



Singapore International Arbitration Centre

www.siac.org.sg



BANKRUPTCY & ARBITRABILITY: A PRAGMATIC VIEW IN SINGAPORE

Nakul Dewan
Counsel, Allen & Gledhill LLP, Singapore

Even if a dispute exists, this may not be sufficient. It must be a dispute which, in the words of the New York Convention, is “capable of settlement by arbitration”. The concept of a dispute which is not ‘capable of settlement by arbitration’ is not meant as an adverse reflection on arbitrators or the arbitral process.....national laws may decide to treat certain disputes as being more appropriate for determination by their own public courts of law, rather than by a private arbitral process.¹

Introduction

Arbitrability of claims is a central issue which shadow boxes international arbitration proceedings because the New York Convention and the UNCITRAL Model Law limit dispute settlement by arbitration to only those disputes which are capable of being settled by arbitration.² Given that the term “capable of being settled by arbitration” is not defined, the considerations which determine whether or not a dispute is arbitrable are based on public policy reasons for not using a private dispute resolution mechanism for adjudicating disputes of a public character. Singapore law sets this out under section 11(1) of its International Arbitration Act (Cap 143A, 2002 Rev Ed) (“**International Arbitration Act**”), which provides that “[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so”.

Bankruptcy of a party is one such instance which needles international arbitration proceedings because it involves an interplay of national insolvency laws and public policy considerations affecting a host of creditors and not just the two parties disputing claims which may be the subject matter of an arbitration agreement. This naturally means that unless the curial law of the seat of arbitration has well defined rules to deal with such situations, the

*Counsel, Allen & Gledhill LLP.

¹ Nigel Blackaby and Constantine Partides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, (Oxford University Press, 2009 5th edition), para 1.64

² Convention on the Recognition and Enforcement of Foreign Arbitral Award (10 June 1958) ISBN 978-92-1-033105-0 (entered into force 7 June 1959), Art II (1) and V(2) (a); United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 as adopted on 7 July 2006, Art 34 (2)(b)(i) and Article 36 (1)(b)(i).



Singapore International Arbitration Centre

www.siac.org.sg

arbitrability of international arbitration claims could get caught in the maze of differing national laws and differing public policy considerations. This would only serve to dislodge the uniformity that international arbitrations strives to achieve. For example, while in Switzerland the insolvency of a party does not generally affect the arbitration agreement, that is not the case in France where a failure to stay the arbitration proceedings may lead to annulment of an Award for breach of international public policy reasons.³ Under Polish law, arbitration agreements lose their force on the declaration of bankruptcy, in Spain they get suspended, and in England and Singapore the trustee or the official assignee (as the case may be) can choose not to adopt them, in which case a matter can be arbitrated only with the leave of court.⁴

A recent judgment of the Singapore High Court in *Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) v Larsen Oil and Gas Pte Ltd*,⁵ has now addressed the issue of arbitrability of claims which arise typically under bankruptcy proceedings and has taken the view that claw back (avoidance) claims, filed by an insolvent company, are non-arbitrable because they are public in character. Read in conjunction of an earlier judgment of the Singapore High Court in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd*⁶, these judgments can be said to set the basis on which Singapore law will consider whether claims raised in bankruptcy are arbitrable or not.

The *Petroprod* Decision: ‘Core’ and ‘Non Core’ Claims

In the *Petroprod* decision, the facts, on the basis of which the arbitrability issue came to be heard by the court, were atypical of arbitration proceedings.

The plaintiff (*Petroprod*), a company in liquidation, filed a suit against the defendant (*Larsen*) for avoiding certain transactions and clawing back payments made pursuant thereto, on the ground that the transactions violated insolvency laws because the payments amounted to unfair preferences or were undervalued within the meaning of sections 98 and 99 of Singapore’s Bankruptcy Act read with section 329(1) of Singapore’s Companies Act (Cap 50, 2006 Rev Ed). While ordinarily this may have been a pure question of insolvency law, the spin in this case was that the payments made to the defendant were pursuant to a Management Agreement entered into between the parties, which provided for dispute resolution via arbitration. As would be expected, the defendant relied on the

³ Domitille Baizeau, *Arbitration and Insolvency: Issues of Applicable Law*, p 102, available at <<http://www.lalive.ch/.../dab Arbitration and Insolvency - Issues of Applicable Law.pdf>> (accessed on 13 July 2010)

⁴ Gary B Born, *International Commercial Arbitration (Vol 1)* (Wolters Kluwer, 2008), p 810. Also see Section 349 A of the English Insolvency Act 1986 (c.45) and Section 148A of Singapore’s Bankruptcy Act (Cap 20, 2009 Rev Ed).

