



HKI Arb Webinar: “Arbitration or Winding-up Petition? Practical Insights on their Effectiveness for Debt Recovery”

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Arbitration or Winding-Up Petition? Practical Insights on their Effectiveness for Debt Recovery

Gillian Lam, James Ng | 29 August 2023



Speaker's Bio



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Gillian Lam is a Senior Associate in the Dispute Resolution Group of Baker McKenzie in Hong Kong and a member of the Firm's Women in Arbitration leadership team. She is a Fellow of the Chartered Institute of Arbitrators and a member of the ArbitralWomen. She is also the Hong Kong ambassador for Arbitration Lunch Match.

Gillian's practice focuses on commercial litigation and arbitration in Hong Kong, including general commercial/corporate disputes, commercial fraud and bribery investigations, contentious employment issues.

She has been granted "Solicitor Advocate" status before the Hong Kong courts.

Speaker's Bio



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James Ng is a Registered Foreign Lawyer in the Dispute Resolution Group of Baker McKenzie in Hong Kong. He is a Fellow of the Chartered Institute of Arbitrators and a HKIAC accredited tribunal secretary.

James has over 8 years of experience in international arbitration, having acted for clients in arbitrations under the HKIAC, ICC, SIAC, ICADR and UNCITRAL Arbitration Rules. His practice broadly covers commercial, construction, hotel management, IP, M&A and shareholders disputes.

Before joining Baker McKenzie, James worked at the HKIAC overseeing more than 300 arbitration cases, with a focus on China-related disputes. He has acted as tribunal secretary in high-stakes commercial arbitrations including emergency arbitrations.

Agenda

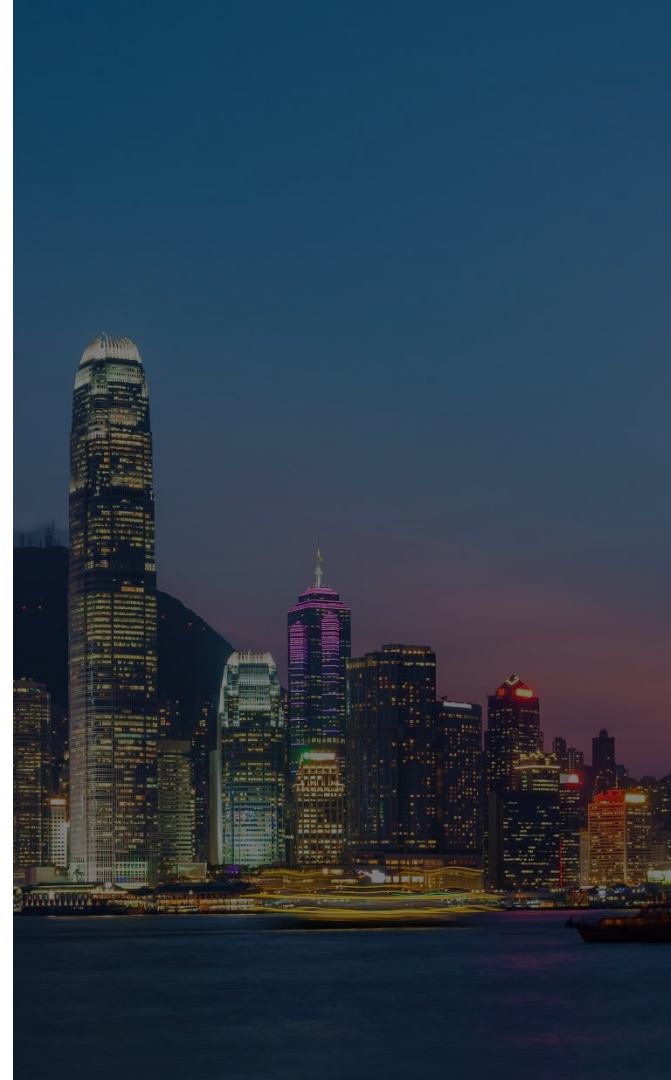
01 Debt recovery options

02 Cases on the effect of DR clauses in insolvency proceedings

03 Case scenarios

04 Practical tips

05 Q&A



01 Debt recovery options



Ways to recover debt



When you have a debt, do you go through arbitration, litigation or insolvency proceedings to wind up the company as a tactic?

