THE HONG KONG AND ENGLISH APPROACHES TO ARBITRABLE PETITION DEBTS AFTER *SIAN PARTICIPATION*: DIAMETRICALLY OPPOSED OR FUNDAMENTALLY SIMILAR?

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The English and Hong Kong courts' respective approaches to winding-up petitions where a dispute as to the alleged petition debt falls within the scope of an exclusive jurisdiction or arbitration clause seem to have diverged following the decision of the Privy Council in Sian Participation. The English courts have reverted to the traditional approach of examining whether there is a bona fide dispute as to the petition debt, whereas the Hong Kong courts adopt an approach whereby the winding-up petition is to be dismissed in favour of determination in the agreed forum unless the debtor's defence borders on the frivolous or abuse of process. This article considers the development of Hong Kong law on this point, and examines the extent to which the two approaches may lead to different results. Finally, it suggests that there may be good reasons for adopting Sian Participation in Hong Kong, even though this seems unlikely in the near future.

Keywords: Arbitration, insolvency, winding-up, arbitration clause, exclusive jurisdiction clause, Sian Participation, Hong Kong, public policy

A. Introduction

In recent years, the question of the proper approach to a winding-up petition where a dispute as to the alleged petition debt falls within the scope of an exclusive jurisdiction or arbitration clause has generated much interest and litigation in the Hong Kong courts. While the Hong Kong authorities have

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not always spoken with one voice, there has been greater clarity following recent decisions from the Hong Kong Court of Final Appeal (CFA) and Court of Appeal (CA). Meanwhile, in the UK, the Privy Council in *Sian Participation Corp v. Halimeda International Ltd*[1] has recently departed from the previous stance adopted by the English CA in *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)*.[2] In doing so, it disapproved of the recent Hong Kong appellate authorities, instead endorsing the analysis adopted in earlier Hong Kong decisions. To what extent will the Hong Kong position be unsettled once again as a result of *Sian Participation*?

This article charts the development of Hong Kong law – from its initial endorsement of *Salford* and departure from the traditional approach in insolvency matters, under which a petitioner would ordinarily be entitled to a winding-up order in circumstances where there is no *bona fide* dispute as to the petition debt, regardless of whether the debt is subject to an exclusive jurisdiction or arbitration clause (known as the 'Established Approach'), to the more nuanced reformulation of the test by the CFA in *Re Lam Kwok Hung Guy*[3] in the context of disputes subject to exclusive jurisdiction clauses, through to recent CA decisions applying *Guy Lam* to disputes which are subject to arbitration clauses (section 2).

It then examines two areas of uncertainty. First, the extent to which the Hong Kong courts will consider the merits of the underlying dispute, where the dispute falls within the scope of an exclusive jurisdiction or arbitration clause, in the exercise of its discretion to grant or dismiss a winding-up petition under the current approach to the issue in Hong Kong law (section 3.1). Second, the potential impact in Hong Kong of *Sian Participation*'s reaffirmation of the Established Approach (section 3.2). Finally, it considers whether Hong Kong should adopt *Sian Participation* and re-embrace the Established Approach and suggests that although this is unlikely given the weight of countervailing Hong Kong authorities, there may be sound reasons for doing so (section 4).

B. Tracing the development of Hong Kong law

1. *The Pre-Guy Lam Authorities*

Until recently, there was little consensus on the proper approach to a winding-up petition where a dispute as to the alleged petition debt falls within the scope of an exclusive jurisdiction or arbitration clause. What follows is an

1 [2024] UKPC 16.
2 [2015] Ch. 589.
3 (2023) 26 HKCFAR 119.

overview of how various levels of courts in Hong Kong approached the issue prior to the CFA decision in *Guy Lam.*

