HCCW 14/2019
[2020] HKCFI 311

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) PROCEEDINGS NO 14 OF 2019

IN THE MATTER OF the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32 (the "Companies Ordinance") s 178(1)(a), s 178(1)(c) and s 177(1)(d) and s 177(1)(f)

and

IN THE MATTER OF ASIA MASTER LOGISTICS LIMITED (亞泰物流有限公司)

BETWEEN

DAYANG (HK) MARINE SHIPPING CO., LIMITED (大陽(香港)海運有限公司) Petitioner

and

ASIA MASTER LOGISTICS LIMITED (亞泰物流有限公司) Respondent

Before: Deputy High Court Judge William Wong SC in Court
Date of Hearing: 30 September 2019
Date of Judgment: 12 March 2020

J U D G M E N T

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1. This is the substantive hearing of the Petitioner's winding up petition dated 11 January 2019 which was amended on 11 April 2019 (the "Petition") based on an unpaid debt of US$360,919.76 (the "Debt").

2. Paragraph 6 of the Petition states:

> "Pursuant to the Charterparty between the Petitioner and the Company as evidenced by a fixture note dated 25 October 2018 (the "Fixture Note"), your Petitioner had chartered its vessel M.V. "Aoli 5" to the Company for about 40 days at a hire of USD6,000 day. According to Clause 12 of the Fixture Note, the hire was payable every 10 days in advance. Pursuant to the statement of account dated 28 November 2018, 10 December 2018 and 19 December 2018 respectively, the 5th to 7th hire totalling in the sum of US$180,000 was being unpaid by the Company to the Petitioner."

3. After 20 December 2018, Asia Master Logistics Limited, the Respondent, has incurred more debt totalling US$360,919.76 as set out in paragraphs 7 and 8 of the Amended Petition dated 11 April 2019.

4. A statutory demand was served on the Respondent on 20 December 2018. The Respondent has not paid the Debt after 21 days from 20 December 2018. Hence, on 11 January 2019, the Petitioner presented the Petition.

Material Facts

5. The Petitioner and the Respondent entered into a charterparty on 25 October 2018, whereby the Petitioner chartered its vessel, MV 'Aoli 5', to the Respondent.

6. The Fixture Note, *inter alia*, sets out the following:

(1) The relevant Vessel is MV 'Aoli 5' (the "Vessel").

(2) The Shipper is Tanlong Group Joint Stock Company (the "Shipper").

(3) Clause 1: Charterer is Asia Master Logistics Limited (i.e. the Respondent).

(4) Clause 5: Duration of about 40 days +/- 10 days at the Charterer's option without guarantee.

(5) Clause 8: Hire at USD6,000/day.

(6) Clause 12: Hire is payable by the Charterer (the Respondent) every 10 days in advance.

(7) Clause 14: Owners guarantee that the Vessels covers are to be watertight throughout the charter period.

(8) Clause 19: Owners guarantee all fitted ship's gear is workable and in good order during the whole voyage with effective gear certificate during the charter. If ships' gear is out of order, the charge of shore crane is to be debited from the owner's account and any time loss/bunker consumption will be off hire.

(9) Clause 23: Arbitration in Hong Kong with English law to apply.

(10) Clause 24: New York Produce Exchange 93 is applicable ("NYPE93").

7. The Vessel was hired by the Respondent from 26 October 2018 to 11 January 2019 (approximately 77 days).

8. The Vessel arrived in Ho Chi Minh for loading on 29 October 2018. Loading was complete on 17 November 2018, and the Vessel departed from Vietnam to Korea.

9. The Vessel arrived at the unloading port at Masan, Korea on 26 November 2018. The Vessel was redelivered to the Petitioner on 11 January 2019.

10. The amount of hire to be paid by the Respondent to the Petitioner is US$321,377.30.

11. The Respondent does not deny that the Debt is due and owing, but it raises a counterclaim against the Petitioner in relation to an alleged breach of the Fixture Note and submits that the dispute should be dealt with by way of arbitration.

12. The Respondent alleges that:

(1) On 29 October 2018, the Vessel arrived at the loading port in Ho Chi Minh, Vietnam and the dock agent appointed by the Shipper (the Respondent's client) made various complaints.

(2) The complaints comprised the following:

(a) The cover on the deck of the Vessel was defective, causing water leakage to the bags of rice (the "Cargo");

(b) There was no electric or mechanical ventilation in the storage compartment;

(c) The cover on the deck of the Vessel was corroded with rust, some of which fell and damaged the Cargo; and

(d) The captain of the Vessel was uncooperative and refused to follow the Respondent's instructions in handling the Cargo.

(3) Regarding the unloading of the Cargo:

(a) On 1 December 2018, the Respondent sent Mr Kelvin Peng ("Mr Peng") to discuss the unloading of the Cargo. While the Cargo was being lifted by crane, some bags fell off or leaked.

(b) On 5 December 2018, Mr Peng "*instructed the captain to temporarily suspend the unloading in order for the Respondent to work out a solution with the Shipper for remedial measures and to discuss about the responsibility for leakage problem and the contributions to pay for extra costs*".

(c) Mr Peng tried to contact the captain of the Vessel in order to give proper instructions to him on how to unload the Cargo, but he was "totally" out of reach.

(d) Mr Peng informed the Petitioner that he had lost confidence with the captain and requested that the captain be changed pursuant to the Fixture Note and NYPE93.

(e) The Petitioner failed to investigate the matter and refused to change the captain.

(f) The consignee adopted an inefficient method to unload the cargo.

13. The Respondent seeks to rely on Clause 8 of the NYPE93 which states:

> "(a) The Master shall perform the voyages with due dispatch, and shall render all customary assistance with the Vessel's crew. The Master shall be conversant with the English language and (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and *the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging, and tallying, at their risk and expense,* under the supervision of the Master.
>
> (b) If the Charterers shall have reasonable cause to be dissatisfied with the conduct of the Master or officers, the Owner shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in appointments."
>
> (Emphasis added.)

Whether the Debt is disputed in good faith and on substantial grounds

14. First, although the Respondent alleges that the Petitioner was in breach of its duties under the Fixture Note and should bear some responsibility for the losses it suffered by reason of the delay, Mr Lai for the Respondent fairly accepted that the Respondent remains in the process of investigation and is thus unable to quantify its counterclaim. In other words, the Respondent is not in a position to say that its counterclaim will exceed and thereafter extinguish the Debt.

15. Where a debtor opposes a petition on the basis that it has a genuine and serious cross-claim against the petitioner greater than or equal to the petitioning debt, it has the burden to prove that its cross-claim is genuine, serious and of substance. There must be supporting relevant details to demonstrate that the cross-claim is based on substantial grounds. The test is very much the same as the test for deciding whether a debt is disputed in good faith and on substantial grounds. (See *Re Sinom (Hong Kong) Ltd* [2009] 5 HKLRD 487 ("*Re Sinom*") at p.491; §§11-12*, per* Kwan J (as she then was) and *Re Alpha Building Construction Ltd*, unreported, HCCW 283/2014, 20 May 2015 at §8 *per* Harris J.)

16. The existence of an arbitration clause, or of the commencement of arbitration, does not *ipso facto* prevent the Court from considering whether or not the company has established the existence of a *bona fide* dispute of substance in relation to the debt on which the petition is based: see *Re Sinom* at p.492; §16 *per* Kwan J (as she then was), *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85 ("*But Ka Chon*") at p.107; §71 *per* Kwan VP, and *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("*Lasmos*") at p.468; §31 *per* Harris J.

17. In my view, there is no doubt that, on any analysis, the Debt is not being disputed in good faith on substantial grounds. Accordingly, it is only right that this Court should make the usual winding up order against the Respondent.

18. First, there is *prima facie* no dispute to the Debt. The Respondent's case is simply that the Petitioner was responsible for the delay. However, it had given no particulars as to the duration of the alleged delay and, importantly, the extent of loss it suffered by reason of the Petitioner's alleged breach of the Fixture Note. As Mr Lai candidly accepted, the Respondent was still in the process of investigation. With respect, it is insufficient for the Respondent to simply say that the Petitioner should bear some responsibility when resisting a petition for winding up based on undisputed debts.

19. The dispute between the Petitioner and the Respondent is whether the Respondent has a *bona fide* cross-claim on substantial grounds. Mr Kirpalani for the Petitioner is correct that where the entire debt is not disputed (exceeding HK$10,000), regardless of whether arbitration proceedings have been commenced, the Court should exercise its discretion to wind up the Respondent.

20. In *Re Hong Kong Sports Industrial Development Limited* [2018] HKCFI 1309, unreported, HCCW 66/2018, 4 June 2018, Harris J at §§3-5 said:

> "3. The Agreement provided in clause 1.5 that in the event of default in the payment of any of the instalments, the entire initial agreed amount less any payments received should become immediately due and payable. The petitioners have commenced an arbitration to obtain an award in their favour for

> this amount. In the meantime, however, they say that as clearly there is a significant sum payable which cannot be disputed they are entitled to issue the present petition.
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> 4. The Company was given a 14-day extension of time to serve an affirmation that has been filed on behalf of the Company by Mr Zhang Lei, in my view, clearly does not explain why at least a sum of US$12,905,000 is not payable. It does not seem to me that the payment of at least that sum is an issue in dispute in the arbitration.
>
> 5. That being the case, there is no evidence before the court which demonstrate a *bona fide* defence on substantial grounds to the claim for that sum and I can see no justification for requiring the arbitration to be completed before allowing the petitioners to petition to wind up the Company for the significant debt which, on the basis of the evidence before me, is indisputably payable to them."

21. Secondly, the Respondent's counterclaim appears to consist of bare allegations without any concrete evidence to substantiate its claims. Indeed, on 25 January 2019, the Respondent's lawyers issued a letter to the Shipper (not the Petitioner) to amount a claim against it. The said letter, *inter alia*, stated:

> "1. Reference is made to the subject case. We, for and on behalf of the ASIA MASTER LOGISTICS LTD hereby claim against your good company for the delay incurred at the discharge port, as well as other loss and expense happened due to the slow discharging and your breach of the contract above mentioned.
>
> ……
>
> 6. In sum, pursuant to Clause 1 & 5 & 32 of the Charterparty, we firmly believe and held that your company should be liable for the above loss/cost/expenses due to your breach of the Charterparty. As primarily estimated, your company should pay our clients a total sum of USD388,000 (excluding any interest)…"

22. I agree with Mr Kirpalani for the Petitioner that under Clause 8(a) of the NYPE93, the Respondent was entirely responsible for both the loading and discharging of the Cargo. Clause 8(b) stipulates that

if a complaint regarding the captain of the Vessel is made to the Petitioner, the Petitioner should investigate the complaint and if necessary, make a change of appointment. I agree that, on the evidence, the Petitioner did conduct an investigation into the Respondent's complaints and found that although the captain of the Vessel's demeanour was brash, there was no reasonable cause to replace him.

23. The Respondent, or its representative, did not provide any further evidence to substantiate its claims, as requested by the Petitioner.

24. Further, the Petitioner found that on 4 December 2018, Mr Peng did not ask the captain of the Vessel to comment on whether there would be cargo leakage; and as such, the captain of the Vessel did not make any statement or assurance that there would be no problem of leakage during the lifting process. In any event, even if the captain of the Vessel did make such an assurance, I agree that the discharge process was the sole responsibility of the Respondent.

25. Moreover, Mr Kirpalani for the Petitioner referred this Court to the contemporaneous documents and submitted that the captain of the Vessel constantly reported the unloading process to Mr Peng, as can be seen in the WeChat messages on 5 December 2018 from 9:42 am onwards. Even after the stevedores stopped unloading after 3:17 pm, Mr Peng did not complain about the captain of the Vessel for failing to adhere to his instructions in any of the WeChat messages. There was also no instruction in the WeChat messages on 5 December 2018 that the captain of the Vessel should suspend unloading the Cargo.

26. Additionally, there is no evidence from the Respondent to show that the Shipper and/or consignee employed more dock workers to

repack and unload the Cargo one by one manually onto the truck without the Respondent's consent. The stevedores were employed by the Respondent and could have stopped unloading at any time upon instructions from the Respondent. The Respondent was in direct communication with the Shipper or the stevedores. From the evidence, it appears that the Respondent only demanded that the unloading process be temporarily suspended on 22 December 2018 after receiving the statutory demand on 20 December 2018 from the Petitioner.

27. In relation to the allegation about the failure to inspect the Vessel, in an email dated 8 November 2018, Mr Peng, *inter alia*, stated:

> "Attention: Because the charterer did not inspect the ship in Kaohsiung Port, Taiwan, some unfavorable conditions occurred in Ho Chi Minh. *The charterer has solved the problem.* We hope that the captain can keep in touch with us, have problems, communicated and feedback immediately, and successfully complete the voyage."
>
> (Emphasis added.)

28. I agree with Mr Kirpalani for the Petitioner that the Respondent, through its agent Mr Peng, clearly acknowledged that the Respondent made the mistake and had rectified the issue with its dock agent and the Shipper.

29. In relation to the complaints, I agree that the survey reports by OMIC Surveyors make it clear that the rust was removed, and there was no leakage. The Petitioner has not received any cargo damage complaint from the consignee of the bill of lading.

30. Importantly, the Respondent has not produced any evidence to show that the Cargo was damaged.

31. In relation to the specific complaint that the captain of the Vessel was uncooperative and refused to follow the Respondent's instructions in handling the Cargo, as mentioned above, I agree, on the existing evidence, that this matter was investigated by the Petitioner and there were no reasonable grounds to replace the captain of the Vessel. The WeChat messages also do not show that the captain of the Vessel was uncooperative.

32. In relation to the specific complaint about the mechanical electric ventilators, I agree with Mr Kirpalani for the Petitioner that these were never requested.

33. Mr Lai for the Respondent submitted that the major reason for the delay was the change of packing of the Cargo by the Shipper. I agree with Mr Kirpalani for the Petitioner that that is not the responsibility of the Petitioner.

34. Mr Lai for the Respondent also submitted that, even if the primary responsibility for unloading the goods rested with the Respondent, the Petitioner should still bear responsibility as the Respondent could not have performed its duty if the captain of the Vessel refused to cooperate; it is therefore arguable that (i) the Respondent's liability should be limited to a degree that is reasonably attributable to its responsibility and (ii) the Respondent should be entitled to claim for the loss and damages it suffered.

