CACV 183/2023, [2024] HKCA 299
On appeal from [2023] HKCFI 1443

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO 183 OF 2023

(ON APPEAL FROM HCCW NO 457 OF 2022)

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32 of the Laws of Hong Kong

and

IN THE MATTER of SIMPLICITY & VOGUE RETAILING (HK) CO., LIMITED 簡尚零售 (香港) 有限公司

Before: Hon Kwan VP, Barma JA and G Lam JA in Court
Date of Hearing: 29 February 2024
Date of Judgment: 23 April 2024

J U D G M E N T

Hon Kwan VP (giving the Judgment of the Court):

1. This appeal is brought by Simplicity & Vogue Retailing (HK) Co., Limited ("**Simplicity HK**" or "**the Company**") against the winding-up order made by Linda Chan J on 22 May 2023. The judge handed down the reasons for judgment on 30 May 2023 ("**Reasons**").[1]

[1] [2023] HKCFI 1443

2. At issue is the approach that should be adopted by the court in winding-up proceedings where there is an agreement between the parties to refer their dispute relating to the petition debt to arbitration. It is contended by the Company that the approach regarding exclusive jurisdiction clauses ("**EJC**") in bankruptcy proceedings laid down by the Court of Final Appeal in *Re Lam Kwok Hung Guy, ex p Tor Asia Credit Master Fund LP* (2023) 26 HKCFAR 119 ("*Guy Lam CFA*") should be applied by analogy to this situation.

3. This judgment is handed down at the same time as the judgment in another appeal heard by the same division about the application of *Guy Lam CFA*, in which the debtor company seeks to stay or dismiss the winding-up proceedings so as to refer the dispute to arbitration. That other case is *Arjowiggins HKK 2 Limited v Shandong Chenming Paper Holdings Limited*[2], on appeal from the decision of Harris J on 10 August 2023[3]. The only difference is that the dispute sought to be referred to arbitration in this instance is the petition debt (a disputed debt petition) whereas the debtor company in *Shandong Chenming* does not dispute the petition debt but seeks to refer to arbitration its cross-claim which is greater than the amount of the petition debt (a cross-claim petition).

Background

4. The background matters taken from the Reasons and from undisputed documents may be summarised as follows.

---

[2] [2024] HKCA 352
[3] [2023] HKCFI 2065

5. By a bond instrument dated 27 November 2017 ("**Bond Instrument**"), Simplicity & Vogue Retailing Corporation ("**Simplicity Cayman**" or "**the Issuer**") issued US$25,000,000 convertible bonds ("**CBs**") convertible into its ordinary shares subject to the terms and conditions in the bond certificate. China Everbright Securities Value Fund SPC ("**the petitioner**") agreed to subscribe to the CBs by a subscription agreement.

6. Under condition 7(A) of the Bond Instrument, the Issuer was required to redeem all of the CBs in full by payment of the Maturity Redemption Amount to the bondholder on the earlier of (1) the date falling on the third anniversary of the issue date being 27 November 2017 and (2) the listing date. As the qualified IPO to The Stock Exchange of Hong Kong Limited never took place and there was no listing of the Issuer's shares, the Maturity Redemption Amount became due on 27 November 2020.

7. By a corporate guarantee 27 November 2017 ("**Corporate Guarantee**") between (among others) the Company as the guarantor and the petitioner as the beneficiary, the Company guaranteed the obligations of the Issuer to the petitioner under the Bond Instrument. Pursuant to the Corporate Guarantee, the Company undertook to pay or discharge the Issuer's obligations in connection with the Bond Instrument on demand, and default interest at 10% p.a. for any due but unpaid sum.