In *Re Southwest Pacific Bauxite (HK) Ltd*[4] (commonly known as *Lasmos*), the agreement under which the petition debt was due contained a clause providing that the parties' disputes, failing mediation, should be referred to arbitration. The debtor sought dismissal of the petition on that basis. Harris J adopted a three-stage approach in determining whether a winding-up petition should be dismissed in favour of arbitration. Subject to 'exceptional circumstances', a petition would be dismissed if: (1) the debtor disputed the debt relied on by the petitioner; (2) the contract under which the debt was alleged to arise contained an arbitration clause covering any dispute relating to the debt; and (3) the debtor took the steps required to commence arbitration and filed an affirmation demonstrating this.[5] As the debtor disputed the debt and had agreed that any disputes should be resolved via arbitration, the petition was dismissed.[6] This represented a departure from the Established Approach, under which the a petitioner is ordinarily entitled to a bankruptcy or winding-up order if the petition debt is not subject to a *bona fide* dispute. In other words, under the Established Approach, the debtor has to show that the debt is disputed on substantial grounds in order to avoid a bankruptcy or winding-up order.

Central to Harris J's reasoning was the English CA's decision in *Salford*, which held that where an alleged petition debt was disputed and subject to an arbitration clause, the petition must be dismissed without consideration of whether there was a *bona fide* dispute.[7] His Lordship cited and approved Etherton C's observation in *Salford* that it would be 'anomalous' to conduct a summary-judgment-type analysis of liability for the petition debt when the petitioner had agreed to refer any dispute relating to the debt to arbitration.[8] He further noted the importance of supporting party autonomy and holding a creditor to their agreement to resolve disputes by arbitration, in line with the policy underlying Hong Kong's Arbitration Ordinance.[9]

Subsequent courts were more reluctant to adopt *Salford.* In *But Ka Chon v. Interactive Brokers LLC*,[10] the CA expressed (*obiter*) reservations as to the correctness of *Lasmos* and emphasized the public policy underlying the insolvency regime. In particular, Kwan V-P observed that the *Lasmos* approach substantially curtailed a creditor's statutory right to petition for

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4 [2018] 2 HKLRD 449 [31].
5 *Lasmos* (above) [31].
6 *Lasmos* (above) [32].
7 *Salford Estates* (above) [41].
8 *Lasmos* (above) [17], citing *Salford* (above) [40].
9 *Lasmos* (above) [14]–[16], [28]–[29], citing *Salford* (above) [39]–[41].
10 [2019] 4 HKLRD 85.

winding-up on the ground of insolvency, and was therefore potentially contrary to public policy. There was also no indication that the drafters of the Arbitration Ordinance intended to radically alter the insolvency regime.[11]

The policy concerns underlying the insolvency regime (albeit different ones) were also emphasized by DHCJ William Wong SC in *Re Asia Master Logistics Ltd*.[12] Unlike Kwan V-P, the Deputy Judge considered that the contractual fettering of a creditor's statutory right to petition for winding-up did not give rise to any public policy concerns – given that, amongst other reasons, the relationship between creditor and debtor was defined by the scope of the contract in the first place.[13] But he identified a number of additional insolvency-related policy concerns, chief of which was that the *Lasmos* approach represented an 'unprecedented fetter' on the court's discretion to make a winding-up order.[14] Its inflexibility might also be prejudicial to the interests of creditors, who could be deprived of all tangible remedies if the debtor's assets were depleted by the time arbitration was completed.[15] By contrast, the policy of protecting contractual bargains and respecting party autonomy was not engaged.[16] This was because the presentation of a winding-up petition would not normally fall within the scope of an arbitration clause, as the hearing of a winding-up petition did not involve the conclusive determination of any dispute as to the underlying debt.[17]

A series of first instance decisions by Linda Chan J adopt yet another approach. In *Re Hongkong Bai Yuan International Business Co Ltd*,[18] it was held that the debtor had to demonstrate a 'genuine dispute' on the debt which required determination by a tribunal before a petition would be dismissed, although the court would give considerable weight to the existence of an arbitration agreement.[19] In her Ladyship's view, this test was simply another expression of the requirement of a '*bona fide* dispute on substantial grounds' under the Established Approach.[20] *Lasmos*, although referred to, was not followed, and no mention was made of public policy.