Ways to recover debt include:

1. Demand letter
2. **Arbitration** – arbitral award
3. Litigation – summary judgment
4. **Insolvency regime:**
 - a. Statutory Demand (SD)
 - b. Winding-up petition

Statutory winding-up regimes:

- **Hong Kong**
 - ss. 177, 178 – Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)
- **United Kingdom**
 - ss. 122, 123 – Insolvency Act 1986
- **Singapore**
 - s. 125 – Insolvency, Restructuring and Dissolution Act 2018

Ways to recover debt

Winding-up



Arbitration



A nighttime photograph of the Hong Kong skyline, featuring numerous illuminated skyscrapers and a prominent Ferris wheel in the foreground. The sky is dark blue, and the water in the foreground reflects the city lights. A blue circular graphic with a grid pattern is overlaid on the lower right side of the image.








02 Cases on the effect of DR clauses on insolvency proceedings

Decisions on DR clauses and insolvency regime

Summary Chart

	Hong Kong	Singapore	United Kingdom
Exclusive Jurisdiction Clause (EJC)	<i>Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP</i> [2023] HKCFA 9	<i>Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd</i> [2018] SGCA 65	<i>BST Properties Ltd v Reorg-Apport Penzugyi RT</i> [2001] EWCA Civ 1997 <i>City Gardens Ltd v DOK82 Ltd</i> [2023] EWHC 1149 (Ch)
	Arbitration Clause	<i>Re Southwest Pacific Bauxite (HK) Ltd</i> [2018] 2 HKLRD 449 <i>But Ka Chon v Interactive Brokers LLC</i> [2019] HKCA 873 <i>Sit Kwong Lam v Petrolimex Singapore Pte Ltd</i> [2019] HKCU 4156 <i>Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd</i> [2020] HKCFI 311 <i>Re Simplicity & Vogue Retailing (HK) Co., Limited</i> [2023] HKCFI 1443 <i>Re NT Pharma International Co Ltd</i> [2023] HKCFI 1623	<i>BDG v BDH</i> [2016] 5 SLR 977 <i>AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)</i> [2020] SGCA 33 <i>BWG v BWF</i> [2020] SGCA 36
	<i>Re Shandong Chenming Paper Holdings Ltd</i> [2023] HKCFI 2065		

Summary Table (Pre-Guy Lam)

	Established approach	Lasmos approach
EJC	 UK <ul style="list-style-type: none">▪ <i>BST Properties Ltd v Reorg-Apport Penzugyi RT</i> [2001] EWCA Civ 1997	 HK <ul style="list-style-type: none">▪ <i>Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP</i> [2023] HKCFA 9  Singapore <ul style="list-style-type: none">▪ <i>Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd</i> [2018] SGCA 65
Arbitration Clause	 HK <ul style="list-style-type: none">▪ <i>But Ka Chon v Interactive Brokers LLC</i> [2019] HKCA 873 (obiter only)▪ <i>Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd</i> [2020] HKCFI 311	 HK <ul style="list-style-type: none">▪ <i>Re Southwest Pacific Bauxite (HK) Ltd</i> [2018] 2 HKLRD 449 (Lasmos)▪ <i>Sit Kwong Lam v Petrolimex Singapore Pte Ltd</i> [2019] HKCU 4156 (obiter only)  Singapore <ul style="list-style-type: none">▪ <i>AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)</i> [2020] SGCA 33▪ <i>BWG v BWF</i> [2020] SGCA 36  UK <ul style="list-style-type: none">▪ <i>Salford Estates (No 2) Ltd v Altomart Ltd (No 2)</i> [2015] 1 Ch 589▪ <i>Telnic Ltd v Knipp Medien Und Kommunikation GmbH</i> [2020] EWHC 2075 (Ch)

DR clauses and insolvency regime

Starting point: the “established approach”

- Petition should be dismissed if there is a **bona fide dispute on substantial grounds**
- **Onus is on the debtor** to adduce sufficiently precise factual evidence to satisfy the Court that there is a bona fide dispute
- Court must be satisfied that the debtor’s evidence is believable
- Court will look at the evidence against the background and consider whether it is not disputed or not capable of being disputed in good faith

