CASE IN BRIEF

AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)[1] (Singapore Court of Appeal, 7 April 2020)

By Bill Gambrill

In 2017, AnAn Group (Singapore) Pte Ltd (**AnAn**), a Singapore company, entered into a global master repurchase agreement (**GMRA**) with VTB Bank (Public Joint Stock Company) (**VTB**), a Russian bank. Under the GMRA, AnAn would sell specified global depository receipts (GDRs) on shares in a nominated company, and would then repurchase those GDRs at later specified dates at pre-agreed rates. While the transaction was structured as a sale and repurchase agreement, it was in substance a loan by VTB to AnAn. The GMRA provided for arbitration of any dispute arising out of or in connection with the agreement under the rules of the Singapore International Arbitration Centre.

In 2018, there was a dramatic collapse in the value of the shares in the nominated company, which triggered a series of defaults by AnAn, and a requirement under the GMRA that AnAn repurchase the GDRs for the sum of approximately US$170 million. As AnAn did not do so, VTB served a statutory demand on AnAn for the unpaid purchase price. Following Anan's non-payment, VTB applied to the High Court to wind up AnAn. AnAn resisted the winding up, disputing that it owed a debt to VTB. The High Court did not consider that AnAn had established that AnAn's dispute of the debt was a *triable issue*; that is, AnAn's evidence did not demonstrate, to the requisite standard, that AnAn did not owe VTB US$170 million. The Court made an order for AnAn's winding up.[2]

The Court of Appeal Decision

AnAn appealed to the Court of Appeal. The Court noted that the issue was being raised before it for the first time.

In winding up proceedings generally, the Singapore courts will not order the winding up of a debtor-company if the debtor-company has disputed that that it is indebted to the creditor, provided that the matters raised in dispute are *triable issues*. However, determining whether issues are *triable* requires a consideration of the merits of the parties' positions.

The question raised in *AnAn* was whether *triable issues* was the correct standard if the dispute was subject to an arbitration agreement. In the arbitration context generally, the Singapore courts consistently applied the *prima facie standard of review* as follows:

> *So long as the parties to the dispute are parties to an arbitration agreement and there is a dispute which falls within the ambit of that agreement, the court would ordinarily stay the court proceedings in favour of arbitration. The court would not embark on any examination of the merits since that would the role and task of the arbitral tribunal.*

The issue was whether the context of winding up proceedings changed that standard, and allowed the courts to consider the merits of the debtor-company's defence, to assess if the debtor-company had raised a triable issue.

Having examined the authorities, both in Singapore and elsewhere, the Court concluded that the *prima*

facie standard, applicable to arbitration proceedings, should apply: winding up applications would be stayed or dismissed if there was a valid arbitration agreement and the dispute was within the scope of the arbitration agreement, provided the dispute was not being raised by the debtor in abuse of the court's process.[4] The Court's view was that the *prima facie* standard was consistent with coherence in the law, the principle of party autonomy and the achievement of cost savings and certainty.

Having concluded that the prima facie standard of review was appropriate, the Court considered whether there should be any limits on that standard of review, noting that there is no question of an automatic stay (or dismissal) of winding up proceedings if a dispute was raised.[5] After considering several different approaches, the Court held that a winding up application should only be dismissed or stayed if there were exceptional circumstances or there was an abuse of process or if the debt was not genuinely disputed.[6]

The Court allowed AnAn's appeal against the winding up order. Having also allowed the admission of further evidence, the Court held that AnAn would have satisfied the triable issue standard in any event.

CASE IN BRIEF Continued

Significance of the Decision in New Zealand

The applicable standard of review issue which arose in *AnAn* does not appear to have been considered directly by the New Zealand courts when considering whether to liquidate a company: that could be because there is a procedure in New Zealand whereby a debtor-company disputing a debt can apply to set aside a statutory demand before liquidation proceedings are filed,[7] which does not appear to be the case in Singapore; most questions as to whether a debt is "disputed" are determined at that stage.

However, it has been held that the principles articulated in *Zurich Australian Insurance Ltd v Cognition Education Ltd* do apply to an application to set aside a statutory demand.[8] That is, if there is a valid and effective arbitration agreement, the parties must arbitrate unless *it is immediately demonstrable either that the defendant is not acting bona fide in asserting that there is a dispute or that there is, in reality, no dispute.*[8] In most cases, applying those principles would lead to a conclusion which would be indistinguishable from applying the *prima facie* test adopted in Singapore: albeit, New Zealand appears to have a different approach in dealing with set-off and cross-claims;[10] and there appears to be an open question as to the application of *Zurich* principles if a debt were to be disputed for the first time after the expiry of an unremedied statutory demand.

The *AnAn* decision demonstrates the extent to which courts increasingly support arbitration, even though insolvency litigation is traditionally considered to be a core responsibility of the courts. In many jurisdictions, it appears to be that, to the extent such an approach represents a change, it is a change *in the right direction: ultimately, parties should be held to their bargains. There is no principled reason to depart from this settled position merely because the creditor elects to pursue his claim by way of a winding up application.*[11]

End Notes

[1] *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 (7 April 2020) (AnAn) (https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sgca-33-pdf.pdf).

[2] *VTB Bank (Public Joint Stock Company) v AnAn Group (Singapore) Pte Ltd* [2018] SGHC 250 (7 September 2018) (https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2018-sghc-250--cwu-183-2018---gd-vtb-v-anan-final-19-11-2018-pdf.pdf).

[3] *AnAn* at [1].

[4] *AnAn* at [56].

[5] *AnAn* at [97].

[6] *AnAn* at [91].

[7] Section 290 of the Companies Act 1993

[8] *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, as applied in Manchester Securities Ltd v Body Corporate 172108 [2018] NZCA 190 at [31].

[9] *Zurich Australian Insurance Ltd v Cognition Education Ltd*, above n 8, at [52].

[10] *AnAn* at [58]. See also *Manchester Securities Ltd v Body Corporate 172108* above n 9 at [32] and *Colebrook v Okarahia Downs Ltd* [2018] NZHC 241 at [46]-[47].

[11] *AnAn* at [88].