The Relevance or Irrelevance of Party Autonomy in Insolvency Proceedings

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A. INTRODUCTION

In commercial transactions involving multinational parties, contracts usually contain exclusive jurisdiction clauses ("**EJC**") or arbitration clauses governing the mode and forum for dispute resolution. This is a manifestation of party autonomy, and accords with the fundamental principle of *pacta sunt servanda*. The common law lends its support to and forestalls the breach of such clauses by various measures including stay of proceedings and anti-suit injunctions. In respect of arbitration clause, most common law jurisdictions have legislation requiring legal proceedings to be stayed when the dispute is governed by such a clause[2]. Notwithstanding the difference between EJC and arbitration clauses in terms of the actual forum chosen by the parties, it is now accepted in Hong Kong that there should not be any distinction in

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2 Generally in accordance with Article 8 of the UNCITRAL Model Law. See, for example, Part I, Arbitration Act 1996 (UK); Sections 20 & 21 Arbitration Ordinance (Cap 609) (Hong Kong); Section 6, International Arbitration Act 1994 (Singapore); International Arbitration Act 1974 (Australia); Section 8, Commercial Arbitration R.S.C., 1985 c. 17 (2nd Supp) (Canada); Section 8, Arbitration Act 1996 No 99 (New Zealand).

terms of their effect on insolvency proceedings[3]. This paper therefore addresses both types of clauses together.

To what extent these clauses can effectively preclude the presentation of a bankruptcy or winding-up petition ("**insolvency petition**") by one party against its counterparty in another forum has recently been subject to debate in various apex courts in the common law world. The Court of Final Appeal in Hong Kong[4] and the Court of Appeal in Singapore[5] regarded these clauses as highly relevant in deciding whether the court should entertain an insolvency petition. On the other hand, the Privy Council[6] held that insolvency proceedings are outside the scope of these clauses so that there is no policy justification for imposing a stay of such proceedings.

Insolvency regimes seek to achieve the efficient realisation of the assets of an insolvent debtor and the fair and orderly distribution of those assets among all unsecured creditors on a *pari passu* basis. There is a public interest in having such a process for the collective benefit of all those having dealings with the debtor. Viewed thus, one can see that party autonomy in a contract between one of the creditors and the debtor should not have significant bearing on the collective right of all unsecured creditors. But there are cases where only a single creditor is

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3 See *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064, [2024] HKCA 299. English law also adopted a unified approach to both EJC and arbitration clauses, see *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16; [2024] 3 WLR 937.

4 *Re Lam Kwok Hung Guy, ex p Tor Asia Credit Master* (2023) 26 HKCFAR 119; [2023] HKCFA 9 ("*Guy Lam (CFA)*").

5 *AnAn Group (Singapore) PTE Ltd v VTB Bank (PJSC)* [2020] SGCA 33 ("*AnAn Group*").

6 *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16; [2024] 3 W.L.R. 937 ("*Sian Participation*").

involved and insolvency proceedings are pursued as a means of enforcing a debt. Should such a creditor be permitted to proceed by way of an insolvency petition when he could not have done so by an ordinary civil claim before the court? Are there cases where party autonomy may still be relevant even in the context of insolvency proceedings?

On a more general level, even in cases where there is more than one creditor, when the debt of the petitioner is subject to an EJC or an arbitration clause, should that be relevant when other creditors are not willing to take up the role of a petitioner? In that context, would a determination by the insolvency court that the petitioner has the *locus* to present the petition as a creditor whose debt is not subject to a *bona fide* dispute on substantial ground be an incursion into the agreement on dispute resolution? Does that depend on the drafting of the EJC or the arbitration clause? As a matter of public policy, is there any reason for such clauses to be overriden even if they specifically refer to insolvency proceedings?

In the following discussion, I will attempt to explore the answers to these questions by examining, primarily, the jurisprudence in Hong Kong. I will also make references to the developments in England and Singapore as Hong Kong has benefitted from the learned expositions in these overseas judgments. Apart from setting out the current position in Hong Kong, the purpose of this paper is to provide a platform for further discussion amongst our learned colleagues from other jurisdictions, which could shed light on the future advancement of the law.

B. THE AUTHORITIES

Prior to *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*[7] ("***Salford Estates***"), there were two English decisions, namely *BST Properties v Reorg-Apport Penzugyi RT*[8]("***BST Properties***") and *Citigate Dewe Rogerson Limited v Artaban Public Affairs Sprl*[9] ("***Citigate***") which adopted "the Traditional Approach", as it was sometimes known. Under this approach, in order for an insolvency petition to be stayed or dismissed, the debtor was required to demonstrate a *bona fide* dispute on substantial grounds. In *BST Properties* and *Citigate*, the English courts held that the test remained the same even if the agreement giving rise to the petitioner's debt contained an EJC.

In *BST Properties*, the loan agreement giving rise to the debt contained an EJC requiring parties to litigate their disputes in Hungary. Jonathan Parker LJ agreed with the lower court's approach in deciding whether the petition debt was *bona fide* disputed on substantial grounds. His Lordship held that whether the EJC should lead to a stay of the proceedings "*does not…affect the question which was facing the Companies Court, namely whether the petition debt is bona fide disputed on substantial grounds*"[10].

Similarly, in *Citigate*, the applicant applied to restrain the presentation of a winding-up petition based on a statutory demand made

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7 [2014] EWCA Civ 1575, [2015] Ch 589.
8 [2001] EWCA Civ 1997.
9 [2009] EWHC 1689 (Ch), [2011] 1 BCLC 625.
10 *BST Properties*, *supra* [28]-[32].

by the respondent. The applicant and the respondent had entered into a consultancy agreement which was governed by Belgian law. The agreement provided that any dispute relating to the agreement would be subject to the jurisdiction of the Belgian courts. Judge Hodge Q.C. refused to grant an injunction to restrain the respondent from presenting a winding-up petition against the applicant. His Lordship held that the only appropriate forum for winding-up proceedings was the Companies Court and that no claim of abuse of process could be made out in the absence of a *bona fide* and substantial dispute over the debts on which the statutory demand was founded[11].

Salford Estates

In 2014, the English Court of Appeal in *Salford Estates* brought about a change in the approach. The petitioner appealed against an order staying a winding-up petition against the respondent in respect of debts arising out of an underlease of some commercial premises. There was an arbitration clause in the underlease. The respondent applied to strike out or to stay the petition, arguing that by presenting the petition the appellant acted in breach of the arbitration clause[12]. The judge found that there was no *bona fide* and substantial dispute regarding the debts but ordered a stay of the petition based on the arbitration clause. On appeal, the appellant argued that a winding-up petition based on an unpaid debt should not be stayed pursuant to an arbitration clause unless the debt was subject to a *bona fide* dispute on substantial grounds.

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11 *Citigate supra* [35]-[36].
12 *Salford supra* [4]-[18] (Sir Terence Etherton C).

In the Court of Appeal, Sir Terence Etherton C (with the concurrence of Longmore and Kitchin LJJ[13]) held that the mandatory stay of proceedings under section 9(1) of the Arbitration Act 1996 did not apply to a winding-up petition[14]. However, the Chancellor held that as section 122(1) of the Insolvency Act 1986 conferred on the court a discretionary power to hear winding-up petitions, it would be anomalous for the Companies' Court to conduct a summary judgment type analysis of liability for a debt that was not admitted when it is not appropriate to do so in an ordinary civil action[15]. Thus, it was right for the court 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 requiring the court to investigate whether or not the debt was *bona fide* disputed on substantial grounds[16].