35. Further, Mr Lai for the Respondent strongly submitted that, as there are factual disputes, this Court should not engage in a mini-trial on affidavit or affirmation evidence and it is undesirable for the Court to

conduct a summary judgment type of analysis of the factual disputes in the present winding-up proceedings. These are well-established propositions of law. However, as will be addressed below, in deciding whether the petitioning debt is *bona fide* disputed on substantial grounds, the Court does not engage in a summary judgment type of analysis of the factual disputes. Instead, the Court has to analyse whether the alleged disputes are substantiated with precise and substantial evidence.

36. The key problem with the Respondent's counterclaim is that it is not substantiated by precise factual evidence. I agree with Mr Kirpalani for the Petitioner that they are pure allegations. Some of the allegations, as set out above, are in fact contradicted by contemporaneous documentary evidence. Critically, the Respondent is not able to quantify its counterclaim. In the circumstances, I am of the firm view that the Debt is not disputed in good faith on substantial grounds.

The Salford- Lasmos Approach

37. Perhaps recognizing the difficulties it faces, Mr Lai for the Respondent heavily relied on the principles as set out in *Lasmos* where Harris J at p.468; §31 said:

> "31. For these reasons I have concluded that I would depart from the approach in the earlier Hong Kong decisions that I have discussed earlier in this judgment and hold that:
>
> (1) if a company disputes the debt relied on by the petitioner;
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> (2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and
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> (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;
>
> the petition should generally be dismissed. I say generally, because for the reasons that I have discussed in the previous paragraph there may be exceptional cases in which it will be appropriate to stay the petition. I would add this, that failure to comply with 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."

38. Mr Lai for the Respondent referred this Court to Clause 23 of the Fixture Note which states:

> "ARBI IN HONG KONG WITH English LAW TO APPLY."

39. Mr Lai submitted that although the above clause is expressed in one short sentence with abbreviation, there is no ambiguity that the parties agreed that, should there be any dispute arising from the shipping contract, they would resolve the disputes by arbitration in Hong Kong and English law would apply to govern their respective rights and obligations.

40. Mr Kirpalani for the Petitioner submitted that the *Lasmos* approach should not be applied. He referred this Court to the Court of Appeal's decision in *But Ka Chon* where Kwan VP, by way of *obiter dicta*, expressed reservations on the *Lasmos* approach.

41. First, I note that up to the present hearing, the Respondent has not commenced any arbitration proceedings. In its letter dated

22 February 2019 issued by Messrs. Kitty So & Tong to Messrs. Tsui & Co., it merely stated that:

> "By the reasons aforesaid, we are instructed that our client is prepared to resolve all disputes between the parties in Hong Kong International Arbitration Centre ("HKIAC") in accordance with the terms of the Fixture Note…Kindly confirm **within 3 days from the date hereof**, whether your client is prepared to attempt arbitration and pay the charges of HKIAC in equal shares, and accordingly issue a cheque in the sum of HK$4,000.00 to our firm."
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> (Original emphasis.)

42. In paragraphs 51 and 52 of the Affirmation of Sung Hiu Kwong filed on behalf of the Respondent, it is stated that:

> "51. The Respondent *will* resort to arbitration in Hong Kong for resolution of the disputes arising from the above matters.
>
> 52. The Respondent has, through its solicitors, namely Messrs. Kitty So & Tong, *proposed* to the Petitioner to resolve the parties' disputes by arbitration in accordance with the arbitration clause of the FN."
>
> (Emphasis added.)

43. I agree that as arbitration proceedings have not even been '*commenced*', the *Lasmos* principle is not engaged. In *But Ka Chon*, Kwan VP at pp.102-103; §§50-56 held that a letter which stated that the solicitors were instructed to "*initiate arbitration between the parties on the said disputes*" and requested the solicitors to reply if they had instructions "*to accept service of... Notice of Arbitration*", was quite clearly not a commencement of arbitration proceedings, as no Notice of Arbitration had been sent. The Court went on to hold such a letter cannot be regarded as a proper notice of an intention to arbitrate (at p.102; §52).

44. In *Re Golden Oasis Health Ltd* [2019] HKCFI 2173, Anthony Chan J at §§40-42 said:

> "40. The 3rd Requirement under the *Lasmos* had received the support of the CA in *But Ke* [sic] *Chon* where it was held at §53 that: "[i]t would make no sense to dismiss or stay the insolvency petition on the mere existence of an arbitration agreement when the debtor has no genuine intention to arbitrate".
>
> 41. In this case, no arbitral proceedings have been commenced by either the Company or NHE pursuant to the Arbitration Clause. This is notwithstanding the fact that GSE's Statutory Demand against the Company was issued on 18 April 2018, the Petition was issued on 24 August 2018 and the Summons was issued on 12 February 2019. It is therefore very difficult to see any genuine intention to arbitrate on either the part of the Company or NHE.
>
> 42. NHE seeks to rely on the fact that it had requested that the dispute be remitted to arbitration pursuant to the Arbitration Clause. Self-evidently, such a request did not satisfy Requirement (3)."

45. The mere gauge of an interest to resolve a dispute by arbitration is not a valid commencement of arbitration proceedings. (See *Annotated Arbitration Ordinance*, Cap.609 at [49.06]). I accept that the wording in the letter issued by Messrs. Kitty So & Tong shows that the Respondent was merely requesting to see if the Petitioner would be willing to attempt arbitration; it was not a formal commencement of arbitration. A formal notice of arbitration must leave the recipient in no doubt of the applicant's intention to resort to arbitration and that some action is required of the recipient. (See also *Fustar Chemicals Ltd v Sinochem Liaoning Hong Kong Ltd* [1996] 2 HKC 407 at p.409F-H, 411B-D *per* Leonard J)

46. Mr Lai for the Respondent also referred to a request form (i.e. Form 1) which the Respondent has obtained and filled in relevant details. However, I agree with Mr Kirpalani for the Petitioner that it is only in draft form. The fact is that the Respondent did not send out Form 1 to commence any arbitration proceedings.

47. Mr Lai for the Respondent referred to the case of *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 Lloyd's Rep 47 and submitted that if, in substance, a party communicates (i) an intention to resort to arbitration and (ii) a requirement that the other party should do something on his part in that regard, this will in general suffice to define the commencement of arbitration.

48. In *Seabridge Shipping AB v AC Orssleff's Eftf's A/S* [1999] 2 Lloyd's Rep 685, the question was whether a notice given by the charterer to the owner satisfied the requirements of section 14 of the Arbitration Act, 1996, which provided, *inter alia*, that "*arbitral proceedings are commenced in respect of the matter where one party serves on the other party…notice in writing requiring … them to appoint an arbitrator or to agree to the appointment of an arbitrator…*" Thomas J (as he then was) expressed the view (at p.690) that section 14 should be construed broadly and flexibly. A strict and technical approach to this section has no place in the scheme of the Arbitration Act 1996. Section 14 was satisfied when the notice was objectively clear in requesting the owner to appoint an arbitrator or to agree to the appointment.

49. It is quite correct that the Court should adopt a purposive and flexible approach to assess whether a party takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process. However, each case depends on its own facts. On the facts of the present case, the Court has to take into account the fact that since 22 February 2019, the Respondent has not sent out any formal request for arbitration. The Form 1 remains in draft form.

Mr Sung of the Respondent has not even signed on the draft form. No steps have been taken to initiate any arbitration proceedings. If the Respondent did have the real intention to resolve the dispute by arbitration, there is nothing to prevent it from taking actual steps to initiate such proceedings. But it chose not to.

50. I am of the view that Harris J's purpose in requiring the subject company to take the steps required under the arbitration clause to commence the contractually mandated dispute resolution process is to ensure that the subject company genuinely intends to have the dispute resolved by arbitration. The requirement is not a matter of formality to be shown to the Court for the purpose of staying or dismissing a winding up petition. Hence, the Court looks at substance and not form. On the facts of the present case, the inaction by the Respondent for about six months negates any real intention to resolve the dispute by arbitration. In the circumstances, I am of the view that this requirement is not satisfied. So, even if the *Lasmos* approach is to be applied, a winding up order should be made.

51. Mr Kirpalani for the Petitioner also submitted that in any event, the letter by Messrs. Kitty So & Tang and the draft Form 1 were not properly served on the Petitioner as Messrs. Tsui & Co. was not a person duly authorized to accept service. (See *The Lake Michigan* [2010] 2 Lloyd's Rep 141 at p.149; §§42-44 *per* Gross J (as he then was)) As I have come to the view that the letter issued by Messrs. Kitty So & Tang and the draft Form 1 do not satisfy the third requirement as set out in the *Lasmos* case, I do not find it necessary to resolve the issue of service of the same. However, as a matter of analysis, I am inclined to agree with the submission of Mr Kirpalani for the Petitioner on this issue.

Legal Analysis – Salford-Lasmos Approach

52. Parties have submitted extensively on the merits and rationales for the *Lasmos* approach. As I have concluded that a winding up order would still be made even if the *Lasmos* approach were applied, it is strictly speaking unnecessary for this Court to express a firm view on this matter. However, in case I am wrong on the application of the third requirement of *Lasmos,* and given the importance of this issue, I shall make some observations which I hope may assist in the future determination of this important issue at the appellate level.

53. To begin with, if a debtor-company fails to satisfy a statutory demand for payment of a debt, the creditor-petitioner may petition to wind-up the debtor-company. The debtor-company may then apply to dismiss or stay the petition on the ground that there is a *bona fide* dispute on substantial grounds. It is not permissible for the debtor-company to merely deny, without more, the existence of the debt. One cannot just hold up his or her hand and simply say there is a dispute.

54. However, when the contract from which the debt arises contains an arbitration clause covering any dispute relating to the debt, two questions arise for consideration: (i) is the Court obliged to stay or dismiss the winding-up proceedings in favour of arbitration; and if not, (ii) should the Court exercise its discretion to do so?

55. For the first question, the mandatory stay proviso in Article 8 of the UNCITRAL Model Law (incorporated *via* section 20 of the Arbitration Ordinance, Cap.609) does not apply. As Kwan VP noted

in *But Ka Chon*, a petition for winding-up is not *an action* brought in a matter that is the subject of an arbitration agreement; accordingly, Article 8 cannot apply (at p.104; §§59-60). This position is established in Hong Kong law and is not subject to dispute. I should say no more about this.

56. As for the second question, there is no controversy that the Court has the discretion to stay or dismiss a winding-up petition under section 180(1) of the Companies (Winding-Up and Miscellaneous Provisions Ordinance), Cap.32 (the "Ordinance"). The real issue lies with how this discretion is to be exercised in a principled manner. From a survey of the authorities, there are two distinct approaches to this issue.

57. The first approach (the "Traditional Approach") suggests that ordinary principles referred to in paragraph 53 above would apply *mutatis mutandis*. The interposition of an arbitration clause does not detract from the debtor-company's need to show a *bona fide* dispute on substantial grounds in its application to stay or dismiss a winding-up petition. The following established line of authorities makes this point very clear:

(1) In *Hollmet AG v Meridian Success Metal Supplies Ltd* [1997] HKLRD 828 ("*Hollmet AG*"), Rogers J (as he then was) held that it is not sufficient for the debtor-company to merely "*hold up his hand and say there is a dispute";* he must still show that there is a *bona fide* dispute on substantial grounds (at p.832A-D; §§19-20). However, the fact that arbitration proceedings have commenced "*may be*" evidence that there

is in fact a *bona fide* dispute on substantial grounds (at p.832A-E; §19).

(2) In *Re Sky Datamann (Hong Kong) Ltd*, unreported, HCCW 487/2001, 29 January 2002 ("*Re Sky Datamann*"), Yuen J (as she then was) applied the usual test of asking whether a "*debt is bona fide disputed on substantial grounds*" even though the debt had arisen from a contract incorporating an arbitration clause (at §§13-31). Notably, Yuen J (as she then was) confirmed the approach in *Hollmet AG* in treating the existence of ongoing arbitration proceedings as a factor that goes into the exercise of discretion (at §12); the Court is not bound to stay or dismiss the petition merely because the company had commenced arbitration.

(3) In *Hoo Cheong Building Construction Co Ltd v Jade Union Investment Ltd*, unreported, HCCW 400/2003, 5 March 2004 ("*Jade Union*"), Barma J (as he then was) endorsed the approach in both *Hollmet AG* and *Re Sky Datamann* (at §§16-18). His Lordship confirmed that it was necessary for the debtor-company to demonstrate that the debt is in fact *bona fide* disputed on substantial grounds (at §19). Equally, the fact that arbitration proceedings have commenced does not show that the debt is *bona fide* disputed on substantial grounds (at §19). The Court has to be satisfied from the evidence this was indeed the case (at §19).

(4) In *Re Southern Materials Holdings (HK) Co Ltd*, unreported, HCCW 281/2007, 13 February 2008, Kwan J (as she then was) followed *Hollmet AG*, *Re Sky Datamann* and *Jade Union* and confirmed that the Court must "*first determine whether the debt is bona fide disputed on substantial grounds*" notwithstanding the existence of an arbitration clause (at §7).

(5) In *Re Sinom*, Kwan (as she then was) confirmed that the existence of an arbitration clause, or the commencement of arbitration, does not prevent the Court from considering whether the debtor-company has established the existence of a *bona fide* dispute of substance in relation to the debt on which the petition was based (at p.492; §16).

(6) In *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 ("*Re Quiksilver*"), Harris J distinguished between winding-up petitions (i) on just and equitable grounds, and (ii) on an unmet statutory demand (at p.769; §§18-19). For the latter, it is necessary for the Court to be satisfied that a debtor-company has a *bona fide* defence on substantial grounds to the claim to the underlying debt before the petition will be stayed for arbitration (at p.769; §18).

58. If a party to an arbitration agreement commences a High Court action in breach of the arbitration agreement, the normal rule is that the High Court action will, save in exceptional circumstances, be stayed. The question is why should it make any difference if, instead of commencing a High Court action, a party chooses to present a winding up

petition? In other words, why should a respondent to a winding up petition prove that the alleged debt is disputed *bona fide* on substantial grounds whilst a defendant to a High Court action can basically deny the debt and the High Court action will normally be stayed. This is particularly so given that a winding up order is a draconian remedy.

