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Singapore Court of Appeal ruling opens door for Hong Kong decision on arbitration/winding-up priority

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A recent Singapore Court of Appeal decision has again highlighted the different approaches taken by courts when dealing with winding-up proceedings concerning a disputed debt where an arbitration clause covers the debt in question.

In *AnAn Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 (AnAn), the Singapore Court of Appeal confirmed that in respect of a winding up application grounded on a debt which is subject to arbitration, the court should generally stay or dismiss a winding up application where there is a dispute in relation to the debt.

The move – which tips Singapore firmly towards the "pro-arbitration" side of the debate, at the risk of creditors being exposed to insolvent companies continuing to trade for longer – also raises the issue of when the Hong Kong courts will finally address head-on an issue that has caused heated debate since the first instance decision of the Honourable Mr. Justice Harris in *Lasmos Limited v. Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426.

Hong Kong court decisions since *Lasmos* have criticised the approach taken in striking obiter remarks, leading the Singapore Court of Appeal to describe the position in Hong Kong as "unsettled."

Collateral damage

The appellant, AnAn Group (Singapore) Pte Ltd, and respondent, VTB Bank (Public Joint Stock Company), were parties to a global master purchase agreement (the "Agreement"). The Agreement documented a loan from the respondent to the appellant, in relation to which the appellant was required at all times to maintain sufficient collateral. The Agreement also contained an arbitration clause which provided that any dispute arising out of or in connection with it would be referred to arbitration.

The value of the appellant's collateral deteriorated and the appellant failed to meet its obligations. The respondent issued a statutory demand against the appellant for the sum of approximately US$170 million, which went unsatisfied. The respondent commenced winding up proceedings against the appellant in the High Court of Singapore.

At first instance, the appellant disputed the winding up proceedings on the basis that (i) the proceedings should be stayed in favour of arbitration in accordance with the arbitration agreement, (ii) there was an event of force majeure or frustration, and (iii) the debt amount was wrongly stated. The High Court held that the disputes raised by the appellant were not bona fide and ordered the appellant be wound up.

The appellant appealed against the winding up order.

Last word?

Having surveyed jurisprudence across numerous jurisdictions, such as England & Wales, Hong Kong, Malaysia and Eastern Caribbean, the Court of Appeal set out the following test. Where a creditor presents a winding up petition and the debtor disputes the debt, the court should generally dismiss the petition where

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 as an abuse of the court's process.

All the debtor would need to show is that there is a *prima facie* dispute between the parties, holding that if the higher 'triable issue' standard of review were to apply, this could encourage creditors to abuse the winding up jurisdiction by using it as a forum to adjudicate on a disputed debt which is subject to arbitration.

The Court of Appeal held that a party did not lose its genuine desire for recourse to arbitration just because its case appears to be weak, and the court should not place itself in the shoes of the tribunal by examining the merits of the debtor's defences.

Abuse of process – a high threshold

To safeguard against the lower *prima facie* standard of review, the Court of Appeal held that a stay or dismissal would not be granted even if the standard has been met if it would result in an abuse of process. The Court of Appeal admitted that the threshold for abuse of process is very high, such as where the debtor had previously admitted to the debt and is seeking to stave off substantiated concerns which justify invoking the insolvency regime, such as where there was a basis to conclude there had been fraudulent preferences.

Dismissal or stay of winding up application?

In AnAn, the Court of Appeal eventually held that the disputes raised by the appellant had satisfied the *prima facie* standard of review. There was no evidence indicating legitimate concerns relating to the appellant's solvency. Accordingly, the Court of Appeal allowed the appellant's appeal against the winding up order and dismissed the winding up application in its entirety.

Hong Kong

The law in Hong Kong for now remains that set out in *Lasmos*, that a winding up petition should generally be dismissed if:

- The company disputes the debt relied upon by the petitioner.
- The contract under which the debt is alleged to have arisen contains an arbitration clause that covers any dispute relating to the debt.
- The company takes the steps required to commence the arbitration.

(see Hogan Lovells publication, Winding-up petition v arbitration clause: Hong Kong court dismisses winding-up petition in favour of arbitration clause).

The Court of Appeal questioned this approach in *But Ka Chon v. Interactive Brokers LLC* [2019] HKCA 873, in which Vice President of the Court of Appeal Madam Justice Kwan made a series of pithy and obiter observations, some centred around the public policy reasons of safeguarding a creditor's statutory right to petition for bankruptcy or winding up on the ground of insolvency (see Hogan Lovells publication, Back to basics – Hong Kong Court of Appeal queries approach to winding-up petitions).

But Ka Chon was followed by the decision in *Dayang (HK) Marine Shipping Co., Limited v. Asia Master Logistics Limited* [2020] HKCFI 311, in which Deputy High Court Judge William Wong emphasised the traditional Hong Kong position, that where a debtor company intends to dispute the existence of a debt, it must show there is a bona fide dispute on substantial grounds. The test should apply in all cases whether or not the debt had arisen from a contract incorporating an arbitration clause. The existence of an arbitration agreement should be regarded as "irrelevant" to the exercise of the court's discretion (see Hogan Lovells publication, A strong statement – Hong Kong court says arbitration agreement is "irrelevant" to the exercise of court's discretion in a winding-up).

These remarks led the Singapore Court of Appeal to describe the law in Hong Kong as "unsettled" and it is certainly the case that a higher court decision in Hong Kong could help clear the air.

A fundamental tension

When the opportunity arises, the court will have to confront the issue of whether the *Lasmos* approach represents an unjustified encroachment into the creditor's statutory right to present a winding up petition, something that would render the arbitration clause unenforceable as a matter of public policy.

It was a tension recognised by the Singapore Court of Appeal itself in AnAn, citing an earlier court decision:

"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 economy efficiency and optimal returns for creditors."

With the decision in AnAn, Singapore has further attempted to cement itself as an arbitration-friendly jurisdiction and aligned with other common law jurisdictions like England & Wales and Malaysia which had earlier adopted the *prima facie* standard of review.

The decision has been criticised as less than straightforward, not least because, in inviting the creditor to demonstrate legitimate concerns about the debtor company's solvency (something a creditor will inevitably try to do), it may seem almost inevitable that the court will have to consider the underlying merits of the dispute, something the Court of Appeal insisted should not need to take place.

Arbitration v. winding-up petition – the tests

We summarise below by way of illustration the variations in approach between various common law jurisdictions.

Jurisdiction	The test
Singapore	The court will generally dismiss the petition where there is a valid arbitration agreement between the parties and the dispute falls within its scope, provided that the dispute is not being raised by the debtor as an abuse of the court's process.
England & Wales	The court will generally dismiss the petition without investigating whether the alleged debt is *bona fide* disputed on substantial grounds, save in wholly exceptional circumstances (*Salford Estates (No 2) Ltd v. Altomart Ltd* (No 2) [2015] 3 WLR 491
Malaysia	Winding up application will generally be dismissed where there is a *prima facie* dispute of the debt.
British Virgin Islands	The court will generally dismiss the petition where the debtor can show triable issues in relation to the debt.
Hong Kong	The court will generally dismiss the petition, provided the company has taken steps to commence the arbitration (the *Lasmos* approach). Questioned by *obiter* remarks in subsequent cases, including in the Court of Appeal.

We are not qualified to advise on the laws of Malaysia or the British Virgin Islands. Any statement on the laws of these countries is necessarily based on our own research and experience. This document is not intended to be a relied upon as a substitute for taking specific legal advice on the particular subject matter.

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