DREW & NAPIER

Court of Appeal Provides Guidance on Carve-Outs for Arbitration Proceedings in the Context of Restructuring Proceedings

***Sapura Fabrication Sdn Bhd and others v GAS and another appeal* [2025] SGCA 13**

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LEGAL UPDATE

In this Update

In *Sapura Fabrication Sdn Bhd and others v GAS and another appeal* [2025] SGCA 13, the Court of Appeal held that the Singapore Courts have no mandatory obligation to grant a carve-out to moratoriums in restructuring proceedings to allow a creditor to proceed with arbitration claims against a debtor company, but may exercise their discretion to do so where appropriate.

This update discusses the practical implications of this Court of Appeal decision.

INTRODUCTION

Where a debtor company engaged in restructuring proceedings has obtained a moratorium, when should the court grant a carve-out to the moratorium to allow a creditor to pursue a claim against the debtor company that falls within the scope of a valid arbitration agreement? Central to this enquiry is the inherent tension between arbitration and insolvency proceedings, which are driven by competing public policy considerations. While it is in the public interest to enforce arbitration agreements to uphold party autonomy and freedom to contract, it is also in the public interest for insolvency proceedings to conclude without delay to advance the collective interests of the general body of creditors. In this regard, restructuring proceedings similarly engage the policy concerns of the insolvency regime as such proceedings are often sought because the debtor company is insolvent or at the very least in distress.

In *Sapura Fabrication Sdn Bhd and others v GAS and another appeal* [2025] SGCA 13 ("***Sapura Fabrication***"), the Court of Appeal held that the Singapore Courts have no mandatory obligation to grant a carve-out to moratoriums in restructuring proceedings to allow a creditor to proceed with arbitration claims against a debtor company. The Singapore Courts may nevertheless exercise their discretion to grant such carve-outs where appropriate but will remain guided by the factors set out in *Wang Aifeng v Summax Global Capital 1 Fund Pte Ltd and another* [2023] 3 SLR 1604 ("***Wang Aifeng***").

This update discusses the practical implications of this Court of Appeal decision.

BACKGROUND

The first appellants in both appeals, Sapura Fabrication Sdn Bhd and Sapura Offshore Sdn Bhd (collectively, the "**Sapura Entities**"), are part of the Sapura Group in Malaysia, which has been involved in restructuring proceedings since 2022. To this end, the Sapura Group applied for and was granted two sets of convening and restraining orders and relief by the High Court of Malaya at Kuala Lumpur ("**KLHC**") in 2022 and 2023, which were subsequently recognised as foreign main proceedings by the General Division of the High Court of Singapore ("**SGHC**").

The respondent ("**GAS**") filed proofs of debt against each of the Sapura Entities for liabilities owed by them under two contracts between GAS and the Sapura Entities ("**Contracts**"). GAS later invoked the arbitration agreement in the Contracts to commence arbitration proceedings against the Sapura Entities for claims arising from their alleged breaches of the Contracts.

In 2024, the Sapura Group applied for and was granted a third set of convening and restraining orders and relief by the KLHC. The Sapura

Group again applied to the SGHC for recognition of this proceeding. The applications were essentially uncontested, save that GAS sought a carve-out to proceed with its arbitration proceedings against the Sapura Entities.

The SGHC exercised its discretion to grant a carve-out in favour of GAS ("**Discretionary Ground**"), based on the test set out in *Wang Aifeng*. Alternatively, the SGHC observed in *dicta* that, if necessary, it would also grant the carve-out in light of the Singapore Court's mandatory obligation to enforce the arbitration agreements on GAS's request for the dispute to be resolved by arbitration ("**Mandatory Ground**").

Dissatisfied, the Sapura Entities appealed to the Court of Appeal, arguing that the carve-out should be refused on both the Discretionary and Mandatory Grounds. While the Sapura Entities subsequently withdrew their appeals pursuant to a settlement between the parties, the Court of Appeal nevertheless found it appropriate to issue its judgment as the issues involved, namely the standard for carve-outs as well as the interplay between arbitration agreements and insolvency proceedings, pertain to legal points of general interest and significance which are in the public interest to ventilate.

THE COURT OF APPEAL'S DECISION

The Court of Appeal held that it would have dismissed the appeals but for their withdrawal.

KEYPOINT

The Singapore Courts have no mandatory obligation to grant a carve-out from moratoriums in restructuring proceedings for arbitration proceedings, but retains the discretion to do so where appropriate.

<u>The Discretionary Ground</u>

The Court of Appeal rejected the adoption of the "exceptional circumstances" test in deciding whether to grant carve-outs from restructuring moratoriums. Instead, the Court's discretion to grant such carve-outs remains guided by the factors set out in *Wang Aifeng* to balance the various considerations and interests involved. In this regard, more weight may be given to considerations that allow the debtor "breathing space" to organise its affairs and put forward a restructuring proposal.

The Court of Appeal also held that the SGHC did not err in exercising its discretion to grant the carve-out application for the following reasons.

First, the complexity of the dispute was the overriding consideration in the application. The arbitration claims were vigorously disputed – GAS highlighted numerous factual disputes that may require factual and expert witness evidence, and there was a possibility of the Sapura Entities asserting the right of set-off. It would accordingly be impracticable for such a complex dispute to be meaningfully adjudicated before an adjudicator within the proof of debt framework in restructuring proceedings.

