Kluwer Arbitration Blog

Arbitration Agreements and Insolvency Proceedings: Comparing the Pro-Arbitration Perspectives in Singapore, the United Kingdom, and India, and Calling for International Consensus

Peter Doraisamy, Pranav Kamnani (PDLegal LLC) · Thursday, January 18th, 2024

In the ever-evolving landscape of international commercial disputes, the co-existence of arbitration and insolvency-related proceedings has become a focal point. This comparative piece delves into the legal position in three key jurisdictions – Singapore, the United Kingdom, and India – and focuses on the pro-arbitration approach of deferring to the arbitral tribunal and staying (or dismissing) winding up and/or insolvency proceedings pending arbitration.

Legal Position in Singapore

Last year, the Singapore High Court in its decision in *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 ("***Fastfreight***") reinforced the grounds and standard for grant of injunction against winding up proceedings arising from claims: (i) covered by an arbitration agreement between the parties; and (ii) arising out of a partial final award. The High Court relied and emphasized on the decisions of the Court of Appeal in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268, *AnAn Group (Singapore) Pte Ltd v VTB Bank* [2020] 1 SLR 1158 and *BWG v. BWF* [2020] 1 SLR 1296.

Background to the *Fastfreight* case

In *Fastfreight*, pursuant to alleged non-payment of hire by the Plaintiff, the Defendant, Bulk Trident Shipping, commenced arbitration proceedings seated in London ("**London Arbitration**").

The Defendant then issued a statutory demand pursuant to section 125(2)(a) of the Insolvency, Restructuring and Dissolution Act 2018 for claims awarded under a partial final award (the "**PFA**"). Consequently, the Plaintiff initiated the proceedings before the High Court of Singapore seeking an injunction restraining the Defendant from commencing winding up proceedings against it for claims awarded in the PFA.

The Plaintiff primarily asserted that the awarded claim was a disputed debt, especially considering its crossclaim and its "appeal" against the partial final award before English courts.

The Decision

The court granted an injunction in favour of the Plaintiff, restraining the Defendant from commencing winding up proceedings until the conclusion of the London Arbitration, without the imposition of any conditions.[1] The court's decision was based on the following findings:

- Although the awarded amount is undoubtedly payable to the Defendant, the same is being disputed in an "appeal" before English courts, as such, the awarded sum is not a debt that is "indisputably due". Accordingly, the Defendant is not entitled to proceed with a winding up application under Singapore law;[2]
- When proceedings for setting aside an arbitral award are pending, under Singapore law, the court has discretion whether to grant an adjournment of enforcement proceedings;[3]
- There is a likelihood that Singapore courts would not grant leave for enforcement of the PFA as it is subject to appeal before the English courts;[4] and
- The Plaintiff has satisfied the *prima facie* standard to prove that there is a crossclaim that is at least equal to the sum awarded in the PFA, and subject to the arbitration agreement.[5]

Conclusion

In arriving at its decision, the court reiterated that the standard of review for resisting a winding up application is different when the court is faced with a disputed debt or a crossclaim that is subject to an arbitration agreement.

Generally, the standard of review is for a party to "*demonstrate to the court that there is a triable issue as to the existence of the relevant ground it seeks to rely on*".[6] However, when the crossclaim or disputed debt is subject to an arbitration agreement, the court will "*ordinarily dismiss*" a winding up petition if the debtor is able to show on a *prima facie* basis that the dispute falls within the scope of a valid arbitration agreement, provided that the dispute has not been brought in abuse of the court's process.[7]

Legal Position in the UK

The courts in the UK have indicated a similar disposition as the courts in Singapore – deferring to the tribunal's jurisdiction to determine the validity of a debt when there is a valid arbitration agreement. The policy consideration is to compel parties to resort to their agreed dispute resolution mechanism[8] and discourage parties from bypassing arbitration by presenting winding up petitions.[9]

The legal position as held by the Court of Appeal in *Salford Estates (No. 2) Limited v. Altomart Limited* [2014] EWCA Civ 1575 and reiterated by the High Court of Justice in *Telnic Ltd v. Knipp Medien Und Kommunikation GmbH (Re Telnic Ltd)* [2020] EWHC 2075 *("**Telnic**")* is briefly summarized below:

- If a debt is not admitted that is sufficient to constitute a dispute.[10]

- Courts have the discretion to stay or dismiss a winding up petition in favour of the disputed debt being resolved;[11] and
- In the absence of "*wholly exceptional circumstances*", courts should not consider whether the disputed debt was brought in good faith on substantial grounds.[12]

On the test of "*wholly exceptional circumstances*", *Telnic* illustrates that it is a challenging test as the court sheds light on circumstances that would not meet the test. These include: (i) past admissions of debt in without prejudice correspondence; (ii) alleged balance sheet insolvency (which in any event the court found was unclear in the present case); (iii) alleged unlawful distribution to shareholders; and (iv) the conduct of a party, including in slowing down the arbitration or failing to participate in good faith.[13] Consequently, the circumstances that qualify as wholly exceptional remain wholly uncertain.