8. Both the Bond Instrument (clause 16(B)(i)) and the Corporate Guarantee (clause 21.2(a)) contained a provision for arbitration in virtually identical terms. They read as follows:

> "**16 GOVERNING LAW AND JURISDICTION**
>
> …
>
> **(B) Arbitration**
>
> (i) Any dispute, controversy, difference or claim (each, a **'Dispute'**) arising out of or relating to the Bonds, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it, shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (**'HKIAC'**) under the HKIAC Administered Arbitration Rules in force when the notice of arbitration is submitted."
>
> "21. **GOVERNING LAW AND DISPUTE RESOLUTION**
>
> …
>
> 21.2 **Dispute resolution**
>
> (a) Any dispute, controversy, difference or claim (each, a **'Dispute'**) arising out of or relating to this Guarantee, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (**'HKIAC'**) under the HKIAC Administered Arbitration Rules in force when the notice of arbitration is submitted."

9. The Maturity Redemption Amount due on 27 November 2020 was US$29,601,572. As no payment was made by the Issuer, on 17 December 2020 the petitioner through its former solicitors demanded the Company to pay the Maturity Redemption Amount pursuant to the Corporate Guarantee.

10. Payments of interest were made by a subsidiary of the Company to the petitioner on 9 and 10 February 2021 of US$240,000 and US$190,555.56. On 30 April 2021, another subsidiary of the Company

paid US$500,000 to the petitioner as partial payment of the amount due under the CBs.

11. By a letter dated 9 August 2021, the petitioner through its solicitors Herbert Smith Freehills ("**HSF**") demanded the Company to pay the Maturity Redemption Amount together with interest accrued after the Maturity Date and default interest by 12 August 2021. As of 12 August 2021, the amount due and payable under the Corporate Guarantee was US$30,942,398 ("**Debt**").

12. On 13 August 2021, a statutory demand ("**SD**") for the Debt was served by HSF on the Company. The Company failed to satisfy the SD within the time limit. It only made another part payment of US$500,000 via a subsidiary on 12 October 2021.

13. On 6 December 2022, the petitioner presented this petition to wind up the Company on the basis that the Company has neglected to pay the remaining part of the Debt of US$30,442,398 and, by virtue of section 178(1)(a) of the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32), it is deemed to be unable to pay its debts.

14. The petitioner filed its verifying affidavit the following day, exhibiting *inter alia* the Bond Instrument and the Corporate Guarantee. By virtue of rule 32(1) of the Companies (Winding-up) Rules (Cap 32H), the Company was required to file its affidavit in opposition within seven days of the filing of the verifying affidavit. It was only on 21 April 2023 that the Company purported to file its affirmation in opposition being the 1st affirmation of Chu Yin Suet ("**Chu 1st**").

15. At the first hearing of the petition before the judge on 24 April 2023, the judge had regard to the practice of the Companies Court that if no evidence at all has been filed by a company when a petition comes on for the first time before the Companies Court Judge, then in order for a company to have leave to file evidence in opposition, it must pay into court the amount of the petition debt or at least a substantial proportion of it[4]. The judge granted leave to the Company to file Chu 1st on condition upon paying the petitioning debt into court within 21 days (i.e. by 15 May 2023) ("**Condition**"). The petition was adjourned to 22 May 2023.

16. The Company failed to comply with the Condition. On 19 May 2023, it issued a summons seeking leave to file the 2nd affirmation of Chu Yin Suet dated 18 May 2023 ("**Chu 2nd**")[5], an extension of time of three months to comply with the Condition, and an adjournment of the petition to another call-over hearing to be fixed by the court.

17. The justification stated in Chu 2nd for seeking an extension of time of three months was as follows:

> "12. … since [the Company] is only a company holding shares of the operating company in Shanghai, and the senior management and decision makers are all based in Shanghai, [the Company] has to rely on the Simplicity group to raise the funds or expand the business of the operating company in Shanghai to increase the cash flow. I am informed and verily believe that the Simplicity group has immediately structured a pro-active business plan so as to increase its sales in the coming months. Arrangements for the introduction of a white knight are also ongoing.
>
> 13. Whilst exhibits on the above are not yet available due to the need for preserving confidentiality of the stakeholders involved, I do confirm that [the Company] has been working

