IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 241

Originating Application No 241 of 2024

In the matter of Part 11 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)

And

In the matter of Section 252 and the Third Schedule of the Insolvency, Restructuring and Dissolution Act (2020 Rev Ed)

And

In the matter of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency

And

In the matter of Sapura Fabrication Sdn Bhd

Between

(1) Sapura Fabrication Sdn Bhd
(2) Mohd Anuar bin Taib
(3) Chew Seng Heng
(4) Norzaimah binti Maarof

… *Applicants*

And

GAS

… *Non-Party*

Originating Application No 242 of 2024

In the matter of Part 11 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)

And

In the matter of Section 252 and the Third Schedule of the Insolvency, Restructuring and Dissolution Act (2020 Rev Ed)

And

In the matter of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency

And

In the matter of Sapura Offshore Sdn Bhd

Between

(1) Sapura Offshore Sdn Bhd
(2) Mohd Anuar bin Taib
(3) Chew Seng Heng
(4) Norzaimah binti Maarof

… *Applicants*

And

GAS

… *Non-Party*

JUDGMENT

[Insolvency Law — Cross-border insolvency — Recognition of foreign insolvency proceedings — Automatic moratorium arising on recognition as foreign main proceedings — Whether carve-out should be granted for arbitration to proceed — Art 20 UNCITRAL Model Law on Cross-Border Insolvency]
[Arbitration — Arbitration agreements — Enforcement of arbitration agreements — Art II(3) Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958]
[Conflict of laws — Recognition and enforcement of foreign insolvency proceedings — Submission to foreign insolvency proceeding]

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18 September 2024 Judgment reserved.

Aedit Abdullah J:

1 In these applications, Sapura Fabrication Sdn Bhd and Sapura Offshore Sdn Bhd (collectively, the "Sapura Entities") sought recognition and relief under the Third Schedule and s 252(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"), which implements the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the "Model Law").

2 As the recognition applications were essentially uncontested, I granted recognition as the requirements of the Model Law had been met.

3 Relying on the court's powers under Art 20(6) of the Model Law to modify the stay arising under Art 20(1) of the Model Law, a non-party, referred to as "GAS" (because of a sealing order I granted), seeks a carve-out to permit it to proceed with arbitration proceedings against the Sapura Entities. In the

alternative, if no carve-out is granted, GAS seeks an order permitting the arbitral tribunal to be constituted. This judgment is only concerned with the carve-out sought by GAS.

4 I have determined that, subject to a condition that no enforcement action, whether in this jurisdiction or otherwise, be taken by GAS in respect of any award it obtains from the arbitration, the carve-out prayed for by GAS should be granted, and the arbitration allowed to proceed.

Background

The Sapura Entities' restructuring proceedings in Malaysia

5 The Sapura Entities are private limited companies incorporated in Malaysia. They are direct subsidiaries of Sapura Energy Berhad, a publicly listed company also of Malaysian incorporation,[1] and collectively, they form the Sapura group of companies (the "Sapura Group"). The Sapura Group's principal line of business is as a global integrated oil and gas services and solutions provider.[2]

6 The Sapura Group's financial problems began with a downturn in the oil and gas industry in 2016, which was subsequently compounded by the COVID-19 pandemic. Restructuring is apparently necessary, failing which, the Sapura Group is likely to default on its financial obligations and become unable to pay its debts when they fall due.[3]

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1 Applicants' Written Submissions dated 2 May 2024 ("AWS") at para 6.

2 AWS at para 6.

3 AWS at para 6.

7 To resolve its impeding financial troubles, the Sapura Group has commenced efforts to restructure its debts through individual schemes of arrangement in Malaysia for the members of the Group, including the Sapura Entities. These efforts remain on foot at the time of the present applications.

8 The Sapura Group's restructuring efforts have been underway since 2022. On 7 March 2022, the Sapura Group applied in Originating Summons No. WA-24NCC-148-03/2022 (the "First Reorganisation Proceeding") seeking orders from the Malaysian High Court: (a) for the convening of meetings of its creditors; and (b) restraining all proceedings against the Sapura Group and/or its assets unless leave of the Malaysian court was obtained.[4] An order in terms of the application was granted by the Malaysian High Court on 10 March 2022.[5]

9 Counsel for the Sapura Entities indicated that Malaysian law does not permit the grant of an indefinite number of extensions of a restraining order. Rather, a restraining order would first be granted for a duration of three months, which can subsequently be extended once for a further duration of nine months. The duration that a restraining order can remain in force is thus a total period of 12 months. There is no jurisdiction for the Malaysian court to grant a further extension of the same restraining order; instead, a fresh application for the convening of creditors' meetings and a restraining order would have to be made after the expiry of the 12-month period. Thus, using the First Reorganisation Proceeding as an illustration, the restraining order was initially slated to expire after three months on 10 June 2022, but this was later extended by a nine-month period to 10 March 2023.[6]

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4 AWS at para 8.

5 AWS at para 9.

6 AWS at paras 8(b) and 9.

10 Subsequently, the Sapura Group applied for the First Reorganisation Proceeding to be recognised by the Singapore court as a foreign main proceeding under the Model Law. An order in terms of the recognition application (the "First Recognition Order") was granted by the Singapore High Court on 25 January 2023.[7] The First Recognition Order was later discharged upon the lapsing of the restraining order on 10 March 2023.[8]

11 This process of a Malaysian application for convening and restraining orders, coupled with Singapore recognition applications, was repeated in respect of the Sapura Group's fresh application to the Malaysian High Court in Originating Summons No. WA-24NCC-121-03/2023 (the "Second Reorganisation Proceeding"). This was granted by the Malaysian High Court on 8 March 2023.[9] The Second Reorganisation Proceeding lapsed, after the 12-month period (comprising the initial three-month period and a subsequent nine-month extension) on 10 March 2024. The recognition order by the Singapore High Court (the "Second Recognition Order"), dated 20 November 2023, was granted subject to a condition that the Sapura Entities apply to lift the automatic stay arising from the recognition of the Second Reorganisation Proceeding as foreign main proceedings within seven business days of the termination of the restraining order relating to the Second Reorganisation Proceeding.[10] I granted the Sapura Entities' applications to lift the stay arising from the Second Recognition Order at a joint hearing with the present applications on 8 May 2024.

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7 AWS at para 10.

