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Singapore Case Law Series: Dispute resolution clauses in MSAs

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When disputants successfully resolve their differences at mediation, it is good practice to record the details of their settlement, with clarity and precision, in the form of a mediated settlement agreement (MSA). Ideally, they should also provide a clause for dispute resolution (for instance, a choice of court, arbitration, mediation or multi-tier dispute resolution agreement), in the event that the terms of the MSA are disputed. Generally, the MSA which contains an express reflection of the parties' agreement to resolve their dispute – will represent a full and final settlement of the issues in dispute. MSAs may then be brought to the court to be recorded as a court order. For instance, section 12(1) of the Singapore Mediation Act (No 1 of 2017) provides the following legislative mechanism to facilitate the recording of mediated settlement agreements as a court order in relevant circumstances:

"Where a mediated settlement agreement has been made in a mediation in relation to a dispute for which no proceedings have been commenced in a court, any party to the agreement may, with the consent of all the other parties to that agreement, apply to a court to record the agreement as an order of court."

But what if some of the terms in an MSA subsequently recorded as a court order need further clarification and lead to further disputes? To what extent can the court modify its own court orders, especially if there is no dispute resolution provision in the court order? The Singapore Court of Appeal case of Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd [2020] SGCA 15 was presented with this conundrum. While the case deals with a negotiated rather than a mediated settlement agreement, the principles will apply to MSAs.

The Facts: What happened?

The parties in dispute were shareholders in Sei Woo Technologies Pte Ltd ('SWTPL'). The Appellant, Retrospect Investment (S) Pte Ltd, initiated a minority oppression action against the Respondents, Lateral Solutions Pte Ltd and Low Yoon Keong, and a number of other defendants. The lawsuit was registered as Suit No 236 of 2017 ('Suit 236'). Before the dispute went to trial, the Respondents agreed in settlement negotiations to buy out the Appellant's shares in SWTPL and set out terms for an independent valuation. As such, on 20 August 2018, the parties agreed to discontinue Suit 236, in favour of a Consent Order – reflecting the outcome of the settlement negotiations – recorded before a Singapore High Court judge.

It subsequently transpired that the parties did not see eye to eye in the determination of the reference date for the valuation of the Appellant's shareholding. The parties had not specifically agreed on a reference date. The parties then filed cross-applications to the High Court to make a determination of the applicable valuation date. The fundamental problem with this cross-application was that the Consent Order did not provide for any right to allow the parties to approach the court for a determination on the applicable valuation date. In other words, there was no dispute resolution provision in the Consent Order which provided the Singapore High Court with the jurisdiction to make such a determination.

Accordingly, the parties modified their positions, and by way of a consent summons, filed a further application to amend the Consent Order in Suit 236 to include the following dispute resolution clause:

"In the event that the parties are unable to come to an agreement on the reference date for the valuation of the [Appellant's] shares in [SWTPL], the parties shall be at liberty to refer the matter to the Court for determination, which determination shall be final."

The application to modify the Consent Order was granted by the Assistant Registrar of the High Court. The High Court judge concurred. The issue on appeal turned on whether such a modification was appropriate in law.

Decision of the Court of Appeal

The Singapore Court of Appeal emphatically ruled that once the Consent Order in Suit 236 was made, and the Suit 236 was discontinued, the court was functus officio. What the notion of functus officio engenders, is that as soon as a suit in court has been concluded, the mandate of the court to rule on all disputed issues in that case expires. This means that the court will not have any power to reopen substantive issues in that concluded suit. This is a settled doctrine to ensure finality in litigation.

The Court of Appeal also recognised that whilst it has an inherent jurisdiction and power to clarify and give effect to the terms of its orders and to give consequential directions, its jurisdiction and powers cannot extend beyond non-substantive amendments to its orders. For instance, whilst clerical and grammatical errors in a rendered court judgment may be clarified, unambiguous orders made in a rendered judgment cannot be contradicted or modified, *unless this power has been provided for at the time the judgment was rendered.* It is also a settled rule that even if the parties had subsequently agreed and consented to any substantive amendments, this is insufficient to confer on the court a jurisdiction, which it ceases to have; the *functus officio* status of the court is, in this case, insurmountable.

The Court of Appeal found and ruled that there was simply no provision for resolving any disputes the parties would have over the determination of the applicable valuation date in the Consent Order. An insertion of this provision would have been a substantive amendment to the Consent Order. It was observed (at para 17), "The text of the original Consent Order was unambiguous and did not contemplate that the parties would refer matters that they could not agree on to the court. Indeed, at the time when the Consent Order was originally recorded, the parties specifically informed the Judge that the parties would not be referring any 'substantive issues' to the court after the discontinuance including the applicable valuation date and the approach to be adopted by the independent valuer."

Consequently, the Assistant Registrar's order that the Consent Order be amended to include a dispute resolution provision was set aside by the Court of Appeal. It is unclear from the judgment what other remedies might have been available to the parties with respect to how the disputed valuation date may be determined.

Lessons Learned from the Court of Appeal

The following learnings can be drawn from this case:
1. The principle drawn from contract law that mediated or negotiated settlement agreements must be carefully and meticulously drafted takes on a special significance if parties wish to record it as a Consent Order of the court. Why? Because a court order, unlike a contract, cannot be renegotiated.
2. We suggest that one way to manage this situation is for MSAs to include a dispute resolution clause, to deal with any differences arising in relation to the interpretation or implementation of the MSA. Such a clause may include a forum of their choice, for instance, arbitration, litigation, mediation or a mixed mode procedure). It is not uncommon for parties, at the time when they finalise their settlement, to leave some elements of their agreement – such as the valuation of shares and other assets – open to future determination by experts (see Teo Lay Gek and another v Hoang Trong Binh and others [2019] SGHC 84) or through neutral evaluation (see Yashwant Bajaj v Toru Ueda [2019] SGCA 69). Such determinations may be challenged. A dispute resolution provision provides an important and predictable mechanism for breaking any deadlock.
3. Court consent orders typically record the terms of the MSA in full (i.e., word for word), so that specific provisions such as dispute resolution clauses would also be reflected in the orders. Such clauses would provide the parties with a method for resolving any ancillary disputes.

Futile challenges and applications which may go all the way to the apex court, such as the one observed in the case of Retrospect Investment, may be avoided if parties included a dispute resolution clause.

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