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Case Note

A TALE OF TWO REGIMES: ARBITRATION AND INSOLVENCY FROM THE PRIVY COUNCIL TO SINGAPORE

Sian Participation Corp v Halimeda International Ltd [2024] 3 WLR 937

In *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937, the Privy Council had to consider the following question: What is the correct test to be applied by the court in deciding whether to proceed with winding-up proceedings, where the disputed debt is subject to an arbitration agreement? In its decision, the Privy Council overturned the prevailing English approach by holding that winding-up proceedings are *only* to be stayed where debts are disputed on genuine and substantial grounds. This note evaluates the Privy Council's approach and argues that Singapore should not follow suit. This is because the Privy Council falsely assumed that the mandatory stay regime under Art 8 of the UNCITRAL Model Law on International Commercial Arbitration does not apply when, in fact, it should.

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I. Introduction

1 In recent times, the waters between the arbitration and insolvency regimes have been muddied by the following problem:

1 This note is written in the authors' own capacity. The opinions expressed in this note are entirely the authors' own views and do not reflect the views or positions of the Supreme Court of Singapore, Rajah & Tann Singapore LLP or Singapore Management University.

What is the correct test to be applied by the court in deciding whether to proceed with winding-up proceedings, where the disputed debt is subject to an arbitration agreement? In *Sian Participation Corp v Halimeda International Ltd*[2] ("*Sian Participation*"), the Privy Council decided that proceedings to appoint a liquidator over a company (which has the same effect as winding-up proceedings in Singapore) are *only* to be stayed where debts are disputed on genuine and substantial grounds (otherwise known as the "triable issue" standard). In deciding so, the Privy Council overturned the leading English authority on the matter, *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*[3] ("*Salford Estates*"), which directed courts to stay or dismiss winding-up proceedings where a disputed debt is *prima facie* subject to an arbitration agreement, save in wholly exceptional circumstances. The significance of *Sian Participation* is underscored by the fact that *Salford Estates* has been broadly followed in various other common law jurisdictions.

2 In Singapore, the applicable test was set out by the Singapore Court of Appeal in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*[4] ("*AnAn Group*"). The court held that where a disputed debt is *prima face* subject to an arbitration agreement, winding-up proceedings would have to be stayed unless a stay would amount to an abuse of process. Against the backdrop of these developments, it is apposite for Singapore to revisit its existing approach and evaluate whether to sail in the same stream as the Privy Council.

3 In this note, the authors respectfully suggest that the Privy Council's approach should not be followed – the Privy Council had erred in holding that winding-up proceedings where debts which are subject to arbitration agreements are only to be stayed when the triable issue standard is met. This is because it failed to consider that where winding-up proceedings are based on debts allegedly owed to applicants, their standing to commence winding-up proceedings necessarily hinges on the existence of debts owed to them. The determination of the debt is thus a matter for arbitration which triggers the mandatory stay provided for by Art 8 of the UNCITRAL Model Law on International Commercial Arbitration[5] ("Model Law") (or the statutory provisions which implement it). This argument is fleshed out in the following order: the note begins with (a) the facts in *Sian Participation* and (b) the Privy Council's

2 [2024] 3 WLR 937.
3 [2015] 3 WLR 491.
4 [2020] 1 SLR 1158.
5 (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 July 1985, amended 7 July 2006).

decision; followed by (c) an analysis of the Privy Council's decision and (d) an analysis of Singapore's existing approach.

II. Facts in *Sian Participation*

4 The main actors in *Sian Participation* were Halimeda International Ltd ("Halimeda"), Sian Participation Corp ("Sian") and Far-Eastern Shipping Co PJSC ("FESCO"). Halimeda was a wholly-owned subsidiary of FESCO, the parent company of a very substantial Russian transportation and logistics group. Sian formed part of a corporate structure through which shares in FESCO were held.

