FACV No. 13 of 2022
[2023] HKCFA 9

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

FINAL APPEAL NO. 13 of 2022 (CIVIL)
(ON APPEAL FROM CACV NO. 393 of 2021)

BETWEEN

Re: GUY KWOK-HUNG LAM (林國雄)	Respondent (Debtor)
and	
Ex Parte: TOR ASIA CREDIT MASTER FUND LP	Appellant (Creditor / Petitioner)

Before:	Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice French NPJ
Date of Hearing:	2 March 2023
Date of Judgment:	4 May 2023

J U D G M E N T

Chief Justice Cheung:

1. I agree with the judgment of Mr Justice French NPJ.

Mr Justice Ribeiro PJ:

2. I agree with the judgment of Mr Justice French NPJ.

Mr Justice Fok PJ:

3. I agree with the judgment of Mr Justice French NPJ.

Mr Justice Lam PJ:

4. I agree with the judgment of Mr Justice French NPJ.

Mr Justice French NPJ:

Introduction

5. This appeal arises out of a bankruptcy order made on 21 July 2021 against the Respondent pursuant to a creditor's petition presented by the Appellant in the Court of First Instance ("**CFI**") on 15 June 2020. The Respondent said the debt alleged by the Appellant was disputed and should be determined by a New York court under an exclusive jurisdiction clause ("**EJC**") in the contract between him and the Appellant which gave rise to the alleged debt. The CFI judge ("**Judge**") held that the Respondent had failed to show that there was a *bona fide* dispute on substantial grounds in respect of the debt and made a bankruptcy order against the Respondent ("**CFI Judgment**").[1] The Court of Appeal ("**CA**") set aside the orders made by the CFI and dismissed the petition

[1] [2021] HKCFI 2135 (Linda Chan J).

on the basis of the EJC ("**CA Judgment**").[2] The Appellant now appeals against the decision of the CA.

Factual background

6. The Appellant is an exempted limited partnership formed and registered in the Cayman Islands. The Respondent is a solicitor qualified to practice in Hong Kong. He is the founder of two groups of companies providing aged care services on the Chinese Mainland and in the United States, referred to in this judgment as CP China and CP US respectively.

7. On 11 July 2017, the Appellant entered into a Credit and Guaranty Agreement ("**Credit Agreement**") with the ultimate holding company of CP China, CP Global Inc (the "**Borrower"**). Pursuant to that agreement, which named the Respondent as personal guarantor, the Appellant advanced term loans totalling US$29,500,000 to the Borrower.

8. There were various securities executed in favour of the Appellant. It is not necessary to set out their detail here. Under the Respondent's personal guarantee, in cl 10.01 of the Credit Agreement, he agreed to guarantee, as primary obligor, the payment in full of all amounts due and owed by the Borrower without any demand or notice.

9. The Credit Agreement contained the EJC in cl 12.16, which provided:[3]

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2 [2022] HKCA 1297.

3 Each District Court in the United States has original and exclusive jurisdiction of all cases under Title 11 (Bankruptcy) of the United States Code: s 1334 (Bankruptcy Cases and Proceedings). There are within each District, Bankruptcy Judges constituting a Court of the District to be known as the Bankruptcy Court

> "12.16 Governing Law
>
> (a) This Agreement and the other Loan Documents and the rights and obligations of the parties hereto and thereto shall be construed in accordance with and governed by the laws of the State of New York.
>
> (b) Each party hereto hereby submits to the exclusive jurisdiction of the United States District Court for the Southern District of New York and of the Supreme Court of the State of New York sitting in New York County (including its Appellate Division), and of any other appellate court in the State of New York, for the purposes of all legal proceedings arising out of or relating to this Loan Agreement or the other Loan Documents or the transactions contemplated hereby or thereby; provided that any suit seeking enforcement against any Collateral or other Property may be brought, at the option of Lender if in the courts of any jurisdiction where such Property is located to the extent such courts have jurisdiction over the relevant Loan Party or over such Collateral or other Property. Each party hereto hereby irrevocably waives, to the fullest extent permitted by applicable law, any objection that it may now or hereafter have to the laying of the venue of any such proceeding brought in such a court and any claim that any such proceeding brought in such a court has been brought in an inconvenient forum."

10. There were three amendments to the Credit Agreement each of which continued the EJC in effect. It is not necessary for present purposes to descend to the detail of those amendments.

11. Before considering the Judge's decision, it is convenient to set out the relevant statutory framework.

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for the District: s 151 (Designation of Bankruptcy Courts) of Title 28 (Judiciary and Judicial Procedure) of the United States Code.

Statutory framework

12. Bankruptcy jurisdiction is conferred on the CFI by s 97 of the Bankruptcy Ordinance (Cap 6) which relevantly provides:

> "**Jurisdiction**
>
> 97. General power of court
>
> (1) Subject to the provisions of this Ordinance, the court shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

The term "court" is defined in s 2 of the Bankruptcy Ordinance as "the Court of First Instance sitting in its bankruptcy jurisdiction."

13. As appears later in these reasons there is a distinction to be drawn between the jurisdiction of the CFI and the powers conferred on it.

14. Relevant provisions of the Bankruptcy Ordinance and Bankruptcy Rules (Cap 6A) are as follows:

Bankruptcy Ordinance

> "Part II
>
> **Proceedings from Bankruptcy Petition to Discharge**
>
> **3. Who may present a bankruptcy petition**
>
> (1) A petition for a bankruptcy order to be made against a debtor may be presented to the court–
>
> (a) by one of the debtor's creditors or jointly by more than one of them;

…

(2) Subject to the following provisions of this Part, the court may make a bankruptcy order on any such petition."

There are a number of conditions to be satisfied before the court can exercise its bankruptcy jurisdiction.

"**4. Conditions to be satisfied in respect of debtor**

(1) A bankruptcy petition shall not be presented to the court under section 3(1)(a) or (b) unless the debtor—

(a) is domiciled in Hong Kong;

(b) is personally present in Hong Kong on the day on which the petition is presented; or

(c) at any time in the period of 3 years ending with that day—

(i) has been ordinarily resident, or has had a place of residence, in Hong Kong; or

(ii) has carried on business in Hong Kong.

(2) The reference in subsection (1)(c) to a debtor carrying on business includes—

(a) the carrying on of business by a firm or partnership of which the debtor is a member; and

(b) the carrying on of business by an agent or manager for the debtor or for such a firm or partnership.

