

CORPORATE  
ARBITRATION V INSOLVENCY

# The interplay between arbitration and insolvency

The Singapore Court of Appeal considers the treatment of a winding-up application where the parties have agreed to refer disputes to arbitration

In *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33, the Singapore Court of Appeal (the Singapore Court) recently grappled with an issue of paramount importance where a creditor seeks to recover a debt arising under a contract containing a clause which provided that disputes would be determined through arbitration (arbitration agreement).

The court will stay court proceedings concerning a disputed debt if the debt is shown to arise under a contract containing an arbitration agreement. With this in mind, the Singapore Court in *AnAn* considered whether it would be appropriate to stay or dismiss court proceedings in connection with the same disputed debt which are commenced upon the presentation of a winding-up application. The Singapore Court concluded that the answer is, in essence, 'yes'.

This is highly significant because the mere presentation of a winding-up application, which a creditor may use for strategic purposes, can have very serious ramifications for the commercial viability of a debtor's business.

*AnAn* recognises that where parties have agreed to resolve disputes by arbitration, one party should not ordinarily be able to side-step that agreement by winding up the other for non-payment of a disputed debt. If the party threatened with a winding-up application (i.e. an alleged debtor) disputes the debt in good faith and/or has its own claim under the contract, then it will be appropriate for the court to stay or dismiss the winding-up application in favour of arbitration.

Indeed, the Singapore Court held that the alleged debtor need only identify, on a *prima facie* basis, the existence of a bona fide dispute or cross-claim. There will be no examination of the merits of the parties' arguments, which will await an arbitration.

This contrasts with the so-called *triable issues* standard of review. Where this approach applies, the court examines the

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available evidence to verify that the dispute or cross-claim raised by the alleged debtor has substantial grounds. Only then will a court stay or dismiss a winding-up application. The practical consequence is to make it more difficult, time-consuming and expensive for an alleged debtor to resist a winding-up application in favour of arbitration.

### Significance of AnAn

Some jurisdictions, including England and Wales, and now Singapore, adopt a version of the (arguably more debtor friendly) *prima facie* standard of review. Other jurisdictions, such as Hong Kong SAR, apply (or appear to be leaning towards) a version of the (arguably more creditor friendly) *triable issues* standard.

Since there is no uniform approach across the common law world, it is even more critical for a commercial party, as a potential future creditor or debtor, to understand at the time of entering into a contract which approach may apply if later forced to advance or resist a winding-up application. This could be a critical factor underpinning a party's preferred method of dispute resolution for a contract.

Furthermore, the applicable standard of review is something which creditors and debtors will then wish to keep in mind when assessing how best to address any later dispute.

The decision in *AnAn* will help parties navigate these issues in Singapore and may prove to be persuasive as and when further judicial attention is given to this important issue in other jurisdictions.

### The underlying facts

AnAn (Singapore) Ptd Ltd. (AnAn), a Singapore holding company, and VTB Bank PJSC (VTB), a state-owned Russian Bank, entered into a global master repurchase agreement (GMRA). Under the GMRA, AnAn agreed to sell to VTB global depository receipts (GDR) of shares in EN+ Group PLC (EN+), before repurchasing them later at pre-agreed rates.

The parties agreed that disputes arising out of, or connected with, the GMRA were to be referred to arbitration.

Shortly after the parties entered into the GMRA and the GDRs changed hands, US sanctions were imposed on major shareholders of EN+, causing the value of the GDRs to plummet. VTB issued a margin call, which AnAn failed to satisfy. A default notice and close-out payment demand followed. When AnAn failed to pay, VTB issued a statutory demand and then a winding-up application against AnAn.

AnAn resisted the winding-up by disputing the debt on various legal and factual grounds. However, the court applied the *triable issues* standard to the defences raised by AnAn and rejected them. The winding-up application was thus allowed and AnAn appealed.

### Applicable standard of review

#### No international consensus

The Singapore Court began by surveying the way in which the applicable standard of review is addressed in other common law jurisdictions, including England and Wales and Malaysia, where something approximating the *prima facie* standard has been adopted, and the Eastern Caribbean Court, which favours the *triable issues* standard.

