Trinity Term
[2024] UKPC 16
Privy Council Appeal No 55 of 2023

JUDGMENT

Sian Participation Corp (In Liquidation) (Appellant) *v* Halimeda International Ltd (Respondent) (Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed
Lord Lloyd-Jones
Lord Briggs
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON
19 June 2024

Heard on 19 March 2024

Appellant
James Morgan KC
Paul Fradley
Phillip Kite
André McKenzie
Jhneil Stewart
(Instructed by Harney Westwood & Riegels LLP (London))

Respondent
Paul Lowenstein KC
Andrew Willins
Rupert Hamilton
Michal Hain
(Instructed by Candey (London))

LORD BRIGGS AND LORD HAMBLEN:

1. Introduction

1. This appeal is about the dividing line between two areas of public policy in the British Virgin Islands ("the BVI"), namely insolvency and arbitration. Put in the broadest terms, it is in the public interest that there should be a relatively simple means whereby a company which is insolvent, because it is unable to pay its debts in full as they fall due, should (unless it can be reconstructed) be placed without undue delay into an insolvency process whereby its assets are divided fairly (mainly pari passu) between all its creditors. At the same time there is a public policy that those who agree together to resolve their disputes by arbitration should be held to that agreement without interference from the courts.

2. It is at first sight not easy to see how those two aspects of public policy could ever conflict. This is because the court does not generally allow a creditor to seek the winding up of a company on the basis of a disputed debt. The petitioning creditor must generally have an undisputed debt if its non-payment is to constitute the requisite evidence that the company is insolvent. If there is no dispute as to the debt, then there is no dispute to attract the policy that those who agree to resolve their disputes by arbitration should arbitrate.

3. The simplicity of this picture has unfortunately been obscured by disagreement between the courts of a number of countries, which apply the same two public policies, as to what really amounts to a dispute about a debt. Leaving aside arbitration for a moment, it is virtually common ground in all those countries that whether a debt is disputed, so as to remove it from the class of unpaid debts sufficient to ground a winding up petition, depends upon whether it is genuinely disputed by the company on substantial grounds. But where a dispute about a relevant debt is covered by an agreement to arbitrate then, generally speaking, if the creditor wishes to pursue a claim for payment he must arbitrate rather than make a claim in court, if the debt is denied or even not admitted, leaving any issue about the genuineness of grounds for dispute to the arbitrator, rather than to a judge.

4. Some countries have adopted that much wider definition of a disputed debt as the test for whether the creditor should be permitted to petition for the debtor company to be wound up. If the debt is merely not admitted by the company, without that non-admission having to be either genuine, or based upon any grounds at all, substantial or otherwise, the creditor will be likely to have its winding up petition dismissed, or at least stayed pending arbitration. Other countries have adopted a position somewhere in between those two alternatives.

5. Thus far, the courts of the BVI have set their face against the adoption of this wider definition of disputed debt as the test for whether the creditor should be permitted to apply for the appointment of a liquidator over the debtor company (which has the same effect as an order for winding up in England), preferring to adhere to the requirement for the debt to be genuinely disputed on substantial grounds before a creditor's application can be dismissed or stayed because of an agreement to arbitrate: see *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 (8 December 2015) ("*Jinpeng*"). By contrast the courts of England and Wales have adopted the wider definition as the applicable test where a supposed dispute about the debt is raised between parties to an arbitration agreement. This is the practical result of the decision of the Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575; [2015] Ch 589 ("*Salford Estates*").

6. This appeal is about a very large unpaid debt incurred by the appellant company which falls squarely into the gap between those two definitions. As a result of the decisions by the courts below it has been established beyond further challenge that the debt, although denied by the company, is not genuinely disputed on substantial grounds. The contract creating the debt included a widely drawn arbitration clause. Nonetheless the result thus far is that the debt was successfully relied upon in a petition for the compulsory winding up of the appellant, both at first instance and upon appeal.