His Lordship sought to achieve consistency in approach between winding-up proceedings and ordinary civil claims. In formulating the *Salford* approach His Lordship was very much influenced by the approach in *Halki Shipping Corpn v Spex Oils Ltd*[17] on what constituted a dispute.

Until the Privy Council reversed it in *Sian Participation*, English courts largely followed *Salford Estates* subject to occasional

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13 *Ibid* [46]-[47].
14 *Ibid* [26].
15 *Ibid* [40], citing *Halki Shipping Corpn v Spex Oils Ltd* [1998] 1 WLR 726.
16 *Ibid* [41].
17 [1998] 1 WLR 726.

disagreements[18]. It was also followed in Singapore by Aedit Abdullah JC in *BDG v BDH*[19].

Lasmos

Three years later, after reviewing Hong Kong, English, and Singaporean authorities, Harris J in the High Court of Hong Kong decided to follow *Salford Estates* in *Re Southwest Pacific Bauxite (HK) Ltd*[20] and laid down what came to be known as the *Lasmos* approach. In so doing, His Lordship departed from the practice adopted in Hong Kong prior to *Salford Estates*[21]. Lasmos was the petitioner in the case and issued a petition to wind up the company on the grounds of insolvency. On the facts, the judge found that there was a *bona fide* dispute on substantial grounds. Adopting the *Lasmos* approach, the judge held that a petition to wind up a company on insolvency grounds should generally be dismissed when three requirements are satisfied:

(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

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18 See cases discussed in *Sian Participation, supra* [77] to [79].
19 [2016] 5 SLR 977.
20 [2018] 2 HKLRD 449, [2018] HKCFI 426 ("*Lasmos*").
21 *Hollmet AG v Meridian Success Metal Supplies Ltd* [1997] HKLRD 828; *Re Sky Datamann (Hong Kong) Ltd* HCCW 487/2001; *Re Jade Union Investment Ltd* HCCW 400/2003; *Re Southern Materials Holding (HK) Co Ltd* HCCW 281/2007; *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759.

(3) The company takes the steps required under the arbitration clause to commence the arbitration process.

But Ka Chon

Doubt was casted on the *Lasmos* approach by the Court of Appeal in Hong Kong in *But Ka Chon v Interactive Brokers LLC* [22]. The case concerned an application by a debtor to set aside a statutory demand and one of the grounds was that the debt was subject to an arbitration clause. The Court of Appeal noted that there could not be any mandatory stay under the UNCITRAL Model Law [23] and section 20 of the Arbitration Ordinance. Kwan V-P considered *obiter* the *Lasmos* approach to be a substantial curtailment of the statutory right of a creditor to petition for bankruptcy. Her Ladyship had reservations whether the discretion under the insolvency legislation should be exercised only in one way when there is an arbitration clause, though she also acknowledged that insufficient weight had previously been given to such clause. At the same time, the learned Vice-President said:

> "Nor do I think that the discretion should invariably be exercised in favour of granting a winding-up or bankruptcy order where the court is satisfied there is no *bona fide* dispute on substantial grounds, ***thereby putting an end to any arbitration proceedings***."[24] (My emphasis)

Thus, the potential effect of a winding-up order on the arbitration process was recognised.

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22 [2019] 4 HKLRD 85, [2019] HKCA 873.

23 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

24 *Ibid* [71].

Dayang

In *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd*[25], Deputy High Court Judge William Wong SC declined to follow the *Lasmos* approach. Instead, the learned judge held that the "Traditional Approach" (i.e. that a petitioner will ordinarily be entitled to a bankruptcy order or a winding-up order if the petition debt is not subject to a *bona fide* dispute on substantial grounds) should be followed. He regarded the existence of an arbitration clause to be irrelevant to the exercise of the discretion by the court in the winding-up petition.

In that case, a winding-up petition was presented by a ship-owner against a charterer company on the basis of an overdue hire. The charterer company resisted the petition by raising a counterclaim that there were defects in the vessel and the uncooperative attitude of its captain, issues in relation to the handling of cargo. As the charterparty contained an arbitration clause, it was contended that the winding-up proceedings ought to be stayed.

The learned judge was of the view that the presentation of a winding-up petition *per se* would not amount to a breach of an arbitration agreement. He held that the Companies Court does not resolve nor determine disputes when ruling on a petitioner's *locus standi* as creditor in the winding-up proceedings. He was furthermore of the view that no

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[25] [2020] 2 HKLRD 423, [2020] HKCFI 311, ("*Dayang*").

estoppel can arise from the court's rejection of a petition for winding-up[26]. Instead, disputes over the debt are resolved by the liquidator (subject to the possibility of appeal). When a creditor submits its proof of debt to the liquidator for determination, the liquidator is not estopped from disclaiming liability. A decision of the liquidator in rejecting a proof of debt is binding for all purposes and will amount to *res judicata*.

Thus, the learned judge reasoned, the mere presentation of a winding-up petition does not involve a breach of the petitioner's obligation to arbitrate[27]. The learned judge further observed that winding-up is a discretionary remedy. The *Lasmos* approach is antithetical to the nature of discretion and represents an unprecedented fetter on the court's discretion[28]. On the facts, the learned judge held that even if the *Lasmos* approach were to be applied, the petition should not have been stayed as the debtor had failed to demonstrate a real intention to resolve the dispute by arbitration[29].

AnAn Group

In the same year, the Singapore Court of Appeal in *AnAn Group (Singapore) PTE Ltd v VTB Bank (PJSC)*[30] addressed a similar issue. The debtor-company had entered into an agreement with the petitioner. The agreement contained a standard arbitration clause providing that all disputes arising out of or in connection with the

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26 *Dayang, supra* [71]-[75].
27 *Ibid* [76]-[83].
28 *Ibid* [88]-[99].
29 *Ibid* [50].
30 *AnAn Group, supra*.

agreement were to be referred to arbitration. When the petitioner applied for a winding up, the debtor company resisted the application on the ground that there was a dispute as to the debt, which required resolution by way of arbitration. It was a single creditor case[31].

The court held that a different standard of review should be adopted when a dispute that is subject to an arbitration agreement arises in relation to a debt which forms the basis of the winding-up application[32]. In general, in order for the debtor company to obtain a stay or dismissal of the winding-up application, it only needs to raise triable issues[33]. This required showing that there was a substantial and *bona fide* dispute in relation to the disputed debt or a cross-claim[34]. However, for cases in which an arbitration clause is engaged, the court formulated the "*prima facie* standard" after a detailed examination of the authorities in England[35], Hong Kong[36], the Eastern Caribbean[37], Malaysia[38], and Singapore[39]. Where the disputed debt or a cross-claim is subject to an arbitration agreement, the winding-up proceedings will be stayed or dismissed as long as (a) there is a valid arbitration agreement between the parties; (b) the dispute falls within the scope of the arbitration agreement, (c) upon a consideration of factors which do not relate to the merits of the dispute in respect of the debt or the merits of the cross-claim, the court is satisfied that the defendant is not abusing the court's process by raising

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31 *Ibid* [71].
32 *Ibid* [24].
33 *Ibid* [25].
34 *Ibid* [25].
35 *Ibid* [30]-[31].
36 *Ibid* [32]-[44].
37 *Ibid* [45].
38 *Ibid* [46].
39 *Ibid* [47]-[54].

the dispute or cross-claim. Both (a) and (b) have to be shown on a *prima facie* basis[40]. This reduced standard of review was justified by the principle of party autonomy and helps to achieve cost-savings and certainty in the law[41]. The court adopted this lower standard to achieve coherence of the law by preventing parties from side-stepping arbitration agreements through winding-up applications instead of ordinary civil action[42].

