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Sian v Halimeda: What is the Future for *AnAn*?

In 2014, the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ("***Salford Estates***") held that a winding up petition brought based on a disputed debt subject to an arbitration agreement ought to be stayed or dismissed, save in "*wholly exceptional circumstances*" (the "***Salford* Approach**"). Since then, the leading arbitration jurisdictions in the common law world have grappled with the question:

> *When should a winding up petition based on a disputed debt subject to an arbitration agreement be stayed or dismissed?*

The question arises from the seemingly conflicting areas of public polices underpinning the insolvency and arbitration regimes. On the one hand, it is in the public interest that there should be a relatively straightforward means of placing an insolvent company into liquidation. On the other hand, it is also public policy that parties who have agreed to resolve their disputes by arbitration should be held to their agreement.

In Singapore, the question was apparently answered in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("***AnAn v VTB***"). The Singapore Court of Appeal ("**SGCA**") largely followed *Salford Estates* and held that the Singapore courts will apply a *prima facie* standard of review when determining whether to stay or dismiss a winding up petition brought based on a disputed debt subject to an arbitration agreement.

In the recent judgment of the Judicial Committee of the Privy Council in *Sian Participation Corp (in liquidation) v Halimeda International Ltd* [2020] UKPC 16 ("***Sian v Halimeda***"), the Privy Council concluded that *Salford Estates* was wrongly decided. Instead, the Privy Council found that a winding up petition brought based on a disputed debt subject to an arbitration agreement ought to be stayed or dismissed only when the debt is disputed on genuine and substantial grounds.

The decision in *Sian v Halimeda* calls into question whether the *AnAn* test is correct, or whether it needs to be replaced with a different test.

The decision in *Sian v Halimeda*

Facts

The appeal in *Sian v Halimeda* was against the decision of the Eastern Caribbean Court of Appeal ("**ECCA**") to place the appellant, Sian Participation Corp ("**Sian**"), into liquidation in the BVI pursuant to the winding up petition brought by the respondent, Halimeda International Ltd ("**Halimeda**").

Halimeda claimed that it was a creditor of Sian for approximately US$226 million (the "**Debt**") due under a facility agreement (the "**Facility Agreement**"), pursuant to which Halimeda had advanced a term loan to Sian. Sian disputed that the Debt was due and payable on the basis of a cross-claim and/or set-off. The Facility Agreement included a generally worded arbitration agreement that provided that any dispute between parties was to be referred to arbitration.

Halimeda applied to place Sian into liquidation on the basis that it was both cash flow and balance sheet insolvent. At first instance, the Judge held that Sian had failed to show that the Debt was disputed on genuine and substantial grounds or that there were other reasons why the winding up petition ought to be dismissed or stayed. He thus ordered Sian to be put into liquidation. Sian's appeal against the Judge's decision was dismissed by the ECCA.

The Privy Council's decision

The key issue before the Privy Council in *Sian v Halimeda* was whether the *Salford* Approach was correct. The Privy Council found that:

(a) *Salford Estates* and the cases which have followed it were wrongly decided; and

(b) Instead of the *Salford* Approach, as a matter of BVI and English law, the correct test when determining whether a winding up petition brought based on a disputed debt subject to an arbitration agreement ought to be stayed or dismissed, is whether the debt is disputed on genuine and substantial grounds.

On the facts of the case, the Privy Council held that Sian had failed to show that the Debt was disputed on genuine and substantial grounds, and no question of remission back to the ECCA arose.

The Privy Council set out the following key reasons for its conclusion:

(a) Under the Insolvency regime in the BVI and UK:

  (i) The process of obtaining an order winding up a debtor company does not require or involve any pursuit or adjudication of the petitioner's claim to be a creditor, either as to liability or quantum;

  (ii) The insolvency court only proceeds to place a debtor company into liquidation on the provisional assumption that it is insolvent, which may turn out to be untrue; and

  (iii) A winding up petition brought based on a genuinely disputed debt on substantial grounds will generally be dismissed.