5. Other preliminary conditions

(1) Where a bankruptcy petition relating to a debtor is presented by a person who is entitled to present a petition under 2 or more paragraphs of section 3(1), the petition is to be treated for the purposes of this Part as a petition under whichever of those paragraphs is specified in the petition.

(2) A bankruptcy petition shall not be withdrawn without the leave of the court.

(3) The court has a general power, if it appears to it appropriate to do so on the grounds that there has been a contravention of rules or for any other reason, to dismiss a bankruptcy petition or to stay such a petition and, where it stays such a petition, it may do so on such terms and conditions as it thinks fit.

…

6. Grounds of creditor's petition

(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.

(2) Subject to sections 6A to 6C, a creditor's petition may be presented to the court in respect of a debt or debts if, but only if, at the time the petition is presented—

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds $10,000 or a prescribed amount;

(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured;

(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and

(d) there is no outstanding application to set aside a statutory demand served under section 6A in respect of the debt or any of the debts.

…

6A. Definition of *inability to pay*, etc.; the statutory demand

(1) For the purposes of section 6(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—

(a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as ***the statutory demand***) in the prescribed form

requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules;

…

9. Creditor's petition and order thereon

(1) A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served in the prescribed manner.

(2) At the hearing the court shall require proof of the debt of the petitioning creditor and of the service of the petition, and, if satisfied with the proof, may make a bankruptcy order in pursuance of the petition.

(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts or has a reasonable prospect of being able to pay them, or considers that for other sufficient cause no order ought to be made, the court may dismiss the petition.

…

(5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

…

12. Effect of bankruptcy order

(1) On the making of a bankruptcy order, the Official Receiver shall thereby become the provisional trustee of the property of the bankrupt, and thereafter, except as directed by this Ordinance, no creditor to whom the

bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, nor shall proceed with or commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose."

Bankruptcy Rules

"**47. Application to set aside statutory demand**

(1) The debtor may, within the period allowed by this rule, apply to the court for an order setting the statutory demand aside.

…

(4) The debtor's application shall be supported by an affidavit—

(a) specifying the date on which the statutory demand came into his hands; and

(b) stating the grounds on which he claims that it should be set aside,

and the affidavit shall have exhibited to it a copy of the statutory demand.

48. Hearing of application to set aside

(1) On receipt of an application under rule 47, the court may, if satisfied that no sufficient cause is shown for it, dismiss it without giving notice to the creditor.

…

(3) If the application is not dismissed under subrule (1), the court shall fix the date, time and place for it to be heard, and shall give at least 7 days' notice thereof to—

(a) the debtor or, if the debtor's application was made by a solicitor acting for him, the solicitor;

(b) the creditor; and

(c) whoever is named in the statutory demand as the person with whom the debtor may enter into communication with reference to the demand

(or, if more than one person is so named, the first of them).

(4) On the hearing of the application, the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.

(5) The court may grant the application if—

(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;

(b) the debt is disputed on grounds which appear to the court to be substantial;

…

(d) the court is satisfied, on other grounds, that the demand ought to be set aside."

Procedural history

15. On 20 May 2020, the Appellant served a statutory demand on the Respondent requiring him to pay US$41,297,644.93, being the alleged outstanding principal and interest accrued up to 14 April 2020 less the estimated value of a security by way of equitable mortgage dated 11 July 2017, executed by the Respondent over all issued shares in the Borrower. No application was made to set aside the statutory demand. The demand was not met and a petition was presented on 15 June 2020 in respect of the unsecured part of the debt pursuant to s 6B(2) of the Bankruptcy Ordinance. The asserted debt was US$41,297,644.93 comprising outstanding principal of US$48,057,003.64 and accrued interest of US$540,641.29 for the period between 31 March and 14 April 2020, less the value of the security valued at US$7,300,000.

16. On 14 April 2021, while the petition was pending, the Respondent commenced proceedings in New York ("**New York Proceedings**") against the Appellant claiming a declaration that there had been no event of default under the Credit Agreement and consequential relief, including damages.[4]

17. The allegations in the New York Proceedings were set out in the CFI Judgment and were as follows:[5]

> "(1) the value of the assets owned by [the Respondent's] company (presumably the Borrower) exceeds US$70 million;
>
> (2) a term sheet in respect of a US$22 million loan to be advanced to a subsidiary of CP Holdings (Pacrim US LLC) had been signed with Bank Leumi on 20 December 2019, which required, *inter alia*, (a) the [Appellant] to subordinate part of its security to Bank Leumi and (b) [the Respondent] giving a 'significant personal guarantee' to Bank Leumi. [The Respondent] only signed a 'limited guarantee agreement relating to the Bank Leumi financing' on 7 April 2020;
>
> (3) prior to appointment of the Receivers, the [Appellant] had not provided any prior notice of any potential event of default to the Borrower, [the Respondent] or any of the guarantors;
>
> (4) the [Appellant] was not entitled to seize the assets of the Borrower or to replace any of the managers/directors of the companies within the CP US Group as there 'is no currently existing event of default that has not been waived' by the [Appellant], and the [Appellant] should be 'estopped from claiming any such event of default exists'. For the same reasons, the [Appellant] acted in breach of its contractual duties under the Credit Agreement; and
>
> (5) the [Appellant] failed to act in good faith in that it did not follow the 'established pattern' in (a) raising concerns relating to potential events of default under the Credit Agreement, (b) providing notice to the Borrower and the guarantors of its concerns and issues, (c) making 'reasonable accommodations

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4 CFI Judgment, [29].

5 CFI Judgment, [28].

> to address the concerns' of the [Appellant] and (d) amending their agreements including through the execution of Waiver. The [Appellant's] sudden attempt to declare an event of default on 15 April 2020 constituted 'a breach of the implied covenant of good faith and fair dealing'. For the same reasons, the [Appellant] should be estopped from claiming that an event of default exists." (footnotes omitted)

18. On the basis of the above allegations, the Respondent claimed:

> "(1) a declaration that there was no event of default under the Credit Agreement and the [Appellant] was not entitled to appoint the Receivers or to take control over the assets provided as security for the Term Loans, (2) an injunction to enjoin the [Appellant] from taking any action in breach of the contractual duties under the Credit Agreement, and (3) damages for 'breach of the covenant of good faith and fair dealing'."

19. The petition was heard on 9 June 2021 and judgment delivered on 21 July 2021. The Judge ordered that the Respondent be adjudged bankrupt and the Official Receiver become the provisional trustee of his estate.

20. The Respondent appealed to the CA, which delivered judgment allowing the appeal on 30 August 2022. The bankruptcy order was set aside and the petition was dismissed.

The question for determination

21. Leave to appeal to this Court was granted by the CA on 8 November 2022 on the following question:

> "Where:
>
> (a) parties to an agreement have agreed to submit to the exclusive jurisdiction of a specified foreign court for the purposes of all legal proceedings arising out of or relating to their agreement or the transactions contemplated thereby,

(b) one of the parties has petitioned in Hong Kong for the bankruptcy of another party on the basis of a debt arising under the agreement; and

(c) the debt is disputed by the latter party,

what is the proper approach of the Hong Kong court to the petition? In particular, should the petition ordinarily be stayed or dismissed pending the determination of the dispute in the foreign court unless there are strong reasons to the contrary (on the footing that the petitioner may not seek to demonstrate such strong reasons by showing that there is no bona fide dispute of the debt on substantial grounds)?"

The grounds of opposition

22. The grounds of the Respondent's opposition to the petition as set out in the CFI Judgment were:[6]

"(1) The [Appellant] is a 'fully secured creditor' and hence has no entitlement to issue the Petition ...

(2) The Term Loans are unenforceable by reason of their contravention of the Money Lenders Ordinance ...

(3) The [Appellant] has no present right to enforce the Term Loans by reason of the doctrines of estoppel and/or waiver ...

(4) [The Respondent] has a genuine counterclaim in conspiracy against the [Appellant] with damages which exceed the Debt ...

(5) The [Appellant] is required to litigate the dispute in the New York court before coming to Hong Kong to invoke the bankruptcy regime …

(6) The Court should exercise its residual discretion to dismiss the Petition …"

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6 CFI Judgment, [32].

The principles applied by the Judge

23. The Judge stated that the principles in relation to the petition were not in dispute:

> "The burden is on [the Respondent] to demonstrate by sufficiently precise factual evidence that there is a *bona fide* dispute on substantial ground in respect of the Debt."[7]

24. That general proposition applicable to bankruptcy petitions in general is not controversial. However, the invocation of the EJC is anterior to its application. The Respondent contended that the Appellant was required by the EJC to litigate its disputes with the Respondent in the New York courts before coming to Hong Kong to invoke the bankruptcy regime.[8]

25. The Judge held that the fact that the parties had agreed to an arbitration clause or an EJC was only a matter which could be taken into account by the court when considering a winding up / bankruptcy petition.[9] In the event, the Judge did not think that there was any *bona fide* dispute that:

> "(1) there was event of default under the Credit Agreement and, therefore, the [Appellant] was entitled to enforce the security provided by the various parties, and (2) [the Respondent] was liable but failed to repay the Term Loans to the [Appellant] on or before 31 December 2019."[10]

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7 CFI Judgment, [31].

8 Citing *De Monsa Investments Ltd v Whole Win Management Fund Ltd* (2013) 16 HKCFAR 419, [100] and *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("***Lasmos***").

9 CFI Judgment, [49].

10 CFI Judgment, [50].

The Judge's analysis of the asserted dispute about the debt

26. The Judge's analysis underpinning her conclusion that there was no *bona fide* dispute was set out at [51] and following of the CFI Judgment. In summary it was as follows:

(1) It was clear from the Respondent's allegations that the fact that CP Holdings' subsidiary was not able to obtain the loan was the result of its inability to satisfy the conditions imposed by Bank Leumi. There was no basis for the Respondent to allege that the Appellant acted in breach of the Credit Agreement or any duty whatsoever given that the Appellant had no obligation to support any part of the security it held in favour of Bank Leumi.

(2) The allegation that the Appellant did not provide any prior notice of any potential event of default to the Borrower or the Respondent was wholly without merit. The Credit Agreement as amended had expressly provided that the term loans should be repaid by 31 December 2019 unless the Borrower exercised the option to extend the maturity date, which the Borrower never did. The Judge was unable to see how the Borrower and the Respondent could blame the Appellant for not giving any notice when they were fully aware of, but decided to let the event of default take place on 31 December 2019.

(3) The allegations made in the New York Proceedings were bold assertions that there was no event of default which had not been waived, that the Appellant had acted in breach of its

contractual duties, and that the Appellant acted in breach of a so-called implied covenant of good faith and fair dealing. The Respondent had not been able to articulate any legal basis, whether under the terms of the Credit Agreement or under New York law, which imposed the "contractual duties" or duty of "good faith" which he alleged were owed by the Appellant.

27. The Judge went on to say that in any event the alleged duties or covenants were "demurrable" as they were inconsistent or contradicted by:

> "(1) the express term of the Credit Agreement in particular, cl 12.01, which provides that:
>
> > 'No amendment or waiver of any provision of any Loan Document, and no consent to any departure by the Borrower or any other Loan Party therefrom, shall be effective unless in writing executed by (1) the [Appellant] and the Borrower or the Loan Parties party to the applicable Loan Document'
>
> (2) the conduct of the parties in entering into the 1st Amendment Agreement, the 2nd Amendment Agreement and the 3rd Amendment Agreement so as to vary the terms of the Credit Agreement and give effect to such amendments."[11]

28. As the above analysis indicates, the exercise undertaken by the learned Judge in coming to the conclusion that there was no *bona fide* dispute in relation to the debt was the kind of analysis that might underpin a successful application for summary judgment on the debt.

29. The Judge went on to deal with and reject the defence to the petition that the Appellant was a fully secured creditor. That is not material to this appeal.

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[11] CFI Judgment, [54].

The illegality defence based on the contention that the Appellant was an unlicensed money lender, rendering the Credit Agreement unenforceable, was clearly material to the question of whether there was a debt. There was some substantial consideration given to that defence in the judgment.[12] The same is true of the estoppel defence.[13]

30. The Respondent relied upon a cross-claim made against the Appellant in proceedings in Texas – the claim being one of tortious interference with the Respondent's attempts to enter into contractual relations with Bank Leumi. Those allegations were found by the Judge to be unsubstantiated, as were the alleged losses caused by an alleged tortious conspiracy or breach of duty by the Appellant.[14]

The Judge's approach to the EJC

31. On the application of the EJC, the Judge had earlier referred to authorities cited by the parties[15] of which she said:

> "In all the above cases, the Courts did not regard the existence of an EJC in the agreement would prevent [sic] the creditor from presenting a winding up petition against the company. Instead, the approach of the Courts was to ask whether the company had demonstrated by evidence that the debt was *bona fide* disputed on substantial grounds."[16]

And further:

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12 CFI Judgment, [65]–[73].

