Dispute Resolution Hotline

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SINGAPORE HIGH COURT: INSOLVENCY MORATORIUM NOT A BAR TO INTERNATIONAL ARBITRATION

- Courts must consider factors such as nature and merits of the claim, while deciding a carve-out application from mandatory stay under Model Law.
- Singapore courts are bound to follow the principles in Salford Estates, as it has been adopted by Singapore Court of Appeals in previous judgments.
- *Sian Participation Corp* (recent UK Privy Council Judgment) which overruled Salford Estates is only applicable in cases of insolvency proceedings, and does not extend to restructuring efforts by way of schemes and arrangements.

INTRODUCTION

Recently, the Singapore High Court ("**SGHC**"), in its judgment in *Re Sapura Fabrications Sdn Bhd* ("**Sapura Fabrications**"),[1] addressed the interplay between the cross-border insolvency proceedings and international arbitration. The case involved application by GAS (a non-party) seeking a carve-out from the moratorium ("**Carve-Out Application**"), to continue its arbitration against the Sapura Entities, which were under moratorium. Sapura Fabrication Sdn Bhd and Sapura Offshore Sdn Bhd (collectively, the "**Sapura Entities**") had commenced restructuring proceedings in Malaysia ("**Malaysian Proceedings**") and sought recognition of those proceedings as foreign main proceedings under Third Schedule and s 252(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "**IRDA**"), which implements the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the "**Model Law**") ("**Recognition Proceedings**"). The SGHC recognized the Malaysian Proceedings as foreign main proceedings and imposed a moratorium. GAS applied to SGHC to seek a carve-out from the moratorium to continue arbitration proceedings against Sapura Entities. SGHC relied on its discretionary powers under Article 20(6) of the Model Law to grant the carve-out in favour of GAS.

The SGHC also considered the mandatory stay of insolvency/restructuring proceedings in favour of arbitration under the International Arbitration Act, 1994 ("**IAA**") and Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10 June 1958 ("**New York Convention**"). The SGHC took note of the recent UK Privy Counsel's ("**UKPC**") judgment in *Sian Participation Corp (In Liquidation) v. Halimeda International Ltd.* ("**Sian Participation**"),[2] wherein the UKPC held that winding-up proceedings should only be stayed for arbitration if the debt is genuinely disputed on substantial grounds. Our analysis of the UKPC judgment in Sian Participation can be found here. However, the SGHC held that the *Sian Participation* judgment is inapplicable in Singapore, and the Singapore jurisprudence continues to be governed by the judgment of English Court of Appeal ("**EWCA**") in *Salford Estate (No. 2) v. Altomart Ltd. (No. 2)* ("**Salford Estate**"),[3] as adopted by Singapore Court of Appeal ("**SGCA**") in *AnAn Group (Singapore) Pte. Ltd. v. VTB Bank (Public Joint Stock Co.)* ("**AnAn Group**"),[4] which states that winding-up proceedings must be stayed in favour of arbitration if the debt has been disputed, and the dispute is governed by an arbitration agreement.

FACTUAL BACKGROUND

Restructuring of Sapura Entities

The Sapura Entities are Malaysian companies involved in the oil and gas industry. The Sapura Group faced financial difficulties and consequently initiated restructuring efforts in 2022, including individual schemes of arrangement in Malaysia for its various entities. Sapura Entities also filed corresponding applications before the SGHC for recognition of Malaysian Proceedings as foreign main proceedings under IRDA.

Dispute between GAS and Sapura

The dispute between GAS and the Sapura Entities arose from two construction contracts entered into in 2019 and 2020 ("**Contracts**"), valued at USD 169 million. The contracts, governed by English law, included arbitration agreements providing for Singapore-seated arbitration under the aegis of Singapore International Arbitration Centre ("**SIAC**"). GAS terminated the contracts in March 2023, citing various breaches by the Sapura Entities. GAS commenced separate arbitrations against each of the Sapura Entities in September 2023, which were later consolidated into a single arbitration by the SIAC. The Sapura Entities denied GAS's claims.