DR clauses and insolvency regime

Arbitration clause: United Kingdom

- Where the debt is **not admitted**, that is sufficient to constitute a dispute and a winding-up petition should be **dismissed or stayed**, save in **exceptional circumstances**
- In exceptional circumstances, the Court will investigate whether the debt is bona fide disputed on substantial grounds
 - *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 1 Ch 589

DR clauses and insolvency regime

Arbitration clause: Singapore

- **“Prima facie” standard**: proceedings will be dismissed if there is a valid arbitration agreement and the dispute falls within its scope, unless there’s **abuse of process**
- If the petitioner can demonstrate **legitimate concerns** over the company’s solvency as a going concern and there are **no triable issues**, proceedings may be stayed
- Applies to either a debt or a cross-claim
 - *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33

DR clauses and insolvency regime

Arbitration clause: Hong Kong

- **Pre-Guy Lam:** “Lasmos approach” – exceptional circumstances
 - Considered by: CA in *Sit Kwong Lam*
 - Doubted by: Kwan V-P (CA) in *But Ka Chon*, Deputy Judge Wong SC in *Dayang*
- **Guy Lam:** Absent countervailing factors (risk of insolvency affecting third parties, frivolous or abuse of process), parties should be held to their contract (i.e. the EJC) and the petition be dismissed
- **Post-Guy Lam:**
 - Does not apply to arbitration clause: Linda Chan J in *NT Pharma, Simplicity*
 - Applies to arbitration clause: Harris J in *Shandong Chenming Paper Holdings Limited*

Pre-Guy Lam position

Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2015] 1 Ch 589

Facts

- Pursuant to an arbitration clause in a lease, the lessor referred a dispute concerning the lessee's obligation to pay service charges and insurance rent to arbitration.
- The lessee failed to pay the amount awarded in full.
- The lessor petitioned for the lessee's winding up. The lessee argued the winding-up petition should be stayed or dismissed pursuant to the arbitration clause.

Ruling

- **Appeal of decision to stay the Petition dismissed.** The discretionary power to wind up a company had to be exercised consistently with the parties' agreement as to the proper forum for the resolution of disputes.
- The fact that a debt was not admitted was sufficient to constitute a dispute for the purposes of the Arbitration Act, irrespective of the merits of any defence.
- Rather than investigating whether the petitioning debt was bona fide disputed on substantial grounds, it was right to dismiss or stay the petition to compel the parties to resolve their dispute in accordance with their chosen method.

If the petitioning debt is disputed or not admitted, and the dispute is subject to an arbitration agreement, the court should exercise its discretion to dismiss or stay the winding up proceedings save in wholly exceptional circumstances.

Pre-Guy Lam position in HK

Re Southwest Pacific Bauxite (HK) Ltd [2018] 2 HKLRD 449 (*Lasmos*)

Facts

- The Petitioner, Lasmos Ltd, issued a petition to wind up the Company on the grounds of insolvency based on an unsatisfied SD.
- The SD sought payment of a debt arisen from a management service agreement which contains an arbitration clause.
- The Company disputed the debt and sought to strike out the petition.
- The issue was the impact of the arbitration clause in the agreement on the exercise of the court's discretion to make a winding-up order.

Ruling

- **Petition dismissed.**
- The Court departed from the **Established Approach**.
- **New “Lasmos” approach:** the winding-up petition should generally, subject to exceptional circumstances, **be dismissed** if:
 1. The company disputes the debt relied on by the petitioner;
 2. The contract under which the debt allegedly arises contains an arbitration clause covering any dispute relating to that debt; and
 3. The company takes steps under the arbitration clause to commence the contractually mandated DR process, which may include preliminary stages such as mediation; and files an affirmation demonstrating that it has done so.

