HCCW 277/2017
[2018] HKCFI 426

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 277 OF 2017

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, sections 178(1)(a), 177(1)(d) and 177(1)(f)

and

IN THE MATTER of Southwest Pacific Bauxite (HK) Limited

BETWEEN

LASMOS LIMITED Petitioner

and

SOUTHWEST PACIFIC BAUXITE (HK) LIMITED Respondent

Before: Hon Harris J in Court
Date of Hearing: 18 January 2018
Date of Decision: 22 January 2018
Date of Reasons for Decision: 2 March 2018

R E A S O N S F O R D E C I S I O N

The application

1. On 27 October 2017 Lasmos Ltd ("**Lasmos**"), the Petitioner, issued a petition to wind up Southwest Pacific Bauxite (HK) Ltd, ("**Company**") on the grounds of insolvency relying on a statutory demand dated 24 July 2017. The statutory demand sought payment of US$259,700.48 ("**Debt**") said to arise under a management services agreement dated 24 July 2013 ("**Agreement**"). On 30 October 2017 the Company issued a summons to strike out the Petition. I heard the summons on 18 January 2018 and made an order on 22 January 2018 that the Petition be struck out. These are my reasons.

Background

2. The Company is a joint venture owned by a number of shareholders including Lasmos, which owns 32.5%. The relationship between the shareholders is governed by a shareholders agreement dated 24 July 2014. The Company's purpose is to hold 75% of Solomon Bauxite Ltd ("**SBL**"). The other 25% is held by Lasmos. SBL's main asset is the lease of a bauxite mine in the Solomon Islands. The Company's board at the relevant times consisted of two directors representing Lasmos, Keith Douglas and Efstratis Kirmos, two directors representing another shareholder, Breakaway Private Equity, Bruce Hills and Stephen Bartrop, and Andrew White and Lawrence Chin representing respectively two other shareholders.

3. On 24 July 2013 as well signing the shareholders agreement Lasmos also signed the Agreement. Under the Agreement Mr Douglas was appointed Chairman of SBL and Mr Kirmos was appointed

General Counsel. The Debt is said by Lasmos to represent the payment it is entitled to pursuant to the Agreement for the services provided by Mr Douglas and Mr Kirmos.

4. The Company has declined to pay the Debt on the grounds that the fees have not been agreed and in particular there has been no agreement as to the rate to be charged. The Company has not suggested that nothing is payable and it has already paid US$100,000. The Company's initial position before me was that there was a "*bona fide* dispute on substantial grounds" as to what further sums were payable. The phrase in parentheses represents what a company faced with a winding-up petition generally has to demonstrate in order to have it struck out.[1] However, the Agreement contains in clauses 17.2 and 17.5 the following provision for arbitration:

> "**17.2 Notification of Dispute**
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> A party claiming that a Dispute has arisen must notify each other party to the Dispute giving details of the Dispute."
>
> "**17.5 Arbitration**
>
> If the Dispute is not settled by mediation within 10 Business Days of the start of the mediation process in clause 17.4, any party may by written notice to the other parties refer the dispute to arbitration. The arbitration will be conducted by a sole arbitrator in accordance with the Hong Kong International Arbitration Centre Administered Arbitration Rules in force at the date of this agreement. The decision of the arbitrator will be binding on the parties. Any arbitration proceedings must be held in Hong Kong and in English. The appointing authority for the purposes of the arbitration shall be the Hong Kong International Arbitration Centre which shall also administer the arbitration. The parties agree to waive any objection to the conduct of such arbitration on the grounds that a mediator was appointed in accordance with clause 17.4(a)(ii)."

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1 *Neo Telemedia Limited* (unrep., CACV 132/2015) (19 October 2015) at [31], citing with approval my judgment in *Yueshou Environmental Holdings Ltd* (unrep., HCCW 142/2013) (16 July 2014) at [8].

5. A number of recent authorities in both England and Singapore have considered the impact the presence of an arbitration clause in an agreement giving rise to a debt relied on to support a winding-up petition, has on the exercise of the court's discretion to make a winding-up order. I asked to be addressed on the authorities and whether Hong Kong law should develop in a similar manner. I consider this question in the next section of this decision.

