The insolvency and arbitration intersection: A review of recent regional approaches to the question of arbitrability

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Abstract

Insolvency-related disputes are often perceived as being exclusive matters for determination by the courts. This is an oversimplification. As demonstrated by legal developments in recent years, a range of disputes may arise from the various facets of an insolvency, some of which are in fact arbitrable. As there is presently no global uniform approach to the question of whether a certain dispute is arbitrable, this article reviews the approaches adopted by the courts in different jurisdictions and their development going forward.

Introduction

In the midst of the pandemic and global economic climate, it is timely to revisit the common misconception that insolvency-related disputes are non-arbitrable. For too long the discourse has focused on traditional notions of arbitrability, despite the fact that arbitrability is an intricate concept which has evolved and continues to adapt as the business and legal environment progresses.

The misconception that insolvency-related disputes are not arbitrable appears to arise from the characterisation of insolvency as a public, statute-governed regime. The insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors. The tension seemingly arises because, in contrast, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution.[1] There are therefore contrasting legal realities at play: insolvency is a public matter, whereas arbitration is a private process.

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[1] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414, 418 [1] (VK Rajah JA for the Court) ('*Larsen Oil*').

The conclusion that insolvency-related disputes are not arbitrable is, however, an over-generalisation. Diverging approaches to this tension have developed in different jurisdictions. These differences are important because the choice of seat for the arbitration clause potentially has an impact on whether parties can present a winding up petition for unpaid debts owed by a possibly insolvent counterparty or whether the parties have to first resort to arbitration to determine the subject matter of the dispute. When considering the seat, parties are often concerned with the enforceability of arbitral agreements and awards[2] and accord relatively less weight, if any, to what would prevail in instances where the underlying dispute intersects with insolvency. This issue deserves far more attention as the going concern of businesses has become a key consideration in the current economy.

In light of this, what insolvency-related matters are arbitrable? There is no short answer as there is generally no list of matters which are not arbitrable. This is an area of law that is evolving as judicial norms change. The categories of insolvency-related matters which are arbitrable, those that have been determined not to be arbitrable and how different courts have adjudicated on the intersection between arbitration and insolvency-related disputes all need to be taken into consideration.

Arbitrability

Arbitrability concerns whether or not disputes of a certain type are capable of resolution by arbitration. In considering arbitrability, there are two key questions to consider: does the type of dispute fall within the scope of the parties' arbitration agreement, and is it capable of being settled by arbitration (or is it reserved for the courts)?

The former question is a question of interpretation: is the arbitration agreement broad enough to apply to the particular type of dispute? The latter question is less straightforward as it is jurisdiction-specific: the applicable legal system in each jurisdiction determines which issues are capable of being resolved through arbitration or whether it is a matter which falls within the exclusive jurisdiction of the courts.[3] This overrides any agreement between the parties.

[2] School of International Arbitration (SIA), Queen Mary University of London and White & Case LLP, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (2021) <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>.
[3] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration: With Amendments as Adopted in 2006*, UN Doc A/40/17 (21 June 1985) and UN Doc A/61/17 (7 July 2006) art 1(5).

Arbitrability in an insolvency context

Across various jurisdictions there appears to be a common theme of differentiation between 'core' insolvency disputes and 'non-core' insolvency disputes, the former being typically non-arbitrable as opposed to the latter which are generally arbitrable.

At a high level, 'core' insolvency claims are those which are central to the winding up process and must be before the court, either because they relate to liquidators' powers to be conferred by the court under the relevant legislation or because they affect third party rights. These claims might include applications for winding up or liquidation, to reschedule a company's liabilities, to operate it under some form of receivership or administration, or to distribute pro rata payments to designated creditors and owners.

The rationale behind reserving these claims for the exclusive domain of the courts was articulated in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd*[4] ('*Hydrox*') as follows:

- It affects the legal status of a person and has serious consequences for the company, and the creation and dissolution of an artificial legal entity is a matter of governmental authority;
- It affects third parties' rights because the process of liquidation creates restrictions on the disposition of property;
- It is in the public interest to ensure there is a standardised process of liquidation, supervised by the court process and in the public domain so that it is transparent.

