Arbitrable disputes in the context of winding up proceedings

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This note discusses two recent decisions of the Court of Appeal of Singapore[1] that dealt with the standard of review to be applied in winding up proceedings where a debtor asserts that there is a dispute which parties agreed to resolve by way of arbitration.

Winding up proceedings

It is quite often that we see contracts providing for disputes arising under the contract to be resolved by way of arbitration.

If there is a debt arising from such a contract, the party who is the creditor may choose to take the position that there is no dispute on the debt and commence winding up proceedings against the other party.

If the other party (who will be the debtor) is able to show that there is a dispute on the debt, the creditor would not succeed in the winding up proceedings.

The question that follows is what is the threshold of information required by the debtor in order to show that there is a dispute? Looking at it another way, the question that follows is what is the *standard of review*[2] when a court is faced with an assertion by a debtor that there is a dispute on the debt?

Earlier there was some doubt on the standard of review. In a High Court decision reported in 2016[3] it was held that the debtor had to show a "*prima facie*" case of a dispute. However, in a High Court decision reported in 2018[4] it was held that the debtor had to show a "*triable issue*" on the dispute. Later in another High Court decision reported in 2019[5] it was held that the debtor merely had to show a "*prima facie*" case of a dispute.

Part of the doubt arose from the laws governing winding up proceedings. In winding up proceedings, a debtor is required to show that there is a "*triable issue*" on his dispute with the debt.

The difference is important because it is easier to establish a "*prima facie*" case of a dispute than it is to establish a "*triable issue*" on a dispute.

Prima facie case

AnAn

The doubt has now been laid to rest by the decision of the Court of Appeal in the case of ANAN GROUP (SINGAPORE) PTE LTD V VTB BANK (PUBLIC JOINT STOCK COMPANY) [2020] SGCA 33 ("**AnAn**").

AnAn was an appeal from the High Court decision that was reported in 2018[6].

After reviewing the law, the High Court decisions reported in 2016, 2018 and 2019 and the position in other jurisdictions, the Court of Appeal held that the standard of review was a "*prima facie*" case and not a "*triable issue*".

At [56] of AnAn the Court of Appeal said the following:

"In our judgment, when a court is faced with either a disputed debt or a cross-claim that is subject to an arbitration agreement, the prima facie standard should apply, such that the winding up proceedings will be stayed or dismissed as long as (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 in abuse of the court's process."

Facts of AnAn
In AnAn, the Appellant and the Respondent entered into an agreement under which the Appellant would sell and repurchase from the Respondent "global depository receipts". The agreement provided for disputes between parties to be resolved by way of arbitration.

The Respondent asserted that there was a default by the Appellant and sought payment of a termination sum calculated and quantified in accordance with the agreement. The Appellant denied liability on the basis that there was a frustration of the agreement and also denied the quantum of the amount payable.

The Respondent disagreed with the Appellant and commenced winding up proceedings against the Appellant.

Decision
At first instance the High Court held that the "*triable issue*" standard of review was the relevant threshold for the Appellant to meet. The High Court also held that the Appellant did not meet this requirement and accordingly made a winding up order against the Appellant.

On appeal to the Court of Appeal the decision was reversed. The Court of Appeal held that the standard of review was a "*prima facie*" case and not a "*triable issue*" on a dispute. The Court of Appeal also held that the Appellant did meet this standard and dismissed the Respondent's winding up application.

Rationale
The rationale for the decision by the Court of Appeal was that there should be coherence with the "party autonomy" principle in the field of arbitration and stay applications made on the basis of an agreement to refer disputes to arbitration in which the "*prima facie*" case standard of review applied.

Arbitrable disputes in winding up actions
As this note focuses of arbitrable disputes in the context of winding up proceedings, care must be taken when reading the AnAn Case and its decision.

The "prima facie" case standard of review only applies if (a) there is a dispute (b) there is an agreement to refer the dispute to arbitration (c) the dispute is the subject matter of the agreement to arbitrate and (d) the agreement to refer the dispute to arbitration is operative.

If there is no agreement to refer a dispute to arbitration, then the "*prima facie*" case standard of review would not apply and instead the "*triable issue*" standard of review will apply in winding up proceedings.

If there is an agreement to refer a dispute to arbitration but the dispute is not the subject matter of that agreement or if the agreement to refer disputes is not operative, then the "*triable issue*" standard of review will apply in the winding up proceedings.

BWG
The Court of Appeal reiterated and affirmed the "*prima facie*" case standard of review in the case of BWG v BWF [2020] SGCA 36 ("**BWG**").

BWG was an appeal from the High Court decision that was reported in 2019[7].

Facts of BWG
There were three sale contracts in respect of a parcel of crude oil ("**Cargo**"). The first was a sale from Party X to the Appellant ("**Contract 1**") the second was a sale from the Appellant to the Respondent ("**Contract 2**") and the third was a sale from the Respondent to Party X ("**Contract 3**").

Under Contract 2, parties agreed to resolve their disputes by way of arbitration.

Each contract provided for payment to be made within a stipulated number of days from the tender of a Notice of Readiness. Under Contract 1 it was 30 days, under Contract 2 it was 90 days and under Contract 3 it was 89 days.

The cumulative effect of the three contracts was "circular" in that Party X was both the ultimate seller and the ultimate buyer.

Party X was unable to pay the Respondent by the "89 days" time line under Contract 3 which fell on 10 July 2018. This resulted in the Respondent not being able to pay the Appellant by the "90 days" time line under Contract 2 which fell on 11 July 2018.

