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# The Consideration of Judicial Insolvency Network Guidelines in the Context of *Forum Non Conveniens* Analysis

***Three Arrows Capital Ltd and others v Cheong Jun Yoong* [2024] SGHC(A) 10**

**19 April 2024**

# LEGAL UPDATE

# In this Update

In the recent decision of *Three Arrows Capital Ltd and others v Cheong Jun Yoong* [2024] SGHC(A) 10, the Appellate Division of the High Court dismissed an application for permission to appeal against a decision of a judge of the General Division of the High Court which dismissed an application to set aside an order for service of proceedings out of jurisdiction and the service of originating claim in the British Virgin Islands.

Director Blossom Hing, Associate Director Joshua Chin and Senior Associate Claire Neoh successfully acted for Mr Cheong Jun Yoong, the Claimant in these proceedings.

## INTRODUCTION

In the recent decision of *Three Arrows Capital Ltd and others v Cheong Jun Yoong* [2024] SGHC(A) 10, the Appellate Division of the High Court ("**AD**") dismissed an application for permission to appeal against a decision of a judge of the General Division of the High Court ("**GD**") which dismissed an application to set aside an order for service of proceedings out of jurisdiction and the service of originating claim in the British Virgin Islands ("**BVI**").

Director Blossom Hing, Associate Director Joshua Chin and Senior Associate Claire Neoh successfully acted for Mr Cheong Jun Yoong in these proceedings.

## BACKGROUND

The subject of the proceedings concerns a dispute between Mr Cheong and Three Arrows Capital Ltd ("**Company**") and its appointed liquidators in respect of the ownership of certain cryptoassets.

On 27 June 2022, the Company was placed in liquidation by a Court in the BVI ("**BVI Liquidation Proceedings**"). The BVI Liquidation Proceedings were recognised in Singapore as the foreign main proceedings in August 2022 pursuant to the UNCITRAL Model Law on Cross-Border Insolvency and the BVI and Singapore Courts (among others) subsequently approved and adopted a cross-border insolvency protocol for the cooperation and coordination of proceedings between the Courts ("**CBIP**"). Among other things, the CBIP largely incorporated key terms of the Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters ("**JIN Protocol**").

In November 2022, Mr Cheong commenced proceedings in Singapore, claiming that he along with other investors beneficially owned certain assets under a trust. A few hours later, the liquidators filed an application in the BVI Liquidation Proceedings effectively seeking orders that were opposite to that sought by Mr Cheong ("**Parallel BVI Proceedings**").

In May 2023, the Singapore Court granted Mr Cheong permission to serve court papers on the Company and its liquidators. The Company and its liquidators applied to set aside the service of court papers but their application was dismissed by Justice Chua Lee Ming ("**Chua J**") of the GD for reasons set out in *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] SGHC 21. In the GD, Chua J was confronted with and decided on novel issues relating to cryptocurrency, including the principles relevant to determining the *situs* of cryptoassets. Chua J ultimately decided that the dispute had sufficient nexus to Singapore and that notwithstanding the BVI Liquidation Proceedings and Parallel BVI Proceedings, Singapore was the *forum conveniens*. An earlier update on Chua J's decision may be accessed at this link.

Concurrent with the proceedings before the Singapore Courts, the Company and its liquidators applied to serve the Parallel BVI Proceedings out of jurisdiction of Mr Cheong in Singapore and Mr Cheong applied to set aside service. The BVI Court dismissed Mr Cheong's application in December 2023 as unlike Chua J, the BVI Court was of the view that BVI was the *forum conveniens*. Leave to appeal against the BVI Court's decision has since been granted.

The Company and its liquidators applied for permission to appeal against Chua J's decision. They argued that permission to appeal should be granted as (a) there are questions of general principle decided for the first time, (b) Chua J had committed a *prima facie* case of error, and (c) there are questions of importance upon which further argument and a decision of a higher tribunal would be to public advantage. In this regard, the Company and its liquidators raised several alleged errors and no fewer than eight alleged questions of general principle and/or importance which arose from Chua J's decision, including questions relating to the determination of *situs* and to the interpretation of the CBIP.

