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Halting Incursion in the Legal Multiverse: The Future of Insolvency-Related Arbitrations in Singapore Following Sapura v GAS

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As defined by Mister Fantastic in the Marvel Cinematic Universe, "[a]n Incursion occurs when the boundary between two universes erodes and they collide, destroying one or both entirely." In the realm of commercial disputes, a similar incursion has taken place for some time between two competing legal regimes — arbitration and insolvency.

In the recent case of *Sapura Fabrication Sdn Bhd & Ors v GAS* [2025] SGCA 13 ("*Sapura*"), the Singapore Court of Appeal ("Court") had the opportunity to consider the interaction between arbitration and insolvency, in the context of a carve-out application to allow arbitration proceedings to continue despite ongoing insolvency proceedings. While the parties in *Sapura* eventually reached a settlement and the appellants withdrew their appeals before the Court could issue its decision, the Court nonetheless decided to issue its judgment to further Singapore's jurisprudence on this thorny area. While there is much to unpack in the Court's decision in *Sapura*, the most interesting highlight, in my view, is perhaps the Court's comment on the SIAC Insolvency Arbitration Protocol (the "SIAC Insolvency Protocol" or "Procotol").

In this post, I discuss the key takeaways from the *Sapura* decision, as well as some practical considerations relating to the upcoming SIAC Insolvency Protocol in light of the *Sapura* decision.

Background

The Sapura Group has been engaging in multiple restructuring proceedings in Malaysia since 2022. To that end, several restraining orders (*i.e.*, moratoriums) were granted by both the Kuala Lumpur High Court and the General Division of the Singapore High Court to restrain legal proceedings against the Sapura Group between 2022 and 2024. On or around 30 June 2022, during the first of these restructuring proceedings, the respondent in *Sapura* ("GAS", as anonymised in *Sapura*) filed proofs of debt against two entities in the Sapura Group (the "Sapura Entities") for claims that arose under two contracts that GAS had entered into with the Sapura Entities. However, on 29 September 2023, GAS commenced arbitration proceedings in Singapore to pursue the same claims against the Sapura Entities. GAS eventually found itself constrained by the moratoriums and applied to the Singapore courts for a carve-out to proceed with the arbitration proceedings against the Sapura Entities.

Perfectly Balanced? — The Court of Appeal's Decision in *Sapura*

The core question that the Singapore courts had to decide in the *Sapura* case was whether GAS' carve-out application should be granted in spite of insolvency proceedings that have already been ongoing for approximately two years. Singapore's apex court answered this question in the affirmative. In doing so, the Court made three significant points.

First, the Court unequivocally confirmed that, contrary to the trial judge's opinion, Singapore courts do not have a mandatory obligation to grant a carve-out to enforce an arbitration agreement ([94] to [99]). If the converse were true, any moratorium could simply be circumvented as long as the claims in question fall within the scope of a valid arbitration agreement. This clearly defeats the primary purpose of a moratorium, which is to put a pause on all legal proceedings against the debtor company and give the debtor company breathing room to organise its affairs and put forward a restructuring proposal.

Instead, the Singapore courts retain the discretion to consider whether to grant a carve-out upon balancing the various considerations and interests of the parties involved (at [67]). This balancing exercise would naturally entail consideration of the interests of the applicant (*i.e.*, the party requesting the carve-out) in upholding the arbitration agreement, the interests in affording a debtor company time and space to put forward a restructuring proposal, and the collective interest of the creditors.

Second, in relation to the exercise of the court's discretion, the Court affirmed the test set out in *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and anor* [2023] 3 SLR 1604 ("*Wang Aifeng*") (*Sapura* at [67]). The test in *Wang Aifeng* involves consideration of the following factors to guide the court's exercise of its discretion (*Sapura* at [25], citing *Wang Aifeng* at [32]):

(a) the timing of the application;

(b) the nature of the claim;

(c) the existing remedies;

(d) the merits of the claim;

(e) the existence of prejudice to the creditors or to the orderly administration of the insolvency proceedings; and

(f) other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the debtor company's resources, and the views of the majority creditors.