'Non-core' claims are those which are incidental to the winding up of the company and will generally not run into the concerns set out above. While this continues to be an evolving and expanding area of law, the types of insolvency-related claims that are generally regarded as 'non-core' include:

- Professional negligence claims brought on behalf of insolvent companies arising from professional services contracts containing arbitration clauses, including claims against auditors, investment advisors or managers and other professional advisors, whether brought before or after the company enters into liquidation;
- Contractual claims brought by creditors against insolvent companies, seeking to recover debts arising under contracts containing arbitration clauses;
- Contractual claims brought on behalf of insolvent companies against their debtors, seeking to recover debts arising under contracts containing arbitration clauses.

[4] (2016) 245 FCR 452, 475 [131] (Foster J).

Apart from the above areas of general agreement however, there is at present a fine line in carving out 'core' issues of insolvency from the rest. The difficulty in such matters is further compounded by the absence of a universal insolvency regime; there is no global consensus on what constitutes a 'core' insolvency claim, which is largely a consequence of diverging insolvency regimes in different jurisdictions.

This also calls to the fore a further question – what happens when a dispute involves both 'core' and 'non-core' insolvency issues? There are differing regional approaches towards this question, which requires balancing the inherent conflict between the public nature of winding up proceedings and the private nature of the arbitration process.

The remainder of this article will consider the judicial approaches adopted by Australia, the United Kingdom, Hong Kong and Singapore in handling these tensions.

Comparative jurisdictional approaches

Australia

The general sentiment among Australian courts is that insolvency-related proceedings may be stayed in favour of arbitration. The courts will look beyond the nature of the relief sought and consider the substance of the dispute: if the substantive dispute is not central to the insolvency of the company, the court will generally stay the matter and refer it to arbitration even where, as in a winding up petition, the arbitral tribunal is unable to grant the relief sought.

Two decisions applying the same reasoning will illustrate how there could be different outcomes.

A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd[5] ('*A Best Floor*') concerned an application seeking a stay of a contributory's winding up proceeding on the ground that it was subject to an arbitration clause contained in the joint venture agreement between the two contributories. Justice Warren held the arbitration agreement was void insofar as it purported to preclude the court's power to wind up the company because it had the effect of obviating the statutory regime for winding up the company under the *Corporations Act 2001* (Cth).[6] While *A Best Floor* has often been taken to stand for the proposition that insolvency-related proceedings are not arbitrable in Australia, it is important to note that the arbitration agreement in that case

[5] *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170. [6] Ibid [18].

purported to exclusively vest in the arbitrator the ability to wind up the company. This is a unique feature of the case that played a pivotal role in its outcome, and should not be overlooked.

This becomes apparent when contrasted with the subsequent decision of *Hydrox*. As with *A Best Floor*, *Hydrox* involved a joint venture agreement between the two shareholders of a company which contained an arbitration clause, and an application by one of the shareholders for relief in the form of a winding up order. Unlike *A Best Floor*, however, the winding up orders were sought on the grounds of oppression and on just and equitable grounds. The Federal Court of Australia ordered a stay to the proceedings on the basis that it was subject to the arbitration clause. The Court held that the majority of the dispute was amenable to resolution in an arbitration setting, and was therefore willing to allow the arbitral tribunal to determine all parts of the dispute, with the exception to the decision on whether the company should be wound up. The mere fact that one party sought a winding up order did not 'alter the characterisation of the real controversy between the parties'.[7] In other words, the winding up order was sought as relief and not because of any grounds of insolvency; the substance of the dispute was about the performance of contractual obligations.

This is consistent with the general approach of analysing the substance of the dispute in determining whether to grant a stay of proceedings and refer the matter to arbitration. In doing so, the Australian courts have demonstrated their willingness to preserve the autonomy of the parties by not interfering with the arbitration process where the substance of the underlying dispute is capable of being resolved by arbitration.

