Introduction

1. In the High Court decision of *Beltran v Terraform Labs Pte Ltd* [2023] SGHC 340 ("*Beltran*"), Nair J considered the novel issue of "arbitration asymmetry": what is the appropriate course of action where a *prima facie* case of an arbitration agreement is made out only in respect of some (but not all) of the claimants in a representative action under Order 4 rule 6(1) of the Rules of Court 2021 ("O 4 r 6(1)")?

2. This unusual intersection between arbitration and representative proceedings may be situated in a stylised account of e-business. The Internet facilitates the formation of business-to-consumer contracts on an unprecedented scale. The damage caused by a business's misconduct is often diffused across numerous victims, such that each victim has a low-value claim that they are not incentivised to pursue except through representative proceedings. The defendant business may seek to avoid litigation by arguing that arbitration clauses were incorporated by notice into the business-to-consumer contracts formed online. Whether there is sufficient notice is fact-dependent. The result is that the defendant business may make out a *prima facie* case of an arbitration agreement in respect of only some of the claimants.

3. The discussion in *Beltran* on this novel issue is merely *obiter* because all the claimants were subject to a *prima facie* arbitration agreement.[1] Nonetheless, Nair J's discussion contains insightful observations that merit further exploration.

4. This article is organised as follows. Section I outlines the possible approaches that a court may adopt when faced with arbitration asymmetry. Section II demonstrates that

[1] *Beltran* at [162].

the Delayed-assessment Approach is untenable. Section III contends that the Carve-out Approach and Discontinuance Approach are defensible and play complementary roles: where the court may determine the arbitrability issue without considering claimant-specific circumstances, the Carve-out Approach is appropriate; conversely, the Discontinuance Approach is appropriate where an individualised assessment is required to determine the arbitrability issue. Section IV emphasises the importance of a diligent assessment of "common interest". Section V concludes.

I. Possible Approaches

5. It is settled law that the court adopts a *prima facie* standard of review when hearing an application for a stay of proceedings in favour of arbitration.[2] Where a *prima facie* case of an arbitration agreement is made out in respect of *all* the claimants in a representative action, the action will be stayed in favour of arbitration.

6. However, where a *prima facie* case of an arbitration agreement is made out only in respect of *some* of the claimants in a representative action, the appropriate course of action depends on, *inter alia*, whether the arbitration agreement is made out in respect of the representative claimant. If the representative claimant is himself subject to a *prima facie* applicable arbitration agreement, a stay will be granted.[3] But if the representative claimant is not subject to a *prima facie* arbitration agreement, the possible approaches are:[4]

[2] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 ("*Tomolugen*") at [63].
[3] *Beltran* at [177].
[4] *Beltran* at [163], [177].

a. the action is allowed to proceed without alterations to the group of represented claimants, with the outcome at trial being determined based solely on the claims of the representative claimant, and any differences in the claimants' respective positions will be assessed at the damages stage (the "Delayed-assessment Approach");

b. the action is allowed to proceed, conditional on the group of represented claimants being trimmed to exclude those subject to a *prima facie* arbitration agreement (the "Carve-out Approach"); or

c. the entire action is stayed or discontinued in favour of arbitration to allow the arbitral tribunal to determine the extent to which the parties and the dispute are subject to an arbitration agreement (the "Discontinuance Approach").

II. Untenability of the Delayed-assessment Approach

7. In analysing the appropriateness of the possible approaches, the starting point is O 4 r 6(1), which provides that a representative action may proceed where the *numerous* claimants have a *common interest* in the proceedings.