13 CFI Judgment, [74]–[80].

14 CFI Judgment, [83]-[84].

15 *BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997; *Citigate Dewe Rogerson Limited v Artaban Public Affairs sSprl* [2011] 1 BCLC 625; *Re International Materials & Technologies Pty Ltd* [2014] NSWSC 168; *Reinsurance Australia Corporation Ltd v Odyssey Re (Bermuda) Ltd* [2000] NSWSC 1118; *De Wet v Vascon Trading Ltd* (BVIHCV (Com) 2011/0129, 6 December 2011).

16 CFI Judgment, [42].

> "While generally the Court would give effect to the contractual bargain reached between the parties, it does not take away or fetter the jurisdiction of the Court to determine whether the company should be wound up if the creditor has the *locus* to present the petition."[17]

The Judge went on:

> "The creditor has *locus* to present a winding up petition if there is no *bona fide* dispute on substantial ground in respect of the debt … The same approach has been applied by the Court in dealing with bankruptcy petition…"[18]

And in a key passage, reflecting what the Appellant called the "Established Approach", the Judge said:

> "In my view, the fact that the parties have agreed to an arbitration clause or an EJC is only a factor which would be taken into account by the Court when considering a winding up/bankruptcy petition."[19]

32. An EJC did not *per se* prevent the Companies Court from considering the issue of whether the creditor had the *locus* to present the petition. Until the debtor could demonstrate a *bona fide* dispute on substantial grounds, there would be no proper basis to contend that there was a dispute which must be litigated in the agreed court. The Judge then embarked on the analysis outlined above leading to her conclusion that there was no *bona fide* dispute.

The decision of the CA

33. The only ground of appeal was that the Judge should have dismissed or stayed the petition because the petition debt was disputed and the Respondent

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17 CFI Judgment, [47].

18 CFI Judgment, [48].

19 CFI Judgment, [49].

had raised a cross-claim which was subject to the EJC and in respect of which proceedings had commenced in New York.

34. The principal judgment was delivered by G Lam JA, with whom Barma JA agreed. It provided a comprehensive account of differing approaches taken in a number of courts over a number of years. It is useful to set out the essential elements of that account, which defines the landscape of the debate in this appeal.

35. His Lordship identified the general rule of practice in bankruptcy and in winding up thus:

(1) The court asks whether there is a *bona fide* dispute of the petition debt on substantial grounds.

(2) If the answer to question 1 is yes, the petition is usually dismissed, leaving the petitioner to establish himself as a creditor by a judgment in a court action.

His Lordship drew an important analogy with summary judgment proceedings on an action for debt:

> "The test may be slightly different in formulation from that for summary judgment in a writ action under Order 14 rule 3 of the Rules of the High Court (Cap 4A) (which is whether 'there is an issue or question in dispute which ought to be tried' or, in short, a 'triable issue')."[20]

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[20] CA Judgment, [20].

The two tests were described as "broadly similar or broadly equivalent and most unlikely to result in different outcomes when applied to the same facts".[21]

36. Although G Lam JA did not refer to it, it may be noted that the New York Civil Practice Law and Rules provide for summary judgment on criteria which require the moving party to show that there is no defence to the cause of action or that the cause of action or defence has no merit.[22] The motion will be denied if any party still shows facts sufficient to require a trial of any issue of fact.

37. Before the CA the Respondent argued that the Judge should have followed the approach of Harris J in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("***Lasmos***") – that would have required the judge to dismiss or stay the petition pending resolution of the dispute about the debt in the New York Proceedings.[23] The English authorities relied upon by the Judge were said to have preceded *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589, which ushered in a different approach.[24]

38. The Appellant filed a respondent's notice in the CA contending that the *Lasmos* approach should not be extended to an EJC and was itself unsound in the arbitration context in which it was developed. The Appellant also submitted that under English and Commonwealth authorities, an EJC did not provide an answer to a winding up petition. The EJC in this case applied to "legal proceedings". The petition, it was argued, was not a legal proceeding based upon

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21 CA Judgment, [20].

22 Consolidated Laws of New York, Civil Practice Law and Rules (Chapter 8), Section 3212.

23 CA Judgment, [24].

24 CA Judgment, [24].

a cause of action between the parties. It initiated a collective statutory mechanism for the benefit of all creditors. The court did not fully adjudicate upon the substantive rights between the parties. The liquidator or trustee in bankruptcy might reject the claims of the petitioning creditor.

39. G Lam JA, after referring to the contending submissions, reviewed the state of the law on EJCs beginning with the case in which an EJC was invoked to stay an ordinary proceeding. His Lordship identified the applicable principles as those set out in *Aratra Potato Company Ltd v Egyptian Navigation Company (El Amria)* [1981] 2 Lloyd's Rep 119, which he encapsulated thus:

> "…the court is not bound but has a discretion whether to stay an action brought in breach of an agreement to refer disputes to a foreign court; but that discretion should be exercised by granting a stay unless strong cause for not doing so is shown…"[25]

His Lordship also observed that reasons for departing from the general rule might stem from factors not contemplated by the parties when contracting and would not include foreseeable factors going to convenience save for exceptional circumstances involving the administration of justice.[26]

40. His Lordship accepted that "strong cause" was not defined. Some cases in England had suggested that the strength of the parties' respective cases was a relevant factor. However, in a closely related area – the grant of anti-suit

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25 CA Judgment, [28].

26 Citing *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631, [36] (Ma CJHC) and [71] (Stone J) with both of whom Tang VP agreed; *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), [7(iii)] (Gloster J).

injunctions, courts were beginning to apply the principle that parties could be held to their bargain.[27]

41. G Lam JA then referred to the judgment of the House of Lords in *Donohue v Armco Inc & Others* [2001] UKHL 64, an anti-suit injunction case in which Lord Bingham said at [25]:

> "Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause …"

42. He also cited *Euromark Ltd v Smash Enterprises Pty Ltd* [2013] EWHC 1627 (QB), in which Coulson J observed at [35]:

> "… it seems to me that the strength of the claimant's claim on liability is either not a relevant consideration for the purpose of this application or, if it is, it remains a matter of very little significance."

