Shearn Delamore &co.

Arbitration Update

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The Enforceability of an Arbitration Agreement against a Wound-Up Company

Recently, the High Court considered whether a liquidator of a wound-up company is bound by the arbitration agreement in **Biaxis (M) Sdn Bhd (In Liquidation) v Peninsula Education (Setia Alam) Sdn Bhd (Formerly Known As Segi International Learning Alliance Sdn Bhd)** [2023] MLJU 2938 ("Biaxis").

Brief Facts

By a Letter of Award, the Plaintiff was appointed contractor by the Defendant who was the Employer for a project. The parties then entered into the Agreement and Conditions of PAM Contract 2007 (With Quantities) and Amendments, Amplifications and Supplementary Clauses to the Agreement and Conditions of Building Contract 2 ("Agreement"), which contained an arbitration clause ("Arbitration Agreement").

The Plaintiff was subsequently wound-up, and a liquidator was appointed. Thereafter, the Plaintiff (through its liquidator) commenced a suit against the Defendant, claiming for an alleged outstanding unpaid sum. The Defendant filed a stay of proceedings pursuant to section 10 of the **Arbitration Act 2005** ("AA 2005") on the basis that there was an arbitration agreement requiring the parties to resolve their dispute via arbitration.

Issue 1: Whether the Liquidator is bound by the Arbitration Agreement

The High Court held that since the Plaintiff had been wound-up, the liquidator steps into the "*shoes*" of the Plaintiff and derives his power pursuant to section 486 of the **Companies Act 2016** ("CA 2016"). The CA 2016 does not require a separate agreement signed by the Liquidator for him to be bound by the terms and conditions of the original agreement. As the cause of action arises from the Agreement, the parties including the Liquidator are subject to the terms and conditions of the Agreement including the Arbitration Agreement, provided that the Arbitration Agreement in not null and void, inoperative or incapable of being performed.

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Issue 2: Whether the Arbitration Agreement is Inoperative

Under section 10(1) AA 2005, a stay of proceedings if applied shall be granted unless the agreement is found to be "*null and void, inoperative or incapable of being performed*".

The High Court referred to the case of **Peace River Hydro Partners v Petrowest Corp** [2022] SCJ No. 41 by the Supreme Court of Canada ("Peace River"), which held that in arbitration law, the term "*inoperative*" has been used to describe arbitration agreements which, although not *void ab initio*[1], "*have ceased for some reason to have future effect*" or "*have become inapplicable to the parties and their dispute*". The making of a winding-up order or a receivership order may be grounds for a court to find an arbitration agreement inoperative as any matter is left to be resolved in the relevant insolvency proceedings.

The High Court adopted the definition of "*inoperative*" in Peace River, holding that since the Plaintiff was wound-up and as such is subject to insolvency protection, the Arbitration Agreement is inoperative.

Conclusion

The High Court dismissed the stay pending arbitration. It is unclear what approach the Court would take in a situation where there is a dispute arising from a private remedial claim and the substantive rights of other creditors are not affected. It is also unclear if this decision is intended to lay down a blanket principle that arbitration agreements cease to be effective upon winding up.

The Singapore Court of Appeal in **Larsen Oil and Gas Pte Ltd v Petroprod Ltd** [2011] 3 SLR 414 ("Larsen Oil") had occasion to consider this.

In Larsen Oil, the liquidators sought the avoidance of a number of payments that it had made to the appellant on the ground that these payments amounted to unfair preferences or transactions at an undervalue. The stay pending arbitration was dismissed.

The Court drew a distinction between a dispute arising only upon insolvency and by reason only of the insolvency regime, and a dispute arising from private remedial claims, that is, the insolvent company's pre-insolvency rights and obligations.

In the former, the dispute arising from the operation of the statutory provisions of the insolvency regime *per se* was non-arbitrable even if the parties expressly included such disputes within the scope of the arbitration agreement. Whilst disputes involving pre-insolvency rights and obligations are arbitrable, such agreements to arbitrate should be

allowed to be enforced against the liquidator to the extent that it does not affect the substantive rights of other creditors.

Biaxis is currently pending appeal in the Court of Appeal.

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[1] Invalid from the beginning.