United Kingdom

Similarly, courts in the United Kingdom have generally held that winding up proceedings may be dismissed or stayed and the underlying disputes referred to arbitration. The test adopted is whether there are 'wholly exceptional circumstances' which justify a court's refusal to grant a stay or dismiss proceedings subject to an arbitration agreement.

Salford Estates (No 2) Ltd v Altomart Ltd (No 2) ('*Salford Estates*')[8] remains the leading authority in the United Kingdom although it has been the subject of some criticism. In that case, a dispute arose in relation to a lease which was subject to a broad arbitration agreement providing that 'any dispute or difference' arising out of or in connection with the lease would be referred to arbitration. The dispute resulted in a final

[7] *Hydrox* (n 4) 483 [162] (Foster J).
[8] *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* ('Salford Estates') [2015] Ch 589.

arbitral award which the lessee did not pay, following which the lessor presented a winding up petition. The lessee sought to strike out or stay the petition.

The court found that its discretionary power to wind up a company had to be exercised in a manner consistent with the policy embodied in the *Arbitration Act* and the parties' agreement to arbitrate, except in 'wholly exceptional circumstances'. As such, winding up proceedings involving disputed debts subject to an arbitration agreement ought to be stayed or dismissed and the disputed debt referred to arbitration. The fact that a debt is not admitted is sufficient to constitute a dispute under the Act and a court is not required to investigate whether or not the debt is a bona fide dispute on substantial grounds but should seek to give effect to the arbitration agreement. Such an approach discourages parties from pursuing winding up proceedings to bypass an arbitration agreement.

Salford Estates was applied, with some reluctance, in the subsequent case of *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd.*[9] In that case, a company brought an action to strike out or dismiss a winding up petition pursuant to an alleged debt arising under a standard service agreement which was subject to an arbitration clause. Mr Steinfeld QC, sitting as deputy High Court judge, considered the *Salford Estates* decision placed a 'very heavy obstacle' on a party petitioning for a winding up order by requiring the court to dismiss the decision without considering whether there exists a bona fide dispute on substantial grounds.[10] However, considering himself bound by the formulation in *Salford Estates,* Mr Steinfeld QC dismissed the petition on the basis that the debtor disputed the debt and the dispute went beyond a non-admission. The dispute was referred to be determined by the arbitrator.

The *Salford* approach remains authoritative in the UK, as demonstrated by the recent decision in *Telnic Limited v Knipp Medien un Kommunikation GmbH.*[11] Sir Geoffrey Vos, Chancellor of the High Court upheld a stay against a winding up petition on the basis that the debt was not admitted and was subject to an arbitration clause. The petitioning party had sought that the stay be dismissed on the basis that the dispute raised by the opposing party was unmeritorious and that Telnic was balance sheet insolvent. However, the court applied *Salford* and refused to inquire into the merits of the case because the allegations of balance sheet insolvency and unlawful distribution were unclear and inconclusive. Accordingly, there was nothing out of the ordinary to take it into the realm of 'wholly exceptional circumstances', and therefore no basis for it to depart from the usual course of staying or dismissing the petition.

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[9] *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] BCC 877.
[10] Ibid [10].
[11] *Telnic Limited v Knipp Medien un Kommunikation GmbH* [2020] EWHC 2075.

Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp ('*Nori Holding*')[12] involved a dispute arising from the termination of certain loan and pledge agreements entered into between the parties. Some of the agreements contained arbitration clauses, while others contained dispute resolution clauses conferring jurisdiction on the Moscow courts. The loans were subsequently restructured and a temporary administrator was appointed for the respondent. The administrator commenced proceedings on behalf of the respondent seeking to invalidate the restructuring and reinstate the loan and pledge agreements, relying on a provision of Russian insolvency law which was similar to a claim to set aside a transaction at an undervalue. On the application of the claimants, the English Commercial Court granted an anti-suit injunction against those proceedings, holding that they fell within the scope of the arbitration agreements, and were arbitrable. In doing so, the court held that the arbitration clause did not contain any express exclusion of disputes of any kind, and there was no good reason to imply a limitation to the effect that the clause does not extend to a claim in insolvency proceedings. As to arbitrability, the court held that it is necessary to focus on the nature of the claim rather than whether it is characterised as an insolvency claim. A claim based on a transaction at undervalue could have been brought before the insolvency process intervened and it is a dispute which is arbitrable regardless of its label.