5 The dispute centred around a loan of US$140m advanced by Halimeda to Sian under a facility agreement, which required disputes to be arbitrated at the London Court of International Arbitration. Halimeda alleged that the loan, together with accrued interest and penalties, had yet to be paid by Sian. Sian disputed that the debt was due and payable on the basis of a cross-claim and/or a set-off – it alleged that Halimeda was an active participant in a state-backed corporate raid in Russia that targeted its stake in FESCO. Halimeda denied the existence of said corporate raid and any alleged involvement in it.

6 Subsequently, Halimeda applied to the Eastern Caribbean Supreme Court to have liquidators appointed in respect of Sian. Sian opposed the application, arguing that the facility agreement required disputes over the debt to be arbitrated. At first instance, Wallbank J refused to stay or dismiss the application, citing Sian's failure to demonstrate that the debt was disputed on genuine and substantial grounds or that there were other reasons why the application ought to be dismissed or stay. In particular, the learned judge noted that a *prima facie* case for Sian's cross-claim based on the alleged corporate raid was not even made out on the evidence.

7 On appeal, the Court of Appeal of the Eastern Caribbean Supreme Court upheld the lower court's finding that a *prima facie* case of a cross-claim had not been made out. Sian applied for and was granted permission to appeal to the Privy Council. The Privy Council was called upon to determine – as a matter of the law of the British Virgin Islands ("BVI") – the correct test to apply for proceedings to be stayed when debts on which applications are based are subject to an arbitration agreement, and are being disputed and/or subject to a cross-claim.

8 Relying on *Salford Estates*, Sian contended that the BVI courts ought to have stayed the proceedings in favour of arbitration, regardless of whether the debt was disputed on genuine and substantial grounds.

Sian posited that there was no difference in terms of policy considerations between the BVI and the English jurisdictions that justified a departure from *Salford Estates*. On the other hand, Halimeda maintained that the arbitration agreement was no bar to the appointment of the company's liquidator except in cases where the debt was disputed on genuine and substantial grounds. According to Halimeda, Sian's reliance on *Salford Estates* was misplaced because BVI law approached insolvency differently from English law.

III. The Privy Council's decision

9 It was against this backdrop that this question fell to the Privy Council. In its decision, the Privy Council began by detailing both the arbitration and insolvency regimes in the BVI and the relevant public policies that undergirded them.

10 First, the Privy Council noted that the BVI inherited its insolvency jurisdiction from the UK, and both the BVI's Insolvency Act[6] and the UK's Insolvency Act 1986[7] were rooted in substantially the same underlying policy[8] – that is, that they were meant to bring about an efficient realisation of the company's assets and their fair distribution among all its stakeholders, generally *pari passu* as between unsecured creditors.[9]

11 Second, the Privy Council noted that the process of seeking and obtaining an order for the appointment of a company's liquidator would not require or involve any pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum.[10] Thus, a court's order would create no *res judicata* as between the applicant and the company – the liquidator would be free to reject the applicant's proof of debt, either in part or in whole.[11] Courts could therefore proceed to appoint a liquidator only on a provisional assumption that the company is insolvent, which might turn out to be untrue, without that invalidating the liquidation process.[12]

12 Third, the Privy Council noted that an application to appoint a company's liquidator would generally be dismissed where the debt

6 Act 5 of 2023.
7 c 45.
8 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [30]–[32].
9 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [30]–[32].
10 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [33].
11 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [33].
12 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [34].

is disputed.[13] As between the courts of the UK and the BVI, there was a consensus that this required the debt to be disputed on genuine and substantial grounds.[14]

13 Turning to the arbitration regime, the Privy Council focused on s 18 of the BVI's Arbitration Act[15] ("2013 Act"), which gave direct effect to Art 8(1) of the Model Law:

> *Article 8. Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

14 According to the Privy Council, the interpretation of s 18, which "must take account of its origin in an international instrument intended to have an international currency",[16] was that it provided for a mandatory stay of proceedings when a *matter* in those proceedings would be referrable to arbitration.[17] As to what constituted a "matter", the Privy Council noted the broad consensus as expressed by Lord Hodge in *FamilyMart China Holding Co Ltd v Ting Chuan*:[18]

> A 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the 'matter' is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought. The Privy Council agrees with the statement of Sundaresh Menon CJ in para 113 of *Tomolugen* [2016] 1 SLR 373 that a 'matter' requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. The Privy Council agrees with Foster J's third proposition in *WDR Delaware* that a 'matter' is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings.