Pre-Guy Lam position in HK

Treatment of Lasmos

CA's *obiter* statements

- Court retains discretion under the insolvency legislation which should not be exercised only one way to substantially curtail the right of the creditor to present a petition, although considerable weight should be given to the factor of arbitration
 - *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873
- Lasmos' third requirement is a sensible requirement to demonstrate to the Court that the debtor has a genuine intention to arbitrate
 - *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] HKCU 4156

Pre-Guy Lam position in HK

Treatment of Lasmos

CFI's *obiter* statements

- The Lasmos approach constituted an unprecedented fetter on the Court's flexible discretion to make a winding-up order
- The established approach should apply in all cases whether or not the debt arose from a contract incorporating an arbitration clause
- The fact that arbitration proceedings have commenced or would be commenced may be relevant evidence that there was a bona fide dispute, but was not alone sufficient to prove the existence of a bona fide dispute on substantial grounds
 - *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd*
[2020] HKCFI 311

Pre-Guy Lam position in HK

Treatment of Lasmos

Further CFI decisions

- *Re Hong Kong Bai Yuan International Business Co., Ltd* [2022] HKCFI 960
 - Company to pay the debt within 14 days to avoid a winding-up order, notwithstanding the arbitration agreement; discretion not exercisable only one way as in Lasmos
- Followed in *DCKD and PSL v JPWL* [2022] HKCFI 1059 and *Re Pan Sutong & Re Proman International Ltd* [2022] HKCFI 1450
 - “The court would only require the parties to resolve the dispute through arbitration if there is a ‘genuine dispute’ or ‘bona fide dispute on substantial grounds’ in respect of the debt”: *Re Pan Sutong* at [58]

The Guy Lam decision

Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP [2023] HKCFA 9

Facts

- The Petitioner advanced term loans to a company controlled by the Debtor, who acted as a guarantor to these loans.
- The Agreement contained **an EJC** in favour of New York courts.
- The Petitioner served an SD on Debtor requiring him to pay the outstanding principal and interest. It then presented a bankruptcy petition as the Debtor did not comply.
- The Debtor opposed the petition in Hong Kong by arguing, among other things, that the Petitioner should be required to litigate the dispute in New York before coming to Hong Kong to invoke the bankruptcy regime.

Court of First Instance: Established Approach

- An EJC does not per se prevent the Companies Court from considering the issue whether the creditor has the locus to present a winding up/bankruptcy petition.
- Unless and until the company/debtor is able to demonstrate to the Court that there is a **bona fide dispute on substantial ground**, there is no proper basis for the company to contend that there is a dispute which must be litigated in accordance with the contractually agreed forum.

The Guy Lam decision

Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP [2023] HKCFA 9

Court of Appeal

- Upheld the effect of the foreign EJC and holding that the court should exercise its discretion to dismiss or stay an action brought in breach of an EJC, unless there are **strong reasons** for not doing so.
- The negative aspect of the ECJ is engaged when a party seeks a determination, and the court finds against the company, that there is no bona fide dispute on substantial grounds.

Court of Final Appeal

- When an EJC is involved, the **Established Approach is not appropriate**. An agreement by the parties to an EJC would **affect** the CFI's exercise of discretion to decline to exercise its jurisdiction.
- Where the underlying dispute of the petition debt is subject to an EJC, **the court should generally dismiss the petition** and hold the parties to their contract, unless there are **countervailing factors such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process**.

Impact on arbitration clauses

- CFA: "It is not necessary for present purposes to explore the interaction of the non-discretionary provision applicable to arbitration clauses with the statutory jurisdiction of the CFI in bankruptcy and in company insolvency".

Exceptional Circumstances v Relevant Considerations

Re Guy Kwok-Hung Lam (per Court of Appeal)

“Strong reasons” (per Lam/Barma JJA)

- The debtor is “incontestably and massively insolvent quite apart from the disputed petition” or “a menace to commercial society if allowed to continue to trade”.
- There may be other creditors seeking a winding up whose debts are not subject to any jurisdiction agreement.
- Assets may be in jeopardy.
- There may be need to investigate potential wrongdoings.
- The effect of a dismissal/stay would deprive P of a real remedy.

Relevant wider considerations (per Chow JA)

- The debtor is “obviously insolvent”.
- The interests of the general body of creditors.
- Where there is a need to:
 - protect the assets of the debtor.
 - put in place a regime to safeguard documents/ records.
 - investigate the affairs and transactions of the debtor.

CFA affirmed the majority’s approach and acknowledged that the “strong cause” test is multi-factorial and should not obscure the range of considerations relevant to the court’s discretion.