The Hong Kong authorities

6. The first reported case in Hong Kong in which the court considered what, if any, relevance an agreement to arbitrate had on the determination of a winding-up petition is *Hollmet AG v Meridian Success Metal Supplies Ltd*.[2] Rogers J (as he then was) says this at 347B–H:

> "… The procedure of winding up is to wind up an insolvent company. What the court is concerned to see is whether or not the company is insolvent. The basis upon which that may be presented, may be under s 178 or it may be on a different basis but at the end of the day, the court must consider whether the company is insolvent.
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> One then turns back to art 8(1), one sees that a winding up proceeding is not a matter which is the subject of an arbitration agreement, it is the underlying contract which is the subject of an arbitration agreement. It is common ground between the parties that in all other types of winding up cases when the court is faced with the question of whether a debt is owing, the test it applies is whether there is a bona fide dispute on substantial grounds.
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> If there is an agreement which provides that disputes should go to arbitration, until the court is satisfied that there is a dispute, it seems to me that it can still be said that money is due and owing under the contract. It is only once the dispute has arisen that the arbitration comes into being. So whether one looks upon the test, under s 177 as considering whether the company is a debtor or whether one applies the other approach

[2] [1997] 4 HKC 343.

> and considers whether there is a bona fide dispute on substantial grounds, it seems to me that until it is properly established that there is a dispute, the debt would exist.
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> It is not sufficient in the Companies Court for a person merely to hold up his hand and say there is a dispute. He must establish that there is a bona fide dispute on substantial grounds. …
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> … If a company wishes to obtain a stay of winding up proceedings on the basis that the underlying debt upon which the statutory notice is founded is disputed, it must establish in the normal way that there is a bona fide dispute on substantial grounds. …"

7. The reasoning we find in these passages gives no weight to the agreement between the parties as to how any dispute between them is to be resolved. Although not expressly stated the thinking behind this approach focuses on what a creditor is doing when presenting a petition, namely, invoking a class right to have an insolvent company wound up. The creditor is not seeking an order that the company pay the debt that the creditor relies on as demonstrating that he has *locus* to present a petition and that the company is insolvent. I address this in more detail in later paragraphs.

8. A similar argument was advanced in 2002 before Yuen J (as she then was) in *Re Sky Datamann (Hong Kong) Limited*.[3] As Yuen J explains in [10] and [11], article 8(1) of the UNCITRAL Model Law which by virtue of *section 6* of the *Arbitration Ordinance*, Cap 341, applied to domestic arbitrations and required a court before which an action is brought to refer a dispute to arbitration if one party so requests, does not apply to a winding-up petition because it does not come within the definition of "action". Although the statutory arbitration scheme has

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[3] (unrep., HCCW 487/2001) (29 January 2002).

changed since 2002 the relevant provisions[4] similarly do not include winding-up petitions. Although Yuen J goes on in her judgment to consider whether a *bona fide* dispute on substantial grounds had been demonstrated, and found that it had, in [12] of the judgment Yuen J states that an arbitration agreement is relevant to the exercise of the court's wide discretion found in *section 180(1)* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32 ("**CWUMP**"), although, Yuen J does not discuss how it impacts on the decision making process:

> "Accordingly, it is clear that the court is not obliged to strike out or stay a petition merely because the petitioner and the company had entered into a contract with an arbitration clause, or even if the company has commenced arbitration. It is a matter for the discretion of the court in each case. In exercising its discretion, the court will consider all relevant circumstances, including the financial position of the company, the existence of other creditors, and the position taken by them."

9. In 2003 in *Re Jade Union Investment Limited* [5] it was argued, amongst other things, that the existence of an arbitration clause is a matter to which very great weight should be given when the court comes to exercise its discretion, and that the court should only consider the merits of a company's defence to a debt in very limited circumstances, normally, where there is evidence of actual insolvency. Barma J (as he then was) rejected this argument in [18], [19] and [21] to [23] of his judgment:

> "18. … A petition for the winding up of a company is quite different from an action between parties, in which the parties seek the court's determination as to their respective rights and liabilities. By a winding up petition, a creditor invokes the

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4 *Section 20* of the *Arbitration Ordinance*, Cap 609.

5 (unrep., HCCW 400/2003) (5 March 2004).

court's jurisdiction under the Companies Ordinance to wind up a company on one or more of the grounds set out in section 177(1) of that Ordinance. In doing so, it exercises a class right available to all of the company's creditors. If a winding up order is made, the creditor will not necessarily have established any right to be paid, or to be admitted to proof in respect of, any particular amount. This is because it will not necessarily have obtained any adjudication from the court of its right to recover any particular amount from the company. It will still be obliged to submit a proof of debt, along with other creditors of the company, and following the adjudication of its proof by the liquidator, it will rank *pari passu* with all other creditors of the same class for a dividend to be paid out of the assets of the company.