The court considered that, by operation of the insolvency process, the dispute resolution method of arbitration would be entirely side-stepped if a higher standard of review was to be adopted[43]. Consequently, the *prima facie* standard was adopted by the court. To safeguard against abuses of this lower standard of review, the stay would not be automatic and the *bona fides* of the debtor in raising the dispute remains a relevant factor in determining whether the stay application is an abuse of process. Also, the court recognised that abuse of process can manifest in a multitude of scenarios, although its threshold is very high. It also emphasised that arguments on the merits of the underlying dispute cannot be entertained under the guise of an argument on abuse of process[44].

Re Guy Lam

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40 *Ibid* [56], [92].
41 *Ibid* [57].
42 *Ibid* [60].
43 *Ibid* [79]-[80].
44 *Ibid* [93]-[100].

In 2023, the Hong Kong Court of Final Appeal handed down its judgment in *Re Lam Kwok Hung Guy*[45]. In that case, the petitioner entered into a credit and guaranty agreement ("**Agreement**") with a company under which the petitioner would advance loans to it and the debtor agreed to guarantee the full payment of all amounts due[46]. The Agreement further contained an EJC whereby the parties agreed that all legal proceedings arising out of or relating to the Agreement should be subject to the exclusive jurisdiction of the Federal and State courts in New York[47]. The petitioner served a statutory demand in respect of the debt. Upon the debtor's failure to repay the sum, the petitioner presented a bankruptcy petition against him[48]. The respondent argued that there was no event of default and that, pursuant to the EJC, the petitioner was required to bring proceedings in the New York courts to establish the respondent's liability, before commencing bankruptcy proceedings in Hong Kong. The issue before the Court of Final Appeal concerned the discretion to decline jurisdiction in a bankruptcy petition where the underlying dispute about the petition debt was the subject of an EJC[49]. It was also a single creditor case.

The Court held that the CFI's jurisdiction in a bankruptcy matter is conferred by the Bankruptcy Ordinance (Cap. 6), and is not amenable to exclusion by contract. Therefore, the parties' agreement to refer their disputes to a foreign court only informed the CFI's discretion to decline to exercise its jurisdiction and did not oust its jurisdiction. The

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45 *Guy Lam (CFA) supra.*
46 *Ibid* [7].
47 *Ibid* [9].
48 *Ibid* [15].
49 *Ibid* [94].

Court observed that the CFI might exercise its discretion to decline jurisdiction in a bankruptcy petition where the underlying dispute of a petition debt was subject to an EJC. It involved a multi-factorial approach[50]. An EJC brings into consideration the public policy interest in holding parties to their agreement. Where the court had undertaken the equivalent of a summary judgment determination by ruling on whether there is a *bona fide* dispute about the debt on substantial grounds, it assumed jurisdiction to decide a question which the parties had agreed to be determined in another forum. As for the public policy considerations behind the bankruptcy regime, the significance of such policies were diminished when the petition is brought by one creditor with no evidence of a creditor community at risk. The Court held that in an ordinary case where the underlying dispute of the petition debt was subject to an EJC, the court should dismiss the petition unless there were countervailing factors, such as the risk of the debtor's insolvency impacting third parties, the debtor's reliance on a frivolous defence, or the occurrence of an abuse of process.

Founder Group

25 days after the Hong Kong Court of Final Appeal handed down its judgment in *Re Guy Lam*, the High Court of Singapore gave judgment in *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd*[51]. The case concerned debts arising from contracts containing

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50 *Ibid* [98].
51 [2023] SGHC 159 ("*Founder Group*").

arbitration clauses. The judge in *Founder Group* applied the approach laid down in *AnAn Group* and dismissed the petition.

The petitioner appealed. Though the Court of Appeal reversed the judge's decision on the issue separability (which is not relevant for present purposes), the Court reiterated the approach in *AnAn* and explained that the *prima facie* standard was adopted in recognition of the arbitral tribunal's jurisdiction to determine its own jurisdiction and the principle of judicial non-intervention in arbitral proceedings[52]. The adoption of a different standard would incentivise creditors to bypass the arbitration agreement and present a winding-up application as a means of obtaining a summary determination by the insolvency court of a matter that in fact fell within the ambit of the arbitral tribunal's jurisdiction[53].

Further, the Court of Appeal reiterated 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 which 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[54].

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52 [2023] SGCA 40 at [28].
53 *Ibid* at [34].
54 *Ibid* at [35].

Thus, in Singapore a claimant would not be regarded as a creditor until a dispute which is subject to an arbitration clause has been resolved by arbitration in his favour[55].

Re Simplicity

Coming back to Hong Kong jurisprudence, *Guy Lam (CFA)* was applied in the context of winding-up involving a debt arising from an agreement containing an arbitration clause in *Re Simplicity & Vogue Retailing (HK) Co Ltd*[56]. The petitioner subscribed to convertible bonds from an issuer whose obligations under the bond instrument were guaranteed by a company. Both the bond instrument and the corporate guarantee contained an arbitration clause. The issuer defaulted and the company failed to honour its guarantee by making full payment. The petitioner presented a winding-up petition against the company.

The Court of Appeal (Kwan V-P, Barma and G Lam JJA) held that it was appropriate to apply the *Guy Lam (CFA)* approach by analogy to the insolvency-arbitration context[57]. The Court of Appeal emphasised the discretionary nature of the *Guy Lam (CFA)* approach which provides flexibility to deal with cases as circumstances require[58]. Furthermore, the Court considered the third requirement in the *Lasmos* approach[59] and held that, as a matter of Hong Kong law, it is necessary for the respondent to show a genuine intention to arbitrate before the

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55 *Ibid* at [36].
56 [2024] 2 HKLRD 1064, [2024] HKCA 299 ("*Re Simplicity*").
57 *Ibid* [34]-[38].
58 *Ibid* [39].
59 See n 16 above.

Court would hold parties to their agreed dispute resolution mechanism and stay the insolvency petition[60].

Re Shandong Chenming Paper Holdings Ltd

The same division of the Court of Appeal also handed down its judgment in *Re Shandong Chenming Paper Holdings Ltd*[61] on the same day as *Re Simplicity*. The petitioner presented a winding-up petition against the debtor company on the ground that part of an arbitral award remained unsatisfied by the debtor. The debtor, however, applied to the court to stay the petition on the ground that it had commenced an arbitration against the petitioner in which the company had a cross-claim against the petitioner in an amount exceeding the remainder of the petition debt[62].

The issue before the Court was whether the *Guy Lam (CFA)* approach applies equally in determining whether or not a winding-up petition should be dismissed or stayed where the debtor asserted that it had an arbitrable cross-claim[63]. The Court of Appeal (Kwan V-P, Barma and G Lam JJA) held that as a matter of principle, the *Guy Lam (CFA)* approach should be applied whether the dispute falling within the scope of an EJC or arbitration clause had been raised by a dispute regarding the petition debt, a claim of set-off, or a cross-claim that does not give rise to

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60 *Re Simplicity*, *supra* [40]-[42].
61 [2024] 2 HKLRD 1040, [2024] HKCA 352 ("*Re Shandong Chenming*").
62 *Ibid* [6]-[13].
63 *Ibid* [1].

set-off[64]. The reasoning of *Guy Lam (CFA)* was grounded in the context of the court's discretion to decline insolvency jurisdiction. The Court held that it should not wear blinkers and would have regard to the entire relationship between the parties when deciding whether to exercise its discretion[65]. Furthermore, where the cross-claim was subject to an arbitration clause, if the court entered into consideration of the merits to determine whether there was a genuine and serious cross-claim, it would in any event be against the parties' agreement and contrary to the policy of upholding contractual bargains[66].