Applying the test in *Wang Aifeng*, the Court in *Sapura* found, among other things, that GAS' claims were so factually complex that it would be impracticable for the claims to be meaningfully adjudicated through the restructuring proceedings (see [69] to [72]). Furthermore, the Court found that the delay of more than two years in the adjudication of GAS' claims in the restructuring process strongly suggests that the existing restructuring process was inadequate to deal with GAS' claims (see [79]). In a similar vein, the Court also found that the consideration of giving the Sapura

Entities breathing space does not hold much weight in view of the delay of more than two years (see [88] and [89]). All in all, the Court found no reason to disturb the trial judge's exercise of his discretion in granting GAS' carve-out application.

Third and most interestingly, the Court made a striking comment on the SIAC Insolvency Protocol which seems to suggest that the adoption of the SIAC Insolvency Protocol could potentially tip the balance between arbitration and insolvency in favour of the former. In particular, the Court noted that the Protocol may attenuate concerns that arbitration would cause undue delay, expense and distraction to insolvency proceedings (see [107]). I elaborate on the Protocol below.

Coming to Bargain — Practicalities of Adopting the SIAC Insolvency Protocol

Simply put, the SIAC Insolvency Protocol, which is still in its draft form, is an arbitration procedure adapted from the main SIAC Rules that is specially designed to resolve insolvency-related disputes. A thorough review of the draft SIAC Insolvency Protocol would risk turning this post into a treatise. Suffice to say, key features of the draft Protocol include accelerated timelines and a streamlined arbitrator appointment procedure. Notably, a final award under the draft Protocol is to be made within 6 months from the date of constitution of the Tribunal, similar to the prescribed timeline under the SIAC Expedited Procedure (see Rule 24 of the draft Protocol).

Absent any extraordinary factors that clearly militate against arbitration, the time and cost savings envisioned in the SIAC Insolvency Protocol would appear sufficiently persuasive for a court to lean towards arbitration and away from insolvency. However, even before we consider the Court's likely view on the Protocol, there are several practical issues that should be considered before parties adopt the Protocol.

First, the SIAC Insolvency Protocol is presently drafted as a strictly opt-in regime (see Rule 1 of the draft Protocol). In other words, parties would have to mutually agree to adopt the Protocol either in the arbitration clauses in their agreements at the outset, or separately in writing prior to or during the insolvency proceedings. However, the latter might be almost impossible to achieve, especially if one party intends to cause inordinate delays to the adjudication of the claims. To avoid this deadlock, it may be more prudent to adopt the Protocol early on by incorporating it into the arbitration clause in parties' agreements.

Second, if parties do adopt the SIAC Insolvency Protocol into their agreements, they should also bear in mind that any arbitration clause to that effect does not necessarily mandate them to resolve all insolvency-related claims through the Protocol, especially when insolvency proceedings are already ongoing. As alluded to earlier, the restraining effect of a moratorium remains the default position under Singapore law, and parties can only proceed with arbitration with the Court's permission.

Third, given the cross-border nature of most insolvency-related arbitrations, achieving the full extent of the SIAC Insolvency Protocol's efficacy would also require cooperation from foreign courts. The same has been alluded to by the Honourable Justice Kannan Ramesh in his speech delivered at the First Meeting of ASEAN Insolvency Judges on 19 November 2024. As the Protocol is the first of its kind, it is foreseeable that certain foreign courts and jurisdictions may not be immediately receptive to it. This may result in tricky situations, such as where the seat court has granted leave for parties to continue with arbitration under the Protocol but the court of the main

proceeding decides otherwise.

Concluding Remarks

While the future of insolvency-related arbitrations may appear unpredictable, the Singapore Court of Appeal's remarks on the SIAC Insolvency Protocol mark the first steps towards a clearer path. Ultimately, it is through continued innovation in procedural mechanisms and jurisprudence that we can create a more harmonized, transparent and effective regime for managing cross-border insolvencies. As a famous Wakandan scientist once said, "just because something works doesn't mean it cannot be improved."

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