15 Drawing from the above, the Privy Council concluded that, because the appointment of a liquidator does not involve the determination of the existence of any debt owed to the petitioner, such an application simply does not require a mandatory stay pursuant to

13 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [67].
14 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [67].
15 Act 13 of 2013.
16 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [44].
17 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [45].
18 [2024] Bus LR 190. *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [47].

s 18 of the 2013 Act.[19] Accordingly, there was nothing anti-arbitration about this conclusion – s 18 clearly dictated that the policy objectives underlying the BVI's arbitration regime (efficiency, party autonomy, *pacta sunct servanda* and minimal curial intervention) did not extend to such applications.[20]

16 The Privy Council observed that this conclusion was similarly arrived at by the Court of Appeal of England and Wales in *Salford Estates*,[21] which concerned the equivalent provision in the English Arbitration Act 1996[22] ("1996 Act"). Where the Privy Council departed from *Salford Estates* was in the Court of Appeal's finding that, notwithstanding the earlier analysis, the legislative policy embodied in the 1996 Act would nonetheless require the court to exercise its discretion to stay the liquidation proceedings save in wholly exceptional circumstances.[23] In the Privy Council's view, it must follow from the earlier analysis that "the legislative policy stops short of such proceedings".[24]

17 Having established that an application to appoint a company's liquidator falls outside of the arbitration regime, the Privy Council decided that the applicable test where the debt on which an application is based is subject to an arbitration agreement would be whether the debt is disputed on genuine and substantial grounds.[25] This test was not met as Sian failed to challenge this aspect of Wallbank J's decision.[26]

IV. Analysis of the Privy Council's decision

18 From the foregoing, it can be seen that the Privy Council sought to cleave winding-up proceedings out of the scope of Art 8 of the Model Law (or the statutory provisions which implement it). In the following section, the authors respectfully disagree with the Privy Council's approach and seek to demonstrate that such proceedings, in fact, may fall squarely within Art 8.

19 As a starting point, winding-up proceedings can only be brought by persons who have the *standing* to do so. This is the case for the BVI

19 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [53].
20 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [92]–[93].
21 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [94].
22 c 23.
23 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [94].
24 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [95].
25 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [99].
26 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [100].

and the UK,[27] as it is for Singapore. Under Singapore law, a winding-up process by the court is "initiated by the making of an application to the court by a party with *locus standi* to do so".[28] Only persons identified under s 124(1) of the Insolvency, Restructuring and Dissolution Act 2018[29] ("IRDA") have the standing to invoke the jurisdiction of an insolvency court to wind up an insolvent company.[30] Section 124(1)(*c*) of the IRDA states that "any creditor, including a contingent or prospective creditor, of the company" has the requisite standing to file an application to wind up the company.

20 As has been observed by the Singapore Court of Appeal, a winding-up application "may adversely affect the reputation of the business of the company and may also set in motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition".[31] Indeed, it cannot be that simply anybody has the standing to file an application to appoint a liquidator. The requirement of standing ensures that "the claimant has a real interest in the winding-up of the defendant and has some basis to inflict upon the company the drastic consequences that follow from simply presenting a winding-up application".[32]

21 In *Sian Participation*, it does not appear that the Privy Council considered this aspect of the issue. As explained earlier, the main thrust of the Privy Council's reasoning was that winding-up proceedings would not require the determination of the existence of a debt and thus do not engage a creditor's negative obligations not to initiate proceedings in court. Notwithstanding the existence of an arbitration agreement, the insolvency regime would apply in full force immediately – with the effect being that the winding-up proceedings would only be restrained where the debt is disputed on genuine and substantial grounds. But this approach presupposes that a debt due and payable to the applicant exists such that the applicant has the requisite standing to begin with.

