HCMP 2665/2017
[2019] HKCFI 1424

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2665 OF 2017

IN THE MATTER of Dickson Valora Group (Holdings) Company Limited

and

IN THE MATTER of s 724 and s 725 of the Companies Ordinance (Cap 622) and 177(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

BETWEEN

DICKSON HOLDINGS ENTERPRISE COMPANY LIMITED	Petitioner

and

MORAVIA CV	1st Respondent
DOMINGO BLANCO RODRIGUEZ	2nd Respondent
DICKSON VALORA GROUP (HOLDINGS) COMPANY LIMITED	3rd Respondent

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Before: Hon G Lam J in Court

Date of Hearing: 31 January 2019

Date of Judgment: 30 May 2019

DECISION

A. Introduction

1. This is an application by the respondents to the petition for an order that the petition be struck out on the ground that the petitioner has no standing to present it, alternatively for an order that further proceedings in the petition be stayed in favour of arbitration pursuant to an arbitration agreement in the shareholders' agreement.

B. Background

2. The protagonists are, on one side, the 1st respondent, Moravia CV ("**Moravia**") — a Netherlands company — and the investors behind it including the 2nd respondent, Mr Domingo Rodriguez, and, on the other side, the petitioner, Dickson Holdings Enterprise Company Limited ("**DHE**") — a Hong Kong company — and the Mainland Chinese resident behind it being Mr Fan Jiqian ("**Fan**").

3. The two sides came together in around 2010 for the purpose of pursuing a business opportunity of building a shopping mall and hotel complex in the Gangyu district of Jiangsu Province in Mainland China in cooperation with Walmart. For that purpose, they agreed to set up a company in Hong Kong called Dickson Valora Group (Holdings) Co Ltd ("**Company**"). The Company was incorporated with DHE and Moravia as

the subscribers on 8 October 2010.

4. On 24 December 2010, the three parties, namely, DHE, Moravia and the Company entered into a shareholders' agreement ("**Shareholders Agreement**"). The initial shareholdings were equally held, with each side holding 500,000 shares out of a total of 1 million shares in the Company.

5. The Shareholders Agreement, written in both Chinese and English, makes various provisions relating to the raising of funds for the project and the management and organisation of the Company.

(1) Recital (B) states that the Company has an authorised share capital of HK$1,000,000 divided into 1,000,000 equal shares and that DHE and Moravia "will have their respective shareholder's rights in accordance to the number of shares invested in the Company".

(2) Recital (C) states that DHE, Moravia and the Company "have agreed to enter into this Agreement for the purpose of governing their relationship as shareholders in relation to the Company and for managing the affairs of the Company upon the terms set out in this Agreement as a complement of the articles of incorporation of the Company".

(3) Part II sets out, by way of preamble, certain statements about the underlying development project, and states that the parties have signed the agreement "as a supplement" of the articles.

(4) Part III contains two paragraphs with information about the cooperation project.

(5) Part IV has the title "Agreements" and contains 9 clauses. Several of the clauses deal with the loans totalling US$3.5 million to be advanced by Moravia. Clause 8 states Moravia will not provide any additional funding and suggests that DHE will use the project company to raise additional funds required to complete the project. Clause 9 provides that in case of deadlock in shareholders' meetings in relation to a number of specified matters (including any increase or modification of the capital stock of the Company), Moravia shall be deemed to have an additional vote.

(6) Part V, headed "Management Organisation", simply sets out the directors and states that matters related to the operation and management after the incorporation of the Company shall be decided by the board of directors from time to time.

(7) The remaining clauses are an entire agreement clause, a clause restricting assignment, a clause on severance and validity, and the clause on dispute resolution as set out below.

6. At the end of the Shareholders Agreement there is the following clause which contains an arbitration agreement:

> " IX. Governing law
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> This Agreement shall be governed by and construed in accordance with Hong Kong law.
>
> Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration under the Hong Kong International Centre Administered Arbitration Rules in force at the date of this Agreement (the "Arbitration Rules"):
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> (i) the place of arbitration shall be in Hong Kong at the Hong Kong International Arbitration Centre (HKIAC);

(ii) there shall be three arbitrators, all of whom shall be appointed according to the Arbitration Rules;

(iii) the arbitration proceedings shall be conducted in the English language;

(iv) the decision of the arbitrators shall be final, binding and conclusive upon the parties to the dispute, their successors and permitted assigns, and they shall comply with such decision in good faith; and

(v) each party to the dispute to submit itself to the jurisdiction of the courts where the award by the arbitrators is sought to be enforced. Notwithstanding the foregoing, judgment upon the award may be entered in Hong Kong, or any court having jurisdiction over the parties or their assets.