59. In a very learned judgment, Harris J in *Lasmos* attempted to rationalise this anomaly by following the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 (hereinafter, "*Salford Estates*"). His Lordship held the debtor-company would no longer need to show a *bona fide* dispute on substantial grounds when applying to stay or dismiss winding-up proceedings. Save in exceptional cases (where the petition will be stayed), the winding-up petition will be dismissed so long as (i) the debtor-company disputes the debt, (ii) the contract under which the debt purportedly arises contains an arbitration clause which covers any dispute relating to the debt, and (iii) the debtor-company has taken steps required under the arbitration clause to commence the dispute resolution process and files an affirmation demonstrating this (together, the "Threefold Conditions"). I shall call this the "*Salford-Lasmos* Approach".

60. There are two possible justifications for the *Salford-Lasmos* Approach. First, in asking if the debtor-company has a *bona fide* dispute on substantial grounds, the Hong Kong Court would be engaging in "*summary-judgment"* type analysis (at §§14, 17, 18 and 21 of *Lasmos*). This is anomalous as it undercuts parties' freedom to contract and the policy of the Arbitration Ordinance to support party autonomy (at §§7, 14-16, 28 of *Lasmos*). The fact that winding-up is a class-remedy does not justify undercutting party autonomy and/or the policy behind the

Arbitration Ordinance (at §§16, 26-28 of *Lasmos*). When a creditor petitions for winding-up, he acts only for his self-interests and the interests of third parties are irrelevant (at §§25-27 of *Lasmos*) (the "Contractual Justification").

61. Secondly, the Traditional Approach is said to be out-of-step with developments in other common law jurisdictions (at §§13-23 of *Lasmos*). Specifically, the English decisions of *Salford Estates*, *Revenue and Customs Commissioners v Changtel Solutions UK Ltd (formerly ENTA Technologies Ltd)* [2015] 1 WLR 3911 ("*Changtel Solutions*"), *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] BCC 877 ("*Eco Measure*") and the Singaporean decision of *BDG v BDH* [2016] 5 SLR 977 ("*BDG"*) were cited by Harris J with approval (the "Comparative Justification").

62. The differences between the Traditional Approach and the *Salford*-Lasmos Approach are best explained by reference to a lively example from *Hayter v Nelson* [1990] 2 Lloyds Rep. 265 (at p.268 *per* Saville J (as he then was)). Suppose that two men had an argument over who won the University Boat Race in a given year; person A claimed that it was Oxford which won the race whilst person B claimed that it was Cambridge. Is there a dispute if it can be shown that A is obviously right, and B is obviously wrong?

(1) Under the Traditional Approach, the answer is "*no*" – for there to be a dispute, B must show a *bona fide* dispute on substantial grounds. Mere assertions would not do.

(2) Under the *Salford-Lasmos* Approach, the answer is "*yes*" – all that B has to do is simply deny that A is right; there is no requirement for B to show a *bona fide* dispute on substantial grounds.

63. Subsequent to the *Lasmos* case, there are a number of decisions which touched on the same issue:

(1) In *Re Sit Kwong Lam* [2019] 2 HKLRD 924 ("*Sit Kwong Lam*"), Ng J held (*obiter*) that insofar as an arbitration clause precludes a creditor-petitioner from petitioning for bankruptcy prior to the commencement or completion of arbitration, it will be unenforceable for being contrary to public policy (at p.930; §22). This is because the petitioner has a statutory right to petition for the bankruptcy of the debtor and such rights cannot be fettered by contract (at pp.930-931; §§23-27). I note that the *Lasmos* decision was not cited in Ng J's decision.

(2) In *But Ka Chon,* the Court of Appeal (obiter) expressly noted its reservations about the *Salford-Lasmos* Approach. In particular, Kwan VP (i) questioned the appropriateness of substantially curtailing the rights of a creditor to present a petition (at pp.105-106; §§63-67), and (ii) doubted that the Court should invariably stay or dismiss the winding-up petition if it is satisfied that there is no *bona fide* dispute on substantial grounds (at p.107; §71).

(3) In *Re Golden Oasis Health Ltd* (supra), Anthony Chan J noted the reservations by *But Ka Chon* towards *Lasmos*, but refused to decide whether to follow *Lasmos* (at §§20-22; 27; 44). This was because, regardless of whether the *Salford-Lasmos* Approach should be followed, the petition would still be dismissed on grounds that there was "*no relevant arbitration clause to support it"* (at §44).

(4) In *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] HKCA 1220, unreported, CACV 215/2019, 1 November 2019, the Court of Appeal dismissed the debtor's appeal against *Sit Kwong Lam* but once again chose not to address the correctness of *Lasmos* as the Threefold Conditions were not met (at §§34-35 per Kwan VP).

The Contractual Justification

64. The importance of protecting contractual bargains and freedom to contract is a theme consistently expressed throughout *Salford Estates* and *Lasmos*. Similar statements to like effect have been made by the High Court of Singapore in *BDG* at pp.984-985; §22 *per* Aedit Abdullah JC (as he then was), a case cited with approval by Harris J in *Lasmos*. The same point was made recently by the High Court of Singapore in *BWF v BWG* [2019] SGHC 81 (26 March 2019) ("*BWF*") by Valerie Thean J (endorsing *BDG*).

(1) In *Salford Estates*, Sir Terence Etherton C (as he then was) at p.600E-F; §40 said:

> "40. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement—as a standard tactic—*to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition.* The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. *That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act*."
>
> (Emphasis added.)

(2) In *Lasmos*, Harris J at p.467; §28 said:

> "28. *The Companies Court would be holding a creditor to his contractual bargain, namely, to resolve any dispute by arbitration.* The reasons for requiring a shareholder to abide by an arbitration, which have been approved by the Court of Appeal in Joseph Ghossoub v Team YR Holdings, apply equally to a creditor."
>
> (Emphasis added.)

(3) In *BDG*, Aedit Abdullah JC (as he then was) at p.984; §22 said:

> "22. The countervailing concern is to hold parties to their agreement; *if they have made a bargain that disputes are to be arbitrated, then they should be held to it*."
>
> (Emphasis added.)

(4) In *BWF*, Valerie Thean J at §35 said:

> "35. *The principle in focus where an arbitration clause is engaged is that of party autonomy, and it extends into the insolvency context.* To hold otherwise, as pointed out by Sir Terence Etherton C in Salford at [40], would encourage parties to bypass the arbitration agreement as a standard tactic by presenting a winding

> up petition, thereby pressuring the alleged debtor with the draconian threat of liquidation."
>
> (Emphasis added.)

65. Nobody can seriously deny the importance of protecting contractual bargains. However, the extent to which one's contractual rights or obligations are (or ought to be) protected by the Court must *ex hypothesi* depend upon the scope of those rights and obligations. This is plainly a matter for contractual interpretation.

66. The analytical starting point should therefore be to construe the agreement to arbitrate. An agreement to arbitrate imposes prescriptive (positive) and proscriptive (negative) obligations. The prescriptive obligation obliges the obligor to have disputes within the scope of the arbitration agreement *determined* in the prescribed forum. Conversely, the proscriptive obligation precludes the obligor from having the disputes *determined* in any other forum. Thus, in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889, Lord Mance JSC at p.1893D; §1 said:

> "1. An agreement to arbitrate disputes has positive and negative aspects. *A party seeking relief* within the scope of the arbitration agreement *undertakes to do so* in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will *seek such relief* in any other forum. If the other forum is the English court, the remedy for the party aggrieved is to apply for a stay under section 9 of the Arbitration Act 1996."
>
> (Emphasis added.)

67. In a similar vein, Godfrey Lam J in *Ever Judger Holding Co Ltd v Kroman Celik Sanayll Anonim Sirketi* [2015] 2 HKLRD 866 at p.880; §30 said:

> "30. For my part, while I have no doubt the court has jurisdiction to grant an injunction to restrain one party to an arbitration agreement from taking steps to have a dispute covered by that agreement *determined by a foreign court*, I am not so sure that the jurisdiction is to be found exclusively, or at all, in s. 45(2). The reasons I say this are, briefly, as follows…First, an arbitration agreement has a positive and a negative aspect. *Positively, the parties agree that any dispute within the scope of the agreement will be determined by arbitration as prescribed*, and, negatively (and often only implicitly), they undertake to each other that they will not bring such dispute to any other forum…"
>
> (Emphasis added.)

68. The words "*determined*" (as in *Ever Judger Holding*) and "*seek[ing] such relief*" (as in *AES Ust-Kamenogorsk*) are key to the analysis. They both clarify that the obligor's duty to submit disputes to arbitration is not unqualified. The obligor's duty is to have disputes (insofar as they are within the scope of the arbitration agreement) *resolved* only at the prescribed forum and nowhere else. Should an obligor commence an action to have such disputes resolved at a forum other than the contractually prescribed forum, they would be in (possibly repudiatory) breach of the arbitration agreement. In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207, Judith Prakash JA at pp.1222-1223; §54 said:

> "it is strongly arguable that the commencement of court proceedings is itself a prima facie repudiation of the arbitration agreement. This is because parties who enter into a contract containing an arbitration clause can reasonably expect that *disputes arising out of the underlying contract would be resolved by arbitration and indeed have a contractual obligation to do so.* Thus, where *court proceedings are commenced without an accompanying explanation or qualification and the relief sought will resolve the dispute on the merits*, the defending party in the court proceedings is entitled to take the view that the party who commenced those proceedings ("the claimant") no longer intends to abide by the arbitration clause…"
>
> (Emphasis added.)

69. This analysis is wholly consistent with the policy behind the Arbitration Ordinance. As Harris J rightly pointed out in *Lasmos*, the policy behind the Arbitration Ordinance is one of "*encouraging and supporting party autonomy in determining the means by which a dispute arising between them should be resolved*" (at p.460; §15, emphasis added). By the same token, section 3(1) of the Arbitration Ordinance makes it expressly clear that the object of that Ordinance is to "*facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense*" (emphasis added).

70. It must therefore follow that an obligor who commences proceedings at a forum other than the contractually prescribed forum would not be in breach of his obligations to arbitrate insofar as such proceedings do *not* have the effect of determining or resolving the disputes.

71. In my view, the correct question to ask is whether the presentation of a winding up petition *per se* would amount to a breach of an agreement to resolve disputes by way of arbitration. Put another way: does the presentation of a petition for winding-up entail a submission of a dispute for the determination and/or resolution by the Companies Courts? The short answer, in my respectful opinion, is unequivocally "*no*". The Companies Court neither resolves nor determines disputes when ruling on a creditor-petitioner's *locus* to wind-up a debtor-company. Instead, disputes over the debt are only finally resolved upon determination by the liquidator (subject to the possibility of appeal). Given that a creditor-petitioner is only obliged by an agreement to arbitrate to submit to arbitration for *resolution or determination*,

the presentation of a winding-up petition does not come within the scope of an agreement to arbitrate.

72. To elaborate, the Companies Court does not, when hearing a petition for winding-up, make any *determination* on the dispute. Its role is simply to consider the prospective merits and ascertain whether the debtor-company had proven a triable case on the defence. It does not even have to decide whether one side or the other is more probably right: see *Tallington Lakes Limited v Ancasta International Boat Sales Ltd* [2012] EWCA Civ 1712 (20 December 2012) §5 *per* David Richards J (as he then was) and *Re Leung Cherng Jiunn (debtor)* [2016] 1 HKLRD 850 ("*Re Leung Cherng Jiunn*") at p.863; §27(5) *per* Kwan JA (as she then was). Thus, in *Cempro Pty Ltd v Dennis M Brown Pty Ltd* (1994) 50 FCR 426, von Doussa J at p.428B said:

> "The obligation of the Court under s 459H(1)(a) is simply to determine whether there is a genuine dispute. *It is not the function of the Court* to embark upon a lengthy hearing *to determine the merits of the dispute or even to determine whether one side or the other is more probably right*. The function of the Court is to ensure that spurious or frivolous defences are not allowed to defeat a statutory demand, and that there is some reasonable ground sufficient to found a genuine dispute. *If there is some reasonable ground to found the dispute, and the company receiving the notice bona fide disputes the debt, there is a genuine dispute*".
>
> (Emphasis added.)

73. Absent any determination on the merits, it should come as no surprise that no estoppel can arise from the Court's rejection of a petition for winding-up. In *Re Vitoria; Ex parte Vitoria* [1894] 2 QB 387, AL Smith LJ noted at p.392:

> "It is said by way of preliminary objection, that, by reason of the order of the Croydon County Court*, it is res judicata that there is not a petitioning creditor's debt* which will support an

> adjudication of bankruptcy or a receiving order. *In my opinion, the registrar of the county court did not decide anything of the kind, and he had no jurisdiction to do so. He had no power to decide that there was not a valid judgment.* He has only power under s. 7, "if he is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made," to dismiss the petition."
>
> (Emphasis added.)

74. In *Makhoul v Barnes* (1995) 60 FCR 572, Hill, Cooper, Branson JJ made the following observations at pp.581D-582D:

> "In a case where the Court, having concluded that it would be appropriate to inquire into the judgment debt, does so inquire and in the result is unable to be satisfied that there was consideration for it, the Court will exercise its discretion against the making of a sequestration order. The creditor will not have satisfied that burden on it of establishing the case for the making of the petition: Wolff v Donovan (1991) 29 FCR 480. *The Court, however, does not determine as an issue between the parties the ultimate question whether the judgment debtor is indebted to the judgment creditor in the amount claimed. The judgment remains and an order dismissing the petition would not found an estoppel if a subsequent petition were presented*: R v Henderson (1890) 8 AC 720 at 730; Re Vitoria; Ex parte Vitoria [1894) 2 QB 387."
>
> "In other words, *because the Court at the petition stage does not actually decide as between the parties that no debt existed but rather only whether the circumstances are such that in the exercise of discretion a sequestration order should not be made,* the decision not to set aside the bankruptcy notice does not involve the same issue as arises on the petition so as to found an issue estoppel. Although this makes consideration of the remaining questions unnecessary, they may be shortly disposed of."
>
> (Emphasis added.)

75. Likewise, in *Brookfield v Real Estate Now Pty Ltd* [2019] FCA 993 (27 June 2019), Derrington J said at pp.646-648; §§20-21:

> "20. Nevertheless, it follows that *because Judge Jarrett was not called upon to "determine as an issue between the parties*

> *the ultimate question whether the judgment debtor is indebted to the judgment creditor in the amount claimed": Makhoul v Barnes at 581; no issue estoppel arises from the dismissal of the sequestration order*. It can be observed that the above authorities concerned the question of whether the existence of the petitioning creditor's debt was finally determined. *Here, of course, the debt in question was that claimed by Mr Brookfield which he set up against the petitioning creditor. Nevertheless, the principle referred to applies with equal force to that issue*.
>
> 21. The above is sufficient for the purposes of establishing, on the hearing of the winding up application, *that the company was entitled to contest that it was not indebted to Mr Brookfield despite the existence of the reasons and judgment of Judge Jarrett*."
>
> (Emphasis added.)