11 *But Ka Chon* (above) [64]–[67]. *See also Re Sit Kwong Lam* [2019] 2 HKLRD 924 [26].
12 [2020] 2 HKLRD 423.
13 *Asia Master Logistics* (above) [118]–[126].
14 *Asia Master Logistics* (above) [96], [99].
15 *Asia Master Logistics* (above) [97].
16 *Asia Master Logistics* (above) [80].
17 *Asia Master Logistics* (above) [71]–[72].
18 [2022] HKCFI 960. *See also DCKD v. JPWL* [2022] 4 HKC 261 [35]; *Re Proman International Ltd* [2022] HKCFI 1350 [36].
19 *Hongkong Bai Yuan* (above) [28].
20 *Hongkong Bai Yuan* (above) [28].

2. *Guy Lam*

Guy Lam concerned a situation where the agreement giving rise to the petition debt was subject to an exclusive jurisdiction clause in favour of a foreign forum (the New York courts), rather than an arbitration clause. Nevertheless, its approach has been adopted in the context of arbitration clauses.

At first instance, Linda Chan J again applied the Established Approach, noting that the existence of an exclusive jurisdiction clause did not prevent the court from considering whether a creditor had standing to present a bankruptcy petition.[21] Unless the debtor could demonstrate a *bona fide* dispute on substantial grounds, they could not contend that there was a dispute to be litigated in the agreed forum so as to engage the exclusive jurisdiction clause.[22] Once the court's jurisdiction was established, the parties' contractual bargain (manifested in their agreement to submit to the exclusive jurisdiction of the New York courts) was merely a relevant factor and did not fetter the court's discretion to determine whether a debtor should be declared bankrupt.[23] As there was no *bona fide* dispute that the debt was owed, a bankruptcy order was made.[24]

The CA allowed the debtor's appeal. G Lam JA (delivering the majority judgment) held that a finding by the court that there was no *bona fide* dispute on substantial grounds was a determination of the dispute.[25] A petitioner who sought a winding-up order on the basis that there was no *bona fide* dispute of the debt would therefore be in breach of their obligation under an exclusive jurisdiction clause to not bring proceedings for determination in any other forum.[26] It was, furthermore, a 'strong policy' of the law to hold parties to their agreement (i.e., *pacta sunt servanda*), and an exclusive jurisdiction clause should prima facie be enforced absent strong reasons otherwise.[27] It would also be anomalous that a party bound by an exclusive jurisdiction clause in favour of a foreign forum could not bring an ordinary action for their claim in an alternative forum, but could bypass the clause by resorting to the more draconian measure of presenting a winding-up petition.[28]

The majority's approach was upheld by the CFA, but for slightly different reasons. French NPJ held that the court's exercise of discretion to decline

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21 *Re Guy Kwok-Hung Lam* [2021] HKCFI 2135 [49].
22 *Guy Lam* (HKCFI) (above) [49].
23 *Guy Lam* (HKCFI) (above) [47], [49].
24 *Guy Lam* (HKCFI) (above) [50], [88].
25 *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 [68].
26 *Guy Lam* (HKCA) (above) [63], [65], [70].
27 *Guy Lam* (HKCA) (above) [83].
28 *Guy Lam* (HKCA) (above) [84].