During the period when the dispute is being resolved, except for the matter being disputed, the parties shall in all other respects continued their implementation of the Contract."

7. On 21 January 2011, the same three parties entered into a Supplementary Agreement adjusting the amount of the loan to be advanced by Moravia and providing for a "success fee" payable to DHE in the event that it fulfilled all its obligations.

8. For reasons that I need not determine at this stage, the project did not proceed smoothly and, on 4 January 2012, DHE transferred 225,000 shares in the Company to Moravia. According to DHE's initial position in these proceedings, this transfer was for nothing in return and thus wrongful. According to the respondents, this was an agreed transfer for consideration and recorded in three versions of a document, each called an "Addendum of Supplementary Agreement", executed on 4, 8 and 16 December 2011 respectively between the same parties, which also dealt with the success fee among other things.

9. The relationship between the two sides deteriorated further.

According to Moravia, it was because DHE had failed to perform its side of the bargain in managing, supervising or sourcing external funding for the project. It is neither necessary nor possible for present purposes to make any findings in that regard.

10. By April 2012, Moravia had found a new partner with whom to proceed to complete and operate the project. In October 2012 a dispute arose as to whether DHE's remaining 275,000 shares in the Company should be treated as already paid up. On 5 November 2012 the directors passed a written resolution to make a call on the unpaid shares and for forfeiture of the shares in case of non-payment, relying on certain provisions in the articles. DHE did not pay any of the instalments demanded, with the result that its 275,000 shares in the Company were forfeited and cancelled.

11. Five years later, on 4 December 2017, DHE presented a petition to this court (HCMP 2665/2017) against Moravia as the 1st respondent, Rodriguez as the 2nd respondent, and the Company as the 3rd respondent, in which it complains against the transfer of its 225,000 shares and the forfeiture of its 275,000 shares and seeks relief from unfairly prejudicial conduct under ss 724-725 of the Companies Ordinance (Cap 622).

12. In May 2018 DHE further took out a summons in the petition proceedings for interlocutory injunctive relief to restrain the disposal of (i) the 1st and 2nd respondents' shares in the Company, (ii) the Company's shares in its subsidiaries, and (iii) any business of the Company or its subsidiaries. On 25 May 2018, Lisa Wong J made an interim order, pending the hearing of the summons, requiring the respondents to notify DHE at least 10 days prior to any intended disposition.

13. For their part, the respondents took out the present summons on 14 June 2018 for an order that (a) the petition be struck out on the ground that DHE, no longer a member, has no standing to present it; or (b) the proceedings be stayed in favour of arbitration pursuant to the arbitration agreement in the Shareholders Agreement.

C. The petition

14. It is necessary to examine in greater detail the claims made in the petition. In §14 DHE states it reached an agreement with Moravia on 24 December 2010 to form the Company for the acquisition, construction and development of real estate projects in the PRC. DHE pleads a common understanding or consensus with Moravia that DHE would be responsible for the connections in the PRC while Moravia would be responsible for the injection of funds in the form of loans (§14).

15. The overarching complaint in the petition is set out in §17, namely, that:

> " the affairs of the Company have been conducted by the Respondents in a manner unfairly prejudicial to the Petitioner at the time when the Petitioner was a shareholder of the Company."

16. Under the heading "Forfeiture of Shares", the petition, as it stands, first complains that 225,000 shares in the Company were transferred by DHE to Moravia on around 4 January 2012 "in return for nothing".[1] As explained below, the attack on this transfer of shares has since been

[1] §18 & §23(a).

abandoned by DHE.

17. Secondly, DHE complains that on 5 November 2012, without valid notice, Moravia caused a written resolution to be approved by the board of directors of the Company to the effect that (i) the shareholders (namely, DHE and Moravia) would be asked to pay HK$275,000 and HK$725,000 in 4 equal instalments on 4 different dates for their 275,000 and 725,000 unpaid shares in the Company; (ii) in the event of non-payment of any instalment, the relevant amount of shares would be forfeited and cancelled; and (iii) 39 million new shares be allotted at par payable in full upon allotment to the shareholders in the proportion of 27.5% and 72.5% (10,725,000 shares and 28,275,000 shares respectively). This is described in the petition as the "Share Forfeiture Scheme".