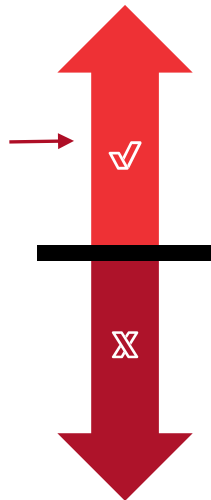
The Threshold Question

Threshold

Established approach

Dismiss/stay petition

D to show
bona fide dispute on
substantial grounds



Winding up

Guy Lam EJC approach

Dismiss/stay petition

P to show
frivolous defence
or abuse of
process



Winding up

Post-Guy Lam in HK (per Linda Chan J)

Re Simplicity & Vogue Retailing (HK) Co., Limited [2023] HKCFI 1443

Facts

- The Company guaranteed the repayment of certain convertible bond instruments. The issuer failed to repay on maturity. The Petitioner petitioned to wind up the Company.
- The Company argued that the dispute over the debt should be referred to arbitration.
- The Petitioner, relying on *Lasmos*, contended that the Court should not stay the winding-up petition because the Company **had not taken steps** to commence arbitration and that Guy Lam did not change the *Lasmos* approach.

Ruling

Winding up order granted as there was no evidence in opposition to the Petition. As *obiter*, the Court observed the following:

- **The ratio in Guy Lam only applies to EJC, not arbitration clause.**
- CFA did not lay any general rule that if the agreement which gave rise to the petitioning debt contains an arbitration clause and there are no supporting creditors to the petition, the court must dismiss or stay the petition.
- Where the Company raises a substantive defence to the petitioning debt, the Court should consider whether the defence is one which can readily be shown to be wholly without merit. If so, the “defence” is one which **“borders on the frivolous or abuse of process”** even if Guy Lam approach applies.
- No basis to require parties to refer their “dispute” to arbitration in the absence of any genuine “dispute” in respect to the debt.

Post-Guy Lam in HK (per Linda Chan J)

Re NT Pharma International Co Ltd [2023] HKCFI 1623

Facts

- The Petitioner sought to wind up the Company based on an undisputed debt which arose from a supply agreement containing an arbitration clause (the Debt).
- The Company did not dispute and had acknowledged the Debt. It opposed the Petition on the ground that (a) Company had a cross-claim against Petitioner in a separate but related agreement; (b) the Debt was "secured" by the amount paid into court.

Ruling

Petition adjourned to give the Company opportunity to pay the Debt. Costs awarded to the Petitioner.

- No valid ground for the Company to oppose to the Petition and no basis to dismiss or stay the Petition.
- The Company should not be allowed to withhold payment of the Debt until determination of its cross-claim in the Arbitration.
- The Debt and the cross claim did not arise from the same agreement.
- The cross-claim would not be stifled if the Company (which on its case is "immensely solvent") is required to pay the Debt.

Obiter comment:

- The Company had not discharged the burden of showing that it has a serious cross-claim against the Petitioner.

Post-Guy Lam in HK (per Harris J)