---

4 *Re Sun Sang Kong Yuen Shoes Factory Co Ltd* [2015] 4 HKLRD 52; *Re Chinaplus Wines Ltd*, HCCW 220/2016, 21 November 2016, Harris J

5 Chu 2nd was expressly stated not to be evidence in opposition to the petition, see §7(2) thereof.

> hard with the senior management and decision makers in Shanghai to enable the Condition to be satisfied. However, given huge figure of petitioning debt in the sum of US$30,942,398 and limitation of time, the above steps have not yet been fruitful and hence [the Company] was unable to comply with the Order on 15 May 2023."

The hearing of the petition and the making of the winding-up order

18. At the adjourned hearing of the petition on 22 May 2023, no evidence of opposition was filed in time by the Company. The petitioner opposed the Company's application for extension of time and adjournment and submitted that as the petition was uncontested, a winding-up order should be made on this ground alone.

19. The judge found no credible evidence in Chu 2nd to show that if given time, the Company or the Simplicity group would be able to comply with the Condition. To the contrary, the assertions in §§12 to 13 of Chu 2nd confirmed that neither the Company nor the group has financial means to comply with the Condition or pay the petitioning debt, and, despite having received the petition for over five months, the Company has not been able to come up with any restructuring proposal, let alone a concrete proposal, to deal with the petitioner's debt or to restore its solvency[6].

20. Mr Smith, SC[7] suggested that if given time, the Company may be able to raise the requisite funds to comply with the Condition. When the judge asked him whether the Company would give an

---

6 Reasons, §19(1)
7 With Mr Tommy Cheung

undertaking to the court to comply with the Condition within the next three months, he was unable to proffer such an undertaking[8].

21. The judge held that the Company failed to demonstrate any good reasons to justify the extension of time or the adjournment sought, and hence there is no proper basis to extend the time for the Company to comply with the Condition or to adjourn the petition. It follows that there was and is no evidence in opposition to the petition and the petitioner is entitled *ex debito justitiae* to a winding-up order[9].

The grounds of opposition

22. Two grounds of opposition were raised in Chu 1st, which the Company was not able to rely on and it was not strictly necessary for the judge to deal with. The judge nevertheless dealt with those grounds of opposition "for completeness", "assuming" there is proper basis for the court to consider those grounds[10], which are as follows:

(1) There is a *bona fide* dispute as to whether the Corporate Guarantee has been discharged by reason of a variation of the principal contract between the petitioner and the Issuer, specifically an agreement to give time to the Issuer, to which the Company did not agree[11] ("**Discharge Ground**").

(2) There are arbitration clauses in both the Bond Instrument and the Corporate Guarantee, and hence the dispute over the

---

8 Reasons, §19(2)
9 Reasons, §20
10 Reasons, §21
11 Chu 1st, §§4(1), 11 to 12

petitioning debt should be referred to arbitration[12]. The argument is based on the approach of Harris J in *Re Southwest Pacific Bauxite (HK) Limited* [2018] 2 HKLRD 449, §31 ("*Lasmos*") ("**Arbitration Ground**")[13].

23. The approach of Harris J as encapsulated in §31 of *Lasmos* is that the petition should "generally" be dismissed where it is shown 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 r.32 of the Companies (Winding-Up) Rules (Cap.32H, Sub.Leg.) demonstrating this".

24. Importantly, Harris J went on to say this in §31:

> "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 r.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."

25. On the Discharge Ground, the judge had regard to clauses 8(a) and (e) of the Corporate Guarantee which expressly provide that there shall be no discharge by reason of variation of the principal contract and the

---

12 Chu 1st, §§4(2), 7(3) to (6) and 8

13 *Lasmos* followed the approach of the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 at 589, §§39 to 41.

principle that parties can agree that the guarantee will not be discharged by any variation which would otherwise have the effect of discharging it[14]. She found it could readily be shown without disputed evidence that the Discharge Ground is "wholly without merit"[15].

