Alternative dispute resolution in insolvency and restructuring proceedings

Oon & Bazul LLP

Singapore July 12 2019

Introduction

Singapore is positioning itself as a hub for insolvency and restructuring.(1) In particular, there has been an increase in cases of cross-border restructuring in Singapore.(2)

The increasing complexity of restructuring and insolvency cases has piqued a growing interest in employing alternative dispute resolution (ADR) processes, either separately or in combination with main court proceedings, to resolve disputes.

Imminent changes to Singapore's mediation landscape suggest that mediation will soon become one of the tools available for insolvency and restructuring practitioners to resolve their clients' concerns. Similarly, there is room for employing arbitration in specific types of dispute, which will assist with insolvency and restructuring matters and help to resolve them more expediently.

This article briefly considers the use of mediation and arbitration in cross-border restructuring in Singapore.

Mediation

Mediation is a flexible process in which a neutral mediator facilitates the parties' settlement negotiations to help them reach their own solution. The focus of mediation is on finding solutions that will resolve the parties' concerns. Mediators make no decisions concerning which party is at fault in a dispute.(3)

On 20 April 2016 the Committee to Strengthen Singapore as an International Centre for Debt Restructuring issued a report which suggested that mediation can be used effectively in restructuring proceedings to:

- resolve individual creditor disputes with a debtor (in the context of a multi-creditor restructuring);
- manage multiple creditor disputes of the same nature; and
- achieve consensus in the restructuring plan between a debtor and its creditors.(4)

Similar to the United States, where the bankruptcy courts are empowered by statute to employ mediation in insolvency and restructuring proceedings, the committee envisages two types of mediation:

- plan mediation; and
- similar claims mediation.

Plan mediation

Plan mediation refers to a process in which a mediator is appointed to help various stakeholders achieve consensus in a restructuring plan or in cases where debtors are subject to dual insolvency proceedings in competing jurisdictions.(5) In such cases, there may not be a common nexus of law or fact, but parties could still achieve consensus on a restructuring plan with commercial considerations in mind.

In *re MF Global Holdings Ltd* (11-150559 (MG) (Bankr SDNY)), MF Global and affiliates (the US applicants) filed for bankruptcy protection in New York, while its UK affiliates were placed in special administration in Wales and England. Each estate cross-claimed against the other and all desired a global resolution of their claims. In 2012, when it was clear that the parties were entrenched in their positions and that protracted litigation was imminent, the bankruptcy judge informally prompted the US applicants and UK affiliates to employ plan mediation. Mediation in this case was a huge success and produced the desired global settlement, resulting in the creditors receiving over $1 billion in aggregate distributions.

Similar claims mediation

Similar claims mediation refers to a process in which a mediator is appointed to facilitate the resolution of multiple claims with a common nexus of law or fact. It is a structured mediation protocol which aims to lead to an expedient resolution of multiple related claims, resulting in cost and time savings.(6)

Lehman Brothers Holdings Inc (08-13555 (JMP) (Bankr SDNY)) is an example of a case which employed similar claims mediation. In this case, the collapse of the financial institution and its affiliates (the applicants) resulted in 75 simultaneous legal proceedings in over 40 countries. Not only were these proceedings very complex, the legal issue was dealt with differently in the various courts across jurisdictions, resulting in varied and conflicting outcomes. To ensure that the applicants could adequately settle their losses and net profits from their derivative agreements, they applied to the bankruptcy courts for leave to mediate with approximately 250 counterparties. Of the 77 proceedings which reached mediation stage, only four were terminated without settlement. The mediation process proved successful and enabled the applicants to avoid costly and time-consuming legal proceedings, thereby achieving greater efficiency and allowing the applicants to carry on with their restructuring plans.(7)

It is evident that both plan and similar claims mediation are processes that should be adopted by parties involved in a restructuring. These processes will assist parties in resolving disputes quickly with cost and time savings.

Imminent changes to mediation landscape

In his decision in *Re IM Skaugen SE* ([2019] 3 SLR 979), the Honourable Justice Kannan Ramesh highlighted that facilitating discussions in a cooperative, collaborative and transparent environment, wherein all parties involved work towards a common objective of attaining an effective and sustainable restructuring, might lead to better outcomes than a typical adversarial process. The judge also stated that the mediator would play the invaluable role of building consensus and trust between the debtor and creditors such that differences would be more easily bridged in the development of the restructuring plan. In this way, the mediator can assist to iron out the creases that frequently occur in a restructuring.(8) It is apparent that the use of mediation in insolvency and restructuring cases is already being contemplated by the Singapore Court.

