CROSS-BORDER INSOLVENCY AND ARBITRATION

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Commercial parties often expect to decide on the dispute resolution mechanism in which any disputes between them ought to be resolved in advance by making appropriate contractual or other arrangements. However, internationally, it is uncertain how such provisions interact with court-supervised insolvency processes, such as en désastre *proceedings locally. In any insolvency, a creditor seeking the recognition of the debt they are owed is vulnerable to arguments that the debt is genuinely disputed. Where those debts are disputed, some jurisdictions show greater deference than others to the existence of arbitration clauses in staying winding-up petitions (or their equivalents) so that the dispute can first be arbitrated. The decision of the Singaporean Court of Appeal in* AnAn v VTB *is the latest installment in these international judicial conversations, drawing upon pan-Commonwealth authorities. It is hoped that these reflections might be of relevance when, inevitably, similar issues arise in Jersey and Guernsey.*

I Introduction

1 Arbitration and insolvency can appear to be uneasy bedfellows as there is a potential clash between private arbitral ordering and court-controlled insolvency processes. The precise impact of an arbitration clause in respect of a debt that is the subject of a substantial and *bona fide* dispute on whether or not that creditor may properly bring a winding-up petition before domestic courts to collect that debt has given rise to much judicial debate internationally.

2 In England, where the existence of the debt is subject to compulsory arbitration because of a contractual arbitration clause entered into by the parties (that is of *prima facie* application to the relevant dispute), the creditor may very rarely bring a winding-up petition.[1] This can even be so where the debt is allegedly "indisputably due".[2] In the

[1] *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575; [2015] BCC 306 ("*Salford Estates*") at paras 31–33, *per* Etherton C.

[2] *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] BCC 877 at para 12, *per* Mr Alan Steinfeld QC (Deputy High Court Judge).

British Virgin Islands ("BVI"), the judiciary scrutinises arbitration clauses more robustly: a winding-up petition is a judicial process and it is for the courts to decide whether or not the debt exists.[3] Hong Kong takes an intermediate position, largely following the English approach while allowing a winding-up petition to be brought despite the existence of a relevant arbitration clause in "exceptional" circumstances. However, the law of Hong Kong is arguably in a state of flux.[4] While there are significant differences between the insolvency regimes in Jersey and Guernsey relative to each other and relative to England and other common law jurisdictions, this is an important question that might have to be specifically considered by the courts in Jersey or Guernsey in the future.

3 The Singaporean Court of Appeal has recently considered these issues in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* ("*AnAn v VTB*").[5] This article will consider the *AnAn v VTB* judgment before reflecting upon possible wider implications, with specific reference to Jersey and Guernsey.

II Facts

4 AnAn Group (Singapore) Pte Ltd ("AnAn"), the appellant, was a Singaporean holding company. VTB Bank (Public Joint Stock Company) ("VTB"), the respondent, was a Russian state-owned bank.[6] The underlying transaction was, essentially, a secured loan: AnAn agreed to sell VTB an interest in the shares of EN+ Group PLC ("EN+"), which it would then repurchase from VTB at a later date at a pre-agreed rate. This was governed by a global master repurchase agreement ("GMRA"), which was entered into on 3 November 2017.[7] On 24 April 2018, VTB sent AnAn a calculation notice which said that AnAn owed them approximately US$170m under the GMRA. However, AnAn disputed VTB's method of valuing the shares in EN+. Nevertheless, VTB sent AnAn a statutory demand for the US$170m allegedly owed on 23 July 2018, which AnAn did not pay.[8]

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[3] *Jinpeng Group Ltd v Peak Hotels & Resorts Ltd* BVIHCMAP 2014/0025 and BVIHCMAP 2015/0003 ("*Jinpeng*") at para 47, *per* Webster JA.
[4] *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("*Lasmos*") at para 33, *per* Harris J; *Dayang (HK) Marine Shipping Co, Ltd v Asia Master Logistics Ltd* [2020] HKCU 494 ("*Dayang*") at para 117.
[5] [2020] SGCA 33.
[6] *AnAn v VTB* at para 4, *per* Chong JA.
[7] *Ibid*.
[8] *Ibid*, at paras 11–12, *per* Chong JA.