8 AWS at para 10.

9 AWS at paras 11–12.

10 AWS at para 13.

12 The present applications before me are thus the third set of applications for the local recognition of the Malaysian proceedings arising from the Sapura Group's third application to the Malaysian High Court for convening and restraining orders in Originating Summons No. WA-24NCC-85-02/2024 (the "Third Reorganisation Proceeding").[11] The orders relating to the Third Reorganisation Proceeding were granted by the Malaysian High Court on 7 March 2024,[12] and it is these orders that form the basis of the Sapura Entities' present applications.

13 As mentioned above, save for reserving the issue of whether the carve-out sought by GAS should be granted which this Judgment addresses, I granted orders recognising the Third Reorganisation Proceeding as foreign main proceedings, as well as the automatic stay and suspension arising under Art 20(1) of the Model Law, at the hearing on 8 May 2024.

The dispute between GAS and the Sapura Entities

14 The dispute between GAS and the Sapura Entities arises out of two construction contracts entered into between GAS and the Sapura Entities on 30 August 2019[13] and 29 February 2020,[14] in which the Sapura Entities undertook to provide certain construction-related services in relation to oil and gas facilities operated by GAS (collectively, "the Contracts").[15] The Contracts

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11 AWS at para 15.

12 AWS at para 16.

13 2nd Affidavit of Lukas Lim Xia Wei dated 10 May 2024 ("LLXW-2") at para 15.

14 LLXW-2 at para 19.

15 LLXW-2 at paras 12(b) and 14–22.

were worth a significant sum, as GAS agreed to pay the Sapura Entities a total of around US$169m for work done by the latter.[16]

15 The Contracts were governed by English law[17] and contained an arbitration agreement providing for Singapore-seated arbitration in the Singapore International Arbitration Centre ("SIAC").[18]

16 Under the Contracts, GAS was given a right to terminate or reduce the scope of the Contracts in the event of certain defined circumstances, including if the Sapura Entities:[19]

(a) became subject to an "Insolvency Event", as defined within the Contracts;

(b) wilfully delayed performance of the Contracts;

(c) abandoned or repudiated the Contracts; or

(d) committed breaches of the Contracts that were material and incapable of remedy.

17 GAS contends that, on 13 March 2023, it formally served notices on the Sapura Entities exercising its rights of termination and/or reduction of scope,[20] which were founded on the basis of the following three broad categories of termination events under the Contracts:[21]

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16 LLXW-2 at para 12(b).

17 LLXW-2 at pp 131–132, cl 18.1 and p 760, Art 18.1.

18 LLXW-2 at p 133, cl 18.2(a) and p 760, Art 18.2(a)–(c).

19 LLXW-2 at paras 23–24.

20 LLXW-2 at paras 12(c) and 26.

21 LLXW-2 at paras 12(d) and 27–30.

(a) First, the Sapura Entities' demobilisation of two vessels on 31 December 2022 and 15 January 2023 which were to be utilised in performance of the Contracts;

(b) Second, the restraining orders granted by the Malaysian High Court in the Second Reorganisation Proceeding on 8 March 2023, which constituted an "Insolvency Event" as defined under the Contracts; and

(c) Third, various additional breaches committed by the Sapura Entities under the Contracts.

18 In letters dated 11 May 2023 and 12 May 2023, the Sapura Entities responded to the termination notices issued by GAS.[22] The Sapura Entities did not dispute the fact of demobilisation of the vessels as GAS alleged but contended that this had been justified in the circumstances.[23] Furthermore, the Sapura Entities also argued that delays on their part arising from the demobilisation of the vessels were excusable as they had made plans (which they had provided to GAS) to mitigate the delays.[24] Finally, the Sapura Entities also disputed GAS's characterisation of the alleged additional breaches as material and/or incapable of being remedied.[25]

The arbitration between GAS and the Sapura Entities

19 On 29 September 2023, GAS commenced separate arbitrations against each of the Sapura Entities in relation to the Contracts by filing Notices of

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22 LLXW-2 at para 31.

23 LLXW-2 at paras 31(a)–31(b).

24 LLXW-2 at para 31(c).

25 LLXW-2 at para 31(d).

Arbitration against the Sapura Entities. In these Notices, GAS nominated the same co-arbitrator for both arbitrations.[26] Subsequently, on 16 October 2023, the Sapura Entities filed their Responses to Notice of Arbitration (also separately), in which they also nominated the same co-arbitrator for both arbitrations.[27] The parties agreed to a protocol to appoint a presiding arbitrator for both of the arbitrations on 9 November 2023, and duly notified their respective nominees and the SIAC of the same.[28] By agreement between the parties, the two separate arbitrations were consolidated into a single arbitration by the SIAC on 20 November 2023.[29]

20 In the arbitration, GAS seeks compensation for all damage it has suffered from the Sapura Entities' breaches that allegedly gave rise to the termination events upon which GAS purported to terminate or reduce the scope of the Contracts.[30] GAS also seeks a full indemnity of its costs and expenses in pursuing its claims through arbitration, as well as interest on the award.[31] Finally, GAS also seeks declarations confirming (a) the validity of its purported termination and reduction of the scope of the Contracts; and (b) that the Sapura Entities have indeed breached various provisions of the Contracts.[32]

21 In their Responses to Notice of Arbitration, the Sapura Entities have denied GAS's claims in their entirety. The Sapura Entities' denial of each of the three termination events cited by GAS can be summarised as follows:

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26 LLXW-2 at para 8.

27 LLXW-2 at para 9.

28 1st Affidavit of Lukas Lim Xia Wei dated 2 April 2024 ("LLXW-1") at para 10.

29 LLXW-1 at para 11.

30 LLXW-2 at para 33(a).

31 LLXW-2 at para 33(b).

32 LLXW-2 at para 33(c).

(a) First, in relation to the demobilisation of the vessels, the Sapura Entities argue that this did not constitute breaches of the Contracts on the basis that the demobilisation (i) was not prohibited by the Contracts; (ii) did not cause any delay in their performance of the Contracts; (iii) did not cause any wilful delay, even if any delay was caused; and (iv) did not constitute abandonment of the Contracts on their part.[33]

(b) Second, in relation to the Second Reorganisation Proceeding, the Sapura Entities argue that the Malaysian High Court's orders in the Second Reorganisation Proceeding did not amount to an "Insolvency Event" as defined under the Contracts. Further, even if the Second Reorganisation Proceeding did constitute an "Insolvency Event" allowing GAS to exercise its rights to terminate or reduce the scope of the Contracts, GAS was precluded from exercising said rights due to waiver by election and/or estoppel.