Second, the significant delay in the adjudication of GAS's proofs of debt (*ie* more than two years between its submission and the SGHC's judgment) strongly indicated that the scheme adjudication process was not adequate to deal with the arbitration claims, which arose out of the same Contracts and were similarly (if not more) complex and disputed compared to GAS's proofs of debt.

Third, there was no significant prejudice to the Sapura Entities or to the general body of creditors. The grant of a carve-out would not adversely impact the scheme, since GAS's arbitration claims only represented about 6-7% of the Sapura Entities' total debt to be restructured. It was also highly speculative for the Sapura Entities to assert that the carve-out would affect their ability to obtain a further reorganisation proceeding from the Malaysian Court, and would unleash a deluge of carve-out claims by other claimants (when in fact the Court of Appeal was not informed of any other carve-out applications up till the date of its decision). Finally, it was inevitable for the Sapura Entities to incur more time and costs in defending the arbitration, considering their decision to dispute and then delay the adjudication of GAS's proofs of debt.

In any event, the imposition of a condition that there should be no enforcement of the award anywhere without the leave of the SGHC also ensured that there would be no undue prejudice to the other scheme creditors.

The Mandatory Ground

The Court of Appeal however disagreed with the SGHC's observation that the Singapore Courts had a mandatory obligation to grant carve-outs to enforce arbitration agreements. While *AnAn* remains good law in Singapore, the Court of Appeal clarified that *AnAn* does not stand for the proposition that the policy of enforcing arbitration agreements should trump the insolvency regime under all circumstances, and distinguished its decision in *AnAn* from the present case for the following reasons.

First, the policy concerns of the insolvency regime were not strictly engaged in *AnAn* because at the time that a creditor commences a winding-up petition based on a debt that is disputed by the debtor company, the company is not yet determined to be a debtor or found to be insolvent. However, the policy concerns of the insolvency regime were

clearly engaged in this case as the Sapura Group had commenced restructuring proceedings to avoid insolvency.

Second, there was an underlying concern in *AnAn* that an alleged creditor, who was also party to an arbitration agreement, could potentially abuse the Court's winding-up jurisdiction to bypass the arbitration agreement. Such a risk of abuse is clearly not present when a creditor seeks a carve-out for arbitration proceedings.

The Court of Appeal also observed that the implementation of the Mandatory Ground would significantly reduce the effectiveness of a moratorium. This was undesirable as it would allow a party to easily circumvent a moratorium by invoking a *prima facie* valid arbitration agreement.

In light of the above, the Court of Appeal found that the decision in *AnAn* was not applicable to situations where restructuring proceedings are already ongoing, such as in the present case. Accordingly, this was not a case in which it was necessary for the Court of Appeal to revisit its decision in *AnAn* in light of the Privy Council's decision in *Sian Participation Corp (in Liquidation) v Halimeda International Ltd* [2024] UKPC 16 ("***Sian Participation***") (which took a position contrary to that in *AnAn*).

COMMENTARY

The Court of Appeal's decision in *Sapura Fabrication* provides welcome clarity to the appropriate balance to be struck between arbitration and insolvency proceedings, particularly in the context of carve-outs from moratoriums for arbitration proceedings. This development also illustrates how Singapore has, since its adoption of the UNCITRAL Model Law on Cross-Border Insolvency in 2017, carefully catered for the co-existence of arbitration and insolvency-related proceedings.

The Court of Appeal's balance of the public policy considerations behind arbitration and insolvency proceedings can also be discerned from its differing approaches in *AnAn* and *Sapura Fabrication*. While the decision in *AnAn* may initially be perceived as a "pro-arbitration" stance taken by the Singapore Courts, the Court of Appeal has now clarified that that decision was taken in a context where the policy considerations in the insolvency regime were not strictly engaged. In contrast, where the policy concerns in both arbitration and insolvency regimes are engaged (such as in *Sapura Fabrication*), the Singapore Courts will give effect to the "breathing space" afforded to companies in distress whilst simultaneously ensuring that debtors have a suitable platform to have their claims properly heard. It nevertheless remains to be seen whether the Court of Appeal will revisit its approach in *AnAn* in a future case, in light of the Privy Council's decision in *Sian Participation* (which we had previously commented on).

The Court of Appeal also recognised the significance of the draft Singapore International Arbitration Centre ("**SIAC**") Insolvency Arbitration Protocol ("**Protocol**"), which aims to modify the SIAC Rules to adapt the arbitration process to the insolvency context (*eg* by truncating timelines). The Court of Appeal noted that this Protocol, if adopted by the SIAC, may facilitate the Court's task in deciding whether to grant a carve-out (*eg* by minimising any undue delay and expense to the insolvency proceeding caused by the arbitration), but ultimately left this matter for future consideration in an appropriate case.

This case also provides useful guidance to creditors who wish to invoke an arbitration agreement against a debtor company involved in restructuring proceedings. Such creditors may wish to carefully consider the factors set out in *Wang Aifeng*, and in particular the complexity and quantum of their dispute with the debtor company, to assess the chances of success in obtaining a carve-out to proceed with its arbitration claims.

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