As a result, VTB commenced a winding-up petition against AnAn.[9] This was granted at first instance.[10]

5 On appeal before the Singaporean Court of Appeal were two issues: (i) when a debt is disputed, what is the standard of review to be met when deciding whether or not a winding-up application should be allowed; and (ii) had that standard been met in this case?[11]

III Ratio

1. *Comparative analysis of various common law jurisdictions*

6 Steven Chong JA began by stating the well-known proposition that a debtor need only raise triable issues in order to obtain a stay or dismissal of a winding-up application. This is to be done by demonstrating that there is a *bona fide* and "substantial" dispute.[12] He distinguished the present proceedings from the Singaporean case of *Metalform Asia Pte Ltd v Holland Leedon Pte* ("*Metalform*").[13] This was because, *inter alia*, the court in *Metalform* had determined that there was a genuine cross-claim which was properly triable by arbitration, and so the threshold would have been met anyway.[14]

7 The court then considered the position in a number of common law jurisdictions. Chong JA observed that, in England, the standard of review was relatively light: where a debt is disputed, the English courts would dismiss or stay a winding-up application as long as the dispute at hand appeared to be, *prima facie*, within the scope of a valid and applicable arbitration agreement of the parties. The English courts would only allow the winding-up to proceed in "wholly exceptional circumstances" as this would accord with the legislative policy of encouraging arbitration.[15] Similarly, in Hong Kong, the position is that it would be inappropriate for the court to engage in some sort of summary judgment exercise in this situation, and credence should be

[9] *Ibid*, at para 13, *per* Chong JA.
[10] *Ibid*, at para 18, *per* Chong JA.
[11] *Ibid*, at para 24, *per* Chong JA.
[12] *Ibid*, at para 25, *per* Chong JA.
[13] [2007] 2 SLR(R) 268.
[14] *AnAn v VTB* at paras 28–29, *per* Chong JA; *Metalform* at para 89.
[15] *AnAn v VTB* at para 30, *per* Chong JA; *Salford Estates* at paras 39–40, *per* Etherton C.

given to pro-arbitration government policy.[16] Chong JA noted that Malaysia adopted a light-touch approach, too.[17]

8 However, Chong JA commented that the position in Hong Kong was still evolving, recalling the *obiter* remarks in *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd* ("*Dayang*")[18] that the prevailing debtor-friendly English and Hong Kong—

> "approach is far from settled . . . If anything, the hesitancy by the Singapore courts to stay or dismiss winding-up proceedings on the mere say-so of the debtor-company should also give some cause for concern".[19]

Similarly, in the Eastern Caribbean Court of Appeal, reservations were expressed with regard to the English position, where it was thought that the *Salford Estates* approach came close to an "automatic stay position", and so a stricter standard of whether or not there was a triable issue was preferred.[20]

2. *Conflicting Singaporean authorities*

9 Chong JA then turned to the conflicting Singaporean decisions on the issue.

10 Aedit Abdullah JC had accepted the *Salford Estates* approach in *BDG v BDH*.[21] However, Abdullah JC slightly restated the test by saying that a winding-up petition would be granted despite the existence of a relevant arbitration agreement if it could be shown that the issues raised to counter the winding-up petition "are not raised *bona fide*", rather than that exceptional circumstances existed.[22] This standard would appear to give the court greater scope to exercise its discretion in deciding to allow a winding-up petition.

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[16] *AnAn v VTB* at para 32, *per* Chong JA; *Lasmos* at paras 15–17, *per* Harris J.

[17] *AnAn v VTB* at para 46, *per* Chong JA; *Awangsana Bina Sdn Bhd v Mayland Avenue Sdn Bhd*, High Court of Malaya WA-28NCC-1146-12/2018 at paras 25–28.