Carve-out Application before the SGHC

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GAS sought a carve-out from the moratorium, i.e., the automatic stay arising under Article 20(1) of the Model Law. GAS argued that its claims did not fall within the scope of the Sapura Entities' proposed schemes of arrangement and that the proof of debt process[5] was inappropriate for resolving its complex claims. The Sapura Entities opposed the carve-out, arguing that GAS's claims were included in the schemes and that the proof of debt process was robust enough to handle the claims.

DECISION OF SGHC

While the SGHC decided the Carve-Out Application exercising its discretionary powers under Article 20(6) of the Model Law, the SGHC also discussed the mandatory stay of insolvency proceedings in favour of arbitration under the IAA and New York Convention.

For exercising the discretionary powers to grant a carve out, the SGHC held that the application must be decided on the basis of the following issues: (i) whether an arbitration proceedings is within the scope of the automatic stay under the Model Law, and (ii) if yes, whether the carve-out from the moratorium ought to be granted.[6]

While dealing with the first issue, the SGHC held that arbitration proceedings are covered by the automatic stay under the Model Law, as decided by the SGHC in its previous decisions.[7]

On whether the carve-out from the moratorium should be granted, SGHC considered the following factors, based on its previous judgements:[8]

1. Timing of the application for carve-out
2. Nature of the claim
3. Existing remedies
4. Merits of the claim
5. Existence of prejudice to the creditors or the orderly administration of the liquidation
6. Other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by grant of permission, the proportionality of the costs of the proceedings to the debtor's resources, and the views of the majority creditors.

The SGHC dealt with each factor individually, while deciding in favour of GAS.

Nature of Claim

The courts first considered the nature of GAS's claims and its suitability for determination in the proof of debt proceedings that are, by default, summary in nature. The more complex a claim is, the less suitable it is for summary determination. Factual complexities are best resolved in "proper hearings", as any determination would require the parties to lead evidence and go through a trial.

Following factors resulted in making GAS's claim too complex for proof of debt process:

1. Sapura Entities conceded to the complexity of the GAS's claim by arguing it to be the cause of delay in Malaysian Proceedings;
2. the correspondence between parties evidenced numerous factual conflicts between the parties;
3. the Contracts being governed by English Law – the proof of debt process was not adept to deal with disputes governed by foreign law that require expert evidence and the parties, having chosen arbitration, would have presumably wanted an English law tribunal to resolve their dispute;
4. Sapura Entities intended to assert set-off against GAS's claim, which as per decision of the Singapore Court of Appeal ("**SGCA**"),[9] should not be decided by liquidators in proof of debt process unless it is "simple arithmetic".[10]

Therefore, the nature of GAS's claim weighed in favour of allowing the Carve-Out Application.

Existing Remedies

This factor is connected to the nature of the claim, i.e., here, the court determines if the claim is suitable for resolution through the proof of debt process. Sapura Entities argued that the proof of debt process in Malaysian Proceedings is robust enough to handle the complexity of GAS's claim. A retired Malaysian judge acted as the adjudicator and had the power to adopt any procedure, including written submissions, oral hearings, etc. However, SGHC held that it was not adequate. The mere possibility of the adjudicator adopting a process suitable to deal with GAS's claim does not make the proof of debt proceedings suitable.

Merits of the Claim

The test is to simply ensure that the claim must not be unsustainable. The applicable standard to assess the merits of the claim is if there is a "serious question to be tried".[11] Sapura Entities did not argue that GAS's claim was completely meritless.

Existence of Prejudice

The test involves balancing the prejudice as between the applicant for the carve-out and the general body of creditors on the other side. As per SGHC, material on record did not show that any prejudice would occur if a carve-out is granted in favour of GAS. The SGHC found that the prejudice, if any, to the creditors would occur on the enforcement of the award(s) by GAS. Therefore, SGHC imposed a condition that there will be no enforcement of the award without prior approval of the SGHC.

