THE APPLICABLE STANDARD OF REVIEW OF A DISPUTED DEBT SUBJECT TO AN ARBITRATION AGREEMENT (*SIAN PARTICIPATION CORP (IN LIQUIDATION) V. HALIMEDA INTERNATIONAL LTD*)

A. Introduction

1. Arbitration and insolvency regimes generally co-exist harmoniously and peacefully. In most cases, a party commences an arbitration to resolve its dispute with another party and obtains an award in its favour. If the judgment debt remains unpaid, the party may then engage the insolvency regime to wind up a debtor company. In this scenario, there is no disputed debt to speak of – the arbitration process simply precedes the insolvency process, and no conflict arises between the policy objectives behind the two regimes.

2. However, complications arise where a party commences a winding-up application based on an unpaid debt, and the debtor then resists the application based on an alleged dispute or a counterclaim that is the subject of an arbitration agreement. What standard of review should an insolvency court apply in respect of the dispute?

3. At first glance, this issue appears to engage conflicting policies underpinning the arbitration and insolvency regimes.

(1) A debtor would seek a dismissal or stay of the winding-up application in favour of arbitration to resolve the dispute in relation to the alleged debt. The debtor is likely to object to any in-depth review of the merits of the dispute by an insolvency court based on the principle of party autonomy, which forms the cornerstone of judicial non-intervention in arbitration.[1]

1 *Tjong Very Sumito and others v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28].

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(2) On the other hand, a creditor would prefer to avoid having to go through the arbitration process as a prerequisite to a winding-up application, especially if the creditor perceives itself as having a strong claim against the debtor and if there is no real dispute as to the existence of the debt. In this connection, the creditor is likely to rely on the policy underlying the insolvency regime, which aims to facilitate the commencement of collective insolvency procedures against an insolvent company without unnecessary delay in order to ensure the greatest recovery for the broader creditor class.

4. In *Sian Participation Corp (In Liquidation) v. Halimeda International Ltd*,[2] the Privy Council held that winding up proceedings should only be dismissed or stayed if the debt, which is subject to an arbitration agreement, is disputed on genuine and substantial grounds (also known as the 'triable issues' test).[3] Notably, the Privy Council overruled the English Court of Appeal's decision in *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)*.[4]

5. The approach in England & Wales and the British Virgin Islands ('**BVI**') now departs from the approach taken by the Singapore Court of Appeal (hereinafter, '**SGCA**') in *AnAn Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Co)*,[5] which applies a prima facie standard of review that is broadly aligned with *Salford Estates*. This case note accordingly considers whether the approach taken by the Singapore courts should be revisited, in view of the Privy Council's decision in *Sian Participation*.

B. Background

1. *The Facts*

6. Pursuant to a facility agreement between the appellant and the respondent, the respondent extended a term loan of USD 140 million to the appellant. The facility agreement included a broad arbitration clause which provided that '*any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement*' would be referred to arbitration at the London Court of International Arbitration.[6]

7. The loan was not repaid by the appellant and the respondent issued a letter of demand to the appellant demanding repayment of the debt, which

2 [2024] UKPC 16 (hereinafter '**Sian Participation**').
3 *Ibid.*, at [99].
4 [2014] EWCA Civ 1575 (hereinafter '**Salford Estates**').
5 [2020] 1 SLR 1158 (hereinafter '**AnAn**').
6 *Sian Participation, supra* n. 2, at [12]–[13].

amounted to more than USD 226 million as at December 2020.[7] Subsequently, the respondent applied to have liquidators appointed in respect of the appellant on the basis that the appellant was both cash flow and balance sheet insolvent.[8]

8. The appellant initially disputed the debt on the basis of a cross-claim and/or set-off, but on an appeal to the Privy Council, it had become a common ground that the dispute was <u>not</u> genuine or based on substantial grounds.[9]

2. *The Privy Council's Decision*

9. The main issue put to the Privy Council was:

> *the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross claim (notwithstanding that dispute is not on genuine and substantial grounds).*[10]

10. The Privy Council's reasoning was as follows

11. It was '*virtually common ground*' that a winding-up application may not be commenced based on a disputed debt. This would depend on whether the debt was <u>genuinely</u> disputed, on substantial grounds.[11]

12. However, English and BVI courts had adopted differing definitions of a disputed debt in the context of winding-up applications.