[18] [2020] HKCU 494.

[19] *AnAn v VTB* at para 43, *per* Chong JA; *Dayang* at para 117.

[20] *AnAn v VTB* at para 45, *per* Chong JA; *Jinpeng* at para 47.

[21] *AnAn v VTB* at para 48, *per* Chong JA; *BDG v BDH* [2016] 5 SLR 977 at para 22, *per* Abdullah JC.

[22] *AnAn v VTB* at para 49, *per* Chong JA; *BDG v BDH* at para 23, *per* Abdullah JC.

11 In contrast, in *BWF v BWG*,[23] Valerie Thean J said that a lower standard of review that should be adopted in deciding if a winding-up petition should be allowed to be brought despite the existence of a relevant arbitration clause was whether or not there was a *bona fide prima facie* dispute. Thean J considered that this lower standard of review would better respect party autonomy, implying that it would be for the arbitral tribunal to dispose of unmeritorious cases efficiently.[24]

3. Prima facie *standard adopted*

12 Chong JA went on to say that the *BWF v BWG bona fide prima facie* dispute approach was to be preferred. This means—

> "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."[25]

13 For the sake of consistency, this is to apply to disputed debts and cross-claims alike.[26]

14 By adopting the *prima facie* standard, it was considered that this would better promote coherence in the law by discouraging parties to an arbitration agreement from presenting winding-up applications "as a tactic to pressure an alleged debtor to make payment on a debt that is disputed or which may be extinguished by a legitimate cross-claim".[27] This is because the test to get an arbitration stayed on the basis of the validity of the arbitration agreement is also the *prima facie* standard.[28] Chong JA reasoned that the same standard ought to apply in respect of a dispute concerning the same debt in the winding-up context for consistency.[29]

15 While it was noted that there was a "wider public interest" in following a "collective enforcement procedure" in the insolvency context, it was thought that a distinction had to be drawn between "disputes involving an insolvent company that stem from its pre-insolvency rights and obligations" and those that "arise only upon the

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[23] [2019] SGHC 81.
[24] *AnAn v VTB* at paras 52–53, *per* Chong JA; *BWF v BWG* [2019] SGHC 81 at paras 29–34, 38, *per* Thean J.
[25] *AnAn v VTB* at para 56, *per* Chong JA.
[26] *Ibid*, at para 58, *per* Chong JA.
[27] *Ibid*, at para 60, *per* Chong JA.
[28] *Ibid*, at para 61, *per* Chong JA.
[29] *Ibid*, at para 63, *per* Chong JA.

onset of insolvency due to the operation of the insolvency regime".[30] Thus, in this context, there was insufficient justification to disturb the principle of party autonomy, and it would be appropriate to apply the pro-arbitration *prima facie* standard.[31] In contrast, the triable issue standard would require the court to "critically consider the merits of the company's defences", with the potentially draconian outcome of a winding-up being ordered. The court, if it is too ready to step in, would be usurping the role of the arbitral tribunal, which the parties freely opted for, on the basis of their own analysis of the relative merits of arbitration.[32] If the debtor is placed in liquidation, then there is limited practical likelihood of the arbitration being brought since the directors would hand over decision-making power to the liquidator.[33] It is therefore not for the courts to—

> "undercut the bargain of the parties by examining the merits of the company's defence(s) irrespective of whether the debt is pursued by way of a court action or a winding-up application."[34]

16 It was further noted that, by not entertaining arguments on the merits of the dispute, time and costs would be saved by adopting a bright-line rule.[35] Even if its adoption means that commercial parties will have to revise their business practices, there are important reasons of principle why commercial parties should be held to their bargains.[36]

4. *Scope of the* prima facie *standard of review*

17 Considering the English and Singaporean authorities particularly, Chong JA held that the *prima facie* standard simply meant that the court should be slow to interfere with the parties' bargain, and that the debtor company simply had to show that "there is a valid arbitration clause" which "captures the dispute before the court (or any part thereof)".[37]