8. As Nair J perceptively observed, the Delayed-assessment Approach is deeply problematic.

9. First, the evaluation of differences in the positions of claimants cannot be delayed until the assessment of damages.[5] The "common interest" requirement is evaluated at the "threshold jurisdictional" stage,[6] and this evaluation requires the court to compare the significance of the common issues between the claimants with the significance of the differing issues.[7]

10. Second, it is illogical and unprincipled for the issue of arbitrability – a jurisdictional issue – to be considered only after the conclusion of trial.[8]

11. Third, the court would violate the twin principles of party autonomy and *kompetenz-kompetenz* – i.e., the jurisdiction of an arbitral tribunal is a matter reserved for the determination by the tribunal itself – if it decides a dispute in respect of claimants who are *prima facie* bound by arbitration agreements.[9] The principle of party autonomy demands that courts uphold arbitration agreements voluntarily entered into.[10] Importantly, the separate principle of *kompetenz-kompetenz* precedes and exists independently of parties' consent; accordingly, "the arbitral tribunal may, in the exercise of its *kompetenz-kompetenz*, conclude that there was never any consent by the parties to refer their disputes to arbitration, and as a consequence, that it had no jurisdiction to begin with".[11] Therefore, the Delayed-assessment Approach violates the principles of party autonomy and/or *kompetenz-kompetenz*, as the case may be.

[5] *Beltran* at [166].
[6] *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 ("*Treasure Resort*") at [69].
[7] *Treasure Resort* at [60].
[8] *Beltran* at [165].
[9] *Ibid.*
[10] *Ibid*.
[11] *Tomolugen* at [25].

12. Fourth, the Delayed-assessment Approach would lead to absurd outcomes: claimants would be encouraged to circumvent arbitration agreements by authorising representatives who are not clearly bound by an arbitration agreement, and the defendant's right to arbitrate in respect of claimants subject to an arbitration agreement would be prejudiced when the defendant takes a step in the proceedings to defend itself in court.[12]

13. Nair J was right to reject the problematic Delayed-assessment Approach.

III. Defensibility of the Carve-out Approach and Discontinuance Approach

14. Neither the Carve-out Approach nor the Discontinuance Approach suffers from the problems described above. Nair J was concerned that these approaches raise their own share of challenges but, with respect, those concerns are largely unwarranted.

A. Neither approach gives rise to the Fundamental Tension

15. Nair J was very concerned that the court's assessment of the propriety of a representative action (*viz,* assessment of whether O 4 r 6(1) is satisfied) is "fundamentally" at odds with the limited scope of the court's duty where the dispute is potentially subject to an arbitration agreement (hereafter the "Fundamental Tension").[13] A court should not exercise jurisdiction if there is a *prima facie* arbitration agreement governing the dispute. Yet, in Nair J's view, the court is doing precisely just that when

[12] *Beltran* at [165].
[13] *Beltran* at [169].

it examines the claimants' claims and circumstances to determine whether there is "common interest" between the claimants.

16. With respect, the learned judge's concern appears to stem from a misconception that the court necessarily exercises jurisdiction when inquiring into the "common interest" issue under O 4 r 6(1). To understand why this is a misconception, we must carefully differentiate between the *jurisdictional* and *discretionary* issues presented by Order 15 rule 12(1) of the Rules of Court 2014 ("O 15 r 12(1)"), the predecessor provision for O 4 r 6(1).

17. O 15 r 12(1) provided that:

> Where numerous persons have the *same* interest in any proceedings…the proceedings may be begun, *and, unless the Court otherwise orders*, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
>
> [dissimilarity to O 4 r 6(1) emphasised in *italics*]

18. The Court of Appeal in *Treasure Resort* explained that O 15 r 12(1) operated in two stages.[14] At the first (*jurisdictional*) stage, the threshold requirement that the claimants have the same interest in the proceedings must be met. At this stage, the court's focus is on what is common between the claimants.[15] If the jurisdictional requirement is met,

[14] *Treasure Resort* at [29].
[15] *Treasure Resort* at [61].

the court, at the second stage, may exercise its *discretion* to discontinue the proceedings where this is justified by the overall circumstances of the case. "Defences" (used loosely here as referring to claimant-specific circumstances that may defeat the claims of that particular claimant) are considered only at this second stage.[16]

