Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: Examining the Creditor's Toolkit in International Arbitration, Cross-Border Insolvency and Enforcement

Timothy Tai, Harrison Chung (Allen & Overy) · Wednesday, October 26th, 2022 · HK45

Allen & Overy's webinar on the second day of Hong Kong Arbitration Week 2022 brought together six practitioners from the fields of arbitration, insolvency and enforcement to discuss the key practical and strategic considerations when acting for and against parties in financial distress.

Guided through a hypothetical case study involving jurisdictions such as Hong Kong, Mainland China, Singapore, the Cayman Islands and Thailand, the panellists provided a comprehensive overview of the onshore and offshore options available to creditors in debt recovery, discussed the interplay between arbitration and insolvency proceedings, and shared tips on maximising the chances of recovery in an enforcement scenario.

Co-Chair of HK45 Joanne Lau (Partner, Allen & Overy, Hong Kong) moderated the event, and was joined by a panel that included Ms Sheila Ahuja (Partner and Co-Head of India Group, Allen & Overy, Singapore); Mr Cosimo Borrelli (Managing Director and Head of Asia Pacific and the Caribbean Restructuring, Kroll, Hong Kong); Ms Joanne Collett (Partner, Walkers, Hong Kong); Ms Ruth Stackpool-Moore (Investment Manager, Omni Bridgeway, Singapore); and Mr Abraham Vergis, SC (Founder and Managing Director, Providence Law Asia LLC, Singapore).

Enforcement Toolkit for Achieving Recovery: What Is Available?

Ms Lau opened the session by observing that clients often look for an overall recovery strategy. She noted that many disputes similar to the case study presented in the webinar have been observed in the Greater China region in recent years, particularly in the technology, real estate and education sectors. Whilst there are differences in features and policy objectives of an arbitration and the insolvency regime, it is almost invariably the case that the creditor would be asking what tools are available to them to achieve a quick and successful recovery of its debt. Various tools may be available, including the exercise of contractual rights in transaction and security documents, commencement of a debt recovery action through arbitration or litigation, or invoking the statutory insolvency regime. It is important for practitioners to consider how best to utilise the tools at their disposal.

Mr Borrelli, a restructuring specialist, observed that the first port of call for creditors is often the

enforcement of secured assets. In common law jurisdictions such as Hong Kong and Singapore, receivers can usually be appointed by simply executing a deed of appointment. Mr Borrelli highlighted the advantages of receivership as it does not involve any court procedures and receivers primarily act for the benefit of the secured creditor so would be able to adapt their actions in accordance with the recovery objectives of the appointing creditor. In contrast, civil law jurisdictions often take a different approach. Mr Borrelli used the example of Mainland China, where the enforcement of security is court-driven and may lack the speed and flexibility offered in common law jurisdictions. Therefore, Mr Borrelli noted that other alternatives such as a winding up procedure may be preferred in certain circumstances.

Ms Collett offered an offshore angle to the discussion. She highlighted that one of the benefits of presenting a winding-up petition is the possibility of appointing a liquidator to the parent company at the top of the corporate chain. This allows the liquidator to remove the directors at the parent company and then take control of the subsidiaries. Ms Collett noted that, as compared to other common law jurisdictions such as Hong Kong and Singapore, offshore courts in the Cayman Islands, BVI and Bermuda take a more restrictive approach to staying winding-up proceedings in favour of arbitration. This potentially allows parties to get relief from the offshore courts more quickly without the need to go through the entire arbitral process.

Commenting on whether a debtor may impede the winding-up process by disputing the existence of the debt, Mr Vergis gave a snapshot of the Singapore law position. Where the disputed debt is subject to an arbitration agreement, he explained, Singapore courts would adopt a light-touch review on the *prima facie* standard, such that the court may dismiss or stay the winding-up so long as there is a valid arbitration agreement and the dispute falls within the scope of that arbitration agreement, provided that the debtor is not raising the dispute as an abuse of process. Ms Lau noted that the legal position in Hong Kong remains unclear, despite recent judgments from Hong Kong courts.

Arbitration as a Tool within the Enforcement Toolkit

Ms Ahuja started off with a comment that arbitration practitioners cannot simply tell their clients to go to arbitrate every dispute; instead, it is important to consider different enforcement options, including non-arbitration routes, holistically and strategically in light of the jurisdictions involved at the outset. This is especially so given it will take time for an arbitration to conclude, and the arbitral procedure may be of limited utility if the counterparty becomes insolvent and/or dissipates assets before an award is issued.

Ms Ahuja reminded the audience of the different tools available to maximise efficiency and secure assets for enforcement, including Emergency Arbitrator procedures, interim measures, expedited procedures and disclosure orders, etc. In particular, Ms Ahuja highlighted the Interim Measures Arrangement between Mainland China and Hong Kong as a game changer, as it allows parties to Hong Kong seated arbitrations administered by the HKIAC and a few other institutions to seek interim relief such as asset preservation measures before Mainland Chinese courts.

Taking a Holistic View of the Enforcement Options at One's Disposal

Drawing the threads of discussion of the different panellists together, Ms Stackpool-Moore emphasised the importance for creditors to take a global view of the availability of enforceable assets early on in the process, with the involvement of litigation funders with assets tracing and investigation capabilities. This allows creditors to verify disclosures of financial conditions and assets of the debtors or to discover whether further assets are hidden in jurisdictions not disclosed. In addition to assisting interim applications for asset freezing, this would allow creditors to plan ahead to consider how and where to enforce any award eventually obtained. Such advance planning is necessary, as different jurisdictions may have specific time limits for enforcement. In-depth knowledge of the financial standing of the debtor will also assist structuring of settlement discussion, such as avoiding repayment by instalments by impecunious debtors.

Ms Collett highlighted the importance of considering options available to creditors at different stages of the recovery process. For instance, where both the winding-up and arbitration proceedings are at an advanced stage, it may be valuable to see to the end of the arbitration process. This is because in complex claims, the arbitral tribunal may be better suited to quantifying claims than liquidators in the proof of debt process. On the other hand, in simple debt claims, it may not be worthwhile to proceed with arbitration simply for the purpose of obtaining an award, particularly where the debtor's assets are already under the control of liquidators. Ms Ahuja concurred, and called for arbitration practitioners to be nimble in considering how to push the case forward to suit the client's objectives in the circumstances.

In a recovery situation, matters do not end with obtaining an award, and Mr Borrelli set out options available to creditors facing a recalcitrant award debtor. Where the award debtor is still solvent, obtaining a charging order over its assets would be one way to earmark assets for enforcement of the award and shield them from other assets to be shared with the general pool of creditors. An alternative would be to bring winding-up proceedings alive again, but as liquidation is a class remedy, it does not leave the creditor with a lot of control over the process. If recovery is considered too difficult for the creditor's appetite, then the sale of the award to professional investors and recovery specialists would be an option, for which he noted there is a fast growing industry focused in this area.

Conclusion

This webinar was insightful in stressing the importance of a coordinated approach in pursuing a global recovery strategy. At different stages of the recovery process, one should consider and constantly re-evaluate whether the legal tools chosen would achieve the client's commercial objective. One should start by asking what assets the debtor has, and where those assets are located. It is clear that there are many opportunities for practitioners of different disciplines – including arbitration practitioners, insolvency experts and litigations funders – across both onshore and offshore jurisdictions to work together in debt recovery matters.

More coverage from Hong Kong Arbitration Week is available here.

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