In light of this, the SGHC allowed GAS's carve-out application, subject to the condition that any enforcement of the award by GAS would only occur after seeking leave of the SGHC.

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September 22, 2024

MANDATORY STAY OF INSOLVENCY PROCEEDINGS IN FAVOUR OF ARBITRATION

While GAS's carve-out application was allowed on the basis of SGHC's discretionary power under Article 20(6) of the Model Law, the SGHC also discussed the mandatory stay of insolvency proceedings in favour of an arbitration under IAA and New York Convention.

As per the New York Convention, if a dispute is governed by an arbitration agreement, courts must, if requested by any of the parties, refer the dispute to arbitration. Only exception being, if the court finds that the arbitration agreement is (i) null and void; (ii) inoperative; or (iii) incapable of being performed.

SGHC relied on the judgment of SGCA in *AnAn Group*,[12] where the SGCA had followed the English precedent in *Salford Estate* to hold that winding-up proceedings must be stayed in favour of arbitration if the debt has been disputed, and the dispute is governed by an arbitration agreement.[13] In *Salford Estate*, EWCA had held that an insolvency proceeding must be stayed in favour of arbitration if the courts find that the disputed debt is governed by an arbitration agreement, on a prima facie basis. While the English Privy Council ("**Privy Council**"), in *Sian Participation*, has recently overruled the Salford Estate judgment, SGHC held that the law in Singapore is still governed by SGCA's judgment in *AnAn Group*, which is binding upon SGHC. Further, the SGHC also distinguished the judgment in *Sian Participation* on the following grounds:

1. *Sian Participation* is distinguishable from the facts of the present case. Privy Council, in *Sian Participation*, reasoned that an insolvency proceeding did not involve the adjudication of the applicant's claim as a creditor, either on merits or on quantum. However, in a restructuring process, as in the present case, the party intends the scheme/arrangement to be a "once-and-for-all" settlement of all of its liabilities part of the scheme. Therefore, the judgment in *Sian Participation* does apply to the present case.

2. Further, the Hong Kong Court of First Instance, in *Re Mega Gold Holdings Ltd.*,[14] had declined to follow *Sian Participation* as they were bound by the earlier judgment of Hong Kong Court of Appeal in *Re Simplicity & Vogue Retailing (HK) Co. Ltd.*[15] and *Re Shandong Chenming Paper Holdings Ltd.*,[16] wherein the Hong Kong Court of Appeal had followed *Salford Estate*.[17]

And therefore, in Singapore, insolvency/restructuring proceedings will be stayed in favour of arbitration if the debt has been disputes, and such dispute is governed by an arbitration agreement.

ANALYSIS

While the SGHC granted the carve-out in favour of GAS using its discretionary power under Article 20(6) of the Model Law, the views expressed by SGHC in relation to the mandatory stay of insolvency/restructuring proceedings in favour of arbitration result in a unique situation. Privy Council had deliberately moved away from the law laid down in *Salford Estate*, finding it to be a hindrance to the pro-arbitration approach. However, as noted by the SGHC in *Sapura Fabrications*, the law in Singapore continues to be governed by the judgment of SGCA in *AnAn Group*, which is a superior court. It remains to be seen if SGCA deviates from the AnAn Group judgment, to adopt the position taken by UKPC in *Sian Participation*.

As seen above, Singapore has adopted the Model Law, which provides for the recognition of foreign insolvency proceedings, as well as, any carve-outs from a moratorium that follows from such recognition. In India, Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") provides a framework for recognition of foreign insolvency proceedings in India. However, it is dependent on the Indian Government entering into reciprocal arrangements with foreign governments. As of the day of this publication, India is yet to enter into any such arrangements. Therefore, the IBC provisions remain without any real force. In such situation, the parties have to rely on the principles of comity to request for a stay of proceedings and enforcement of a moratorium in India.[18] While this does not amount to recognition of foreign insolvency proceedings in India, this approach adopted by Indian courts has helped in administering and assisting the foreign insolvency proceedings.