43. In an earlier decision, *Standard Chartered Bank v Pakistan National Shipping Corporation* [1995] 2 Lloyd's Rep 365, Clarke J had observed that, in a case in which a defendant had no arguable defence on quantum and liability, that would be a strong reason to refuse a stay – there would be no real issues between the parties to be tried in England or elsewhere. That approach was approved in Hong Kong on an application for a stay on *forum non conveniens* grounds where there was no exclusive jurisdiction clause – *Bayer Polymers Co*

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[27] Citing *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87, 96; approved in *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd* (2016) 19 HKCFAR 586, [57].

Ltd v Industrial and Commercial Bank of China, Hong Kong Branch [2000] 1 HKC 805.

44. *Euromark* was applied in *Hyundai Engineering & Construction Co Ltd v UBAF (Hong Kong) Ltd* (HCA 175/2012, 25 September 2013). On the other hand, *Standard Chartered Bank* was followed in *Xu Ziming v Ruifeng Petroleum Chemical Holdings Ltd* (HCA 450/2013, 27 August 2014 and 29 October 2014) and in *Madison Communications Pte Ltd v Le Ecosystem Technology India Pte Ltd* [2017] 5 HKLRD 284. Neither *Euromark* nor *Hyundai* were cited to the court in those cases.

45. G Lam JA referred to Hong Kong decisions in which *Euromark* had been applied.[28] He noted that the Singapore Court of Appeal had decided in 2018, departing from previous decisions, that the merits of the defence were irrelevant although a stay might be refused where the applicant was acting abusively or a stay would result in a denial of justice.[29]

46. His Lordship also considered the effect of arbitration clauses on winding up petitions. Since the enactment of legislation giving effect to Art 8 of the UNCITRAL Model Law, the approach is that a dispute exists unless there is a clear and unequivocal admission of liability and quantum.[30] Four decisions of the CFI between 1997 and 2014 had held that despite the existence of an arbitration clause, the court would proceed with the petition in the usual way

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28 *Deltatre SpA v Hong Kong Sports Industrial Development Ltd* [2018] 4 HKLRD 478; *Lo Ka Lee Kelly (t/a Leader Packing (HK) Co) v Spiriant Asia Pacific Ltd* [2021] 3 HKLRD 461; *Shanghai Gopher Asset Management Co Ltd v China Base Group Ltd* [2021] HKCFI 3216.

29 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271, [111]–[113] and [128]–[134].

30 *Tommy C P Sze & Co v Li & Fung (Trading) Ltd & Others* [2003] 1 HKC 418, [50]–[51]. Prior to the Model Law proceedings could only be stayed and the dispute referred to arbitration if a substantive defence to the claim existed giving rise to a genuine dispute.

unless the debtor company showed that the debt was disputed on substantial grounds.[31] The reasoning in each of those decisions was reviewed.

47. English decisions on the question were discussed.[32] Of importance was *Salford Estates*. The Court of Appeal there upheld a first instance decision to dismiss a winding up petition where there was an arbitration clause in the lease from which the alleged debt was said to have arisen. Sir Terence Etherton C, delivering the principal judgment in that case, said at [41]:

> "…it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds."

Telnic Ltd v Knipp Medien Und Kommunikation GmbH [2020] EWHC 2075 (Ch) was also cited for the proposition, derived from *Salford Estates*, that:

> "Once it is accepted that the petition debt is alleged to arise under an agreement that contains a binding arbitration clause and the debt is disputed or not admitted, this approach precludes, save in wholly exceptionally [sic] circumstances, an inquiry by the Companies court as to whether the debt is disputed in good faith on substantial grounds."[33]

48. His Lordship then referred to the judgment of Harris J in *Lasmos* which held that:

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31 *Hollmet AG & another v Meridian Success Metal Supplies Ltd* [1997] HKLRD 828; *Re Sky Datamann (Hong Kong) Limited* (HCCW 487/2001, 29 January 2002); *Re Jade Union Investment Limited* (HCCW 400/2003, 5 March 2004); *Re Southern Materials Holding (H.K.) Co Ltd* (HCCW 281/2007, 13 February 2008).

32 *Jubilee International Inc v Farlin Timbers Pte Ltd* [2006] BPIR 765; *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083 (Comm).

33 CA Judgment, [53].

> "(1) if a company disputes the debt relied on by the petitioner;
>
> (2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and
>
> (3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) and files an affirmation in accordance with *Rule 32* of the *Companies (Winding Up) Rules*, Cap 32H, demonstrating this;
>
> the petition should generally be dismissed."[34]

On the other hand, in *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85, Kwan VP observed, in obiter, that the *Lasmos* approach following *Salford Estates* was a substantial curtailment of a creditor's statutory right to petition for bankruptcy or winding up. That said, Her Ladyship acknowledged that considerable weight should be given to the factor of arbitration in the exercise of the discretion.[35]

49. A view contrary to *Lasmos* and *Salford Estates* was expressed in *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd*; *Re Asia Master Logistics Ltd* [2020] 2 HKLRD 423. In *Re Hongkong Bai Yuan International Business Co Ltd* [2022] HKCFI 960, Linda Chan J, who was the judge at first instance in this matter, held that it was incumbent on the debtor to

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[34] CA Judgment, [54] citing *Lasmos*, [31].

[35] See also *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] 5 HKLRD 646, albeit the debt there in question was held not to be subject to any arbitration agreement.

demonstrate "a genuine dispute on the debt which requires determination of a tribunal" despite the existence of an arbitration clause applicable to the dispute.[36]

50. The preceding, very helpful survey of the authorities by G Lam JA, demonstrates the ebb and flow of judicial opinion in the case of arbitration provisions which raise issues similar, but not identical, to those raised by exclusive jurisdiction provisions, albeit they fall within the statutory framework protective of the arbitral process: see s 20 of the Arbitration Ordinance (Hong Kong) (Cap 609) which gives legal effect to Art 8 of the UNCITRAL Model Law, which provides:

> "*Article 8. Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

51. G Lam JA then considered whether the EJC was engaged in this case. He identified the dispute between the Appellant and the Respondent as outlined earlier and observed:

> "[The Appellant] asks the Hong Kong court dealing with the bankruptcy petition to determine that dispute, and to decide that the various defences and cross-claims raised by [the Respondent] have no substance and are to be ignored. That, it seems to me, would plainly be

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[36] *Re Hongkong Bai Yuan International Business Co Ltd*, [28]; cited and followed in *DCKD & Another v JPWL* [2022] HKCFI 1059, [35] and *Re Proman International Ltd* [2022] HKCFI 1450, [58].