(b) Under the arbitration regime in the BVI and UK:

  (i) The relevant statutory provisions and Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") provide for a mandatory stay of legal proceedings at the request of a party to an arbitration agreement when a matter in those proceedings is referrable to arbitration;

  (ii) Arbitration agreements have both positive and negative aspects. A positive obligation to arbitrate matters which fall within the arbitration agreement, and a negative obligation not to commence proceedings in respect of such matters in the courts or any other legal forum; and

  (iii) There is a broad international consensus that the approach to the interpretation of arbitration agreements should be pro-arbitration and expansive. In this regard, the English courts have set a very low threshold for the identification of a dispute sufficient to require arbitration. All that is necessary is that the debt should not be admitted.

(c) A creditor's winding up petition does not resolve or determine anything about the petitioner's claim. The presentation of the petition thus does not offend (i) the negative obligation under an arbitration agreement; and/or (ii) the public policies underlying the arbitration regime.

(d) None of the general objectives of arbitration regime – efficiency, party autonomy, *pacta sunt servanda* and non-interference by the courts – are offended by allowing a winding up to be ordered where the petitioner's unpaid debt is not genuinely disputed on substantial grounds.

(e) To require a petitioner to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation adds undue delay, trouble and expense.

(f) Any concerns as to parties attempting to (i) bypass an applicable arbitration agreement; and/or (ii) use a winding up petition as a means of applying improper pressure on a company, can be addressed by treating the petitioner's conduct as types of abuse of process. The insolvency court can deal with abuses of its processes by ordering indemnity costs against offending petitioners.

The Privy Council's findings in *Sian v Halimeda* also applied in relation to exclusive jurisdiction clauses. The presence of an applicable exclusive jurisdiction clause should thus not lead to the stay or dismissal of a winding up petition unless the petitioner's debt is genuinely disputed on substantial grounds.

The decision in *AnAn v VTB*

In *AAG v VTB*, the issue before the SGCA was whether the "*triable issue*" or *prima facie* standard of review applied when determining whether to stay or dismiss a winding up petition based on a disputed debt subject to an arbitration agreement.

Under the narrower "*triable issue*" standard, the insolvency court would stay or dismiss a winding up petition if the debtor company proved that the dispute as to the debt was raised in good faith and on substantial grounds.

The SGCA held that the *prima facie* standard of review applied, and laid out the applicable *AnAn* test. Under the *AnAn* test, the Singapore courts will stay or dismiss a winding up petition where it appears on a *prima facie* basis that:

(a) There is a valid arbitration agreement between parties;

(b) The dispute as to the debt or cross-claim falls within the scope of the arbitration agreement; and

(c) The dispute is not being raised in abuse of the Court's process.

In adopting the *AnAn* test, the SGCA followed in the footsteps of *Salford Estates* and adopted a wide definition of disputed debts in the context of winding up proceedings. The SGCA's key reasons for doing so were as follows:

(a) Adopting the *prima facie* standard of review would promote coherence between the insolvency and arbitration regimes concerning stay applications.

(b) By adopting the *prima facie* standard for winding up proceedings, creditors would be discouraged from abusing the insolvency court's winding up jurisdiction to avoid the parties' agreed method of dispute resolution – i.e. arbitration.

(c) Replacing the "*triable issue*" standard with the *prima facie* standard would give effect to the principle of party autonomy. Under the "*triable issue*" standard, the insolvency court would have to critically consider the merits of the debtor company's defences, despite parties' agreement that such disputes ought to be determined by arbitration.

(d) If the insolvency court winds up a debtor company on the basis that no triable issue was demonstrated, this would undercut parties' pre-dispute bargain by offloading the determination of the dispute to the appointed liquidators, where such determination ought to be made by an arbitrator.

(e) The "*triable issue*" standard also created uncertainty by forcing alleged debtor companies to convince the insolvency court that there was a substantial and *bona fide* dispute before the winding up petition could be stayed or dismissed in favour of arbitration. This would cause parties to incur significant costs in arguing on the merits of the dispute before the courts, where the same should be referred to arbitration.