19. Nair J assumed that the *Treasure Resort* framework remains wholly applicable to O 4 r 6(1) without any consideration of the differences in wording between the two provisions.[17] The wordings differ in two ways. First, O 4 r 6(1) refers to "common interest" while O 15 r 12(1) referred to "same interest". This difference is insignificant. The Court of Appeal in *Treasure Resort* had interpreted "same interest" broadly as merely requiring commonality of interest.[18] The adoption of "common interest" language in O 4 r 6(1) merely reflects the flexible approach of *Treasure Resort*.[19] The second and more significant difference is that the second limb of O 15 r 12(1), which said "unless the Court otherwise orders [the proceedings may be] continued", is absent in O 4 r 6(1). Nair J assumed that the court retains a residual discretion under O 4 r 6(1).[20] With respect, the better view is that, under O 4 r 6(1), the court no longer has a discretion to order otherwise once common interest is shown.[21] The discretion under O 15 r 12(1) arose from the phrase "unless the court otherwise orders",[22] and the absence of this phrase in O 4 r 6(1) clearly evinces that no residual discretion is granted by that

[16] *Treasure Resort* at [62].
[17] See *Beltran* at [166].
[18] *Treasure Resort* at [57].
[19] Jeffrey Pinsler, *Singapore Civil Practice* vol 1 (LexisNexis, 2022) ("*Singapore Civil Practice*") at para 12-96.
[20] *Beltran* at [166].
[21] *Singapore Rules of Court: A Practice Guide* (Chua Lee Ming ed-in-chief, Paul Quan gen ed) (Academy Publishing, 2023) at para 04.022; *cf Singapore Civil Procedure 2024* vol 1 (Cavinder Bull, gen ed) (Sweet & Maxwell, 2024) at para 4/6/1.
[22] *Treasure Resort* at [27]-[28].

provision. The second stage of the *Treasure Resort* framework is not applicable to O 4 r 6(1).

20. Therefore, O 4 r 6(1) only presents a single jurisdictional issue. However, the first jurisdictional stage of the *Treasure Resort* framework *cannot* be adopted wholesale. If the court ignores the issue of separate "defences" against different claimants (as is the approach under the first stage of the *Treasure Resort* framework) and proceeds to trial, then at trial either (**a**) the court considers claimant-specific defences, but the defendant may nonetheless be prejudiced in that such defences may only be properly adjudicated in separate trials,[23] or (**b**) the court refuses to consider claimant-specific defences against the representative claimant, which would amount to an unjust bar to defences.[24] In other words, solely relying on the first stage of the *Treasure Resort* framework would fail to advance the purpose of representative actions of "facilitat[ing] access to and the efficacious administration of justice".[25] It is submitted that the purpose of O 4 r 6(1) is best advanced by engaging in a holistic examination of the jurisdictional issue of "common interests"; this entails a consideration of both the similarity and differences between the claimants' circumstances.

21. The outcomes (*viz*, whether the action is allowed to continue as a representative action) of the single holistic inquiry under O 4 r 6(1) and the two-stage inquiry under O 15 r 12(1) are unlikely to differ since the same factors are considered. However, the key

[23] *Singapore Civil Practice* at para 12-101.
[24] *Treasure Resort* at [63].
[25] *Treasure Resort* at [38].

difference is that O 4 r 6(1) abandons the *discretionary* stage which was an *exercise* of the court's jurisdiction.

22. Once it is recognised that O 4 r 6(1) is concerned solely with *existence* (rather than exercise) of the court's jurisdiction over the suit as a representative action, the ostensible Fundamental Tension fades away.

23. Nair J noted that where a suit is not properly brought as a representative action, the representative claimant is still "rightfully before the court as far as their own claims are concerned"[26] and may sue in their own right. However, the learned judge erred when he reasoned that this demonstrates that the court had assumed jurisdiction over all the claimants.[27] On the contrary, this demonstrates that the court had assumed jurisdiction over the representative claimant (but not the represented claimants).