> a judicial determination as to the parties' rights and obligations under the Agreement, and falls within the wording and intendment of the Exclusive Jurisdiction Clause. Moreover, it would be a summary determination based on affidavits alone without the process of discovery that may take place if the dispute is resolved in the New York proceedings."[37]

52. Accepting that a winding up or bankruptcy petition may not be a proceeding for the purpose of the EJC, a petition for such an order on the basis of a disputed indebtedness under the Agreement would fall within legal proceedings arising out of or relating to the Agreement. The EJC operated as an agreement not to present a bankruptcy petition unless and until the underlying dispute had been determined in the agreed forum. His Lordship cited *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 at [83].

53. G Lam JA went on to hold that where the court finds against a company on a winding up petition, that its defences do not raise any *bona fide* disputes on substantial grounds, that is a determination of the dispute.[38] He equated the process to a summary judgment procedure.[39] Further, the determination that the debt is not *bona fide* disputed on substantial grounds can, like a summary judgment, give rise to an issue estoppel.[40]

54. From the preceding, His Lordship extracted the proposition that:

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37 CA Judgment, [64].

38 CA Judgment, [68].

39 CA Judgment, [68] citing *Jubilee International Inc*; *Salford Estates* and *Fieldfisher LLP* v *Pennyfeathers Ltd* [2016] BCC 697.

40 CA Judgment, [69]–[70] citing *Levin v Ikiua* [2010] 1 NZLR 400, [55]–[71].

> "… for a petitioner to seek a winding up order on the basis that there is no bona fide dispute of the debt on substantial grounds is to that extent to seek a determination of the dispute by the court."[41]

55. His Lordship recognised that winding up is a "class remedy which depends on the solvency of the company and the views of the class of unsecured creditors", but the question whether the petitioner is a member of that class is an anterior question.[42] Even if the class remedy (i.e. the winding up order) was available only in Hong Kong, it would not follow that the anterior question relating to the debt relied upon for the petition should not be determined through the agreed dispute resolution mechanism.

56. His Lordship concluded that the same approach should be applied to an EJC in winding up and bankruptcy petitions as in ordinary actions.[43] The policy of the law requires parties to abide by their contracts. He rejected the proposition that an EJC should be treated simply as a factor to be taken into account. That approach was likely to give rise to uncertainty and conflicting approaches.[44]

57. G Lam JA did not go so far as to say that an EJC required the stay or dismissal of the petition. But where the debt on which the petition was based is disputed "the petition should not be allowed to proceed, in the absence of strong reasons, pending the determination of the dispute in the agreed forum."[45] An

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41 CA Judgment, [70].

42 A distinction made by Harris J in *Lasmos*, [27], by Millett J in *Re International Tin Council* [1987] Ch 419, and by the Singapore Court of Appeal in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, [71].

43 CA Judgment, [83].

44 CA Judgment, [85].

45 CA Judgment, [86].

example of a strong reason might be a case in which the debtor was massively insolvent, apart from the disputed debt or there might be other creditors seeking a winding up or bankruptcy where the debts, if disputed, were not subject to an EJC.

58. In the end, His Lordship said that the Appellant should be held to its agreement and the petition stayed or dismissed. He rejected the argument that there were public policy concerns arising from the alleged curtailment of creditor's rights.[46] There was no strong reason to allow the petition to proceed. No reason had been given for a stay. The petition should be dismissed. [47]

59. Chow JA, while agreeing in the outcome, was not prepared to follow the *Lasmos* approach. His Lordship did not consider that an EJC should be given conclusive or near conclusive weight in the exercise of the court's discretion.[48] The list of relevant factors could not be exhaustively stated. His Lordship agreed that the Appellant's petition was caught by the EJC. The approach taken by the CFI effectively rendered the EJC immaterial or irrelevant. His Lordship agreed that the petition should have been dismissed.

The Appellant's contentions

60. The landscape of the debate between the parties was well traversed in the judgments of the CFI and the CA. It is unnecessary to do more than identify the salient features of the submissions by the parties before this Court.

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46 CA Judgment, [94].

47 CA Judgment, [105].

48 CA Judgment, [112].

61. The Appellant contended for the "Established Approach", namely that a petitioner is ordinarily entitled to a bankruptcy or winding up order if the petition debt is not subject to a *bona fide* dispute. The debtor has to show that the debt is disputed on substantial grounds. The Appellant accepted that it was for the petitioner to establish its locus before the court. However, it contended that where there is an EJC the established approach should remain applicable subject to the court's discretion to give weight to the EJC. The approach of the majority in the CA was said to undermine the insolvency regime and its underlying legislative policy.

62. The Appellant submitted that the reasoning of the CA involved an anterior exercise precluding an insolvency petition from being heard. It necessarily preceded the question of locus and insolvency.[49]

63. Supportive of the established approach is the character of the insolvency regime as having a "strong public dimension, which strongly militates against [the approach adopted by the Court of Appeal]".[50] The Appellant pointed to the strong public interest in an orderly system of fairness to all creditors which benefits the public as a whole. It cited the stay of proceedings that follows upon the grant of a bankruptcy order,[51] the reversal of preferences and undervalue transactions,[52] and the scheme of *pari passu* distribution.

64. The public interest was said to extend beyond the class of existing creditors to the prevention of continued trading by an insolvent trader.[53] Further,

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49 Appellant's case, [17].

50 Ibid, [19].

51 Bankruptcy Ordinance, s 12(1).

52 Ibid, ss 49-51.

53 Appellant's case, [21.1].

the insolvency regime polices commercial morality. Insolvency requires public explanation and inquiry.[54]

65. The Appellant submitted that in insolvency proceedings different considerations are in play from those informing the upholding of EJCs in private actions. The law, it was said, also requires as a general principle, that parties cannot contract out of insolvency legislation.

66. To give presumptive weight to EJCs was to erode the insolvency regime. The CFI was empowered and mandated by statute to ascertain if the petitioner has locus under the Bankruptcy Ordinance. It was wrong to borrow from the inherent jurisdiction to stay writ actions and to apply the same approach to dismiss petitions under the Ordinance. It would be undermining the efficacy of the domestic regime if an EJC could be invoked to submit that no argument could be heard on the debt/locus because the creditor agreed to have it adjudicated elsewhere.[55] The established approach allowed the debtor to show a *bona fide* dispute in which event the matter would be left to be dealt with under the EJC.[56]

67. The Appellant characterised the Ordinance as providing "an existing calibrated balance between parties' autonomy and the insolvency regime".[57] The "inherent jurisdiction [of the court]" it was said,[58] should not be developed in a manner that cuts across the statutory scheme. The exercise of discretion under

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54 Ibid, [22].