19. That being so, it seems to me that the court, in exercising its winding up jurisdiction, in cases such as this, where the company asserts that the debt on which the petition is founded is disputed, is concerned first to determine whether or not the petitioner is to be regarded as a creditor of the company so that it is entitled to present the petition. This it does by considering whether or not the debt is bona fide disputed on substantial grounds. Neither the existence of an arbitration clause in a contract between the petitioner and the company, nor the existence of an arbitration commenced pursuant to it, of themselves demonstrate that the debt is in fact bona fide disputed on substantial grounds. It remains necessary for the company to discharge its burden of establishing this, by placing before the court the evidence from which the court can see that such a dispute exists. …

…

21. This brings me to the third strand of Mr Harris' argument. I am afraid that I am unable to agree with it. If, having considered the evidence, the court concludes that there is no bona fide dispute of substance in relation to the debt relied upon by the petitioner, I see no good reason why the existence of an arbitration clause should be regarded nonetheless as somehow relevant to the court's exercise of its discretion as to whether or not to make a winding up order. There being, in the view of the court, no dispute of substance, the mechanism by which the parties may have resolved to resolve any disputes between themselves is neither here nor there. Moreover, the question of whether or not there is a dispute of substance would appear to be one which logically arises prior to the point at which the court is called upon to exercise its discretion as to whether or not to make a winding up order.

> 22. Further, it is difficult to see why the making of a winding up order in cases in which an arbitration clause exists in a contract between petitioner and company should, as a matter of discretion, be done only where there is evidence of 'actual insolvency'. By this expression, I understood Mr Harris to mean that the insolvency of the company should be proven by some means other than its failure to meet a statutory demand. Given that section 178(1)(a) of the Companies Ordinance deems a company which does not comply with a valid statutory demand to be insolvent, I see no warrant for requiring a petitioner whose contract with the company contains an arbitration clause to be deprived of the benefit of that provision and to be required to establish by positive evidence, which may seldom be available to it, that the company is insolvent.
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> 23. None of this is, of course, to say that the court does not, having concluded that the debt is not bona fide disputed on grounds of substance, go on to consider whether or not it ought to exercise its discretion by making a winding up order in the particular case before it. It remains necessary to exercise this discretion, as Yuen J said, in the light of all the relevant circumstances."

10. From the time of Barma J's decision it has been understood that the Companies Court determines a petition based on a disputed debt arising from an agreement containing an arbitration clause in the same way that it does any other petition based on non-payment of a disputed debt, namely, by requiring a company that opposes a winding up to demonstrate that it has a *bona fide* defence on substantial grounds: see, for example, Kwan J (as she then was) in [7] of *Re Southern Materials Holding (H.K.) Co Ltd* [6] and [18] of my own decision in *Re Quiksilver Glorious Sun JV Ltd*,[7] which arose from a shareholders dispute, in which I summarise *obiter* the state of the law as explained in the decisions to which I have referred as follows:

> "Commonly a winding-up petition issued on the grounds of insolvency relies on a statutory demand to prove insolvency. If

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6 (unrep., HCCW 281/2007) (13 February 2008).
7 [2014] 4 HKLRD 759.

> it does so in order for the company to defeat the petition it must demonstrate that it has a *bona fide* defence on substantial grounds to the claim for the underlying debt. That determination is undertaken by the court. The petition will not be stayed to arbitration if the debt arises under an agreement which contains an arbitration clause: see the decision of Yuen J (as she then was) in *Re Sky Datamann (Hong Kong) Ltd*.[8] This is consistent with the nature of winding-up proceedings. The creditor does not seek to recover the sum due to him under the agreement containing the arbitration clause; rather he seeks to put an insolvent company into liquidation for the benefit of all its creditors."

11. The issue in *Quiksilver* was whether the petition should be stayed to allow the underlying dispute between the shareholders to be determined in accordance with the arbitration agreement in the shareholders agreement that they had signed, and which covered the subject matter of the complaints in the petition, although an arbitrator could not order that the company be wound up, which was the relief sought by the petitioner. I concluded for the reasons contained in [17] to [22] of that judgment that it should be. In [22] I summarise my analysis:

> "I have already rejected the objection that because of its nature a just and equitable winding-up petition cannot be stayed to arbitration. I have also explained why the fact that the precise relief sought in a petition is not available from an arbitrator is not a critical consideration, although it is relevant. In my view the correct approach is to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement."

12. Although this was said specifically with reference to a petition brought by a shareholder on the just and equitable ground,[9] in my view it is also relevant in the insolvency context and more so than some

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[8] (unrep., HCCW 487/2001, [2002] HKLRD (Yrbk) 22) (29 January 2002).

