FRASERS
LAW COMPANY

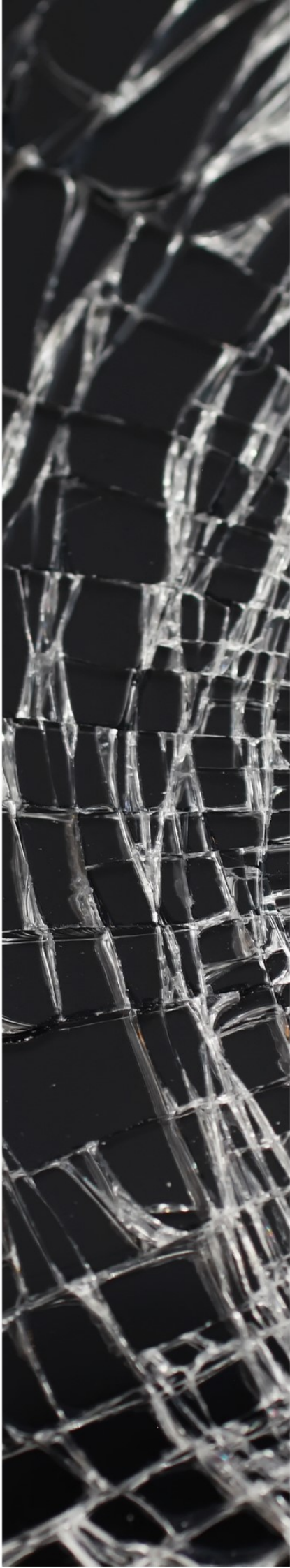
Contemporary Issues: Insolvency and Arbitration in Vietnam

Discussion Paper | July 2023

A bankruptcy proceeding often brings with it questions as to how creditors might be able to make their claims. For example, tension may arise between the unified dispute resolution procedures under a contract (such as an arbitration agreement) and bankruptcy regulations.

By way of the parties' arbitration agreement, the parties have ostensibly intended, at the outset, for all disputes arising from the underlying contract to be resolved through arbitration. But on the other hand, most bankruptcy laws provide that all cases be consolidated under bankruptcy proceedings via the courts.

We discuss the interplay of these dispute resolution regimes under the common law and under a civil law jurisdiction such as Vietnam.



Under common law jurisdictions

In Hong Kong, the current approach is that set out in the case of *Re: Southwest Pacific Bauxite (HK) Ltd.*[1] In this case, the obligee, Southwest Pacific, filed a winding-up petition against the obligor, Lasmos, in relation to a debt arising from a management services agreement. The relevant agreement contained a multi-step dispute resolution clause, providing for mediation and then arbitration. The court then ruled that a winding-up petition should be dismissed if the following concur:

i. a company disputes the debt relied on by the winding-up petitioner.

ii. the contract under which the debt is alleged to arise contains an arbitration clause.

iii. the company (obligee) takes steps to commence the dispute resolution process and files an affirmation demonstrating this.

In a subsequent case, *But Ka Chon v. Interactive Brokers LLC*,[2] the Court of Appeal, analysed the case under the *Lasmos* approach and concluded the bankruptcy petition against Mr. But should *not* be stayed. In the first place, as Mr. But's claims of misrepresentation were adjudged unmeritorious, there was no "genuine dispute." Further and in any event, the third requirement was not fulfilled, as Mr. But had not filed a Notice of Arbitration in relation to his claims. In addition to this ruling, the Court of Appeal made the following notable findings on an obiter basis:

i. An insolvency proceeding is not among the cases contemplated by a non-mandatory stay under Article 8 of the UNCITRAL Model Law. Therefore, the court must review all relevant circumstances, including the financial position of the company, existence and position of other creditors.

ii. The *Lasmos* ruling present a "substantial curtailment" of a creditor's statutory right to bring bankruptcy or insolvency proceedings.

iii. Considerable weight must nonetheless be given to the factor of arbitration, as to subject a disputed debt to summary determination, as would be the nature in bankruptcy proceedings, would be a curtailment of the policy underlying arbitration legislation, and the parties intentions.

iv. The company seeking a stay must establish there is a *bona fide* dispute on substantial grounds, otherwise, it can only expect a short adjournment to commence arbitration or, give an undertaking to proceed with arbitration with due dispatch.