18. It is averred that the resolution was unilaterally, arbitrarily and wrongfully imposed by Moravia and the directors it had nominated, that there was no basis for DHE's shares to be forfeited and that Moravia should not have departed from the common understanding or consensus with DHE.[2] It is further averred that the purpose of the Share Forfeiture Scheme was to create a pretence for misappropriating DHE's 50% shareholding,[3] to enable Moravia to exercise complete control over the Company,[4] to convert Moravia's loan into equity,[5] and to oust DHE completely after it had made contribution to the project in accordance with the common understanding or

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[2] §§20-21.

[3] §28(1). This evidently includes both the transfer of 225,000 shares in January 2012 and the forfeiture of 275,000 shares subsequently.

[4] §28(2).

[5] §30.

consensus.[6]

19. It is further complained that no notice of the board meeting as required under the articles of association had been given to DHE (presumably what is meant is no notice was given to the director nominated by DHE, namely, Fan). The articles provided as follows:

> " 16. A meeting may be convened by any two Directors or by the company secretary on requisition by any two Directors. Each Director shall be entitled to receive at least fifteen (15) Business Days notice of a Board meeting unless all Directors agree otherwise. Directors and alternate Directors who at the time of the despatch of the notice are outside of Hong Kong, shall be notified by fax at the fax number as notified in writing to the Company and/or the secretary of the Company for this purpose. …
>
> 17. Any resolution of the Board of Directors in writing signed by the majority of the Directors, in whatever part of the world they may be, shall be valid and binding as a resolution of the Directors provided that notice shall have been given to all the Directors of the Company in accordance with Article 16."

20. DHE did not pay the instalments, and its shares were forfeited in 4 tranches between December 2012 and March 2013.

21. By way of relief, DHE claims, *inter alia*, declarations that the November 2012 resolution and the Share Forfeiture Scheme were invalid and of no effect, an order for rectification of the share register on the basis that it holds 50% of the shareholding, and an order that Moravia do purchase DHE's 50% shareholding in the Company at a fair price to be determined.

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[6] §28(3).

D. The respondents' response

22. The respondents have not yet been directed to file any points of defence but their stance on the complaints in the petition may broadly be seen from the affirmations filed in opposition to DHE's application for interlocutory injunction and in support of their own application for strike-out or stay.

23. The respondents say that, first, the 225,000 shares transferred in January 2012 were voluntarily sold by DHE to Moravia and were duly paid for at the price of HK$225,000 (agreed to be equivalent to RMB200,000) together with a further payment of HK$42,050 for the reimbursement of expenses. This was reflected in the Addendum to the Supplemental Agreement signed on 4 December 2011, clause 2 of which provided that DHE agreed to transfer 22.5% of the shareholding in the Company to Moravia and that thereafter Moravia would hold 72.5% of the shareholding.

24. The respondents say that DHE had failed to perform its duties under the Shareholders Agreement to manage, supervise and to take steps to ensure the success of the project. Further, as the costs of the project had increased drastically from DHE's initial estimates, Moravia explored the possibility of bringing a further partner into the project. This was opposed by Fan, who made threats, spread lies and caused disruption to the operation of the project. As the shares initially allotted to DHE had never been paid for, two of the directors nominated by Moravia decided to convene a board meeting to consider issuing notices to the shareholders to ask them to comply with the payment obligations. A notice was issued to all directors

(including Fan) on 12 October 2012 informing them of the resolutions to be signed on 5 November 2012. Since DHE failed to make payment, its shares were forfeited in accordance with the provisions of the Company's articles.

25. As for the capitalisation of Moravia's loans into share capital, the respondents say that it would enhance the financial position, in particular, the capital base, of the Company and improve its ability to find lenders to fund the project. The allotment was on a *pro rata* basis and it was DHE's own choice not to subscribe for the new shares.

E. Strike-out application

26. The strike-out application can, in my view, be shortly dealt with. The principal ground relied upon is that DHE was not registered as a member of the Company when the petition was presented. It is said that it did not therefore have *locus* and the petition must be struck out. Even if the steps leading to the forfeiture of DHE's shares in the Company may be impugned, the proper course (it is argued) would be for DHE first to bring proceedings to set aside those steps, before it can have any standing as a member.