Re Shandong Chenming Paper Holdings Ltd [2023] HKCFI 2065

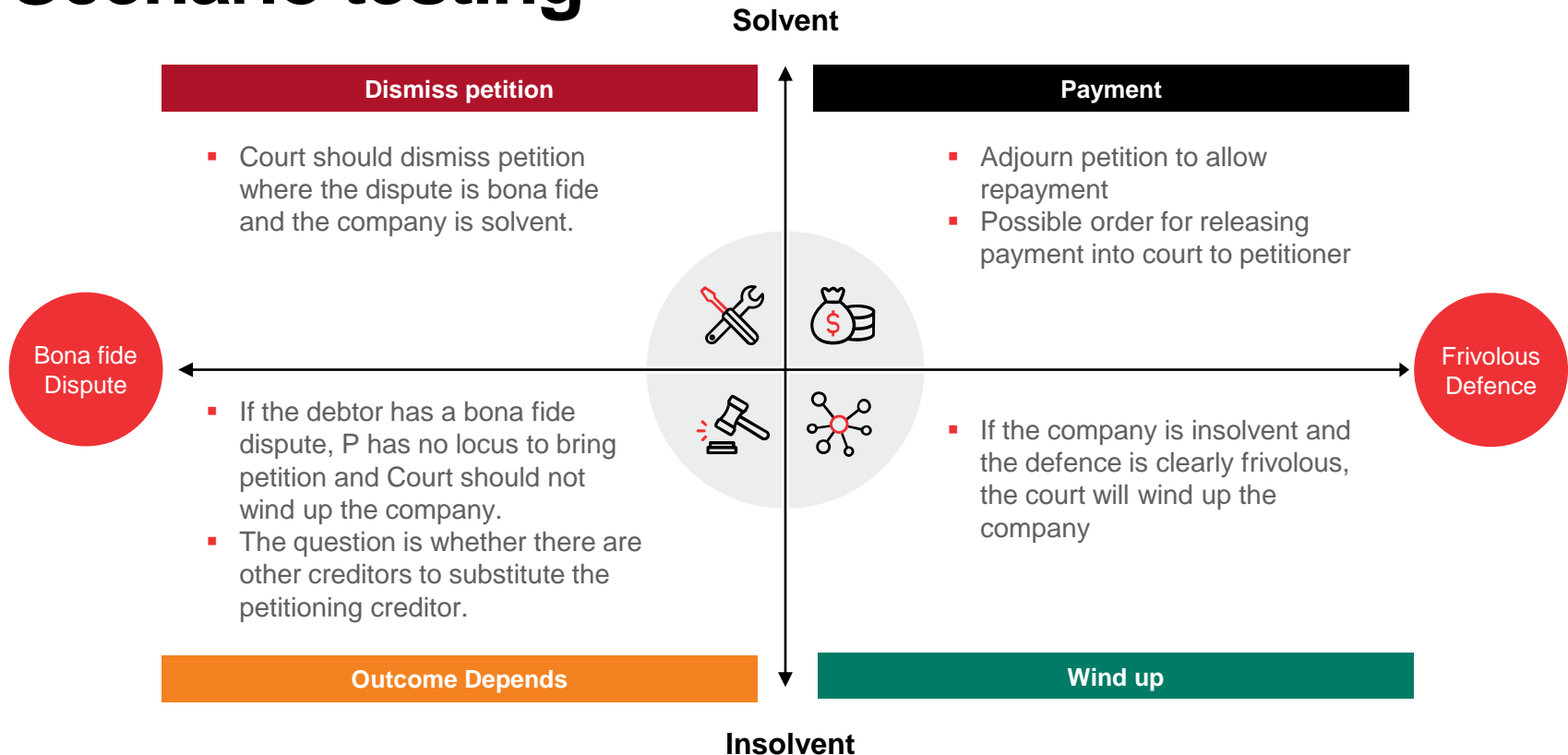
Facts

- The Petitioner sought to wind up the Company on the grounds of insolvency arising from non-payment of an arbitration award.
- The Company sought to dismiss or adjourn the Petition based on a cross-claim under a second arbitration.

Held

- **Petition stayed.**
- *Guy Lam* principles applies to both a claim subject to an EJC and an arbitration clause.
- *Simplicity* is wrong in suggesting that the *Guy Lam* ratio does not apply to an arbitration clause.
- The same principle in *Guy Lam* applies if the debtor relies on a cross-claim.
- More appropriate to stay the petition in this case than to dismiss it given the “long and torrid history of the matter”.

Scenario testing



Summary Table (Post-Guy Lam)

EJC

Arbitration Clause

Established approach



UK

- *BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997

Post-Guy Lam

- *City Gardens Ltd v DOK82 Ltd* [2023] EWHC 1149 (Ch)

Lasmos / Guy Lam approach



HK

- *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9



Singapore

- *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65



HK

- *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873 (obiter only)
- *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd* [2020] HKCFI 311

Post-Guy Lam

- *Re Simplicity & Vogue Retailing (HK) Co., Limited* [2023] HKCFI 1443
- *Re NT Pharma International Co Ltd* [2023] HKCFI 1623



HK

- *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449
- *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] HKCU 4156 (obiter only)

Post-Guy Lam

- *Re Shandong Chenming Paper Holdings Ltd* [2023] HKCFI 2065



Singapore

- *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33
- *BWG v BWF* [2020] SGCA 36