In *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* ('*Riverrock Securities*'),[13] the English Commercial Court granted an interim anti-suit injunction against insolvency proceedings brought in Russia, on the basis that the avoidance claims brought in those proceedings fell within the scope of the arbitration agreement between the parties and were arbitrable. Contrary to the respondent's position that the arbitration agreement did not extend to a claim to set aside an undervalue transaction, the Court held that the avoidance claims fell within the scope of arbitration because the agreements were expressed in expansive terms. Justice Foxton also held that the relief claimed was an insolvency form of relief, but that did not in itself render the claims non-arbitrable.

In both *Nori Holding* and *Riverrock Securities*, the English Commercial Court specifically declined to adopt the position taken by the Singapore courts, which is discussed in further detail below.

[12] *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm).
[13] *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm).

Singapore

The Singaporean authorities have departed from the English authorities in two key ways. First, rather than requiring 'wholly exceptional circumstances' to exercise their discretion not to stay insolvency proceedings in favour of arbitration, the courts have held that a stay may be declined if there is an 'abuse of process', including circumstances where the debt is admitted on both liability and quantum. Secondly, the courts have held that there is a presumption that arbitration clauses do not apply to claims that could only be brought in insolvency, unless the clauses expressly provide that they do.

Both of these propositions are illustrated by the leading authority of *Larsen Oil*.[14] *Larsen Oil* involved a claim by Petroprod Ltd (Petroprod) and four of its subsidiaries, each of which was in liquidation, to set aside payments which the companies had made to their former manager, Larsen Oil and Gas Ltd (Larsen), shortly before the companies were wound up. These payments were alleged to have amounted to unfair preference or undervalue transactions and/or been made with the intent to defraud. Larsen applied to stay the proceedings on the basis of an arbitration clause in its management agreement with Petroprod. The Court of Appeal began by identifying the tension between the principle of party autonomy underlying the arbitration process and the policy of centralisation of disputes in the insolvency context:[15]

> Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors. The appeal before us raised an interesting and novel point of law relating to the interfacing of these two policies where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process?

The court first considered the construction of the arbitration agreement. It found that the assumption that the parties would have preferred a dispute resolution mechanism which could deal with all disputes in a single forum did not apply to claims that could only be brought in an insolvency context. As such, it made sense to 'draw a line' between private remedial claims, which could be determined by arbitration, and claims that can only be made by a liquidator/judicial manager of an insolvent company.[16] For this reason, the arbitration clause could not be construed to cover Petroprod's avoidance claims in the absence of express

[14] *Larsen Oil* (n 1).
[15] Ibid 418 [1] (VK Rajah JA for the Court).
[16] Ibid 423 [21].

language to the contrary. Notably, the English Court has stated that the *Larsen Oil* approach is not part of English law[17].

In considering the concept of arbitrability more generally, a further distinction was drawn between disputes involving an insolvent company that 'stem from its pre-insolvency rights and obligations' and those that arise 'only upon the onset of insolvency due to the operation of the insolvency regime'.[18] In light of the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management, a dispute arising from the operation of the statutory provisions of the insolvency per se will be treated as non-arbitrable even if parties expressly include them within the scope of their arbitration agreement.[19] On the other hand, disputes that stem from a company's pre-insolvency rights and do not affect the substantive rights of other creditors are arbitrable when the arbitration is only to resolve private disputes between the parties to the arbitration agreement.[20]