26. As for the Arbitration Ground, the Company has not taken steps to commence arbitration and so falls foul of requirement (3) in *Lasmos*. Mr Smith submitted that the approach in *Guy Lam CFA* should be followed by analogy in that a contracting party should similarly be bound by an arbitration clause unless the ground of opposition "borders on the frivolous or abuse of process", and/or where there are other creditors supporting the winding-up petition (at §105). The arbitration clauses are contained in the evidence adduced by the petitioner and are thus already before the court[16]. In Chu 2nd, the Company confirmed that it "intends to and will formally commence an arbitration"[17], and there are no supporting creditors appearing in the petition.

27. The judge took the view that the ratio in *Guy Lam CFA* only applies to an EJC, not an arbitration clause. In deciding whether to exercise the discretion to dismiss or stay a petition where the parties have agreed to an arbitration clause, the judge was inclined to think that she should be guided by the principles stated by the Court of Appeal in *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85 and

---

14 Citing O'Donovan and Phillips on *The Modern Contract of Guarantee* (English Edition; 4th edition), §§7-096 to 7-100.

15 Reasons, §§23 to 27

16 As was noted in the Reasons at §34(1). We were given to understand that the Company had raised in its skeleton submissions lodged three days prior to the first hearing of the petition before the judge that it would rely on the Arbitration Ground even though it did not file evidence of its own.

17 At §19(5)(iii)

Sit Kwong Lam v Petrolimex Singapore Pte Ltd [2019] 5 HKLRD 646, and she will also consider whether the requirements in *Lasmos* are satisfied[18].

28. She arrived at this conclusion on the Arbitration Ground in §37 of the Reasons:

> "It does not seem to me to be right that once there is an arbitration clause in the agreement which gave rise to the petitioning debt, the Companies Court should invariably refuse to consider the merit of the 'defence' raised by the company and require the parties to litigate their dispute in arbitration. There is no reason why the Companies Court should adopt such a mechanistic approach or fetter the exercise of its discretion in this way. In my view, where, as here, the company raises a substantive 'defence' to the petitioning debt, the court should consider whether the 'defence' is one which can readily be shown to be wholly without merit. If the court is able to come to that view without considering any detailed arguments or disputed evidence, it would have no difficulty in concluding that the 'defence' is one which 'borders on the frivolous or abuse of process' even if *Guy Lam* approach applies. There is no proper basis to require the parties to refer their 'dispute' to arbitration in the absence of any genuine 'dispute' in respect of the debt."

The grounds of appeal

29. The Company raised two broad grounds of appeal.

30. Ground 1 is premised on the Arbitration Ground. The contention is that the judge erred in law in granting a draconian winding-up order against the Company in circumstances where there is no strong reason why the disputes over the petition debt should not be referred first to arbitration as contractually agreed. The judge erred in failing to recognise that the reasoning in *Guy Lam CFA* is in principle broad and wide enough to apply by analogy to the scenario of a petition presented in

---

[18] Reasons, §35

reliance on a debt where the petitioner had previously agreed to resolve disputes over the debt by arbitration. In a pro-arbitration jurisdiction like Hong Kong, *a fortiori* a contracting party should similarly be bound by the arbitration clause unless the ground of opposition "borders on the frivolous or abuse of process", and/or where there are other creditors supporting the winding-up petition. In proceeding to resolve the disputes between the petitioner and the Company summarily, the judge's approach went against the principles in *Guy Lam CFA* which stressed the importance of party autonomy and holding parties to their agreements.

31. Ground 2 sought to challenge the judge's refusal to adjourn the petition for three months to another call-over hearing and extend time for the Company to comply with the Condition. The contention is that the judge's exercise of discretion is plainly wrong. Her error was amplified by the following matters: there were no supporting creditors appearing in the petition; the petitioner had agreed to be bound by the arbitration clauses; the petition debt was not a judgment debt and the Company was in the course of making arrangements to satisfy the Condition; the adjournment sought was not excessively long in light of the substantial amount of the debt; and it was unreasonable to require the Company to give an undertaking to pay into court the amount of the debt in the petition.