(1) Following the decision in *Salford Estates*, the English courts adopted a wider definition of a disputed debt.[12] As will be explored further below, the *Salford Estates* test simply requires the debtor to show that there was a dispute over the debt which is subject to an arbitration agreement.[13] Unless there are wholly exceptional circumstances, the court would then dismiss or stay the winding-up application.

(2) The BVI courts preferred to adhere to the 'triable issues' standard – whereby the debt had to be genuinely disputed on substantial grounds before a winding-up application could be dismissed or stayed based on an arbitration agreement.[14]

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7 *Ibid.*, at [14]–[15].
8 *Ibid.*, at [16].
9 *Ibid.*, at [15], [18].
10 *Ibid.*, at [26(1)].
11 *Ibid.*, at [3], [67].
12 *Sian Participation, supra* n. 2, at [4].
13 *Salford Estates, supra* n. 4, at [39]–[41].
14 *Sian Participation, supra* n. 2, at [5].

13. The Privy Council held that *Salford Estates* was wrong to have introduced a discretionary stay of winding-up applications where an insubstantial dispute regarding the debt was raised between parties to an arbitration agreement.

14. First, the starting point (which was also accepted in *Salford Estates*) was that the mandatory stay provisions under section 18 of the BVI Arbitration Act/section 9 of the English Arbitration Act 1996 (both of which, in practice, give effect to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter, '**Model Law**') did not apply to a creditor's winding-up application. A winding-up application falls outside the ambit of the mandatory stay regime because it does not amount to a claim for the payment of the disputed debt – the existence or quantum of the debt is not an issue in the winding-up application. Rather, the creditor simply relies on the non-payment of the debt in a winding-up application as evidence that the debtor is unable to pay its debts as they fall due.[15]

15. Second, it was not inconsistent with the policy underlying arbitration legislation for a party to an arbitration agreement to seek the winding up of a counterparty who fails to pay a debt and does not genuinely dispute the debt on substantial grounds.

(1) Efficiency: As outlined at [3.2] above, the Privy Council opined that there was no good reason to make a creditor go through the '*delay, trouble and expense*' of an arbitration as a '*prelude*' to seeking a winding up order where there is no genuine or substantial dispute regarding the debt.[16]

(2) Party autonomy/*pacta sunt servanda*: The positive obligation in an arbitration agreement is to refer disputes to be resolved via arbitration. The negative obligation is to refrain from commencing court processes in respect of the disputes which fall within the scope of the arbitration agreement. The BVI Arbitration Act (or arbitration law more generally) seeks to enforce the positive and negative aspects of arbitration agreements, and not to restrict the parties' rights in respect of matters falling outside the scope of the arbitration agreement.[17] As such, the Privy Council found that the commencement of a winding-up application did not offend the negative obligation in an arbitration agreement 'at all', because this was simply not something which the creditor had agreed to refrain from doing.[18]

15 *Ibid.*, at [53]–[54], [88].
16 *Ibid.*, at [92].
17 *Ibid.*, at [61]–[62].
18 *Ibid.*, at [89].

(3) Non-interference by the courts: As explained at [14] above, an insolvency court determining a winding-up application did not need to (and did not in fact) resolve the underlying dispute giving rise to the debt, and was not otherwise involved in the resolution of the dispute through other means.[19]

16. The Privy Council noted that while the starting point adopted in *Salford Estates* was correct, the English Court of Appeal had incorrectly assumed that the policy underlying the English Arbitration Act 1996 went further into the prohibition of court proceedings than the mandatory stay provision in section 9 thereof.[20]

(1) As outlined at [15.3] above, the legislative policy did not extend to winding up or liquidation proceedings, which do not engage the merits of the debt at all.