## DECISION OF THE APPELLATE DIVISION OF THE HIGH COURT

The AD dismissed the Company and its liquidators' application for permission.

In relation to the issue of *situs* of cryptoassets, the AD found that the issue was not a question of such importance that a decision of the higher tribunal would be to the public advantage. The BVI Court and the Singapore Court had taken the same approach in determining the *situs* of the cryptoassets, and in any event, an appeal against Chua J's decision on *situs* would not alter the outcome of the appeal. This was because even if the *situs* of the cryptoassets was not Singapore, the dispute would still have sufficient nexus to Singapore given Chua J's finding that the cause of action arose in Singapore.

Crucially, the AD highlighted that an applicant who seeks permission to appeal a decision must also show that the denial of leave may conceivably result in a miscarriage of justice. Permission to appeal will not be granted over an issue that will not alter the outcome of the case.

The Company and its liquidators also argued that a decision by an appellate Court was necessary to provide guidance on the issue of *forum conveniens* in a case where one of the parties was subject to foreign main insolvency proceedings elsewhere. The AD disagreed and held that it was a "*settled point"* that civil domestic courts may well be *forum conveniens* even where the main insolvency proceedings are elsewhere.

Separately, the AD noted that there had been "*differences*" in the decisions of the Singapore and BVI Courts on various issues leading up to the

decision on *forum conveniens*, and that the effect of Chua J's and the BVI Court's decisions is that there will be parallel proceedings in two jurisdictions, giving rise to a risk of inconsistent findings. Of potential relevance was the CBIP. However, the Company and its liquidators accepted that it was unclear whether the CBIP would apply to the proceedings, given that the proceedings involving Mr Cheong were civil rather than insolvency in nature.

The AD disagreed with the Company and its liquidators that Chua J had committed a *prima facie* case of error. The AD held that in a *forum conveniens* analysis, the decision is "*not a scientific exercise but one of judgment*". While the BVI Court may have reached a different conclusion from Chua J on the facts, that was not sufficient to show that there was a *prima facie* case of error in Chua J's decision.

Finally, the Company and its liquidators also argued that the issue of whether the CBIP applies to Singapore civil proceedings (given that the CBIP is meant to govern "insolvency" proceedings as defined in the protocol), and the manner of its application, are questions of importance upon which a decision of a higher tribunal would be to the public advantage. The AD decided that what was raised was essentially a question of interpretation of the scope of the CBIP, which would be peculiar to the precise factual matrix of the dispute. That therefore did not constitute a general point of importance in the context of a *forum non conveniens* decision.

KEYPOINT

*Permission to appeal will only be granted if the denial of leave may conceivably result in a miscarriage of justice. The fact that a different Court reached a different conclusion on the same facts may not suffice.*

## COMMENTARY

The AD's decision provides useful guidance on the requisite threshold for permission to appeal. Even if the decision below and putative appeal engage novel or interesting issues of law, permission to appeal will not necessarily be granted if there will be no change to the outcome of the decision below.

In addition, while the appellate Court is open to considering decisions from other jurisdictions, the mere fact that a different Court has ruled differently does not necessitate the granting of leave to appeal. Such differences can be addressed in the leave to appeal decision (as was done in this case), or in a future decision.

Of note to practitioners and corporations who are involved in cross-border transactions, in the event of a cross-border insolvency, a Court-to Court protocol may be implemented, such as that set out in the JIN Protocol.

The applicability of the JIN Protocol (against which the CBIP was largely modelled after) did not feature in the *forum conveniens* analysis, and in turn the AD's consideration, on the facts of this case. The JIN Protocol may however under certain circumstances prove to be a relevant, or even material factor, particularly so given increasingly cross-border nature of insolvencies and restructurings.

If you have any questions or comments on this article, please contact:

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