The leading decision of *Larsen Oil* has been followed in subsequent cases.[21] In *AnAn,* the Court of Appeal confirmed that the 'triable issue' standard ordinarily required to stay or dismiss winding up proceedings does not apply where such a dispute is subject to an arbitration agreement. Instead, a debtor who challenges a winding up application on the basis of a debt subject to an arbitration agreement need only satisfy the 'prima facie' standard of review. Thus when a court is faced with a disputed debt subject to an arbitration agreement, winding up proceedings will be stayed or dismissed as long as (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in an abuse of the court's process.[22]

The court gave several reasons for applying the lower 'prima facie' standard of review, noting that 'the reduced standard promotes coherence in the law, gives effect to the principle of party autonomy and helps to achieve cost savings and certainty in the law'.[23]

In this regard, the court departed from the test adopted by English courts, which requires 'wholly exceptional circumstances' to exist before a stay application is refused in favour of arbitration. In finding

[17] *Riverrock Securities* (n 13) [56] (Foxton J).
[18] *Larsen Oil* (n 1) 431 [45] (VK Rajah JA for the Court).
[19] Ibid 431 [46].
[20] Ibid 431-2 [47].
[21] See *Silica Investors Ltd v Tomolugem Holdings Limited* [2015] SGCA 57 ('*Tomolugen*'); *BWG v BWF* [2020] 1 SLR 1296 ('*BWG'*) and *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] 1 SLR 1158 *('AnAn*').
[22] *AnAn* (n 21) 1179 [56] (Steven Chong JA for the Court).
[23] Ibid 1179 [57].

that this standard was too high, the court decided that a stay or dismissal of insolvency proceedings in favour of arbitration should be brought unless there is an 'abuse of process', including circumstances where the debt is admitted on both liability and quantum.

Singapore could be viewed as a middle ground in its approach to the conflict between arbitration and insolvency-related proceedings: a preferred deference to arbitration is coupled with a residual discretion to facilitate insolvency proceedings by protecting the liquidator's right to commence such proceedings in court.

Hong Kong

The position regarding the arbitrability of insolvency disputes in Hong Kong remains divided. In their early consideration of this issue, the Hong Kong courts emphasised that the interaction between an arbitration clause and insolvency was very much dependent on the facts and circumstances of each case. In the case of *Re Sky Datamann (Hong Kong) Ltd,*[24] Yuen J held that the Court was not bound to strike out or stay a winding up petition on the grounds of non-payment of a debt merely because the relevant contract contained an arbitration clause or because arbitration had commenced; it was a matter for the discretion of the court in each case. The arbitration agreement did not automatically take priority over the jurisdiction of the court. Rather, the approach was that the court should exercise its discretion having regard to all the relevant circumstances, including the financial position of the company, the existence of other creditors, and the position taken by them.

This approach was departed from in the decision of Harris J in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd*[25] ('*Lasmos*') which in essence followed the English decision of *Salford Estates*. Justice Harris granted the stay of a winding up petition on the basis that three conditions were satisfied: (i) the company disputed the debt; (ii) the contract from which the debt arose contained an arbitration clause; and (iii) the company had taken steps to commence the contractual arbitration.[26] The court stayed the winding up petition without considering whether there was a bona fide underlying dispute on substantial grounds; it was enough for the debtor to assert that the debt was disputed and point to arbitration proceedings on foot.

In adopting an approach preferring arbitration, this decision brought Hong Kong in line with the approach of other common law jurisdictions like the United Kingdom and Australia. However, as with *Salford*

[24] *Re Sky Datamann (Hong Kong) Ltd* [2002] HKLRD (Yrbk) 22.
[25] *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449.
[26] Ibid [31].