[9] See also the Court of Appeal in *Joseph Ghossoub v Team YR Holdings Hong Kong Ltd* [2017] HKEC 1532, [24], [29]–[30].

of the earlier authorities recognise. In *Hollmet* [10] Rogers J says this at 347A: "*Although in many instances, people may regard winding up petitions as a means of enforcing a contract, that is not what it is*." In *Jade Union* Barma J is to similar effect in [18] of the judgment quoted earlier. As far as they go the statements are correct, but they are misleading. A petitioner is seeking to recover a debt. He does not do so by suing for a judgment, he does so by invoking the court's insolvency jurisdiction, which will allow him to prove for the debt in a liquidation. The difference is material, but the difference goes to jurisdiction and the principles and considerations which inform how it is exercised, not the substantive nature of what the petitioner is seeking to achieve. The collective nature of the jurisdiction requires, where relevant, the court to consider the interests and views of other creditors, if any, once the court is satisfied that the petitioner is a creditor and before making a winding-up order. The question of whether or not a winding-up order should be made is not arbitrable. It does not, however, follow that a dispute between a petitioner and a company over a debt relied on to establish *locus* to present a winding-up petition is not. This is not a distinction which is drawn in the Hong Kong cases to which I have referred. As I will demonstrate when considering the English and Singaporean authorities it is a distinction which the courts in those jurisdictions have identified and consider important in determining whether a creditor should be required to arbitrate a disputed debt before presenting a petition.

The development of the law in England and Singapore

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[10] *Supra*.

13. In *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [11] a lessor claimed payment of certain service charges and insurance rent that an arbitrator had found was payable by the company lessee. The lessor claimed payment of the amount found payable and amounts for the same items for a subsequent period. The amount determined to be payable by the arbitrator was paid on the day the petition was issued. The company objected on the grounds that the additional sums were disputed and that the dispute should be referred to arbitration. Judge Nigel Bird QC agreed and dismissed the petition. The petitioner appealed.

14. Sir Terence Etherton C, with whom the other members of the Court of Appeal agreed, dismissed the appeal. The Court found that the mandatory stay provisions in *section 9* of the *Arbitration Act 1996* did not apply to a petition but went onto uphold the First Instance decision on the following grounds at [39] to [41]:

> "39 My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Warren J in the *Rusant* case, at para 19.
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> 40 Henry and Swinton Thomas LJJ considered in *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the

[11] [2015] Ch 589.

> discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement—as a standard tactic—to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.
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> 41 There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted. In accordance with the decision in the *Halki Shipping* case, that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under section 122(1)(f) of the 1986 Act, it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.
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> 42 The judge stayed the Petition because, contrary to my conclusion, he thought that the mandatory stay provisions in section 9 were engaged. I consider that it would have been better to have dismissed the Petition rather than to stay it in the absence of any evidence that there was another creditor of Altomart who was willing to be substituted as the petitioner. That is not, however, a point taken by Salford Estates on this appeal."

15. As in England, the Legislature in Hong Kong has enacted legislation advancing a policy encouraging and supporting party autonomy in determining the means by which a dispute arising between them should be resolved. This is expressly stated in *section 3* of the *Arbitration Ordinance*, Cap 609:

"**Object and principles of this Ordinance**

(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.

(2) This Ordinance is based on the principles—

(a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and

(b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance."

16. The courts of Hong Kong have, as is the case in other common law jurisdictions, been strongly supportive of the development of arbitration and the policy underlying the *Arbitration Ordinance*. Mimmie Chan J, at the time the judge in charge of the Arbitration List, summarised the position in September 2015 in [1] of her judgment in *KB v S*:[12]

"The attitude of the Hong Kong Court towards enforcement of arbitration awards and parties' agreements to submit their disputes to arbitration has been made demonstrably clear in the authorities. In summary:

(1) The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.

(2) Under the Arbitration Ordinance ('Ordinance'), the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.

(3) Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.

(4) Enforcement of arbitral awards should be 'almost a matter of administrative procedure' and the courts should be 'as mechanistic as possible' (*Re PetroChina*

[12] (unrep., HCCT 13/2015) (15 September 2015).

International (Hong Kong) Corp Ltd [2011] 4 HKLRD 604).

(5) The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).

(6) In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).

(7) In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited* [2009] 4 HKLRD 353 (CA)).

(8) Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111).

(9) Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 136A-B).

(10) The Court of Final Appeal clearly recognized in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act bona fide (p 120I and p 137B of the judgment)"

17. As Sir Terence Etherton C observes "*it would be anomalous, in the circumstances, for the Companies' Court to conduct a summary*

judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration" thus giving no weight to the policy underlying the *Arbitration Ordinance*.

18. In *Revenue and Customs Commissioners v Changtel Solutions UK Ltd*[13] the issue for determination concerned whether or not the Companies Court when presented with a petition by the Revenue to wind up on the grounds of insolvency should defer in the determination of the prospects of success of an appeal over the decision said by the Revenue to give rise to a debt on which it relied to the First-tier Tribunal (an appeal tribunal). David Donaldson QC sitting as a deputy judge of the Companies Court held that it should. The Court of Appeal allowed the Revenue's appeal. Vos LJ in addressing submissions by counsel for the company drawing by analogy support from the reasoning of the Court of Appeal in *Salford Estates* [14] says this:

> "48 Finally, Ms Kyriakides referred in this connection to the very recent decision of the Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 3 WLR 491 where Sir Terence Etherton C (with whom Longmore and Kitchin LJJ agreed) upheld Judge Bird's decision to stay (or dismiss) a petition where the debt on which it was based arose under a contract subject to an arbitration clause, and section 9(1)(4) of the Arbitration Act 1996 required the court to stay legal proceedings 'in respect of a matter which under the agreement is to be referred to arbitration'. At para 26, Sir Terence Etherton C made clear that section 9 did not apply to a winding up petition where what was in issue was whether a debt was outstanding and due. In that case, however, the debt fell within the wide ambit of the arbitration clause, and Sir Terence Etherton C thought it was right as a matter of discretion for the court to stay or dismiss the petition so as to compel the parties to resolve their dispute, as to whether, in effect, summary judgment on the debt was appropriate, by their

[13] [2015] EWCA Civ 29; [2015] 1 WLR 3911.
[14] *Supra*.

> chosen method of dispute resolution rather than requiring the court to investigate whether the debt was disputed in good faith on substantial grounds: paras 40–41. In my judgment, the decision in the *Salford Estates* case supports the conclusion I have reached. Section 9 did not operate to deprive the Companies Court of jurisdiction. But the fact that the parties had agreed an alternative method of dispute resolution was, as a matter of discretion, relevant to whether it was appropriate to allow the petitioner to proceed with a winding up before having it determined that the debt was due by the method that it had agreed. Likewise in this case, as I have said, the existence of the tax appeal and the decision of Judge Poole were relevant, but not necessarily conclusive, to the judge's decision on the petition."

19. *Salford Estates* was followed and applied by Alan Steinfeld QC sitting as a deputy High Court judge in the Chancery Division in *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [15]. The deputy judge explained the effect of *Salford Estates* in [10] of his judgment:

> "The result of *Salford* (above), it seems to me, is to place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause. The problem for such a petitioner is that the company is entitled to have the petition dismissed without having to show, as would normally be the case, that the debt upon which the petition is based is, to use the time-hallowed expression, bona fide disputed on substantial grounds. What the Court of Appeal decided in clear terms in the *Salford Estate* case was that, where there is an arbitration clause, it is sufficient to show that the debt is 'disputed' and for that it is sufficient to show that the debt is not admitted. In this case it is clear that the debt is disputed and indeed the dispute goes beyond a mere non-admission."

20. It would appear that the present position in England is that if an alleged debt arising under an agreement containing an arbitration clause is not admitted the petition should be dismissed.

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[15] [2015] BCC 877.

21. In 2016 Aedit Abdullah JC considered the same question in *BDG v BDH*.[16] In June 2016 the defendant served a statutory demand for payment of a debt arising under two contracts to supply drilling units for fossil fuel production in Nigeria. The contracts contained arbitration agreements, which covered any dispute about the sums payable under the contracts. The company applied for an injunction to restrain presentation of a petition on the grounds that there was a dispute over the debt that was governed by an arbitration clause, which the judge granted. The judge held the approach of the English Court of Appeal in *Salford Estates*[17] was consistent with Singaporean decisions granting stays of proceedings in favour of arbitration explaining in [9]:

> "However, where an arbitration agreement governs the dispute, the relevant standard is whether *prima facie* there is an arbitration clause and if so, the dispute is governed by that clause: *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ('*Salford Estates*'); Eco Measure Market Exchange Ltd v Quantum Climate Services [2015] BCC 877. The position in England and Wales should be adopted in Singapore as well as it gives due recognition to the upholding of arbitration agreements. Using the summary judgment standard of triable issues would result in the courts usurping the functions of the arbitral tribunal and condoning breach of the arbitration agreement. The English approach in *Salford Estates* would be consistent with Singapore decisions granting stay of proceedings in favour of arbitration. There is also a strong leaning in Singapore towards upholding arbitration agreements."

22. In [19] to [23] Abdullah JC considers the standard to be applied in determining whether or not a dispute exists and, as I read the judgment, holds that although accepting "*the broad approach in Salford Estates*" [22] it is necessary for the company to demonstrate that

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16 [2016] 5 SLR 977.
17 *Supra*.

there is a *prima facie* dispute. The court is not concerned with the strength of the company's defence.

23. In addition the judge held in [28] that it is necessary for the company to demonstrate *prima facie* compliance with the dispute resolution clause.