(2) The Privy Council also disagreed that there was an 'apparent anomaly' between the policy of prohibiting the summary judgment of claims subject to an arbitration clause and the similar summary process undertaken by the Companies Court in assessing whether the petitioning creditor's debt is genuinely disputed on substantial grounds. Despite acknowledging that both cases entailed the identification of triable issues, the Privy Council distinguished the summary process undertaken by the Companies Court from summary judgment as the former did not amount to '*a means of resolving a claim by final resolution in a judgment*'.[21]

17. The Privy Council was also unconvinced by the concerns raised in *Salford Estates* of the risk of the traditional 'triable issues' test adopted by the BVI courts being used to:

(1) bypass an applicable arbitration agreement; or

(2) improperly threaten winding up proceedings as a means of compelling the debtor into paying the debt. The debtor may feel compelled to accede to the threat rather than to have to establish a genuine and substantial dispute before an inappropriate judicial forum.[22]

18. The Privy Council noted that such conduct was not specifically 'anti-arbitration' – rather, these risks would simply be treated by insolvency courts as an abuse of process with attendant costs having consequences on errant parties.[23]

19 *Ibid.*, at [92].
20 *Ibid.*, at [94].
21 *Ibid.*, at [96].
22 *Ibid.*, at [97].
23 *Ibid.*, at [97].

19. For completeness, the Privy Council's decision was specifically limited to broadly worded arbitration agreements,[24] and it has left the door open to arbitration agreements which expressly contemplate insolvency proceedings.

C. The position in Singapore: AnAn

20. In *AnAn*, the debtor company entered into an agreement for the debtor to sell global depository receipts ('**GDRs**') of shares in a company known as EN+ Group PLC to the creditor company and to subsequently repurchase the GDRs at pre-agreed rates. The agreement was effectively a loan from the creditor to the debtor, with the GDRs to act as collateral for the loan.[25]

21. Under the agreement, amongst others, the debtor was required to maintain sufficient collateral measured by an indicator which was essentially calculated based on the ratio of the purchase price of the GDRs plus accrued interest to the prevailing value of the GDRs.[26] Following the creditor's purchase of the GDRs, the value of the GDRs fell and the creditor asked the debtor to top up a cash margin to restore its collateral within a stipulated timeframe.[27] The debtor failed to do so, and the creditor eventually issued a statutory demand for the debt owed by the debtor, which the debtor failed to repay within a three-week period.[28] The creditor then applied to wind up the debtor on the basis of the statutory demand, which the debtor resisted based by disputing the debt claimed by the creditor.[29] The main issues before the SGCA were '*the standard of review when a dispute that is subject to an arbitration agreement arises in relation to a debt which forms the basis of a winding-up application*', and whether the applicable standard of review was satisfied on the facts.[30]

22. As explained at [5] above, the SGCA in *AnAn* held that a prima facie standard of review should be adopted when a dispute, that is subject to an arbitration agreement, arises in relation to a debt forming the basis of a winding-up application.[31]

23. Under Singapore law, a winding-up application will be stayed or dismissed if:[32]

24 *Ibid.*, at [99].
25 *AnAn, supra* n. 5, [4].
26 *Ibid.*, at [5].
27 *Ibid.*, at [9].
28 *Ibid.*, at [10]–[12].
29 *Ibid.*, at [13].
30 *Ibid.*, at [24].
31 *Ibid.*, at [24(a)], [56].
32 *Ibid.*, at [56].

(1) There is a valid arbitration agreement between the parties;
(2) The dispute falls within the scope of the arbitration agreement; and
(3) The dispute is not being raised by the debtor in abuse of the court's process.

24. The SGCA's reasons for adopting a reduced standard of review are: (a) to promote coherence in the law; (b) to give effect to party autonomy; and to achieve cost savings and certainty in the law. Each of these justifications will be explored in turn below.

25. First, a prima facie standard of review ensures coherence in the treatment of applications for a stay of court proceedings in favour of arbitration.[33]

(1) It is well established that a prima facie standard applies for stay applications under section 6 of the Arbitration Act 2001 and International Arbitration Act 1994 in Singapore (which codifies Article 8 of the Model Law). If a creditor had commenced an action for the debt before the court, the debtor would simply need to demonstrate, on a prima facie basis, that an arbitration agreement existed, and the dispute fell within the scope of the arbitration agreement in order to obtain a stay of the claim.[34] The SGCA found that there was no principled basis to apply different standards for assessing the same disputed debt.