(c) Third, in relation to the additional alleged breaches, the Sapura Entities plead a general denial.

22 Apart from providing an outline of the points above, the Sapura Entities did not, in either of their Responses to Notice of Arbitration, provide any particulars, further argument or elaboration on the basis for their positions. In addition, the Sapura Entities also reserved their position on: (a) whether GAS had served its notices of termination in accordance with the terms of the Contracts; (b) their right to amplify, supplement or amend their defences as outlined in their Responses to the Notice of Arbitration; and (c) their right to raise counterclaims in the arbitration.[34]

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33 LLXW-2 at paras 35(a)–35(d).

34 LLXW-2 at para 37.

The parties' cases

GAS's arguments

23 GAS seeks a carve-out, under Art 20(6) of the Model Law, from the automatic stay arising under Art 20(1) of the Model Law for the arbitration to proceed.

24 First, GAS submits that its claims against the Sapura Entities in the arbitration do not fall within the scope of the Sapura Entities' proposed schemes of arrangement. According to GAS, the Sapura Entities' proposed schemes are only intended to compromise claims against the Sapura Entities that were owing as at a cut-off date of 31 January 2022.[35] As the claims that GAS pursues in the arbitration arose after that cut-off date, they do not fall within the scope of the proposed restructuring, and there is thus no reason for GAS to be restrained from proceeding with the arbitration as it stands outside of the collective restructuring insofar as those claims are concerned.[36]

25 Moreover, to the extent that the Sapura Entities have argued that the proposed schemes of arrangement were subsequently amended to extend the cut-off date beyond 31 January 2022 to include contingent claims potentially falling due after that date, GAS submits that this amendment was done in bad faith in a deliberate bid to thwart GAS's attempts at proceeding to arbitration.[37]

26 Second, GAS submits that the proof of debt process, that includes an appeal to an adjudicator, is an inappropriate forum for dealing with its claims in the arbitration, which are factually involved and vigorously disputed by the

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35 Non-Party's Written Submissions dated 2 May 2024 ("NPWS") at para 44.

36 NPWS at para 45.

37 NPWS at paras 47–48.

Sapura Entities. Given that the proof of debt process only entails a summary determination, it is not an appropriate mode for resolving GAS's claims in the arbitration, which are complex construction disputes that involve issues of foreign law and expert evidence.[38] GAS also emphasises that as it is not disputed that its claims in the arbitration fall within the scope of valid arbitration agreements between GAS and the Sapura Entities, the Sapura Entities cannot avoid their submission to arbitration by pushing GAS's claims into a less rigorous process of summary determination under the proof of debt regime.[39]

27 Third, on the assumption that GAS's claims in the arbitration do not fall within the scope of the Sapura Entities' schemes, GAS submits that allowing its claims to be resolved through arbitration would not impede the achievement of the schemes. Instead, it would be in the interests of the Sapura Entities and their creditors for the Sapura Entities to proceed with the finalisation of the schemes without introducing GAS's claims in these schemes.[40]

The Sapura Entities' arguments

28 The Sapura Entities argue that no carve-out from the automatic moratorium should be granted to GAS to allow it to proceed with the arbitration.

29 First, GAS's claims in the arbitration fall within the scope of their proposed schemes of arrangement. The terms of the schemes of arrangement were amended to include certain contingent claims arising after 31 January 2022 (the "Designated Contingent Claims") – including GAS's claims – through

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38 NPWS at paras 56–63.

39 NPWS at paras 64–65.

40 NPWS at paras 75–77.

notices that the Sapura Entities issued to the contingent claimholders (including GAS) on 6 November 2023 and 9 April 2024.[41]

30 Second, GAS's claims in the arbitration are not so complex that they have to be resolved outside of the proof of debt regime.[42] In oral submissions, counsel argued that the proof of debt regime put in place was sufficiently comprehensive and robust to accommodate GAS's claims in the arbitration. There would be two tiers to the adjudication of proofs of debt, with experienced decision-makers appointed at each level: namely, the scheme chairman and then a retired Malaysian Court of Appeal judge respectively. The adjudicator was also vested with the discretion to adopt such procedures as considered fit, which could include requesting for the taking of evidence and written submissions. These processes, inspired from adjudication structures used in the Lehman Brothers bankruptcy, render it unnecessary for GAS's claims to be resolved outside of the proof of debt regime.

31 Third, requiring arbitration would prejudice the interests of the Sapura Entities and their creditors. If the Sapura Entities are forced to channel their limited resources to defending the arbitration, this would distract from and disrupt the group restructuring, thus potentially leading to value destruction and lower recoveries for their creditors.[43]

The decision

32 The carve-out sought by GAS to allow the arbitration to proceed is granted in the exercise of my discretion under the law applicable to applications

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41 AWS at para 48.

42 AWS at para 50.

43 AWS at para 52.

to proceed in the face of an insolvency law moratorium. This is set out under "the Discretionary Ground" below. It is also possible to argue that the international arbitration regime mandatorily trumps the insolvency moratorium as a matter of the operation of law, but I do not need to decide the issue between the parties on this basis. Nevertheless, this is briefly considered below under "the Mandatory Ground".

The Discretionary Ground

Applicable legal framework on moratoria under the Model Law

33 The automatic moratorium that arises upon recognition of a foreign proceeding as a foreign main proceeding is of the same scope and effect as a winding-up order under the IRDA: see Art 20(2)(*a*) of the Model Law. In this connection, s 133(1) of the IRDA provides that, upon the making of a winding-up order, an automatic stay of proceedings against the company arises such that, henceforth, no "action or proceeding may be proceeded with or commenced against the company" except (a) with the court's permission; and (b) in accordance with such terms as the court may impose.

34 An application for a carve-out from a moratorium under the insolvency legislation should be determined by the following issues:

(a) First, whether the intended course of action, such as an action or proceeding, against the company is caught by the scope of the relevant moratorium.

(b) Second, whether the carve-out from the moratorium should be granted.

Is the arbitration between GAS and the Sapura Entities caught by the Art 20(1) stay?

35 On the first issue, GAS does not dispute that the arbitration is caught by the automatic moratorium under Art 20(1) of the Model Law.

36 The point does seem clear. In *Re IM Skaugen SE and other matters* [2019] 3 SLR 979, the High Court held that the scheme of arrangement moratorium under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) – the predecessor provision to the current s 64 of the IRDA – extended to arbitration proceedings as opposed to being confined to in-court litigation (at [79]). Similarly, in *The "Engedi"* [2010] 3 SLR 409, Judith Prakash J observed that because arbitration "in this day and age is a well-established means of dispute resolution", "[t]o exclude arbitrations … would be to create a gaping exception to the process of preserving the assets of an insolvent company from dissipation" (at [36]).

Should the carve-out sought by GAS be granted?

37 Section 133(1) of the IRDA does not contain any express benchmarks or criteria against which the court is to weigh the exercise of its discretion. The High Court's decision in *Wang Aifeng v Sunmax Global Capital 1 Fund Pte Ltd and another* [2023] 3 SLR 1604 ("*Wang Aifeng*") provides a useful restatement of the applicable principles to applications for leave to commence proceedings against a bankrupt under s 327(1)(*c*) of the IRDA. The applicability of *Wang Aifeng* to the context of cross-border corporate insolvency (under Art 20 of the Model Law) has since been affirmed by the Court of Appeal in its recent decision in *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2024] 1 SLR 130 (at [19]).

38 In *Wang Aifeng*, Goh Yihan JC identified the following factors as relevant considerations for the court's determination of whether to grant a carve-out from an insolvency law moratorium (at [32]):

(a) the timing of the application for permission;

(b) the nature of the claim;

(c) the existing remedies;

(d) the merits of the claim;

(e) the existence of prejudice to the creditors or to the orderly administration of the liquidation; and

(f) other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the debtor's resources, and the views of the majority creditors.

39 Taking into account those factors relevant to the present case, I am satisfied that the carve-out sought by GAS should be granted.

(1) The nature of the claim

40 The court's focus when considering the nature of the claim is on whether the claim is of such a type that it should proceed by action rather than through the proof of debt regime. The factors include the degree of complexity of the legal and factual issues involved, and whether it may be preferable for those issues to be resolved through a proper hearing rather than in proof of debt: see *Wang Aifeng* at [35]. As a general rule, the greater the complexity of the claim, the less suitable it would be for summary determination through the proof of debt process.

41 Here, the complexity of the dispute between GAS and the Sapura Entities weighs strongly in favour of having the dispute resolved through arbitration rather than through the proof of debt regime.

42 First, it is clear from the correspondence between the parties that there are considerable factual disagreements between them. GAS also takes the view that some of these disputes would require expert evidence.[44] In my view, the general rule that complex claims are less appropriately resolved through the proof of debt process applies with particular force when the source of the complexity is factual rather than legal, as factual disputes generally require the parties to have the opportunity to lead evidence of their own and to test the other side's evidence.

43 Indeed, the Sapura Entities have conceded that the complexity of the dispute between the parties has been the cause of delay in the adjudication of the proofs of debt that GAS had filed in the First Reorganisation Proceeding. Although GAS's proofs of debt were filed more than two years ago, these have yet to be adjudicated upon as, according to the Sapura Entities, they raise "issues of alleged contingent claims that entail the assessment of voluminous documents and the consideration of issues of foreign law".[45] Given that proof of debt is intended to be a forum for the swift and summary determination of claims against the debtor, it defeats the purpose of the exercise for the adjudication to have taken as long as it has, and still remain on foot. The time taken so far points to the proof of debt regime being unsuitable for resolving GAS's claims.

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44 LLXW-2 at paras 40 and 44.

45 3rd Affidavit of Norzaimah Binti Maarof dated 22 April 2024 at para 21 (Applicants' Bundle of Documents dated 2 May 2024 ("ABOD") at p 2528).

44 Second, the Sapura Entities are vigorously disputing GAS's claims. In letters dated 1 May 2024, the Sapura Entities wrote in to the scheme chairman communicating their position that GAS's proof of debt should be rejected in its entirety.[46] A heavily contested dispute is clearly ill-suited to be resolved in a summary fashion.

45 Third, a source of potential legal complexity is the fact that the Contracts are governed by English law, rather than Malaysian law. Although the general differences between English and Malaysian law might not be that great, both parties chose English law as the governing law of their agreement, and would presumably have wanted or been inclined towards an English law tribunal determining their dispute. Indeed, the parties' nominated arbitrators are a King's Counsel and a former English appellate judge. Similar factors were considered by the English High Court in *Cosco Bulk Carrier Co Ltd v Armada Shipping SA and another* [2011] 2 All ER (Comm) 481 as pointing in favour of granting a carve-out for arbitration to proceed.

46 Fourth, the complexity of the dispute is also compounded by the fact that the Sapura Entities have indicated that they intend to assert rights of set-off against GAS's claims. Apart from disputing the entirety of GAS's proof of debt, the Sapura Entities stated in their letters dated 1 May 2024 that they have counterclaims against GAS that "should be deducted from any amounts payable [to GAS] by way of set off".[47] Guidance was given in the Court of Appeal's recent decision in *Kyen Resources Pte Ltd (in compulsory liquidation) and others v Feima International (Hongkong) Ltd (in liquidation) and another matter* [2024] 1 SLR 266, that a liquidator should not attempt to resolve cross-

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46 LLXW-2 at para 48.

47 LLXW-2 at para 48.

claims and set-off within the proof of debt regime unless it was a "matter of simple arithmetic" (at [53]). Such issues of set-off are better resolved in a trial, or, in this case, an arbitration. This guidance would understandably also apply to other corporate insolvency officeholders, including the present context of a scheme of arrangement.

(2) The existing remedies

47 The next consideration is whether the claim can be appropriately dealt with through proof of debt: see *Wang Aifeng* at [37]. In this case, given the features of the dispute between the parties that I have highlighted above, GAS's claim is not one that can be adequately resolved within the proof of debt regime.

48 Although counsel for the Sapura Entities emphasised the robustness of the Sapura Entities' proof of debt framework, which included the services of a retired Malaysian appeal judge as an adjudicator, this is not enough. The process remains a summary one, regardless of the personalities involved. Further, while the proof of debt framework does vest the adjudicator with a discretion to adopt procedures including written submissions and oral hearings, this is left to the discretion of the adjudicator, and thus there is no actual requirement that there be a hearing, as well as weighing and determination of evidence, unlike in arbitration. The dispute between GAS and the Sapura Entities is one that should be resolved in accordance with the processes of arbitration. The mere fact that there might be a chance of achieving a similar degree of robustness if the adjudicator decides to adopt such processes is not enough.