Sun Entertainment

Sun Entertainment Culture Ltd v Inversion Productions Ltd[67] was another Hong Kong case decided after *Guy Lam (CFA)*. The first instance decision was made in September 2023 (thus not long after the CFA handed down its judgment in *Guy Lam*). The Court of Appeal heard the appeal on 4 September 2024 and handed down its judgment on 27 September 2024 (thus after *Sian Participation*). However, no reference was made to *Sian Participation* in the Court of Appeal judgment since it was common ground between the parties that the approach in *Guy Lam (CFA)* and *Re Simplicity* should be followed. The appeal hinged solely on whether the dispute raised by the debtor was frivolous or an abuse of process. The Court of Appeal affirmed the judge's conclusion that it was. Hence, the winding-up order was upheld.

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64 *Ibid* [51].
65 *Ibid* [37]-[39].
66 *Ibid* [43]-[44].
67 (2024) 4 HKLRD 991, [2024] HKCA 884 ("*Sun Entertainment*").

The parties entered into a written loan agreement for a sum of US$7,500,000 which also contained an arbitration clause covering any dispute between the parties as to any matter arising out of or related to the agreement including any question regarding its validity[68]. Upon the debtor company's failure to satisfy three statutory demands served by the petitioner, a winding-up petition against the debtor company was presented[69]. The debtor company opposed the petition based on a defence of usury under the Money Lenders Ordinance (Cap 163) and contended that this dispute should be referred to arbitration pursuant to the arbitration clause based on the *Guy Lam (CFA)* approach[70].

Deputy High Court Judge Le Pichon after excluding default interest in the calculation of the effective interest rate, held that the debtor's defence was frivolous and an abuse of process, and that it did not afford any reason for staying or dismissing the petition even if the *Guy Lam (CFA)* approach was applied[71]. In any event, the judge found that there were also countervailing public policy considerations against staying or dismissing the petition[72].

The debtor's appeal to the Court of Appeal was dismissed. The Court (Kwan V-P, Barma and G Lam JJA) held that the trial judge's analysis on the effective interest rate under the agreement was correct.

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68 *Ibid* [6].
69 *Ibid* [8]-[9].
70 *Ibid* [10].
71 *Ibid* [17]; see also *Sun Entertainment Culture Ltd v Inversion Productions Ltd* [2023] HKCLC 723, [2023] HKCFI 2400 ("*Sun Entertainment (CFI)*") [50].
72 *Sun Entertainment, supra* [50].

There was no valid ground for opposing the petition[73]. The trial judge was therefore correct in deciding to proceed on the petition and wind-up the debtor company notwithstanding the existence of the arbitration clause in the agreement.

Sian Participation

Two months after the Hong Kong Court of Appeal decisions in *Re Simplicity* and *Re Shandong Chenming*, the Judicial Committee of the Privy Council reversed *Salford Estates* in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd*[74]. In its judgment, the Board expressed agreement with the reasoning in *Dayang*. *Sian Participation* was an appeal from the BVI, but its judgment set out the current state of the law of England and Wales because the Board gave a direction pursuant to the practice endorsed in *Willers v Joyce & Anor (No 2)*[75] in holding that *Salford Estates* should no longer be followed in England and Wales.

The debtor company had borrowed money from the applicant and the loan agreement contained an arbitration clause. Upon the default of the debtor, the applicant sought to have it wound up. The debtor company resisted the application arguing that whether the debt was due ought to have been determined at arbitration rather than through liquidation proceedings. In the BVI proceedings, the BVI courts held that there was no genuine and substantial ground for disputing the debt.

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73 *Sun Entertainment*, *supra* [28] and [58].
74 *Sian Participation*, *supra*.
75 [2016] UKSC 44; [2018] AC 843.

The Board held that *Salford Estates* was wrongly decided for the following reasons:

(a) The insolvency court does not determine a dispute which is the subject matter of an arbitration agreement. Insolvency proceedings are only concerned with the making of an order which would lead to *pari passu* distribution between unsecured creditors. The petition is not a claim for payment of the debt. The finding of insolvency is only a provisional one, with the non-payment of the debt serving as evidence of the company's inability to pay its debts as they fall due. It creates no *res judicata* and no judgment is entered in respect of the liability and quantum of the petitioning debt. Though the examination of whether there is a genuine dispute on substantial grounds involves an evaluation akin to summary judgment, this does not mean that the Companies Court resolves a claim with a final resolution in a judgment;

(b) The policy of staying proceedings to arbitration (and the chosen forum) does not extend to insolvency proceedings. Under section 9 of the Arbitration Act 1996, a "matter" that the parties have agreed to refer to arbitration (thus engaging party autonomy) relates only to the determination of a dispute by a particular tribunal. If no such matter arises in the court proceedings, then the mandatory stay provisions do not apply and the policy underlying the grant of a stay

equally does not apply. It is not the policy of the Arbitration Act to fetter the rights of the parties in respect of matters which fall outside the scope of the arbitration agreement. The parties' freedom to choose to resolve their disputes by arbitration is to be respected but that also means respecting the boundaries of the choice made. This is an important aspect of **party autonomy**.

(c) The Arbitration Act does not require a creditor to obtain an arbitration award before enforcing an undisputed debt by a claim in court. Since the Arbitration Act has no application to insolvency proceedings, the lowering of the threshold for identification of dispute under the test for mandatory stay in *Halki Shipping Corp v Sopex Oils Ltd* should not be applied to a dispute as to a debt in insolvency context;

(d) The same consideration applies to EJC based on *pacta sunt servanda*. Prior to *Salford Estates*, the test of there being a genuine dispute on substantial grounds had been applied where the contract creating the debt contains an EJC (citing *BST Properties Ltd v Reorg-Apport Penzugyi RT*);

(e) *Salford Estates* wrongly extended the policy for statutory stays to apply as a discretionary consideration even though winding up proceedings are not claims within section 9 of the Arbitration Act 1996. It is implicit in such reasoning that the discretion to wind up would be virtually illusory where

the debt relied upon by the petitioner was merely not admitted, even if not genuinely disputed on substantial grounds;

(f) The mandatory stay under section 9 is not triggered by a creditor's winding-up petition because it is not a claim of the type caught by that provision. It does not resolve or determine anything about the petitioner's claim to be owed money by the company. Thus, it does not offend the negative obligation embodied in an arbitration agreement.

After *Sian Participation*, the English approach is now settled: the core question remains whether a debtor seeking to stay or dismiss a creditor's application has shown that the petition debt is genuinely disputed on substantial grounds[76].

On the other hand, the High Court of Singapore has continued to apply *AnAn Group* in *Re Sapura Fabrication Sdn Bhd and anor*[77]. In Hong Kong, the courts have continued to apply *Guy Lam (CFA)*.

Re Mega Gold

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[76] *Ibid* [88]-[99].
[77] [2024] SGHC 241.

In *Re Mega Gold Holdings Ltd*[78], two petitions filed by the same petitioner were heard together: a winding-up petition against Mega Gold Holdings Limited ("Company") and a bankruptcy petition against Man Chun Sing Matthew ("Debtor"). Both petitions were presented on the basis of debts allegedly owed by the Company and the Debtor to the Petitioner, which arose from various agreements made between the Petitioner and the Company under which the Debtor agreed to guarantee the performance of the Company's obligations[79]. The Company and the Debtor invited the Court to stay the petitions against them in favour of arbitration as the petition debts were disputed and subject to arbitration clauses requiring disputes arising out of or relating thereto be referred to arbitration[80].