18 Of course, to grant an automatic stay once a *prima facie* case had been made out might give the borrower an unfair advantage. It would

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[30] *Ibid*, at para 69, *per* Chong JA; *Larsen Oil and Gas Pte Ltd v Petropod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 at paras 45–46.
[31] *Ibid*, at para 71, *per* Chong JA.
[32] *Ibid*, at para 77, *per* Chong JA.
[33] *Ibid*, at para 80, *per* Chong JA.
[34] *Ibid*, at para 82, *per* Chong JA.
[35] *Ibid*, at para 86, *per* Chong JA.
[36] *Ibid*, at para 88, *per* Chong JA.
[37] *Ibid*, at paras 91–92, *per* Chong JA.

therefore be relevant to consider whether the claim that an arbitration agreement applied was brought *bona fide* and was not an abuse of process. However, the *Salford Estates* approach of using "wholly exceptional circumstances" as a safeguard was thought to be unhelpful as it seemed to be an overly exacting and amorphous standard.[38] The Singaporean Court of Appeal then offered several examples of what might amount to an abuse of process in this context:

(a) where a debt is "admitted as regards both liability and quantum";

(b) where the debtor "has waived or may be estopped from asserting his right to insist on arbitration", such as if the parties subsequently agreed to resolve their dispute through litigation; or

(c) where the debtor company is "seeking to stave off substantiated concerns which justify the invocation of the insolvency regime", such as when assets have gone missing and there is "an urgent need to appoint independent persons to investigate" the situation, or there is a "proper basis" to conclude that there had been "fraudulent preferences" or a need to engage avoidance provisions in the relevant insolvency legislation.[39]

19 However, in determining whether or not there has been an abuse of process, the court would have to look at the facts of the case closely. It would thus have to be wary of slipping into error by looking at the underlying merits of the case.[40]

5. *Decision*

20 In *AnAn v VTB*, it was therefore ultimately held that the *prima facie* standard had been met and there had not been any abuse of process. It was noted that, even if a party puts forward "misconceived or legally unsustainable" arguments, that does not "give rise to the inevitable conclusion that they were put forward in bad faith", and that the standard required for there to be abuse of process is a rigorous one.[41] The winding-up petition was therefore dismissed in its entirety.[42]

V Comment

1. *Jersey and Guernsey relevance*

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[38] *Ibid*, at paras 93–95, *per* Chong JA; *Salford Estates* at para 30.
[39] *Ibid*, at para 99, *per* Chong JA.
[40] *Ibid*, at para 100, *per* Chong JA.
[41] *Ibid*, at para 102, *per* Chong JA.
[42] *Ibid*, at para 113, *per* Chong JA.

21 In Jersey and Guernsey, it appears that this specific question has yet to be substantially considered judicially. However, the Jersey position seems to be more aligned to the BVI position, as reflected in *Jinpeng.*[43] In contrast, Guernsey seems more aligned to the English position in *Salford Estates*.[44]

22 In Jersey, in the insolvency context, an arbitration clause remains enforceable, subject to the court being of the opinion that this is appropriate "having regard to all the circumstances in the case".[45] This seems to suggest a wider-ranging and more intense standard of review, although it would be open to the court to interpret the scope of such relevant circumstances narrowly. However, as a matter of Jersey judicial practice, there is a strong tendency towards staying court proceedings in favour of arbitration (in the context of staying litigation that ought to be arbitrated under an arbitration agreement).[46] In support of this, the well-known maxim of Jersey contract law, "*la convention fait la loi des parties*", has been invoked.[47]

23 As for Guernsey, an arbitration agreement may not be "discharged by lack of capacity" (such as due to insolvency) except by agreement of the parties, so arbitral proceedings may be brought by or against a liquidator.[48] Given there is no explicit discretion for the court to prevent a matter from being referred to arbitration, one might infer that this approximates an automatic stay position where there is a clash between insolvency legislation and arbitration agreements. However, the position is not entirely clear.