If the principles in Guy Lam CFA should be applied by analogy[19]

32. As in *Guy Lam*, the question for determination is concerned with the discretion to decline jurisdiction in an insolvency petition where the underlying dispute about the petition debt is the subject of an agreed dispute resolution mechanism. The only difference is that *Guy Lam* was concerned with an EJC whereas the contractual provision in this instance is an arbitration clause.

33. *But Ka Chon* and *Sit Kwong Lam* made *obiter* observations on the proper approach and did not decide whether *Lasmos* should be adopted in insolvency petitions where the parties have agreed to resolve their dispute over the debt by arbitration. Since those decisions in 2019, there has been a divergence of views in the Court of First Instance whether the *Lasmos* approach should be followed. In the majority judgment of the Court of Appeal in *Re Lam Kwok Hung Guy, ex p Tor Asia Credit Master Fund LP* [2022] 4 HKLRD 793 ("*Guy Lam CA*"), there is a detailed review of the authorities with divergent views[20]. The controversy is whether the debtor should be required to demonstrate a bona fide dispute of the petition debt on substantial grounds notwithstanding the existence of an arbitration clause in order for a petition to be stayed or dismissed[21].

34. It is appropriate that this controversy should be laid to rest in light of the reasoning in *Guy Lam CFA*. Even though particular considerations relevant to the discretion not to exercise jurisdiction in

---

19 The appellant in *Shandong Chenming* had also raised as a ground of appeal that *Guy Lam CFA* does not apply by analogy to a disputed petition debt subject to an arbitration clause but conceded the point subsequently, only seeking to argue that *Guy Lam CFA* does not apply to disputed cross-claims subject to an arbitration clause.

20 At §§43 to 48, 57, 60.

21 *Guy Lam CFA*, §61

insolvency proceedings where the dispute is covered by EJC are not entirely the same as arbitration clauses, the effect of arbitration clauses on insolvency petitions is of central importance to the reasoning of the majority in the Court of Appeal and of the Court of Final Appeal[22].

35. The majority of the Court of Appeal dismissed the bankruptcy petition on the basis that the approach to staying an ordinary action based on an EJC should be extended to insolvency proceedings involving an EJC. The cogent reasons mentioned in *Guy Lam CA* apply equally in the context of arbitration clauses:

(1) The agreement for dispute resolution mechanism has positive and negative aspects. The parties affirmatively agree to submit their dispute for resolution by the agreed mechanism and neither will bring proceedings to resolve their dispute by any other mode. The negative aspect operates as an agreement not to present an insolvency petition unless and until the underlying dispute has been resolved by the agreed mechanism. Where a petitioner seeks a winding-up order on the basis that there is no bona fide dispute of the debt on substantial grounds, he is to that extent seeking a determination of the dispute by the court and hence the negative aspect of the agreed dispute resolution mechanism is engaged (§§63, 65, 70).

(2) Even though winding up is a class remedy, there is an anterior question whether the petitioner is a member of that class for

---

[22] *Guy Lam CA*, §§43 to 60, 67 to 73, 85; *Guy Lam CFA*, §§87(5), 91, 96 to 102, 104 to 105.

which the remedy is invoked. There is no 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. It does not follow that the anterior question relating to the underlying debt, including whether the debt is disputed in good faith on substantial grounds, may not or should not be determined through the agreed dispute resolution mechanism. An agreed dispute resolution mechanism does not necessarily preclude the court from determining the application for a winding-up or bankruptcy order as opposed to the anterior question whether the petitioner has the requisite locus by being owed the disputed debt (§§77 to 81, 92).