76. Instead, disputes over debts owed by the debtor-company are only determined or resolved when the creditor-petitioner submits its proof of debt to the liquidator for determination. The liquidator will have to assess *de novo* whether to accept such proof of debt. In particular, the liquidator must be satisfied that there is adequate evidence that the debt on which the proof is based exists. In so doing, the liquidator is acting in a quasi-judicial capacity and is not estopped from disclaiming liability to pay a creditor-petitioner even if the proof of debt had arisen from a judgment against the debtor-company. *A fortiori,* the liquidator is not bound to accept a proof of debt from the creditor-petitioner by mere reason of the fact that the latter was previously confirmed by the Court to have *locus* to bring a winding-up petition. This position is supported by the authorities: -

(1) In *Re Quatrovision Pty Ltd (in liquidation)* (1982) 61 FLR 214, Powell J said at p224: -

> "As I have earlier recorded, the basis of this aspect of the rule is that what is in issue are the rights between the person claiming and the rights of the general body of creditors as represented by the trustee; *in which case*

> *the trustee is not bound by any estoppel to which the bankrupt may have subjected himself and may go behind any judgment*…it seems to me that the position of a *liquidator of an insolvent company is so strongly analogous to that of a trustee in bankruptcy that one ought to apply to him*, when dealing with proofs of debt, the bankruptcy rule which Mr. Pegler seeks to have applied in this case."
>
> (Emphasis added.)

(2) In a similar vein, Etherton J (as he then was) in *Re Menastar Finance Ltd* [2002] EWHC 2610 (4 November 2002) said at §§44-45: -

> "44. The power of a liquidator is, in this respect, no different from that of the court itself, *since the liquidator, in deciding whether to accept or reject a creditor's proof in whole or in part, is acting in a quasi judicial capacity:* see Tanning Research Laboratories Inc v O'Brien (1990) 8 ACLC 248 at p.253, citing Re Britton & Millard Ltd (1957) 107 LJ 601. His statutory duty is to ensure that the company's property is collected in and applied in satisfaction of its liabilities pari passu among its proper creditors.
>
> 45. *In deciding whether to go behind the judgment debt, and, if so, in appraising the validity of the creditor's claim, neither the court nor the liquidator nor the trustee in bankruptcy is limited to the evidence that was before the court when it gave its judgment…*"
>
> (Emphasis added.)

(3) The same point was made in *Active Base Ltd v Roderick John Sutton,* unreported, HCCW 470/2005, 4 June 2008, where Kwan J (as she then was) noted, at §53, that a liquidator is, in rejecting a proof of debt, entitled to go behind an estoppel or judgment debt on which the debtor-company's liability is founded. This was affirmed in *Bank of China Ltd Shantou Chaoyang Sub-Branch v John*

Howard Batchelor, unreported, HCMP 161/2014, 6 September 2017, where Chu JA said at §§29-32:

> "29. Mr. Barlow however argued that the proposed preliminary issue is not a question of law, but a question of mixed fact and law, in that liquidators appointed under the Companies Ordinance not only have statutory power, but also statutory duty to look beyond judgments of courts (both domestic and foreign) without the restraint of evidential or procedural principles such as res judicata in order objectively to ascertain whether or not the judgment is or is not a true liability of the company…
>
> 30. In particular, Mr Barlow referred to Active Base Limited v. Roderick John Sutton & Desmond Chung Seng Chiong, Joint & Several Liquidators of Moulin Global Eyecare Holdings Ltd. (unreported) HCCW 470/2005, 4 June 2008, in which Kwan J (as Kwan JA then was) said at §53…
>
> 31. While we note Ms Chan's contention that liquidators do not enjoy different status and the Liquidators should be bound by the doctrine of res judicata, *we do not understand her submission to go so far as to suggest that Active Base was wrongly decided. Although it is not strictly necessary for us to come to a definitive view about that, we are not persuaded that Active Base was wrong decided*. We also do not agree that the principles mentioned in the other authorities cited by Mr Barlow are inapplicable to this case.
>
> 32. On the facts of this case, we are satisfied that it is *reasonably arguable that the Liquidators are not bound by the PRC Judgment in their adjudication of the proof of debt*. …"
>
> (Emphasis added.)

77. Consistently with the quasi-judicial nature of the liquidator's office, decisions of the liquidator are final and conclusive. Unless and until set aside by way of an appeal, the decisions of the liquidator in rejecting a proof of debt are binding for all purposes: see *Spencer Bower and Handley on Res Judicata 4th Ed.* at §2.20; *Bank of Credit and*

Commerce International (Overseas) Ltd (in liq) v Habib Bank Ltd [1999] 1 WLR 42 at p.50C-50H *per* Park J.

78. As an aside, I note that it might be possible for a creditor-petitioner to refer a liquidator's rejection of a proof of debt to arbitration. Whilst the point remains untested in Hong Kong, the High Court of Australia had held in *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 that a liquidator could be bound by an arbitration clause between the debtor-company and the creditor-petitioner insofar as the liquidator's rejection of proof is based on the general law (at pp.342-343 per Brennan and Dawson JJ). This is because the liquidator who defends his decision to reject a proof is no longer acting in a quasi-judicial capacity but is cast in the role of an adversary in defending the assets available for distribution (at pp.342-343 per Brennan and Dawson JJ). If this approach is followed in Hong Kong, it would put an end to any argument that a Court, by allowing a petition for winding-up would somehow frustrate the rights of parties to arbitrate given that the dispute can still be referred to arbitration following the rejection of the proof of debt.

79. If (i) agreements to arbitrate impose proscriptive obligations not to refer the dispute (so far as within the scope of the contract) to a non-contractual forum for *determination and/or resolution*, and (ii) the presentation of a winding-up petition does not result in the *determination and/or resolution* of the dispute, it must follow a creditor does not, by the mere presentation of such petition, breach his obligations to arbitrate. Hence, I disagree with Sir Terence Etherton C (as he then was) in *Salford Estates* that the presentation of a winding-up petition would be *"entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue"* (at p.600F; §40). Ironically, the point that the

presentation of a petition does not result in *relief* being granted for the disputed debt was noted by Sir Terence Etherton C at pp.597H-598B; §§31-33 of the same case:-

> "31. In the present case Salford Estates relies on non-payment of the specific debt mentioned in the Petition *as evidence* that Altomart is unable to pay its debts as they fall due within section 123(1)(e) of the 1986 Act and so the ground for invoking the exercise of the court's jurisdiction to wind up a company unable to pay its debts in section 122(1)(f) of the 1986 Act is satisfied. By contrast with the wording of section 9(1) —"(whether by way of claim or counterclaim)"—*the Petition is not a claim for payment of the debt*.
>
> ……
>
> 33. *The making of a winding up order might or might not result in the right to payment of an amount equal to the debt specified in the Petition in the present case.* It would depend on the value of the assets available for distribution in the liquidation to Altomart's body of creditors and the respective priority ranking of the creditors, including Salford Estates, under the statutory framework."
>
> (Emphasis added)

80. Hence, the short answer to the Contractual Justification is that concerns over protecting contractual bargains simply do not arise if the presentation of a winding-up petition does not come within the scope of the creditor-petitioner's obligations to arbitrate to begin with. Equally, appeals to the need to protect party autonomy in the abstract do not meaningfully advance the analysis for, at the end of the day, one must look at the contractual agreement to see what rights and obligations have been vested in order to ascertain what ought to be protected.

81. And for essentially the same reasons, I also respectfully differ from Sir Terence Etherton C (as he then was) in *Salford Estates* at pp.600D-601A; §§40-42, in regarding the winding-up petition process as analogous to RHC Order 14 applications for summary judgments. Whilst

the tests for resisting summary judgments and for staying or dismissing a winding-up petition are substantially similar (see *Re Leung Cherng Jiunn* at pp.862-863; §27 *per* Kwan JA (as she then was)), it is fallacious to thereby conclude that the effects of both applications are the same.

82. Summary judgments are final and conclusive judgments on the merits. They are recognisable in common law jurisdictions, and can give rise to an issue-estoppel or *res judicata*: *Mullen v Conoco Ltd* [1998] QB 382 at pp.396D-G *per* Hobhouse LJ; *Re Chime Corp Ltd (No 2)* [2003] 2 HKLRD 945 at p.954 D-G; §23 *per* Kwan J (as she then was).

83. By contrast, the Court's finding that a creditor-petitioner has *locus* makes no determination on the parties' rights and obligations. The creditor-petitioner must still submit proof of debt before its claims against the debtor-company are finally determined by the liquidator. There can be no question of the liquidator being estopped from disclaiming liability. In this respect, I fully agree with Barma J's (as he then was) analysis at §26 of *Jade Union*:

> "Finally, I should say that I do not consider that this approach has what Mr Harris described as the unsatisfactory result that a winding up petition may be presented in circumstances in which summary judgment could not be obtained, and thus to circumvent the provisions of the Arbitration Ordinance. *In my view, to permit the presentation of a winding up petition in these circumstances does not have the effect of circumventing the provisions of that Ordinance, since the court considering the petition is not, as I have explained above, adjudicating on the parties rights as between themselves*."
>
> (Emphasis added.)

84. I do accept, however, that the presentation of winding up petitions can as a matter of practical reality put considerable pressure on the debtor-company to pay in lieu of arbitration, given the risk of

reputational damage to the debtor-company arising from the commencement of the winding up process. To that extent, there is indeed a risk of debtor-companies being strong-armed into settling disputes.

85. Whilst Sir Terence Etherton C (as he then was) saw this as a threat to the agreement to arbitrate (at p.600F; §40 of *Salford Estates*), this approach is, with respect, conceptually muddled. As explained, the existence of the arbitration agreement is neither here nor there because the determination of a winding-up petition does not resolve disputes over liability. Instead, the problem identified by Sir Terence Etherton C is best characterised as an abuse of process for a creditor-petitioner to improperly invoke the Court's jurisdiction to "*determine or resolve*" a dispute. This characterisation has the benefit of consistency with Anglo-Hong Kong common law: see *inter alia Re London and Paris Banking Corporation* (1874-1875) LR 19 Eq. 444 at p.448 *per* Sir G. Jessel MR; *Re A Company (No.0012209 of 1991)* [1992] 1 WLR 351 at p.354H *per* Hoffmann J (as he then was); *Re Sinom* at p.491; §11 *per* Kwan J (as she then was); *Re Leung Cherng Jiunn* at p.863; §27(5) *per* Kwan JA (as she then was); *China Health Group Ltd v Li Hong Holdings Ltd,* unreported, HCMP 2593/2016, 29 March 2017, at §27 *per* Chow J.

86. In turn, the risk of abuse of process can be (and indeed, have been) mitigated by the wide arsenal of powers by the Court to prevent and punish abuse of process. In this respect, I share the views of Kwan VP in *But Ka Chon* that the Court is not "*powerless to deal with any such tactic that may be practised by a creditor seeking to apply improper pressure on the alleged debtor*" (at p.107; §71). Specifically, two such powers are worth highlighting:

(1) First, if the creditor-petitioner had presented the petition at a time when it knew that the debt was genuinely disputed on substantial grounds, the Court may order it to pay the other party's costs on an indemnity basis: *Lakehouse Contracts Limited v UPR Services Limited* [2014] EWHC 1223 (26 February 2014) at §§11 and 26-27 *per* Henderson J (as he then was); *Re Leung Cherng Jiunn* at p.863; §27(5) *per* Kwan JA (as she then was).

(2) Secondly, the debtor-company may, in some cases, even have a claim against the creditor-petitioner for damages for malicious presentation of the winding-up petition: *Gregory v Portsmouth City Council* [2000] 1 AC 419 at p.427B-E *per* Lord Steyn; *General Nice Resources (Hong Kong) Limited v Ningbo Iron and Steel Co. Ltd,* unreported, HCA 854/2015, 17 May 2016, at §§30, 33-58 *per* DHCJ Kent Yee; *McPherson & Keay's Law of Company Liquidation* (4th Edition) at §2-051.

87. On the other hand, I do accept, as Harris J did in *Lasmos*, that when a creditor-petitioner presents a winding-up petition, he normally does so believing that this is the "*most efficacious method of obtaining payment"*; indeed, he is acting for his self-interests and not altruistically for the class of the debtor-company's creditors (at pp.465-466; §25 of *Lasmos*). Having said that, in the absence of a breach of an arbitration agreement, I do not see how a respondent company can escape from the need to prove that the underlying debt is *bona fide* disputed on substantial grounds.

Winding-up as a discretionary remedy

88. It is trite law that, where the statute confers a discretion on the courts, the courts must not fetter the exercise of such discretion by way of rigid rules from which a judge is never at liberty to depart: *Ward v James* [1966] 1 QB 273 at p.295C-F per Lord Denning MR; *Kong Kee Brothers Construction Co Ltd v Attorney General*, unreported, HCMP 2712/1985, 27 February 1986 *per* Hunter J; *LKW v DD* (2010) 13 HKCFAR 537 at p.558; §§51-52 *per* Ribeiro PJ.

89. In *Ward v James* (supra), Lord Denning MR at p.295C-F said:

> "*The cases all show that, when a statute gives discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart*. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion, and point out those considerations which should be ignored. *This will normally determine the way in which the discretion is exercised, and thus ensure some measure of uniformity of decision*. From time to time the considerations may change as public policy changes, and so the pattern of decision may change: this is all part of the evolutionary process".
>
> (Emphasis added.)

90. The same is true in the context of section 177 of the Ordinance. Although a creditor whose debt is payable but unpaid is entitled to a winding-up order *ex debito justitiae* (*Bowes v Hope Life Insurance Co* (1865) 11 HLC 389 at p.402 *per* Lord Cranworth; *Re Crigglestone Coal Company Ltd* [1906] 2 Ch 327 at p.337 *per* Collins MR), that principle applies only if the petition debt had not been *bona fide* disputed on substantial grounds. Indeed, the courts may well refuse to exercise its winding-up discretion where that is the case:

see *Re Southard & Co Ltd* [1979] 1 WLR 1198 at p.1203E-F *per* Buckley LJ; *Ebbvale Ltd v Hosking* [2013] 2 BCLC 204 at p.211B-G; §25 *per* Lord Wilson.

