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [65]–[66].

18 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [67].

19 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [68].

20 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [69].

‘satisfied,’ would favour a *prima facie* threshold rather than a determination on a balance of probabilities.

14 The Court of Appeal therefore concluded that courts in Singapore should adopt the *prima facie* standard of review when considering stay applications under s 6 of the IAA.²¹

B. *Whether a dispute over minority oppression or unfairly prejudicial conduct to minority shareholders is arbitrable*

15 In relation to the issue of arbitrability, the Court of Appeal held that a stay of court proceedings under s 6(2) of the IAA would be refused if the subject matter of a dispute is not arbitrable.²²

16 Arbitrability covers:²³

... matters which so pervasively involve ‘public’ rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve... disputes [over such matters] by ‘private arbitration should not be given effect’.

Additionally, having regard to s 11 of the IAA,²⁴ the Court of Appeal concluded that there will ordinarily be a presumption of arbitrability so long as a dispute falls within the scope of an arbitration clause, unless it can be shown that: (a) Parliament intended to preclude the dispute from being arbitrated;²⁵ or (b) it would be contrary to public policy to permit the dispute to be resolved by arbitration,²⁶ which is the “essential criterion of non-arbitrability”.²⁷

21 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [70].

22 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [73]–[74]. If the subject matter of the dispute is not arbitrable, the arbitration agreement would be either “inoperative” or “incapable of being performed” pursuant to s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

23 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [71]. See also Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 944.

24 Under s 11(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”), “[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so”. Additionally, s 11(2) of the IAA provides that:

... [t]he fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

25 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [76]. See also *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [44].

26 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [76]. See also *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [44].

27 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [75].

17 In the High Court, Quentin Loh J held that the dispute over minority oppression under s 216 of the CA was not arbitrable. He observed that a claim for relief under s 216 “straddled the line between arbitrability and non-arbitrability”²⁸ and that in most cases, a claim under s 216 would fall on the side of non-arbitrability.²⁹ This is because third parties that are not bound by the arbitration clause could be affected by such a claim.³⁰ Additionally, the remedies available for a claim of minority oppression could include remedies that the arbitral tribunal lacks the power to grant. Since the remedy is “inextricably linked” to the “nature and extent of the commercial unfairness or unfair prejudice itself”, the arbitrability of the remedy sought was held to affect the arbitrability of the claim.³¹

18 On the other hand, the Court of Appeal, referring to both local and foreign case law, held that an arbitrator’s lack of power to grant a particular relief sought is not determinative of whether the subject matter of a dispute is arbitrable, as it did “not follow from the limitation which might apply to an arbitrator’s powers that the dispute is thus unsuitable for resolution by arbitration”³² While claims which arose upon insolvency were typically found to be non-arbitrable partly because the arbitral tribunal lacks the power to grant winding-up orders,³³ the Court of Appeal considered that the reason why such matters were non-arbitrable was that the greater public, particularly the creditors and members of the company, would also have an interest in such liquidations.³⁴

19 In contrast, a claim concerning oppressive or unfairly prejudicial conduct towards minority shareholders “stands on a different footing” and does not engage public policy considerations because.³⁵

(a) Section 216 of the CA, which prohibits oppression or injustice to the members of companies, was not introduced to protect or further any “public” interest.³⁶ Instead, it is concerned with protecting the members’ commercial expectations, and

28 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [120].

29 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [142].

30 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [142].

31 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [116] and [120].

32 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [82].

33 See, eg, *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1991] SLR(R) 382; *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 at [13] and [18]; and *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [45].

34 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [83].

35 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [84].

36 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [88].

the essence of a claim under s 216 lies in “upholding the commercial agreement between the shareholders”³⁷.

(b) Disputes over oppressive or unfairly prejudicial conduct towards minority shareholders have been held to be arbitrable in other jurisdictions such as New South Wales and Victoria in Australia, the British Virgin Islands, and British Columbia in Canada.³⁸

(c) Contrary to the High Court decision, the jurisdictional limitations on an arbitral tribunal’s ability to grant certain remedies such as winding-up orders are not relevant to the issue of arbitrability for several reasons.³⁹ First, s 12(5)(a) of the IAA in fact confers wide remedial powers on arbitral tribunals to “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”.⁴⁰ Secondly, the jurisdictional limitations on the type of relief that an arbitral tribunal can grant may be overcome by express agreement of parties subject to public policy considerations and third parties’ rights.⁴¹ Thirdly, and in any event, “the fact that the relief sought might be beyond the power of the tribunal to grant does not in and of itself make the subject matter of the dispute non-arbitrable”.⁴²

(d) Overall, the dispute may first be resolved by the arbitral tribunal where parties are bound by the tribunal’s findings. Parties may then apply to the court for any specific relief which is beyond the power of the tribunal to grant.⁴³ The procedural difficulties and even substantial inconvenience arising from having the dispute resolved by arbitration before parties turn to the court for their remedy should not render the dispute non-arbitrable.⁴⁴

37 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [88] and [93]. The Court of Appeal also referred to *Fulham Football Club Ltd v Richards* [2011] EWCA Civ 855, which held (at [77]–[78]) that:

... dispute[s] between members of a company or between shareholders on 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.

