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Impact of Arbitration Clause on Winding up Petition: A Comparative Re-collection in Hong Kong, England and Singapore

Mingjie (Anffy) Xiao (University of Hong Kong) · Tuesday, July 30th, 2024

The impact of arbitration clauses on winding-up proceedings (i.e., if both are present, when and how can the former get prioritized over the latter) has long been an issue with diversified practices throughout various jurisdictions. With the judgment by the Hong Kong Court of Appeal ("HKCA") in *Re Simplicity & Vogue Retailing (HK) Co Limited* [2024] HKCA 299 ("*Simplicity CA*") and the UK Privy Council ("UKPC") in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd*, [2024] UKPC 16 ("*Sian*"), the positions across major common law jurisdictions on this topic have witnessed significant shifts.

This post will discuss the jurisprudence of Hong Kong, with some discussion of English and Singaporean laws.

Simplicity CA and Hong Kong Laws

Simplicity CA: A Summary

Simplicity CA dealt with an appeal regarding the conflict between a winding-up petition and arbitration clauses contained in the bond and guarantee instruments. The HKCA pronounced that arbitration clauses should generally be given priority over winding-up petitions to the same effect as foreign Exclusive Jurisdictional Clauses ("EJCs")[1], following "by analogy" the renowned principle in *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 ("*Guy Lam*"). Emphasizing Hong Kong law's "protective of arbitration" attitude, the HKCA concluded that parties may only be untied from arbitration clauses when "strong reasons", "wholly exceptional circumstances" or "countervailing factors" that "border on the frivolous or abuse of process" occur (Simplicity CA, [37], [39]).

Similar to all other Hong Kong precedents, the HKCA also stressed its discretionary power, where, by adopting a "multi-factorial" approach, it would weigh "a range of considerations" (though not specified) required by circumstances of the case before it could grant, stay, or dismiss winding-up orders. Such flexible stance embraces factors crystalized by other case law, including assessing the parties' "genuine intention to arbitrate" (Simplicity CA, [39], [40]-[42]), as set out in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd.* [2018] HKCFI 426 ("*Lasmos*").

Looking at the whole picture, *Simplicity CA* may be deemed to have restated and redirected the various yet separated practices under Hong Kong law since *Lasmos*.[2)]

Hong Kong Law: Fragmentation and Re-unity

The fragmentation of Hong Kong law regarding this topic is widely observed.[3)] Starting from *Lasmos*, the Court of First Instance ("HKCFI") put forth a three-tier cumulative test: (a) the debt relied on by the petitioner is disputed; (b) the debt can be covered by the arbitration clause in that case; and (c) the company took steps to commence the arbitration thereunder. Petitions that satisfy these three tiers would either be dismissed or stayed.

Lasmos was neither approved nor denounced in *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85 or *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] HKCA 1220, as the HKCA, in its *obiters*, refused to address this question (*But Ka Chon,* [49], [73]; *Sit Kwong Lam*, [35]). However, the HKCA did emphasize its discretionary power to give a stay or dismissal in favor of arbitration (*But Ka Chon,* [49], citing *Salford Estates (No. 2) Limited v Altomart Limited* [2014] EWCA 575 Civ, [34], [38], [39]). To this end, the court would no longer only look for *bona fide* disputes but would also give "considerable weight" to the arbitration clause (*But Ka Chon,* [70]; *Sit Kwong Lam*, [39]). Further, though only in *obiter*, the "genuine intention to arbitrate" (the third prong of *Lasmos*) might veto the winding-up petition (*But Ka Chon,* [49], [55]*; Sit Kwong Lam,* [37]).

Uncertainty was partially clarified in *Guy Lam*, which dealt with the set-aside application against the bankruptcy order involving EJCs. The Hong Kong Court of Final Appeal highlighted that despite being discretionary, the ECJs would generally trump over winding-up petitions, unless the petitions would affect third parties' rights or relying on the EJCs would constitute an abuse of due process (*Guy Lam*, [92]-[93], [105]).

A major deviation from *Guy Lam* came from the HKCFI later in *Re Simplicity & Vogue Retailing (HK) Co., Limited* [2023] HKCFI 1443 ("*Simplicity CFI"*) which stated that *Guy Lam*'s reasoning was not applicable in cases involving arbitration clauses (*Simplicity CFI*, [35]). This was finally shifted back in *Simplicity CA*.

With all these developments, one can see the fragmentation in Hong Kong law until now.

On the one hand, it is a relief that after *Simplicity CA*, it could be generally concluded that an arbitration clause will be given priority with limited exceptions. This interpretation finally aligns with the positions taken by other major common law jurisdictions discussed below, which repronounced coherent guidelines that envisage Hong Kong's pro-arbitration approach.

On the other hand, controversies have not vanished once and for all. First, determining "exceptional circumstances" leaves the courts with considerable, if not excessive, discretion. The identification of disputes "border[ing] on the frivolous or abuse of process" still calls for further tests, which was not actually touched on in *Simplicity CA* as the dispute was considered not established at all (*Simplicity CA*, [45]). Second, as the court preserves the power to block the "obviously insubstantial" disputes' access to arbitration (*Simplicity CA*, [45]), the court may, by reviewing substantially and "filtering" disputes at their own discretion, effectively (and oddly) put

themselves in a "first-instance-tribunal" status while there is an arbitration agreement. Topped up with the unclear boundary of "insubstantial disputes", such a test avails potential petitioners hopes (if not encouragement) that the arbitration agreement may be bypassed if they deploy tactful approaches in leading the court in that direction. This would be contrary to the very purpose of the entire regime. Further clarification from the Hong Kong court is still necessary.