⁵ [2010] SGHC 186, dated 30 June 2010 (“*Petroprod*”)

⁶ [2006] 3 SLR(R) 174 (“*Aloe Vera*”)



Singapore International Arbitration Centre

www.siac.org.sg

dispute resolution clause and filed an application before the Singapore High Court seeking a stay of the proceedings on the ground that the dispute ought to be referred to arbitration.⁷

The mere fact that a company is in liquidation does not *ipso facto* render non-arbitrable claims filed by it. While the precise dividing line between claims that are non-arbitrable and those which are not, has not been drawn up, it is generally accepted that “core” bankruptcy claims are not arbitrable whereas “non-core” bankruptcy claims are arbitrable.⁸ Claims are categorised to be “core” if they either invoke a substantive right created by bankruptcy law or are such claims which could not have existed outside of bankruptcy. Claims are categorised as “non-core” if they only bear a tenuous relationship to the bankruptcy case and would, in all likelihood, have been litigated anyway.⁹

In *Petroprod*, the Singapore High Court accepted the distinction between core and non-core claims and took the view that only core claims are not arbitrable. In determining what constitutes a core claim, the court adopted a “cause of action” test. In this case, the plaintiff sought a claw-back of payments the court took the view that since the plaintiff’s right to seek a claw back only arose because the plaintiff was in liquidation the claims would be non-arbitrable because they were premised on a statutory cause of action.¹⁰

The Aloe Vera Interplay

The Singapore High Court’s decision in *Aloe Vera* rules that if a foreign award is being enforced in Singapore, the question of whether the subject matter of dispute is arbitrable is a matter of Singapore Law.¹¹ In fact, in *Aloe Vera*, the Singapore High Court took the view that it is “antithetic” and demonstrative of “an insular attitude to the decisions of foreign tribunals” if national courts make decisions involving their nationals without regard to the fact that their nationals have chosen to “do business in a foreign jurisdiction and to make their agreements subject to foreign law and foreign arbitration”.¹²

⁷ Supra 5, para 12. While the decision was under section 6 of the Arbitration Act (Cap 10 2002, Rev. Ed) (the “**Arbitration Act**”) which applies to domestic arbitrations, the Court noted that there was no concept of arbitrability under the Arbitration Act but there was the concept under section 11(1) of the International Arbitration Act, which would be applicable.

⁸ Supra 1, para 2.128

⁹ When the Federal Arbitration Act and the Bankruptcy Code Collide, July 2002, available at <<http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=1595>> (13 July 2010) Also see, Supra 4, Gary B. Born *International Commercial Arbitration*, at p. 809.

¹⁰ The Court relied on the judgment of the New South Wales Supreme Court in *New Cap Reinsurance Corporation Limited v A E Grant & Ors, Lloyd’s Syndicate No 991* [2009] NSWSC 662 as a guiding point to hold that claw-back (avoidance) are ‘core’ claims.

¹¹ Supra 5, para 72

¹² Supra 5, para 38



Singapore International Arbitration Centre

www.siac.org.sg

While *Aloe Vera* deals with arbitrability of claims at the stage of enforcement, if the principle is applied to arbitrations which are seated in Singapore, then it is likely that Singapore courts and arbitrators will consider the question of arbitrability based on Singapore law by giving due recognition to the choice made by the parties in agreeing to seat their arbitration in Singapore. For example, a Spanish party in bankruptcy may still be bound by an agreement to arbitrate a dispute in Singapore, if its contract is governed by Singapore law and the seat of arbitration is Singapore. This approach would also be consistent with the view being adopted by a number of international arbitral tribunals, who have proceeded with arbitrations notwithstanding pending bankruptcy proceedings involving one of the parties unless (i) a party has been able to lead clear and convincing evidence that a foreign law applicable to a party prohibits participation in the arbitration, and (ii) that such foreign law should be recognized.¹³

Conclusion

While it is not common that parties to international arbitration agreements end up in some form of bankruptcy or other,¹⁴ given the interplay of differing national laws, the bankruptcy of a party continues to pose interesting challenges to the arbitrability of claims. After *Petroprod*, it is quite clear that under Singapore law only core bankruptcy claims would not be subject to arbitration, being contrary to Singapore's public policy.

However, *Petroprod* leaves open an interesting issue. What happens if the insolvent party, whose right to raise a claim is contractual, carefully drafts its pleadings to categorise its claims as arising under insolvency laws. Would the courts go behind the mischief and strike out the claims or would the court be bound to respect the statutory basis of the claims. Given that in *Petroprod* the court held that the plaintiff's non-core claims need not be referred to arbitration in order to avoid multiplicity of proceedings, it might incentivise a party in bankruptcy to drum up a core claim in order to skirt an international arbitration agreement and make all its claims, 'core' and non-core, the subject matter of national insolvency proceedings rather than international arbitration. While such possibility exists, presumably if it is practised to avoid an international arbitration agreement, it would be detected and appropriately tackled.

¹³ Supra 4, Gary B. Born *International Commercial Arbitration*, p 815

¹⁴ While the two really bear no correlation, a case study from 1989 to 1995 showed that out of 500 Awards approved by the ICC, in 27 of them issues related to the existence of insolvency proceedings arose. See *Mantilla-Serrano, Fernando, International Arbitration and Insolvency Proceedings, Arb.Int'l 1995, at 51 et seq.*, available at <http://ldb.uni-koeln.de/php/pub_show_content.php?page=pub_show_document.php&pubdocid=126300&pubwithtoc=ja&pubwithmeta=ja&pubmarkid=970000> (Accessed on 13 July 2010).