38 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [94].

39 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [97].

40 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [97].

41 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [97].

42 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [98].

43 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [100].

44 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [105].

20 Accordingly, the Court of Appeal held that the subject matter of the present dispute, a claim for relief under s 216 of the CA for oppression or prejudicial conduct towards the plaintiff as a minority shareholder, was arbitrable.

C. *Whether court proceedings between Silica Investors and Lionsgate, or any part thereof, fall within the scope of the arbitration clause in the Share Sale Agreement*

21 In determining whether a dispute is covered by an arbitration agreement, two stages are involved: (a) the court must first ascertain what the matter(s) are in the court proceedings; and (b) the court must then determine whether the matter(s) fall(s) within the scope of the arbitration agreement on its true construction.⁴⁵

(1) *First stage: Ascertaining what the matter(s) are in the court proceedings*

22 In respect of the first stage, a methodological question arises relating to the “degree of specificity” with which the court should characterise a matter.⁴⁶ The Court of Appeal held that a matter “should not [be] characterised ... in either an overly broad or an unduly narrow and pedantic manner”,⁴⁷ and a “practical and common-sense inquiry” should be undertaken in deciding whether a matter falls within an arbitration clause.⁴⁸

23 The Court of Appeal reached the above conclusions based on the following reasons:

- (a) Section 6(2) of the IAA does not restrict the court to the binary choice of either staying proceedings *entirely* and so forcing parties to arbitrate, or refusing the stay and allowing court proceedings in their entirety to continue. Instead, the court need only stay the *part* of the court proceedings “so far as” they relate to the matters that are subject of the arbitration clause. This would “militate against taking an excessively broad view of what constitutes a ‘matter’”.⁴⁹

45 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [108].

46 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [109].

47 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [113] and [122].

48 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [113].

49 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [108] and [113]. Under s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed), a stay is only mandated “so far as” the court proceedings relate to the matter(s) which are the subject of the arbitration clause.

(b) The traditional test to determine what constitutes a matter is too “malleable” and “eludes consistent and predictable application”.⁵⁰ Under the traditional test, “the assertion of a right or liability ... which ... is at least susceptible of settlement as a discrete controversy” would constitute a matter, but a “mere issue” would not.⁵¹ The Court of Appeal found the distinction between a “discrete controversy” and a “mere issue” to be “so fine that it may be illusory”, such that the test may lead parties to completely different results even if applied to the exact same facts.⁵²

(c) Case law from Australia and the British Virgin Islands shows that the courts in such jurisdictions have refrained from characterising a matter too broadly.⁵³

(d) A broad approach to the characterisation of a matter does not comport with the reality that disputes may be complex and involve disparate factual and legal issues.⁵⁴ While a broad characterisation of a matter would be simpler and more convenient, “to boil down a complex dispute to a singular aspect of its essence would be contrived”.⁵⁵

24 Accordingly, the Court of Appeal held that the four categories of allegations in the present dispute constituted separate matters for the purposes of the stay application under s 6 of the IAA.⁵⁶ To say that all four allegations formed part of the same matter, although they were different from one another, would be “unprincipled” and “artificial” – not all of the four allegations had a nexus to the Share Sale Agreement which contained the arbitration agreement.⁵⁷ This is contrary to the High Court decision, where Loh J adopted a broad approach to the characterisation of the matter and held that the “essential dispute” between the parties was whether the affairs of AMRG had been conducted in a manner that was “oppressive, *ie*, commercially unfair or unfairly prejudicial ... towards [Silica Investors] as a minority shareholder”.⁵⁸

50 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [114].

51 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [112].

52 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [114].

53 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [115]–[120].

54 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [121].

55 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [121].

56 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [122].

57 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [121].

58 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [37].

(2) *Second stage: Determining whether the matter(s) fall(s) within the scope of the arbitration clause*

25 In relation to the second stage, the Court of Appeal affirmed the position that the court should construe the arbitration clause “based on the presumed intentions of the parties as rational commercial parties”.⁵⁹ It further held that in determining whether a matter falls within the scope of an arbitration clause, the court must consider the “underlying basis and true nature of the issue or claim, and is not limited solely to the manner in which it is pleaded”.⁶⁰

26 In the High Court, Loh J, having characterised the matter broadly, held that the entire claim fell within the scope of the arbitration clause because at least two of the allegations, the Share Issuance Allegation and the Management Participation Allegation, were sufficiently connected to the Share Sale Agreement that contained the arbitration clause.⁶¹ Loh J further held that:⁶²

... [t]he 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.

27 In contrast, before the Court of Appeal, as the four categories of allegations had been held to constitute separate matters, the Court of Appeal had to consider whether the Share Issuance Allegation and the Management Participation Allegation separately fell within the scope of the arbitration clause.⁶³

28 With respect to the Share Issuance Allegation, the Court of Appeal first found that the “substance of the controversy” was whether any commercial justification existed for the share issuance by AMRG on 15 September 2010.⁶⁴ This issue was said to be wholly unaffected by the Share Sale Agreement, which contained the arbitration clause, because there was nothing in the Share Sale Agreement which would provide or remove any commercial justification for the share issuance by AMRG.⁶⁵ Thus, the Share Issuance Allegation did not fall within the ambit of the arbitration clause in the Share Sale Agreement.