24. In short, the "common interest" inquiry does not amount to an exercise of jurisdiction over the represented claimants, and is not at odds with the court's limited duty *vis-à-vis* claimants potentially subject to an arbitration agreement. The Carve-out Approach and the Discontinuance Approach – both of which incorporate the "common interest" inquiry – do not give rise to any "Fundamental Tension".

B. Neither approach necessitates an impermissible "individualised assessment"

25. Nair J was also concerned that the assessment of whether the represented claimants are subject to an arbitration agreement "may require the court to conduct an individualised

[26] *Beltran* at [99].
[27] *Ibid* at [100], [169].

assessment of each claimant's claim".[28] This individualised assessment would be more invasive than the general "common interest" inquiry.

26. This difficulty is more apparent that real. Where there is no significant variation between the claimants' circumstances (e.g. the applicability of an arbitration agreement depends on whether the represented claimants contracted on standard terms *A* or *B*, and it is undisputed which standard terms each claimant contracted on), then the court may determine the applicability of an arbitration agreement without engaging in an "individualised assessment".[29] The group of represented claimants may then be trimmed to exclude those subject to a *prima facie* arbitration agreement (i.e., the Carve-out Approach applies). On the other hand, where there is significant variation between the claimant's circumstances (e.g. where each claimant's personal negotiations with the defendant determines whether an arbitration agreement was incorporated into their respective contracts), the court may conclude that there is a lack of "common interest" and refrain from engaging in an "individualised assessment" of which claimant is bound by an arbitration agreement. The Discontinuance Approach applies, and the claimants may only sue in their own right.

C. Representative claimant's standing

27. Nair J reasoned that the representative claimant may not have the requisite standing to argue whether the represented claimants are subject to an arbitration agreement.[30] This

[28] *Beltran* at [170].
[29] See e.g. *Ehret v Uber Techs, Inc* 148 F Supp 3d 884, 902-03 (ND Cal, 2015).
[30] *Beltran* at [172].

is because O 4 r 6(2) merely requires that represented claimants consent to the representative claimant bringing an action on their behalf.

28. The animating concern is twofold. First, the court's jurisdiction is "confined to declaring contested legal rights of the parties represented in the litigation" and thus there must be a "real controversy" for the court to resolve.[31] Second, where the representative claimant is not personally affected by the arbitration agreements, he may fail to "to fairly and capably represent the interests of…[the represented claimants]".[32]

29. Assuming that the issue of arbitrability is a real controversy, the sole concern, then, is whether "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome'".[33] Where the argument against enforceability of arbitration agreement is common to a large proportion of the represented claimants, the failure of such an argument would result in discontinuance of the suit or a substantial trim-down of the group of represented claimants, making litigation much more costly for the claimants; the representative claimant is thus incentivised to vigorously advocate against enforceability, and may be regarded as having sufficient standing to make the argument. On the flipside, vigorous advocacy is less assured where the representative claimant raises claimant-specific arguments against enforceability of an arbitration agreement. Having said that, even in this instance, the potential lack of standing may be cured by the represented claimants

[31] *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [19].
[32] *Syed Nomani v Chong Yeow Peh* [2017] 4 SLR 1064 at [18].
[33] *United States Parole Commission v. Geraghty* 445 U.S. 388 (1980) at 404.

specifically consenting to the representative claimant arguing on the issue of arbitrability.

D. Sufficient safeguards to ensure the defendant is not prejudiced

30. Represented claimants, not being parties, are not obliged to give discovery or evidence, or to be cross-examined.[34] The defendant thus faces an uphill task in establishing the *prima facie* applicability of arbitration agreements. Having said that, the court may mitigate potential prejudice to the defendant by exercising its case management powers to make orders (e.g. pertaining to discovery, interrogatories and recovery of costs) against represented claimants.[35]

31. Moreover, given that O 4 r 6(1) is intended to "facilitate access to and the efficacious administration of justice",[36] the holistic inquiry as to "common interest" arguably may take into consideration potential prejudice to the defendant. In other words, prejudice to the defendant would weigh against a finding of "common interest".