91. Where, as in this case, the debt is being disputed *bona fide* on substantial grounds, the principle of *ex debito justitiae* does not arise for application. Instead, the courts retain a wide discretion to act flexibly and may still allow a petition notwithstanding the existence of a *bona fide* dispute on substantial grounds.

92. In *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572, the English Court of Appeal emphasized that the rule that the petition would be dismissed or stayed if the debt is being disputed *bona fide* on substantial grounds is a merely a *rule of practice* (at p.575A *per* Lord Denning MR; at p.576E-F *per* Shaw LJ; at pp.578C; 579D-E *per* Oliver LJ). Instead, the courts retain a wide discretion and must remain flexible in its approach (at p.579A-B *per* Oliver LJ). Even in cases where there is a substantial dispute, the Court may allow the petition if (i) this can be done without undue inconvenience and (ii) the position of the company is such that, if the petition is dismissed, he would lose his remedy altogether by the time he established his debt by way of an action. Accordingly, at p.579D-F, Oliver LJ said:

> "Whilst I do not in any way, therefore, seek to weaken the rule of practice as a general rule, *I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross-examination.* The court must, I think, reserve to itself the right to determine disputes – *even perhaps in some cases substantial disputes* – where this can be done without undue inconvenience and where the position of the company, whether it be an English company or a foreign company, is such that the likely result in effect of

striking out the petition would be that the creditor, *if he established his debt, would lose his remedy altogether*."

(Emphasis added.)

93. In *Alipour v Ary* [1997] 1 WLR 534, the English Court of Appeal cited *Re Claybridge Shipping Co SA* with approval, and held that the rule of practice must yield to the interests of justice if a creditor-petitioner would probably be left without an effective remedy if the petition were to be struck out; hence, if a creditor-petitioner can show a good arguable case that he is a creditor and that the effect of dismissal would be to deprive him of a remedy or otherwise result in injustice, the petition could proceed. Peter Gibson LJ made the following helpful observations at p.546A-C and p.548A-B:

"The position as we see it, in the light of the authorities as affected by the current procedures of the Companies Court, is this. (1) A creditor's petition based on a disputed debt will normally be dismissed. (2) *It will not be dismissed if the petitioning creditor has a good arguable case that he is a creditor and the effect of dismissal would be to deprive the petitioner of a remedy or otherwise injustice would result or for some other sufficient reason the petition should proceed*. (3) On a contributory's petition where the locus standi of the petitioner is disputed, the court will consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed, in determining whether to require the petitioner to seek the determination of the dispute outside the petition. "

"The judge's fourth reason was that the proposition established by In re J.N. 2 Ltd. [1978] 1 W.L.R. 183 , that a petitioner should establish his locus standi outside the petition if it was disputed, was a valid point of departure and the other factors did not persuade him to depart from that proposition. Whilst we accept that the judge could properly have regard to that factor, in our judgment in the light of the procedural changes since 1977 it is not a factor of great weight. *More importantly, the rule of practice must, in the light of In re Claybridge Shipping Co. S.A. [1981] Com.L.R. 107 , yield to the interests of justice when a petitioner would probably be left without an effective remedy if the petition were to be struck out. In our judgment the judge erred in not so concluding in the present case.*"

(Emphasis added.)

94. In *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liq)* [2009] 1 BCLC 274, Lord Hoffmann made plain that the Court would not necessarily dismiss a petition simply because the debt is *bona fide* disputed by the debtor-company on substantial grounds. In his Lordship's view, this is merely a rule of practice (rather than law) and there is no doubt that the Court retains a discretion to order winding-up even if a dispute exists. At p.278G-I; §9, his Lordship said:

> "9. The next question is whether the debt is disputed. If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. *This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute*: see, for example, Brinds Ltd v Offshore Oil NL (1985) 2 BCC 98,916 . But the board does not find it necessary to examine the limits of the discretion because they consider that there is no substantial dispute."
>
> (Emphasis added.)

95. In *Re GBI Investments Ltd* [2010] 2 BCLC 624, Warren J (at p.645I-646A; §§84-85) confirmed that, under existing authorities, there is no absolute jurisdictional bar to a petition being allowed to proceed where the debt on which the petition is founded is *bona fide* disputed on substantial grounds. His Lordship said:

> "84. The law today, which I regard as clear, is that *there is no absolute jurisdictional bar to a petition being allowed to proceed, or indeed the making of winding-up order, where the debt on which the petition is founded is bona fide disputed on substantial grounds.*
>
> 85. However, before the Companies Court will make a winding-up order or even allow a petition to proceed where the debt is bona fide disputed on substantial grounds, there have to

> be exceptional circumstances. The Privy Council in Parmalat declined to give any guidance on the limits of the discretion. But some guidance can be obtained from two other authorities."
>
> (Emphasis added.)

96. The above authorities clearly establish that the Court has a flexible discretion to allow a petition even in circumstances where the debtor-company could show a *bona fide* dispute on substantial grounds. However, by requiring the courts to dismiss or stay a winding-up petition as long as the Threefold Conditions have been satisfied, the *Salford-Lasmos* Approach is antithetical to the nature of a discretion and represents an unprecedented fetter on the Court's discretion.

97. Furthermore, the inflexibility in the *Salford-Lasmos* Approach might also be prejudicial to the interests of creditor-petitioners. If compelled to establish the existence of a debt by an action (through Court proceedings or through arbitration), the creditor-petitioner might be deprived of all tangible remedies if the assets of the debtor-company have been dissipated by the time the action for debt has been completed by arbitration.

98. Harris J, in *Lasmos,* very sensibly noted (at pp.467-468; §§28-30) that sufficiently exceptional circumstances might warrant a stay (in lieu of dismissal) of winding-up proceedings in favour of arbitration. The petition could then be issued and stayed other than for applications relevant to the appointment of a provisional liquidator pending determination of arbitration. However, it is not clear how the Court could be satisfied that there are sufficiently exceptional circumstances. The difficulties in proving a sufficiently "*exceptional circumstance*"

under the *Salford-Lasmos* Approach have been highlighted in a number of English authorities:

(1) In *Salford Estates*, Sir Terence Etherton C (as he then was) explained that it would only be in "*wholly exceptional circumstances"* which he found "*difficult to envisage*" that the Court would refuse a stay of winding-up in favour of arbitration (at pp.600B-D; §39).

(2) In *Eco Measure*, DHCJ Alan Steinfeld QC considered the creditor-petitioner faces a "*very heavy obstacle*" when presenting a petition claiming debts due under a contract containing an arbitration clause (at §10)

(3) In *Fieldfisher LLP v Pennyfeathers Ltd* [2016] EWHC 566 (8 March 2016) ("*Fieldfisher*"), Nugee J noted, at §29, that it was apparent from *Salford Estates* that Sir Terence Etherton C did not envisage that there would be any circumstances which were wholly exceptional:

> "29. Taken together, these admissions are no doubt the sort of material that might be very useful in persuading the court or an arbitrator on hearing the claim that the defences ought to be rejected. However, I do not regard them as giving rise to wholly exceptional circumstances entitling the court to remove the principles applicable under the Arbitration Act. *It is apparent, from the way in which the Chancellor expressed himself in [39] of Salford Estates, that he did not envisage that there would be any circumstances which were wholly exceptional.* It seems to me that the fact that the alleged debtor has made admissions in the past that money is due cannot fall within the description of wholly exceptional circumstances that the Chancellor seems to have had in mind."
>
> (Emphasis added.)

99. The short point is that there are no strong reasons to put an unprecedented fetter on the Court's hitherto flexible discretion to make a winding-up order.

The Comparative Justification

100. It is not at all clear that since *Salford Estates,* the existing authorities go so far as to establish a proposition of law that a debtor-company only has to "deny" or "not admit" a petitioning debt for the relevant winding-up petition to be stayed or dismissed.

101. For English authorities, *Salford Estates* was followed at first instance in *Eco Measure* (at §10 *per* DHCJ Alan Steinfeld QC) and *Fieldfisher* (at §§20-26 *per* Nugee J) in the related context of an application for an administration order. It is difficult to make much out of these given that those first-instance decisions were, of course, bound to follow *Salford Estates.*

102. On the other hand, the English Court of Appeal decision of *Changtel Solutions* does not, on closer inspection, lend unequivocal support for *Salford Estates* and may arguably be regarded as inconsistent with the *Salford-Lasmos* Approach. Given that *Changtel Solutions* was cited by *Lasmos* with apparent approval (at p.462; §18 of *Lasmos*), and seeing as this is the only English appellate authority that had considered the approach in *Salford Estates*, it is worth setting out the approach in *Changtel Solutions* in some detail:-

(1) The HMRC issued a number of VAT assessments against the debtor-company which were unpaid. The debtor-company

appealed against those assessments before the English First Tier Tribunal ("FTT"), which then granted the debtor-company an extension of time on the basis that the debtor-company's appeal against those assessments were not "*hopeless"* or not devoid of reasonable or real prospects of success. The HMRC then separately petitioned the Companies Court to wind up the debtor-company on the basis that it could not pay its debts in respect of the VAT assessments.

(2) At first instance, DHCJ David Donaldson QC (in [2014] EWHC 548 (21 March 2014)) dismissed HMRC's petition to wind-up the debtor-company on grounds that the forum for determining the dispute over the debtor-company's liability to VAT was the FTT (at §11). Given that the FTT had held that the debtor-company's appeal was not "*hopeless*", the learned judge held that he was obliged to abdicate his discretion to the tax tribunal and should not consider if the debt was disputed in good faith on substantial grounds (at §§12-14).

(3) On appeal by HMRC to the Court of Appeal, Vos LJ (as he then was) endorsed *Salford Estates* only insofar as it stands for the proposition that the Court's discretion to stay or dismiss winding-up petitions is not ousted by mere reason of the fact that the debtor-company had appealed against the VAT assessments before the FTT. Whilst those appeals are relevant to the existence of discretion, they should not be conclusive to the learned judge's decision on the petition. Thus, at p.3922B-F; §48, Vos LJ said:

> "48. In (Salford), however, the debt fell within the wide ambit of the arbitration clause, and Sir Terence Etherton C thought it was right as a matter of discretion for the court to stay or dismiss the petition so as to compel the parties to resolve their dispute, as to whether, in effect, summary judgment on the debt was appropriate, by their chosen method of dispute resolution rather than requiring the court to investigate whether the debt was disputed in good faith on substantial grounds: paras 40–41. *In my judgment, the decision in the Salford Estates case supports the conclusion I have reached. Section 9 did not operate to deprive the Companies Court of jurisdiction.* But the fact that the parties had agreed an alternative method of dispute resolution was, as a matter of discretion, *relevant* to whether it was appropriate to allow the petitioner to proceed with a winding up before having it determined that the debt was due by the method that it had agreed. *Likewise in this case, as I have said, the existence of the tax appeal and the decision of Judge Poole were relevant, but not necessarily conclusive, to the judge's decision on the petition.*"
>
> (Emphasis added.)

(4) In the premises, Vos LJ held that the learned judge had taken an erroneous approach towards discretion because he had failed to even consider if the debt was disputed in good faith on substantial grounds (at p.3922G; §49):

> "49. I turn now to the exercise of the judge's discretion in this case. In my judgment, the view the judge took was significantly affected by his inappropriate view that it was incumbent on the Companies court to defer to the view taken by the tax tribunal. In these circumstances, his whole approach to the exercise of his discretion was flawed and cannot stand. *His reluctance even to engage with the prospective merits of the application was dictated by his view that he was obliged to abdicate his discretion to the tax tribunal*"
>
> (Emphasis added.)

(5) Vos LJ then proceeded to consider the prospective merits of the debtor-company (at p.3922H; §49), and held that the debtor-company had failed to prove, on the facts, that there was a bona fide dispute on substantial grounds given the "*prima facie formidable*" case of HMRC (at p.3927E; §69). Accordingly, the appeal against DHCJ David Donaldson QC's decision was allowed.

> "49. … It is, therefore, necessary for this court to reconsider whether or not the debt relied upon *was disputed in good faith on substantial grounds. It is to that task that I now turn*"
>
> "69. The judge described HMRC's case as "*prima facie formidable*". I agree. *In my judgment, that should have led him to conclude that the dispatch assessments were not disputed in good faith on substantial grounds*. Accordingly, he ought to have exercised his discretion to wind up the company."
>
> (Emphasis added.)

103. The following can be distilled from *Changtel Solutions*:-

(1) First, Vos LJ only cited *Salford Estates* for the narrow proposition that the Court's discretion towards winding-up petitions cannot be foreclosed by the existence of an arbitration agreement (as in *Salford Estates*) or a tax appeal (as in *Changtel Solutions*). Notably, Vos LJ (as he then was) did not endorse the *Salford Estates* proposition that a stay or dismissal of the petition would be granted as long as the debtor-company denies or does not admit to the existence of the debt.

(2) Secondly, although Vos LJ agreed that the existence of an arbitration agreement or a tax appeal is relevant to the exercise of discretion, his Lordship did not, in fact, proceed on that basis. At p.3922H; §49, Vos LJ expressly noted that the debtor-company still had to show a *bona fide* dispute on substantial grounds notwithstanding the existence of the tax appeal. In fact, the first-instance decision was overruled precisely because DHCJ David Donaldson QC failed to consider this.

104. In the premises, it is not entirely accurate to regard *Changtel Solutions* as support for the *Salford-Lasmos* Approach. Notably, in a speech given to the International Law Association on 9 November 2016, Sir Geoffrey Vos noted the inconsistencies between *Salford Estates* and *Changtel Solutions*, but, unfortunately, declined to address them on that occasion:

> "*I expressed some views in Changtel Solutions UK Ltd (formerly Enta Technologies Ltd) v Revenue and Customs Commissioners [2015] EWCA Civ 29 that some have thought to be at odds with (Salford Estates).* I would maintain, however, that the new Master of the Rolls made clear in Salford that section 9 did not apply to a winding-up petition where what was in issue was whether a debt was outstanding and due. *Moreover, we decided in Changtel that it was not incumbent on the Companies Court to defer to the view taken by the tax tribunal as to, first, whether or not a company was unable to pay its debts and secondly, whether as a matter of discretion the petition should be dismissed or the company should be wound up. But again, all that can wait for another day.*"
>
> (Emphasis added.)