27 Insolvency Act 1986 (c 45) (UK) s 124(1); Insolvency Act (Act 5 of 2003) (BVI) s 162(2); see also *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten ed) (Sweet & Maxwell, 5th Ed, 2018) at para 5-17.

28 *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 17.2.

29 2020 Rev Ed.

30 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [73].

31 *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [82].

32 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [82].

22 With respect, this cannot be the case. Especially where a winding-up application has been brought on the basis that the company in question has been unable to pay its debt, the existence of the debt goes directly to the applicant's standing and is fundamental to whether the insolvency regime has even been brought into play. This much appears to be echoed by the Singapore Court of Appeal in *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd*[33] ("*Founder Group*"):

> Disputes over whether the indebtedness has been established can affect both parts of the inquiry. It clearly has a bearing on whether the claimant is in fact a creditor if that is the capacity in which the claimant makes the application. It will often also have a bearing on whether the company is or should be deemed to be insolvent because the company's alleged inability to answer for its debts can sometimes only be assessed once a particular debt has been established and the company's inability to pay that debt has been demonstrated.

23 Therefore, and contrary to what has been said in *Sian Participation*, where a winding-up application has been brought, it would be necessary to determine that a debt that is due and payable to the applicant exists. Where the disputed debt in question is *prima facie* subject to an arbitration agreement, the determination of the disputed debt would fall within Art 8 of the Model Law – which attracts an arbitration stay. That the existence of a debt is relevant to the issue of standing makes it a substantial issue that is legally relevant to, and not peripheral nor tangential to, the subject matter of the proceedings; where the debt has not been established, the proceedings must come to an end.

24 As a corollary, until the merits of the disputed debt are decided by an arbitral tribunal, the insolvency regime does not come into play. Indeed, it has been observed that "the arbitration of the dispute *vis-à-vis* the debt is a necessary *precondition* to bringing the insolvency regime into the equation"[34] [emphasis added].

25 In other words, the Privy Council was incorrect to conclude that it was only required to stay the proceedings where the debt was disputed on genuine and substantial grounds. So long as the debt has been disputed, that determination must be deferred to the arbitrator. Whether there is any genuine or substantial ground for such a dispute is necessarily a question for the arbitrator, pursuant to the arbitration agreement. To proceed nonetheless would require the court to delve into the merits of the dispute. This would amount to an infringement upon

33 [2023] 2 SLR 554 at [24].

34 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [71].

party autonomy, to say nothing of the potential prejudice caused to the company as a result of *res judicata*.

V. Analysis of Singapore's existing approach

26 In Singapore, the leading authority on this issue is the Court of Appeal's decision in *AnAn Group*. There, VTB Bank and AnAn Group entered into what effectively amounted to an agreement for VTB Bank to provide a loan to AnAn Group.[35] The court found that the parties had agreed to arbitrate disputes arising out of this loan.[36] Following a default event, VTB Bank served a statutory demand on AnAn Group for the outstanding sum.[37] A winding-up proceeding was commenced by the former after the latter did not comply with the statutory demand.[38] To resist the application, AnAn Group sought to dispute both the existence and quantum of the sum allegedly owed to VTB Bank.[39] The question of the applicable standard to be met by AnAn Group in disputing the debt therefore arose for the Singapore Court of Appeal's consideration.

27 After examining existing authorities from Singapore and various other common law jurisdictions,[40] the Singapore Court of Appeal held that courts would have to stay winding-up proceedings so long as it could be shown on the *prima facie* standard that:[41]

(a) there is a valid arbitration agreement between the parties;

(b) the dispute falls within the scope of the arbitration agreement; and

(c) the dispute is not raised by the debtor-company in abuse of the court's process.

35 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [4].
36 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [7].
37 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [12].
38 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [13].
39 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [13].
40 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [30]–[54].
41 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [56].

On the facts of *AnAn Group*, the court held that AnAn Group met the *prima facie* standard and there was no abuse of process.[42] AnAn Group therefore succeeded in resisting the winding-up application.

