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UPDATE

Primacy of arbitration recognised as stay granted in Cayman insolvency – *In re the SPhinX Group of Companies*[1]

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The Cayman Islands Court of Appeal recently upheld a stay of Cayman liquidation application in favour of an arbitration in New York. The stay was granted because the liquidation applications would have required the Cayman Court to consider a different debt which was governed by an arbitration clause.

Summary

The Cayman Islands Court of Appeal has recently upheld a stay of certain Cayman liquidation applications, in favour of an arbitration in New York. The applications were for a reserve to be made for a disputed debt. The Court held that the reserve application would have required the Cayman Court to consider the substantive merits of the disputed debt, which dispute was governed by an arbitration agreement. The legislative justification is grounded in section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the Foreign Awards Law) which provides that any party to Court proceedings may apply to have the proceedings stayed if they are 'in respect of any matter agreed to be referred' to arbitration.

This decision is reflective of a broader international trend towards recognising the greater prominence of arbitration and the decline in the types of disputes which are considered non-arbitrable. In particular, it underlines the importance of arbitration in insolvency proceedings, and allows for potential stays in such proceedings where mandated by the contractual obligations of the insolvent company and third parties.

The judicial context

SPhinX represents a significant departure from the Grand Court's last foray into the interface between domestic liquidations and arbitration.

In *Cybernaut Growth Fund*[2] Jones J in the Grand Court was asked to stay or strike out a petition to wind up an investment fund on the basis that arbitration proceedings had commenced in New York in relation to the fund's partnership agreement. Jones J found that a petition to wind up a company fell within the exclusive jurisdiction of the Court and that it was in the public interest that this was so, particularly, as here, in the case of a regulated business. As such, a winding-up application was a dispute that was non-arbitrable, and so the Court would not stay the petition.

The Grand Court decision in *SPhinX*

In *SPhinX*, Sir Andrew Morritt in the Grand Court rejected the submission, based on *inter alia*, *Cybernaut* that the issues raised by the reserve application were non-arbitrable on two grounds. Firstly, he considered that the reserve in question was 'entirely dependent' upon the existence of the debt, which itself was subject to a binding arbitration clause.

[1] CICA No. 6 of 2015, judgment released: 2 February 2016

[2] [2014 (2) CILR 413]

Secondly, he carefully considered three recent English authorities on point. In *Fulham FC v Richards*,[3] Fulham FC, the petitioner, brought unfair prejudice proceedings under section 994 of the Companies Act 2006. The parties had agreed that all disputes between members of the FA Premier League, including the petitioner, should be referred to arbitration. Fulham FC argued that unfair prejudice disputes fell outside of the scope of decisions that were arbitrable because the section engaged the supervisory jurisdiction of the High Court and included winding-up as a potential remedy.

The High Court and Court of Appeal both held that a stay could be awarded based on section 9 of the Arbitration Act 1996 (which is in substantially the same form as section 4 of the Foreign Awards Law). Patten LJ held that:

'it does not follow from the inability of an arbitrator to make a winding-up order affecting third parties that it should be impossible for the members of a company, for example, to agree to submit disputes *inter se* as shareholders to a process of arbitration. It is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process.'

In *Assaubayev v Wilson Partners*[4] a solicitor sent his client a bill under a retainer which contained an arbitration clause. The client sought to challenge the bill in court proceedings and argued that the arbitration clause should not apply as the court claim raised issues concerning the Court's supervisory jurisdiction over solicitors.

The Court of Appeal agreed with the High Court that the court claim should be stayed under section 9 of the Arbitration Act. In doing so it followed the *Fulham* case to the effect that just because an arbitrator cannot exercise a Court's supervisory jurisdiction, that is no reason not to grant a stay. There was no public interest reason why the costs matters referred to arbitration should not be so decided.

Finally, in *Salford Estates (No.2) Ltd v Altomart Ltd*[5] a petition to wind up a company was based on a debt which was itself subject to arbitration. The judge ordered a stay, the petitioner appealed. The Court of Appeal held that the automatic stay entitlement of section 9 of the Arbitration Act was triggered by the fact that the disputed debt fell within the arbitration clause.

Sir Andrew concluded that the ground for refusing a stay in matters referred to arbitration is that the matter is of such public interest that it cannot be delegated to a private contractual process. On the facts here, he concluded that all the conditions for ordering a stay pursuant to section 4 of the Foreign Awards Law having been made out, he was bound to grant a stay. He further observed that whilst he did not decide the matter on this basis, had it been necessary, the Court would not have hesitated to grant a stay on the grounds that such a power derived from its inherent jurisdiction.

The Cayman Court of Appeal

Sir Richard Field JA, in a judgment with which Mottley JA and Morrison JA concurred, affirmed Sir Andrew's judgment. He held that by applying the stay in section 4 of the Foreign Awards Law the Courts were respecting the parties' private contractual rights to have certain agreed issues determined by arbitration and not by judicial proceeding.

The Court expressly recognised that 'the enforcement of an arbitration agreement in a liquidation context may delay the liquidation court process and add to the expense of administrating the estate but that cannot be a reason for failing to protect the contract right to arbitration as required by section 4 of the Foreign Awards Law, but to do otherwise would allow one party escape its "freely undertaken obligation"'. Finally the Court stopped short of overruling Cybernaut, but said it considered its correctness to be 'debatable'.

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[3] [2012] Ch 333

[4] [2014] EWCA Civ 1491

[5] [2014] EWCA Civ 1575

Comment

This decision may be seen as a part of a general trend in common law jurisdictions, including England and Australia, of recognising a greater degree of primacy for arbitration in insolvency proceedings. Applications to stay Cayman winding-up petitions in favour of foreign arbitral proceedings are now more likely to succeed. Such stays will most likely be available in cases that concern the adjudication of private rights between an insolvent company or partnership and a third party when those rights are governed by an arbitration clause, but which may nonetheless affect the way an insolvency is managed by the Grand Court.

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