105. Before leaving this point, I should point out that in *The City Hotel (Londonderry) Limited v Stephenson* [2003] NICA 47 (25 November 2003), the Northern Irish Court of Appeal rejected the

submission that the debtor-company would only need to satisfy a "*less onerous test of showing that there was a dispute*" by reason of the arbitration clause (at §21 per Campbell LJ); there was accordingly no bypass around the need to prove a *bona fide* dispute on substantial grounds when the debtor-company applies for an injunction to restrain the creditor-petitioner from petitioning for winding-up (at §18 per Campbell LJ). It appears that this decision was not cited to or considered by the English Court of Appeal in *Salford Estates*.

106. Insofar as the Singaporean authorities are concerned, the approach is even less settled. There have been a trio of first-instance decisions in Singapore that had considered the *Salford-Lasmos* Approach – (i) *BDG*, (ii) *VTB Bank v Anan Group* [2018] SGHC 250 (19 November 2018) ("*VTB Bank*"), and (iii) *BWF*. The latter two decisions were decided after *Lasmos*.

107. *BDG* was the first Singaporean decision to consider *Salford Estates*, and was cited with approval by Harris J at pp.464-465; §§21-23 of *Lasmos*. Whilst Aedit Abdullah JC (as he then was) appeared to endorse *Salford Estates*, his reasoning suggests that the Court would not stay or dismiss a winding-up petition in favour of arbitration simply because the debtor-company had denied or not admitted to the debt.

108. At pp.983-984; §§17 and 22 of *BDG*, the learned judge held that the broad approach in *Salford Estates* should be followed and that it is not necessary for the debtor-company to have raised a triable issue. All that has to be established is that there was a *prima facie* dispute.

> "17. I have concluded that the injunction applied for should be granted as there is *prima facie a dispute* between the parties, which is subject to the arbitration clause. *It is not necessary for*

> *the Plaintiff to have raised a triable issue.* There may be possible ramifications on winding-up applications, but avoiding these ramifications cannot trump the need to uphold the arbitration agreement."
>
> "22. I accept that the *broad approach in Salford Estates should be followed*."
>
> (Emphasis added.)

109. The learned judge then noted (at p.985; §23 of *BDG*) that, if indications are that issues are not raised *bona fide*, that would be a reason to find that there is no *prima facie* dispute and proceedings would not be stayed or dismissed. As to the meaning of "*bona fide*", the learned judge explained (at p.983; §20 of *BDG*) that the approach in determining the existence of a *bona fide* dispute in Singapore is to ask whether a triable issue had been made out, applying a standard similar to that for summary judgment.

> "20. What matters then is by what standard the existence of a dispute is to be measured. *The general approach in determining the existence of a bona fide dispute in Singapore is to consider whether a triable issue has been made out, applying a standard similar to that for summary judgment*…"
>
> "23. It may be thought that adopting this lower standard would stymie the winding up regime by opening the door to gaming of the system by companies desperate to fend off their creditors. There are two responses to this. *Firstly, if indications are that issues are not raised bona fide, that would be a reason to find that there is no dispute prima facie, or that the court's powers should not be exercised in the applicant's favour*…"
>
> (Emphasis added)

110. With respect, it is difficult to see how the learned judge's conclusions at §§17 and 22 could follow from his reasoning at §§20 and 23 of *BDG*. Specifically, it is inconsistent for the learned judge to assert, on the one hand, (i) that the absence of a triable defence to the debt was a reason to find that there is no *prima facie* dispute, and, on the other

hand, (ii) that it was sufficient for the debtor-company to simply deny or not admit the debt; it being unnecessary for the debtor-company to have raised a triable issue.

111. One possible solution to this inconsistency might be to say that the learned judge had intended the phrase "*bona fide*" (when used in §23 of *BDG*) to mean something different when that phrase was used in §20 of *BDG*. Indeed, that appears to be the approach taken by Dedar Singh Gill JC in *VTB Bank*. Whatever the solution might be, it is evident that the learned judge had not intended to adopt the *Salford Estates* approach in Singapore unreservedly.

112. The next Singaporean decision to consider *Salford Estates* was *VTB Bank*. This decision is notable for its express repudiation of the *Salford-Lasmos* Approach and for its re-interpretation of *BDG*. First, Dedar Singh Gill JC thought that *Salford Estates* (i.e. the *Salford-Lasmos* Approach) was "*too extreme*" insofar as it emphasizes the absolute primacy of the arbitration agreement; it represented an unprecedented fettering of the Court's discretion to order a winding up. Furthermore, the Lasmos Approach might even be seen as a blow to the insolvency regime as creditor-petitioners might be delayed or derailed from recovering their debts if debtor-companies could simply stay or avoid winding-up proceedings by making unmeritorious allegations as to the existence of a dispute. Thus, at §§65 and 67 of *VTB Bank*, Dedar Singh Gill JC said:

> "65. However, with respect, I considered the Salford approach to be *too extreme* insofar as it emphasises the absolute primacy of the arbitration agreement. …the *Salford* approach represents an *unprecedented fettering of the court's broad discretion* to order a winding up"

> "67. On the whole, the Salford approach appears to "place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause" (see Eco Measure at §10). *This may be seen to deal a blow to the insolvency regime since creditors legitimately seeking to wind up insolvent companies may be delayed in or entirely derailed from the recovery of their debts by debtor-companies, which would be able to stave off winding up proceedings simply by raising disputes which they say should be resolved by arbitration, even if these allegations may be entirely unmeritorious*".
>
> (Emphasis added.)

113. Secondly, the learned judge tried to square the *BDG* circle by taking a charitable reading of §23 of *BDG*. In his view, Aedit Abdullah JC had not intended "*bona fide*" as imposing a standard of "*triable issues*", and that "*bona fide"* must, in the context of §23 of *BDG*, be read to mean "*genuineness*" of the debtor-company's defence (at §§70-71 of *VTB Bank*).

> "70. *I note that the concept of "bona fide" under the BDG approach bears a slightly different meaning as compared to under the orthodox approach*. Under the latter, the inquiry into whether the dispute is "bona fide" is, in substance, equivalent to the inquiry into whether the dispute is "substantial"…In contrast, under the BDG approach, the winding up court is not to consider the strength or merits of the debtor-company's case at all (see [69(b)] above); *the inquiry into the "bona fide" requirement is simply limited to a consideration of the genuineness of the debtor-company's defence.*"
>
> "71. …Under the BDG approach, the debtor-company needs to establish a prima facie case that there is a dispute between the parties which falls within the scope of the arbitration agreement, *and that the debt is bona fide (or genuinely) disputed.*"
>
> (Emphasis added.)

114. I am not entirely clear how the "*genuineness*" test could be meaningfully distinguished from the "*triable issue*" test. Notably, Dedar Singh Gill JC did not explain how the "*genuineness"* test is to be

applied, and, despite his professions to the contrary, considered the merits or strengths of the debtor-company's defence when applying the "*genuineness*" test (see, for example, §§77-80 of *VTB Bank*). Indeed, this is probably inevitable since it is evidentially unrealistic to isolate considerations of the merits from the "*genuineness*" of a defence insofar as this requires an examination of the debtor-company's intentions.

115. The final decision in the trio of Singaporean cases is *BWF*, where Valerie Thean J firmly endorsed *Salford Estates* and rejected the Traditional Approach on grounds that it undermined party autonomy. Even then, the learned judge held that it would not suffice for the debtor-company to make "*mere allegations of dispute*". If there are evidence of "*abuse of process*" by the debtor-company, the Court would decline a stay. Examples of "*abuse of process*" would include cases where the debtor-company had made a clear and unequivocal admission to liability. Examination into the merits of the parties' arguments would not, however, be necessary. At §39, the learned judge said:

> "39. What may form the content of a prima facie bona fide dispute?…*Mere allegations of dispute would not suffice; only where an applicant for a stay is guilty of an abuse of process would the Court decline to grant a stay* (see Tjong Very Sumito at [59]; Vinmar at [131]). In BDG, the High Court considered and dismissed contentions made on abuse of process, at [32]. *An example of abuse raised in Tjong Very Sumito at [59] and [61], which was subsequently affirmed in Vinmar at [131], was that of an applicant who had made a clear and unequivocal admission as to both the liability and quantum of a claim*, but seeks a stay for no reason other than its alleged inability to pay. *Such an applicant cannot be said to have raised issues bona fide, and his application for a stay would be refused. As the Court of Appeal noted, the threshold for abusive conduct is very high, and would only occur in exceptional situations* (see *Vinmar* at [131])."
>
> (Emphasis added.)

116. As is apparent, the authorities in Singapore are not, to say the least, consistent. In my view, the following can be distilled from the Singaporean case law:-

(1) First, support for *Salford Estate* is not unanimous. Although *BDG* (at p.984; §22 *per* Aedit Abdullah JC) and *BWF* (at §§24 and 35 *per* Valerie Thean J) purportedly endorsed *Salford Estates*, *VTB Bank* found that approach "*too extreme"* in its emphasis on party autonomy (at §65 *per* Dedar Singh Gill JC).

(2) Secondly, all three cases are unanimous in holding that the courts would not stay or dismiss a winding-up petition on the mere basis that the debtor-company had denied or not admitted the debt: see p.985; §23 of *BDG* per Aedit Abdullah JC; §§66-68 of *VTB Bank* per Dedar Singh Gill JC*;* §39 of *BWF* per Valerie Thean J.

(3) Thirdly, there is substantial variance in what needs to be shown beyond a bare denial or non-admission of debt. *BDG* and *VTB Bank* respectively required the denial or non-admission to be "*bona fide*" (at p.985; §23 of *BDG* per Aedit Abdullah JC) and "*genuine*" (§70 of *VTB Bank* per Dedar Singh Gill JC). Despite professing to the contrary, both approaches appear to require inquiries into the merits. On the other hand, *BWF* suggests that the Court has to be satisfied that the denial or non-admission was not an "*abuse of process"* (§39 of *BWF* per Valerie Thean J).

117. In the premises, it appears to me that the *Salford-Lasmos* Approach is far from settled under Singapore law and English law. If anything, the hesitancy by the Singapore courts to stay or dismiss winding-up proceedings on the mere say-so of the debtor-company should also give some cause for concern.

Public Policy Concerns: Ousting creditor's statutory right to wind-up

118. A further factor meriting consideration is the concern expressed in *But Ka Chon* (at p.105; §63 per Kwan VP) that there is a rule of public policy that renders unenforceable contracts that fetter a creditor-petitioner's statutory right to petition for winding-up. For that proposition, the cases of *Re Greater Beijing Region Expressways Ltd* [1999] 4 HKC 807 (hereinafter "*Re GBRE*") and *Re Sit Kwong Lam* were cited with approval.

119. On proper analysis, I am inclined to the view that there is nothing against public policy for a creditor to voluntarily agree, by contract, to fetter its own rights to petition for winding-up of a debtor-company.

120. First, creditors are creatures of contract. The relationship between a creditor and a debtor-company is defined by the scope of the contract and not by statute. Being a creature of contract, there is no reason why a creditor cannot voluntarily modify its rights vis-à-vis a company by way of an agreement. The situation can be distinguished from shareholders who, being creatures of statute, play a critical role in the constitution and governance of a company. Concerns over corporate governance and minority oppression otherwise applicable to

shareholders' disputes simply do not apply to a creditor. If so, there is no reason why a creditor's voluntary surrender of rights to petition for winding-up should be rendered unenforceable as a matter of public policy. Indeed, the following authorities clearly disclose the possibility for creditors to agree (by contract or otherwise) to fetters on their rights to petition for winding-up:

(1) In *Re a company (No 00928 of 1991), ex parte City Electrical Factors* [1991] BCLC 514, Harman J held (at p.518A-C) that it was, in the circumstances of the case, possible to imply a contractual term that the creditor-petitioner had agreed not to present a further winding-up petition based on the same debt.

> "It is an order following an express agreement in writing between the parties into which is necessarily, in my view, *to be implied a term that contractually the parties are agreed that no further Companies Court proceeding shall be commenced until the Queen's Bench proceedings then contemplated have been concluded*. Upon that being done, of course, the debt will merge in the judgment if the petitioner is successful and there will not be any further petition based upon the debt because it will be based upon the judgment instead."
>
> (Emphasis added.)

(2) In *Re Colt Telecom Group Plc* [2002] EWHC 2815 (Ch) (20 December 2002), Jacobs J (as he then was) cited *City Electrical Factors* with approval and held that a "*no-action*" clause which precludes a creditor from petitioning for an administration and/or winding-up order was enforceable. Jacob J (as he then was) at §73 said:

> "73. As regards [*City Electrical Factors*], Mr Brisby said it was an example of the "personal contract" exception. He submitted that it did not apply here because the no-action clause purported to bind all holders of the Notes, including subsequent purchasers. This all depends upon what is meant by the exception. In effect Mr Brisby reads the exception as not applying to any obligation which can be transferred to third parties. But that makes little sense. Why should an original noteholder be barred from action, but a subsequent holder entitled to take action? *The flaw in his position is this. The no-action clause in no way fetters the rights of the company. It is restrictive of noteholders' rights only. As Mr Sheldon put it the creditors' rights are creatures of contract, not creatures of statute as in the case of shareholder rights. The "personal exception" means a contractual or other fetter on third parties, not the company*."
>
> (Emphasis added.)

(3) In *Casurina Limited Partnership v Rio Algom Limited* (2004) 181 OAC 19, the Ontario Court of Appeal held (at §§40-41) that a "*no-action clause*" was valid and had to be given a "*broad interpretation*". This was so even though the "*no-action clause*" was "*facially unlimited*" in its exclusion of the debenture-holder's rights to take action against the creditor (including, as it seems, petitioning for winding-up) except through a bond-trustee. Again, the Ontario Court of Appeal did not seem troubled by public policy considerations that may arise from the enforcement of a "*no-action clause*".

> "40. Spence J. agreed with the rationale for *giving a facially unlimited no action clause a broad interpretation*. However, in light of Millgate and the arguments of the appellants, he conducted a further analysis of the no-action clause read together with the broad powers of the trustee contained ins. 12.11 of the indenture before concluding, *based on the wording of the indenture read as a whole, that the clause prevents*

> *individual bondholders from bringing an oppression action against the issuer or any other party*.
>
> 41. In my view, Spence J. made no error in his approach to the interpretation of the trust indenture. His analysis and conclusion are reasonable and deserve the deference of this court."
>
> (Emphasis added.)