Recorder Richard Khaw SC considered the decision of the Privy Council in *Sian Participation* but was of the view that he was bound by *Guy Lam (CFA)* and *Re Simplicity* under the doctrine of *stare decisis*[81]. Applying *Guy Lam (CFA)*, the learned Recorder held that the core issue was whether the disputes raised by the Company and the Debtor "border on the frivolous or abuse of process"[82]. After considering the various defences put forward by the Company and the Debtor, the learned Recorder took the view that the disputes raised in opposition to the petitions were not frivolous and did not amount to an abuse of process. The Company and the Debtor had also demonstrated a sufficiently genuine intention to arbitrate. Given that there were no countervailing

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78 [2024] 4 HKLRD 583, [2024] HKCFI 2286 ("*Re Mega*").
79 *Ibid* [1].
80 *Ibid* [14], [17] and [28].
81 *Ibid* [70].
82 *Ibid* [68].

factors militating against the public policy of holding the parties to their arbitration clauses, the Court ordered the petitions to be stayed pending the resolution of the disputes by arbitration[83].

The three approaches

To sum up, the common law has developed differently in England, Singapore and Hong Kong.

In England and Wales, after *Sian Participation*, an insolvency court accords no weight to an EJC or an arbitration clause in insolvency proceedings taking the view that the relief granted in insolvency proceedings would not interfere with party autonomy embodied in those clauses, at least not in a generally worded EJC or arbitration clause.

In Singapore, the insolvency court adopts a reduced "*prima facie*" standard of review when the agreement which gives rise to the debt contains an arbitration clause. To safeguard against abuses of this lower standard of review, the court would consider whether the debtor's reliance on the arbitration clause is an abuse of process although it is emphasised that arguments on the merits of the underlying dispute cannot be entertained under the guise of an argument on abuse of process.

In Hong Kong, the insolvency court exercise its discretion on a multi-factorial assessment. It gives due weight to an EJC or

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83 *Ibid* [95].

arbitration clause by dismissing the petition in the absence of any countervailing factors. However, the public policy interest in holding parties to their agreement on dispute resolution is not the only consideration. The public policy underpinning the insolvency regime is also engaged. As demonstrated by post-*Guy Lam (CFA)* cases, there is scope for the merits of the dispute to be examined, albeit not to the extent as inquiring whether the debt is subject to a *bona fide* dispute on substantial grounds.

Both the *Guy Lam (CFA)* approach and that under *AnAn Group* recognised that the discretion should not be exercised in favour of dismissing a petition when it can be demonstrated that there are real insolvency concerns like the risk of dissipation of assets, fraudulent preferences, and engagement of avoidance provisions, particularly when third party creditors are involved[84].

The three approaches are the result of different understandings in respect of a few core questions. First, it depends on the court's perspective on whether insolvency proceedings and the subsequent liquidation process interfere with the choice of the parties for dispute resolution set out in an EJC or an arbitration clause. This in turn affects the way in which the court pays regard to the party autonomy embodied in an EJC or arbitration clause and the scope thereof. Secondly, it depends on the court's perspective as to the discretionary power under the insolvency jurisdiction and the right of a petitioner to an insolvency

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[84] See *Guy Lam* (CFA), *supra* [105]; *AnAn Group*, *supra* [99].

order when the debtor cannot show that the debt is subject to a *bona fide* dispute on substantial grounds.

C. DISCUSSION

Returning to the questions raised at the outset:

(a) whether party autonomy has any significance in the exercise of discretion in insolvency proceedings; and

(b) if it is relevant, what, if any, weight would an insolvency court place on an EJC or arbitration clause without losing sight of other relevant considerations which underlie the insolvency regime.

Since these questions are raised in the context of insolvency proceedings, the court should start with public policy considerations pertaining to such regime. A bankruptcy or a winding-up order sets into motion the statutory scheme for collection of the assets of an insolvent entity and the fair and orderly *pari passu* distribution of such assets. Such a scheme is put in place for the collective benefit of all creditors[85]. In a multi-creditor scenario, there is obviously a greater interest in having a liquidator or trustee in bankruptcy appointed to ensure orderly *pari passu* distribution of the debtor's assets. When there are other creditors who have interests in the orderly distribution of assets, a creditor whose debt is not subject to an EJC or arbitration clause can support the petition or

[85] Derek French, *Applications to Wind up Companies* (4th edn, OUP 2021) [7.33]-[7.35].

apply to be substituted as the petitioner in winding-up proceedings[86]. Whilst there is no equivalent procedure for substitution in bankruptcy proceedings, another creditor could present his own petition and the court may direct that both petitions be heard together. Therefore, the question of how much weight is to be accorded to a parties' EJC or arbitration clause assumes less significance in cases where there are other creditors. Even in cases where the only creditor invoking the insolvency regime is subject to an EJC or arbitration clause, the interests of any other existing creditors must be relevant for the consideration by the insolvency court.

On the other hand, the question of EJC or arbitration clause can assume greater significance in cases where the only creditor is the petitioning creditor whose debt is subject to an agreement containing such a clause. *Guy Lam* was a single creditor case. The same appears to be so in *AnAn Group*. It is entirely proper to seek to enforce payment of an undisputed debt by insolvency proceedings[87]. If the insolvency proceedings are pursued as a debt collection exercise without engaging any interests of third parties, why should there be a difference in terms of relevance or irrelevance of an EJC or arbitration clause as compared with an ordinary civil claim?

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86 In *Salford, supra* at [34], it was held that in cases where several alleged debts were specified in the winding-up petition to prove the company's inability to pay its debts, and only few arose out of a transaction containing an arbitration agreement, one cannot rely on the concept of a non-discretionary stay of the petition pursuant to section 9(1) and 9(4) of the Arbitration Act 1996. If the petition proceeded, no reference could be made to the arbitration agreement because the making of a winding-up order would have brought into effect the statutory scheme for proof of debt, which would supersede any arbitration agreement.

87 *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd* (2022) 25 HKCFAR 98 [42].

It has been suggested that the drafting of the EJC or arbitration clause may lead to different results. Whilst their Lordships in *Sian Participation* did put down a caveat that different considerations would arise if the clause was framed in terms which applied to a liquidation application[88], the Board plainly expected that their reasoning would be applied to all generally worded clauses. Hence, it is neither possible nor fruitful to explain the difference between the English approach and that adopted in Hong Kong (and Singapore) by reference to the different drafting of the clauses in question.

Since an arbitral tribunal does not have the power to make winding-up or bankruptcy orders[89], it may be argued that it is not within the bargain embodied in an arbitration clause to exclude the right of a party to seek such relief from the insolvency court. By extension, it could not have been the parties' intention to preclude a party from bringing insolvency proceedings. However, such argument only address the positive obligation to refer matters within the scope of the arbitration clause to arbitration. It does not address the negative obligation to refrain from seeking resolution of a dispute in another forum. Also, this line of argument does not apply to an EJC.

C1. Is party autonomy engaged in insolvency proceedings?

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88 *Sian Participation* (n 4) [99].

89 *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 at [14]; *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2023] UKPC 33, [2024] 1 All ER (Comm) 697 at [75]; *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164, (2016) 245 FCR 452 at [26]; *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [83].