24 Notwithstanding the wide variety of possible approaches to this particular issue internationally, it may be practically desirable for a Jersey court to interpret its discretion to refuse to allow a matter to be

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[43] *Jinpeng* at para 47, *per* Webster JA.

[44] *Salford Estates* at paras 31–33, *per* Etherton C; Guernsey often follows English precedents on arbitration but will still draw its own conclusions: *States of Guernsey v Miller & Baird (CI) Ltd* 2005–06 GLR 295 at para 55.

[45] Arbitration (Jersey) Law 1998, at art 4(1) and 4(2).

[46] *Makarenko v CIS Emerging Markets Growth Ltd* 2001 JLR 348 at paras 1–8 and 32.

[47] *Makarenko v CIS Emerging Markets Growth Ltd* 2001 JLR 348 at para 32; "the agreement forms the law of the parties". *See* also *Consolidated Resources Armenia v Global Gold Consolidated Resources Ltd* [2015] JCA 061 at paras 87–88.

[48] Arbitration (Guernsey) Law 2016, ss 5(1) and 90(1).

referred to arbitration in the insolvency context narrowly so as to align itself with England and (ostensibly) Guernsey.[49]

25 While it for each jurisdiction to reach its own conclusion on which approach to this issue would best suit its specific circumstances, as a matter of first principles, one must recall that "*la convention fait la loi des parties*".[50] This notion that parties should fulfil their contractual obligations has ancient roots and would be equally applicable in Guernsey.[51] It has similarities with the cornerstone concept of contractual freedom in English law.[52] In all three jurisdictions, therefore, there is a strong impetus to hold parties to their bargains, particularly sophisticated commercial parties who would have typically made a conscious choice in incorporating some sort of dispute resolution clause into their contractual arrangements. Of course, this does not mean that courts should not apply any scrutiny whenever a party proffers an arbitration agreement in the face of a winding-up petition.[53] However, there are cogent practical and theoretical reasons why Jersey ought to tend towards the English approach in this regard.

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[49] A Jersey court would typically take careful note of English precedents on arbitration but will form its own view as appropriate: *Makarenko v CIS Emerging Markets Growth Ltd* 2001 JLR 348 at para 32.

[50] "The agreement forms the law of the parties"; this is a well-established part of Jersey contract law: J Kelleher, "*Cause* for Consideration: Whither the Jersey Law of Contract?", in P Bailhache (ed), *A Celebration of Autonomy: 800 Years of Channel Islands' Law* (Jersey: Jersey Law Review, 2005), at 77.

[51] *Incat Equatorial Guinea v Luba Freeport Ltd* 2010 JLR 287 at paras 21–23; A Ozanne and G Dawes, "Guernsey Contract Law: Which Way?", in P. Bailhache (ed), *A Celebration of Autonomy: 800 Years of Channel Islands' Law* (Jersey: Jersey Law Review, 2005) at 90.

[52] See, for example, *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 at para 33.

[53] The BVI High Court has recently commented that it would be logical to consider whether or not the winding-up petition was brought by the plaintiff "selflessly acting on behalf of a body of creditors" or if it is really just a "one-on-one commercial dispute": *IS Investment Fund Segregated Portfolio Co v Fair Cheerful Ltd* BVIHC(COM) 2020/034 at para 9. While such an evaluation runs the risk of being overly subjective, some level of judicial scrutiny is both legitimate and desirable.

2. *Cross-Commonwealth judicial conversations*

26 This judgment of the is a clear statement of Singaporean law, definitively setting out how a Singaporean court would deal with the situation of an arbitration agreement being proffered as a defence to a winding-up petition going forward. However, in *AnAn v VTB*, there was some preoccupation with whether a higher or lower standard of review should be adopted.[54] It might be hoped that future judicial consideration of this area would focus more explicitly on the nature and quality of the standard of review as a whole, rather than treating it primarily as falling along a unidimensional scale of intensity.