(4) In *Elliott International LP v Law Debenture Trustees Ltd* [2006] EWHC 3063 (Ch) (23 November 2006), the English High Court was invited to make certain declarations as to the meaning of a "no-action" clause contained in a bond governed by English law. Warren J noted (at §57) that the "no-action" clause in that case precluded bondholders from taking any step that may lead to "dissolution" of a company, and that "dissolution" was wide enough to include "administration". His Lordship also observed (at §44) that "no-action" clauses exist for "*perfectly sensible commercial reasons*". Once again, the English High Court was untroubled by the possible fetters on the creditor's right to commence (presumably) winding-up proceedings.

> "44. The position is more difficult in relation to condition 14(b), since the issue is not one just between the trustee and the claimants so much as between the bondholders amongst themselves. *It is common in bond issues to find a "no action" clause which prevents bondholders from taking independent action for a number of perfectly sensible commercial reasons.* That the issuer itself might have an interest in seeing that such a provision is observed is readily apparent: for instance to see that multiple suits against it are avoided…"
>
> "57. *As I have mentioned, for this purpose "dissolution" is defined widely and includes administration*. It would follow, on this argument, that the Opposition Proceedings would fall within the literal wording of both paragraphs (B) and (C) of condition

> 14(b). If all situations within paragraphs (A, (B) and (C) fell within paragraph 14(b), then there would be an issue of fact to be determined before the declarations sought could be made, something which I cannot resolve today."
>
> (Emphasis added)

(5) In *Re Golden Key Ltd (In Receivership)* [2009] EWHC 148 (Ch) (4 February 2009), Henderson J (as he then was) noted that a "non-petition" clause was effective in "*oust(ing) the general law of insolvency*". Crucially, neither party objected to "non-petition" clause from a public policy standpoint; nor was the learned judge at all concerned by such a consideration. Henderson J (as he then was) at §§47-48 said:

> "47. Section 9.3 is headed "Non-petition", and provides (in short) that none of the secured parties is to institute any form of bankruptcy or insolvency proceedings against the Company or the Co-issuer…
>
> 48. The important point is that *all of the noteholders*, by virtue of this and other similar provisions in the contractual documentation, have agreed to limit their rights of recourse against the Company and its assets to their entitlement under the documentation, and *not to pursue any insolvency procedures against the Company. In other words, the usual rights of an unsatisfied creditor to initiate insolvency proceedings are ousted in favour of the rights, whether sounding in contract or trust, provided by the documentation. No party has submitted that there is any objection, from a public policy point of view*, in investors agreeing to make their investment upon such a basis. One consequence of this, as it seems to me, is that the degree of assistance which can be obtained, in construing the documentation, from analogies with the general law of insolvency is limited. *Since the parties have expressly agreed to oust the general law of insolvency, one should not too readily assume that the parties intended their rights to be governed or influenced by insolvency concepts, such as pari passu distribution, unless the documentation expressly so provides.*"
>
> (Emphasis added.)

(6) In *Westcoast (Holdings) Ltd v Wharf Land Subsidiary (No.1) Ltd* [2012] EWCA Civ 1003 (26 July 2012), the English Court of Appeal had to decide whether a shareholder was entitled (*qua* creditor) to bring a winding-up petition against the company for failure to repay a shareholder's loan. Clause 5.3 of the shareholder's agreement contained an undertaking by shareholders not to "*take any steps…for the winding-up…of the Company"*. Rimer LJ held (at §22) that for as long as the shareholder's agreement remained valid, the shareholder was barred from taking steps to wind-up the company. On the facts, the shareholder was no longer barred by clause 5.3 from petitioning for winding-up because the shareholder's agreement had been terminated (at §24).

(7) For completeness, I note that it was decided in Australia that shareholders may not, by agreement, oust their statutory rights to petition for winding-up: *A Best Floor Sanding v Skyer Australia Pty Ltd* [1999] VSC 170 (at §§13-18 *per* Warren J). The simple response to *A Best Floor Sanding* is that this decision can be distinguished as it involved the rights of a contributory as opposed to the rights of a creditor. In my view, this distinction must be right given that the special policy considerations applicable to shareholders cannot, with respect, apply to creditors. In *BDG*, Aedit Abdullah JC at §24 said:

> "24. The Defendant cites A Best Floor Sanding, an Australian case, as authority for the proposition that the usual winding-up standard should prevail. *However, that case was really concerned with the rights of a contributory*: unsurprisingly, the Supreme Court of

> Victoria held an arbitration agreement to be void in so far as it purported to have the question of winding up subject to arbitration."
>
> (Emphasis added.)

(8) Be that as it may, in any event, I note that the position in *A Best Floor Sanding* was doubted by the English Court of Appeal in *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 ("*Fulham FC*"), where Patten LJ held, *obiter,* that an agreement between shareholders not to present a winding up petition until the substantive dispute is determined in arbitration is enforceable in principle. The position is *a fortiori* for creditors. Patten LJ at pp.357-358; §83 said:

> "83. Although not necessary for the resolution of this appeal, I also take the view, as Austin J did in the ACD Tridon case [2002] NSWSC 896, that the same probably goes for a similar dispute which is used to ground a petition under section 122(1)(g) to wind up the company on just and equitable grounds. *In those cases the arbitration agreement would operate as an agreement not to present a winding up petition unless and until the underlying dispute had been determined in the arbitration.* The agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. *It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition under section 122(1)(g)*."
>
> (Emphasis added.)

121. Secondly, the courts have already accepted, without controversy, undertakings by creditors not to petition for winding-up. See, for example, *Hongfan International Ltd v Hong Kong Yahe Co Ltd* [2018] HKCFI 2565, unreported, HCMP 1633/2017 (22 November 2018) at §§3-6 *per* DHCJ To and *Re C Mahendra Exports (HK) Ltd* [2019] HKCFI 1556, unreported, HCCW 38/2019 (29 April 2019) at §3 *per* Harris J. If creditors are permitted to voluntarily fetter their rights to petition for winding-up by way of an undertaking to the Court, there is no reason why they cannot do the same by way of a contractual agreement. In *Re Colt Telecom* (Supra), Jacob J (as he then was) at §74 said:

> "74. As to Mr Brisby's point about there being an overriding public policy striking down any contractual obstacle to presentation of an administration (or indeed winding) there are several answers. Firstly, if right, there would be no exception of any sort, personal or otherwise. *The Companies Court would not be accepting on a regular basis (as it does) undertakings not to present a petition.*"
>
> (Emphasis added.)

122. Thirdly, our courts do have the power to stay petitions for unfair prejudice and/or winding-up for just and equitable grounds until such time when the underlying substantial disputes have been resolved by arbitration. It is hard to regard this as anything but a "*fetter*" on shareholder's rights to petition for unfair prejudice or winding-up. Yet, the courts never had difficulty in entertaining a stay in favour of arbitration in such cases. If that is so, the position should be *a fortiori* in the case of creditors' petition for winding-up where public policy concerns are not as germane:-

(1) In *Re Peveril Gold Mines Ltd.* [1898] 1 Ch 122, the company's articles provided that no petition shall be presented to wind-up the company save when certain

conditions have been met. The petitioner failed to meet those conditions. The Court of Appeal held that it would be contrary to public policy for the articles of association to exclude or limit the contributory's statutory right to petition for winding; importantly, their Lordships reserved their views on whether it might be possible for a contributory to agree, by way of a personal contract with the company, to present a petition for winding-up (at p.131 *per* Lindley MR; at p.132 *per* Chitty LJ).

> "*I do not intend to decide whether a valid contract may or may not be made between the company and an individual shareholder that he shall not petition for the winding up of the company*. That point does not arise now. But to say that a company is formed on the condition that its existence shall not be terminated under the circumstances, or on the application of the persons, mentioned in the Act is to say that it is formed contrary to the provisions of the Act, and upon conditions which the Court is bound to ignore." (at p.131 per Lindley MR)
>
> "I am of the same opinion. *We have not now to consider whether an individual shareholder can or cannot bind himself not to petition for the winding-up of the company*, nor generally how far the provisions of the Act may be modified by the articles of association…" (at pp.131-132 per Chitty LJ)
>
> (Emphasis added.)

(2) In *Fulham FC*, the English Court of Appeal held that *Re Peveril Gold Mines Ltd* was decided on the narrow basis that the articles of association cannot restrict the conditions for the presentation of a petition for winding-up. It did not decide that an agreement to resolve shareholders' disputes that might justify a winding-up order on just and equitable grounds would infringe the statute or be void on public

policy grounds (at p.357F; §82 *per* Patten LJ). Indeed, Patten LJ went further to hold that it is possible for disputes between shareholders and the company forming the basis of winding-up relief to be referred to arbitration (at p.355D-E; §76 *per* Patten LJ).

> "76. Warren J was, I think, right to regard the arbitration clause she had to consider as unenforceable in so far as it included within the scope of the reference the question whether the company should be wound up. Such an order lies within the exclusive jurisdiction of the court and the discretion as to whether or not to make that order is for the court, not the arbitrator to exercise. *But I part company with her if and in so far as she suggests in para 18 of her judgment that there can be no resort to arbitration in respect of the dispute between shareholders or the company which forms the grounds upon which such relief may be sought*."

> "82. (Re Peveril Gold Mines Ltd) is therefore *limited to the narrow point of whether the articles of a company can effectively restrict or re-model the conditions for the presentation of a petition* under what would now be section 122 of the Insolvency Act 1986. *It does not suggest that an agreement to resolve a dispute between shareholders which might justify a winding up order on just and equitable grounds would either infringe the statute or be void on grounds of public policy. In fact it suggests the opposite.*"

(Emphasis added.)

(3) In *Re Quiksilver*, Harris J rightly held that a petition for winding-up on just and equitable grounds can be stayed to arbitration insofar as the substance of the dispute falls within the scope of the arbitration agreement. At pp.7701-771; §§22-23, Harris J said:

> "22. I have already rejected the objection that because of its nature a just and equitable winding-up petition cannot be stayed to arbitration. I have also explained why the fact that the precise relief sought in a petition is not available from an arbitrator is not a

> critical consideration, although it is relevant. *In my view the correct approach is to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement*.
>
> 23. In the present case the dispute between the parties concerns the basis upon which the joint venture is to end. In broad terms Glorious Sun says that Quiksilver should sell its shares and grant a new licence in respect of the trademarks. Quiksilver say, although only recently, that Quiksilver Glorious Sun JV and Quiksilver Glorious Sun Licensing should be wound up. *These issues can be determined by arbitration. If the arbitrators conclude that Quiksilver is correct an application can then be made to the Court for winding-up orders*."
>
> (Emphasis added.)

(4) In *Joseph Ghossoub v Team Y&R Holdings Hong Kong Ltd*, unreported, CACV 6/2017, 21 July 2017 ("*Joseph Ghossoub*"), the Court of Appeal had to decide *inter alia* whether it would be a fetter on a shareholder's right to petition for unfair prejudice (in Hong Kong) to stay proceedings in favour of England. Kwan JA (as she then was) held that this was so. In reaching this conclusion, her Ladyship distinguished *Fulham FC* and *Re Quiksilver* on grounds that *Joseph Ghossoub* concerned an English exclusive jurisdiction clause, as opposed to an arbitration clause (at §§30-31 *per* Kwan JA (as she then was)). Whereas an arbitral tribunal has jurisdiction (by consent) to deal with the underlying dispute, the parties are not at liberty to confer jurisdiction on the English Court by agreement where there is none (at §27 *per* Kwan JA (as she then was)). Accordingly, if a stay of proceedings were granted, the petitioner might be trapped in a lacuna where it can neither seek relief for unfair prejudice in Hong Kong nor in England: -

> "27. … Unlike an arbitration agreement in which parties are free to agree to refer whatever dispute for determination by a consensual dispute resolution process, subject to the overarching issue of arbitrability (that the subject matter can suitably be determined within the limitations of a private consensual process), *parties are not at liberty to confer jurisdiction on the court by agreement where there is none.*
>
> ……
>
> 30. The judge is correct in stating that arbitrability was at the core of Fulham FC, and it was in that context that the English Court of Appeal considered and decided there was no statutory restriction or rule of public policy that had the effect of rendering the arbitration agreement void or unenforceable insofar as it purported to bind the parties to submit disputes of unfair prejudice to arbitration. *We agree with her that this line of cases is distinguishable.*
>
> 31. *Apart from the Hong Kong court, no other tribunal has jurisdiction to determine the petition for unfair prejudice in respect of the Company*. *The exclusive jurisdiction clause*, insofar as it purported to bind the petitioner and Cavendish to submit the dividends complaint in the petition to the English court for determination (*a jurisdiction which the English court does not appear to have*), is a fetter on the statutory right of the shareholder to present an unfair prejudice petition based on that complaint. *We think the situation is more akin to a line of Australian cases cited by Ms Chan, in which it was held that the non-availability of remedies under a protective Australian statute* (the Trade Practices Act 1974, dealing with statutory claims for misleading and deceptive conduct) in the nominated foreign court constituted "strong cause" for not enforcing an exclusive jurisdiction clause, as it was undesirable that this clause should circumvent statutory protection for investors and against misleading or deceptive conduct…."
>
> (Emphasis added.)

(5) Upon proper analysis, it is rather difficult to see how the lacuna identified by the Court of Appeal in *Joseph Ghossoub* could possibly arise. Whilst it is true that parties cannot force the English Court to grant relief for unfair prejudice, there is

absolutely nothing to prevent the English Court from determining the underlying merits of the substantive dispute (for example, by way of a declaration or otherwise), with the parties then being free to apply to the Hong Kong Court for the grant of any specific relief which might be beyond the power of foreign Court to award. Thus, in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373, Menon CJ at p.412; §100 said:

> "100. In the court below, the Judge developed that point and, as we mentioned at [96] above, observed (at [120] of the HC Judgment) that "the arbitrability of the remedy sought could affect the arbitrability of the claim". But, with respect, it is not clear to us why that needs to be the case. *Conceptually, there is nothing to preclude the underlying dispute from being resolved by an arbitral tribunal, with the parties remaining free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal to award. In so far as any findings have been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from relitigating those matters before the court*. The point is neatly illustrated by Patten LJ's observation in Fulham FC v Richards that the underlying dispute grounding a winding-up application on the "just and equitable" ground under s 122(1)(g) of the UK Insolvency Act 1986 would be arbitrable even if it might be beyond the power of the arbitral tribunal to grant some of the remedies sought."
>
> (Emphasis added.)