An EJC or an arbitration clause contains a positive as well as a negative obligation. A party seeking relief within the scope of an EJC or arbitration clause undertakes to do so in the specified forum or in arbitration. The concomitant obligation is that neither party will seek such relief in any other forum[90]. If a party commences insolvency proceedings in a non-contractual forum, the court's adjudicative power would be engaged in respect of the dispute between the parties. In *Guy Lam (CA)*, G Lam JA took the view that if the court determined whether or not the petition debt was disputed on substantial grounds, that would amount to a determination of the petitioner's claim[91]. French NPJ took the same view in the Court of Final Appeal[92]. The same analysis was applied in Singapore in *Founder Group*[93]. The court upheld the parties' agreement "to have an arbitral tribunal rather than the court decide whether, and if so to what extent, the claimant is a creditor of the defendant"[94].

On the other hand, the Board in *Sian Participation* took the view that party autonomy is not engaged if the court makes a winding up order where the creditor's unpaid debt is not genuinely disputed on substantial grounds[95]. Although the Privy Council did not say that party autonomy cannot ever be relevant in the insolvency context, it held that

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90 *Re Lam Kwok Hung Guy, ex p Tor Asia Credit Master Fund LP* [2022] HKCA 1297, [2022] 4 HKLRD 793 ("*Guy Lam (CA)*") [63], citing *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 W.L.R. 1889 at [1].

91 *Guy Lam (CA), supra* [68]-[70]; *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083 (Comm) [19]-[20]; see also Ivan Sin & Thomas Leung, "Exclusive jurisdiction clause and insolvency: another victory for party autonomy?" (2024) 140 LQR 22, 24-25.

92 *Guy Lam (CFA), supra* [102].

93 *Founder Group, supra*.

94 *Ibid* [42].

95 *Sian Participation, supra* [92].

seeking a liquidation is not something which the creditor has promised not to do.

In holding that the insolvency court is not resolving anything about the debt, nor interfering with the resolution of any dispute about it, their Lordships relied on *In re Vitoria*[96] and *In re A Company (No 000928 of 1991), Ex p City Electrical Factors Ltd*[97] . However, in these two cases, the insolvency courts were not involved in determining whether the petition debt was genuinely disputed on substantial grounds[98]. In *In re Menastar Finance Ltd*[99] (the other authority cited by their Lordships in *Sian Participation*), the petition was based upon a judgment debt and the debtor was not represented at the hearing and did not file any evidence[100].

Thus, the issues that arose in those cases were different from that in *Sian Participation*, where the court at first instance determined that the debt was not disputed on substantial grounds[101]. Though the dispute relating to the debt was no longer in issue when the matter was before the Board, in principle the engagement of an EJC or arbitration clause should be considered by reference to the position at the first instance level. When the first instance insolvency court has to determine whether the petitioner has *locus* to present an insolvency petition, by deciding whether the petition debt is subject to any *bona fide* dispute on

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96 [1894] 2 QB 387.
97 [1991] BCLC 514.
98 In former case, the Court of Appeal held that an earlier refusal to make a receiving order did not constitute a *res judicata* precluding the judgment creditor from presenting a second petition. As for the latter case, the issue before Harman J was simply whether there should have been an implied term into an agreement that no further petition would be presented in respect of the same debt.
99 [2002] EWHC 2610 (Ch), [2003] BCC 404.
100 *Ibid* [22]-[23].
101 *Sian Participation, supra* [6], [17].

substantial grounds, it is no less a judicial determination regarding a dispute about the debt even though the relief granted is not a monetary judgment for the payment of the debt.

Further, aside from determining the status of the petitioner as a creditor, as noted in *AnAn Group* the consequence of a winding-up or bankruptcy order was that the decision-making function (which according to the EJC or arbitration clause) belonging to the arbitral tribunal or the agreed foreign forum would be off-loaded onto the liquidator in the proof of debt process[102]. It is open to debate whether the liquidator would be bound by an arbitration agreement or an EJC[103]. In any event, as observed in *AnAn Group*, the taking of a circuitous route to arbitrate (or to litigate abroad in the chosen forum under the EJC) after the making of a winding-up order would result in increased uncertainty and unnecessary costs for the parties. It may result in the unnecessary winding-up of a company based on a disputed debt that is properly referable to arbitration or a foreign forum. It may thus be too narrow an approach for the Board in *Sian Participation* to confine its analysis to the nature of a winding-up or bankruptcy order in holding that party autonomy is not relevant without paying regard to the subsequent steps in the insolvency process including

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[102] *AnAn Group, supra* [79].

[103] *AnAn Group, supra* [80] suggested that the liquidator is not bound to do so. Likewise, in *Salford* the Chancellor was of the view that the statutory scheme for proof of debt superseded any arbitration agreement. On the other hand, it was held by the High Court of Australia in *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 at p.342-343 that a liquidator who defends his rejection of a proof of debt on a ground under the general law stands in the same position vis-à-vis the creditor as the company and is therefore bound by an arbitration agreement. The position is different if the liquidator rejects a proof of debt based on a ground which allows him to go behind a judgment, account stated, covenant or estoppel. In *Sian Participation, supra*, the Privy Council endorsed this line of reasoning, see [33].

the liquidator's or trustee's decisions made on proof of the debt and the potential appeals against such decisions.

Moreover, a bankruptcy or winding-up order vests the control over the right to litigate a dispute in the trustee in bankruptcy or the liquidator. Depending on recognition of such order in the agreed forum under the EJC or arbitration clause, the original debtor or its directors may lose control over how the dispute is to be litigated. Viewed thus, the initiation of an insolvency process does interfere with resolution of the dispute which is subject to an EJC or arbitration clause.

There are authorities suggesting that determination of the status of a petitioner as a creditor by the insolvency court would be binding on the parties in the subsequent stages of the insolvency process[104] as well as in other legal proceedings[105]. Where the court refused to set aside a statutory demand and held that the petition debt was not subject to a *bona fide* dispute on substantial grounds, it is generally impermissible, absent a change in circumstances, for the debtor to advance the same arguments at the substantive hearing of the petition[106]. This principle is capable of general application at the various stages of the insolvency process[107] though the precise juridical basis for the existence

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[104] G Lam JA in *Guy Lam (CA), supra* at [70] citing *Levin v Ikiua* [2010] 1 NZLR 400 and *Direct Acceptance Investments Pty Ltd v Blackwell* (1995) 17 ACSR 89 and *Direct Acceptance Investments Pty Ltd v Blackwell (No 2)* (1995) 13 ACLC 1251.

[105] *Roseoak Investments Ltd v Network Rail Infrastructure Ltd* [2009] EWHC 3769 (Ch); [2010] BPIR 646; *George v AVA Trade (EU) Ltd* [2019] IEHC 187; *Levin v Ikiua* (n 93).

[106] *Brillouett v Hachette Magazines Ltd* [1996] BPIR 518, 520B-D, approved in *Turner v Royal Bank of Scotland* [2000] BPIR 683 [18].

[107] See *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60, [2017] Bus LR 784 [49], where Henderson LJ held that "…*the considerations of public policy on which the principles are founded are likely to apply with equal force at whatever later stage in the process the question arises*". In Hong Kong, there were first instance decisions applying the principle in respect of insolvency of companies,

of such a rule has been subject to debate. In *Turner v Royal Bank of Scotland*[108], Chadwick LJ held that "*[t]o hold otherwise would be to encourage a waste of court time, and a waste of the parties' money; and would defeat the obvious purpose of the statutory scheme*"[109].