jurisdiction to determine the *bona fides* and substance of a dispute about a petition debt involved a 'multi-factorial' approach.[29] This was underpinned by the balancing of competing policy interests. On one hand are the public policy considerations inherent in the insolvency regime, particularly the need for an 'orderly system of fairness to all creditors'.[30] However, if the petition debt is disputed, these public policy considerations are not engaged to their full extent and the engagement of the insolvency process should be put on hold.[31] Rather, these considerations are only relevant to a lesser extent, to 'prevent a debtor from mounting a completely frivolous defence'.[32] On the other hand, if the parties have agreed to have their disputes under the agreement giving rise to the debt determined exclusively in another forum, the public policy interest in holding parties to their agreement is engaged.[33] Having set out these factors, French NPJ ultimately held that where an exclusive jurisdiction clause was involved, the traditional pre-*Lasmos* approach (what his Lordship termed the 'Established Approach') was inappropriate and the petitioner and the debtor should be held to their contract, absent countervailing factors such as the risk of an insolvency affecting third parties or a dispute that 'borders on the frivolous or abuse of process'.[34]

3. *Simplicity and Shandong*

Neither the CA nor the CFA in *Guy Lam* explicitly addressed the position of arbitration clauses. This was subsequently considered by the CA in the twin decisions of *Re Simplicity & Vogue Retailing (HK) Co Ltd*[35] and *Re Shandong Chenming Paper Holdings Ltd*.[36] In *Simplicity*, the agreement giving rise to the petition debt was subject to an arbitration clause. In *Shandong*, the debtor asserted a cross-claim which exceeded the petition debt (this being a potential defence to the petition) and which was subject to an arbitration clause.

The CA confirmed that the 'multi-factorial' approach in *Guy Lam* also applied to arbitration clauses (in *Simplicity*),[37] and also regardless of whether the dispute falling within the arbitration agreement was a dispute of the petition debt, a claim of set-off, or a cross-claim (in *Shandong*).[38] This was

29 *Guy Lam* (HKCFA) (above) [104].
30 *Guy Lam* (HKCFA) (above) [63].
31 *Guy Lam* (HKCFA) (above) [98].
32 *Guy Lam* (HKCFA) (above) [99].
33 *Guy Lam* (HKCFA) (above) [100]–[101].
34 *Guy Lam* (HKCFA) (above) [105].
35 [2024] 2 HKLRD 1064.
36 [2024] 2 HKLRD 1040.
37 *Simplicity* (HKCA) (above) [37]–[38].
38 *Shandong* (HKCA) (above) [51].

because the reasons articulated by G Lam JA applied equally in the context of arbitration clauses – indeed especially so, because the 'statutory protective framework' of arbitration meant there was a stronger case for upholding the parties' agreement that disputes should be resolved by arbitration.[39] The same approach applied to cross-claims because it would similarly be inconsistent with the parties' agreement for the court to enter into a detailed assessment of the merits to determine that there was no genuine and serious cross-claim, and the same public policy considerations in holding parties to their agreements would come into play.[40]

The third requirement in *Lasmos* (that the debtor had to take the steps required to commence arbitration and file an affirmation confirming this) was also retained in a watered-down form. Before dismissing a petition and holding the parties to their agreed dispute resolution mechanism, the court had to be satisfied of a genuine intention to arbitrate.[41] This was to deter a debtor from raising an arbitration clause as merely a tactical move.[42]

C. Unanswered questions

1. *To What Extent Will the Court Consider the Merits of the Underlying Dispute?*

In the cases discussed above, the basic question which the courts have had to grapple with – and the most important question for parties and their advisers – is when, and the extent to which the merits of a dispute as to the petition debt will be considered if that dispute is subject to an exclusive jurisdiction or arbitration clause. This is particularly so when it is commonly the case that the debtor simply has no defence, and will not be able to satisfy any requirement on the merits regardless of how low the threshold is set.