(2) While the SGCA recognized that arbitration and insolvency regimes appear to embody contrasting policies,[35] applying a prima facie standard of review would not give rise to a conflict between the two. The court noted that disputes arising from the debtor company's pre-insolvency rights and obligations could be distinguished from disputes arising upon the onset of insolvency due to the operation of the insolvency regime (such as disputes regarding trading or avoidance provisions of insolvency legislation).[36]

(3) Where a debtor has raised a dispute involving pre-insolvency rights and obligations that ought to be referred to arbitration, the policy concerns of the insolvency regime do not strictly come into play. This is because the debt is not established to be due and owing to the creditor until the arbitration processes are concluded. The SGCA accordingly held that the arbitration of the dispute was a '*necessary precondition to bringing the*

33 *Ibid.*, at [60].
34 *Ibid.*, at [61]–[63].
35 *Ibid.*, at [68].
36 *Ibid.*, at [69].

insolvency regime into the equation', and there was accordingly no conflict between the respective policy objectives in such cases.[37]

(4) Finally, applying the 'triable issues' standard for winding-up applications brought based on a disputed debt would encourage the abuse of the court's winding up procedures by creditors, who might use winding-up applications as a pressure tactic to compel the debtor to make payment.[38] Adopting a coherent prima facie standard of review across winding up and stay applications would prevent the use of the court's winding up jurisdiction as a means of sidestepping the parties' agreed mode of dispute resolution.[39]

26. Second, a prima facie standard of review gives effect to party autonomy, which is paramount in arbitration

27. In contrast, requiring the debtor to establish that the debt was genuinely disputed on substantial grounds (that is, the 'triable issues' standard) effectively asks the court to conduct a thorough examination of the evidence and delve into the merits of the debtor's defences.[40] This would cause substantial prejudice to the parties.

28. Third, having the court review the merits of the debtor's defence would result in uncertainty and increased expenditure for parties. Parties to an arbitration agreement would have no confidence that the merits of their dispute would be ventilated in their chosen forum.[41] Parties would also incur unnecessary costs in litigating the merits of their dispute before the court (at the triable issues stage) and before the arbitral tribunal (at the substantive merits review stage).[42]

29. Noting that the prima facie standard of review represented a lower threshold for a debtor to meet, the SGCA recognized the need for an appropriate measure to check against abuses of this standard.[43] The threshold for abusive conduct is high, and would include scenarios where[44]:

(1) A debtor has in fact admitted to both the liability for, and quantum of, the debt;

37 *Ibid.*, at [71].
38 *Ibid.*, at [72].
39 *Ibid.*, at [74].
40 *Ibid.*, at [76].
41 *Ibid.*, at [84].
42 *Ibid.*, at [85].
43 *Ibid.*, at [93].
44 *Ibid.*, at [99].

(2) There exists a waiver or estoppel of the debtor's right to insist on arbitration; and

(3) There is evidence of the debtor attempting to stave off substantiated concerns justifying the invocation of the insolvency regime (such as the dissipation of assets, or matters requiring an independent investigation).

30. The SGCA was careful to caveat that the abuse of process mechanism is not intended to be a backdoor for parties to ventilate the merits of the dispute, which are irrelevant under the prima facie standard.[45]

31. The SGCA has since further clarified that the 'triable issues' standard continues to apply in winding-up applications premised on a disputed debt that is <u>not</u> actually subject to an arbitration agreement.[46] This approach is eminently sensible – where the parties do not assert (or are precluded from asserting) the existence of an arbitration agreement, a higher standard of review by the insolvency court is justified. The courts have jurisdiction over the dispute in any event, and an insolvency court is not precluded from assessing the merits of the debtor's defence on the same standard as applicable when considering an application for summary judgment.[47]

32. For completeness, the General Division of the High Court of Singapore in *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)*[48] recently cited *Sian Participation* (in *obiter*).

