



Press Summary

20 September 2023

FamilyMart China Holding Co Ltd (Respondent) v Ting Chuan (Cayman Islands) Holding Corporation (Appellant)

[2023] UKPC 33

On appeal from the Court of Appeal of the Cayman Islands

Justices: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Briggs, Lord Kitchin

Background to the Appeal

China CVS (Cayman Islands) Holding Corp (the "**Company**") operates a convenience store business in the People's Republic of China under the "FamilyMart" brand. The appellant ("**Ting Chuan**") owns 59.65% of the shares in the Company and the respondent ("**FMCH**") owns the remaining 40.35%. The relationship between Ting Chuan and FMCH so far as is relevant is governed by a shareholders' agreement (the "**SHA**"). The SHA is governed by the laws of the Cayman Islands but contains an agreement that any disputes in connection with or arising out of the SHA shall be submitted to arbitration under ICCA Rules in Beijing (the "**arbitration agreement**").

On 12 October 2018 FMCH presented a petition in the Grand Court of the Cayman Islands to wind up the Company under the Companies Act, on the ground that it was just and equitable to do so. This was based on alleged misconduct by Ting Chuan in connection with the management of the Company. While FMCH does not intend to wind up the business, establishing that it is just and equitable to do so is a necessary step in enabling FMCH to obtain a court order for the buy-out of Ting Chuan's shareholding.

Ting Chuan applied to strike out or stay the petition under section 4 of the Foreign Arbitral Awards Enforcement Act (the "**FAAEA**"), or under the inherent jurisdiction of the court, on the basis that the underlying disputes between the shareholders should be resolved by arbitration. The Grand Court of the Cayman Islands struck out certain elements of FMCH's petition and granted a stay of the remainder under section 4 of the FAAEA until the

underlying matters had been arbitrated. The Court of Appeal overturned this decision on the basis that no part of the winding up petition was susceptible to arbitration. Ting Chuan now appeals to the Board.

Judgment

The Board unanimously allows the appeal. Lord Hodge gives the judgment, with which Lord Reed, Lord Lloyd-Jones, Lord Briggs and Lord Kitchin agree.

Reasons for the Judgment

The parties agreed that the dispute falls within the scope of the arbitration agreement. The Board notes that the central dispute between the parties, then, is whether FMCH's petition has made the matters raised in that petition not susceptible to arbitration [13].

Section 4 of the FAAEA provides, relevantly, that, if any party to an arbitration agreement commences legal proceedings against another party in respect of any "matter" agreed to be referred to arbitration, any party to the proceedings may apply for a stay, and that the court, unless satisfied that the arbitration agreement is "inoperative", shall make an order staying the proceedings. As section 4 of the FAAEA gives effect to article II of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "**New York Convention**"), the Board holds that it is important to look to the case law in other contracting states to promote legal certainty [16]; [28]; [31].

(1) The meaning and ascertainment of a "matter"

Following its review of several jurisdictions' case law, the Board holds that there is a general consensus among leading arbitration jurisdictions in the common law world that, where a country is a signatory of the New York Convention, domestic courts will take a pro-arbitration approach, giving priority to the parties' agreement to arbitrate [26]-[27]; [34]-[57]; [100].

There is also a general consensus that, in determining which "matters" must be referred to arbitration, the court will adopt a two-stage test: first, the court determines what the matters are which the parties have raised, or foreseeably will raise, in the court proceedings and, secondly, the court determines in relation to each such matter whether it falls within the scope of the arbitration agreement. The following principles are relevant to the two-stage test: (1) the court must ascertain the substance of the dispute, including any raised and possible defences; (2) stays may be granted in relation to a part of the court proceedings; (3) a "matter" is a substantial issue that is legally relevant to a claim or a defence which is susceptible to determination by an arbitrator as a discrete dispute, rather than an issue which is peripheral or tangential; and (4) the test entails a matter of judgment and the application of common sense [34]-[65]. The Board acknowledges that giving effect to the parties' bargain by this approach may involve the fragmentation of the parties' disputes, but notes that the effects of such fragmentation can be mitigated by effective case management by both the court and the arbitral tribunal [66].

(2) The meaning of "inoperative"

The Board holds that there is a general consensus in the common law world that the power to wind up a company lies within the exclusive jurisdiction of the courts. An arbitral tribunal

can, however, grant certain remedies, such as ordering a share buy-out, where no third party has a legal interest, and there is no public element. In an application to wind up a company there may be matters in dispute, such as allegations of breaches of a shareholders' agreement, which can be referred to an arbitral tribunal notwithstanding that only a court can make a winding up order [70]; [75]-[78]; [80]-[81].

(3) The application of the FAAEA to the facts of this case

Ting Chuan had identified the relevant matters which it argued were arbitrable: the first and second concerned whether FMCH had lost trust and confidence in Ting Chuan and the management of the Company, and whether the parties' relationship had irretrievably broken down. The third, fourth and fifth matters were whether it was just and equitable to wind up the company, whether an order should be made requiring Ting Chuan to sell its shares to FMCH or whether a winding up order should be made [23].

The parties agreed, correctly in the Board's view, that the fifth matter, concerning whether or not an order to wind up the company should be made, was not arbitrable. With regards to the third and fourth matters, the Board holds that an arbitrable tribunal does not have the power to make a ruling on whether it is just and equitable that the Company should be wound up or whether a share buy-out should be ordered [82].

However, the Board holds that the first and second matters are arbitrable: they are controversies relating to legal or equitable rights which are of substance, lying at the heart of the legal proceedings for a winding up order, which the parties agreed fall within the scope of the arbitration agreement. A stay in relation to the first and second matters is granted [83]-[97]. The Board also grants a discretionary stay of the winding up petition in relation to the Company under the discretion given to it by section 95(1)(d) of the Companies Act to make "any other order that it thinks fit"; the determination of the stayed matters will be an essential precursor to the assessment of whether it is just and equitable to wind up the Company [98]-[103].

(4) Section 95(2) of the Companies Act

Finally, the Board holds that while the arbitration agreement requires certain matters to be determined by arbitration, that obligation does not amount to a contractual prohibition against the initiation of winding up proceedings as contemplated by section 95(2) of the Companies Act [91]; [104].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at:

http: www.jcpc.uk/decided-cases/index.html