UK

- *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 1 Ch 589
- *Telnic Ltd v Knipp Medien Und Kommunikation GmbH* [2020] EWHC 2075 (Ch)

DR clauses and insolvency regime

Policy considerations

Established approach

- **Insolvency regime as class remedy:**
A winding-up petition is a class action in the public interest.
- **Pro-creditor's statutory rights to petition:**
The Court's discretion should not be exercised one-way to curtail the statutory right of a creditor to present a petition.
- **Pro-court discretion:**
The Court should not adopt a mechanistic approach or fetter the exercise of its discretion in any way and should take into account DR clause as a relevant factor.

Lasmos / Guy Lam approach

- **Pro-arbitration:**
Desirable to stay proceedings in favour of arbitration.
- **Party's autonomy:**
Parties should be held to their contractual bargain. It is unusual for the Companies Court to conduct a summary judgment-type analysis - may encourage parties to bypass arbitration.
- **Petition as a debt recovery tool:**
Creditor issues a petition to recover his debt, not out of some altruistic concern for the creditors of the company generally.

03 Case scenarios



Scenario 1

- **A** entered into a customer agreement with **B** where **A** opened an online portfolio margin account with **B**'s online broker-dealer platform. The agreement contains an arbitration agreement.
- **A** traded in futures product and **B** issued a margin call in light of an unexpected unpegging of currencies. **A** failed to deposit funds to resolve the margin deficit. **B** liquidated **A**'s positions and **A** complained of improper handling of its liquidation policy.
- **B** subsequently served a statutory demand on **A** for the account deficit and interest thereon. **B** then filed a winding-up petition.
- **A** applied to dismiss or stay the petition, arguing that the customer agreement contains an arbitration agreement.



How will the HK, SG and English courts decide this?

- A. The Court has the discretion to examine if there is a bona fide dispute on substantial grounds
- B. The petition should be stayed or dismissed unless there are exceptional circumstances
- C. The petition should be stayed or dismissed unless there is an abuse of process.
- D. The petition should be stayed or dismissed absent countervailing factors

Scenario 2

- **C** entered a series of contracts with **D**. They include an asset purchase agreement (transferring an asset from **C** to **D**) and related supply agreements (where **C** would supply the asset's products to **D**).
- The supply agreements do not state that they form part of the APA. They stipulate that **D** must pay **C** within 30 days after receipt of an invoice. Each of the agreements contains an arbitration agreement.
- **D** failed to pay **C** within 30 days of the issuance of several invoices. **C** therefore issued a statutory demand and subsequently a petition to wind-up **D**.
- **D** disputes the debt based on a cross-claim against **C**, alleging that **C** has breached the APA.



How will the HK, SG and English courts decide this?

- A. The Court has the discretion to examine if there is a bona fide dispute on substantial grounds as to cross claim.
- B. The petition should be stayed or dismissed unless there are exceptional circumstances
- C. The petition should be stayed or dismissed unless there is an abuse of process.
- D. The petition should be stayed or dismissed absent countervailing factors

04 Practical tips



Factors to consider



- Location of the company or the debt (which insolvency jurisdiction applies)
- DR mechanism involved
- Conduct a realistic assessment of the creditor's claim and any reasonable defence or cross-claim by the debtor
- Risks associated with commencing insolvency proceedings
- Existence of other creditors and whether they are taking enforcement actions
- Evidence available to persuade the Court to make a bankruptcy or winding-up order, e.g.:
 - Other creditors pursuing the debtor
 - Debtor is "incontestably and massively insolvent"
 - Debtor's defence is "completely frivolous" or borders on "abuse of process"
 - Risk of misappropriation of assets

Pros and cons of a winding-up petition



Pros

- Threat of a winding-up petition is a powerful tool in debt recovery
- Likely to encourage quick settlement of debt
- No risk of adverse outcome in arbitration
- Facilitate debt recovery in urgent cases



Cons

- Multiplicity of proceedings
- Time, money and adverse costs order
 - Risk of the Court staying or dismissing petition and compelling arbitration
 - Need to prove the defence is frivolous
 - Indemnity costs

Q&A



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