Discussion

24. It can be seen from a careful reading of the authorities that there is a difference of emphasis in the Hong Kong authorities and the more recent ones in England and Singapore. The Hong Kong authorities assume that once a creditor invokes the court's insolvency jurisdiction by issuing a petition (possibly also by issuing a statutory demand, although the cases do not discuss whether a different test might apply on an application to enjoin a creditor from issuing a petition) the character of the exercise the court undertakes when considering whether the petitioner is a creditor where this is in issue is different from the exercise the court undertakes when faced with a claim in a writ action over a disputed debt arising under a contract, which contains an arbitration clause that covers such a dispute. In the case of the latter the dispute is only of concern to the contracting parties. In the case of the former the Hong Kong authorities reason that because what the creditor seeks is a winding-up order, which is a class remedy, the determination of whether or not there is a dispute over the debt is not subject to the normal consequences of the parties having agreed that any dispute between them be resolved by arbitration. This view elides what in my view are a number of relevant elements of the process, which properly understood have different characteristics.

25. *First*, a creditor issues a petition for the purpose of recovering his debt,[18] not out of some altruistic concern for the creditors of the company generally. The creditor does so because he believes (or for present purposes must reasonably be assumed to do so) this to be the most efficacious method of obtaining payment. Although one can find in the Hong Kong authorities including *Hollmet* [19] statements that winding-up proceedings are not a means of enforcing a debt[20] this does not alter the purpose for which a petitioner issues a petition, namely, to recover payment of his debt, albeit through the collective insolvency regime that is engaged when a winding-up order is made. In my view there is a material distinction between the purpose for which a creditor presents a petition and the interests of the general class of unsecured creditors, who have an interest in a potential winding up. This is illustrated by the impact the presentation of a petition has on limitation periods. It is well established that presentation of a petition stops time running in respect of debts relied on by a petitioner, but not other creditors. As Judge Paul Baker QC explains in the following passage in *In re Cases of Taffs Well Ltd*: [21]

> "Mr. Phillips submitted that the presentation of the petition was the initiation of a class remedy on behalf of all the creditors whose rights are thus suspended until the order is made which quantifies their rights. He thus argues that time stops running against all the other creditors as from the date of the petition. I am quite unable to accept this view of the presentation of petition. In my judgment, the petitioning creditor does not bring an action on behalf of all the other creditors of a company known and unknown so as to stop time running

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18 *New Hampshire Insurance Co v Rush & Tompkins Group plc* [1998] 2 BCLC 471 (CA), Millett LJ, 474 c–d.

19 *Supra*.

20 See, for example, *Credit Lyonnais v SK Global Hong Kong Ltd* [2003] 4 HKC 104, Rogers VP, [14] and the more comprehensive discussion in *Re International Tin Council* [1989] Ch 308, Nourse LJ, 331–334; my own decision in *Yueshou Environmental Holdings Ltd*, unrep., HCCW 142/2013, [11].

21 [1992] Ch 179, 188–189.

> against them. Indeed, some of them may be owed debts not then due and so could not bring actions at that point. Against them, time has not *started* to run. A petitioning creditor does not petition for the general good but rather in the hope of recovering his own debt or part of it. As Mr. Mortimore pointed out in his reply, it would be strange if, by presenting a petition, a petitioner must be considered as saving creditors whose time was about to run out, and thus contrary to his own interest increase the number of claims to the fund. Finally, the right of creditors to come in and support or oppose the petition is inconsistent with the idea of a class action, for why should that be necessary if the petition is being presented on their behalf?"

26. *Secondly*, in order to assess how the remedy sought is relevant, it is necessary to understand its nature. The classic statement of the nature of winding up as a class remedy is to be found in the judgment of Buckley J in *In re Crigglestone Coal Co Ltd*:[22]

> " But then comes another consideration, viz., that the order which the petitioner seeks not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiæ is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon s. 91 of the Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority of the unsecured creditors are entitled to prevail, but on which the debtor has no voice."

27. There is a material difference between establishing: (a) that the petitioner is a member of the class; and (b) that the class remedy of a winding-up order should be granted. The former issue does not concern considerations relevant to the class generally and there is my view no

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[22] [1906] 2 Ch 327, 331–332.

reason in principle why the fact that what is sought is a class remedy should be relevant to the method by which it is determined whether or not a debt is owed.

28. *Thirdly*, it may be objected that requiring a creditor to arbitrate a dispute without first determining whether the company has a *bona fide* defence on substantial grounds is regressive, because it deprives a creditor of an advantage that he has under the existing authorities. In my view this criticism is not justified. The Companies Court would be holding a creditor to his contractual bargain, namely, to resolve any dispute by arbitration. The reasons for requiring a shareholder to abide by an arbitration, which have been approved by the Court of Appeal in *Joseph Ghossoub v Team YR Holdings*,[23] apply equally to a creditor. Further for the reasons explained in the next paragraph this approach does not deprive a creditor of the opportunity to access the insolvency regime immediately if the circumstances justify it.