As between Party X and the Respondent, there were negotiations for a settlement agreement to be made under which Party X would pay the Respondent the sale price in four instalments from August 2018 to November 2018 and for the CEO of Party X to issue a personal guarantee on the instalments payable by Party X.

As between the Appellant and the Respondent, the Respondent sent an email dated 6 July 2018 to the Appellant informing the Appellant that (a) payment under Contract 2 was on the basis that Party X first pays the Respondent and (b) Party X was having difficulties and proposed to pay in instalments as per their negotiations. The Appellant did not challenge the assertions in the email.

However, on 9 July 2018, the Appellant wrote to the Respondent reminding them that the payment under Contract 2 was due on 11 July 2018.

Given the pressure from the Appellant, the Respondent executed a settlement agreement on 12 July 2018 with Party X on the terms of their negotiations which included the four instalments from August 2018 to November 2018 and the personal guarantee.

On 10 August 2018, the Appellant served a Statutory Demand on the Respondent asserting that there was a debt due and owing under Contract 2.

The Respondent wrote to the Appellant disputing the debt, asserting that they are to pay the Appellant only after Party X pays the Respondent, that the transaction in their agreement was a sham and circuitous and that disputes under Contract 2 were to be resolved by way of arbitration. The Appellant disagreed with the Respondent.

The Respondent filed an injunction to restrain the Appellant from commencing a winding up action against the Respondent.

The Respondent also proceeded to commence winding up proceedings against Party X (when it failed to pay the first instalment) and bankruptcy proceedings against the CEO under the personal guarantee issued by him.

Decision

The injunction application was heard by the High Court. The court held that the relevant standard of review was a "*prima facie*" case of a dispute which parties have agreed to refer to arbitration. The High Court was satisfied that the Respondent did meet this requirement and accordingly granted the injunction against the Appellant. The High Court did not follow the High Court decision in 2018 which applied the "*triable issue*" standard of review.

On appeal to the Court of Appeal, the Court of Appeal affirmed the decision of the High Court and reiterated its decision (in AnAn) that the relevant standard of review is the "*prima facie*" case of a dispute.

Abuse of process

As it stands, there is no longer any doubt on the standard of review which is a "*prima facie*" case of a dispute. Although it is much easier for a Defendant to establish a "*prima facie*" case of a dispute than it is to establish a "*triable issue*" on a dispute, there are some safeguards to prevent allegations of disputes that are unmeritorious and made solely to stave off winding up proceedings.

Bona fide

A Defendant resisting winding up proceedings must show that his dispute is a *bona fide* dispute. If he is unable to show this, the Defendant's conduct may be seen as an "*abuse of process*".

An "*abuse of process*" is where there is an "*improper use of the court's machinery*"[8]. The court has a discretion to disallow a party to prosecute or defend court proceedings on the basis that there is an "*abuse of process*". When exercising the discretion, the court will take into account (a) all the facts and surrounding circumstances and (b) matters of interest of justice and public policy.

One such example of an "*abuse of process*" is where a Defendant admits to a debt but subsequently disputes the debt without giving a clear and convincing reason for the change in position[9].

Another example of an "*abuse of process*" is where a Defendant raises a dispute but adopts an inconsistent position in a related proceeding[10].

BWG – Abuse of process

In BWG, the Court of Appeal dealt with the Appellant's assertion that there was an "*abuse of process*" because the Respondent adopted inconsistent positions namely:

- On the one hand the Respondent disputed the debt owing to the Appellant by asserting that (a) payment was to be made against shipping documents but the documents were not given (b) there was no passing of title from the Appellant to the Respondent and (c) the entire transaction was a sham and illegal

- On the other hand, the Respondent commenced winding up proceedings against Party X and bankruptcy proceeding against the CEO in respect of the debt owing under the transaction.

The Court of Appeal was of the view that as there was a settlement agreement between Party X and the Respondent, the Respondent's claim against Party X did not involve issues relating to shipping documents and title. In other words, the claim was under the settlement agreement and not Contract 3.

The Court of Appeal did however consider that the Respondent's enforcement of the settlement agreement was made at a time when the Respondent knew of the illegality surrounding the transactions.

Taking all matters into account the Court of Appeal was of the view that the "interest of justice" outweighed any underlying illegality so as to not deprive the Respondent from disputing the debt.

Accordingly, the Respondent was allowed to dispute the debt in the winding up proceedings.

Summary

In summary, it is now resolved once and for all that the court will apply the "*prima facie*" standard of review where (a) the Claimant commences winding up proceedings against the Defendant (b) the debt arises from an agreement between the Claimant and the Defendant (c) under the agreement any dispute arising from that agreement is to be referred to arbitration ("arbitration clause") (d) the Defendant disputes the debt and (e) the arbitration clause is operative.

The Defendant must also show that his dispute is a bona fide dispute failing which it may be seen as being an "*abuse of process*".

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1. The two cases are (i) AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) [2020] SGCA 33 and (ii) BWG v BWF [2020] SGCA 36.
2. This question was an issue before the Court of Appeal in AnAn. The exact question was "*What is the standard of review when a dispute that is subject to an arbitration arises in relation to a debt which forms the basis of a winding up application?*"
3. BDG v BDH [2016] 5 SLR 977.
4. VTB Bank (Public Joint Stock Company) v AnAn Group (Singapore) Pte Ltd [2018] SGHC 250.
5. BWF v BWG [2019] SGHC 81.
6. See footnote 4.
7. See footnote 5
8. BWG at [52]
9. BWG at [55]
10. BWG at [56]

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