(3) The merits of the claim

49 The examination here is not of any substantive consideration; it is simply to determine whether the claim is clearly unsustainable. The applicable standard

to assess the merits of the proposed action is whether there is a "serious question to be tried": see *Wang Aifeng* at [39]–[40].

50 The Sapura Entities did not argue that GAS's claim was wholly unmeritorious. In any event, there is nothing to show that the claim was without foundation or unsustainable.

(4) The existence of prejudice

51 The court examines the balance of prejudice as between the applicant for the carve-out and the general body of creditors on the other side: *Wang Aifeng* at [43].

52 There is nothing here to point to any undue prejudice that would be occasioned to the Sapura Entities' other creditors if the carve-out sought by GAS to allow the arbitration to go ahead is granted.

53 GAS submits that there is generally no prejudice in allowing a creditor to invoke the adjudicatory jurisdiction of a tribunal or foreign court to determine a dispute between itself and the debtor company. What unfair advantage may result would come from enforcement of a favourable result ahead of other creditors who have not been able to pursue their claims. This position derives support from the decision of the Privy Council in *Stichting Shell Pensioenfonds v Krys and another* [2015] AC 616 ("*Stichting Shell*"), where the Board held that "as a general rule, there can be no objection in principle to a creditor invoking the purely adjudicatory jurisdiction of a foreign court" (at [40]), as a creditor only acts inconsistently with a collective insolvency process if it seeks to use foreign proceedings to steal a march on other creditors, such as through attachment to or enforcement against the insolvent company's foreign assets (at [44]).

54 Indeed, a clear determination of the Sapura Entities' liabilities to GAS (if any) would arguable be in the interests of both the Sapura Entities as well as their creditors, as GAS could then rely on the award to lodge its proof of debt in the restructuring, which the Sapura Entities ought to accept as-is without much fuss: see *American Energy Group Ltd v Hycarbex Asia Pte Ltd (in liquidation)* [2014] EWHC 1091 (Ch) at [56].

55 There is no evidence of there being a risk of a deluge of similar proceedings that may undermine the effectiveness of the moratorium. And apart from a general statement that the Sapura Entities would have to marshal resources to defend the arbitration, there is no evidence that the arbitration would substantially hinder or distract from the ongoing restructuring efforts. Indeed, although the Contracts that form the subject of the dispute are worth a considerable sum – US$169m – in absolute terms, this sum is dwarfed by the total debt that the Sapura Entities are seeking to restructure (approximately MYR$12bn). In these circumstances, it cannot be said that the arbitration would place an unduly high strain on the Sapura Entities' restructuring efforts.

56 However, to the extent that GAS may gain an advantage over the other creditors if it were to be allowed to enforce any award it obtains against the Sapura Entities, this may prejudice the other creditors who are staying their hands. Thus, in order to mitigate against this risk, I find that it is appropriate to impose a condition that there should be no enforcement of the award anywhere, whether of the claims proper or of costs, without leave of this court, pursuant to Art 20(6) of the Model Law. This condition allows the court the opportunity to consider and weigh the overall impact that enforcement may have at the appropriate juncture.

(5) Other miscellaneous factors

57 Lastly, I address together GAS's submissions that (a) its claims in the arbitration fall outside of the scope of the Sapura Entities' proposed schemes of arrangement; and (b) the Sapura Entities have acted in bad faith by purportedly amending the scope of their schemes of arrangement to include GAS's claims in the arbitration so as to stifle GAS's attempt at pursuing arbitration.

58 In my judgment, neither of these points have been established.

59 First, in relation to the scope of the Malaysian scheme, I accept the legal proposition that the automatic moratorium under Art 20(1) of the Model Law would not affect a person whose claims against the company are not subject to the recognised foreign insolvency proceeding (and from which recognition the automatic moratorium has come into force): see *In re OGX Petróleo e Gás SA* [2016] Bus LR 121 at [53]; *Chang v Cosco Shipping (Qidong) Offshore Ltd* [2022] BCC 176 at [47]. However, the burden of proof is on the party claiming to be entitled to stand outside the collective process to establish this. Here, however, GAS has not done so.

60 A recognising court cannot go behind the decisions and orders made by the foreign court in determining the scope of the foreign insolvency proceeding. The Sapura Entities have put in, by way of a supplemental affidavit, evidence that the draft scheme paper before the Malaysian High Court in the Third Reorganisation Proceeding includes the Designated Contingent Claims,[48] which GAS's claims are part of.

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[48] 1st Affidavit of Chew Seng Heng dated 10 May 2024 at paras 5–6.

61 Second, in relation to GAS's allegation of bad faith, there is sufficient evidence to show that any extension of the scope of the scheme to include GAS's claims was not a deliberate response with a view to undermining the conduct of the arbitration. The notice sent to GAS by the Sapura Entities on 6 November 2023, long before the present applications, did state that the notice was being sent to GAS as it "ha[d] alleged claims against the [Sapura Entities] which are intended to be compromised as part of the Schemes", and that the proposed schemes of arrangement included "contingent and unliquidated breach of contract and tort claims".[49] Further, I accept the Sapura Entities' explanation that the amendment to the scope of the schemes was to "reflect the more recent commercial reality and financial needs of the [Sapura Entities]".[50] The Sapura Entities' restructuring has been ongoing since 2022, resulting in three sets of applications to the court birthing three Reorganisation Proceedings. An update of the scope of the schemes would thus be expected.

(6) Conclusion

62 For the reasons above, to the extent that the issue of whether a carve-out ought to be granted is properly approached as a matter of discretion, I am satisfied that the carve-out sought by GAS to proceed with the arbitration should be granted, subject to the condition that no enforcement action should be taken in respect of any award it obtains from the arbitration without the permission of this court.

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49 3rd Affidavit of Norzaimah Binti Maarof dated 22 April 2024, Tab 1, pp 21 and 25 (ABOD at pp 2539 and 2543).

50 3rd Affidavit of Norzaimah Binti Maarof dated 22 April 2024 at para 10 (ABOD at pp 2523–2524).