(3) There is a strong policy of the law to require parties to abide by their contracts. An agreement for dispute resolution mechanism is important and prima facie the parties should be held to that agreement. An action brought in breach of it will ordinarily be stopped unless there are strong reasons otherwise. The concern for the creditors' statutory right to present an insolvency petition is a matter primarily within a party's autonomy. There is no reason why a creditor's voluntary surrender of rights to petition for winding up should be held unenforceable for being contrary to public policy. There are no public policy concerns in relation to the curtailment of creditors' rights to petition on insolvency grounds (§§83, 85, 93, 94).

(4) It would be anomalous for the insolvency court to conduct a summary judgment type determination of liability for the debt relied upon, when the petitioner has agreed that any such dispute is exclusively to be resolved by the agreed dispute resolution mechanism (§83).

(5) It would also be an anomaly that a party bound by an agreement for dispute resolution mechanism cannot expect to proceed with an ordinary action for his claim, but can resort to the more draconian measure of presenting a petition for winding up or bankruptcy and expect the court to deal with it by determining whether the debtor has raised any bona fide dispute on substantial grounds (§84).

36. The Court of Final Appeal upheld the approach in the majority judgment. The reasoning relating to the appropriate exercise of the discretion to decline the exercise of jurisdiction applies equally to arbitration clauses. The relevant parts of the judgment of French NPJ in *Guy Lam CFA* read as follows:

> "96. It appears to have been common ground on this appeal that, absent the EJC or an arbitration provision, a petitioner will ordinarily be entitled to a bankruptcy order (or in the case of corporate insolvency, a winding-up order) if the petition debt is not subject to a bona fide dispute on substantial grounds. This is what was called the 'Established Approach'.
>
> 97. The determination by the court of whether it is satisfied with the proof of the petitioning creditor's debt is an exercise of the court's bankruptcy jurisdiction. So is the determination whether there is a bona fide dispute about the debt on substantial grounds. And so too, is the decision by the court to grant, dismiss or stay the petition.
>
> 98. Although the determination of whether the debt is bona fide disputed on substantial grounds is an element of the

jurisdiction conferred on the court, it is a threshold question. If the debt is disputed in a petition, then the engagement of the bankruptcy process in that case is on hold — for the rationale, referred to in the appellant's public policy arguments, is not yet engaged.

99. Those public policy considerations may be relevant in an attenuated form, to prevent a debtor from mounting a completely frivolous defence — an abuse of process designed to put off the evil day.

100. 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. A circumstance enlivening that discretion is the fact that the parties agreed to have all their disputes under the agreement giving rise to the debt be determined exclusively in another forum.

101. It is at this stage that the public policy interest in holding parties to their agreements comes into play. It is not the only consideration. The public policy underpinning the legislative scheme of the court's bankruptcy jurisdiction is still present. The more obviously insubstantial the grounds for disputing the debt, the more it comes into prominence.

102. But where, as in this case, the court has undertaken the equivalent of a summary judgment determination, it has assumed the jurisdiction to decide a question which the parties had agreed would be determined in another forum. The significance of the public policy of the legislative scheme for bankruptcy jurisdiction is much diminished where the petition is brought by one creditor against another and there is no evidence of a creditor community at risk. Where that factor exists it may be evidenced by another creditor presenting a petition.

103. It is relevant in this case that it was always possible for the appellant to sue on the debt in New York and to apply there for summary judgment. While there may be some effect on the timing of the instigation of any consequential bankruptcy proceedings in Hong Kong, the absence of other creditors pursuing the respondent is an indicator that the public interest is unlikely to be adversely affected by such a delay.

104. The above approach to the exercise of the discretion to decline jurisdiction to determine the bona fides and substance of a dispute about a petition debt is in some sense multi-factorial. While a 'strong cause' test is indicative it should not obscure the range of considerations relevant to the court's discretion.