29. *Fourthly*, the fact that the agreement pursuant to which a debt is said to arise contains an arbitration clause with the consequence that the Companies Court will require any dispute over the debt to be determined by arbitration does not mean, as perhaps the earlier Hong Kong decisions assume, that a creditor cannot invoke the collective insolvency process prior to the arbitration being determined if the circumstances justify it. As the English Court of Appeal explains in the passage I have quoted from *Salford Estates*,[24] the presence of an arbitration clause does not oust the Companies Court's jurisdiction. The presence of an arbitration clause is relevant to how the Companies Court

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[23] See [11] & [12] and note 9.
[24] *Supra*.

exercises its discretion. In *Jinpeng Group v Peak Hotels and Resorts* [25] the Eastern Caribbean Court of Appeal decided not to apply *Salford Estates* because it thought the British Virgin Islands' ("**BVI**") law on the need for *bona fide* dispute was already too entrenched to be changed, although in reaching this decision the Court of Appeal did not suggest that it considered the reasoning in the English decision to be wrong. For present purposes the case is significant, because the Court of Appeal also held that assuming *Salford Estates* applied in the BVI, the circumstances of the cases were exceptional enough to justify the appointment of provisional liquidators. Assets had gone missing and the Court was satisfied that there was an urgent need to appoint independent persons to be responsible for investigating what had happened with a view to recovering the company's assets.

30. As *Jinpeng* [26] illustrates as a consequence of a winding-up order's character as a discretionary class remedy there may be circumstances in which a creditor whose debt is disputed would be justified in issuing a petition before an arbitration had been concluded. If a creditor can demonstrate a *prima facie* case for a winding up and a risk of misappropriation of assets or some other matter, which would normally justify the court appointing provisional liquidators, a petition could be issued and stayed other than for applications relevant to the provisional liquidation pending determination of the arbitration. Another example would be circumstances which justify early presentation of a petition in order to engage the referral back provisions in *section 184(2)*

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[25] (unrep., BVIHCMAP 2014/25 and 2015/0005) (8 December 2015). The Cayman Islands Court of Appeal *Deutsche Bank & others v Kenneth Krys* (unrep., CICA 6/2015) (2 February 2016) on appeal from Sir Andrew Morritt sitting in the Financial Services Division agreed with the *Salford Estates* and applied it.

[26] *Supra*.

of the *CWUMP*, because of substantiated concerns that there had been fraudulent preferences or to engage the avoidance provisions in *section 182*.

31. For these reasons I have concluded that I would depart from the approach in the earlier Hong Kong decisions that I have discussed earlier in this judgment and hold that:

(1) if a company disputes the debt relied on by the petitioner;

(2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) and files an affirmation in accordance with *Rule 32* of the *Companies (Winding Up) Rules*, Cap 32H, demonstrating this;

the petition should generally be dismissed. I say generally, because for the reasons that I have discussed in the previous paragraph there may be exceptional cases in which it will be appropriate to stay the petition. I would add this, that failure to comply with *Rule 32* may have the same consequences even where there is an arbitration clause as would be the case where there is not. The Companies Court may take the view in the exercise of its discretion that in the absence of any evidence being filed in time by the company it should be wound up immediately or a

condition imposed for allowing the necessary evidence to be filed out of time such as a payment into court.[27]

32. In the present case the Company disputes the debt and requires the dispute to be resolved in accordance with the arbitration clause in the Agreement. It should, therefore, be dismissed. In case this matter goes further and if I am wrong in my conclusions on the legal issue I will deal briefly with the defence.

Bona fide defence on substantial grounds

33. The Agreement contains the following payments provisions in clause 8.2:

> "**8.2 Management fee**
>
> (a) Commencing from the Payment Commencement Date, the Manager shall be entitled to the Management Fee payable by SWPBHK in the sum of $750,000 per annum. In the event that bauxite ore production reaches 2.0 Million Tonne (MT) per annum the Management Fee shall be the sum of $1,000,000 for each subsequent year or part year thereof that bauxite ore production is maintained at least in 2.0MT. The Management Fee shall be payable by monthly instalments in arrears.
>
> (b) The payment of the Management Fee is subject to the Manager carrying out the functions and duties set out in clauses 3 and 7 of this agreement and performing in accordance with the business plan for the Production Phase.
>
> (c) From the Effective Date until the Payment Commencement Date, the parties may agree such remuneration for services requested from time to time."

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[27] See *HK Zexin Resources Co Ltd* [2018] HKCFI 298 and authorities referred to in [6] of the judgment.

34. The Effective Date was the date the shareholders agreement and subscription agreements were executed (clause 2.1). The position was that until the Payment Commencement Date (which is the period we are concerned with) Lasmos was entitled to be paid for such services as it provided such sum as were subsequently agreed or a *quantum meruit*.