(1) In that case, the debtor Sapura Group had entered into various individual schemes of arrangement in Malaysia, which were subsequently recognized in Singapore as a foreign main proceeding.[49] A non-party, GAS, applied for a carve out of the stay arising under Article 20(1) of the UNCITRAL Model Law on Cross-Border Insolvency to allow GAS to proceed with arbitration proceedings against the debtor entities.[50] While the carve out was eventually granted on the basis of the Court's discretion to allow applications to proceed in the face of an insolvency moratorium, the High Court also considered the argument that the policy of mandatory enforcement of international arbitration agreements effectively trumps restructuring applications.[51]

45 *Ibid.*, at [99].
46 *See Founder Group (Hong Kong) Ltd (in liquidation) v. Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 (hereinafter '**Founder Group**').
47 *Ibid.*, at [33].
48 [2024] SGHC 241.
49 *Ibid.*, at [1]–[2].
50 *Ibid.*, at [3].
51 *Ibid.*, at [32].

(2) The High Court noted *Sian Participation's* position that the court's discretion should not '*take into account the underlying policy of the arbitration legislation in a situation in which the mandatory stay provision of the arbitration legislation was not engaged*'.[52] However, the High Court ultimately concluded that the SGCA's decisions in *AnAn* and *Founder Group* remain binding. The High Court also opined that the reasoning at [33] and [94] of *Sian Participation* did not apply in the context of schemes of arrangement, which does entail a final resolution of the scheme company's liabilities forming the basis of the debt.

D. Commentary: Contrasting the approaches in AnAn and Sian Participation

33. This case note takes the view that the approach taken by the SGCA in *AnAn* is to be preferred over that of the Privy Council in *Sian Participation*.

34. The fundamental difference between the two approaches is their respective views on whether a 'triable issues' standard of review amounts to an adjudication for the purposes of the arbitration agreement. In *Sian Participation*, the Privy Council stressed that applying the 'triable issues' standard in the context of a winding-up application does not amount to an adjudication of the dispute, because the eventual order made on the winding-up application does not resolve or otherwise determine the substantive dispute.[53] In the Privy Council's view, this justifies the now-conflicting tests adopted in applications for a mandatory stay in favour of arbitration and winding-up applications respectively.[54]

35. With respect, applying the 'triable issues' standard in the context of a winding-up application does not turn it into a legal beast of a different nature altogether. Even accepting the Privy Council's view that the presentation of a winding-up application *simpliciter* does not offend the negative obligation in an arbitration agreement, it does not follow from this that the court is also allowed to investigate the merits of the parties' substantive dispute in the course of deciding that winding-up application.

(1) Parties to an arbitration agreement have agreed that the merits of their disputes are to be determined by an arbitrator. Applying a 'triable issues' standard of review as per *Sian Participation* requires an in-depth examination of the evidence and merits of the debtor's defences. As this exercise

52 *Ibid.*, at [65].
53 *See* [14] – [16] above.
54 *Sian Participation, supra* n. 2, at [91].

squarely falls within the arbitral tribunal's purview as per the parties' arbitration agreement,[55] such an inquiry by an insolvency court would amount to a breach of the parties' agreement. The fact that this inquiry is undertaken in the course of an application which does not ultimately resolve the substantive dispute does not undo this breach of the principle of party autonomy.

(2) As will be explained further at [37] below, the approach in *Sian Participation* also potentially inhibits the arbitration of the creditor's debt if the liquidator chooses not to commence an arbitration (particularly for extraneous reasons unrelated to the merits of the dispute) even if the now-defunct board of directors may have done so. An even more troubling outcome, as noted in *AnAn* at [80], would be if the liquidator eventually rejects the creditor's debt, which would mean that the debtor was irreversibly wound up without a proper basis for doing so.

(3) The *Sian Participation* approach is also prone to abuse – a creditor would simply need to threaten winding up to exert significant pressure over a debtor and circumvent the parties' agreed dispute resolution mechanism. It is understandable that a debtor may choose to simply yield to the undue threat rather than to risk unsuccessfully defending the application on short notice and the reputational and commercial damage associated with insolvency. The supposed procedural efficiency of the *Sian Participation* approach does not trump these serious substantive risks. This is elaborated on further at [39] below.

36. The approach in *Sian Participation* also incorrectly presumes that the arbitration agreement between the parties may be sidestepped or done away with if the debtor appears to have no genuine defence to the creditor's claim.