> 105. It is clear however, that the so-called 'Established Approach' is not appropriate where an EJC is involved. And in the ordinary case of an EJC, absent countervailing factors such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process, the petitioner and the debtor ought to be held to their contract. …"

37. On the above analysis, it is clear that the "Established Approach" would not be appropriate where the petition debt is covered by an arbitration clause. Ms Sit, SC[23] has not argued to the contrary, even though she contended that the approach in *Guy Lam CFA* should not be applied by analogy as the determination in that case only concerned EJCs. But having regard to the statutory framework protective of arbitration[24], there is apparently an even stronger case for upholding the parties' contractual bargain that disputes falling within the scope of an arbitration clause should be resolved by arbitration[25].

38. Following the approach in *Guy Lam CFA*, 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, leaving the dispute to be resolved by arbitration as agreed and with regard to the public policy in holding the parties to their agreement. The court is alive that such public policy consideration is not the only consideration and it may exist in an "attenuated form", as when a wholly frivolous defence is mounted that would constitute an abuse of process.

---

[23] With Mr Danny Tang

[24] Arbitration Ordinance, Cap 609 section 20, which gives effect to article 8 of the UNCITRAL Model Law. It has not been argued that the mandatory stay in article 8 should apply to the winding-up petition here. We are concerned with a discretionary stay for arbitration.

[25] *Guy Lam CA* at §110, per Chow JA

39. The emphasis here is that the court is concerned with an exercise of discretion, whether it be the exercise of its jurisdiction to make a bankruptcy or winding-up order upon being satisfied with the proof of the petitioning debt, or in making a determination whether there is a bona fide dispute of the debt on substantial grounds, or in ordering the petition to be dismissed or stayed. As explained in the passages quoted, the approach of the court in exercising its discretion is "multi-factorial". The public policy of the legislative scheme for the court's insolvency jurisdiction may be prominent where the grounds for disputing the debt are obviously insubstantial. The significance of this public policy may be much diminished where there is no supporting creditor and no evidence of a creditor community at risk. The "strong reasons"[26] or "wholly exceptional circumstances"[27] test should not "obscure the range of considerations relevant to the court's discretion". The "countervailing factors" mentioned being "the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process" are just instances where the court may exercise its discretion not to hold the parties to the agreed dispute resolution mechanism. By this approach, the court retains flexibility to deal with the case as the circumstances require[28].

40. What of requirement (3) in *Lasmos* that the debtor should actively pursue arbitration? Mr Smith pointed out there was no requirement in *Guy Lam CFA* for the debtor to commence a claim pursuant to the agreed dispute resolution mechanism. Rather, the court recognized it was always possible for the petitioner to sue in New York and while that might lead to some delay, the absence of other creditors pursuing the debtor

---

[26] *Guy Lam CA*, §86
[27] *Salford Estates*, §39
[28] *Guy Lam CA*, §§86, 112

meant that the public interest was unlikely to be adversely affected by such a delay. He submitted that the requirement for the debtor to actively pursue arbitration is difficult to justify when it is the petitioner who should establish the anterior question that it has the requisite locus to petition by being owed the debt.

41. Ms Sit submitted that regardless of whether one looks at it from the lens of *Lasmos* or *Guy Lam*, the consideration is the same in that a genuine intention to arbitrate is fundamental to engaging the public policy in holding the parties to their agreement to arbitrate, and hence must be demonstrated by the debtor. There is nothing in *Guy Lam CFA* to suggest that requirement (3) in *Lasmos* is wrong or should not be applied in the arbitration context.

42. It is not onerous to demonstrate that there is a genuine intention to arbitrate. To deter a debtor from merely raising an arbitration clause as a tactical move with no genuine intention to arbitrate, it is sensible for the court to require itself to be satisfied of the genuine intention so as to hold the parties to their agreed dispute resolution mechanism. The courts have emphasized that the steps required under the arbitration clause to commence the process may include preliminary stages such as mediation[29]. And even if no steps at all were taken, the court could still exercise its discretion in an appropriate case to grant a short adjournment for the debtor to commence arbitration and require an undertaking from him to proceed with the arbitration with all due dispatch[30]. If no progress

---

[29] *Lasmos*, §31; *Sit Kwong Lam*, §§37, 38

[30] *Hollmet AG v Meridian Success Metal Supplies Ltd* [1997] HKLRD 828 at 832B to D

is made during the adjournment, the court could consider lifting the stay and proceed to exercise its jurisdiction on the petition debt[31].