Following *AnAn v VTB*, the Court of Appeal provided further clarification as to the applicability of the *AnAn* test in *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 ("***Founder***"). In *Founder*, the SGCA broadly divided winding up petitions where there is a dispute as to indebtedness into 2 categories:

(a) *Where the dispute in question is not governed by an arbitration agreement*: The approach the insolvency court takes in such circumstances is to determine whether there is a dispute raised in good faith and on substantial grounds – i.e. the "*triable issue*" standard. Where that is found to be the case, the insolvency court will typically dismiss or stay the winding up petition.

(b) *Where the dispute in question is governed by an arbitration agreement*: When a party brings a winding up petition in breach of an arbitration agreement, the debtor company may apply for the proceedings to be stayed or dismissed. The *AnAn* test would apply, and a stay or dismissal will typically be granted if the Court is satisfied on a *prima facie* basis that there is a valid arbitration agreement between the parties and the dispute falls within the scope of that agreement.

On the facts in *Founder*, the SGCA held that the *AnAn* test was not applicable, and the "*triable issue*" standard of review applied. This was because the debtor company disputed liability for the petitioner's debt on the basis that

the contracts from which the debts arose were sham contracts that were null and void. In light of the debtor company's own position, it was precluded from relying on the arbitration agreements in the contracts to seek a stay or dismissal of the petition.

The future of the *AnAn* test

The insolvency and arbitration regimes in Singapore are largely similar to those in the BVI and UK.[1] The decision of the Privy Council in *Sian v Halimeda* thus raises doubt as to whether the *AnAn* test and the reasons for it remain correct when:

(a) The presentation of a winding up petition does not appear to offend the public policies underlying the arbitration regime given that the petition does not resolve or determine anything about the petitioner's claim.

(b) Winding up a debtor company where the petitioner's unpaid debt is not genuinely disputed on substantial grounds:

  (i) Does not appear to offend the general objectives of the arbitration regime; and

  (ii) Does not automatically offload the determination of the dispute to the appointed liquidators as it remains open to the liquidators to refer the dispute to arbitration for determination.

(c) Costs incurred by a debtor company in proving that there is a substantial and *bona fide* disputed debt subject to an arbitration agreement must also be weighed against the costs incurred by a petitioner forced to go through an arbitration where there is no genuine or substantial dispute.

(d) The abuse of process doctrine is well established in Singapore, and the Singapore courts are competent to deal with parties attempting to (i) bypass an applicable arbitration agreement; and/or (ii) use a winding up petition as a means of applying improper pressure on a company.

The SGCA has yet to have the opportunity to consider and address *Sian v Halimeda*. As such, it remains to be seen whether the *AnAn* test will remain good law, or whether the Singapore courts will adopt a different test.

If the *AnAn* test is to be replaced, the way forward may be to return to the "*triable issue*" standard of review. It is arguable that doing so would provide petitioners and debtor companies with certainty as to the applicable test when a winding up petition is brought based on a disputed debt subject to an arbitration agreement.

Following the decision in *Founder* there appears to be some uncertainty as to when the *AnAn* test applies. In particular, it appears that the insolvency court must first consider whether a debtor company's position in resisting the winding up petition precludes it from invoking the *AnAn* test. Such confusion may perhaps be avoided if the "*triable issue*" standard of review is the singular test which applies regardless of whether the disputed debt is subject to an arbitration agreement.

[1] See (i) s 125(1) of the Insolvency, Restructuring and Dissolution Act 2018 which provides that the insolvency court has the discretion to decide whether to wind up a debtor company, or stay or dismiss a winding up petition; (ii) s 3 of the International Arbitration Act 1994 ("**IAA**") which gives effect to Article 8 of the Model Law; (iii) s 6 of the IAA which provides that the Singapore courts must grant a stay of proceedings so long as the matter is subject to an arbitration agreement; and (iv) s 6 of the Arbitration Act 2001 which provides that the Singapore courts have the discretion to decide whether to stay legal proceedings in favour of domestic arbitrations, which must be exercised in a manner that gives weight to the autonomy of the arbitral process.

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