The Mandatory Ground

63 While the application by GAS for a carve-out succeeds on the basis of the court's discretion, I also consider briefly whether the arbitration regime effectively trumps restructuring applications.

The policy of mandatory enforcement of international arbitration agreements

64 The International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") embodies a policy of mandatory enforcement of international arbitration agreements within its scope. Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958 (the "New York Convention"), which is given force of law in Singapore as the Second Schedule of the IAA, provides that, if a dispute is governed by an arbitration agreement in writing, the Singapore court must, if one of the parties requests it, refer the parties to arbitration, unless it finds that the arbitration agreement is (a) null and void; (b) inoperative; or (c) incapable of being performed. The principle set out in Art II(3) is given practical implementation in the form of provisions in national legislation for stay of court proceedings in favour of arbitration which, in Singapore's case, is s 6 of the IAA. In *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*"), the Court of Appeal held, following the approach of the English Court of Appeal in *Salford Estates (No 2) v Altomart Ltd (No 2)* [2015] Ch 589 ("*Salford Estates*"), that the principles applicable to stay applications under s 6 of the IAA were generally applicable to the court's discretion in winding-up petitions based on disputed debts governed by arbitration agreements, citing the benefit of "promot[ing] coherence in the law" (at [57]), amongst other things. Thus, an insolvency court would generally stay or dismiss a winding-up petition based on a disputed debt if it is satisfied on a *prima facie* basis that there is a valid arbitration agreement between parties and

that the dispute falls within the scope of the arbitration agreement: see *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 ("*Founder Group*") at [28(c)], citing *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [63].

65 It is noted that the Privy Council has recently held in *Sian Participation Corp (in liquidation) v Halimeda International Ltd* [2024] UKPC 16 ("*Sian Participation*") that *Salford Estates* was wrong in concluding that the court's discretion could take into account the underlying policy of the arbitration legislation in a situation in which the mandatory stay provision of the arbitration legislation was not engaged (at [94]–[96]). However, the Court of Appeal's decisions in *AnAn* and *Founder Group*, which are aligned with *Salford Estates*, are binding.

66 I should add, also, that *Sian Participation* appears to be distinguishable from the present context. A crucial plank of the Board's reasoning was that a winding-up petition did not contradict the parties' agreement to resolve their dispute through arbitration because the court's decision on a winding-up petition did not "require or involve any pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum": see *Sian Participation* at [33]. Thus, "nothing about a debt covered by an arbitration agreement is resolved in winding up or liquidation proceedings in court": see *Sian Participation* at [94]. Even if that might be true *vis-à-vis* winding up petitions – and, potentially, applications for judicial management orders – the same cannot be said in respect of the present situation of a company seeking to compromise claims against it through a scheme of arrangement, since the scheme company is intending that the scheme be a once-and-for-all resolution of its liabilities that are the subject of the scheme. The Board's reasoning that a winding-up petition does not conflict with the parties' arbitration agreement because it does not

entail a "final resolution" of a dispute surrounding the petition debt (see *Sian Participation* at [96]), may thus not be applicable to a scheme of arrangement. I would also note in passing the Hong Kong decision in *Re Mega Gold Holdings Ltd* [2024] HKCFI 2286, the Hong Kong Court of First Instance declined to follow *Sian Participation* given earlier Hong Kong Court of Appeal decisions that are aligned with *Salford Estates* and *AnAn*: see *Re Shandong Chenming Paper Holdings Ltd* [2024] 2 HKLRD 1040; *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064.

67 The Sapura Entities argue, relying on the English High Court decision of *Ronelp Marine Ltd and others v STX Offshore and Shipbuilding Co Ltd and another* [2016] EWHC 2228 (Ch) ("*Ronelp*"),[51] that exceptional circumstances are required before the statutory regime in insolvency will be overridden. But *Ronelp* would seem distinguishable on the basis that it did not involve an international arbitration agreement but a non-exclusive jurisdiction clause. International arbitration agreements are, relative to jurisdiction clauses and domestic arbitration agreements (governed by the Arbitration Act 2001 (2020 Rev Ed) (the "AA"), *sui generis* in terms of the strictness of their enforcement. As the Hong Kong Court of Final Appeal noted in *Re Lam Kwok Hung Guy, ex p Tor Asia Credit Master Fund LP* (2023) 26 HKCFAR 119, the enforcement of international arbitration agreements is a "non-discretionary" matter, in contrast to the court's handling of jurisdiction clauses which is "not burdened by statutory constraint" (at [91]–[92]). A similar observation was made by the English High Court in *Hex Technologies Ltd and others v DCBX Ltd* [2023] 2 BCLC 683 (at [68]). Thus, *Ronelp* does not necessarily decide the matter when the court is tasked with considering a contest between the conflicting policies underlying the IRDA (including the Model Law) and the IAA.

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[51] Applicants' Further Written Submissions dated 9 July 2024 ("AFWS") at para 12.

68 For largely the same reason, the Sapura Entities' reliance on an article by Justice Kannan Ramesh (Kannan Ramesh, "The *Gibbs* Principle: A Tether on the Feet of Good Forum Shopping" (2017) 29 SAcLJ 42), for an example of the insolvency regime overriding contractual rights is not helpful. It is not clear that the reasoning underpinning the abandonment of the *Gibbs* rule in Singapore extends to an international arbitration agreement. Critically, the international arbitration regime is statutory, whereas the *Gibbs* rule is a common law rule of private international law.

69 On the other hand, a counterweight to all of the above is that the drafters of the Model Law did contemplate that Art 20(1) of the Model Law "establishes a mandatory limitation to the effectiveness of an arbitration agreement" similar in kind to "other possible limitations restricting the freedom of the parties to agree to arbitration that may exist under national law", and is therefore not inconsistent with the New York Convention: see *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, UN Sales No E.14 V.2 (2014) at para 180. The possibility of the policy underlying the arbitration legislation being disapplied was recently considered, albeit *obiter*, in *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455. In that case, Hri Kumar Nair J observed in the context of a judicial management application that there was a good argument that, as a matter of policy, the principle established in *Salford Estates* and *AnAn* ought not to be applied as strictly in judicial management applications due to their focus on rescue and rehabilitation (at [62]–[67]).