59 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [124]; *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd’s Rep 619 at [13].

60 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [125].

61 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [55].

62 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [56].

63 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [127].

64 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [133]–[134].

65 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [134].

29 As regards the Management Participation Allegation, the Court of Appeal held that there was a *prima facie* case that the Management Participation Allegation fell within the scope of the arbitration clause in the Share Sale Agreement.⁶⁶ This is because the basis for Silica Investors' allegation that it had a legitimate expectation of participating in AMRG's management was premised on a clause in the Share Sale Agreement.⁶⁷

D. *Whether the rest of the court proceedings against Lionsgate and the remaining defendants should be stayed pending the resolution of the arbitration between Silica Investors and Lionsgate*

30 When faced with proceedings whose outcome depends on the resolution of a related arbitration, a Singapore court essentially has to decide on two matters: (a) whether the court proceedings should be stayed in whole or in part; and (b) if the court proceedings are stayed in part, whether the putative arbitration should run before, concurrently with, or after the remaining court proceedings are resolved.⁶⁸

31 The factual matrix of the present case made deciding on the appropriate option a delicate task because:

- (a) there was an overlap in the parties to the putative arbitration and the parties to the court proceedings;
- (b) there was an overlap in the issues engaged in the putative arbitration and those engaged in the court proceedings; and
- (c) there was an underlap in the remedies that the putative arbitral tribunal could grant, compared to those the court could grant.⁶⁹

32 After examining how the courts of various jurisdictions have addressed situations in which a dispute “falls to be resolved in part by arbitration and in part by court proceedings, with the two sets of proceedings involving overlapping issues and parties”,⁷⁰ the Court of Appeal found that the unifying theme of the cases was “the recognition that the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole”.⁷¹

66 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [137].

67 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [136].

68 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [139].

69 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [140].

70 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [143]–[185].

71 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [186].

33 The Court of Appeal then concluded as follows:

(a) The bar for granting a case management stay in Singapore is not as high as the “rare and compelling threshold” adopted by the English and New Zealand courts, under which stays are only granted in rare and compelling circumstances, having regard to the legitimate interests of plaintiffs.⁷² While the plaintiff’s right to sue whoever he wants wherever he wants is fundamental, it is not absolute and may be curtailed or even regarded as subsidiary to holding the plaintiff to his obligation to arbitrate when he has agreed to do so.⁷³

(b) In every case, a court must aim to strike a balance between three higher-order concerns:⁷⁴

[F]irst, a plaintiff’s right to choose whom he wants to sue and where; second, the court’s desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court’s inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes.

The balance struck must ultimately serve the ends of justice.

(c) The court’s discretion to stay court proceedings pending resolution of a related arbitration may be made conditional on the agreement of parties not subject to the arbitration agreement to be bound by any applicable findings that may be made by the arbitral tribunal.⁷⁵

(d) When faced with situations of overlapping parties and issues, the court may consider factors including: the relationship between the parties to the court proceedings and the parties to the arbitration; the claims and issues raised in the court proceedings and those in the arbitration; issue estoppel; the risk of inconsistent findings between the two sets of proceedings; the risk of delay; and cost.⁷⁶

34 In this case, the Court of Appeal resolved the present appeals by holding that:

72 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [164], [175] and [187]. See also *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 at 186 and *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZHC 1681 at [97].

73 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [187].

74 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [188].

75 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [187].

76 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [179]–[180] and [188].

(a) Silica Investors should first decide whether it is willing to forgo its claim against Lionsgate on the Management Participation Allegation.⁷⁷

(b) If Silica Investors does so forgo this claim against Lionsgate, then there will be no need for court proceedings to be stayed. However, Silica Investors would similarly not be entitled to rely on the Management Participation Allegation against the remaining defendants as that would be “a naked attempt on its part to circumvent the arbitration clause in the Share Sale Agreement”⁷⁸

(c) If Silica Investors decides to pursue the Management Participation Allegation against Lionsgate, then:

(i) court proceedings against Lionsgate in respect of that allegation will be stayed under s 6 of the IAA.⁷⁹ Additionally, court proceedings in respect of the remaining three allegations will be stayed pursuant to the court’s inherent power of case management, subject to two provisos: that the Management Participation Allegation should be arbitrated expeditiously; and that undue delay would entitle any party to the arbitration to apply to court for the stay to be lifted and court proceedings in respect of Silica Investors’ remaining three allegations to proceed.⁸⁰

(ii) Silica Investors should also consider whether it is willing to offer to arbitrate the Management Participation Allegation with the remaining defendants. If Silica Investors does make such an offer but the remaining defendants decline, then that, taken together with their present stance of seeking a stay of court proceedings against them on the basis of case management:⁸¹

... will provide strong grounds for finding that it would be an abuse of process for them to seek to re-litigate (in the broad sense) the Management Participation Allegation in court after the conclusion of the arbitration between Silica Investors and Lionsgate.