In a recent case, *Guy Kwok-Hung Lam v Tor Asilua Credit Master Fund LP*,[3] the Court of Appeal discussed how the *Lasmos* approach might be applied to an exclusive jurisdiction clause in a foreign forum. While acknowledging the *Lasmos* case, the court did not hold that the approach should extend to an exclusive jurisdiction clause. Rather, the court will stay the insolvency proceedings based on "strong reasons." In this case, as the debtor, Mr. Lam

[1] [2018] 2 HKLRD 449

[2] [2019] HKCA 873

[3] [2022] HKCA 1297

had already commenced New York proceedings against the creditor, which shows that his debt was properly disputed. Further, no other creditor, except Tor, participated in the bankruptcy proceeding. Therefore, there were strong reasons to stay the bankruptcy proceeding to respect the exclusive jurisdiction clause.

In Singapore, the case of *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)*[4] sets out the relevant standard of review. In this case, the High Court applied a *prima facie* standard of review, such that the winding-up proceedings will be stayed or dismissed if the dispute falls within the scope of the arbitration agreement, and the dispute is not raised by the debtor in abuse of process. A higher standard may allow the creditor to "bypass the arbitration agreement by presenting a winding-up petition." The court further considered that it would be "totally inconsistent" with an agreement to arbitrate where a disputed claim would be subject to summary determination, as it would be in insolvency proceedings.

Nonetheless, the court further emphasised that a stay should be denied if the debtor is in abuse of process. Some instances that may suggest an abuse of process are:

i. When the debt is admitted in both liability and quantum;

ii. When the debtor has waived or is estopped from asserting his rights to insist on arbitration;

iii. When the debtor seeks to stave off substantiated concerns, which justify the need to commence insolvency, such as when assets go missing.

[4] [2020] SGCA 33

Under Vietnam law

Bankruptcy proceedings in Vietnam are governed by the Law on Bankruptcy,[5] as well as implementing regulations promulgated by government agencies and the Supreme People's Court of Vietnam. The commencement of bankruptcy proceedings takes place over 2 distinct phases: (i) acceptance of the petition for bankruptcy under Article 39 of the Law on Bankruptcy; (ii) initiation of the bankruptcy proceedings under Article 42 of the same law. The impact on the arbitration depends on the current stage of the bankruptcy proceedings.

At the court acceptance stage, Article 41 of the Law on Bankruptcy explicitly provides that 5 days after the court accepts the bankruptcy process, arbitration proceedings related to the property obligations of the insolvent entity shall be temporarily stayed. However, for a court to accept a bankruptcy petition, it must comply with the requirements under Articles 26 to 29 of the Law on Bankruptcy on the formal contents of the petition subject to the eligible applicant group. Further, the court may deny due course to a petition on any of the following grounds[6]:

i. The petitioner is not among the eligible applicants; [7]

ii. The petitioner fails to modify or supplement the petition, when required to do so by the court;

iii. Another court has initiated bankruptcy proceedings against the entity;

iv. The petitioner withdraws the petition, after having entered into an agreement with the insolvent entity;

v. The petitioner fails to pay the bankruptcy fees and expenses, when ordered or required to do so.

No arbitration/litigation is stayed until all conditions for court acceptance are satisfied and the court officially issues the notice of acceptance for the bankruptcy petition. But whether a dispute may be subject to an arbitration agreement is not a ground to resist suspension of the arbitration (as contrasted to the approach under the common law above).

As provided in Article 42(2) of the Law on Bankruptcy, the initiation stage begins when, after accepting the petition, the court decides that the enterprise or cooperative has failed to pay its debts within 3 months after such debts become due (i.e., insolvent under Article 4(1) of the Law on Bankruptcy). If the court finds that the debtor is not insolvent, then it shall issue a decision not to initiate bankruptcy proceedings. As provided in Article 71 of the Law on Bankruptcy, these two scenarios present concurrent effects on the suspension of the arbitration:

---

[5] Law No. 51/2014/QH13, dated 19 June 2014.