27 Helpfully, *AnAn v VTB* sets out the position in Singapore against the backdrop of the variety of approaches that have been adopted in different common law jurisdictions. Nevertheless, since the divergence in approaches internationally means there is no common law consensus on what is the most appropriate balance to be struck, Chong JA rightly pointed out that approaches taken in different jurisdictions are largely a "neutral" factor.[55] Rather, what is relevant are the underlying strengths and weaknesses of each approach.

28 Nevertheless, one could still see the outcome in *AnAn v VTB* as a (partial) endorsement of the *Salford Estates* approach. No doubt, this will continue to be a contested area of law across the Commonwealth, and it seems probable that perhaps a slight majority of major common law jurisdictions will generally tend towards the *Salford Estates* approach, while a significant minority will lean in favour of some variation of the more searching standard applied in *Jinpeng* by the Eastern Caribbean Court of Appeal.

3. *Practical implications*

29 From a policy perspective, this recent decision does appear to support Singapore's twin ambitions of cementing its status as an international hub for both cross-border insolvency and arbitration matters.[56] Although the *AnAn v VTB* judgment appears to lean in favour of party autonomy to arbitrate, and a sophisticated insolvency landscape requires courts to have well-equipped judicial toolboxes,

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[54] See, for example, *AnAn v VTB* at para 50, *per* Chong JA.
[55] *Ibid*, at para 88, *per* Chong JA.
[56] I Merovach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford: Oxford University Press, 2018), at 116; A Stone Sweet and F Grisel, *The Evolution of International Arbitration: Judicialization, Governance and Legitimacy* (Oxford: Oxford University Press, 2017), at49.

national insolvency laws should not be readily open to abuse for a creditor to exert some sort of undue pressure on a debtor. The Singaporean Court of Appeal was therefore pragmatic to distinguish between pre-insolvency rights and those which arise post-insolvency.[57] In other words, there is and ought to be a material difference in how arbitration rights are dealt with early on in the insolvency process (such as when a winding-up petition is brought), and how they may be dealt with when the insolvency process is more advanced, such as where arbitration is afoot when an insolvency process is commenced, or where a party seeks to commence arbitration following an insolvency process.

30 However, in adding abuse of process as a counterbalance to the creditor-friendly *bona fide prima facie* dispute standard, it is doubtful that the Singaporean Court of Appeal in fact provided any more clarity than was provided by the "wholly exceptional circumstances" safety valve used in *Salford Estates*.[58] In common law jurisdictions, abuse of process is a concept that can, rightly, be applied flexibly and which falls within the court's inherent jurisdiction.[59] In England, it has been defined as the "use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process", such as in the case of vexatious litigation.[60] It is apparent that this concept is no more tangible that the wholly exceptional standard, and it is not clear that the abuse of process standard will lead to materially different decision-making. Looking at the three categories of (non-exhaustive) examples of abuse of process in this context given by Chong JA, only the first is relatively straightforward to apply. One can know fairly clearly where a debt has been admitted in respect of liability and quantum. However, estoppel arguments might require extended consideration of issues of fact and law and, if the company is "seeking to stave off substantiated concerns which justify the invocation of the insolvency regime", how can an ordinary (unsecured) creditor know that the assets of the debtor company have gone missing in suspicious circumstances or that there have been "fraudulent preferences"?[61]

31 Overall, the decision in *AnAn v VTB* is a noteworthy instalment in the ongoing international judicial dialogue—to which Jersey and

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[57] *AnAn v VTB* at para 69, *per* Chong JA.
[58] *Ibid*, at para 93–95, *per* Chong JA; *Salford Estates* at para 30.
[59] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536, *per* Lord Diplock.
[60] *Att Genl v Barker* [2000] EWHC 453 (Admin) at para 19.
[61] *AnAn v VTB* at para 99, *per* Chong JA.

Guernsey may soon contribute—on this evolving subject. It may signal the start of a slight consensus in favour of the *Salford Estates* standard but its additional gloss on abuse of process may prove more theoretically than practically helpful to litigants.

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