The ebbs and flows of Hong Kong judicial opinion over the years may be summarized as follows. Prior to *Lasmos*, and consistently with the general approach absent an exclusive jurisdiction or arbitration clause, it was up to the debtor to demonstrate a *bona fide* dispute for a petition to be dismissed in favour of arbitration or submission to a foreign forum. Then – under *Salford* and *Lasmos* – there would generally be no consideration of the merits so long as the dispute was subject to an exclusive jurisdiction or arbitration clause. A winding-up order could still be made in exceptional circumstances notwithstanding an applicable exclusive jurisdiction or arbitration clause, but these

39 *Simplicity* (HKCA) (above) [34], [37].
40 *Shandong* (HKCA) (above) [43]–[44].
41 *Simplicity* (HKCA) (above) [42].
42 *Simplicity* (HKCA) (above) [42].

were more to do with cases involving potential misappropriation or unlawful preferences.[43] Although Linda Chan J subsequently sought to resurrect the Established Approach in the form of the 'genuine dispute' test, this was soon replaced by the current approach as derived from *Guy Lam*, which held that parties should generally be held to their agreement as to the appropriate forum. At the same time, merits are clearly still relevant, even under *Guy Lam*, in light of the express reference to the countervailing factor of a dispute which 'borders on the frivolous or abuse of process'.

How different, then, are the traditional and current approaches? The obvious distinction is that they have different starting points. Under the Established Approach, a creditor is entitled to a winding-up order *ex debito justitiae* unless the debtor is able to show a *bona fide* dispute on substantial grounds.[44] Under the current approach, parties should be held to their exclusive jurisdiction or arbitration agreement and any winding-up petition should be dismissed unless the creditor is able to show that the debtor's defence 'borders on the frivolous or abuse of process'. The burden of proof is reversed.

Beyond that, debtors would be keen to point out that the standard of proof is also different, and there are plenty of 'soundbites' in the recent authorities that support this. Thus, once an underlying dispute falling within an exclusive jurisdiction or arbitration clause is shown, the threshold for dismissal of the petition is a 'high' one.[45] A lack of merit in the underlying dispute is insufficient to bring a case within the 'rare category' in which the court would reject the debtor's opposition despite the existence of an arbitration clause.[46] Rather, it must 'readily be shown without disputed evidence' that the debtor's defence 'borders on the frivolous or abuse of process'.[47] A 'plain and obvious' case is required, and the defence must be 'bound to fail'.[48] Apart from looking at undisputed evidence, the court should not inquire into the merits to determine whether there is a genuine and serious dispute, because to do so would be contrary to the parties' agreement.[49] There is a real difference between this inquiry and the Established Approach.

Creditors, by contrast, may seek to argue that there is little difference in practice between the traditional and current approaches, apart from a reversed burden of proof. Both approaches involve essentially the same

43 *Lasmos* (above) [31]–[32].
44 *Re Crigglestone Coal Co Ltd* [1902] 2 Ch. 327, 337.
45 *Simplicity* (HKCA) (above) [47].
46 *Re Shandong Chenming Paper Holdings Ltd* [2023] 4 HKLRD 359 [17].
47 *Simplicity* (HKCA) (above) [47].
48 *Re Mega Gold Holdings Ltd* [2024] HKCFI 2286 [69].
49 *Shandong* (HKCA) (above) [43].

inquiry into the merits, and so the existence of an exclusive jurisdiction or arbitration clause should not make any difference to the outcome. Such a contention (which is possible in principle, but far from straightforward) can be developed as follows.

The starting point is that in principle, some consideration of the merits is always warranted. As explained by Linda Chan J at first instance in *Simplicity*, it is inappropriate for the court to adopt a mechanistic approach and fetter its discretion by invariably refusing to consider the merits of any defence raised by the debtor whenever an exclusive jurisdiction or arbitration clause is applicable.[50] Where a debtor raises an alleged defence to the petition debt, the court should consider whether it can 'readily be shown to be wholly without merit' without 'detailed arguments' or considering 'disputed evidence'.[51] If so, the defence is one which 'borders on the frivolous' even under the *Guy Lam* approach.[52] This analysis was endorsed on appeal, with the CA noting that in such circumstances there would be a 'sufficient countervailing factor' militating against the exercise of discretion to decline jurisdiction.[53] This should be uncontroversial, but the question is to what extent this is different from the *bona fide* dispute threshold.