[6] Article 35 of Law on Bankruptcy.

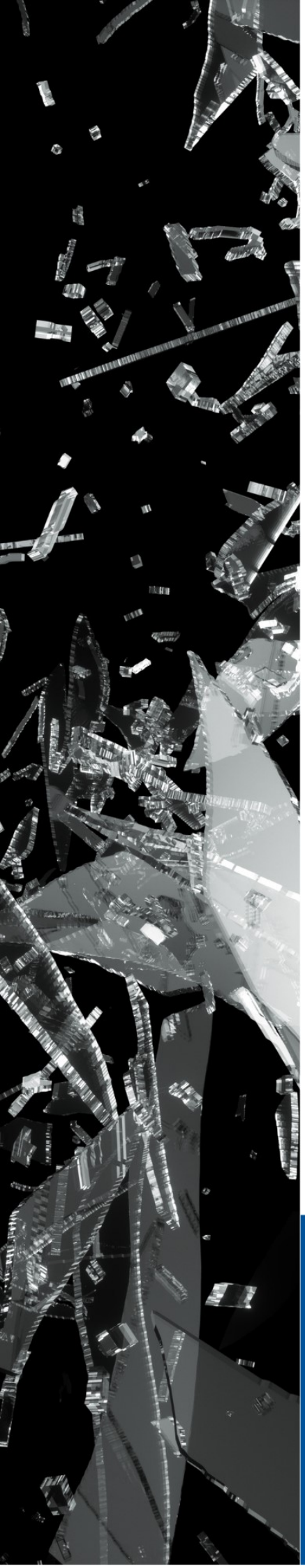
[7] The eligible applicants are (i) unsecured and partially secured creditors, (ii) employees, grassroot level trade unions, or higher level trade unions (when there is no grassroot level), (iii) legal representatives of enterprises and cooperatives, (iv) owners, chairpersons of boards of management or members' council subject to the types of the entity, (v) shareholders holding at least 20% of ordinary shares for at least 6 consecutive months prior to the filing, (vi) shareholders of less than 20% of ordinary shares if stated in the company charter, (vii) members of legal representatives of cooperatives.

i. If the court decides not to initiate bankruptcy, the court or arbitral tribunal shall issue a decision lifting the stay;

ii. If the court initiates bankruptcy procedure, then the court or arbitral tribunal shall issue a decision suspending the arbitration, and transfer the case to the bankruptcy court for the settlement of the dispute.

An important qualification in Article 41(2) of the Law on Bankruptcy is that the stay of the arbitration proceedings must comply with the laws on commercial arbitration. Considering that the laws on commercial arbitration of Vietnam apply only in Vietnam-seated arbitrations, in a scenario where the arbitration is seated abroad, it may be that the foregoing provisions on the Law on Bankruptcy do not apply. Therefore, when the arbitration is seated abroad, the standards for granting a stay vis-à-vis bankruptcy proceedings applicable in that seat must be kept in mind.

July 2023



FRASERS
LAW COMPANY

Authors

Earl Rivera-Dolera
CIPP/Europe, FCIArb, FSIArb
Head, International Arbitration
earl.dolera@frasersvn.com

Nguyen Le Quynh Chi LL.M.
Senior Associate
qchi.nguyen@frasersvn.com

Rafael Roman Cruz
Associate
rafael.cruz@frasersvn.com

Dang Dinh Duc
Associate
duc.dang@frasersvn.com

Ho Chi Minh City

Unit 19.01, 19th Floor, Deutsches Haus
33 Le Duan Boulevard, District 1
Ho Chi Minh City, Vietnam
Tel: +84 28 3824 2733

Hanoi

Unit 1205, 12th Floor, Pacific Place
83B Ly Thuong Kiet Street, Hoan Kiem District
Hanoi, Vietnam
Tel: +84 24 3946 1203

Email: legalenquiries@frasersvn.com

Website: www.frasersvn.com