IV. Importance of a Realistic Approach towards the "Common Interest" Inquiry

32. As explained, the Carve-out Approach and the Discontinuance Approach play complementary roles. Where the applicability of arbitration agreements depends on claimant-specific arguments, the representative claimant is less likely to have standing to make such arguments; the defendant is more likely to be prejudiced by procedural limitations against represented claimants as non-parties; and there is likely to be a lack of "common interest". Consequently, the Discontinuance Approach is likely

[34] *Treasure Resort* at [36].
[35] *Singapore Civil Practice* at para 12-107, citing *Treasure Resort* at [37].
[36] *Treasure Resort* at [38].

appropriate. Conversely, where the applicability of arbitration agreements depends on arguments common to a large proportion of the represented claimants, the representative claimant is more likely to have standing to make such arguments; the defendant is less likely to be prejudiced by procedural limitations; and there is likely to be sufficient "common interest". Consequently, the Carve-out Approach is likely appropriate.

33. In other words, the applicable approach is determined by the "common interest" assessment. In so assessing, the court cannot assume the applicability of arbitration agreements. The court must "adopt a practical and *realistic* approach, and not indulge in speculation on hypothetical possibilities that…defences could be raised".[37] Otherwise, the defendant would be able to manufacture a lack of "common interest" – and thereby cripple representative proceedings – simply by waiving its arbitration rights as to the representative claimant and then alleging that some or all of the represented claimants are subject to arbitration agreements.[38] If representative claimants are "picked off" successively, the represented group would eventually also fail to meet the numerosity requirement in O 4 r 6(1).

34. Such gamesmanship by the defendant must not be allowed because it has a claim-suppressing effect that immunises the defendant from legal liability.[39] Representative proceedings allow claimants to overcome cost-related barriers and vindicate their individual rights. The "*realistic* alternative to a [representative proceedings] is not [a multitude of] individual suits, but zero individual suits, as only a lunatic…sues for [a

[37] *Treasure Resort* at [70].
[38] Emily Villano, "Arbitration Asymmetries in Class Actions" (2022) 131 Yale LJF 742 ("Villano") at 753.
[39] Villano at 754.

small sum]".[40] Further, arbitration is not a viable alternative; empirical studies reveal that "almost no consumers or employees 'do' arbitration at all".[41] Canadian courts have addressed this claim-suppressing concern by holding that arbitration agreements are unenforceable where referring the dispute to arbitration would result in a real prospect of the challenge not being resolved.[42] This approach, which significantly extends the doctrine of unconscionability,[43] is unlikely to be adopted by Singapore courts given the Court of Appeal's rejection of a broad doctrine of unconscionability founded on inequality of bargaining of power.[44] The corollary is that, in Singapore, the "common interest" inquiry does the heavy lifting in ensuring representative proceedings remain accessible. The defendant cannot be allowed to manufacture a lack of "common interest".

V. Conclusion

35. The Delayed-assessment Approach is untenable. It is inconsistent with how a representative action works, and contradictory to the twin principles of party autonomy and *kompetenz-kompetenz,* for the outcome at trial to be premised on the assumption of non-enforceability of arbitration agreements.

36. In contrast, the Carve-out Approach and the Discontinuance Approach are preferable because they do not suffer from such difficulties. Further, on close examination, Nair J's reservations about these approaches are largely unwarranted.

[40] *Carnegie v Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004).
[41] Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 Yale LJ 2804 at 2814-2815.
[42] *Uber Technologies Inc v Heller* (2020) SCC 16 ("*Uber*") at [32]-[46].
[43] *Uber* at [103].
[44] *BOM v BOK* [2019] 1 SLR 349.

37. Whether the Carve-out Approach or the Discontinuance Approach is more appropriate in a particular case is determined by a diligent assessment of the "common interest" requirement. Ultimately, O 4 r 6(1) must be applied in a broad and flexible manner, bearing in mind that the purpose of representative actions is to facilitate access to and the efficacious administration of justice.[45]

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[45] *Treasure Resort* at [38].