On one reading of *Guy Lam*, there has been no change in the relevant threshold – in other words, it remains the case that there must be a *bona fide* dispute for a petition to be dismissed even where the dispute is subject to an exclusive jurisdiction or arbitration clause. This argument is based on French NPJ's discussion of the 'Established Approach' in *Guy Lam*, where His Lordship reasoned as follows[54]:

> 98. Although the determination of whether the debt is *bona fide* disputed on substantial grounds is an element of the jurisdiction conferred on the court, it is a threshold question. If the debt is disputed in a petition, then the engagement of the bankruptcy process in that case is on hold – for the rationale, referred to in the appellant's public policy arguments, is not yet engaged.
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> 99. Those public policy considerations may be relevant in an attenuated form, to prevent a debtor from mounting a completely frivolous defence – an abuse of process designed to put off the evil day.

This passage explains why the requirement of a *bona fide* dispute should be satisfied in order for a petition to be dismissed under the Established Approach. Where there is a *bona fide* dispute on substantial grounds in

50 *Re Simplicity & Vogue Retailing Co Ltd* [2023] HKCFI 1443 [37].
51 *Simplicity* (HKCFI) (above) [37].
52 *Simplicity* (HKCFI) (above) [37].
53 *Simplicity* (HKCA) (above) [47].
54 *Guy Lam* (HKCFA) (above) [98]–[99].

relation to the petition debt, the insolvency process is put on hold and its underlying public policy considerations are not yet engaged, save to the extent that a debtor ought to be prevented from mounting a completely frivolous defence amounting to an abuse of process. Yet this is the same reason why the exception of a dispute that 'borders on the frivolous or abuse of process' was carved out under the current approach. The rationale for the requirement of a *bona fide* dispute is unaffected by the existence of an exclusive jurisdiction or arbitration clause. Such a clause does not entitle a debtor to mount frivolous defences, nor should it. It follows that the public policy interest in holding parties to their agreements, although relevant to the court's exercise of discretion, is only relevant to the prima facie position that the court will adopt – that is, the petition should be dismissed in favour of determination in the appropriate forum *unless* the petitioner shows that the debtor's defence is frivolous.[55] But although this is a plausible reading of *Guy Lam*, especially given that the threshold for a defence that 'borders on the frivolous or abuse of process' is never addressed in the judgment, it is difficult to square with French NPJ's endorsement of the majority's approach in the CA, a point which any well-advised debtor would undoubtedly raise.

Lastly, another potential point creditors could raise is that it is difficult to distinguish between the current threshold of a frivolous defence (in cases where an exclusive jurisdiction or arbitration clause is applicable) and the traditional standard of the lack of a *bona fide* dispute on substantial grounds (under the Established Approach), and it makes good sense to treat them as identical. As recently affirmed by the CA, 'substantial', in the context of the Established Approach, simply means 'having substance and not frivolous'.[56] Unless the distinction between the two standards is subsequently clarified by appellate authority, any suggestion that there is some subtle distinction between them will only result in potentially inconsistent decisions and an increasingly complex legal landscape.

2. *Sian Participation and its implications*

The Privy Council's decision in *Sian Participation* falls to be considered against this backdrop. *Sian Participation* was an appeal from the British Virgin Islands (BVI). The debtor failed to repay a loan advanced under a facility agreement, which contained an all-encompassing arbitration clause providing that 'any claim, dispute or difference of whatever nature arising under, out of or in connection with' the agreement would be referred to arbitration. The petitioner bought a winding-up petition. The debtor

55 *Guy Lam* (HKCFA) (above) [104]–[105].
56 *Yip Hai Tak v. Swiss Cosmeceutics (Asia) Ltd* [2024] HKCA 186 [21].

disputed that the debt was payable and sought to resist the petition on the basis of the arbitration clause.