Estates, the *Lasmos* approach has also been the subject of criticism. In *But Ka Chon v Interactive Brokers LLC*[27] ('*But Ka Chon*'), the Court of Appeal dismissed an appeal on not setting aside a statutory demand because the dispute should have been arbitrated. However, in obiter it commented that the Lasmos approach constitutes a significant curtailment of the creditor's statutory right to petition for bankruptcy and that preventing a creditor from exercising the statutory right to petition for winding up on the ground of insolvency would be 'contrary to public policy'.[28] A similar obiter comment was also expressed in *Sit Kwong Lam v Petrolimex Singapore Pty Ltd.*[29]

Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics[30] ('*Dayang*') continued with this competing approach, in which DHCJ Wong SC wound up the company despite there being an arbitration agreement. One party presented a winding up petition based on an unpaid debt, whereas the other party did not dispute the debt but raised a counterclaim in relation to an alleged breach of the agreement and submitted that the dispute should be resolved by arbitration. The court found that, while it was not obliged to stay the proceedings under s 20 of the *Arbitration Ordinance* as that section applied only to actions and not petitions to wind up, it could exercise its discretion to do so. As a matter of principle, it considered two distinct approaches by which this discretion could be exercised:

- The first approach, known as the '*Salford-Lasmos* approach', involved the three-part test set out by Harris J in *Lasmos*. This is generally perceived as a pro-arbitration approach;
- The second approach, known as the 'traditional approach', stated that it was insufficient for a party to simply assert that it disputed the debt; rather, that party had to demonstrate a bona fide dispute on substantial grounds before the court would exercise its discretion to stay the proceedings.

Ultimately, the court adopted the 'traditional' approach and refused to grant the stay on the basis that the respondent did not have a bona fide dispute on substantial grounds. The decision in *Dayang* demonstrates that the law in this area in Hong Kong remains in a state of flux and poses intriguing questions for an appellate court to determine going forward.[31]

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[27] *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85.
[28] Ibid 105 [62] (Kwan VP).
[29] *Sit Kwong Lam v Petrolimex Singapore Pty Ltd* [2019] 5 HKLRD 646, 658-9 [34]-[39] (Kwan VP for the Court). Note that *Sit Kwong Lam* did not involve an insolvent company.
[30] *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics* [2020] 2 HKLRD 423.
[31] Ibid (n 30) 457-62 [88]-[99].

Concluding remarks

While several jurisdictions have, in response to the potential influx of insolvency-related claims triggered by the pandemic, introduced amendments to their insolvency regimes, others have not. Australia introduced significant reform to the corporate insolvency regime to (amongst other things) provide a simplified debtor in possession restructuring process and a simplified liquidation pathway. In the United Kingdom, temporary measures suspending use of statutory demands and restricting winding-up petitions have been introduced. In Singapore, whilst some temporary measures such as an increased monetary threshold for winding-up proceedings were introduced in 2020, a Simplified Insolvency Programme has been launched in early 2021 providing for a simplified winding-up programme and debt restructuring for micro and small companies. Hong Kong has been relatively quiet, although a corporate rescue bill is expected to be tabled for legislative discussion in 2021. This will potentially introduce a statutory corporate rescue procedure in Hong Kong but is unlikely to provide immediate relief. It remains to be seen how these measures across jurisdictions will impact insolvency proceedings in a post-pandemic era.

With businesses around the world being impacted by the pandemic, and in view of the disruption to court proceedings and associated delays, the development and expansion of matters deemed to be arbitrable is critical to timely resolution of disputes. Savvy multinational corporations are appreciating the nuances in the different jurisdictions to ascertain what is most attractive to them in terms of certainty of processes available to resolve disputes. The insolvency process and arbitration can co-exist.

How courts tackle the issue of arbitrability of insolvency-related disputes differs across jurisdictions and remains an evolving area of jurisprudence. There are jurisdictions which tend to be more 'arbitration-friendly' towards insolvency-related disputes including Australia and the United Kingdom. Singapore is also in the same category but takes a more nuanced approach. On the other side of the coin, Hong Kong remains undecided on how to approach the tension between arbitration insolvency-related proceedings.

Accordingly, parties should be strategic in considering these potential issues when drafting their arbitration agreements and should revisit the applicable case law in the relevant jurisdiction or jurisdictions as and when issues arise before deciding on the appropriate choice of forum.