Restraining Winding-Up Proceedings in Favour of Arbitration: What is the Standard for Granting an Injunction?

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Introduction

Following service of a statutory demand, if no payment is received, a claimant can ordinarily commence winding-up proceedings against the respondent. However, if the debt is disputed and falls within the scope of an arbitration clause, the court ought rightly to grant an injunction to restrain winding-up proceedings.

Such was the conclusion reached by the Singapore High Court in *BWF v BWG* [2019] SGHC 81, which grappled with the applicable legal standard for determining whether an injunction restraining a winding-up should be granted in circumstances where the underlying claim is *prima facie* arbitrable – ought the standard to be that of a *bona fide prima facie* dispute, or that of a triable issue?

After assessing contrasting approaches in earlier High Court cases, the Court here found in favour of the Plaintiff, holding that the applicable standard is that of a *bona fide prima facie* dispute. It now remains for the Court of Appeal to issue its own resolution of the contrasting approaches.

The Plaintiff was successfully represented by Kendall Tan and Ting Yong Hong of Rajah & Tann Singapore LLP's Shipping & International Trade Group.

Brief Facts

The basic factual matrix involved a disputed crude oil trading transaction between the Plaintiff and the Defendant, where the purported cargo was to be sold afloat by the Defendant to the Plaintiff. After the transaction fell through, the Defendant served a statutory demand under section 254 of the Companies Act on the Plaintiff, claiming for allegedly unpaid invoices under the agreement between the parties ("**Contract**").

Notably, the Contract contained an arbitration clause which stated that any dispute arising out of or in connection with the Contract would be referred to arbitration in London.

The Plaintiff subsequently disputed the alleged debt claim and applied for an injunction to restrain the commencement of winding-up proceedings, contending that the dispute should be referred to arbitration. Amongst other things, the Plaintiff relied on the fact that the Defendant had failed to comply with the express requirements of the relevant payment provisions (by failing to present a Certificate of Quality in respect of the alleged cargo). Further, the Plaintiff contended that the Defendant had never actually obtained possession or title to the alleged cargo and therefore could not sell the cargo to claim the price. In this respect, the Plaintiff relied on the Defendant's inability to produce anything more than photocopy non-negotiable bills of lading (and not originals) under the Contract, which absent exceptional circumstances, would not be sufficient to constitute a document of title. Moreover, the Plaintiff also tendered evidence to the Court which it said gave it reason to believe that the documents presented by the Defendant in purported performance of the Contract were unauthorised copies of transactional documents belonging to third parties wholly unrelated to and with no knowledge of the Contract.

Holding of the High Court

The main question for the Court was the applicable standard for determining whether to grant an injunction to restrain winding-up proceedings where the disputed debt falls within the scope of an arbitration clause.

After considering opposing submissions based on contrasting case law, the High Court found the applicable standard to be that of a *bona fide prima facie* dispute. The Court further found that the Plaintiff had met this standard, and granted an injunction enjoining the Defendant from taking out winding-up proceedings.

Contrasting standards

The Defendant submitted that the applicable standard should be that of showing a triable issue, while the Plaintiff submitted that it should simply be the lower threshold of a *bona fide prima facie* dispute. Each side relied on separate Singapore High Court decisions which took contrasting positions.

The Court here adopted the position advanced by the Plaintiff.

This position, which advocated a unifying approach to the law, was guided by a line of decisions from the Singapore Court of Appeal, beginning with *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, which emphasised the judicial policy of non-intervention in Singapore in the context of promoting and facilitating arbitration. The decision stated that "*the need to respect party autonomy (manifested by their contractual bargain) … has been accepted as the cornerstone underlying judicial non-intervention in arbitration*".

The Court also relied on the decision in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271, where the Court of Appeal departed from previous authorities on the test for when it would grant a stay of proceedings on the basis of an exclusive jurisdiction clause. That decision established that a Singapore court would disregard the merits of the parties' cases when considering whether there was strong cause to refuse a stay, as to hold otherwise would fail to give effect to the parties' agreement. The decision highlighted the central principle of party autonomy, and alluded to the desirability of coherence in the law across exclusive jurisdiction clauses, *forum non conveniens* and arbitration.

Applying these principles, the Court held that an injunction would be granted to restrain winding-up proceedings so long as there was a *prima facie* dispute that was subject to an arbitration agreement, and there were no indications that the issues were not raised *bona fide*. This was the standard applied by the High Court in *BDG v BDH* [2016] 5 SLR 977 ("***BDG***"), where the 'triable issues' standard was similarly rejected.

In reaching this position, the Court declined to follow the 'triable issues' approach advanced by the Defendant, which was based on the position in *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250 ("***VTB***"). There, the court required the applicant to demonstrate triable issues before it would grant an injunction to enjoin winding-up proceedings on the basis of a disputed debt governed by an arbitration agreement.

VTB had adopted this position on the basis that a previous Court of Appeal decision (*Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("***Metalform***")) was binding on the High Court. However, the Court here disagreed with the holding in *VTB*, finding that *Metalform* was not binding on the Court on this question as its *ratio decidendi* did not directly engage the significance of an arbitration clause.

Application

Taking guidance from the above mentioned cases, the Court highlighted that it would not be concerned with the merits of the parties' arguments in considering whether there was a *bona fide* dispute, and that it would refuse a stay or injunction only where the applicant is guilty of an abuse of process. Further, the threshold for abusive conduct is very high, and would only occur in exceptional situations.

Here, the Court found that the Plaintiff had in fact raised a *prima facie bona fide* dispute over the claimed debt, thus crossing the threshold for the grant of an injunction. On the facts, the Defendant had failed to show any abuse of process on the part of the Plaintiff.

The Court was also willing to find that the Plaintiff would have passed the 'triable issues' threshold as well on the basis of each of the substantive defences which it had raised.

The Court thus granted an injunction to prevent the Defendant from commencing winding-up proceedings.

Concluding Remarks

Arbitration has become one of the preferred choices of dispute resolution, and arbitration clauses are increasingly common features of commercial agreements. Therefore, the interaction between the fields of litigation and arbitration and the court's approach to arbitration is of great importance.

This decision highlights the court's policy of facilitating arbitration, as well as the weight given by the court to the autonomy of the parties and their right to contractually agree to submit their disputes to arbitration. Parties

to an arbitration agreement should be aware that they will be held to their bargain and will not easily be able to bypass the agreed dispute resolution framework. Such an approach fosters certainty for parties who have agreed to arbitration as the dispute resolution mechanism in their contracts, not just in commodities trading or sea carriage, but across all areas of commercial contracts.

The question of the applicable standard for granting an injunction will be of keen interest to the legal community due to the various approaches taken by the courts. Notably, both *VTB* and *BDG* are on appeal, and are set to be heard by the Court of Appeal later this year. We will monitor the outcomes of these decisions and keep you updated as to any developments in this area.

For further queries, please feel free to contact our team below.

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Contacts

Kendall Tan
Partner, Singapore

T +65 6232 0634
kendall.tan@rajahtann.com

Ting Yong Hong
Partner, Singapore

T +65 6232 0504
yong.hong.ting@rajahtann.com

Please feel free to contact the editorial team of *Arbitration Asia* at arbitrationasia@rajahtannasia.com.