Further, the moratorium under Section 14 of the IBC has been interpreted by Indian courts to have an overriding effect over all other statutes. This is due to the non-obstante provision in Section 238 of the IBC. Courts have held that the non-obstante clause in IBC is of the widest amplitude resulting in the effect of moratorium to be stretched to its limits.[19] This may extend to arbitral proceedings as well. However, the Courts have generally refused to stay the proceedings for appointment of arbitrations opining that if any moratorium is granted, it would be effective against the arbitral proceedings directly.[20] Further, the judgment of the Hon'ble Supreme Court in *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*[21] empowers the adjudicating authority under IBC to exercise its discretion in admitting an application for corporate insolvency resolution process ("**CIRP**"), on factors such as feasibility of the CIRP. This may allow the adjudicating authority to exercise its discretion to refuse admitting an application for CIPR and refer the parties to arbitration.

Various committees constituted to review the insolvency law in India have recommended the introduction/adoption of a framework for dealing with cross-border insolvency proceedings. In 2018 the Insolvency Law Committee proposed a draft bill to fill the vacuum in relation to cross-border insolvency in India.[22] This draft bill was largely based on the Model Law. In 2020, the Cross-Border Insolvency Rules/Regulation Committee published a report on comprehensive set of rules and regulations to implement the recommendations by Insolvency Law Committee.[23] However, we are yet to see any progress on that front.

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You can direct your queries or comments to the relevant member.

[1] [2024] SGHC 241.

[2][2024] UKPC 16.

[3][2015] Ch 589.

[4][2020] 1 SLR 1158.

[5]Proof of debt process is a summary determination of the debts submitted by the creditors in a restructuring proceeding in Malaysia.

[6][2024] SGHC 241, ¶34.

[7]*Re: IM Skaugen SE*, [2019] 3 SLR 979; *The "Engedi"*, [2010] 3 SLR 409.

[8]*Wang Aifeng v. Sunmax Global Capital 1 Fund Pte. Ltd. & Anr.*, [2023[3 SLR 1604.

[9]*Kyes Resources Pte. Ltd. (in compulsory Liquidation) & Ors. v. Feima International (Hongkong) Ltd. (in liquidation),* [2024] 1 SLR 266.

[10][2024] 1 SLR 266, ¶53.

[11][2024] SGHC 241, ¶49.

[12][2020] 1 SLR 1158.

[13][2015] Ch 589.

[14][2024] HKCFI 2286.

[15][2024] HKCA 299.

[16][2024] HKCA 352.

[17][2024] HKCFI 2286, ¶71.

[18]*Toshiaki Aiba as Bankruptcy Trustee of the Estate of Vipan Kumar Sharma v. Vipan Kumar Sharma & Anr.*, 2022 SCC OnLine Del 1260; *Uphealth Holdings Inc. v. Dr. Syed Sabahat Azim & Ors.*, Judgment dated 22 May 2024 in C.O. No. 241 of 2024, Calcutta High Court.

[19]*Bhanu Ram & Ors. v. M/s HBN Dairies and Allied Ltd.*, Company Appeal (AT) (Insolvency) No. 82 of 2018.

[20]*Millennium Education Foundation v. Educomp Infrastructure and School Management Ltd.*, 2022 SCC OnLine Del 1442; *Jasani Realty (P) Ltd. v. Vijay Corporation*, 2022 SCC OnLine Bom 879.

[21](2022) 8 SCC 352.

[22]The report and draft bill by Insolvency Law Committee can be accessed at https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

[23]The Report on the rules and regulations for cross-border insolvency resolution can be accessed at https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf.