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Perspectives
Summer | 2010

International Arbitration

PERSPECTIVES ON INSOLVENCY

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Advocacy. In resolving both commercial and investor-state disputes, we apply our extensive experience in marshalling complex evidence, analyzing applicable law and procedures, developing and evaluating alternative strategies and engaging in compelling written and oral advocacy.

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The current financial and economic crisis has touched almost every aspect of the business world. The increase in insolvencies has inevitably affected performance of contractual agreements entered into prior to the onset of financial trouble.

Therefore, the impact of insolvency proceedings on arbitration agreements has become significant and merits particular attention in today's environment.

Because of the growing bankruptcy problem, we have decided to focus this issue of our newsletter on the relationship between the statutory insolvency regimes of eight countries and the contractual rights of parties that have agreed to arbitrate their international disputes. Our articles discuss the particulars of each country's insolvency regime and the possible conflict with pending or future international arbitration proceedings. In addition, they address whether the statutory insolvency regimes in the respective jurisdictions permit arbitration of contractual disputes involving insolvent parties, whether leave of court is required to proceed against an insolvent party in arbitration, and whether parties can obtain security for costs against impecunious parties.

We hope that this issue, covering Brazil, the United States, the United Arab Emirates, Germany, Thailand, France, the United Kingdom and Hong Kong is helpful and enhances your awareness of the subtleties that may arise in an arbitration with an insolvent party. If you have any questions, please feel free to contact any of the authors or the editors.

Thank you,
Violeta Balan and Nick Longley

Arbitration and Bankruptcy in Brazil

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Although in some jurisdictions arbitration is a long-established form of alternative dispute resolution, this mechanism has only recently been regulated in Brazil. The Brazilian Commercial Code, enacted in 1850, already included a few sparse provisions regarding commercial arbitration, but there were no references to specific rules. It was not until 1996 that Brazil passed its first specific arbitration statute, Law No. 9,307/96 (Arbitration Law). This legislation follows the main trends in international arbitration and is particularly influenced by the UNCITRAL Model Law on International Commercial Arbitration.

Brazil's Arbitration Law allows any person capable of entering into contracts to elect to arbitrate disputes relating to disposable property rights. Whenever an arbitration clause is included in an agreement, any controversy arising out of this agreement must be arbitrated according to the rules established by the parties, and the arbitral award will be final and binding upon the parties. Thus, the arbitration award has the same effect as a decision rendered by the courts and it constitutes a document valid for filing an execution process, if the other party refuses to comply with the decision.

However, the Arbitration Law did not immediately find wide acceptance in Brazil. After its enactment, many Brazilian courts questioned the enforceability of arbitration agreements, arguing that they were a violation of the constitutional principle of free access to the judiciary. It wasn't until 2001 that the Supreme Court confirmed the constitutionality of the Arbitration Law.[1]

Since then, the Arbitration Law has enjoyed increasing success, currently being widely recognized and adopted by most sectors of industry and commerce as a reliable and efficient mechanism of resolving disputes in Brazil. However, despite its success, the Arbitration Law is still rather new and there are many controversial issues yet to be explored in arbitration jurisprudence.

One of these controversial issues is the relationship between arbitration and bankruptcy within the Brazilian legal system—two areas of law guided by very distinct principles. The discussion becomes particularly intriguing given the lack of cases submitted to the consideration of Brazilian courts so far.

The main aim of Brazilian bankruptcy law[2] (Bankruptcy Law) is to preserve and optimize the productive use of properties and assets of the insolvent companies throughout the liquidation process. When a company becomes bankrupt, its management must be surrendered to a court-appointed manager chosen by the bankruptcy court. The bankruptcy court is competent to hear and decide all claims and

actions related to the properties, assets, interests and business of the bankrupt company.

Therefore, the Bankruptcy Law aims to centralize all matters related to the liquidation of an insolvent company under a sole judicial administrator able to make decisions in the best interests of creditors according to the preferences established by law. The centralization process is also intended to avoid fraud in the liquidation of the company, as all decisions taken throughout the procedure are open to all interested parties.

The basis of arbitration is profoundly different to that of bankruptcy. While arbitration relies on the decentralization and confidentiality of disputes, bankruptcy depends on the centralization and openness of all matters related to the liquidation of an insolvent company.

These differences become increasingly significant in situations where, for example, an arbitration is already underway and one of the parties goes bankrupt. Should the arbitration be immediately suspended or terminated and the dispute submitted to the bankruptcy court? Or should the arbitration proceed until the final award is rendered?

There are no clear-cut answers to these questions, since neither the Bankruptcy Law nor the Arbitration Law contains any express provisions on this subject. However, two recent cases decided by the Court of Appeals of the State of São Paulo explored the controversy after a comprehensive analysis of both laws.

The first case was decided in July 2008 on an interlocutory appeal filed by a creditor against a decision by the First Bankruptcy Court of São Paulo that denied his proof of claim on the ground that it was based on an arbitration award rendered after the bankruptcy declaration. The Court of Appeals decided that the creditor's proof of claim was valid and ruled that arbitration proceedings already in place should not be suspended or terminated by the supervening bankruptcy of a party.

The Court of Appeals held that when parties enter into an arbitration agreement there are no restrictions on their capacity to contract or limitations to the free disposal of their assets. Therefore, the arbitration agreement was legal and valid, and subsequent events did not affect this. The court concluded that when a party becomes bankrupt during the course of arbitration, the proceedings must continue, with the insolvent party being represented by the court-appointed manager.

The decision also considered article six of the Bankruptcy Law, which states that the course of all actions and executions against the debtor must be suspended as of the bankruptcy declaration, except for those lawsuits dealing with undetermined amounts. The court found that the arbitration should be encompassed by the exception, since the dispute was related to an unliquidated obligation due by the debtor.

The second case, decided in December 2009, considered circumstances very similar to the previous case. In this case, however, the arbitration notice had been issued after the bankruptcy adjudication. The bankrupt company (represented by the court-appointed manager) filed a collection action against the appellant, who refused to proceed with the payment and argued that the disputed debt had to be resolved by arbitration. The Court of Appeals dismissed this argument, holding that arbitration procedures could not be invoked after the bankruptcy adjudication.

The Court of Appeals held that an arbitration agreement is an ancillary agreement whose effects depend on the conditions precedent: that at the time it is invoked, the parties must have full capacity to contract and that the dispute concerns disposable property rights.

These cases make clear that the core question is whether the arbitration was commenced before or after bankruptcy proceedings were initiated. Once a party is declared bankrupt, all arbitration agreements to which the bankrupt company is a party become ineffective and the claims must be submitted exclusively to the bankruptcy court. On the other hand, arbitration proceedings already in progress must continue normally, and any award rendered in such proceedings will serve as a valid proof of claim before the bankruptcy court.

It is important to mention however that these issues have not yet been discussed by the Brazilian Superior Court. Even if the above two cases reveal a very reasonable interpretation of the Arbitration Law,

there are very few other decisions to confirm a definitive position of the Brazilian courts on the relationship between arbitration and bankruptcy. Because the Arbitration Law is still very new in Brazil, additional court decisions will be required to further clarify these issues. ◆

Endnotes

1 TJ-SP. AI 531.020-4/3-00, Des. Manoel de Queiroz Pereira Calças. June 25, 2008.

2 TJ-SP. AI 658.014-4/2-00, Des. Roberto Solimene. December 10, 2009.

When International Arbitrations and US Bankruptcies Collide

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The question of what happens to an international arbitration when a party files for bankruptcy in the United States is arising with increasing frequency. In the United States, the public policy interests that underlie both bankruptcy and arbitration legislation sometimes clash on critical points. The federal courts have developed competing approaches to addressing these issues. This fractured caselaw introduces uncertainty at the intersection of arbitration and bankruptcy.

US Bankruptcy Code

Under the US Bankruptcy Code, bankruptcy courts serve as a centralized forum for resolving all disputes related to the debtor's property and other assets, including, at least in some cases, arbitration claims against the debtor. Centralized dispute resolution helps to ensure efficient organization and limits the debtor's need to expend estate resources in multiple courts.

Section 362 of the US Bankruptcy Code automatically stays claims against the debtor. This forces parties that contracted for a private means of dispute resolution to participate, at least initially, in a judicial bankruptcy proceeding. As for the debtor's own claims, whether to prosecute them will no longer be a unilateral decision of the debtor but likely will be decided by a trustee or, if the debtor retains possession of the estate, be subject to the court's approval. Further complicating matters is the fact that some foreign tribunals, including arbitral bodies, may not give effect to a stay order entered by a US bankruptcy court.

The Federal Arbitration Act

The Federal Arbitration Act (FAA) reflects congressional policy to enforce valid arbitration agreements. However, while the Supreme Court has consistently recognized the importance and validity of this policy, the Court has not addressed the inherent conflict between bankruptcy law and arbitration law. Whereas bankruptcy law centralizes all debtor-related disputes into one judicial forum and seeks to give the debtor time to reorganize or liquidate, arbitration law enforces agreements to expeditiously resolve disputes out of court.

Notwithstanding its strong support for arbitration agreements, the Supreme Court has repeatedly recognized that the FAA's mandate to enforce private contracts may be "overridden by a contrary congressional command" or be qualified by "an inherent conflict" between the FAA and another statute's "underlying purpose."[1] While it is generally agreed that the Bankruptcy Code does not represent a "congressional command" contrary to the FAA, some US courts have wrestled with whether

these two bodies of law inherently conflict and, if so, how to reconcile them. The result has been inconsistency between jurisdictions and troubling uncertainty.

Inconsistent and Uncertain Caselaw

To enforce an arbitration agreement against a debtor, a party must first demonstrate that the arbitration agreement is valid and that the dispute falls within the agreement's scope. Then, to defeat the arbitration agreement, the burden shifts to the debtor to show that the Bankruptcy Code's purpose would be significantly impaired by enforcing the agreement.

This inquiry, in turn, generally depends on whether the bankruptcy court deems the arbitration a "core" or "non-core" proceeding. Core proceedings are those that are central to resolving a bankruptcy case. A non-exhaustive list of core proceedings may be found in the Judicial Code, 28 U.S.C. § 157. Whereas bankruptcy judges have full authority to adjudicate core proceedings, in non-core proceedings they can only make recommendations to district court judges, and in some cases cannot hear the case at all.

Core claims may be further categorized as "procedurally core" or "substantively core." Procedurally core claims are "garden variety pre-petition contract disputes dubbed core because of how the dispute arises or gets resolved."[2] The arbitration of a procedurally core dispute rarely conflicts with any policy of the Bankruptcy Code unless the resolution of the dispute fundamentally and directly affects a core bankruptcy function. Substantively core claims are more likely to be intertwined with the bankruptcy reorganization and thus are far less likely to be referred to arbitration.

Whether an arbitration claim presents a core or non-core issue may be difficult to predict. The distinction generally rests on whether the bankruptcy court views the claim as "arising" out of the bankruptcy or instead as materially "relating" to the bankruptcy. This is sometimes a difficult distinction that generally rests on the materiality of the dispute to the reorganization.

Most US jurisdictions follow this core versus non-core analysis. They tend to hold that bankruptcy courts generally must enforce arbitration agreements with respect to non-core claims, and that they may refuse to enforce the agreements with respect to core claims, depending on the nature of the claims and the facts of the particular bankruptcy.[3] Some jurisdictions, however, take a different approach. They focus on whether referring the case to arbitration would jeopardize the objectives of the Bankruptcy Code without regard to whether the proceeding involves core or non-core claims.[4]

Generally, bankruptcy courts will enforce arbitration agreements unless doing so would interfere with the debtor's reorganization, particularly when it is the debtor seeking to enforce the agreement. But the lack of a dependable framework heightens uncertainty, complexity and cost. First, the determination of whether an arbitration proceeding is core or non-core can itself be an expensive and time-consuming procedural battle. Second, the significance of the core/non-core distinction to an arbitration agreement may vary between jurisdictions, and even within the same jurisdiction, and often results in further procedural battles.

Courts are divided over other issues involving the intersection of bankruptcy and arbitration law as well. For example, courts have reached different results in determining whether an arbitration clause contained in an executory contract is enforceable where the bankruptcy court had previously rejected the underlying contract.[5] Other issues, such as the impact of a bankruptcy in a foreign country on an arbitration being conducted in the United States, or the impact of a bankruptcy in the United States on a foreign arbitration proceeding, raise unsettled questions of a type that courts throughout the world are being forced to consider as bankruptcies proliferate.[6]

It should also be noted that even if the bankruptcy court enforces an arbitration provision, the arbitration will serve only to liquidate claims against the debtor. To impose a remedy, the prevailing party will ultimately have to work through the bankruptcy court.

Conclusion

Given the uncertainty in this area, parties may find it in their interest, when negotiating arbitration agreements, to seek to find a way to protect against a potential bankruptcy, i.e., seek guarantors where bankruptcy is a potential issue. ◆

Endnotes

1 *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987).

2 *In re S.W. Bach & Co.*, 2010 WL 810128, at *6 (Bnkrcy S.D.N.Y. Mar. 10, 2010).

3 *E.g., In re U.S. Lines*, 197 F.3d 631, 640 (2d. Cir. 1999).

4 *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006); *In re D&B Swine Farms, Inc.*, 2010 WL 358493, at *4-6 (E.D.N.C. Jan. 23, 2010).

5 Compare *Moglia v. Public Employers Ins. Co.*, 547 F.3d 835, 837 (7th Cir. 2008) (arbitration agreement not enforceable) with *In re Fleming Cos.*, 2007 WL 788921, at *1-3 (D. Del. Mar. 16, 2007) (arbitration agreement enforceable).

6 See *Vivendi S.A. v. Deutsche Telekom A.G.*, No. 4A_428/2008 (Swiss Federal Tribunal 2009); *Syska v. Vivendi* [2008] EWHC 2155 (Comm.); see also *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 715 (2d Cir. 1987) (refusing to enforce arbitral award in deference to Swedish bankruptcy proceeding).

Arbitration and Insolvency Law in Dubai—Is There a Link?

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Dubai currently has no effective insolvency law. Try to imagine it: How would creditors recover their entitlements? Does it lead to more arbitration activity? Does it explain why the Dubai International Arbitration Centre received more than 300 new cases last year and why arbitration is increasingly used?

Insolvency Law—Is It Necessary?

By definition, when a company reaches a state of insolvency it no longer has sufficient assets to meet its liabilities. This makes the management and distribution of those assets of paramount importance. There is value in the company that goes beyond its physical assets: knowhow, goodwill, ongoing relationships, employee loyalty and other intangible aspects that cannot easily be transferred by contract. If, however, the company's physical assets are disposed of in a piecemeal manner, those additional elements may be lost, thereby reducing the company's total value. If this happens, value and total return to the creditors are lost, and from this loss flows a fundamental principle of bankruptcy law: asset maximisation.

But asset maximisation is not, in itself, enough. The individual creditor may consider that there are sufficient assets for its debt to be realised and it is not until a later creditor tries to enforce its claim that the insolvency will prove fatal to further creditors' claims. The first creditor to act will therefore secure a greater return than the slower, less well informed, or less well positioned creditor. The competing processes add uncertainty and the costs of preventive and protective action (including monitoring), which further devalue the asset.

Thomas Jackson, one of America's foremost academic experts on bankruptcy law, has analysed the concept in some detail, and concluded that the neutral bankruptcy principle would be to ensure a collective and compulsory insolvency regime: *compulsory*, to prevent any creditor from jumping the queue, and *collective*, to ensure the greatest return for the greatest number of creditors.

The concept of *pari-passu* (equal and proportionate) distribution of assets on insolvency in so many jurisdictions is a further neutral aspect of insolvency machinery. This principal ensures each creditor a proportional return wherever it finds itself in the process and removes another element of individual incentive. Logically, this process would include a stay on individual litigation or arbitration to prevent the race to the tribunal and the associated costs and asset attrition. Certainty and transparency would be a requisite so that repeat players could put their faith in the system and would not have incentives to seek to cheat or avoid the system to the overall detriment of their fellows.

Professor Jackson was attempting to rationalise US bankruptcy law, but consider what the absence of an appropriate collective and compulsory bankruptcy process, with no clear structure for creditors, might mean for a legal system. It is for this reason that reform is contemplated in the United Arab Emirates.

The Need for Reform in the UAE

According to Dahlia Khalifa, a senior World Bank adviser, it takes an average of five years to close a business in the UAE because of inadequate insolvency laws:

> In the UAE, because there is not a very strong insolvency regime, there are actually very few companies that go through the insolvency process..... What needs to be addressed is the creation of an insolvency regime so companies can go through a very clear process to resolve issues if there are any criminal obligations or results that come from filing for bankruptcy.

It has been reported in *Gulf News* that the UAE will introduce a new law "*within months*" to deal with the increased volume of corporate bankruptcies in the economic downturn. But where does that leave insolvencies in the meantime and what has this to do with arbitration?

If an efficient insolvency structure puts the creditors into an orderly system, enforcing a collective and compulsory proceeding for the greater good, and specifies how the financial remains of a failed company are to be dealt with, what happens in Dubai when the structure fails to achieve that? A free-for-all, perhaps, with creditors scrambling to lay hands on whatever assets are left. As a result, there are probably more disputes, with creditors urgently trying to establish their entitlements, but no appropriate insolvency rules to regulate these claims and impose a central, collective and cost effective distribution of assets and entitlements.

These issues are clearly at the forefront of thought in Dubai. As recently as early March 2010, the Dubai International Arbitration Centre (DIAC), in cooperation with the International Bar Association (IBA), organised a roundtable discussion regarding international insolvency laws and dispute mechanism models. Dr Hussam Talhuni, Director of DIAC, said that the purpose of the discussion was to apprise the business community and all stakeholders about the application of international insolvency laws in the context of the domestic law and to bring the discrepancies in the dispute mechanism models to the notice of legal practitioners. The participants were presented with some of the insolvency models implemented in the United States, France, Canada, Switzerland, and the United Kingdom.

A Link with the Increased Number of Arbitrations?

The number of arbitrations commenced in the Dubai International Arbitration Centre in 2009—approximately 300—is truly staggering when measured against the size of Dubai's business community. Presumably, there also would have been a large number of parties who could have gone to arbitration but decided against pursuing a failed company.

The remarkable number of arbitrations commenced in 2009 is entirely consistent with the theory that the absence of an effective insolvency regime leads to a rise in disputes, as part of the scramble for what little cash may be left. The number of arbitrations, therefore, may not evince the popularity of arbitration, but rather, simply reflect the inadequacy of the existing insolvency regime.

Look also at the arrangements specially made to deal with the investment company Dubai World. In December 2009, Decree 57 was issued by the Ruler of Dubai to facilitate the restructuring of the Dubai World group of companies, with a special tribunal set up to deal with claims and a modified legal regime. The Decree needed to address a jurisdictional issue but the special arrangements underline the absence of the necessary modern insolvency machinery.

The acid test for the theory (as to the likely explanation for the 300 arbitrations) will come after the promised new insolvency law has come into force and has become well-used. If the number of requests for arbitration drop away in some sort of correlation then the theory can claim some proof.

Until then it is very much a matter for debate. ◆

The Effect of German Insolvency Proceedings on International Arbitration

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The impact of insolvency proceedings on arbitral proceedings is becoming an increasingly important consideration for parties. Two scenarios can be generally envisioned: (i) a company files for insolvency while it is engaged in arbitral proceedings; or (ii) arbitral proceedings are initiated after insolvency proceedings have commenced. In both scenarios, the parties need to assess how the insolvency proceeding affects the arbitral proceedings. This article assesses the impact of insolvency proceedings initiated in Germany on foreign arbitral proceedings.

Initially, the arbitral tribunal has to determine whether the insolvency proceedings have any impact on the arbitration at all. The proceedings might not if the national laws applicable to the insolvency proceedings restrict their applicability to the territory of that jurisdiction (known as the principle of territoriality).

German insolvency law follows the principle of universality pursuant to Council Regulation (EC) No. 1346/2000 dated May 29, 2000, on insolvency proceedings as well as pursuant to Sec. 335 et seq. of the German Insolvency Code. In other words, German insolvency law demands recognition in any other jurisdiction. Therefore, the arbitral tribunal should recognize the German insolvency proceedings. If they do not, there is a risk that any arbitral award would violate German public policy and, therefore, would not be enforceable in Germany.[1]

In order to ensure the enforceability of a future arbitral award in Germany, the arbitral tribunal should consider the following issues.

The Insolvency Administrator's Role

Under German insolvency law the insolvency administrator is the only authority entitled to manage and dispose of the debtor's assets, regardless of whether these assets are located in Germany or abroad.[2] Consequently, the debtor's management loses the ability to represent the insolvent debtor. Insolvency administrators act in their own names just as if they were the debtor's legal successor, so any claim a creditor has against the insolvent debtor has to be directed against the insolvency administrator in person.[3]

German insolvency law does not affect the validity of arbitration clauses the insolvent debtor entered into with creditors. Moreover, the insolvency administrator is bound by such agreements and cannot set them aside.[4] Therefore, in principle, any creditor can file arbitral proceedings while insolvency proceedings are pending. However, such proceedings should be filed against the insolvency administrator in person, not against the debtor. This should also be reflected in the caption

of the creditor's statement of claim, as well as in the future arbitral award.

Further, to observe the principles of due process, the arbitral tribunal is required to give the insolvency administrator sufficient time to become acquainted with the facts of the case and the status of the arbitral proceedings. The administrator also must be given the opportunity to state a position on any question of fact or law relevant for the case.[5] Submissions and statements by the insolvent debtor's management are not taken into consideration as the debtor can no longer dispose of the assets. If the insolvency administrator is not given opportunity to defend the case, the award cannot be recognized pursuant to Art. V para. 1 b of the New York Convention. Therefore, upon learning that insolvency proceedings have been initiated, the creditor should ask the arbitral tribunal to stay the arbitration for a reasonable period of time.

Observing the Competing Creditors' Rights

German insolvency law aims to satisfy creditors on equal terms. As a result, "insolvency creditors" may only enforce their claims within the framework of the insolvency proceedings. Insolvency creditors are creditors who neither have a right *in rem* in the asset they are claiming (e.g. ownership) nor a right to a legal charge over the asset. These limitations form part of the German public policy and an arbitral award not honoring them would in effect purport to discriminate against other competing insolvency creditors and will not be enforceable in Germany.[6] Hence, the following acts should be observed in order not to discriminate against the competing insolvency creditors.

- Each insolvency creditor's claims must be filed with the insolvency administrator in writing. The insolvency administrator collects all (alleged) claims and adds them to a list of claims, the so-called insolvency schedule (Insolvenztabelle). Thereafter, an oral hearing takes place to discuss and review these claims; the insolvency administrator, the debtor and all insolvency creditors may participate in the hearing and object to any claim. If the insolvency administrator or other insolvency creditors do not object to a certain claim, the respective claim is deemed to be acknowledged.[7] In this situation, the creditor does not need to initiate arbitral proceedings because the acknowledgement of the claim has the same effect as a final and binding judgment. If arbitral proceedings are pending by the time the respective claim is acknowledged, the insolvency creditor should withdraw the claim in order to terminate the arbitral proceedings.
- If the insolvency administrator or other insolvency creditors object to a claim, the insolvency creditor has to initiate legal proceedings to overcome the objections. If the dispute is subject to a valid arbitration clause, and the insolvency administrator has objected to the claim, the creditor may commence arbitral proceedings against the insolvency administrator in person. If a competing insolvency creditor has objected to the claim, the usual position is that the creditor cannot commence arbitral proceedings, as other insolvency creditors are not bound by the arbitration agreements. Instead, the creditor has to file a lawsuit against the objecting creditor(s) with the national courts at the debtor's seat. In case both the insolvency administrator and other insolvency creditors object to the respective claim, the insolvency creditor has to initiate arbitral proceedings against the insolvency administrator and, at the same time, litigate against the other creditors. This situation is very unsatisfactory as it doubles legal expenses and bears the risk of conflicting decisions.[8]
- If the arbitral proceedings were initiated prior to the insolvency proceedings, the same rules basically apply. Therefore, the creditor should request the arbitral tribunal to stay the proceedings until the insolvency administrator has reviewed the claim and decided whether to object. If the arbitral tribunal fails to do this and renders an award against the insolvency administrator prior to the hearing in the insolvency proceedings, such an award would not be enforceable under German law.

The Correct Motion of the Insolvency Creditor in the Arbitral Proceedings

A motion requesting the insolvency administrator to pay a certain amount of money or to release a certain asset would discriminate against the competing insolvency creditors. Therefore, an insolvency creditor can only ask the arbitral tribunal to determine that the creditor's claim is valid. An arbitral award forcing the insolvency administrator to fulfil an insolvency

creditor's claim would not be enforceable under German law. If insolvency proceedings have been initiated after the arbitration has commenced, the insolvency creditor should amend the claim and request the arbitral tribunal to declare the claim to be valid.[9] The creditor can present such an award to the insolvency court which will include the claim in the insolvency schedule.[10] This acknowledgement by the insolvency court overturns the insolvency administrator's prior objection. ◆

Endnotes

1 A conflict can arise if the jurisdiction applicable at the seat of arbitration follows the principle of territoriality and therefore does not recognize the German insolvency proceedings.

2 Exceptions to this general rule are provided in Art. 3 para. 2, 3 and 4 Council Regulation (EC) No. 1346/2000.

3 Kreft, Insolvenzordnung, 5th edition, 2008, sec. 80 note 37.

4 BGH, decision dated 20 November 2003, ref. no. III ZB 24/03; BGHZ 24, 18.

5 Ehricke, ZIP 2006, 1847 (1850); Heidbrink / von der Groeben, ZIP 2006, 265 (269).

6 See, e.g. BGH, decision dated January 29, 2009, ref. no. III ZB 88/07; Ehricke, ZIP 2006, 1847 (1848); Heidbrink / von der Groeben, ZIP 2006, 265 (268).

7 An objection by the debtor does not interfere with the acknowledgement of the claim.

8 Ehricke, ZIP 2006, 1847 (1852 et seq.).

9 BGH ZIP 1988, 324.

10 According to the prevailing opinion in German literature, the award would not have to be rendered enforceable beforehand.

The Thai Perspective— Effect of Bankruptcy on Arbitration

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Thailand introduced reforms to its bankruptcy laws in 1998 in the aftermath of the 1997 Asian financial crisis. Those reforms introduced business reorganisation provisions similar to the Chapter 11 provisions of the US Bankruptcy Code. Further amendments have been made to the Thai bankruptcy laws, which are now governed by the Bankruptcy Act BE 2483 (1940) as amended by the Bankruptcy Act (No. 7) BE 2547 (2004).

This article considers the extent to which Thai Bankruptcy Law overrides the contractual rights of parties to arbitrate disputes. Two separate parts of Thai Bankruptcy Law are considered. These are:

- Liquidation
- Business Reorganisation

Liquidation

Creditors can file a bankruptcy petition with the Bankruptcy Court if the debtor is insolvent (i.e., the debtor owes THB 1 million, in the case of individuals, or THB 2 million, in the case of corporate entities, and total debts exceed total assets). Under Thai law, a debtor is assumed insolvent if any of the events set out in Section 8 of the Bankruptcy Act occur (this assumption can be rebutted by proving solvency, which can normally be demonstrated with a simple balance sheet test).

If the debt arises out of a contract containing a valid arbitration clause, it is in the discretion of the Thai Bankruptcy Court to dispose of proceedings under the Arbitration Act. However, there is no precedent[1] of a Thai court ordering the parties to arbitrate. Commencement of arbitration is considered a matter for the parties to undertake.

Under Section 14 of the Bankruptcy Act the court has the discretion to order the debtor to enter into "absolute receivership," in which case the interest and control of the debtor's property will be vested with the Official Receiver (a government official) for distribution amongst its creditors.

On entering into absolute receivership a debtor is prohibited from doing any act relating to the assets without the consent of the court, the Official Receiver or following agreement at a creditor's meeting.

The effect of an order for absolute receivership on an arbitration which has already been commenced, or which is contemplated, is that it is the Official Receiver alone who has the power, pursuant to Section 22 (3), to "...compromise, come to settlement, or file actions, or defend actions, relating to the assets of the debtor."

It is open for other creditors to join bankruptcy proceedings but Thai

courts will not strike out bankruptcy proceedings to give effect to an arbitration agreement, after the granting of an order for absolute receivership.

From the date of the order for absolute receivership of a company, the Official Receiver controls the conduct of any dispute and is required to pursue only pending civil actions that involve the debtor's assets. On request by the Official Receiver, the court is empowered to "order the cessation of ... the civil action or make any other order it may deem proper" (Section 25 Bankruptcy Act). A "civil action" under this section has been held by the Supreme Court to include arbitrations.

However, Section 27 of the Bankruptcy Act prescribes that a creditor can only seek repayment of its debt by complying with the procedure set out in the Act. In order to make any recovery, a claimant-creditor will need to file its proof of debt within two months of the order for absolute receivership or its claim will be extinguished.

Business Reorganisation

Proceedings for a business reorganisation are governed by Chapter 3/1 of the Bankruptcy Act. They are similar to US Chapter 11 petitions in that they provide protections for corporate debtors. Proceedings can be commenced by filing a petition for restructuring by the debtor where creditors are owed in excess of THB 10 billion. When the Bankruptcy Court makes an order for the acceptance of the petition for reorganisation for hearing, the Bankruptcy Act provides for an automatic stay or moratorium of any action (including arbitration) against the debtor to recover any sums of money. Section 90/12 (4) provides:

> Neither an action shall be taken against the debtor in a civil case ... nor a dispute in which the debtor may become liable or incur damage shall be submitted to arbitration for ... if the obligation arises before the day on which the court approves the plan.

In short, a stay under this section provides security for the debtor against any form of legal process. Indeed, Bankruptcy Act Section 90/12, paragraph 3, explicitly provides:

> The judgment or order of the court or the arbitral award which is contrary to or inconsistent with the provision in any subsection of paragraph one shall not be binding on the debtor.

However, a creditor whose rights have been limited by the application of Section 90/12 can apply to the court for an order amending, modifying or terminating any limitation of their rights.

Where an automatic stay has been imposed that results in the expiration of a limitation period, Section 90/15 extends that limitation period by one year from one of the following events:

- the date of the successful completion of the plan
- the court orders dismissal of the petition for reorganisation
- a disposition of the case
- cancellation of the reorganisation order
- cancellation of the reorganisation process
- an order putting the debtor into absolute receivership

In practice, in the case of contemplated arbitration by a claimant-creditor seeking to recover any element of the debt from the assets of the debtor, the creditor will need to file a proof of debt. This avoids the uncertainty involving limitation periods. All creditors, including unsecured, secured and judgment creditors must file a proof of debt within one month of the date of the announcement of the Planner in the government gazette. It is the Planner who prepares the business reorganisation plan for the debtor (Plan) which must include, among other things:[2]

- reasons for the reorganisation
- details of assets, liabilities and other obligations of the debtor
- methods of the business reorganisation
- redemption of collateral
- action to be taken where debts are to be assigned
- solutions for lack of liquidity
- a time period for implementing the Plan

The Plan must be approved at a creditor's meeting and subsequently sanctioned by the court. Once sanctioned, the Plan becomes binding on all creditors.

In the event that a creditor fails to submit its proof of claim within the one month period, it loses all rights to recover any monies owed by operation of law.

Conclusion

A Thai court will uphold an arbitration agreement if bankruptcy proceedings have yet to commence. However, if the debtor is subject to absolute receivership, any creditor will need to file a proof of debt within two months of the order to avoid losing all rights to recover its debts.

Similarly, under a business reorganisation, any legal disputes, including arbitral proceedings, will be stayed. It is therefore important for a claimant creditor to file its proof of debt within one month of the appointment of the Planner to preserve its claims. Failure to participate within this one-month time period will result in any existing claims becoming automatically barred. ◆

Endnotes

1 Thailand has a civil system of law with no binding precedents. In theory, interpretation of statute is made on each set of facts as presented to the court. However, court rulings are persuasive in providing guidance as to how a court will interpret a similar circumstance in the future.

2 A full list of the Plan's mandatory requirements is set out at section 90/42 Bankruptcy Act.

Bankruptcy and Arbitration Laws in France

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In France, when bankruptcy proceedings are instituted against a party involved in a pending arbitration it can result in conflicts between the applicable arbitration and insolvency rules. In that context, an arbitral tribunal sitting in France may be confronted with determining the extent to which they must defer to mandatory insolvency rules.

A recent decision by the French *Cour de cassation*[1] provides clear guidance on this matter. In the case of *Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income*, rendered on May 6, 2009,[2] the highest French judicial authority confirmed the general principle that arbitrators must apply when confronted with the bankruptcy of a party to an arbitration in France. The Court ruled that an arbitral tribunal may only render a decision deciding the amounts owed by the insolvent party, and that, under French bankruptcy law, the tribunal cannot order the bankrupt party to pay any amount. Failure to respect these principles will lead French courts to set aside the resulting award if the seat was in France, or to refuse to recognize and enforce the award in the French legal system.

The facts of the case brought before the *Cour de cassation* were as follows: Jean Lion, a French company, concluded three contracts containing an arbitration clause with Income, an Egyptian company. In 2001, Income initiated arbitration proceedings in London against Jean Lion, under the Rules of the Refined Sugar Association. While the arbitration proceedings were pending, Jean Lion was declared bankrupt in France and subjected to judicial liquidation.

In 2004, the arbitral tribunal ruling upon the dispute rendered an award in favour of Income, ordering Jean Lion to pay certain sums. The arbitral award was declared enforceable in France by a judgment of the Paris First Instance Court in 2006. In 2008, the Paris Court of Appeal confirmed that the arbitral award was recognised and enforceable in France. At the request of Jean Lion's liquidators, the *Cour de cassation* eventually reversed the decision of the Paris Court of Appeal and declared that the award violated French principles of international public policy under Article 1502.5 of the Code of Civil Procedure.

Jean Lion's liquidators argued two main legal grounds before the *Cour de cassation*. The first ground was an alleged procedural defect, namely the liquidators claimed they were not validly summoned in the arbitration and therefore the proceedings should not have resumed. In the second ground, Jean Lion's liquidators contended that an arbitral tribunal may decide the value of the debt owed

by the insolvent party but may not, in any case, require the debtor to pay the amounts.

The *Cour de cassation* rejected the first argument on the basis of estoppel. However, the second argument successfully persuaded the Court.

The Court found that, by recognizing an arbitral award in which Jean Lion was ordered to pay certain amounts to Income, despite being bankrupt, the Court of Appeal breached article L. 621-41 of the French Commercial Code (now article L. 622-22) and violated the fundamental principle of equality between the creditors in insolvency proceedings.

Interestingly, Income had argued before the Court of Appeals that this principle would not be applicable as it had only requested recognition of the arbitral award, not enforcement, in France. In effect, Income had clearly stated that it would not seek its enforcement.

Relying on that representation, the Court of Appeal decided that "in order to be unlawful, the recognition or enforcement of an award should constitute an effective and concrete violation of international public policy rules. This is not the case when there is a purely formal violation of the prohibition of condemnation of a legal entity that was declared bankrupt." The Court of Appeal reiterated a well-known concept of French arbitration law that requires a "blatant, concrete and effective violation of international public order" to set aside international arbitration awards with a seat in France or to oppose their recognition and enforcement in France.

However, the Court of Appeal's decision was also quashed by the *Cour de cassation* for breach of article L. 621-41 of the Commercial Code (now article L. 622-22). The *Cour de cassation* stated in broad terms that "with respect to bankruptcy matters, the stay of proceedings is a rule of both national and international public policy." Even in the context of an international arbitration, as long as bankruptcy proceedings are filed in France against a party, an arbitral tribunal must apply French international public policy rules. Therefore, because the award did not respect such rules, the Court of Appeal should have denied recognition and enforcement of the award. The *Cour de cassation* held that its finding was not affected by the creditor's representation that he would not seek the enforcement of the award. As a matter of international public policy, it does not matter whether the creditor decides to abandon the enforcement of the award or if enforcement is not possible if the debtor has no assets.

The *Cour de cassation*'s decision is therefore a strong confirmation of the limits set by French law to an arbitral tribunal's jurisdiction and powers, even with a seat outside France, if one party is subject to insolvency proceedings in France while the arbitral proceedings are pending. Although somehow strict, the approach of France's highest court allows for harmonious coexistence of bankruptcy and arbitration laws in France as well as in arbitrations involving parties subject to French bankruptcy proceedings. ◆

Endnotes

1 The *Cour de cassation* is France's highest legal authority.

2 Civ. 1ère, May 6, 2009, n°08-10.281, JCP Ed. Gen. 2009, n°20, May 13, 2009, act. 135.

Insolvency and Arbitration—The English Perspective

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Arbitration proceedings in England are creatures of contract, arising out of the agreement between the parties to refer their disputes to arbitration. However, except in limited circumstances, when one of the parties to an arbitration agreement becomes insolvent, England's statutory insolvency regime takes precedence over the rules of the arbitration.

The Insolvency Regime in England and Wales

The formal insolvency regime in England and Wales is primarily governed by the provisions of the Insolvency Act 1986, and related legislation. Where the insolvent party is a foreign entity that either has a presence in the United Kingdom or is involved in proceedings there, the EC Regulation on Insolvency Proceedings (EC Regulation)[1] or the UNCITRAL Model Law on Cross-Border Insolvency (Model Law)[2] may also come into play. This article focuses on the interplay between the two primary forms of formal insolvency procedure available (compulsory liquidation and administration) and arbitration proceedings where the seat is in London.

The Impact of Insolvency on Arbitration Proceedings

When an entity enters either compulsory liquidation or administration, proceedings against that entity are automatically stayed. In the case of compulsory liquidation, the stay applies from the making of the winding up order and prevents both the commencement and the continuation of proceedings against the company or its property unless done with the permission of the court.[3]

Where a company has entered administration, the stay applies from the earlier of (i) the making of an application for an administration order; (ii) the filing of a notice of intention to appoint an administrator; and (iii) the appointment of the administrator. The stay restricts the commencement or continuation of any legal process against the company or its property except with the consent of the administrator (if already appointed) or the permission of the court.[4]

It is commonly accepted that the stay of "proceedings" or "legal process" in compulsory liquidation and administration extends to arbitration proceedings. Accordingly, when an entity enters either form of formal insolvency procedure, any pending or contemplated arbitration proceedings situated in London are automatically stayed.

Alternatively if the entity is subject to insolvency proceedings in a foreign jurisdiction there will not be an automatic stay on the commencement or continuation of arbitration proceedings against that entity in London. However, a foreign insolvency appointee can seek assistance from the courts in England

and Wales pursuant to the Cross-Border Insolvency Regulations 2006 (CBIR).[5] Under the CBIR, insolvency appointees of foreign entities can apply for recognition of their insolvency proceedings as foreign main proceedings (if they are taking place in the state where the debtor has the centre of its main interests) or foreign non-main proceedings (if they are taking place in a state where the debtor has an establishment). If proceedings are recognised as foreign main proceedings, an automatic stay applies to the continuation of individual actions (including arbitration) concerning the debtor in the place where recognition is granted. If proceedings are recognised as foreign non-main proceedings, the foreign representative can also ask the court to impose a stay on the continuation of individual actions, including arbitration.

The position is not quite as straightforward when the insolvent entity is subject to insolvency proceedings that have been opened in another EU Member State. If that is the case, and if arbitration proceedings have been commenced in London prior to the opening of the insolvency proceedings, it is the law of England, rather than the law of the other EU Member State, that determines the effect of those insolvency proceedings on the pending arbitration.[6]

This position was recently confirmed by the Court of Appeal in the case of *Syska (as administrator of Elektrim SA (in bankruptcy)) and another v Vivendi Universal SA and others*.[7] In that case, the court confirmed that where an entity was subject to Polish insolvency proceedings but was involved in an arbitration in London prior to those insolvency proceedings being commenced, it was the law of England that was to determine the effect of the insolvency proceedings on the pending arbitration. The court further held that there was nothing in English domestic law that would prevent the arbitration from continuing, notwithstanding the Polish insolvency proceedings. If, however, the arbitration had not been commenced prior to the insolvency proceedings being initiated, Polish insolvency law would determine the effect of the insolvency proceedings on whether any future arbitration could be commenced[8] and any stay of proceedings under Polish law would have effect in England.

The Availability of Security for Costs in Arbitration Proceedings in London

Both liquidators and administrators have the power to bring legal proceedings, including arbitration, in order to take possession of, collect and get access to the property of the company to which they are appointed.[9] Accordingly, a respondent in arbitration proceedings in such circumstances should consider applying for security for its costs of the arbitration. This consideration also will be a relevant where the claimant is suspected to be, or to become, insolvent, but has not yet entered a formal insolvency procedure.

In principle, security for costs is available to a respondent in an arbitration that has been commenced by an insolvent party (whether or not formal insolvency proceedings have been commenced in relation to that party) but, in practice, this will depend on the rules applicable to the arbitration in question and any exclusion of those rules agreed between the parties.

The provisions of the Arbitration Act 1996 (Act) apply when the seat of the arbitration is in England and Wales or Northern Ireland (regardless of whether the parties have agreed that another set of arbitration rules are also to apply). Section 38(3) of the Act provides that the tribunal may order a claimant to provide security for the costs of the arbitration, but it does not specify the grounds on which such an order may be made (other than to provide that the fact that a party is foreign to the United Kingdom is not a sufficient basis on which to make a security for costs order). In addition, all of the powers of the tribunal must be exercised by the tribunal acting fairly and impartially as between the parties. Section 38 of the Act is not a mandatory provision and, accordingly, the parties may exclude its operation by agreement, although it seems unlikely that parties would want to do this.

In addition to the provisions of the Act, the power for the tribunal to award security for costs may also be contained in the rules the parties have selected to apply to any arbitration proceedings. For example, Article 25 of the London Court of International Arbitration Rules gives the tribunal the power, unless otherwise agreed by the parties, to order the claiming party or the counterclaiming party to provide security

for legal or other costs of the respondent to the claim or counterclaim. Conversely, the tribunal also has power to order a respondent to provide security for all or part of the amount in dispute.

Factors that may be taken into account by a tribunal considering a security-for-costs application, and that are relevant to issue of insolvency, include whether the claimant is able to satisfy any costs order made in the respondent's favour, whether the security-for-costs order would force the claimant to abandon its claim and whether the claimant's impecuniosity is a result of the respondent's alleged conduct.

A security-for-costs order generally provides for a time within which security must be given, stays all further proceedings until security is given and provides for the action to be dismissed without further order if security is not given within the specified time. Section 41(5) of the Arbitration Act also specifically empowers the tribunal to dismiss proceedings if a claimant fails to comply with a security for costs order.

Conclusion

Where an English insolvency process intervenes where arbitration proceedings are pending or on foot, consideration should be given not only to whether the solvent party should seek protection in relation to its costs, but also to what impact the insolvency regime may have on the arbitration proceedings themselves. ◆

Endnotes

1 Council Regulation (EC) No 1346/2000 on Insolvency Proceedings.

2 The Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law in 1997.

3 Section 130(2) of the Insolvency Act 1986.

4 Section 43(6), Schedule B1 of the Insolvency Act 1986.

5 Which enacts the Model Law in the UK.

6 Articles 4 and 15 of the EC Regulation.

7 [2009] All ER (D) 91 (Jul).

8 Article 4 of the EC Regulation.

9 A liquidator in a compulsory liquidation will require the sanction of the court before commencing any proceedings.

Interplay Between Insolvency and Arbitration Proceedings—a Hong Kong Perspective

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The number of international arbitrations involving the Hong Kong International Arbitration Centre doubled between 2004 and 2008. The number of winding up petitions is also currently on the rise because of the poor global economic environment. This article discusses conflicts that may arise between the statutory insolvency regime and the contractual rights of parties to arbitrate their disputes in Hong Kong.

Can Arbitration Be Used To Circumvent Statutory Insolvency Regimes?

Courts in Hong Kong support party autonomy and almost always give effect to arbitration clauses. Article 8 of the UNCITRAL Model Law (applicable to international arbitrations pursuant to section 6(1) of the Hong Kong Arbitration Ordinance) states that a court must stay a court action[1] if there is a valid arbitration agreement and the party applies for the stay prior to that party's first court filing on the substance of the dispute. The court may refuse to stay the court proceedings only if the arbitration agreement is null and void, inoperative or incapable of being performed.

The court's power of stay to uphold arbitration agreements is automatic and does not require an examination of the merits of the case. One exception however appears to be when a party opts to file a winding up petition. In such circumstances, recent decisions show that the courts will not stay valid winding up petitions in circumstances where there is also an underlying arbitration agreement.

In a recent Hong Kong case, *Re Sinom (Hong Kong) Limited*,[2] the Court of First Instance confirmed that neither the existence of an arbitration clause nor the commencement of arbitration prevents the court from dealing with a winding up petition. In this scenario, the court will allow the winding up petition to proceed, provided that it is satisfied that the creditor can establish that the sum claimed is due—i.e., there is no *bona fide* dispute in relation to the substance of the debt on which the winding up petition is based.[3] This principle was first established in *Re Jade Union Investment Limited*[4] decided in early 2004.[5] In that case, the creditor made a winding up petition against Jade Union shortly before the commencement of arbitration proceedings. The winding up petition was made on the basis that Jade Union was deemed to be insolvent, as it failed to comply with a statutory demand for an outstanding payment served by the creditor.

During the hearing on the winding up petition, Jade Union asserted that the court should not consider the winding up petition because of the existence of an arbitration clause in the contract that provided that any dispute

or difference between the parties should be referred to arbitration. The court was not persuaded by Jade Union's argument and held that neither the existence of an arbitration clause in the contract nor the commencement of an arbitration, of themselves, demonstrated that there was a *bona fide* dispute in relation to the amount claimed.

The court also explained that permitting a winding up petition to proceed in these circumstances did not have the effect of circumventing the provisions in the Arbitration Ordinance relating to the stay of proceedings. A winding up petition is quite different from an 'action' between the parties, in which the parties seek the court's determination as to their respective rights and liabilities. By a winding up petition, a creditor merely invokes the court's jurisdiction under the Companies Ordinance to wind up a company on one or more of the grounds set out in the Ordinance. In doing so, the creditor exercises a class right available to all of the company's creditors. Even if a winding up order is made, the creditor is still obliged to submit a proof of debt, along with other creditors of the company, and the liquidator will then decide how much the creditor is entitled to receive from the assets of the company. It follows that by making a winding up order the court does not thereby adjudicate the petitioner's rights to recover any particular amount from the company.

Is Leave of the Court Required To Proceed Against an Insolvent Party in Arbitration?

Section 186 of the Companies Ordinance provides that when a winding up order has been made, or a provisional liquidator has been appointed, no action or proceeding against the company can be begun or continued except by leave of the court. It is well recognized in Hong Kong that "action or proceeding" encompasses arbitrations, so leave of the court is required to proceed against an insolvent party in arbitration.

The legal principles on the exercise of the court's discretion under Section 186 are set out in the case of *Re B+B Construction Company Limited (In Liquidation)*:[6]

(i) the court will exercise its discretion on the basis of what is right and fair according to the circumstances of each case, this involves a balancing exercise;[7]

(ii) if the issue can be conveniently decided in the course of the winding up, leave will be refused in the absence of special circumstances, as there is a positive benefit in having the issue decided by the liquidator since this should be less expensive and quicker than an independent action and the liquidator is obliged to act even-handedly as between each class of claimant so prejudice would not normally be caused to any particular class of claimant;[8]

(iii) however proceedings will be allowed to be commenced or continued where an action is the most convenient method of trying a question, and particualrly so when the questions would involve substantial issues of facts that are in dispute and also matters of law of complexity;[9] and

(iv) leave is more likely to be granted where the company in liquidation is insured in respect of the claim made against it as the judgment will be funded to the limit of the cover by the insurance company and the costs of the action will be borne by the insurance company.[10]

Can Parties Obtain Security for Costs Against Impecunious Parties?

Pursuant to Section 2GB(1) of the Arbitration Ordinance, the arbitral tribunal may make orders or give directions requiring a claimant to give security for the costs of the arbitration.

The Ordinance does not specify the grounds upon which the arbitral tribunal will consider when deciding whether to grant security for costs.[11] It is generally accepted that the respondent (i.e., the party applying for security for costs) has to establish to the arbitral tribunal's satisfaction that the claimant will be unable to pay his costs if the claim is unsuccessful, or that there will be serious difficulties in enforcing an order for costs against the claimant.[12] The merits of the underlying dispute between the parties are not always relevant in deciding whether to grant security for costs.[13] It is therefore probable that the respondent can obtain security for costs against an impecunious claimant, provided that the threshold test cited above is satisfied. ◆

Endnotes

1 An exception to this mandatory power of stay relates to Labour Tribunal proceedings—the court has a discretion to order the stay of proceedings upon satisfaction of certain requirements (Section 6(2) of the Arbitration Ordinance).

2 HCMP73/2009, 5 August 2009.

3 It is well-established in Hong Kong that where a winding up petition is based on a debt, the said petition will be dismissed by the court if the allegedly insolvent company is able to establish that the debt relied upon is genuinely disputed on substantial grounds.

4 HCCW 400/2003, 5 March 2004.

5 This case was approved by later cases, e.g. *Re City Top Engineering Limited* (HCCW 1035/2004, 20 April 2006) and *Re Southern Materials Holding (H.K.) Company Limited* (HCCW 281/2007, 13 February 2008).

6 HCCW114/2001.

7 *Re Aro Co. Ltd [1980] 1 Ch 196; Re Axona International Credit & Commerce Ltd* [1985] 2 HKC 675; *Re King's Dyeing & Weaving Factory Ltd (No. 2)* [1986] HKC 621.

8 *Re Exchange Securities & Commodities Ltd & Ors.* [1983] BCLC 186.

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