70 However, it is not clear how this is borne out as a matter of statutory construction by the wording of the New York Convention and IAA which do not, on their face, clearly admit to such an exception. Further, there is local Court of Appeal authority establishing that the entry of a party to an arbitration

agreement into insolvency proceedings does not cause an arbitration agreement to cease to have effect, at least in relation to disputes concerning the parties' pre-insolvency rights: see *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil*") at [51]. To the extent that certain statements in *Larsen Oil* – *eg*, that "there will usually be *no good reason not to observe* the terms of the arbitration agreement" [emphasis added] (at [51]) – appear to suggest the existence of a discretion to decide if arbitration ought to proceed, these statements may be explicable on the basis that the arbitration agreement in *Larsen Oil* was a domestic arbitration agreement governed by the AA and not an international arbitration agreement governed by the IAA (at [5]). It is also noteworthy that there is foreign authority holding, either expressly or impliedly, that an arbitration agreement continues to operate even after the lodging of a proof of debt by a creditor: see *Philpott and another (as joint liquidators of WGL Realisations 2010 Ltd) v Lycee Francais Charles de Gaulle School* [2016] 1 All ER (Comm) 1; *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.

71 To sum up, it is evident from the overview above that the conflict between the international arbitration and insolvency regimes is not an easy one to resolve, as there exist potential arguments on both sides that the one should trump the other. However, as it is not necessary to resolve the matter in the present case, I leave further arguments and a conclusive decision to be made on a future occasion.

The effect of submission to a foreign insolvency proceeding on an arbitration agreement

72 The Sapura Entities argue that GAS has submitted to the jurisdiction of the Malaysian courts by filing a proof of debt in the First Reorganisation

Proceeding, and that the effect of GAS's submission is to render the arbitration agreement "inoperative" within the meaning of that term in Art II(3) of the New York Convention and s 6 of the IAA.[52] GAS argues otherwise. It submits that there has either (a) been no submission in the first place, as any submission on its part to the First Reorganisation Proceeding lapsed with the close of the First Reorganisation Proceeding and does not extend to the ongoing Third Reorganisation Proceeding;[53] or (b) in any event, its submission does not affect the validity and enforceability of the arbitration agreement.[54]

73 The issues that arise are: (a) firstly, whether GAS has in fact submitted to the jurisdiction of the Malaysian courts by filing a proof of debt in the First Reorganisation Proceeding; and (b) secondly, if GAS has so submitted, what the effect is of such submission *vis-à-vis* the arbitration agreement.

(1) Whether GAS has submitted to the jurisdiction of the Malaysian courts

74 There is generally no dispute between the parties that a creditor's lodging of a proof of debt can amount to a submission to the jurisdiction of the court having supervisory jurisdiction over the foreign insolvency proceedings: see *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [123]; see also *Rubin and another v Eurofinance SA and others (Picard and others intervening)* [2013] 1 AC 236 at [167]. By filing a proof of debt in the First Reorganisation Proceeding, GAS had submitted to the jurisdiction of the Malaysian court insofar as the First Reorganisation Proceeding was concerned.

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52 AFWS at para 39.

53 Non-Party's Further Written Submissions dated 9 July 2024 ("NPFWS") at paras 14–15.

54 NPFWS at paras 40–41.

75 The problem, though, is that there have been three separate Reorganisation Proceedings, such that the parties disagree on whether GAS's submission to the First Reorganisation Proceeding persists to the current Third Reorganisation Proceeding.

76 The Sapura Entities argue that that submission to jurisdiction persisted throughout the rest of the succeeding proceedings, citing *Sapura Energy Bhd & Ors v Martin Bencher (Malaysia) Sdn Bhd* [2024] 3 CLJ 159 ("*Martin Bencher*"). The Sapura Entities argue that the Malaysian High Court found in *Martin Bencher*, in the specific context of the Sapura Entities' restructuring, that a proof of debt submitted in the First Reorganisation Proceeding constituted a submission to the subsequent Reorganisation Proceedings. Additionally, the Sapura Entities argue that a submission to an earlier proceeding can constitute a submission to a subsequent proceeding if there is a sufficient nexus between both proceedings: see *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 ("*Giant Light Metal*").

77 GAS argues that each of the Reorganisation Proceedings are distinct. Even if it had submitted to the Malaysian courts' jurisdiction, its submission was spent once the First Reorganisation Proceeding ended.[55] Further, GAS submits that *Martin Bencher* does not assist the Sapura Entities as it is distinguishable from the present case.[56] Finally, GAS argues that, in any event, the proof of debt filed in the First Reorganisation Proceeding related to different claims that that which it intends to advance in the arbitration,[57] such that the scope of its submission does not extend to the intended claims in the arbitration.

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55 NPFWS at para 15.

56 NPFWS at paras 30–39.

57 NPFWS at para 15.

78 I find that GAS has indeed submitted to the Malaysian courts' jurisdiction insofar as the Third Reorganisation Proceeding is concerned. I accept the Sapura Entities' reliance on the Malaysian court's decision in *Martin Bencher*. Although the issue of GAS's submission to the Third Reorganisation Proceeding is, strictly speaking, an issue of Singapore private international law, the Malaysian courts' view on the issue of submission is relevant and can legitimately be taken into account: see *Giant Light Metal* at [25]–[26]; *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322 at [71]–[72].

79 In my judgment, the court in *Martin Bencher* did, as the Sapura Entities argue, find that a submission to the First Reorganisation Proceeding by way of filing of proof of debt amounted to a submission to the Second Reorganisation Proceeding. This much is clear from the court's statement that the "continuation of the proof of debt process" from the First Reorganisation Proceeding "effectively maintain[ed] Martin Bencher's submission to the jurisdiction of the scheme [in the Second Reorganisation Proceeding]", such that Martin Bencher remained a creditor in the Second Reorganisation Proceeding (at [47]).

80 I disagree with GAS's contention that the Singapore court should find that its submission to the Malaysian courts' jurisdiction lapsed with the termination of the First Reorganisation Proceeding. That submission might make sense if a fresh proof of debt exercise had to be instituted in respect of the Second and Third Reorganisation Proceedings, but the Malaysian courts' orders in both of these subsequent proceedings conspicuously failed to make any reference to a filing of fresh proofs of debt, instead referring only to the scheme chairman being entitled to rely on the outcome of adjudication of those proofs of debt whose adjudication he had completed during the First Reorganisation

Proceeding.[58] Given that the Second and Third Reorganisation Proceedings did not seem to have required a fresh proof of debt exercise at large for all creditors, the import of the Malaysian High Court's decision in *Martin Bencher* was that the Second and Third Reorganisation Proceedings were, in substance, *extensions of time* to complete the proof of debt exercise commenced during the First Reorganisation Proceeding, albeit taking the procedural form of separate filings due to a lack of a power for continuous extensions to be granted to extend the First Reorganisation Proceeding. But for that characteristic of the Malaysian scheme of arrangement, there would have been no doubt that the First Reorganisation Proceeding would have extended to-date. In my view, there is thus an air of unreality in GAS's submission that the three Reorganisation Proceedings should be viewed as completely distinct proceedings. Such an approach, with respect, places far too much focus on the form rather than the substance.

