Dispute Resolution Hotline

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SINGAPORE: INJUNCTION AGAINST COMMENCEMENT OF WINDING UP PROCEEDINGS BASED ON A FOREIGN AWARD

- Injunction restraining the creditor from initiating winding-up proceedings can be granted if:
  - the debt is disputed on bona fide and substantial grounds.
  - there are genuine cross claims based on substantial grounds exceeding the debt amount.
- The standard of review in matters of grant of injunctions against winding-up proceedings arising out of claims subject to an arbitration agreement is different than those not subject to one. In the case of the former, the party needs to establish that the disputed debt or cross-claim falls within the scope of a valid arbitration agreement on a prima facie basis, while the latter involves a higher "triable" threshold.

INTRODUCTION

In ***Fastfreight Pvt. Ltd. v Bulk Trading Shipping Ltd., [2022] SGHC 210***, the Singapore High Court laid down certain principles governing the grant of injunctions restraining the creditor from initiating winding-up proceedings based on a partial final award.

FACTUAL BACKGROUND

Fastfreight Private Limited **("Charterer")** was a charterer which entered into a time charterparty **("Charterparty")** with the Owner of the vessel Bulk Trading Shipping Limited **("Owner")** to transport cargo from India to China. A sub-charterparty was concluded between Charterer and Shyam Metalics and Energy Ltd. **("Sub-Charterparty"),** which was the shipper of the cargo. The Charterparty incorporated terms of the New York Produce Exchange, 1993 Charter **("NYPE")**. The NYPE read with the fixture recap provided for an arbitration agreement with seat London with English Law as the governing law.

Disputes arose pertaining to non-payment of hire by the Charterer to the Owner. Upon commencing the charter trip and arriving at Lanqiao, China, three members of the Vessel tested positive for COVID-19 due to which the vessel was not allowed to berth at Lanqiao port and discharge the cargo. Without the Charterer's consent, the Owner sailed the vessel to Rizhao port to discharge the cargo pursuant to a proposal by the sub-charterers and a settlement agreement with the receivers of the cargo. The Charterer refused to pay the demanded hire amount upon the request of the Owner on the ground of loss and damages suffered due to a breach of guarantee that the crew was free from COVID-19 as represented in Clause 32 of the Charterparty's fixture cap. This, according to the Charterer, opened it to claims by the sub-charterers. The Charterer also submitted that that it was off - hire during the relevant period as the vessel was directed to international waters for weeks on the directions of the Owner.

Arbitration proceedings were commenced by the Owner in London claiming for unpaid hire in the sum of USD 2,14,717.79. Charterer counterclaimed for damages totalling USD 7,661,844.39 arising out of losses claimed by the sub-charterers against Charterer amongst other things.

In the arbitral proceedings, the arbitral tribunal issued a partial final award ("**PFA**") directing the Charterer to pay the Owner the claimed sum of USD 2,147,717.79 with interest ("**PFA sum**"). The Charterer appealed to the English courts and included the PFA sum in the counterclaim value, which now totalled USD 9,809,562.18. The leave to appeal was granted on a question of law.

The Charterer also arrested the vessel of the Owner to secure its counterclaim in the arbitration, against which the Owner put up the demanded security for release of the vessel.

Subsequently, the Owner filed an application for winding-up of Charterer after serving a written demand for payment of the PFA sum under Section 125(2)(a) of the (Singapore) Insolvency, Restructuring and Dissolution Act, 2018. The Charterer responded by filing an application for an injunction restraining the Owner from initiating winding-up proceedings.

ARGUMENTS BY THE CHARTERER

Charterer contended that an injunction should be granted as:

1. The counterclaim value is higher than the PFA sum;
2. The PFA sum is a disputed debt because of the pending appeal in the English courts;

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3. Determining whether the PFA sum is disputed debt and that a cross-claim exists has to be done on a *prima facie* basis where an arbitration agreement exists;
4. The balance of convenience lies in favour of Charterer;

ARGUMENTS BY THE OWNER

The Owner opposed the injunction on the grounds:

1. The PFA sum is not *prima facie* disputed as it became payable immediately upon the issuance of the PFA.
2. There is no *prima facie* cross-claim as it does not extinguish Charterer's ability to pay the PFA sum in light of Clause 11 of the NYPE mandating Charterer to pay the hire amount free from any cross-claims or deductions.
3. The Charterer applying for an injunction is in abuse of the court's process, which cannot be permitted in light of ***AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)***[1] **("AnAn Group Case").**
4. Solvency must be an important determination when deciding whether to grant an injunction. It was submitted that the Charterer was insolvent in the present year on the ground that it was deemed to be insolvent in the previous year, according to the Owner's expert witness. Hence, an injunction should be granted

JUDGMENT OF THE SINGAPORE HIGH COURT

Relying on ***Metalform Asia Pte Ltd v Holland Leedon Pte Ltd***,[2] the Singapore High Court stated that there are two circumstances where an injunction against winding-up can be granted:

1. Where the debtor-company disputes the creditor's debt on *bona fide* and substantial grounds;
2. Where the debtor-company has a genuine cross-claim based on substantial grounds equal to or exceeding the creditor's undisputed debt.

However, the standard of proof regarding injunctions against winding-up proceedings differs in a dispute for debt or cross-claim that is subject to an arbitration agreement. Absent an arbitration agreement, the standard of proof required to determine the existence of a disputed debt/cross-claim is the "unlikely to succeed/triable issue" standard. On the other hand, to determine whether the debt is disputed and whether the cross-claim falls within the scope of the arbitration agreement, a *prima facie* review would be undertaken.[3] Such a review does not allow the parties to circumscribe the arbitration process and approach the court and examine the merits of the dispute.

With regards to solvency, the Singapore High Court held that where there are legitimate concerns about the solvency of the debtor, an injunction may nevertheless be granted subject to certain conditions – like where the debtor had no genuine interest to arbitrate the dispute, the creditor can approach the court to proceed with the winding-up.

Whether there is a disputed debt that falls within the scope of the arbitration agreement?

The Singapore High Court stated that even if the arbitral tribunal has ordered payment of the PFA sum, it does not follow that it ceases to be disputed, entitling the Owner to file a winding-up proceeding. The PFA sum is being disputed by the Charterer through the avenue of an appeal to the English courts, which had granted leave due to a substantial question of law involved in the PFA.

Further, the PFA sum has not yet become an enforceable amount in Singapore. No steps were taken by The Owner to enforce the PFA. The Singapore High Court restated the position in ***Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd.***[4] by holding that where setting aside proceedings relating to an award are pending, adjourning enforcement proceedings is a matter of discretion for the enforcing court. Since there was a likelihood of the Singapore courts not granting leave for enforcement of the PFA due to the appeal being underway in the English courts, the Singapore High Court held that winding-up of the Charterer without an enforcement petition being filed would be anomalous. Therefore, on a *prima facie* standard, the Singapore High Court held that the PFA sum is a disputed amount.

Whether there is a cross - claim that falls within the scope of the arbitration agreement?

Given the PFA, the Charterer's case was that it was not responsible for any hire amount as it was off - hire during the material time. Further, the Charterer provided sufficient evidence and documentation to show that the basis of its cross – claim were genuine. On this basis, the Singapore High Court held that the Charterer has established on a *prima facie* basis that there existed a cross - claim.

The Singapore High Court also dismissed the Owner's contention that the injunction being sought is an abuse of the court's process. In the ***AnAn Group Case***, it was held that a winding-up application should not be restrained on the basis of a dispute or a cross - claim raised in abuse of the court's process. The Singapore High Court held the threshold to show abusive conduct is very high. Abusive conduct can be shown where, for instance, a party has admitted to the claim but seeks a stay for no reason other than its inability to pay. In the present case, the Charterer had arrested the vessel and security was put up by the Owner. Hence, this was not a simple case of inability to pay. Rather, the Charterer had taken extensive measures to seek payment for the counterclaim amount. On this basis, the Singapore High Court found that there is *prima facie* cross - claim subject to the arbitration agreement that exceeds the PFA sum.

Whether the injunction should be granted and whether security for costs should be ordered?

The Singapore High Court granted the injunction against restraining the Owner from commencing winding-up proceedings till the pendency of the arbitral proceedings. With regards to security for costs, it was argued by the Owner that the security should be granted only on the condition that it be equal to the PFA sum. The Singapore High Court referred to ***Diamond Glass Enterprise Pte. Ltd. v Zhong Kai Construction Co. Pte. Ltd.***[5]**("Diamond Glass")**where a similar request for security was made owing to the stay of the winding-up proceedings. While the Court of Appeal in ***Diamond Glass*** granted security on the basis of other reasons it declined to lay down a general rule that parties should pay adjudicated amounts as security till resolution of disputes.