(6) Accordingly, the fact that the English Court has no jurisdiction to grant, entertain and provide remedies for unfair prejudice is, in my view, neither here nor there. A similar point was made by DHCJ Laurence Rabinowitz QC in *Cavendish Square Holding BV v Ghossoub* [2017] EWHC 2401 (Comm) (6 October 2017), where the judge (at §97) criticised *Joseph Ghossoub* in the following terms: -

"97. Secondly, it will be recalled that the contention that Mr Ghossoub has an inalienable statutory right to bring a claim for unfair prejudice in Hong Kong is an argument that finds some support in the reasons given by both Judge Le Pichon and the Hong Kong Court of Appeal for refusing to stay the HK Petition…I have already explained why the argument simply does not arise. However, had it been necessary to deal with the point, I should make clear that I would have rejected Mr Ghossoub's submission on this issue. In particular:…

> (2) The view taken by Judge Le Pichon, (at paragraph 84 of the judgment) and accepted by the Hong Kong Court of Appeal (at paragraph 30 of the judgment) is that the decision of the English Court of Appeal in Fulham should be understood as concerned only with the question of the arbitrability of such disputes and that Fulham has no wider significance to other dispute resolution provisions such as exclusive jurisdiction clauses.
>
> (3) With great respect to the Judge Le Pichon and the Hong Kong Court of Appeal, I would respectfully disagree with this conclusion, certainly as a matter of English law. *To my mind, the Court of Appeal's analysis of this issue in Fulham has a wider impact than that which they have recognised and strongly suggests that, certainly so far as concerns English law, no bar exists to parties agreeing that unfair prejudice disputes relating to the affairs of an English company are to be resolved by a tribunal other than the English court*.
>
> (4) In particular, whilst it is plainly correct, as the Hong Kong courts noted, that the issue of arbitrability was at the core of Fulham and therefore may have coloured the approach taken by the Court of Appeal to the issues before it, *the key issue before the Court in Fulham , as it seems to me, was whether effect could be given to any dispute resolution provision that removed from the English court the ability to entertain and provide relief in respect of a dispute about unfair prejudice in relation to an English company, in particular where the relief sought did not include a winding up order*. If, as the Court of Appeal concluded, it was open to contracting parties to agree that such a dispute should be removed from the jurisdiction of the English court and should

> be referred to arbitrators for determination, *I find it difficult to see why contracting parties should not also be able to agree that the matter should be referred for resolution to some other (non-arbitration) tribunal.*
>
> (5) *That is not to say that the other tribunal will necessarily regard itself as having jurisdiction to entertain and provide remedies in relation to such a dispute; but that, I would suggest, is a rather different point."*
>
> (Emphasis added.)

(7) Despite my reservations towards *Joseph Ghossoub*, it is noteworthy that Kwan JA (as she then was) did not, in fact, cast any doubt on the correctness of *Fulham FC* and *Re Quiksilver*. Instead, she chose only to distinguish those cases on the basis that *Joseph Ghossoub* concerned an exclusive jurisdiction clause instead of an arbitration clause (at §30). Whilst I find this distinction unconvincing, the fact remains that the correctness of *Re Quiksilver* was expressly left undisturbed by the Court of Appeal in *Joseph Ghossoub*.

123. Fourthly, section 179 of the Ordinance is essentially procedural and permissive in nature. It merely states that a petition for winding-up shall be by way of petition, and goes on to identify the classes of petitioners. It does not say that a creditor must or shall be entitled to present a petition for winding-up. It is erroneous to imply a *non-derogable* right to petition for winding-up from the statute. In *Re Colt Telecom* (Supra), Jacob J (as he then was) at §74 said:

> "74. Third, the language of the statute does not suggest any such policy — s.9 is essentially *procedural and permissive* in its language, saying that an application is to be by petition and identifying the classes of permitted petitioner. *It does not, for instance, say "the following ... shall be entitled to petition" or use similar mandatory language.* It is true that both Byrne J

> and Chitty LJ refer to the predecessor of the current statutory language in relation to compulsory winding up but that is in no way essential to the reasoning."
>
> (Emphasis added.)

124. Fifthly, I am of the view that *Re GBRE* does not support a proposition of law that it will *always* be contrary to public policy to fetter a shareholder's right to petition for winding-up. In *Re GBRE*, at issue were two companies – Miracle and GBRE. The former, Miracle, was the controlling shareholder of the latter, GBRE. By Article 18(d) of a joint-venture agreement between shareholders of Miracle, it was agreed that no shareholder of Miracle shall cause Miracle to wind-up GBRE without the approval of Mr. Gao and Mr. Ho. Was Article 18(d) unenforceable because it fettered Miracle's statutory right *qua* shareholder to petition for the winding-up of GBRE? The Court of Appeal held that this was so. It distinguished *Re Peveril Gold Mines Ltd* on grounds that *Re GBRE* was not a case where individual shareholders have personally contracted to exercise their rights in particular way (at p.816H-I; §§48-49 per Rogers JA). This was because Article 18(d) *bound all present and future shareholders of Miracle*; the effect of that was akin to including a provision in GBRE's Articles of Association, precluding Miracle from presenting a winding-up petition without Mr. Gao and Mr. Ho's consent (at pp.816I-817E; §49 *per* Rogers JA). This, in the view of the Court of Appeal, elevated Article 18(d) of the joint-venture agreement *to the status of a regulation* which interfered in the corporate governance of GBRE (at pp.821I-822B; §74 per Cheung J):

> "48. Both Lindley MR and Chitty LJ left open the question as to whether an individual shareholder could by contract fetter his personal rights.
>
> 49. *The present case is not a case where it can be said that the individual shareholders have entered personal contractual obligations to exercise their rights in particular way.* Article 28

> of the Joint Venture Agreement is designed to ensure that any *subsequent owner of shares in Miracle is bound by the Joint Venture Agreement*. Article 2 of the Joint Venture Agreement provides that Miracle must hold a controlling stake in GBRE. In those circumstances, if Mr. Gao's and Mr. Ho's approval was required for the presentation by Miracle i.e. by the controlling shareholder, of a petition to wind up GBRE, this would be to fetter the statutory right of Miracle as the controlling contributory of GBRE. *This, as it seems to me, would be just as much contrary to public policy when it is contained in the Joint Venture Agreement as it would if there were contained in the Articles of GBRE a provision that the controlling shareholders might not present a winding-up petition without the consent of Mr. Gao and Mr. Ho or whoever bought their shares in Miracle…*
>
> ……
>
> 74. In this case, under Article 26 of the Agreement, it is a condition precedent to the transfer of shares in Miracle that the transferee must "agree to be bound by and shall be entitled to the benefit of the Agreement" as if he is an original party. The mischief envisaged by Lord Davey as far as non-assenting shareholders are concerned is, of course, not present. *However, the Agreement clearly intends to bind future shareholders, not merely in their capacity as individuals, but as shareholders. In my view, this Agreement is being elevated to the status of a regulation of a company. This goes beyond merely creating a personal obligation between individuals. On the authority of Lord Davey in Welton, the Agreement should not be upheld.*"
>
> (Emphasis added.)

125. Pausing here, it is immediately evident that *Re GBRE* was decided on the narrower basis that the contractual fetters on winding-up were not merely personal contractual obligations to exercise their rights in particular ways. The crucial point that distinguished *Re GBRE* from *Re Peveril Gold Mines Ltd* was that Article 18(d) of the joint1--venture agreement purported to bind *present and future shareholders of Miracle*. Since that was so, Article 18(d) went beyond a mere personal contract and was *de facto* akin to a company regulation. Given its interference with the corporate governance of GBRE, the Court of Appeal,

unsurprisingly, held that Article 18(d) was unenforceable as a matter of public policy.

126. Accordingly, the *obiter dicta* in *Re Sit Kwong Lam* have to be analysed in light of the *ratio decidendi* in *Re GBRE*. In the premises, I am not convinced that there is a rule of public policy that prevents a creditor from voluntarily fettering his right to petition for winding-up of the debtor-company. In this regard, I note that this conclusion is fortified by support from the following academic commentaries: *Applications to Wind Up Companies* (3rd Edition) at §§7.426-7.428; *McPherson & Keay's Law of Company Liquidations* (4th Edition) at §3-017; *Goode on Principles of Corporate Insolvency Law* (4th Edition) at §5-18; *Foskett on Compromises* (9th Edition) at §23-04; *Corporate Finance Law: Principles and Policy* (2nd Edition) at pp.402-403.

127. Accordingly, I am of the view that there are no public policy objections to the *Salford-Lasmos* Approach. The real problem is its effects on the Court's discretion to order winding-up, as opposed to its effects on the petitioner's "right" to petition for winding-up.

The relevant legal test or threshold

128. For the sake of completeness, I like to deal with two further issues. The first is whether the test to be applied for winding up applications is different from the test to be applied for summary judgment applications. I can well understand that conceptually given that in an application for summary judgment, the Court is tasked to determine the merits of a dispute but in a winding up petition, the Court is merely asked

to determine whether a debt is disputed *bona fide* on substantial grounds, there is no reason why the two tests should be the same.

129. Recently, in *Re Leung Cherng Jiunn*, Kwan JA (as she then was) at p.863; §27(4) said:

> "27(4). Notwithstanding this difference, it is fair to say that the threshold tests in both situations are broadly similar, as noted in the two recent English authorities. If a petition is dismissed on the basis there is a *bona fide* dispute on substantial grounds, it would be most unlikely that summary judgment could be obtained. Most probably, the defendant would be given leave to defend, whether unconditionally, or with conditions imposed if his defence is regarded as shadowy. Conversely, where a defendant has obtained leave to defend, unconditionally or with conditions, it would be most unlikely that a petition would be granted. See *Markham v Karsten* at [45]. The statements of Rogers J in *ICS Computer* at 183E-F did not suggest otherwise."

130. In *Re Generic Enterprises Limited formerly known as Lionstar Enterprises Limited* [2019] HKCFI 2784, unreported, HCCW 123/2018, 15 November 2019 at §§9 and 10, I said:

> "9. There are *dicta* to the effect that the threshold test for resisting a petition would require a higher standard. (See *Re ICS Computer Distribution Ltd* [1996] 1 HKLR 181 at 183G-J *per* Rogers (as he then was).) In practice, I do not see how this higher standard will yield a different result when applying to the facts of a particular case…
>
> 10. I am of the view that the key is for the Court to assess whether there are real and substantial disputes of facts which render the summary procedure of a bankruptcy and/or winding up proceedings unsuitable for the determination of such real and substantial disputes of fact. In such scenario, the validity of the petitioning debt would need to be fully investigated in a trial. However, peripheral and/or disputes of fact which do not go to the foundation of the petitioning debt are normally distractions and are irrelevant in determining whether there are *bona fide* disputes to the petitioning debt on substantial grounds."

131. In *Applications to Wind Up Companies* (3rd Edition) at §7.483, it is stated that:

> "…However, unlike giving summary judgment, preventing a creditor's winding-up petition proceeding, because of a dispute about the petitioner's debt, does not finish litigation over the debt: it merely requires the claim to be pursued in a more appropriate forum. So it may be appropriate to use different tests for these different purposes."

132. In *Tallington Lakes Ltd v South Kesteven District Council* [2012] EWCA Civ 443 (15 February 2012), Etherton LJ (as he then was) at §22 said:

> "22. I have to emphasise, however, in this context that it is well established that *the threshold for establishing that a debt is disputed on substantial grounds in the context of a winding-up petition is not a high one for restraining the presentation of the winding-up petition, and may be reached even if, on an application for summary judgment, the defence could be regarded as "shadowy"*."
>
> (Emphasis added.)

133. However, this is not the occasion to fully address this issue and guidance from the appellate courts will be helpful.

134. Secondly, I do not think that it is necessary to give more "*weight*" to the arbitration factor. As I have explained, the existence of the arbitration agreement is neither here nor there. If the commencement of winding-up proceedings does not come within the scope of an arbitration clause, it is not for the courts to improve the bargain for the debtor-company to the prejudice of the creditor-petitioner. The debtor-company could have, if it wished, negotiated for express limitations on the creditor-petitioner's right to wind-up. I accept, of course, that the debtor-company might potentially be caught in a

Catch-22 situation if the agreement does exclude the right to present a winding-up petition since such agreements may potentially be unenforceable as a matter of public policy. But that is simply a risk that the debtor-company would have to assume.

135. There is a further practical problem. An invitation to give greater emphasis to arbitration agreements invariably begs further questions as to how such "*greater*" emphasis should be given. As I have pointed out above, the Singaporean authorities have not been altogether successful in navigating a middle-ground between the Traditional Approach and the *Salford-Lasmos* Approach. I suspect that similar problems would more or less arise if the same is attempted in Hong Kong.

136. Having gone through the above analytical journey, I am of the view that the present state of the law can (and should) be stated in the following terms:

(1) First, where a debtor-company intends to dispute the existence of a debt, he must show that there is a *bona fide* dispute on substantial grounds. It should not suffice for the debtor-company to merely deny the debt. This test would apply in all cases whether or not the debt had arisen from a contract incorporating an arbitration clause.

(2) Secondly, the existence of an arbitration agreement should be regarded as irrelevant to the exercise of discretion.

(3) Thirdly, the fact that arbitration proceedings have commenced or would be commenced may be relevant

evidence that there is a *bona fide* dispute. However, this alone would not be sufficient to prove the existence of a *bona fide* dispute on substantial grounds.

(4) Fourthly, where the creditor-petitioner petitions in circumstances where it knows there to be a *bona fide* dispute over the debt on substantial grounds, it runs the risk of being liable to pay the debtor-petitioner's costs on an indemnity basis. It would also be at risk of liability under the tort of malicious prosecution.

Disposition

137. For all the reasons stated above and applying the legal principles as set out above, I make the usual winding up order against the Respondent company.

138. As far as costs is concerned, I make a costs order *nisi* that the Petitioner is entitled to the costs of the Petition against the Respondent company, to be taxed, on a party to party basis, if not agreed. The costs order *nisi* will be made absolute within 14 days from the day hereof unless the parties make an application to vary the same within the 14-days period.

139. Finally, it remains for me to thank Mr Kirpalani for the Petitioner and Mr Lai for the Respondent for their helpful assistance to this Court.

(William Wong SC)
Deputy High Court Judge

Mr Lavesh Kirpalani, instructed by Tsui & Co, for the petitioner
Mr Alex S W Lai, instructed by Kitty So & Tong, for the respondent