The application of principles to this case

43. There is however difficulty in applying the above principles to the circumstances here. The Company did not file evidence in opposition to the petition and did not comply with the Condition for an extension of time to do so. There is no appeal against the imposition of the Condition. Its application for extension of time of three more months to comply with the Condition and an adjournment of the petition was dismissed, as it was found by the judge there was no credible evidence to show that if given time the Condition would be complied with. This was reinforced by the fact that having considered the petition for five months, the Company was unable to come up with anything in respect of the petitioning debt, whether it be restructuring proposal or otherwise. There was no useful purpose in an adjournment. As there was no evidence in opposition and nothing to show that the petitioning debt was disputed, the judge held that the petitioner is entitled *ex debito justitiae* to a winding-up order.

44. The Company has challenged the judge's exercise of discretion in refusing to adjourn the petition in Ground 2. There is nothing to suggest that the judge had misunderstood the evidence or the relevant principles in the exercise of her discretion and no basis for the appeal court to intervene in an exercise of discretion on the

[31] *Telnic Ltd v Knipp Medien und Kommunikation GmbH* [2020] EWHC 2075 (Ch), §16

well-established grounds. Nor could it be said that the judge's exercise of discretion is plainly wrong.

45. Mr Smith has contended that the Arbitration Ground was raised in opposition in that the petitioner has adduced evidence of the contractual documents which contained the arbitration clause, that the Company had stated in its skeleton submissions for the first hearing it would rely on the arbitration clause and that the Company had confirmed in Chu 2nd (which was not filed as evidence in opposition) the Company "intends to and will formally commence an arbitration". These matters taken together cannot be regarded as sufficient and proper evidence to indicate that the petition debt was disputed and that the dispute would be referred to arbitration. The fact that the Company has failed to pay the Debt in the SD is not evidence that the petition debt was disputed, as it was stated in the petition and verified on affidavit that the Company had made two part payments of US$500,000 each before the petition was presented[32].

46. On this basis alone, this appeal should be dismissed.

47. Even if the Arbitration Ground could be regarded as properly raised in opposition to the petition and Ground 1 of this appeal is engaged, the judge has found it could readily be shown without disputed evidence that the Discharge Ground (the sole defence relied on by the Company to dispute the petitioning debt) is "wholly without merit". Other than attacking this as a "theoretical exercise", Mr Smith has not seriously challenged this finding. It could be shown without detailed argument that

---

[32] Ms Sit also referred to a repayment schedule commencing 30 April 2021 proposed to the petitioner by the Company's representative. As this was exhibited to Chu 1st which the Company is unable to rely on for failing to comply with the Condition, this will not be considered.

the defence raised is one which "borders on the frivolous or abuse of process". Applying this high threshold and the principles in *Guy Lam CFA* by analogy, and even without going into requirement (3) in *Lasmos*, this would be a sufficient countervailing factor which militates against the exercise of discretion to decline jurisdiction in the winding-up petition and hold the parties to their agreement to arbitrate.

Conclusion

48. For the above reasons, the Company's appeal is dismissed. There is no dispute that costs should follow the event. We order the Company to pay the petitioner's costs of this appeal, with a certificate for two counsel.

(Susan Kwan)	(Aarif Barma)	(Godfrey Lam)
Vice President	Justice of Appeal	Justice of Appeal

Ms Eva Sit SC and Mr Danny Tang, instructed by Herbert Smith Freehills, for the Petitioner (Respondent)

Mr Clifford Smith SC and Mr Tommy Cheung, instructed by W K To & Co, for the Company (Appellant)

The Official Receiver, attendance excused