77 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(a)].

78 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(b)].

79 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(c)].

80 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(c)] and [190(e)].

81 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(d)].

(d) Subject to the foregoing, if Silica Investors proceeds with arbitrating its Management Participation Allegation against Lionsgate, then the remaining court proceedings will be stayed in the interests of case management.⁸²

IV. Analysis of the Court of Appeal's decision

A. Standard of review in stay applications

35 The Court of Appeal's decision that a *prima facie* standard of review should be adopted by a Singapore court hearing a stay application under s 6 of the IAA provides welcome guidance and clarity on this area of the law. The low threshold of review preferred by the court affirms the judicial commitment to minimal curial intervention in the arbitral process.⁸³

36 However, it is questionable whether a *prima facie* standard of review is appropriate in all stay applications. As a commentator has observed, a distinction should be made between cases where an arbitration agreement was never formed, and cases where an arbitration agreement was formed but is no longer valid or where the arbitration agreement does not cover the dispute.⁸⁴ In the latter situation, the parties at least agree that there was a binding arbitration agreement at the outset. The *prima facie* standard of review would be appropriate in such situations. However, if the parties do not even agree that there was ever any binding arbitration agreement, then a more stringent assessment may be justified as a party may otherwise be subjected to a promise that it never made.⁸⁵

82 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(f)].

83 Alastair Henderson, Vanessa Naish & Daniel Waldek, "Singapore Court of Appeal Provides Guidance on Applicants to Stay Proceedings in Favour of Arbitration and Scope of Arbitrability" *Lexology* (3 November 2015) <<http://www.lexology.com>>.

84 Nicholas Poon, "Singapore Court of Appeal Affirms a *Prima Facie* Standard of Review for Stay Applications in Favour of Arbitration: *Tomolugen Holdings Limited and another v Silica Investors Limited* [2015] SGCA 57" *Singapore Law Watch Commentary* (October 2015) at p 4; Nicholas Poon, "Clash of Jurisdictions: The Applicable Standard of Review for Stay Applications under the International Arbitration Act" *Singapore Law Blog* (3 September 2015) <<http://www.singaporelawblog.sg/blog/article/132>> (accessed 6 November 2015).

85 Nicholas Poon, "Singapore Court of Appeal Affirms a *Prima Facie* Standard of Review for Stay Applications in Favour of Arbitration: *Tomolugen Holdings Limited and another v Silica Investors Limited* [2015] SGCA 57" *Singapore Law Watch Commentary* (October 2015) at p 4; Nicholas Poon, "Clash of Jurisdictions: The Applicable Standard of Review for Stay Applications under the International Arbitration Act" *Singapore Law Blog* (3 September 2015) <<http://www.singaporelawblog.sg/blog/article/132>> (accessed 6 November 2015). See also Michael Hwang SC & Aloysius Chang, "*Malini Ventura*, Supreme Court of (cont'd on the next page)

B. Arbitrability

37 The Court of Appeal's decision that a dispute over minority oppression or unfairly prejudicial conduct to minority shareholders is arbitrable once again reinforces Singapore's pro-arbitration stance.⁸⁶ However, caution must be exercised to ensure that an arbitration-friendly approach does not inadvertently result in rendering arbitration a more uncertain process. While the Court of Appeal has clearly articulated how it reached the conclusion that a claim under s 216 of the CA is arbitrable, there are at least two areas that may merit further discussion: (a) whether public interest is implicated in a dispute concerning s 216 of the CA; and (b) the difficulties of resolving a dispute across two *fora* – in arbitration and in court – where the claim involves a remedy that the arbitral tribunal does not have the power to grant.

(1) Public interest in disputes concerning s 216 of the CA

38 A key reason for the Court of Appeal's decision that a dispute on minority oppression under s 216 of the CA is arbitrable was that s 216 “was not introduced to protect or further any public interest”, but rather to protect the commercial expectations of parties associating for an economic purpose through a company.⁸⁷

39 However, while s 216 may not have been introduced to further any public interest, in some circumstances, a successful s 216 claim might very well affect the interests of third parties in a manner that is not insignificant. The remedies that may be awarded upon a successful s 216 claim, whether in the context of a solvent company or otherwise,⁸⁸ are varied and may include, *inter alia*, the cancellation or variation of

Singapore, High Court, HC/Suit No 792 of 2015 (HC/Summons Nos 3763 and 3844 of 2015), Case Date 11 August 2015” A Contribution by the Institute for Transnational Arbitration Board of Reporters.

86 See, eg, *Star-Trans Far East Pte Ltd v Norske-Tech Ltd* [1995] 2 SLR(R) 720 at [25]; *Re An Arbitration between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354 at [45]; *WSG Nimbus Pte Ltd v Board of Control For Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [90]–[91]; *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28]; and *BLC v BLC* [2014] 4 SLR 79 at [51]–[52]. See also Michael Hwang, Andrew Chan & Ramesh Selvaraj, “Singapore” in *Arbitration in Asia* (Michael J Moser gen ed) (Juris Publishing, 2nd Ed, 2008) at p SING-62.