A series of first instance decisions in Hong Kong starting from Kwan J's judgment in *Re Choy Wai Bor* took a more robust view, interpreting *Turner* as an instance of *res judicata*[110]. The same view was shared by the courts in Ireland, Australia and New Zealand. McDonald J of the Irish High Court held that an English court's refusal to set aside a statutory demand gave rise to an issue estoppel, which prevented the plaintiff from raising the same issues before the Irish courts[111]. In Australia, Young J held that in adjudicating a proof of the petition debt, a liquidator was estopped from denying the petitioner's status as a creditor unless there was fraud or collusion[112]. Likewise, in New Zealand, it has been held that a decision of the court upholding a statutory demand gives

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see *China Citic Bank Corporation Ltd Tianjin Branch & Ors v Silver Starlight Ltd* [2022] HKCFI 2076, [2022] HKCLC 917 [40] and *Re C. Mahendra Exports (H.K.) Ltd* [2019] HKCFI 1556, [2019] HKCLC 289.

108 [2000] BPIR 683.

109 *Turner, supra* [48]-[49].

110 *Re Choy Wai Bor, supra at,* [26]-[30], followed by *Re Wiemer, ex p Hang Seng Bank Ltd* [2013] 2 HKLRD 1214 [13]-[16], *Chan Yuk Lun v Chan Ying Chit* [2015] 1 HKLRD 501 [9]-[10] and *China Citic Bank Corporation Ltd Tianjin Branch & Ors v Silver Starlight Ltd* [2022] HKCFI 2076, [2022] HKCLC 917 [40]-[46].

111 *George v AVA Trade (EU) Ltd, supra*. The defendant in that case also relied on the abuse of process principles laid down in *Henderson v Henderson* to argue that certain claims should be struck out because they could and should have argued before the English courts. That argument was however rejected by McDonald J after a consideration of the relevant principles and the public interests involved in those claims: [117] et seq.

112 *Direct Acceptance Investments Pty Ltd v Blackwell* (n 93) 92 and *Direct Acceptance Investments Pty Ltd v Blackwell (No 2) supra* 1253, cited in *Guy Lam (CA), supra* [70]; c.f. *BL & GY International Co Ltd v Hypec Electronics Pty Ltd* [2001] NSWSC 705, (2001) 164 FLR 268 [58]-[61] and *Re Glowbind Pty Ltd (in liq)* (2003) 48 ACSR 456 [15], where the court held that such an estoppel did not arise where the debtor did not have the opportunity to contest the petition debt.

rise to an issue estoppel confirming the existence of the debt in question[113].

English law has taken a less dogmatic approach. In *Coulter v Chief Constable of Dorset Police*[114], Chadwick LJ explained the rationale underpinning the *Turner* principle as:

> "*… not based on estoppel, whether of a Henderson v Henderson nature or res judicata. It goes no further than this: (i) that it is indeed a waste of the court's time and the parties' money to rehearse arguments which have already been run and have failed; and (ii) that, in circumstances where it is desired to run arguments which have not already been run, then … the court will inquire why those arguments were not run at the time when they could and should have been run.*"[115]

The explanation offered by Chadwick LJ in *Coulter* was later approved by Henderson LJ in *Harvey*[116]. Thus, the *Turner* principle has been characterised as a principle founded on public policy considerations instead of a form of estoppel[117]. It applies not only to arguments already advanced on an earlier occasion, but also to arguments that "could and should have been run" on that occasion[118].

More recently, Hong Kong steered towards the more flexible approach. In *Re Pan Sutong*,[119] Kwan VP (who was the judge in the *Re Choy Wai Bor* case) said that previously phrases such as issue estoppel or

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113 *Levin v Ikiua* (n 93) [55]-[71], referred to in *Guy Lam (CA), supra* [70].
114 [2005] EWCA Civ 1113.
115 *Ibid* [22].
116 [2017] EWCA Civ 60, [2017] Bus LR 784.
117 *Harvey, supra* [49].
118 *Coulter, supra* [22], followed in Hong Kong by *Re Yip Kim Po (A Debtor)* [2022] HKCFI 1912, [2022] 5 HKC 473 [21]. See also *Harvey, supra* [51].
119 [2024] HKCA 580, [2024] HKCLC 469.

res judicata were being used in a loose sense. In view of the developments in the UK, Her Ladyship opined that courts in Hong Kong should avoid using such terminology so as to avoid "bringing in all the strictures attendant on those doctrines"[120].

Regardless of the juridical basis of the *Turner* principle, it is clear from the authorities that it would generally be difficult for the debtor to re-open an issue at a later stage of the insolvency process where the same issue has already been determined against him in an earlier decision. The mere fact that an argument could be put in a more sophisticated manner or that more evidence is available does not, *ipso facto*, justify a second bite of the cherry[121].

Even if one assumes that the trustee in bankruptcy or liquidator has to refer the dispute to arbitration (as postulated in *Sian Participation* and *Dayang*[122]), the above-mentioned public policy at least requires the arbitrator to pay regard to the insolvency court's determination as to the absence of *bona fide* dispute over the debt on a substantial ground. The case of *Levin v Ikiua*[123] demonstrates that a liquidator can rely on issue estoppel to prevent the debtor company's former directors from re-litigating the issue as to whether the debt was in fact owed. In *George v AVA Trade (EU) Ltd*[124], McDonald J of the Irish High Court held that such a determination was binding on a foreign court

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120 *Ibid* [119].
121 *Ibid* [124], citing *Atherton v Ogunlende* [2003] BPIR 21, 27.
122 *Dayang, supra* [78] and *Sian Participation, supra* [33], both citing the High Court of Australia's decision of *Tanning Research, supra* in support of this argument.
123 [2010] 1 NZLR 400.
124 [2019] IEHC 187.

as a matter of issue estoppel or *res judicata*[125]. Still further, even assuming that there is no issue estoppel and the earlier judicial decisions on creditor status were not binding on the foreign court or the arbitral tribunal, it is "*capable of being taken into account when deciding whether it is an abuse of process for [the debtor] to re-litigate the same question*"[126].

C2. Does the engagement of party autonomy unduly fetter the discretion of the insolvency court?

An important objection of the Privy Council to the approach in *Salford Estates* is the undue fettering of the discretion of the insolvency court. Thus, it was stated:

> *"It is also implicit [in the reasoning in Salford Estates] that the discretion to wind up would be virtually illusory where the debt relied upon by the petitioner was merely not admitted, even if not genuinely disputed on substantial grounds."*[127]

Winding-up or bankruptcy orders are not forms of relief that can be granted by an arbitral tribunal. Depending on the connection of the debtor with the forum agreed under an EJC and the utility of such proceedings[128], it may not be appropriate for such relief to be sought in that forum. As it is entirely proper to seek to enforce payment of an undisputed debt by insolvency proceedings[129], is it right to preclude a

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125 *Ibid* at [48]-[116].
126 *Harvey, supra* (n 96) [48].
127 *Sian Participation, supra* [75].
128 *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd, supra* [20]-[24].
129 *Ibid* [42] and [57]-[67].

creditor from seeking such relief simply because he has agreed to resolve a dispute by another forum pursuant to an EJC or arbitration clause?

French NPJ highlighted the discretionary nature of the exercise in *Guy Lam (CFA)* when His Lordship said that the "*threshold character of a dispute about indebtedness leaves room for the exercise of a discretion by the court to decline to exercise the jurisdiction to determine that question*"[130]. In exercising the discretion, not only will the court take into account the principle of party autonomy, but it will also have to bear in mind the public policy underpinning the legislative scheme of the court's insolvency jurisdiction. Thus, His Lordship specifically alluded to the engagement of such public interest and held that the discretionary exercise is multi-factorial[131]. In *Guy Lam (CA)* Chow JA alluded to the "*[w]ider considerations such as whether the debtor is obviously insolvent, whether there is a need to protect the assets of the debtor, or to immediately put in place a regime to safeguard the documents/records, or investigate the affairs or transactions, of the debtor, as well as the interests of the general body of creditors, may also be taken into account in the exercise of the court's discretion*"[132].

