The arbitrability of shareholder disputes in the Cayman Islands: What will the Privy Council finally decide? – Alex Potts KC

It is now over 6 months since the Judicial Committee of the Privy Council heard the important appeal from the Cayman Islands Court of Appeal (CICA) in the case of Ting Chuan (Cayman Islands) Holding Corporation v FamilyMart China Holding Co Ltd, JCPC, 2020/0055.

The Privy Council's judgment was reserved at the conclusion of the hearing, but the judgment is expected to be delivered any day now, and hopefully within the next six months.

The hearing of the appeal was a historic occasion, as the Judicial Committee of the Privy Council physically heard the appeal at a special sitting held in the Cayman Islands itself (for the first time in the legal history of the Cayman Islands).

The case, however, has even greater historic significance associated with the fact that it relates to the important issue of the arbitrability of shareholder disputes involving Cayman Islands companies and, in particular, shareholders' petitions for the compulsory winding up of a solvent company on 'just and equitable' grounds. The appeal is of public importance, and of international interest, for a number of reasons.

Most importantly, the appeal presented the first opportunity for a final appellate court such as the Privy Council, to consider arguments relating to the arbitrability of shareholder disputes in some detail, having regard not only to Cayman Islands law, but also comparative jurisprudence from other common law jurisdictions, including a number of pro-arbitration decisions of the Court of Appeal of England and Wales, and also the appellate courts of Hong Kong.

Given the fact that Privy Council decisions are treated as either binding, or highly persuasive, in a number of common law jurisdictions, the Privy Council's judgment, when it is eventually published, has the potential to promote, or to undermine, the arbitrability of a large number of corporate shareholder disputes, not only in the Cayman Islands, but in a number of different jurisdictions.

By way of a very brief summary of the background facts to the appeal, CVS (Cayman Islands) Holding Corp is a company incorporated in the Cayman Islands (the Company) and the ultimate owner of a business comprising some 2,400 convenience stores in China.

The Appellant (Ting Chuan) owns 59.65% of the shares of the Company and the Respondent (FamilyMart) owns the remaining 40.35%. Ting Chuan and FamilyMart are parties to a shareholder agreement which contains an arbitration agreement.

On 12 October 2018, FamilyMart presented a shareholder's petition to wind up the Company, complaining about Ting Chuan's conduct of the Company's affairs. Ting Chaun applied to strike out this petition on the ground that any disputes should be resolved by arbitration.

The Grand Court of the Cayman Islands (Mr. Justice Kawaley) dismissed the strike out application in 2019, but ordered the petition be stayed until the

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complaints in the petition had been arbitrated.

The Cayman Islands Court of Appeal (Moses JA, Martin JA and Rix JA) allowed FamilyMart's in 2020, holding that no part of the petition was arbitrable. Having reviewed the facts of the case, the relevant winding-up provisions of the Cayman Islands' Companies Act, and various lines of authority at common law, *the Cayman Islands Court of Appeal held that "where the underlying issues are central and inextricably connected to determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult … in order to determine the threshold issue as to whether there are sufficient grounds to justify winding up on just and equitable grounds, the court must evaluate all the circumstances of the case".*

The Cayman Islands Court of Appeal noted, in particular, that English Court of Appeal cases such as Fulham Football Club (1987) Ltd v Richards [2011]
EWCA Civ 855 could be distinguished, because in those sorts of cases, the courts had not needed to consider relief that invoked the "exclusive jurisdiction of the court, namely whether the company should be wound up".

Ultimately, the appeal in this case reflects an inherent tension between the statutory winding up provisions of the Cayman Islands' Companies Act on the one hand (which are somewhat unique to the Cayman Islands, given the absence of a separate regime locally for the resolution of unfair prejudice
claims, outside the context of a windingup petition), and the pro-arbitration provisions of the Cayman Islands Arbitration Act and the Foreign Arbitral
Awards Enforcement Act on the other hand.

It will no doubt take a degree of careful reasoning (or mental gymnastics) on the part of the Privy Council to reconcile the two sets of conflicting, public policy considerations, that inform the two sets of statutes.

Since predicting the future is a fool's errand, there is little benefit in this author trying to predict the decision of the Privy Council in any great detail, especially given the potential for a split Court, and dissenting judgments.

On balance, however, it is anticipated by this author (and certainly hoped) that the Privy Council's judgment (whether unanimously or by a majority) will adopt a pro-arbitration approach, whether as a broad matter of principle, or having regard to the specific facts of this case, and the particular nuances of local Cayman Islands law relating to shareholder disputes.

In any event, the eventual outcome, and the Privy Council's judgment in due course, should be of significant interest to anybody with a legal, commercial, professional, or academic interest in the resolution of corporate disputes in common law jurisdictions, including the Cayman Islands,
whether by litigation or by arbitration.

There are also a number of other first-instance judgments, and pending cases in the Cayman Islands, whose final determination depends, to a
considerable extent, on the judgment of tthe Privy Council.

For example, in the recent first-instance judgment in the case of Re Ren Ci & Ors (FSD 210 of 2022), the Grand Court of the Cayman Islands granted a stay of Cayman Islands Court proceedings dealing with a corporate shareholder dispute, in favour of a HKIAC arbitration.

The Court held that an arbitration clause contained in a Shareholders' Agreement applied broadly, and even to a complaint based on an alleged breach of the company's Articles of Association.

On the other hand, in the Grand Court's recent judgment in the case of Jian Ying Ourgame High Growth Investment Fund

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(in Liquidation) v Powerful Warrior Limited (FSD 255 of 2021), the Court refused to enforce an arbitration agreement in favour of HKIAC arbitration, where it had doubts as to
the validity of the arbitration agreement itself.

By separate coincidence, the Cayman Islands has recently established its own arbitration centre, known as the Cayman Islands Mediation and
Arbitration Centre ('CIMAC'), and so the jurisdiction is well-equipped to deal with the full range of corporate disputes, whether in Court or in arbitration. Additionally, the Grand Court of the Cayman Islands has also adopted a new Practice Direction, providing or mandatory judicial mediation in appropriate cases.

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