87 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [88].

88 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [88]. The Court of Appeal noted that an application for relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) “almost always arises in the context of a solvent company”.

any transaction or resolution,⁸⁹ a buyout order⁹⁰ and even the winding up of the company.⁹¹ Hence, in cases where a claim of minority oppression rests on the allegation that a transaction was entered into in a way that is unfairly prejudicial or oppressive to minority interests, for instance, it is not difficult to see how an order to vary or cancel the transaction could affect the interests of various stakeholders: the parties to the transaction, shareholders and perhaps even the creditors that facilitated the transaction. In contrast, if the claim of minority oppression is premised on the minority shareholder's inability to participate in the management of the company contrary to a legitimate expectation of doing so, the claim of minority oppression under s 216 might not significantly affect the interests of third parties.

40 Notably, claims arising from the liquidation of a company are not arbitrable because creditors and members of the company would have an interest in the matter.⁹² By parity of reasoning, given that a successful claim under s 216 of the CA in certain circumstances could also implicate the interests of creditors and members of the company, such claims arguably should not always be arbitrable.

41 Overall, although the interests of third parties in a dispute involving the liquidation of a company may admittedly be greater than those in a dispute under s 216 of the CA, the outcome of a s 216 claim may still have significant implications on the interests of third parties, especially if a remedy like winding up is subsequently ordered, and this perhaps merits further consideration of the arbitrability of a s 216 claim.

(2) *Resolving the dispute in two fora*

42 The Court of Appeal's approach in requiring certain disputes to be resolved in two different *fora* – in arbitration and in court – also raises difficulties apart from those of inconvenience and procedural complexity. One such difficulty concerns how the arbitral tribunal is to decide on the issue of remedies. Can and should the tribunal express its own views on whether a particular remedy should be granted, regardless of whether the remedy is one that is within its power to grant? If so,

89 Companies Act (Cap 50, 2006 Rev Ed) s 216(2)(a). See, eg, *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304.

90 Companies Act (Cap 50, 2006 Rev Ed) s 216(2)(d).

91 Companies Act (Cap 50, 2006 Rev Ed) s 216(2)(f). See, eg, *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 2 SLR(R) 114 and *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337.

92 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [83]. See also *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] Bus LR 1521 at [32]; *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [45]–[46]; and *In re Cybernaut Growth Fund LP* Cause No FSD 73 of 2013 (23 July 2013) at [7].

would the court from which parties seek a remedy simply give effect to the tribunal's views on the appropriate remedy (in addition to the tribunal's views on whether oppression has been established)?⁹³

43 On the one hand, if the arbitral tribunal expresses its opinion on whether a particular remedy should be granted (even if the remedy is one that it has no power to grant),⁹⁴ and the court simply gives effect to the tribunal's views, then it may appear as if the court is simply rubber stamping the tribunal's decision on the remedy. This may be inappropriate if the arbitral tribunal never had the jurisdiction to grant that remedy; for instance, if the arbitral tribunal states that a winding-up order would be appropriate, and the court simply grants such an order because it does not wish to depart from the tribunal's views, then this would be akin to the arbitral tribunal having the power to award a winding-up order, an order which affects the interests of third parties.⁹⁵ However, there are good reasons why arbitral tribunals do not have the power to grant remedies that affect the interests of third parties. The source of an arbitral tribunal's power is contractual and arbitral awards would generally only be binding on parties to the arbitration

93 See "The Court of Appeal Rules on the Arbitrability of Shareholders Claim" *Herbert Smith Freehills* (8 September 2011) <<http://hsfnotes.com/arbitration/2011/09/08/the-court-of-appeal-rules-on-the-arbitrability-of-shareholders-claim>> (accessed 6 November 2015); Matthew Weiniger, "Court of Appeal Rules on Arbitrability of Shareholders' Claims" *International Law Office* (15 September 2011) <<http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/United-Kingdom/Herbert-Smith-LLP/Court-of-Appeal-rules-on-arbitrability-of-shareholders-claims>> (accessed 6 November 2015).

94 See Michael Hwang, "The Prospects for Arbitration and Alternative Dispute Resolution: Supplement to Programme Statement for Corporate Governance and Arbitration of Company-law Disputes" *The 6th Asian Roundtable on Corporate Governance: Implementation and Enforcement in Corporate Governance*, Seoul, South Korea (2 November 2004) at p 5, suggesting that "the arbitral tribunal can make an order directing a shareholder to take steps to wind up a company".

95 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [96]; *In re Cybernaut Growth Fund LP* Cause No FSD 73 of 2013 (23 July 2013) at [7]. See also Tracey Evans Chan, "The Public Interest in Judicial Management" (2013) Sing JLS 278 at 278–280; *Deldar Tony Singh v Rajinder Singh* [2012] SGHCR 13 at [16]; *LaserResearch (S) Pte Ltd v Internech Systems Pte Ltd* [2011] 1 SLR 382 at [11]–[12]; *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 at [36]; *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 at [52]; and *Eversendai Engineering Pte Ltd v Synergy Construction Pte Ltd* [2004] SGHC 129 at [23]:

... winding-up is a drastic remedy and the Court would hesitate before imposing the draconian measure of winding-up the company unless this is the fairest course of action after taking into account the interests of all parties including the creditors, contributories, suppliers, employees, customers and shareholders.