55 Ibid, [35].

56 Ibid, [37].

57 Ibid, [38].

58 Ibid, [39].

s 5(3) of the Bankruptcy Ordinance must have regard to established principles and policy in bankruptcy proceedings.

68. The Appellant also pointed to delay in the time of the initiation of the regime flowing from the CA's approach. Respect for party autonomy was said to be implicit in the established approach.

69. It was submitted that neither EJCs nor Non-Petition Clauses could be invoked to oust the court's jurisdiction. However, that is not contended in this case and it is not necessary to further refer to the Appellant's case on that point.

70. As a fall-back position, the Appellant contended that, as a matter of construction, the reference to "proceedings" in the EJC in this case did not extend to bankruptcy petitions or disputes arising from them.[59]

The Respondent's contentions

71. The Respondent did not take issue with the public policy considerations informing the insolvency regime. The question was whether the "strong cause" approach undermined them. He contended that it did not and the court should endorse an approach which was consistent across ordinary actions and insolvency proceedings in relation to EJCs and arbitration clauses.[60]

72. The Respondent submitted that the question of locus is anterior to the question of whether the court should exercise its jurisdiction to make a winding up or bankruptcy order. It is only at the latter stage that public policy

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59 Ibid, [71].

60 Respondent's case, [9].

comes into play.[61] The Respondent relied upon the decision in *Lasmos* and the Singapore Court of Appeal decision in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, both of which dealt with arbitration clauses.

73. Given that the policy considerations informing the insolvency regime are not engaged at the point at which the court decides whether the debt is disputed, that matter can be determined in accordance with the parties' agreed dispute resolution mechanism. Where, as in this case, the petition was in substance a dispute between two parties, the petitioner should be held to the bargain it had struck under the EJC.[62]

74. The delay argument advanced by the Appellant begged the question whether the alleged debt is in fact a debt.[63]

75. The Respondent contended that under the strong cause approach an EJC is a weighty starting point but that is not the end of the matter. The court's jurisdiction is not ousted.[64] The court can still take into account insolvency considerations in deciding whether there is a "strong cause" e.g. in cases in which the debtor may be "massively insolvent quite apart from the disputed petition debt".[65]

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61 Ibid, [19].

62 Ibid, [27].

63 Ibid, [25].

64 Ibid, [31].

65 Ibid, [34].

76. The Respondent also pointed out that in a petition claiming that the defences raised by the debtor are not arguable, the debtor could have been sued for summary judgment on the debt in the agreed jurisdiction.[66]

77. While the term "strong causes" could not be defined, examples were offered:

(1) where there is a risk that the petitioner of a foreign debtor company could be left without a remedy or suffer injustice;[67]

(2) where there is evidence that the debtor company is hopelessly insolvent, its assets in jeopardy and the directors under investigation. [68]

78. The "strong cause" approach was said to be sufficiently flexible to deal with debtors who did not have any genuine intention to dispute the debt, e.g., who had made an early admission and retracted it without satisfactory explanation.[69]

79. Underpinning the Respondent's justification for the strong cause approach were notions of party autonomy[70] and coherence of the law.[71]

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66 Ibid, [38].

67 Ibid, [39(1)].

68 Ibid, [34].

69 Ibid, [40].

70 Ibid, [43]–[53].

71 Ibid, [54]-[61].

Jurisdiction and powers of the CFI

80. This appeal is concerned with the appropriate exercise, by the CFI, of the discretion to decline the exercise of jurisdiction on forum grounds.

81. Jurisdiction is the authority of the court to decide cases. It may be defined by a variety of criteria – most obviously subject matter and geography. The general or civil jurisdiction of the CFI is defined in s 12 of the High Court Ordinance (Cap 4) by reference to the "original jurisdiction and authority of a like nature and extent as that held and exercised by the Chancery, Family and Queen's Bench Divisions of the High Court of Justice in England" and also in s 12(2)(b), by reference to:

> "any other jurisdiction, whether original or appellate jurisdiction, conferred on it by any law."

82. The jurisdiction to entertain and determine bankruptcy petitions derives from s 97 of the Bankruptcy Ordinance, read with the definition of "court" in s 2 of the Ordinance.

83. Among the general powers conferred on the CFI is that conferred by s 16(3) of the High Court Ordinance:

> "to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings."

84. There are also necessary implied powers sometimes confusingly designated as "inherent jurisdiction". [72]

85. The jurisdiction of the CFI in bankruptcy matters is conferred by the Bankruptcy Ordinance. It is not amenable to exclusion by contract. Parties may agree between themselves not to invoke the jurisdiction of the court. That has no effect on its jurisdiction. Parties may agree to refer their disputes to a foreign court. That does not affect the jurisdiction of the CFI. What it does inform is the court's discretion to decline to exercise its jurisdiction.

The discretion to decline jurisdiction

86. Subject to statutory constraints, the CFI may decline to exercise its jurisdiction in certain cases. A clear example is where a court determines on *forum non-conveniens* principles that it should not hear a case in which it has jurisdiction. In Hong Kong that discretion is informed by the principles set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 and applied by this *Court in SPH v SA* (2014) 17 HKCFAR 364.

87. The discretion of a court to decline to exercise its jurisdiction in favour of another forum may be exercised in classes of cases that attract a range of considerations:

(1) Any case in which the question is what is the appropriate forum to hear a case in which the court has jurisdiction.

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[72] I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23(1) Current Legal Problems 23, 27; M.S. Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113(1*)* Law Quarterly Review 120, 127; and K. Mason, "The Inherent Jurisdiction of the Court" (1983) 57 Australian Law Journal 449, especially 457.

(2) An ordinary writ action where the dispute is contractual and covered by an EJC clause in the contract.

(3) A case in which the dispute is contractual and covered by an arbitration provision in the relevant contract (albeit the court may be required by statute to decline jurisdiction).

(4) A bankruptcy or winding up petition in which the issue of *forum non-conveniens* may arise.