The appeal in *Guy Lam* was dismissed because there was no countervailing factor to outweigh the parties' contractual bargain as to forum in the EJC. As observed by the Court of Appeal, there was no suggestion of any insolvency on the debtor's part other than in respect of the petitioning creditor's claim, nor was there evidence of any other

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130 *Guy Lam (CFA), supra* [100].
131 *Ibid* [101] and [104].
132 *Guy Lam (CA), supra* [112].

creditors willing to act as petitioner[133]. Accordingly, the court concluded that there was "*no evidence of a creditor community at risk*"[134].

Thus, under the approach in *Guy Lam (CFA)*, there is room for giving weight to countervailing factors which are relevant in the insolvency context[135] as illustrated by the judgment in *Sun Entertainment Culture Ltd v Inversion Productions Ltd*[136]. There, Deputy High Court Judge Le Pichon declined to stay the petition and proceeded to make a winding up order since she found the debtor's grounds for disputing the debt to be frivolous and an abuse of process. Her Ladyship also disagreed with the debtor company's contention that there was no evidence of a "*creditor community risk*"[137]. The agreement was "*entered into to enable the debtor to engage in the production of a movie which necessarily involves the* [debtor] *employing staff and entering into different types of agreements*" [138]. The judge therefore could not rule out third-party interests in the balancing exercise[139].

Though it can fairly be said that the multi-factorial approach places great weight on party autonomy stemming from an EJC or arbitration clause insofar as it displaces the Traditional Approach of *bona fide* dispute on substantial grounds in insolvency petitions, it by no means disregards other factors which are relevant in the insolvency context.

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133 *Ibid* [87], [105].
134 *Guy Lam (CFA), supra* [102].
135 *Ibid* [105].
136 *Sun Entertainment (CFI), supra,* upheld on appeal in [2024] 4 HKLRD 991 on the basis that the debtor's ground for disputing the debt was frivolous and an abuse of process. The CA did not find it necessary to address the third party's interest.
137 *Ibid* [48].
138 *Ibid* [49].
139 *Ibid* [49].

French NPJ did stress that the weight to be attached to party autonomy is different in a single creditor scenario.

Such an approach is more flexible than the one laid down in *Salford Estates* which only permits a petition to proceed in the wake of an arbitration clause if there were exceptional circumstances. Further, the approach pays special regard to the insolvency context in that the test of whether the application raises a frivolous dispute or is an abuse of process is applied in respect of the merits of the ground for disputing the debt[140]. This is to be contrasted with the threshold tests for raising a dispute in a stay application in an ordinary civil action based on an EJC (as set out in *Donohue v Armco Inc*[141]) or arbitration clause (as set out in *Halki Shipping Corpn v Sopex Oils Ltd* [142]).

The reason for such difference was given by French NPJ in *Guy Lam (CFA)*, "*[t]he more obviously insubstantial the grounds for disputing the debt, the more* [the public policy underpinning the legislative scheme of the court's bankruptcy jurisdiction] *comes into prominence*"[143]. Therefore, if the debtor's case is so weak that it "*borders*

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[140] See *Re Simplicity, supra*; *Sun Entertainment, supra*.

[141] *Donohue v Armco* [2001] UKHL 64, [2002] 1 All E.R. 749 [24] "… [the court] will ordinarily exercise its discretion (whether by granting a stay of proceedings … or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.". In such context, strong merit of a claim is not a strong reason, see *Guy Lam (CA), supra* [32]-[42] and *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [111]-[113] and [128]-[134].

[142] *Halki Shipping Corpn v Spex Oils Ltd, supra*. See also *Sian Participation, supra* [63]: "All that is necessary is that the debt should not be admitted. It need not be denied, nor need any, let alone any substantial, grounds to be shown for disputing the debt."

[143] *Guy Lam (CFA), supra* [99], [101]; c.f. *AnAn Group, supra* [100], where Steven Chong JA explicitly stated that "…in determining whether an applicant for a stay or dismissal of the winding-up application is guilty of an abuse of process, the court must be wary that it does not engage in

on the frivolous or abuse of process"[144], that would have been a sufficient reason for the Bankruptcy or Companies Court to refuse to give effect to the EJC or arbitration clause. His Lordship also noted that "*while a 'strong cause' test is indicative it should not obscure the range of considerations to the court's discretion*". As the insolvency court is tasked with balancing competing public interests, there are clearly relevant discretionary considerations other than those arising in ordinary civil actions.

Viewed thus, the recognition of party autonomy as a weighty factor in the exercise of the discretion by the insolvency court is not conclusive. In Hong Kong, the distinction between a single creditor scenario and a multi-creditor scenario is borne in mind in terms of the weight to be attached to the bargain contained in an EJC or arbitration clause. The multi-factorial approach does not render the exercise of discretion illusory.

C3. Should party autonomy prevail when there is an EJC specifically designating a forum for insolvency proceedings?

This question was explicitly left open in *Guy Lam (CFA)*[145] and *Sian Participation*[146]. Nor did the question arise in *AnAn Group*. It is beyond the scope of this paper to offer any views on modified universalism in handling cross-border insolvency cases based the concept

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examining the merits of the parties' dispute, since the court is not the proper forum to adjudicate the dispute between the parties."

144 *Guy Lam (CFA), supra* [105].

145 *Guy Lam (CFA), supra* [106].

146 *Sian Participation, supra* [99].

of centre of main interest ("**COMI**") espoused in The Model Law on Cross-Border Insolvency promulgated by the UNCITRAL in 1997 or the alternative concept of the "Commitment Rule"[147] proposed by a group of eminent insolvency academic lawyers.

A common thread in *Guy Lam (CFA)* as well as *AnAn Group* is that although party autonomy is relevant, there are cases where the insolvency court must give due weight to legitimate insolvency concerns even if there is an EJC or arbitration clause governing the dispute in issue. In the above discussion, we have referred extensively to the relevant Hong Kong jurisprudence. Additionally, in *AnAn Group*, Court of Appeal of Singapore discussed these legitimate concerns in the context of abuse of process[148]. It was rightly pointed out there that even in a multi-creditor scenario with some creditors not being constrained by an arbitration clause, there could be legitimate concerns on the part of a petitioning creditor who is subject to such constraint when the debtor elects to pay off the smaller debts of the other creditors[149].

These concerns could equally arise even if the relevant EJC was drafted with specific reference to insolvency proceedings. Following the reasoning of the courts in *Guy Lam*, since it involves the exercise of discretion (as opposed to a matter of jurisdiction) the insolvency court must pay regard to such legitimate concerns regardless of how the EJC is worded.

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147 The proposal was set out in a letter sent to the Secretariat of UNCITRAL Working Group V (Insolvency) on 14 September 2023, see https://ccla.smu.edu.sg/sgri/blog/2023/09/14/towards-new-approach-choice-insolvency-forum#_ftnref6.

148 *AnAn Group, supra* [99(c)] and [111].

149 *AnAn Group, supra* [105].

As regard the weight to be attached to an EJC with an express choice of insolvency forum, it must depend on the circumstances and the basis on which the choice of insolvency forum was agreed as well as the countervailing insolvency considerations (if any). The approach in *Guy Lam (CFA)* is flexible enough to empower the insolvency court to strike the right balance between the competing interests in upholding party autonomy and the underlying policy of the insolvency regime.

Mr Justice Johnson Lam PJ
Hong Kong Court of Final Appeal
March 2025