See also Ministry of Law, "About Liquidation or Winding Up" (30 October 2015) <<https://www.mlaw.gov.sg/content/io/en/corporate-insolvency/about-liquidation-or-winding-up.html>> (accessed 6 November 2015).

agreement.⁹⁶ The court may be better placed to balance the interests of all the stakeholders⁹⁷ and to make a final decision on whether to award specific remedies that affect the interests of third parties.

44 On the other hand, if the question of remedies in a minority shareholder's claim of oppression is left entirely to the court, then this would arguably go against the principle of minimal curial intervention⁹⁸ and may also derogate from the arbitral tribunal's jurisdiction to dispose of the case finally.⁹⁹

45 Additionally, although winding up is a remedy of last resort in cases of oppression or unfairly prejudicial conduct under s 216 of the CA,¹⁰⁰ there are other remedies such as a buyout order that are beyond the arbitral tribunal's power to grant;¹⁰¹ thus, it may not be unusual for minority oppression claims to have to be resolved across two *fora*. The unresolved issues as to how the arbitral tribunal is to decide on the issue of remedies and whether the court would give effect to the tribunal's opinion on remedies leave room for more curial intervention in arbitral awards and, to some extent, undermines the finality of the arbitral award rendered.¹⁰² Ultimately, if a claim under s 216 can only be

96 *In re Cybernaut Growth Fund LP* Cause No FSD 73 of 2013 (23 July 2013) at [7]. See also *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [198] and *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [75].

97 See Muthucumaraswamy Sornarajah, "Stay of Litigation Pending Arbitration" (1994) 6 SAclJ 61 at 68:

Whatever significance is attached to the arbitrability doctrine in modern law, where there is a public interest issue involved in a dispute and litigation has been commenced as regards the dispute, there may be great justification for the courts to exercise their discretion against granting stay as the public interest issue is better disposed of by the courts.

98 See *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [59] and [65]. See also *Lim Chin San Contractors Pte Ltd v L W Infrastructure Pte Ltd* [2012] 2 SLR 1040 at [21] and [40] and *TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [43].

99 Section 19B(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) provides: "An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties."

100 *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* [1991] 2 SLR(R) 1 at [61]; *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 1 SLR(R) 795 at [9]; *Lim Swee Khian v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 at [91].

101 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 at [143].

102 The importance of finality of arbitral tribunal decisions was emphasised in *TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [1]:

However good or bad in the eyes of a party, the decision of an arbitral tribunal with the requisite jurisdiction is final and binding. This general proposition of law is a manifestation of the fundamental principle of *interest reipublicae ut sit finis litium* or finality in proceedings. Arbitration will not survive, much less flourish, if this core precept is not followed through by the courts.

fully resolved across two *fora*, it would unduly lengthen the dispute resolution process, potentially making arbitration a less desirable and more uncertain option.

46 Further, the approach taken by the Court of Appeal suggests that at least in certain cases, by agreeing to an arbitration agreement, parties essentially agree to having their dispute heard by an arbitration tribunal first and later going to court to resolve the issue of remedies. However, it is questionable whether this accords with the commercial sensibilities of rational businessmen, who are often said to intend that any dispute arising out of their relationship should be decided by the same tribunal.¹⁰³ Requiring these parties to appear before both an arbitral tribunal and a court before the matter can finally be concluded may not necessarily accord with the most commercially sensible interpretation of their intention in entering into the arbitration agreement.

47 A possible alternative, though not without its drawbacks, would be to interpret the parties' intention in entering into the arbitration agreement as an intention to forgo the remedies that are beyond the arbitral tribunal's jurisdiction to grant. As between the parties to the arbitration agreement, therefore, the matter would have to be resolved before an arbitral tribunal completely and finally, and parties would be confined to those remedies that are within the jurisdiction of the arbitral tribunal to grant. That may simply be regarded as part and parcel of opting for arbitration rather than litigation; in other words, by choosing arbitration over litigation, the parties may be taken to have accepted the accompanying limitations of the arbitration process,¹⁰⁴ including in certain cases a more limited choice of remedies. While such an interpretation would avoid the difficulty of parties having to go through two *fora* to settle the matter finally, the parties' intentions must be

103 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 1325–1336; *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [40]; *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826 at [27]; *Fiona Trust & Holding Corp v Privalov* [2007] 2 Lloyd's Rep 267 at [17]–[18], affirmed in *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd's Rep 619 at [13]; *Ulysess Compania Naviera SA v Huntingdon Petroleum Servs, The Ermoupolis* [1990] 1 Lloyd's Rep 160 at 164; *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [13] and [20]; *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [24].