27. I reject this argument. The forfeiture of its shares is the very conduct complained of by DHE as unfairly prejudicial conduct in the petition. It seems to me highly unattractive to contend that DHE should be denied standing to complain about conduct which deprived it of membership in the Company, on the ground that it is not a member.

28. The authorities do not support the respondents' position. In *Re Rational Industrial Ltd* (unrep, HCCW 1193/2002, 20 March 2003),

where there was also a complaint about forfeiture of shares, Kwan J (as she then was) held that the court had a discretion whether to require a petitioner to establish his *locus* to claim relief under s 168A of the predecessor Companies Ordinance (Cap 32) in proceedings outside the petition, or to determine the question of *locus* in the context of the petition, citing *Alipour v Ary* [1997] 1 WLR 534 and *Re Kenly (HK) Ltd* (unrep, HCCW 964/2002, 2 January 2003). See also *Re Mak Shing Yue Tong Commemorative Association Ltd* [2005] 4 HKLRD 328, §§52-65. I have no doubt in this case that whether DHE's shares were validly and properly forfeited should be allowed to be dealt with in the petition. The strike-out application must therefore be rejected.

F. Stay application

29. Stay of proceedings in favour of arbitration is governed by s 20(1) of the Arbitration Ordinance (Cap 609), which gives effect to Article 8 of UNCITRAL Model Law, which in turn provides as follows:

> "*Article 8. Arbitration agreement and substantive claim before court*
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> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

30. It is not in dispute that in approaching an application for stay

under s 20(1), the court asks itself four questions, namely:

> " (1) Is the arbitration clause an arbitration agreement?
>
> (2) Is the arbitration agreement null and void, inoperative or incapable of being performed?
>
> (3) Is there in reality a dispute or difference between the parties?
>
> (4) Is the dispute or difference between the parties within the ambit of the arbitration agreement?"

See *Tommy CP Sze & Co v Li & Fung (Trading) Ltd & Others* [2003] 1 HKC 418, *per* Ma J (as he then was) at §§19-22; *Chu Kong v Lau Wing Yan and Others* [2019] 1 HKLRD 589, §20, *per* Poon JA.

31. In the present case, of the four questions above, the only one in issue is whether the dispute falls within the ambit of the arbitration agreement.[7] To determine this issue, the correct approach is to identify the substance of the dispute between the parties, and ask whether or not that dispute is covered by the arbitration agreement: *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, §22, *per* Harris J. In the terminology of Article 8(1) of the UNCITRAL Model Law, the questions are: what is the "matter" in the action, and is that "matter" the subject of the arbitration agreement in question.

32. There is nothing to prevent the substantive dispute in petition proceedings for relief from unfairly prejudicial conduct, in the sense of the commercial disagreement to be resolved between the parties, from being determined by arbitration. Even where certain relief sought by a party can

[7] Although Mr Domingo Rodriguez, the 2nd respondent, is not a party to the Shareholders Agreement, he is only a nominee of Moravia holding 0.1% of the shareholding in the Company and does not therefore raise any separate issues.

under the Companies Ordinance (Cap 622) only be granted by the court upon a petition, the petition proceedings may still be stayed in favour of arbitration, with the stay being lifted, after the conclusion of the arbitration, for the court to make the appropriate orders in light of the arbitral findings: *Re Quiksilver Glorious Sun JV Ltd*, §23; *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333, at §§77, 88 and 92.

33. Further, Ms Rachel Lam submits on behalf of the respondents that it is sufficient to justify a stay for the respondents to show that there is a *prima facie* case that the dispute is covered by the arbitration agreement, citing *Chee Cheung Hing Co Ltd v Zhong Rong International (Group) Ltd* (unrep, HCA 1454/2015, 9 March 2016). This does not appear to be disputed by Mr Anson Wong SC for DHE.

34. I turn first to the complaint about the transfer of 225,000 shares in the Company. As mentioned above, it was the express subject matter of agreement between the parties in the Addendum, which, as I have said in my decision dated 20 February 2019 on a different application in these proceedings (see [2019] HKCFI 482), is part and parcel of the Shareholders Agreement and therefore likewise subject to the arbitration clause. Whether or not the transfer was a proper and valid sale (including whether or not the price had been paid) appears to me to be, at least *prima facie*, a matter falling within the scope of the arbitration clause. At the hearing, however, Mr Wong on behalf of DHE abandoned this complaint and, after the hearing, DHE's solicitors provided a draft amended petition in which the averments relating to this complaint were, for the most part, removed.[8]

[8] There is still an allegation of misappropriation of DHE's 50% shareholding in para 28(1) which may be taken to be erroneously left there.