(1) *Sian Participation* argues that there is no good reason to subject the creditor to the '*delay, trouble and expense*' of commencing an arbitration over a claim which is not genuinely or substantially disputed by the debtor. The Privy Council's reasoning here seems to mirror the proposition that where a defendant has no genuine defence, it would follow that he does not genuinely desire trial in the agreed forum.[56] This proposition has now been rejected by the SGCA in *Vinmar Overseas (Singapore) Pte Ltd v. PTT International Trading Pte Ltd*[57] and *AnAn*.

55 *See* [24] above.

56 *See The Jian He* [1999] 3 SLR(R) 432 and *The Hung Vuong-2* [2000] 2 SLR(R) 11 [This proposition was previously used to justify the SGCA's consideration of the merits of the defendant's defence in an application to stay court proceedings pursuant to an exclusive jurisdiction clause], at1.

57 [2018] 2 SLR 1271 (hereinafter '**Vinmar**').

(2) As the SGCA noted in *AnAn*,[58] the insolvency court is effectively being asked to rule on the existence of a debt arising out of pre-insolvency rights and obligations. Where such pre-insolvency rights and obligations are subject to an arbitration agreement between the parties, the court is bound to give effect to the arbitration agreement. There is no discretion to sidestep the parties' agreement based on the quality of the dispute being raised.

(3) An exclusive jurisdiction agreement (and equally, an arbitration agreement) is an agreement that a dispute will be resolved, 'whatever the merits', in a particular forum.[59] It represents the parties' express desire for trial in the agreed forum regardless of the merits of the disputes that may arise.

(4) Accordingly, there is no basis to assume that an applicant does not desire trial in the agreed forum if the party does not have an arguable defence – this incorrectly suggests that the parties' desire as per their exclusive jurisdiction agreement or arbitration agreement is lost in such circumstances. As noted by the SGCA in *Vinmar* and *AnAn*,[60] there are many reasons why an applicant may still desire trial in its agreed forum despite having no genuine defence – for example, the applicant may wish to avail itself of procedural advantages that would not be available if the matter were to be determined by the court.

37. It is respectfully submitted that the Privy Council erred in prioritizing a creditor's right to efficiency in the insolvency process over party autonomy in cases where a debtor does not appear to have a genuine or substantial dispute in respect of the claim.

(1) The bargain of the parties is paramount, and should not depend on the merits of the claim.

(2) In any event, the Privy Council's concerns regarding efficiency also appear to be overstated. Most institutional rules now contain procedures for the expedited arbitration procedures, which would allow a creditor to obtain an award within six months in most cases and entail minimal delay. The creditor may also consider summary determination procedures, such as the early determination of the debtor's defence under Rule 29 of the Singapore International Arbitration Centre Rules 2016.[61] These procedures would certainly reduce the time and costs of arbitration, especially

58 *AnAn, supra* n. 5, at [71].

59 *Ibid.*, at [121].

60 *Ibid.*, at [121]; *AnAn*, *supra* n. 5, at [81]–[82].

61 Equivalent procedures can be found in the procedural rules of most major arbitration centres, including the London Court of International Arbitration,

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where a creditor has a strong claim. Obtaining an arbitral award is also likely to result in time and cost savings at the second stage of the winding up process, as a liquidator is unlikely to reject a proof of debt based on a binding and enforceable arbitral award.

38. Further, the Privy Council in *Sian Participation* does not appear to have considered the prejudice caused to the debtor company in having the court or a liquidator assume the decision-making function of the arbitral tribunal.

(1) As the SGCA noted in *AnAn*, the 'triable issues' standard requires the court to effectively step into the shoes of the arbitral tribunal, thereby contravening the parties' arbitration agreement and depriving the parties of the advantages that they would have obtained (such as finality, confidentiality and ease of enforcement) had the arbitration agreement been complied with.[62]

(2) Making a summary determination of the substantive issues in dispute in place of the arbitral tribunal incorrectly presumes that the court would make the same decision as the arbitral tribunal, which need not happen in reality. This would result in substantive prejudice to parties, quite apart from the damage to the debtor company's business and reputation caused by the winding-up application.[63]