104 See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 3498; *Sonera Holding BV v Cukurova Holding AS* 895 F Supp 2d 513 at 521 (2012); *Gilmer v Interstate/Johnson Lane Corp* 500 US 20 at 31 (1991); and *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 at 628 (1985): by agreeing to arbitrate, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”. Arguably, a party may also be taken to have traded the right to pursue certain remedies that only the court can grant, in exchange for resolving the dispute through arbitration rather than litigation.

carefully analysed to ensure that this interpretation is appropriate in all the circumstances of the case.

48 Even where this interpretation is appropriate, however, there may remain residual difficulties in cases where the rights of third parties outside of the arbitration agreement are involved. These difficulties may be alleviated to some extent by s 13 of the IAA, which allows any party to the arbitration to seek judicial assistance in obtaining evidence from such third parties.¹⁰⁵ Additionally, if the plaintiff is not seeking remedies beyond the arbitral tribunal's power to grant, then third party rights may not be significantly affected. However, the situation where a plaintiff wishes to pursue these other remedies concurrently in court against other defendants who are not parties to the arbitration agreement would still raise difficulties and would require the court to decide how to ensure that the case is managed in a just and efficient manner. It is to this issue of the disposition of related court proceedings that the authors now turn.

C. *Disposition of related court proceedings*

49 Finally, in relation to the issue on whether the rest of the court proceedings against Lionsgate and the remaining defendants should be stayed, the Court of Appeal's direction that Silica Investors consider arbitrating the Management Participation Allegation with the remaining defendants, who were not parties to the arbitration agreement,¹⁰⁶ sheds light on the strength of the current judicial attitude towards arbitration. It seems that even where the interests of third parties not bound by the arbitration agreement are implicated and there are overlapping issues to be resolved in arbitration and in court, the judicial attitude still favours allowing the matter to be resolved by arbitration.¹⁰⁷ However, it remains to be seen whether arbitration is truly a suitable forum for such matters, as consent is the basis of arbitration and any award rendered by the arbitral tribunal may not be binding on parties outside of the

105 Under s 13(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), "[a]ny party to an arbitration agreement may take out a subpoena to testify or a subpoena to produce documents". Additionally, s 13(2) of the IAA provides that:

... [t]he High Court or a Judge thereof may order that a subpoena to testify or a subpoena to produce documents shall be issued to compel the attendance before an arbitral tribunal of a witness wherever he may be within Singapore.

See also Tan Ruo Yu, "Stay of Oppression Claims in Favour of Arbitration in Singapore: *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] SGHC 101" (2014) 10(2) AIAJ 181 at 188.

106 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190].

107 See also Mohammed Reza & Shaun Lee, "Singapore Arbitration Case Note: Arbitrability of Minority Oppression Claims" *Legal Highlights* (November 2015) at p 4.

arbitration.¹⁰⁸ The matter might then only be partially resolved due to the limited binding effect of the arbitral award, leaving it open for interested third parties who are not bound by the award to make arguments in court on issues that may already have been resolved by the arbitral tribunal.

50 The Court of Appeal alleviated this concern when it held that if Silica Investors were to make such an offer to arbitrate, and the remaining defendants declined, then they may subsequently not be allowed to seek to challenge findings made by the arbitral tribunal when the dispute returns to court; this would, broadly speaking, be akin to “re-litigating’ issues already decided in the arbitration” and might potentially amount to an abuse of process.¹⁰⁹ However, this holding may not be entirely satisfactory as the remaining defendants are essentially presented with a kind of Hobson’s choice: either agree to arbitrate and therefore be bound by any findings made by the arbitral tribunal, or decline to arbitrate but nevertheless effectively be bound by the arbitral tribunal’s findings, as any attempt to challenge these findings in court could well amount to an abuse of process. Arbitration could effectively become the only forum for the remaining defendants to make any submissions on the Management Participation Allegation when they had never consented to arbitrating this issue.

51 Additionally, the basis for finding that it would be an abuse of process for the remaining defendants to seek to re-litigate (in the broad sense) the Management Participation Allegation in court would be their stance of asking for a stay of the court proceedings against them on the basis of case management, coupled with their (hypothetical) rejection of Silica Investors’ offer to arbitrate.¹¹⁰ This leaves open the position of interested parties who are also not bound by the arbitration agreement and who do not ask for a stay of court proceedings against them. In such cases, would there then be concurrent arbitration and court proceedings, a situation that the Court of Appeal considered could lead

108 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1405.

109 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [142] and [190(d)]. See also Sabrina Pearson, “Same Claims, Same Evidence, Different Claimant: Abuse of Process for Defendant to Raise Same Defences?” *Kluwer Arbitration Blog* (12 August 2014) <<http://kluwerarbitrationblog.com/2014/08/12/same-claims-same-evidence-different-claimant-abuse-of-process-for-defendant-to-raise-same-defences>> (accessed 6 November 2015); *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 at [23]–[27]; *Art & Antiques Ltd v Richards* [2013] EWHC 3361 at [23] and [33]–[41]; and *Michael Wilson & Partners Ltd v Sinclair* [2012] EWHC 2560; [2013] 1 All ER (Comm) 476 at [50].

110 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(d)].

to duplication of resources?¹¹¹ Alternatively, might the court choose to stay the court proceedings of its own accord, exercising its inherent power of case management?¹¹² If so, would those interested parties later be allowed to challenge the arbitral tribunal's findings in court?