35. A statutory demand can only be served in respect of a liquidated sum.[28] Similarly, the petitioner's claim at the time of presentation of a petition must be in respect of a "debt', which is not defined in the *CWUMP* and has generally been understood to mean a monetary claim, which in England would have been recovered in an action for debt during the period when it was necessary to take proceedings in a "specific form of action",[29] although (unlike the position in respect of a statutory demand[30]) it may be payable in the future or be contingent. What is clear is that the claim must be in respect of a liquidated amount. Cheung JA explains in [6.5] of his judgment in *Re Grande Holdings Ltd*:[31]

> "In my view, a more useful statement on the meaning of a debt for a liquidated sum is that it is a pre-ascertained liability under the agreement of the parties. This includes a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery. This can be found in the judgment of Patten LJ in *McGuinness v Norwich and Peterborough Building Society* [2012] 2 All ER (Comm) 265. After reviewing the authorities, Patten LJ stated that:
>
> > [36] These authorities indicate and I think establish that a *debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual*

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28 French, *Applications to wind up Companies* (3rd ed) [7.161]; *Reinsurance Australia Corp Ltd v Odyssey Re (Bermuda) Ltd* (2000) 36 ACSR 348.

29 *Applications to wind up Companies, ibid*, [7.314].

30 *Ibid*, [7.161].

31 [2016] 1 HKLRD 435.

> *liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure. Ex p Ward* is the obvious example of that. Claims in tort are invariably unliquidated because they require the assistance of a judicial process to ascertain the amount due by way of damages. In some cases the calculation of the award will be straightforward and obvious but the unliquidated nature of the claim excludes it from being a good petitioning creditor's debt which satisfies the requirements of s.267.
>
> [37] The most obvious use of the term 'liquidated' has been in relation to liquidated damages. 'Liquidated' has been defined judicially as meaning the sum which the parties have by their contract assessed as the damages to be paid for its breach: see *Wallis v Smith* (1882) 21 Ch D 243 at 267 *per* Cotton LJ. If a genuine pre-estimate of loss the provision is enforceable according to its terms. I would therefore regard a claim for liquidated damages as one for a liquidated sum within the meaning of s.267 unless a claim in damages is excluded by the use of the word 'debt'. (Emphasis added.)"

36. The Company says that although there were discussions about the amount to be paid for the services, and there is no dispute that the services were provided at the Company's request, an agreement was never concluded about how they were to be paid and, consequently, there is no debt due, which can found a petition.

37. Lasmos's case is that all that needed to be agreed was the hourly rate to be charged by Lasmos and that it can be seen from an email written by Mr Hills dated 7 January 2015 that a rate of A$1,500 per day was agreed. The minutes of a meeting of the directors of the Company on 13 August 2015 record that "the invoice" for Lasmos's services was referred to and there is no suggestion that there is anything remaining to be agreed other than the timing of the payment; the minutes record that

subject to Lasmos's board's approval Lasmos had agreed to accept an immediate payment of US$130,000 and defer payment of the balance. However, the minutes state that "*Lasmos were working on their invoice which would be for the period to 30 June 2015…*" The invoice is dated 28 August 2015 and refers to the board meeting and the agreement to pay US$130,000 immediately.

38. It does not seem to me clear that all that clause 8.2(c) required to be agreed is a daily rate. There is nothing in the language of clause 8.2(c) or any other part of the Agreement to which I have been taken, which requires this reading. Neither is there anything to suggest that once a daily rate (and the rate used in the invoice was A$1,250) had been agreed Lasmos's record of days worked did not remain to be agreed. There is no record, for example, of how many hours work constituted a day's work or how Lasmos was to be paid for part of a day. Neither was there any agreed mechanism for recording or reporting the amount of time spent. It seems to me that at this stage it is certainly arguable that the parties' discussions fell short of arriving at a binding agreement on fees that results in the claim being for a liquidated debt.

39. The subsequent contemporaneous communications between the other shareholders are also consistent with an agreement not having been reached. For example, in an email of 24 September 2015 Lawrence Chin states that he does not recall the US$130,000 payment being agreed, but would defer to others on this point. He then goes on to suggest that the invoice lacks supporting descriptions of the services provided and is inadequate. Mr Chin's comments are inconsistent with an agreement that the amount of the invoice that was to be submitted had

been reached and his comments read as a genuine record of what he thought at the time. They were in reply to an email of 23 September 2015 from Mr Hills, which sought board approval of payment of the invoice, and recommended the payment of US$130,000 "*discussed at the last Board meeting as a progress payment*...." This also suggests the board had not agreed to pay any particular sum other than the progress payment.

40. In conclusion it seems to me that there is a *bona fide* dispute on substantial grounds and if I had not decided to dismiss the petition for the reasons discussed in the earlier sections of the judgment I would have done so on this ground.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Toby Brown, instructed by Hart Giles, for the petitioner

Mr Christopher Chain, instructed by Bird & Bird, for the respondent

The attendance of the Official Receiver was excused