28 Three aspects of the Singapore Court of Appeal's reasoning are worth noting. First, in holding that the *prima facie* standard applies, the court acknowledged the need to prevent the courts' winding-up jurisdiction from being abused. The court observed that in a usual situation where a creditor seeks to claim for a debt that is subjected to an arbitration, a court would generally stay the proceeding under the relevant arbitration legislation when it is satisfied that a *prima facie* case of a valid arbitration agreement has been established.[43] If the *same* debt is being relied on by a creditor-applicant to wind up the company, and suppose that the triable issue standard is applicable, the debtor-company would need to meet a higher threshold[44] – this might encourage a creditor-applicant to initiate winding-up applications in order to pressure a debtor-company into paying up.[45]

29 Second, the court held that applying the *prima facie* standard gave regard to party autonomy.[46] This was because the triable issue standard might require courts to "critically consider the *merits* of the company's defences"[47] [emphasis added], despite the fact that parties agreed that the substantive disputes regarding debts would be resolved by arbitration.[48] Therefore, the *prima facie* standard would be appropriate since the courts would not be the agreed-upon forum to resolve the substantive dispute surrounding these debts.

30 Third, the court declined to adopt the "wholly exceptional circumstances" exception under *Salford Estates*, because its ambit was uncertain and a very high threshold must be met for the exception

42 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [101]–[102].
43 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [61].
44 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [62].
45 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [63].
46 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [75]–[80].
47 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [77].
48 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [77].

to apply.[49] In the court's view, an abuse of process exception struck a better balance between the following concerns previously mentioned in *Tomolugen Holdings Ltd v Silica Investors Ltd*:[50]

> The court must in every case aim to strike a balance between three higher order concerns that may pull in different considerations: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice.

31 The *prima facie* standard would give weight to the first and second concerns by giving "significant leeway" to parties to resolve their dispute via arbitration.[51] As regards the third concern, an abuse of process exception grants courts the power to refuse stays even if the *prima facie* standard is met if doing so would amount to an abuse of process.[52] Additionally, having an abuse of process exception would cohere with other areas of the law, such as stay applications on an exclusive jurisdiction clause as well as a stay under s 6 of the International Arbitration Act 1994[53] ("IAA").[54] The court also provided some examples of conduct constituting an abuse of process, including:[55]

> (a) where the debt is admitted as regards both liability and quantum;
>
> (b) where the debtor has waived or may be estopped from asserting his rights to insist on arbitration, such as where the parties have agreed subsequently that disputes may be resolved by litigation; and
>
> (c) where the debtor-company is seeking to stave off substantiated concerns which justify the invocation of the insolvency regime.

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49 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [95].

50 [2016] 1 SLR 373 at [188]; see *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [96].

51 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [97].

52 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [97].

53 2020 Rev Ed.

54 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [98].

55 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [99].

32 The court clarified that the abuse of process exception "cannot be used as a gateway for parties to introduce arguments on the merits of the dispute, when such arguments are plainly irrelevant under the *prima facie* standard".[56]

33 In the authors' view, the Singapore Court of Appeal's decision to adopt the *prima facie* standard was the correct one for the reasons described above. But what remains unanswered is whether this test engages s 6 of the IAA, which gives effect to Art 8 of the Model Law. This issue does not appear to have been raised before the Singapore courts.[57] Notwithstanding, the Court of Appeal did make the following observations in *Founder Group*:[58]

> While the court in *AnAn* did not expressly state that the *AnAn* requirements are relevant to the question of standing, there is simply no principled basis for thinking that they are not. In the same way that a claimant who relies on a debt that is disputed in good faith and on substantial grounds has not proved himself to be a *creditor*, a claimant who relies on a disputed debt that is subject to arbitration cannot claim to have status as a creditor either. This conclusion is also reflected in the court's discussion in *AnAn* of how the arbitration regime interacts with the insolvency regime when the disputed debt is subject to an arbitration agreement. The court observed that the insolvency regime is not engaged at the point when a dispute arises in relation to a debt that is subject to an arbitration agreement. At that point, it cannot be assumed that the company is in fact a debtor, that being the precise question that the parties have agreed to refer to arbitration. Rather, it is only when the debt has been established by way of arbitration, and remains unsatisfied, that the insolvency regime is engaged. [emphasis in original]

34 These observations track the earlier analysis that when a disputed debt is subject to an arbitration agreement, the arbitration regime is engaged. Although it is settled law that the liquidation of an insolvent company is non-arbitrable,[59] this is not fatal to the argument since disputes related to pre-insolvency matters may still be arbitrable.[60] If the

56 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [99].