As for Hong Kong SAR, it was correctly noted that the law is in a state of flux. While

## AnAn rejects an approach which may well make it more difficult, time-consuming and expensive for an alleged debtor to resist a winding-up application in favour of arbitration

the *prima facie* standard was adopted by the Hong Kong Companies Court in the well-known 2018 decision in *Re Southwest Pacific Bauxite (HK)* [2018] HKLRD 449, significant doubt has subsequently crept in. Most notably, this approach was questioned by the Hong Kong Court of Appeal in 2019

and, more recently, in the first instance decision in *Dayang (HK) Marine Shipping Co., Limited v Asia Master Logistics Limited* [2020] HKCFI 311 (Dayang), which surfaced a few weeks before the Singapore Court's decision in *AnAn*. The Hong Kong SAR therefore appears to be headed back towards the *triable issues* standard.

Singapore, on the other hand, now joins the *prima facie* club, thus reinforcing the jurisdictional divide on this issue. In arriving there, the Singapore Court rooted its decision on the threefold imperatives of promoting (i) coherence in the law, (ii) the principle of party autonomy, and (iii) certainty and savings. Each aspect touches on important practical and policy points.

#### Coherence in the law

The Singapore Court decided that coherence in the law is necessary to prevent abuse of winding-up applications by creditors.

This is because an alleged debtor can seek a stay or dismissal of litigation in relation to a disputed debt in a fairly straightforward manner, simply by identifying, to a basic *prima facie* standard, that the dispute is within the scope of an arbitration agreement. However, to achieve the same outcome in the context of a winding-up application, the alleged debtor would need to marshal evidence and demonstrate one or more meritorious defences on the basis of the *triable issues* standard of review. This dichotomy of approaches thus promotes arbitrary or tactical use of the winding-up jurisdiction.

Indeed, the Singapore Court noted that retaining the *triable issues* standard would make "the winding-up regime vulnerable to

abuse by creditors, who may utilise the draconian threat of liquidation to pressurise the alleged debtor into payment. This would undercut the parties' pre-agreed method of dispute resolution, being arbitration."

The conclusion reached was that there is no basis to apply different standards to what

is essentially the same disputed debt. There should be a coherent, consistent approach. If the *prima facie* standard applies for ordinary claims which are subject to arbitration, it should likewise apply to winding-up applications, which carry far more severe consequences for a company.

In Hong Kong SAR, the court in *Dayang* similarly referred to the risk of winding-up being used by a creditor as a pressure tactic to strong-arm an alleged debtor into paying, but took the view that this could be policed by the court's inherent powers to address such abuse, through appropriate cost orders for example.

From a public policy perspective, the Singapore Court found a way to square the possible tension between the arbitration and insolvency regimes by holding that until a debt is established through arbitration, the insolvency regime does not come into play. This is because the question whether a party is in fact a debtor, is precisely the question the parties agreed to refer to arbitration.

### Party autonomy

Another problem the Singapore Court identified is that the *triable issues* standard offends against the principle of party autonomy where parties have explicitly agreed to refer any disputes under the relevant contract to arbitration.

It would be contrary to such an agreement for the court to take the place of an arbitral tribunal by examining and passing judgment on the alleged debtor's defences, thereby eroding any of the advantages which the parties sought to obtain by agreeing to refer disputes to arbitration in the first place.

The Hong Kong SAR court in *Dayang* explored this issue but arrived at a different conclusion. It held that the *triable issues* standard does not cut across the principle of party autonomy because the presentation of a winding-up application falls outside of the scope of an arbitration agreement. This is because the court does not substantively determine the alleged dispute in the context of hearing a winding-up application. This is left to the liquidator later in the proof of debt process.

The Singapore Court dismissed this notion, since even if the decision-making function is offloaded to a liquidator, this would still undercut the agreed method of dispute resolution.

Moreover, there could be dire consequences if, as the judge in *Dayang*

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contemplated, a liquidator were subsequently to reject a debt relied on by a creditor in support of a winding-up application. A winding-up order is irreversible (only a permanent stay is possible), so the result would be irreparable harm to the debtor company's stakeholders.

### Certainty and savings

Finally, the Singapore Court recognised the importance of certainty that a dispute will be resolved in the manner agreed between the parties. The *triable issues* standard would require an alleged debtor to convince the court that defences to an alleged debt have merit in order to obtain a stay or dismissal of a winding-up application in favour of arbitration. This would likely involve material time and expense, and the arguments would later need to be rehashed before a tribunal.

### Scope and application of the prima facie standard

Singapore has thus opted, as the Singapore Court put it, for limited judicial intervention. Unless exceptional circumstances apply or there is an abuse of process, or the debt is not genuinely disputed, a winding-up application will be dismissed or stayed if the debt arises under a contract containing an arbitration agreement.

But what about possible abuses of the lower review standard by debtors who seek to buy time and delay an inevitable insolvency, and the corresponding prejudice some creditors will undoubtedly experience?

The Singapore Court said there was no question of an automatic stay. The bona fides of the debtor in raising a dispute would remain a relevant factor, although this would

not be a back door for parties to run arguments on the merits of the dispute.

The threshold for finding that a debtor has been abusive will be high, but abuse could manifest in a number of different scenarios. Some examples were highlighted by the Singapore Court, including where the debt is admitted both as to liability and quantum, where the debtor has waived its right to insist on arbitration and, importantly, where a debtor-company seeks to stave off substantiated concerns which justify the invocation of the insolvency regime.

This might be where assets have gone missing or other pressing circumstances indicate a need to engage insolvency legislation protections.

Once satisfied that there is a *prima facie* dispute which falls within the scope of an arbitration agreement, the appropriate outcome would usually be the dismissal of the winding-up application, rather than a stay, given the ongoing damage a lingering winding-up application is likely to inflict on the company. However, with respect to possible abuse, the court recognised that there would be rare situations where a debtor-company could strategically manipulate the lower review standard with a view to staving off a winding-up application, thereby leaving the debtor unrestrained to continue trading, deplete assets and/or pay off smaller creditors who are not bound to arbitrate to the detriment of other creditors who are and could then be left worse off in a later winding up after an arbitration had run its course.

The Singapore Court foresaw some ways to mitigate these problems, including a 'middle ground' safeguard of requiring the prompt resolution of a dispute through arbitration. The court also confirmed that where there are legitimate concerns about the solvency of a company as a going concern and that no *triable issues* are raised by the debtor, the court might impose the control mechanism of ordering a stay (rather than dismissal) of a winding-up application so that it could be proceeded with if, for example, it could be shown that the debtor company had no genuine desire to arbitrate the dispute or if it was paying other creditors to stave off a winding-up to the detriment of the applicant creditor.

In any event, said the court, "any possible misuse of the *prima facie* standard must be contrasted with the real possibility of abuse by creditors unilaterally choosing the

insolvency route to bypass their obligation to refer the dispute to arbitration.”

### Impact on commercial practice

The Singapore Court recognised in *AnAn* that applying the *prima facie* standard may well mean that commercial practice would have to be adjusted if the standard of review is lowered, but that such an adjustment would be in the right direction as parties would be discouraged from bypassing an arbitration agreement.

Whether or not an adjustment is required, the decision certainly flags the commercial importance for parties to understand from the outset the consequences of including an arbitration agreement in their contracts.

In Singapore (and other places where the *prima facie* standard has been adopted) we now know that it will be difficult for a creditor to leapfrog an arbitration to a winding-up. Where they have agreed one, parties can expect to be held firmly to an arbitration agreement, even in a potential insolvency setting. This is in contrast to a stronger emphasis on not fettering a creditor’s ability to invoke the statutory insolvency regime in other jurisdictions.

It is therefore all the more important to pay attention to the fine print of an arbitration agreement and possibly to consider suitable carveouts for insolvency proceedings if a party wishes to preserve the ability to wind up a counterparty which cannot or refuses to pay.

If problems do later emerge, a creditor should think carefully about the wisdom of

applying to wind up a counterparty rather than proceeding directly to arbitration, and a debtor should be cognizant of its ability to insist on arbitration when faced with a winding-up application.



**Daniel Cohen**  
Partner  
Akin Gump Strauss Hauer & Feld LLP  
Hong Kong SAR



**Naomi Moore**  
Partner  
Akin Gump Strauss Hauer & Feld  
Hong Kong SAR



**Hannah Wright**  
Registered foreign lawyer  
Akin Gump Strauss Hauer & Feld  
Hong Kong SAR