81 This conclusion is reinforced by the *Giant Light Metal* case relied on by the Sapura Entities. In that case, Andrew Ang J identified a principle of "inchoate submission" where (at [48]):

> … the courts are willing to recognise, for the purposes of international jurisdiction, that a party's consent to the jurisdiction of a foreign court in relation to certain claims may be imputed to further claims in some circumstances. … Such "inchoate submission" … is also possible in relation to claims which are brought pursuant to subsequent and separate proceedings in respect of the same parties, rather than just to claims which are part of the same proceedings.

The learned judge also observed that, in determining if a submission to one proceeding should be imputed to another, the court's assessment "[would] be

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[58] Compare ABOD at p 253, para 7 and p 271, paras 6–8 (First Reorganisation Proceeding), with ABOD at p 797, para 13 and p 1685, para 13 (Second Reorganisation Proceeding) as well as ABOD at p 1957, para 13 (Third Reorganisation Proceeding).

informed by concerns of fairness to both the plaintiff and the defendant, and also *a desire to disregard technical impediments created by procedural rules under both foreign and forum law*" [emphasis added]: see *Giant Light Metal* at [49].

82 In my view, the present case falls squarely within the rationale articulated by Ang J since, as mentioned at [80] above, the need for separate Reorganisation Proceedings has been because of Malaysian law requiring a fresh filing to be made every 12 months. The separate filings are part of a single and continuous restructuring effort by the Sapura Entities, such that a creditor either submits to the restructuring or he does not; he does not submit for the initial leg, but not to the subsequent legs, of the restructuring.

83 For this reason, I agree with the Sapura Entities that it is sensible for the Singapore courts to look to the substance of the matter and find that GAS's submission to the First Reorganisation Proceeding also amounted to a submission to the subsequent Reorganisation Proceedings, including the ongoing Third Reorganisation Proceeding.

84 Finally, to the extent that GAS resists a finding of submission on the basis that the subject-matter of its proof of debt in the First Reorganisation Proceeding differs from the subject-matter of the intended arbitration, this goes up against *Stichting Shell*. There, although the subject of the creditor's proof of debt in the BVI liquidation involved a different claim than that which it pursued in the Dutch courts, the Privy Council considered this to be "irrelevant", as by lodging proof of debt in the BVI liquidation, the creditor had "submitted to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it" (at [32]). In the same way that there was no difficulty in *Stichting Shell* in finding

a submission to the BVI courts' jurisdiction in respect of the creditor's claim in the Dutch proceedings based on the creditor's proof of debt in the BVI liquidation in respect of a different debt, it is nothing to the point that GAS's proof of debt in the First Reorganisation Proceeding involves a different claim than that which it intends to assert in the arbitration.

(2) The effect of GAS's submission to the Malaysian courts' jurisdiction

85 Given my finding that GAS has submitted to the Malaysian courts' jurisdiction for the Third Reorganisation Proceeding, I turn to consider the effect of such submission in respect of the arbitration agreements in the Contracts.

86 In my judgment, GAS is correct that its submission has no effect on the enforceability of the arbitration agreements. The distinction that GAS draws between the adjudicatory jurisdiction and enforcement jurisdiction of a foreign court is, to my mind, a sound one. I have already referred to it at [53] above. In *Stichting Shell*, the Board stated that it "would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on claim B"; rather, a creditor crossed the Rubicon into impermissible conduct if it did not merely seek to adjudicate the merits of the dispute in a foreign forum, but sought to use the foreign court to obtain priority access to the insolvent's assets in derogation from the cardinal principle that the debtor's assets should be distributed *pari passu*: at [31]. By the same token, the fact that GAS had submitted to the Reorganisation Proceedings did not preclude it from seeking to have its dispute with the Sapura Entities determined by arbitration, being the mode of dispute resolution that the parties had contractually agreed between themselves. Given that I have imposed

a condition that GAS takes no step towards the enforcement of any award it might obtain, the concern of priority-grabbing in *Stichting Shell* does not arise.

87 I thus find that, even though GAS has submitted to the jurisdiction of the Malaysian courts and the Third Reorganisation Proceeding, such submission has not rendered the arbitration agreements ineffective or unenforceable.

Conclusion

88 For all the reasons above, if it were necessary to do so, I would also allow the carve-out sought by GAS on the basis of the Mandatory Ground, given that (a) the arbitration agreements in the Contracts remain valid; and (b) the dispute between the parties indisputably falls within their scope. This triggers the Singapore court's mandatory obligation to enforce the arbitration agreements on GAS's request for the dispute to be resolved by arbitration.

Conclusion

89 Based on my findings on the Discretionary Ground above, I exercise my power under Art 20(6) of the Model Law to vary the automatic moratorium to allow GAS to proceed with the arbitration against the Sapura Entities. This carve-out is subject to the condition that GAS takes no step towards the enforcement of any award it obtains from the arbitration without obtaining the prior permission of this court.

90 In closing, I make one final point. GAS has raised a complaint that, in obtaining a recent extension of the restraining orders for the Third Reorganisation Proceeding from the Malaysian High Court, the Sapura Entities had surreptitiously introduced an additional prayer that amounts to an anti-suit or anti-arbitration injunction restraining it from pursuing arbitration against the

Sapura Entities; in other words, its victory in the present case would be rendered nugatory if it proceeds to arbitration in reliance of this court's decision, as it may then find itself in contempt of the Malaysian court's order. My decision in the present case makes no express or implied comment on the Malaysian court's decision. My decision to grant the carve-out sought by GAS is determined by reference to Singapore law, and any difficulty that GAS may face stemming from the Malaysian court's orders is for it to navigate and negotiate before the proper forum, which is the Malaysian court.

Aedit Abdullah
Judge of the High Court

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