There is a readily available pool of mediators who are cognisant of and well versed in issues arising in the insolvency and restructuring field. The Singapore Mediation Centre has already identified mediators who are versed in mediation and insolvency and restructuring matters and formed an Insolvency Panel to assist parties.

Further, Singapore intends to be among the first signatories of the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) on 7 August 2019.(9) This convention will promote the enforceability of international commercial settlement agreements reached through mediation in the same way that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) facilitates recognition and enforcement of international arbitration awards in signatory countries.

As explained by the Singapore International Mediation Centre Chair George Lim, with the Singapore Convention, "mediation will now have 'teeth'".(10) As more states sign the Singapore Convention, mediation settlements made in the context of insolvency will also be increasingly enforceable, making it more attractive as an alternative to litigation.

Arbitration

Unlike mediation where the focus is on achieving a resolution to the problem and not on the merits of the case, arbitration requires the evaluation of the merits of each party's case prior to arriving at a decision that binds both parties.

The Committee to Strengthen Singapore as an International Centre for Debt Restructuring has suggested that arbitration can be used effectively in pre-insolvency and post-insolvency disputes. It further elaborated that types of pre-insolvency dispute between debtors and creditors where arbitration may be particularly helpful include:

- disputes involving cross-border issues, as arbitration would prevent issues from being re-litigated across various jurisdictions; and
- complex cases (eg, disputes involving highly complex financial instruments) where:
    - there may be a need for specialist knowledge in the subject area; and
    - there will likely be inconsistent court decisions.(11)

The committee also explained that post-insolvency disputes in which arbitration would be helpful include:(12)

- resolving intercompany claims between affiliates across multiple jurisdictions within a large enterprise group;
- resolving issues across multiple concurrent insolvency proceedings. For example, where the business of a large multinational enterprise is sold as a going concern and proceeds of the sale have to be allocated across various insolvency proceedings. Arbitration can be used to resolve disputes regarding how the distribution of proceeds of a sale should be done. The committee stated that such arbitration proceedings would have been relevant in claims made between the UK, US and Canadian bankruptcy estates in the insolvency of the Nortel group;(13) and

- determining a debtor's centre of main interests to avoid the situation in which different jurisdictions claim that the primary administration of a restructuring proceeding should be based in the local forum.

Arbitration in Singapore insolvency proceedings

Under Singapore law, claims which arise from insolvency are non-arbitrable. In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation)* ([2011] 3 SLR 414), the Court of Appeal began its judgment by observing that arbitration and insolvency proceedings employ different legal philosophies. The court described arbitration as embodying "the principles of party autonomy and the decentralisation of private dispute resolution", while the insolvency process is "a collective statutory proceeding that involves the public centralisation of disputes".(14) *Larsen* went on to hold that the arbitration of claims which arose from insolvency would run contrary to the objectives of the insolvency regime:(15)

Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. It is… not [an] unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.(16)

The Court of Appeal affirmed the non-arbitrability of claims which arise from insolvency in *Tomolugen Holdings Ltd v Silica Investors Ltd* ([2016] 1 SLR 373) and in the later High Court decision in *Duncan, Cameron Lindsay v Diablo Fortune Inc* ([2018] 4 SLR 240).

Accordingly, the committee suggested the use of arbitration in only pre-insolvency and post-insolvency proceedings.