Legal Position in India

General Scheme of India's Insolvency Regime

The law relating to the Corporate Insolvency Resolution Process ("**CIRP**") in India is codified in the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), which distinguishes between financial creditors and operational creditors.[14]

Legal standard of "*existence of dispute*" for operational creditors

The CIRP is rigid and inflexible for operational creditors and the mere existence of a dispute is sufficient for a debtor to resist the initiation of a CIRP.[15]

The Supreme Court of India in *Mobilox Innovations v. Kirusa Software Pvt. Ltd*. 2017/INSC/975 ("**Mobilox**") held that while examining an application by an operational creditor under section 9 of the IBC, the adjudicatory authority must examine whether there is:

- The existence of an 'operational debt' as defined under the IBC;
- The existence of documentary evidence to establish that the operational debt is due and payable but has not been paid; and
- An undisputed or admitted operational debt. To determine whether the operational debt is undisputed or disputed, it would be relevant to consider pendency of any suit or arbitration proceedings filed before the receipt of a statutory demand based on the unpaid operational debt.[16]

If any of the above three conditions are not met, the adjudicatory authority must reject the application and at this stage, avoid examining the merits of the dispute so long as a dispute exists in fact and is not "*spurious, hypothetical or illusory*".[17]

Subsequently, in *K. Kishan v. M/S Vijay Nirman Company Pvt. Ltd* 2018/INSC/710, the Supreme Court of India held that an application to set aside an arbitral award and the appeal process thereafter under section 37 of India's Arbitration and Conciliation Act, 1996 constitutes a dispute.[18]

The standard of "*existence of dispute*" without any *bona fide* requirements appears to be a comparatively lower threshold indicating heightened deference to the jurisdiction of the arbitral tribunal when an operational debt is disputed.

Different standard for financial creditors

In comparison, the CIRP is more flexible for financial creditors.[19)] The National Company Law Tribunal, the adjudicating authority under the IBC, has been conferred the discretion to admit insolvency applications advanced by financial creditors.[20)] Such discretion cannot be exercised arbitrarily, and an application is generally admitted upon satisfaction of the existence of a financial debt and default on the part of the corporate debtor, unless there are "*good reasons not to admit the petition*".[21)]

A Call for International Consensus

Despite different characterizations, it appears that there may be consensus across the three jurisdictions that generally, insolvency proceedings may be resisted so long as the debtor is able to prove, to a *prima facie* standard, the existence of a disputed debt covered by an arbitration agreement. However, there certainly is a lack of consensus and clarity on the exceptions to this rule.

In our view, pursuant to the above discussion, some of the questions that require consideration are:

- Is the exception of "*abuse of process*" adopted by Singapore preferable over a seemingly vague exception of "*wholly exceptional circumstances*" as adopted by the UK? Further, can either of these exceptions be delineated by clear principles or should they remain up to the court's discretion on a case-by-case basis?
- Should jurisdictions consider applying different principles to the initiation of insolvency proceedings by financial creditors as compared to operational creditors, as India does?
- Is it necessary or is there any benefit to maintaining a different threshold for a disputed debt(s) covered by an arbitration agreement in contrast to a disputed debt that is not, as Singapore does?

The above questions are critical for the potential streamlining of international law on this issue. In our opinion, despite their differences, the pro-arbitration approach across the three jurisdictions is indicative of tremendous potential for building international consensus. This potential coupled with the challenges that insolvency proceedings pose to the enforcement of arbitral awards calls for international consensus to streamline and address the interplay between arbitration and insolvency laws. Such streamlining would promote efficiency in international business and advance the objective of the UNCITRAL Model Law on International Commercial Arbitration to harmonize national approaches to arbitration from the stage of initiation of an arbitration to the enforcement of arbitral awards while keeping in mind the nuanced and unanticipated interplay between arbitration and insolvency.

The views expressed in this blog post are those of the authors and do not represent the views of their firm.

The authors wish to thank Aishwarya Jain for her assistance in preparing this blog post.

References

?1 *Fastfreight Pte Ltd v. Bulk Trident Shipping Ltd* [2022] SGHC 210 ("***Fastfreight***") at [61].

?2 *Fastfreight* at [36].

?3 *Fastfreight* at [38].

?4, ?7 *Ibid*.

?5 *Fastfreight* at [46].

?6 *Fastfreight* at [28].

?8 *Salford Estates (No. 2) Limited v. Altomart Limited* [2014] WLR(D) 536 ("***Salford***") at [41].

?9 *Salford* at [40].

?10 *Salford* at [40]; *Telnic* at [26].

?11 *Salford* at [41]; *Telnic* at [27].

?12 *Telnic* at [27]: "*It is not, therefore, appropriate, save in wholly exceptional circumstances, for that judge to inquire whether the debt is disputed in good faith on substantial grounds*."

?13 *Telnic* at [29]-[32].

?14 *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*(2022) 2022/INSC/710 ("***Vidarbha Industries***") at [78].

?15 *Vidarbha Industries* at [79].

?16 *Mobilox* at [25].

?17 *Mobilox* at [40].

?18 At [18].

?19 *Ibid*.

?20 *Vidarbha Industries* at [81].

?21 *Vidarbha Industries* at [87].

This entry was posted on Thursday, January 18th, 2024 at 8:45 am and is filed under India, Insolvency, Singapore, UK
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.