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In ***Diamond Glass***, the creditor's argument was that the debtor being insolvent, imposition of security is justified. The Court of Appeal therein found that the assertions of the debtor being insolvent were baseless and lacked evidence. In the present case, the Singapore High Court examined the reports of both the party-appointed experts and concluded that there was no real evidence pointing towards Charterer being insolvent.

ANALYSIS AND INDIAN APPROACH

The Singapore High Court reinforced the established position laid down in ***Anan Group***. ***Anan Group*** had held that a *prima facie* standard of review would suffice where the disputed debt or cross - claim falls within the scope of the arbitration agreement. The courts cannot undercut the preferred dispute resolution method to delve into the merits of the debtor-company's defences and undermine party autonomy. Therefore, whether a cross-claim or a disputed debt exists has to be determined on a *prima facie* basis where the debt is subject to an arbitration agreement. In that regard, the Singapore High adopted a pro-arbitration approach.

In India, debts arising out of arbitration awards are considered to be valid debts where operational creditors can initiate the Corporate Insolvency Resolution Process **("CIRP")** against the corporate debtor, subject to an exception that the same must be undisputed. According to Section 9(5)(ii)(d) of the Insolvency and Bankruptcy Code, 2016 **("IBC")**, the National Company Law Tribunal **("NCLT")** can reject the CIRP application if a *"notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility"*.

In ***Mobilox Innovations v Kirusa Software Pvt. Ltd.***,[6] **("Mobilox")** the Supreme Court stated that where the debt is subject to a legitimate dispute in amount equal to or greater than the amount of debt, then the creditors cannot resort to initiating the CIRP process under the IBC. Regarding the threshold required for a dispute to exist, the Supreme Court noted that the expression "bona fide" was dropped from the original bill of the IBC. Therefore, the "existence" of a dispute pending between the parties pertaining to the debt was sufficient to deny initiation of the CIRP process for debt recovery. The Supreme Court stated:

> "*Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence, It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.*"

Mobilox was relied on by the Supreme Court in ***K. Kishan v Vijay Nirman Company Pvt. Ltd***.[7] where a domestic award was challenged under Section 34 of the Arbitration & Conciliation, 1996 **("Arbitration Act")**. The Supreme Court considered the filing of a Section 34 petition challenging the award to be a valid dispute disallowing the initiation of the CIRP process. This was because the counterclaim exceeding the claim value was rejected by the arbitral tribunal on merits, which was also under challenge before the Courts.

As regards winding-up proceedings arising from foreign awards, Section 46 of the Arbitration Act states that a foreign award would only be binding once it is enforced. To be enforced as decree, a foreign award must meet the requirements of Sections 47 and 48 of the Arbitration Act,[8] after which it could be termed to be an operational debt. However, in ***Agrocorp International Pvt. Ltd. v National Steel and Agro Industries Ltd.***,[9] the Mumbai bench of the NCLT deviated from this approach. The NCLT allowed the initiation of insolvency proceedings notwithstanding that the foreign award was not yet enforceable by following the requisite procedure under Sections 47 and 48 of the Arbitration Act. On the other hand, the Hyderabad bench of the NCLT in ***Adityaa Energy Resource Pte Ltd. vs. Simhapuri Energy Ltd.***[10] held that insolvency proceedings cannot be started on the basis of a foreign award which has not been enforced and attained finality in accordance with Part – II of the Arbitration Act. Reconciliation of such divergent views is needed by the courts in order to streamline the approach of initiating insolvency proceedings based on debts arising out of foreign awards.

– Ansh Desai, Mohammad Kamran & Ashish Kabra

You can direct your queries or comments to the author

[1] AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2020] 1 SLR 1158

[2] Metalform Asia Pte Ltd v Holland Leedon Pte Ltd [2007] 2 SLR(R) 268

[3] Anan Group at [56]

[4] Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd. [2019] 4 SLR 537

[5] Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co. Pte Ltd, [2021] 2 SLR 510

[6] Mobilox Innovations v Kirusa Software Pvt. Ltd., (2018) 1 SCC 353

[7] K. Kishan v Vijay Nirman Company Pvt. Ltd., (2018) 17 SCC 662

[8] Government of India v Vedanta Limited & Ors.; 2020 SCC Online SC 749

[9] Agrocorp International Pvt. Ltd. v National Steel and Agro Industries Ltd., 2020 SCC OnLine NCLT 8413

[10] Adityaa Energy Resource Pte Ltd. vs. Simhapuri Energy Ltd., 2019 SCC OnLine NCLT 32473