In Singapore, the judiciary has demonstrated its support for the use of arbitration in restructuring and insolvency proceedings. The Honourable Chief Justice Sundaresh Menon shared that the Supreme Court will fully support the Permanent Court of Arbitration's study of the development of an arbitral framework to manage the restructuring of public sector debt in Asia in his keynote address at the 18th Annual Conference of the International Insolvency Institute. He explained that some capital investment in Asia will probably be funded through debts and guarantees issued by public sector enterprises, which come with a risk of default but do not easily or always lend themselves to restructuring before domestic courts. The framework envisages a mechanism that will apply the advantages of arbitration, including party autonomy on procedural flexibility and choice of seat, in developing an effective instrument to manage the overall restructuring of public sector debt. The Singapore Court's support for this ambitious project reflects positive judicial attitudes towards the use of arbitration in restructuring and insolvency proceedings.(17)

This favourable judicial attitude was further seen in the Supreme Court's press release stating that the Judicial Insolvency Network, of which the Supreme Court is a member,

seeks to examine how arbitration can be tapped for resolving certain insolvency matters and disputes more efficiently.(18)

Benefits of employing arbitration in insolvency proceedings

One of the primary advantages of selecting arbitration over litigation in insolvency proceedings is greater international enforceability.(19) Arbitration awards can be enforced under the New York Convention in over 150 states,(20) while only 46 states have adopted the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency.(21) Greater enforceability promotes greater certainty for claimants in pre and post-insolvency disputes.

Other advantages to choosing arbitration over litigation to resolve pre-insolvency and post-insolvency disputes in Singapore include confidentiality and greater party autonomy over the dispute resolution process. Arbitration is confidential and parties can select an arbitrator who may be an expert in their field.

Potential drawbacks

While Singapore may have substantial case law on the types of insolvency claim which are non-arbitrable, there is a lack of consistency in approach as to which aspects of insolvency disputes are arbitrable across different jurisdictions. The courts of different jurisdictions may reach inconsistent decisions regarding whether certain insolvency-related disputes referred to arbitration were actually non-arbitrable and whether arbitration had been commenced inappropriately.(22) This would give rise to substantial uncertainty as to whether an arbitral award for an insolvency-related dispute would be enforceable internationally. This uncertainty dilutes one of the key advantages that arbitration possesses over litigation (ie, greater international enforceability).

Comment

It is evident that mediation and arbitration are sensible alternatives to litigation in restructuring and insolvency cases. Time and cost savings can greatly aid cash-strapped debtors. There is a lot of potential for growth in the development of ADR in restructuring and insolvency in Singapore, given the judiciary and legislature's interest in developing ADR processes such as mediation and arbitration for use in the insolvency and restructuring context.

Endnotes

(1) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) and Dylan Loh, "Two Bills passed to boost Singapore's position as dispute resolution hub" *CAN* (10 January 2017).

(2) Bloomberg, "Singapore lawyers warn of 1998-like pain as debt defaults spread", *The Straits Times*, (24 February 2016).

(3) State Courts Singapore, *An overview of Mediation* (8 May 2019).

(4) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) at 3.54.

(5) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) at 3.56.

(6) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) at 3.55.

(7) Kayjal Dasan and Samuel Seow, "Seminar Review: Mediation in International Insolvency", *International Arbitration Asia* (20 September 2015).

(8) *Re IM Skaugen SE* [2019] 3 SLR 979 at [94].

(9) Adrian Lim, "United Nations passes resolution for new treaty on mediation named after Singapore", *The Straits Times* (21 December 2018).

(10) Ruxandra Gheorghe, "George Lim Discusses The New Singapore Mediation Convention", *International Mediation Institute* (12 July 2018).

(11) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) at 3.61.

(12) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) at 3.62.

(13) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) at 3.62.

(14) *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation)* [2011] 3 SLR 414 at [1].

(15) *Tomolugen Holdings Ltd v Silica Investors Ltd and other appeals* [2016] 1 SLR 373.

(16) *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation)* [2011] 3 SLR 414 at [45].

(17) Sundaresh Menon, Chief Justice, Supreme Court of Singapore, "The future of cross-border insolvency: some thoughts on a framework fit for a flattening world", keynote address at the 18th Annual Conference of the International Insolvency Institute 2018 (25 September 2018), at [35], (accessed 12 January 2019).

(18) Supreme Court of Singapore, "Towards Greater Excellence in Cross-Border Insolvency", *Media Release* (28 September 2019).

(19) Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (20 April 2016) at 3.63.

(20) New York Arbitration Convention, "Contracting States – List of Contracting States" *New York Arbitration Convention*.

(21) United Nations, "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)" *United States Commission on International Trade Law*.

(22) Robert Kovacs, "A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration" (2012) at p 94.

This article was first published by the International Law Office, a premium online legal update service for major companies and law firms worldwide