57 Jasdeep Singh Gill & Marius Benedikt Gass, "One Step Forward, Two Steps Sideways" [2021] LMCLQ 6 at 14. Although the decision in *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 was noted in *Re Sapura Fabrication Sdn Bhd* [2024] SGHC 241, the applicability of s 6 was not argued there.

58 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [35].

59 *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR(R) 382 at [23]; see also *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [69]–[70].

60 Darius Chan & Sidharrth B Rajagopal, "To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes" (2021) 38(4) *Journal of International Arbitration* 457 at 479; see also *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [82] and [98].

foregoing is true, such situations would attract arbitration stays under s 6. Perhaps when the appropriate case comes along, the Singapore courts will take the opportunity to dispel any uncertainty in this regard.

35 For completeness, it is worthwhile to consider how the abuse of process exception fits into the larger legislative picture under the arbitration regime. Assuming that s 6 is applicable, the court may be hard-pressed to justify the existence of such an exception – on its face, s 6 provides for the court to refuse a stay only where the arbitration agreement is "null and void, inoperative or incapable of being performed".[61]

36 But it has been argued elsewhere that s 6(2) of the IAA, which gives the court the power to order a stay "upon such terms or conditions as it may think fit", offers room to incorporate the exception.[62] This is not without force, especially when one considers that the purposive interpretation requires an interpretation that would promote the underlying object of the statute.[63] Although the IAA was enacted to facilitate international commercial arbitration within Singapore's legal framework, this is only to the extent that arbitration would be in accordance with the rule of law.[64] It may therefore be at odds with the procedural aspect of the rule of law if s 6 (2) is interpreted to limit the court's ability to prevent abusive conduct, such as when the applicant seeking a stay is not ready and willing to do all things necessary for the proper conduct of the arbitration.[65] Viewed in this way, a condition for a stay order may potentially include non-abusive conduct on the part of the applicant.

VI. Conclusion

37 To conclude, this note summarised the facts and decision by the Privy Council in *Sian Participation*. There, the Privy Council held that a winding-up proceeding is only stayed when it could be shown that there is a substantial and *bona fide* dispute to a debt even though it is *prima facie* subject to an arbitration agreement. In the authors' view, the Privy Council did not consider how disputed debts affect the standing of creditors to initiate winding-up proceedings. Specifically, a creditor's standing

61 This is as opposed to s 6(2) of Singapore's Arbitration Act 2002 (2020 Rev Ed) ("AA"), which governs domestic arbitration. Under s 6(2) of the AA, the court retains some discretion to refuse to stay court proceedings in favour of a domestic arbitration.

62 Darius Chan & Sidharrth B Rajagopal, "To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes" (2021) 38(4) *Journal of International Arbitration* 457 at 481.

63 Interpretation Act 1965 (2020 Rev Ed) s 9A(1).

64 Sundaresh Menon, "Arbitration's Blade: International Arbitration and the Rule of Law" (2021) 38(1) *Journal of International Arbitration* 1 at 7.

65 *CSY v CSZ* [2022] 2 SLR 622 at [1].

presupposes that a debt is validly owed to him or her by a company. This question, however, is to be decided by arbitration. Therefore, the Privy Council – by applying the standard of a substantial and *bona fide* dispute, which draws the courts into the merits of the company's defence – undermines party autonomy. Decisions in Singapore have recognised this tension and rightly held that only a *prima facie* standard needs to be applied for winding-up proceedings to be restrained. What remains to be seen is whether the courts have the power to refuse a stay proceedings in favour of international arbitrations to protect their processes from abuse.