The Privy Council reaffirmed the Established Approach (and upheld the first instance judge's order to put the debtor into liquidation), holding that the correct test for the court to apply in the exercise of its discretion to make a winding-up order where the debt was subject to an exclusive jurisdiction or arbitration clause was whether the debt was disputed on genuine and substantial grounds.[57] It also held that *Salford* had been wrongly decided and should no longer be followed in England and Wales.[58]

In so holding, the Privy Council referred to *But Ka Chon* and endorsed the reasoning in *Asia Master Logistics*, noting that a winding-up petition did not involve any resolution or determination of the petitioner's claim to the relevant debt, and therefore did not breach the negative obligation in a typical arbitration clause not to have disputes resolved by any court process.[59] Nor would the policies undermining arbitration legislation be offended by ordering a winding-up where the petitioner's debt was not genuinely disputed: party autonomy and *pacta sunt servanda* would not be undermined because seeking liquidation was not something the petitioner had promised not to do, and to require the petitioner to resort to arbitration as a precondition of liquidation where there was no genuine or substantial dispute would simply add delay and expense for no good reason.[60]

What, then, for Hong Kong law? On the Privy Council's analysis, *Lasmos* was wrongly reasoned, for – as the Privy Council rightly noted – it essentially applied the approach in *Salford.*[61] So too is the CA decision in *Guy Lam.* By contrast, Linda Chan J's first instance decisions in *Hongkong Bai Yuan* and *Guy Lam* were correctly decided.

The position is less clear in relation to the CFA decision in *Guy Lam*, as well as *Simplicity* and *Shandong*, given the ambiguities in the current law as discussed above. The Privy Council observed that these cases adopted 'substantially the same approach' as in *Lasmos*, the implicit suggestion being that they were wrongly reasoned as well.[62] But this suggestion requires pause for thought. For the reasons explained above, whether *Lasmos* remains good law in Hong Kong is an open question. Indeed, the CFA in *Guy Lam* made no

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57 *Sian Participation* (above) [122]–[123].

58 *Sian Participation* (above) [124]–[125].

59 *Sian Participation* (above) [83], [88]–[89], [98].

60 *Sian Participation* (above) [92]. Though not wrongly decided, as the petition would also have been dismissed on the Established Approach because there was a *bona fide* dispute: *Lasmos* (above) [40].

61 *Sian Participation* (above) [81].

62 *Sian Participation* (above) [81], [84].

reference to *Salford* or *Lasmos* in its own analysis of the relevant principles. Its recognition of the 'frivolous or abuse of process' exception is also a departure from *Lasmos*. The reality is that *Lasmos* represented the high-water mark of the Hong Kong courts' willingness to exercise its discretion to dismiss a winding-up petition in favour of arbitration. Since then, the courts have rowed back from that approach, though the precise extent to which they have done so remains somewhat ambiguous.

D. The way forward

Critical questions remain to be answered. In particular, how might the Hong Kong courts react to *Sian Participation* and develop the law on this question going forward, and what arguments might parties run in the Hong Kong courts?

By reverting to the Established Approach, with the onus being on the debtor to show the existence of a *bona fide* dispute irrespective of any exclusive jurisdiction or arbitration clause, *Sian Participation* makes it more difficult for debtors – who are often already in financial difficulties – to resist winding-up petitions. But debtors would make two obvious points. The first is that the traditional and current approaches involve different tests, with the current approach involving a less stringent examination of the merits of the underlying dispute.[63] The second is that Privy Council decisions are not binding in Hong Kong, not least on a point of law decided differently by the appellate courts. The Court of First Instance remains bound by the CFA (*Guy Lam*) insofar as exclusive jurisdiction clauses are concerned, and by the CA (*Simplicity*) insofar as arbitration clauses are concerned. Any change in the law will therefore require a trip to the CFA. Indeed, both points were accepted at first instance in *Re Mega Gold Holdings Ltd*, the first case to consider the implications of *Sian Participation* in Hong Kong.[64] For now, therefore, the courts are set on a debtor-friendly, pro-arbitration approach.