(3) The SGCA rejected the argument in *Dayang (HK) Marine Shipping Co, Ltd v. Asia Master Logistics Ltd*[64] that the triable issues standard would not breach the arbitration agreement because the substantive dispute would be finally and conclusively determined by a liquidator at the proof of debt stage. The Hong Kong court opined that the liquidator would be acting in a quasi-judicial capacity and could conduct a de novo assessment of the merits of the creditor's claim without upsetting the winding up order.[65]

(4) Letting the liquidator take the place of the arbitral tribunal (instead of the court) does not solve the problem of undermining the parties' agreement – in either case, the dispute would not be decided through the parties' chosen dispute resolution process. While *Sian Participation* does argue that a debt disputed by the liquidator may be arbitrated, if needed later in the process,[66]

the Arbitration Institute of the Stockholm Chamber of Commerce, the Hong Kong International Arbitration Centre, the International Centre for Dispute Resolution and JAMS.

62 *AnAn, supra* n. 5, at [77].

63 *Ibid.*, at [78].

64 [2020] HKCU 494.

65 *AnAn, supra* n. 5, at [79].

66 *Sian Participation, supra* n. 2, at [33].

the Privy Council does not seem to have considered a situation where liquidator decides not to commence arbitration against the creditor. In this case, the merits of the dispute giving rise to the debt may never be substantively challenged. This convoluted path to arbitration unnecessarily increases uncertainty and costs for parties and may even cause the debtor company to be wound up needlessly.[67]

39. Finally, *Sian Participation* appears to understate the risks of parties abusing the 'triable issues' standard to circumvent a valid arbitration agreement or as a pressure tactic to force the debtor company into payment. The Privy Council reasoned that such conduct is not strictly anti-arbitration, but would be considered as an abuse of process and dealt with through costs consequences.[68]

(1) With respect, it is difficult to see how the examples of abusive conduct outlined above are not 'anti-arbitration'. Rather, as argued above at [34.3], these tactics are precisely intended to circumvent the parties' bargain on the applicable dispute resolution mechanism.

(2) It is also difficult to see how the court would apply the abuse of process doctrine in cases where a creditor has attempted to commence a winding-up application to bypass an arbitration agreement. If the 'triable issues' test applies per *Sian Participation*, the debtor company would have to establish the merits of its defence before the insolvency court in order to obtain a dismissal or stay of the winding-up application. Imposing costs consequences on the applicant after the fact does not address the concern regarding the uncertainty occasioned upon parties to an arbitration agreement, the prejudice to the debtor in having to ventilate the merits of its defence before a forum other than an arbitral tribunal (and usually on short notice) nor does it deter such strategic applications from being filed. If the quantum of the disputed claim far exceeds the creditor's potential costs exposure, a creditor may be prepared to risk some potential exposure to costs in the hope that its improper threat of liquidation leads to a settlement with the debtor.

(3) In contrast, the abuse of process safeguard adopted in *AnAn* appears to be a rather more elegant solution to protect the rights of creditors where a lower standard of review applies. While the abuse of process doctrine does not permit the court to consider the merits of the dispute, a debtor's conduct as regards the debt and other suspicious circumstances are all relevant factors in assessing whether a winding-up application is justified despite the existence of a dispute that should be referred to arbitration.

67 *AnAn, supra* n. 5, at [80].
68 *Sian Participation, supra* n. 2, at [97].

This safeguard ensures that there is no 'automatic' dismissal or stay of winding up proceedings where an arbitration agreement is relied upon – this protects the creditor's interests.

E. Conclusion

40. On balance, the prima facie standard of review adopted in *AnAn* represents the better approach as it strikes a more favourable balance between the rights of the creditor and the debtor.

41. While the Privy Council's decision in *Sian Participation* reduces the hurdles that a creditor needs to cross in obtaining a winding up order against a debtor that does not genuinely dispute its claim, it does unjustifiable damage to the fundamental principle of party autonomy in arbitration and creates a backdoor for creditors to side-step the arbitration process altogether.

42. *AnAn* presents a more nuanced approach that (a) respects the parties' bargain under a generally worded arbitration agreement (which is in the debtor's interests), and (b) provides a safeguard to allow a winding-up application to continue where the debtor's conduct amounts to an abuse of process (which is in the creditor's interests).

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