(5) A bankruptcy or winding up petition based on a debt covered by an arbitration or EJC provision in the contract under which the petition debt arises.

88. It has been suggested that much can be brought under the general rubric of *forum non-conveniens*. In a very useful report on Declining Jurisdiction in Private International Law, written some 30 years ago, Professor J.J. Fawcett observed:

> "Common law jurisdictions, by operating a discretionary rule in relation to foreign choice of jurisdiction agreements, are actually imposing a forum non-conveniens limitation on the effectiveness of the agreement of the parties."[73]

89. Each class of case gives rise to particular considerations relevant to the discretion not to exercise jurisdiction in that class. In each case there will be an exercise of power in the form of a dispositive order – whether it be by way of stay or dismissal of the proceedings or the dismissal of an application seeking a

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[73] J.J. Fawcett, Declining Jurisdiction in Private International Law, Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994 (Clarendon Press, 1995), 54.

stay or dismissal. Ordinarily, where the decision goes to the discretion to exercise jurisdiction there would not be a joinder of issues on the merits which could give rise to a *res judicata* or issue estoppel.

90. In a simple *forum non-conveniens* case the question of the appropriate forum is determined by reference to a variety of factors. One of them may be the failure by a defendant arguing for a different forum, to demonstrate a real issue to be resolved. It seems that in Hong Kong, absent a *bona fide* defence, a challenge based on *forum non-conveniens* will fail.[74]

91. Apart from an arbitration case none of these classes of case involves a challenge to the existence of jurisdiction in the court in which a stay is sought. A dispute which is the subject of an arbitration provision may fall within the jurisdiction of the court but in such a case the court is required by s 20 of the Arbitration Ordinance, to refer the parties to arbitration upon the request of a party unless the agreement is null and void, inoperative or incapable of being performed. The court must then stay the legal proceedings in the action.[75] It is not necessary for present purposes to explore the interaction of the non-discretionary provision applicable to arbitration clauses with the statutory jurisdiction of the CFI in bankruptcy and in company insolvency.

92. In the case of an EJC invoked in recovery proceedings, consideration of the question of whether the court should decline jurisdiction in favour of the agreed forum is not burdened by statutory constraint. An application to the court

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74 G Johnston and P Harris SC, The Conflict of Laws in Hong Kong, (Sweet & Maxwell, 3rd ed, 2017), [3.096] citing *Bayer Polymers* following *Standard Chartered Bank v Pakistan National Shipping Corp*; *Hong Kong Exchanges and Clearing Ltd v Shi Huaifang* [2019] HKCFI 1212; *Haitong International Securities Co Ltd (海通國際證券有限公司) v ADS Securities LLC* [2018] 3 HKLRD 13; *Madison Communications Private Ltd v Le Ecosystem Technology India Private Ltd*; *High Hope Zhongding Corp v 廈門墩峰進出口有限公司* (HCA 2485/2015; unreported, 16 January 2017.

75 Arbitration Ordinance, s 20(5).

to stay or dismiss proceedings on the basis of an EJC may also invoke other grounds, for example *Spiliada* grounds, in support of a determination that the court is not the appropriate forum. The fact that a plaintiff has agreed contractually to dispute resolution in another forum will be highly relevant to whether the court should nevertheless proceed to entertain the claim. In *El Amria*, in the Court of Appeal, Lord Justice Brandon characterised as a correct statement by the Judge appealed against:

> "…that the court will generally enforce an exclusive jurisdiction agreement, and that the plaintiffs had to show strong reasons why it should not do so."

93. The strong reasons requirement is not met by reasons which suffice only to establish that the forum of the plaintiff's choice is the *forum conveniens*. In Dicey, Morris & Collins it was said that:

> "The court will exercise its discretion to grant a stay unless the claimant shows strong reasons, certainly requiring more than that it show England to be the *forum conveniens*, why the English proceedings should not be stayed." [76]

A fortiori, if a plaintiff could not show that the English court was the appropriate forum a stay would be ordered.

The discretion to decline jurisdiction in bankruptcy

94. The question for determination by this Court is concerned with the discretion to decline jurisdiction in a bankruptcy petition where the underlying dispute about the petition debt is the subject of an EJC.

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[76] L.A. Collins and J. Harris & Others (eds), Dicey Morris and Collins on the Conflict of Laws (Sweet & Maxwell, 16th ed, 2022), [12-107].

95. The jurisdiction conferred on the CFI in bankruptcy includes the authority to decide bankruptcy petitions relating to debtors. A petition must meet the requirement in s 6(1) of the Bankruptcy Ordinance that it is in "respect of one or more debts owed by the debtor". The petitioner must prove the debt. Failure by the alleged debtor to apply to set aside a statutory demand or to comply with it, does not establish more than that, for the purposes of s 6(2)(c), the alleged debtor "appears either to be unable to pay or to have no reasonable prospect of being able to pay". That is so even though a debtor can, on an application to set aside a statutory demand, dispute the debt "on grounds which appear to the court to be substantial".[77] As s 9(5) makes clear, the debtor may appear on the petition and dispute that he is indebted to the petitioner. The court may in such a case "stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt".

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.

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[77] Bankruptcy Rules, r 48(5)(b).

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. On that basis this appeal should be dismissed.

106. The preceding observations do not cover the case, not pressed here, that the EJC required bankruptcy proceedings undertaken by the petitioner against the debtor to be instituted in New York. Any question of a discretion to decline to entertain the petition on that basis would involve larger considerations of public policy against the private contract of the parties. But that may be a case for another day.

107. The majority in the CA was correct in its approach. The appeal should be dismissed with costs.

Chief Justice Cheung:

108. Accordingly, the appeal is unanimously dismissed. The Court further makes an order *nisi* that the Appellant pay the costs of the appeal to the Respondent and directs that, if any party wishes to vary this order, written submissions should be filed within 14 days of the handing down of this judgment and the Court will make a final order as to costs on the papers.

(Andrew Cheung)
Chief Justice

(R A V Ribeiro)
Permanent Judge

(Joseph Fok)
Permanent Judge

(M H Lam)
Permanent Judge

(Robert French)
Non-Permanent Judge

Mr José-Antonio Maurellet SC, Mr Nick Luxton and Mr Brian Fan, instructed by Ropes & Gray, for the Creditor/ Petitioner (Appellant)

Ms Rachel Lam SC, Mr Terrence Tai and Ms Clara Wong, instructed by Hill Dickinson Hong Kong, for the Debtor (Respondent)