It also follows that creditors will face an uphill battle if they want *Sian Participation* to be adopted in Hong Kong – i.e., for the onus to once again be on the debtor to show a *bona fide* dispute in order for a petition to be dismissed. The CFA may be justifiably reluctant to hold that *Guy Lam* was wrongly decided so as to upend the law on a point that was only recently settled by ultimate appellate authority.

Any argument to persuade the CFA to adopt *Sian Participation* would likely have to rest on the controversial notion that the traditional and

63 *See* s. 3.1 above.
64 [2024] HKCFI 2286 [70].

current approaches are fundamentally similar and only differ in respect of the burden of proof,[65] such that adoption of *Sian Participation* does not necessitate a wholesale departure from *Guy Lam* – a notion that has already been rejected at first instance.[66] This change might then be justified on the basis that a uniform approach irrespective of the applicability of an exclusive jurisdiction or arbitration clause would reduce arguments as to whether such a clause is engaged on particular facts. This would disincentivize clearly insolvent debtors from attempting to generate unnecessary litigation. In turn, this prevents the debtor's estate from being depleted, protects the interests of creditors and shareholders, and promotes efficient use of judicial resources in the interests of the public as a whole.

In support of an argument that *Sian Participation* should be adopted, creditors might also point out that it is not 'anti-arbitration' for two reasons. The first is identified in *Sian Participation* itself. A potential creditor is unlikely to agree to refrain from presenting a winding-up petition where there is no genuine or substantial dispute as to the debt.[67] And where there is such a dispute, any petition will simply be dismissed and arbitration will prevail as the agreed means of dispute resolution.[68] The second is that even if the debtor cannot show a genuine dispute on substantial grounds, the court's discretion, even under the Established Approach, is not invariably exercised in favour of granting a winding-up order.[69] The existence of an arbitration clause and other relevant circumstances will still be given due weight. The court might nevertheless grant a short adjournment to enable the debtor to commence arbitration and gather sufficient evidence.[70] That the parties have commenced arbitration is also a factor in favour of a stay pending the outcome of the arbitration.[71]

E. Conclusion

Whether *Sian Participation* will be followed in Hong Kong remains to be seen. On the conventional understanding of *Guy Lam* as interpreted in subsequent authorities, Hong Kong and England adopt substantially different

65 *See* s. 3.1 above.
66 *Mega Gold* (above) [70].
67 *Sian Participation* (above) [93].
68 *Sian Participation* (above) [93].
69 *But Ka Chon* (above) [71].
70 *Hollmet AG v. Meridian Success Metal Supplies Ltd* [1997] HKLRD 828, 832B–D.
71 *Jinpeng Group Ltd v. Peak Hotels and Resorts Ltd* (BVIHCMAP 2014/0025 and 2015/0003, 8 Dec. 2015) [50].

approaches where a petition debt is subject to an arbitration clause – with Hong Kong courts being more inclined to dismiss the petition in favour of arbitration in accordance with the parties' agreement (without any detailed assessment of the merits) unless it is obvious that the underlying dispute is one bordering on being frivolous or an abuse of process. If so, a wholesale reversal of the current approach is unlikely in the near future, given that it was only recently settled by the CFA.

But this is not the only possible view. A plausible (though controversial) argument can be made to the effect that the traditional and current approaches are fundamentally similar and involve consideration of the merits to the same degree, and so the applicability of an arbitration or exclusive jurisdiction clause to the petition debt makes little difference to whether a winding-up order should be granted. This is because it might be argued that the requirement of a *bona fide* dispute for a petition to be dismissed (under the Established Approach) and the requirement of a frivolous defence for a winding-up order to be granted (under the current approach) are essentially mirror images of each other that differ only in respect of the burden of proof. Such an argument would suggest that Hong Kong law and English law are not all that different, and would open the door for the adoption of *Sian Participation* in Hong Kong.