There is, as a result, nothing in this regard that remains in the petition to be stayed and referred to arbitration.

35. The forfeiture of DHE's remaining 275,000 shares seems to me to stand on a different footing. The nature of the complaint is, first, a breach of the articles of association, in a form of failure to give notice of the proposed directors' resolution and wrongful application of the forfeiture provisions to shares which had in fact been paid up. In addition, the petition alleges an exercise of directors' powers for wrongful purposes (and implicitly, therefore, in breach of fiduciary duties). It appears from the likely defence, as gleaned from the affirmations filed thus far, that the principal contentions will revolve round the questions of notice, payment, and purpose. The dispute does not seem to me on its face to have any direct connection with the Shareholders Agreement. Can it be said that it is nevertheless a "dispute, controversy or claim arising out of or relating to [the Shareholders Agreement], or the breach, termination or invalidity thereof"?

36. On behalf of the respondents, Ms Lam submits that the arbitration clause is to be construed broadly. In particular, she submits that as a general presumption, parties are to be taken to intend that any dispute arising out of the same relationship is to be decided by the same tribunal. Reliance is placed on the following passage in the speech of Lord Hoffmann in *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40 at §13:

> " In my opinion the 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. As Longmore LJ remarked, at para 17:

> 'if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so'. "

and also on the following passage in Longmore LJ's judgment in the Court of Appeal in the same case: [2007] EWCA Civ 20, where his Lordship, after considering previous authorities on the meaning of various phrases used in arbitration clauses such as "arising out of" or "arising under", stated (at §17):

> " Not all these authorities are readily reconcilable but they are well-known in this field and some or all are invariably cited by counsel in cases such as this. Hearings and judgments get longer as new authorities have to be considered. For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so."

37. Ms Lam submits that the phrase "relating to" has a very wide meaning and includes disputes which "whilst not arising under the contract are related to or connected with it": *Yingde Gases Investment Ltd v Shihlien China Holding Co Ltd* (unrep, HCA 2059/2012, 20 January 2014), at §38; *El Nasharty v J Sainsbury plc* [2004] 1 Lloyds Rep 309. She submits that the complaints about the Share Forfeiture Scheme concern the affairs and management of the Company. It is said that since the Shareholders Agreement expressly governs the relationship between Moravia and DHE as shareholders of the Company, concerns the management and affairs of the

Company and is expressed to be complementary to the articles, DHE's complaints "arise out of" or "relate to" the Shareholders Agreement.

38. Put in this way, the respondents' submission is tantamount to saying that any dispute between the parties to the Shareholders Agreement about the affairs of the Company falls within the arbitration clause.

39. With respect, even bearing in mind the principles favouring a broad construction, I do not find it possible to ascribe to the clause the meaning contended for. First, although the Shareholders Agreement is expressed to have been entered into for the purpose of governing the parties' relationship as shareholders in relation to the Company and for managing the affairs of the Company, it makes only relatively limited provisions with regard to the affairs of the Company.

40. The presumption of one-stop adjudication, as counsel put it, must be approached in this case having regard to the special features of company law. Once the parties became shareholders in the Company, they did not only enter into a contractual relationship arising from and governed by the Shareholders Agreement, but also a relationship governed by the company law of Hong Kong as well as the articles of the Company arising simply from the fact that they were shareholders in the Company. There are various rights and obligations associated with membership of a company that exist independently of any shareholders' agreement. There can be various types of disputes between shareholders on questions on which their shareholders' agreement, as such, makes no provision at all. It has to be borne in mind that the arbitration clause in this case applies to disputes arising out of or relating to the *Shareholders Agreement* or the breach,

termination or invalidity thereof, *not* arising out of or relating to any *affairs of the Company*. If the parties had intended otherwise, they could have easily devised an arbitration clause that expressly applied to any dispute between them relating to any affair of the Company. An example of a provision inserted into the articles of a company, requiring any difference relating to "any of the affairs" of the company to be referred to arbitration, may be found in *Newmark Capital Corporation Ltd & Others v Coffee Partners Ltd & Another* [2007] 1 HKLRD 718, §13.