England and Wales

The English law on this topic has undergone a major change recently as the decision of the UKPC in *Sian* overturned the up-to-then authoritative precedent *Salford Estates (No. 2) Limited v Altomart Limited* [2014] EWCA 1575 Civ ("*Salford*").

In *Salford*, a tiered test was adopted (which was later considered in Singapore law) that a stay or dismissal of petitions could be granted if an arbitration clause exists and the disputed debt falls therein. Examinations on substantial grounds were not needed (*Salford*, [40]-[41]).

In *Sian*, by expressly denouncing *Salford*, the UKPC stated that the arbitration will only be referred to when there is a "genuine and substantial" disputed debt falling within the arbitration agreement (*Sian*, [99]). The UKPC opined that a winding-up petition *per se* was not included in the parties' "negative obligation" for "not resolving disputes in court" under the arbitration agreement, which is then outside the reach of the pro-arbitration policy. Additionally, setting such a threshold on a disputed debt is not "anti-arbitration" as it neither impedes arbitration by securing potential creditors' resort to liquidation for debts without substantial dispute, nor will it create a loophole for bypassing the arbitration agreement as winding-up petitions based on substantially disputed debts may trigger indemnity cost on the abuse of process (*Sian,* [93], [97]).

Apart from stripping winding up petitions from arbitration policy-wise, looking closely, the approach in *Sian*, to some extent, shared a similar thought with *Simplicity CFI*, which refused to be "mechanistic" to favor arbitration for disputes that were "wholly without merits" (*Simplicity CFI*, [37]). Both seemed to flexibly exercise their discretion to prevent insubstantial disputes from causing delay, trouble, or expenses (*Sian*, [93], [97]).

However, their standpoints may differ substantially – while the *Sian* approach calls for a positive establishment of debt that amounts to be "genuine and substantial", the priority of arbitration seems to be *presumed* under *Simplicity CA* while a high-bar exception (i.e., "frivolous" or "obviously insubstantial") was imposed on any counterarguments. Such drastic comparison may affect not only the threshold of the test but also the allocation of the burden of proof between parties, which may considerably tip the balance on the outcome even under the same set of facts.

Singapore

Compared to Hong Kong and English law, Singapore's practices are comparatively consistent and straightforward. The leading case is *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*") in 2020, which was further confirmed by *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGHC 159 ("*Founder Group*") last year. In *AnAn*, the Court of Appeal of Singapore decided to follow the approaches of

English law in granting priority to arbitrations over winding-up petitions, which formed its three-step test:

- First, there is a *prima facie* valid arbitration agreement between the parties;
- Second, the dispute *prima facie* falls within the scope of the arbitration agreement;
- Third, as surrounding factors, the defendant (who seeks to block the winding-up petition) did not abuse the court process (*AnAn*, [56], [99]-[100]).

Dismissal would be granted if the three tests are satisfied, while a stay would be granted if either (a) concerns about the solvency of the debtor arise, or (b) the claimant can prove that the defendant has raised no triable issues (*AnAn*, [111]).

The *Anan* approach, as observed by the Singaporean High Court in *Founder Group*, is deemed as a defendant-friendly version as the passing of a "prima facie" threshold can block the winding-up order.[4] Notably, the Singapore and Hong Kong laws demonstrate certain similarities, although the former appears to follow a more consistent approach. First, the tests in *AnAn* are effectively similar to those under *Lasmos*, and it also shares a position with *Simplicity CA* in requiring a genuine intention to arbitrate by taking steps to commence arbitration, as confirmed in *Founder Group*. Second, it seems hard to conclude that, simply by adding "prima facie", the threshold in *Anan* is substantially lower than those under Hong Kong law. In *AnAn*, the *prima facie* validity of the arbitration clause was presumed under the principle of separability, which functions similarly under Hong Kong law (See e.g., *Chee Cheung Hing & Co Ltd v Zhong Rong International (Group) Ltd* (HCA 1454/2015), [17]). More importantly, as the *prima facie* test played little role in *AnAn* due to the catch-all wording of its arbitration clause (i.e., "all disputes"), the boundary of the test is still uncertain. Further practices are needed to compare the approaches of the two jurisdictions.

Conclusion

Though with no united formula, by observing changes across major common law jurisdictions, one can still see an increasing trend emphasizing the proactive discretion of the courts – arbitration clauses may no longer be a façade for ill-founded disputes on debt confronting legitimate winding-up petitions. This sheds light for the current practitioners that some common elements formulating the factual matrix may deserve greater attention – (a) the existence of an arbitration agreement that (b) covers (at least, prima facie) good arguable disputed debts with (c) the intention to arbitrate reflected.

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References

?1 EJCs refer to parties' agreement to submit disputes to the exclusive jurisdiction of a foreign court.

?2 Halsbury's Laws of Hong Kong, [95.1087] Who May Not Petition, FN 7.

?3 This is even noticed by the Singapore court in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158; in *Simplicity CA*, the HKCA also recognized that there "has been a divergence of views" in HKCFI (*Simplicity CA*, [33]).

?4 *Founder Group*, [41]: "The court need only be satisfied prima facie that the arbitration agreement is valid and prima facie that it encompasses the dispute".

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