Issues in Cross Border Insolvency: Court Addresses Carve-Out for Arbitration Proceedings

OCTOBER 2024 | SINGAPORE

Introduction

Where the Court has granted recognition of foreign insolvency proceedings against a company, an automatic stay and suspension of actions or proceedings against that company will arise. Thereafter, no "action or proceeding may be proceeded with or commenced against the company" except (i) with the court's permission, and (ii) in accordance with such terms as the court may impose, as per section 133(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("**IRDA**").

However, may a third party pursue an arbitration against the company in accordance with a valid arbitration agreement?

Background

In *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241, two companies ("**Sapura Entities**"), which were part of the Sapura group of companies ("**Sapura Group**"), were undergoing reorganisation proceedings in Malaysia as part of a debt restructuring effort. They sought and obtained recognition and relief in Singapore under the Third Schedule and section 252(1) of the IRDA.

Separately, a non-party to the recognition proceedings ("**GAS**") had entered into two construction contracts ("**Contracts**") with the Sapura Entities containing an arbitration agreement. After a dispute arose, GAS commenced arbitration against the Sapura Entities, seeking compensation for alleged breaches of the Contracts. To enable the arbitration to proceed, GAS sought a carve-out from the automatic stay.

Decision of the High Court

The Court found that the carve-out prayed for by GAS should be granted and the arbitration be allowed to proceed.

First, it was clear that the arbitration was caught by the automatic moratorium under Article 20(1) of the UNCITRAL Model Law on Cross-Border Insolvency (as given force of law under the IRDA) ("**Model Law**").

Second, the Court was satisfied that the carve-out sought by GAS should be granted, subject to a condition that GAS would require leave of the Court to enforce any award.

1. The complexity of the dispute between GAS and the Sapura Entities weighed strongly in favour of having the dispute resolved through arbitration rather than through the proof of debt regime.
2. With regard to remedies, GAS's claim was not one that could be adequately resolved within the proof of debt regime.
3. There was nothing to show that the claim was without foundation or unsustainable.
4. There was nothing to point to any undue prejudice that would be occasioned to the Sapura Entities' other creditors if the carve-out sought by GAS to allow the arbitration to go ahead was granted. However, other creditors might be prejudiced if GAS were allowed to enforce any resulting award. The Court therefore imposed the condition that there should be no enforcement of the award anywhere without leave of the Court.

Third, if it were necessary to do so, the Court would also have allowed the carve-out sought by GAS on the basis that the international arbitration regime mandatorily trumps the insolvency moratorium as a matter of the operation of law, given that (i) the arbitration agreements in the Contracts remained valid; and (ii) the dispute between the parties indisputably fell within their scope. This triggered the Singapore court's mandatory obligation to enforce the arbitration agreements on GAS's request for the dispute to be resolved by arbitration. Despite its decision, however, the Court noted that the conflict between the international arbitration and insolvency regimes could not be readily resolved.

Fourth, the Court considered whether GAS had submitted to the jurisdiction of the Malaysian courts in relation to the reorganisation proceedings. Although it found that GAS had indeed submitted to the jurisdiction of the Malaysia courts, such submission had no effect on the enforceability of the arbitration agreements.

Case Management: Court-to-Court Communication and Draft JIN Guidelines

In relation to case management, the Court noted in *Re Sapura 1200 Ltd* [2024] SGHC 242 that it had employed the Protocol on Court-to-Court Communication and Cooperation between Malaysia and Singapore in Cross-Border Corporate Insolvency Matters. It had also taken into consideration the draft Judicial Insolvency Network guidelines on the Management of Applications for the Arrest of Vessels where the Vessel Owner or Bareboat Charterer is the Subject of Cross-Border Insolvency Proceedings ("**Draft Guidelines**"). Although still in draft form, the Draft Guidelines provide useful guidance for better case management.

Accordingly, court-to-court communications were held to apprise the Malaysian court of the steps taken in Singapore and the application of the Draft JIN Admiralty Guidelines. Such communication also enabled the efficient management of potential further applications by other entities of the Sapura Group for recognition of the reorganisation proceedings in Singapore.

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