41. For this reason, even general words having a wide import may not be apt to encompass all disputes concerning shareholders' rights. In the present case the complaint is based on a breach of the articles and of the fiduciary duty of directors. The Shareholders Agreement makes no provision concerning notice of board meetings, payment for shares or forfeiture of shares. The proprietary rights of a member to its shares in the Company is not the subject matter of the Shareholders Agreement at all, but governed by ordinary company law. As I understand the position, the Shareholders Agreement is neither relied upon for the claim nor for the defence. While the respondents do allege that DHE had failed to perform its obligations under the Shareholders Agreement for the promotion of the project and the procurement of funding, such allegations appear to form only the backdrop to the respondents' case rather than to provide a legal defence to DHE's complaint. The dispute in the petition concerns the legal validity of the share forfeiture, not the motives for or commercial reasons leading to it. In my judgment, the dispute cannot be said to have arisen out of or to relate to the Shareholders Agreement or its breach, termination or invalidity.

42. This conclusion is in my view consistent with and supported by

the following persuasive authorities from other jurisdictions. In *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, there were a number of claims made by a shareholder against the company, including a group of "share divestiture claims" which alleged, *inter alia*, that the plaintiff's shares had been transferred away by transfer forms that were not properly authorised by it and also for a collateral and improper purpose. The shareholders' agreement contained a clause for all "disputes or differences between the parties … touching and concerning the construction or effect of [that] Agreement or the rights and liabilities [thereunder]" to be referred to arbitration (although it is to be noted that the company was not a party to the agreement in that case). Austin J held that the issue of improper purpose did not touch and concern the rights and liabilities of the parties under the shareholders' agreement because it was essentially a question about the discharge by the directors of their equitable duties to the company, even though a breach of such duties may be enforceable derivatively by the plaintiff as a shareholder. To that extent his Honour held that the "share divestiture claims" did not fall within the arbitration clause in the shareholders' agreement (see §§171-174).

43. *Robotunits Pty Ltd v Mennel* [2015] VSC 268 concerned a claim brought by a company against its former managing director for the return of money allegedly paid out without basis and in breach of the defendant's duties as managing director. Croft J held that the subject matter of the proceedings was whether the defendant had a proper legal or equitable basis for causing the company to make the payments. In the result, it was held that although the company's claims for breach of fiduciary duty did not arise out of that agreement, the matter in question did fall within the arbitration clause because at the heart of the controversy between the parties was

whether the shareholders' agreement, which contained the arbitration clause, provided a proper basis for the payments. It would appear, however, that but for the fact that the shareholders' agreement was relied upon by the defence to justify the payments, there would have been no reason to regard the matter as falling within the arbitration clause.

44. In *BTY v BUA* [2018] SGHC 213, the dispute between the shareholder and the company was whether the company had adopted or approved a set of accounts (to which the plaintiff had objected) in breach of its articles of association. This question turned on, *inter alia*, the meaning and application of various provisions in the articles. On an appeal from an application by the company for a stay of proceedings in favour of arbitration pursuant to s 6 of the International Arbitration Act of Singapore,[9] Vinodh Coomaraswamy J, refusing a stay, held that the "matter" in litigation did not arise either out of or in connection with the shareholders' agreement, but concerned the articles which created a separate legal relationship between the parties operating on a separate legal plane.

G. Conclusion

45. For the above reasons, I conclude that the petition should not be

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[9] That section provides:

"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."

struck out. Further, the respondents have not shown, even on a *prima facie* basis, that the matter or the substance of the dispute in these proceedings fall within the ambit of the arbitration clause. There is no other basis suggested for a stay of proceedings. The respondents' summons filed on 14 June 2018 must therefore be dismissed.

46. As for costs, I take into account the fact that although DHE has prevailed under this decision, I would have stayed at least that part of the petition complaining about the transfer of 225,000 shares but for the fact that the complaint was abandoned at the hearing upon probing by the court. I make an order *nisi* that the 1st and 2nd respondents do pay DHE half of its costs of the application, to be taxed if not agreed, with a certificate for two counsel.

(Godfrey Lam)
Judge of the Court of First Instance
High Court

Mr Anson Wong SC, Mr Alan Kwong and Mr Michael Ng, instructed by William KW Leung & Co, for the Petitioner

Ms Rachel Lam, Mr Terrence Tai and Ms Jasmine Cheung, instructed by Angela Wang & Co, for the Respondents