52 It is hoped that the courts will provide more guidance on these issues in future cases. In the meantime, a defendant who wishes to seek a stay of court proceedings pending resolution of a related arbitration should be mindful that it subsequently may not be allowed to challenge findings made in the arbitration on the grounds of abuse of process. This is especially so if the plaintiff offers to arbitrate the dispute with that defendant. Effectively, if the defendant, having sought a stay of court proceedings, declines to arbitrate, it may later find itself bound by any findings made by an arbitral tribunal before which it never appeared or made any arguments.

V. Conclusion

53 Overall, the approach taken by the Court of Appeal in deciding on the appropriate standard of review in stay applications under s 6 of the IAA, the arbitrability of minority oppression or unfairly prejudicial conduct, the construction of arbitration clauses, and the disposition of related court proceedings, is consistent with the pro-arbitration stance adopted in Singapore.¹¹³ At the same time, however, it should be borne

111 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [142]. See also Gabrielle Kaufmann-Kohler, "How to Handle Parallel Proceedings: A Practical Approach to Issues Such As Competence-competence and Anti-suit Injunctions" (2008) 2(1) *Dispute Resol Int'l* 110 at 110; *The Titan Unity* [2014] SGHCR 4 at [42], suggesting that "it would be good if counsel for parties have in mind the procedural efficiencies that may be gained with a joinder and the potential costs consequences that may result with concurrent court and arbitral proceedings without a joinder"; *Boz Export & Import, Inc d/b/a Masal Cafe v Karakus* 32 Misc 3d 1242(A) at 6 (NY Misc, 2011); *Niazsons (K) Ltd v China Road and Bridge Corp Kenya* (Civil Appeal No 157 of 2000) at [1]: "It is the policy of the law that concurrent proceedings before two or more fora is disapproved."

112 See Shaun Lee, "Court Can Exercise Inherent Powers to Stay Proceedings in support of Arbitration" *Singapore International Arbitration Blog* (2 August 2012) <<http://singaporeinternationalarbitration.com/2012/08/02/court-can-exercise-inherent-powers-to-stay-proceedings-in-support-of-arbitration>> (accessed 6 November 2015); *Shanghai Construction (Group) General Co Singapore Branch v Tan Poo Seng* [2012] SGHCR 10 at [18]:

[The] justification for granting a stay pending arbitration pursuant to the inherent jurisdiction of the court has been extended beyond preventing the abuse of the court's process ... to include the efficient resolution of disputes and management of cases.

113 See also Mohammed Reza & Shaun Lee, "Singapore Arbitration Case Note: Arbitrability of Minority Oppression Claims" *Legal Highlights* (November 2015) at p 4.

in mind that the jurisdictional limits of arbitral tribunals may sometimes mean that a matter may be more efficiently and conveniently dealt with in court. If the arbitration agreement is upheld at too high a cost, and parties are compelled to arbitrate even when this would cause them substantial inconvenience and result in greater procedural complexity, this could eventually deter parties from agreeing to arbitration in the first place.

54 Ultimately, as the Court of Appeal itself remarked in an earlier case, “[a]rbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step”.¹¹⁴ Requiring parties to arbitrate even when remedies outside of the arbitral tribunal’s jurisdictional limits are at stake may only prolong their entire process of dispute resolution, as parties may eventually find themselves having to take the additional step of going to court to resolve the issue of remedies after going through the entire process of arbitration. The inconvenience occasioned by such an approach may also cause arbitration to lose part of its allure to parties that are simply after the most efficient possible method of dispute resolution.¹¹⁵ Additionally, when there are multiple parties involved in the dispute, not all of whom are parties to the arbitration agreement, and there are overlapping issues to be decided in arbitration and in court, then caution must also be exercised to ensure that parties are not compelled to arbitrate issues they never agreed to arbitrate.

55 With the increasing complexity of cases in today’s dispute resolution landscape, courts will only be placed in the unenviable position of being confronted with ever more challenging questions about the delicate interface between arbitration and the court system. Singapore’s arbitration-savvy courts have time and again demonstrated their readiness and ability to handle such challenges. Indeed, the Court of Appeal’s detailed examination of comparative jurisprudence and its robust analysis in *Tomolugen Holdings Ltd v Silica Investors Ltd* reflect its deftness in handling increasingly sophisticated disputes, providing useful guidance on issues concerning arbitrability, the determination of whether a dispute falls within the ambit of an arbitration clause and the disposition of related court proceedings. It is no wonder that Singapore

114 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [29].

115 See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 72:

While far from perfect, international arbitration is, rightly, regarded as generally suffering fewer ills than litigation of international disputes in national courts and as offering more workable and effective opportunities for remedying or avoiding those ills which do exist.

See also Christopher Drahozal, “Why Arbitrate? Substantive *versus* Procedural Theories of Private Judging” (2011) 22 *Am Rev Int’l Arb* 163.

has become a leading arbitration hub and further judicial elucidations on these cutting-edge issues in modern international arbitration will be anticipated.