7. The appellant says that the courts of the BVI should have followed *Salford Estates* and dismissed or stayed the application to appoint a liquidator, requiring the respondent first to establish its debt by an arbitration award. It is submitted that the BVI courts should have followed *Salford Estates*, because there is no difference between England and the BVI, either in the two public policies or in the legislation by which they are implemented, to justify taking a different approach to what is, in substance, a common problem. In response the respondent says that (i) the arbitration-based defence to the liquidation application was properly refused on case management grounds, (ii) even applying *Salford Estates* it would still have succeeded, (iii) the BVI is different from England and Wales, and entitled to pursue its own different approach, and (iv) that in any event *Salford Estates* was wrongly decided.

8. For reasons which follow, the Board has not been persuaded that any of the respondent's points (i) to (iii) offer a satisfactory solution to this appeal. The result is that although the Board is of course sitting as the final court of appeal of the BVI, not England and Wales, it is necessary to resolve the question of principle as to whether *Salford Estates* was wrongly decided. The Board has concluded that it was, and that it was therefore correct for the courts of the BVI not to follow it. Its reasons for that conclusion occupy most of the rest of this opinion.

9. The Board has also been invited to rule upon the question whether the appellant had an appeal to the Board as of right. That is, in the event, an academic question

because, after the Court of Appeal refused leave to appeal as of right, the Board granted permission to appeal on the basis that it raised an arguable point of law of great general or public importance. Nonetheless the Board acceded to the invitation to rule upon the question, and has concluded that, for the reasons which follow, the appellant did not enjoy an appeal as of right.

2. The facts and procedural history

10. The respondent is a wholly owned subsidiary of Far-Eastern Shipping Co PJSC ("FESCO"). FESCO is the parent company of a very substantial Russian transportation and logistics group with operations in ports, rail, logistics, and shipping.

11. The appellant forms part of the corporate structure through which 49.9997% of the shares in FESCO were held ("the SGS Investment Branch"). The ultimate beneficial owner of the majority shareholding in the SGS Investment Branch is Mr Ziyavudin Magomedov ("Mr Magomedov").

12. Pursuant to a Facility Agreement dated 7 December 2012 ("the Facility Agreement"), the respondent advanced a term loan of USD 140m to the appellant.

13. The Facility Agreement includes at clause 14.1 an arbitration agreement which provides that "any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement" shall be referred to arbitration at the London Court of International Arbitration or LCIA ("the Arbitration Agreement").

14. The loan has not been repaid. On 12 February 2020, the respondent sent a letter to the appellant demanding payment of the debt ("the Debt"). As at 15 December 2020, the total sum claimed was USD 226,365,598.31.

15. The appellant disputes that the Debt is due and payable on the basis of a cross-claim and/or set-off. The appellant alleges that, beginning in late 2019 or early 2020, a "corporate raid" backed and instigated by the Russian State has been mounted against the SGS Investment Branch targeting its shareholding in FESCO. The SGS Investment Branch alleges that the respondent has been an active participant in the corporate raid. The respondent denies the existence of the corporate raid and its involvement in it.

16. On 29 September 2020, the respondent applied to have liquidators appointed in respect of the appellant on the basis that it was both cash flow and balance sheet insolvent ("the liquidation application").

17. The liquidation application was heard by Wallbank J on 20-21 April and 13 May 2021. On 19 May 2021, Wallbank J delivered an oral judgment. He held that the appellant had failed to show that the Debt was disputed on genuine and substantial grounds or that there were other reasons why the liquidation application ought to be dismissed or stayed. By an order dated 19 May 2021, he appointed liquidators and ordered the appellant to be put into liquidation. The appellant appealed against that decision. That appeal was dismissed by the Court of Appeal (Pereira CJ, Webster and Henry JJA) in a judgment given on 11 November 2022.

18. The Court of Appeal dismissed the appeal against Wallbank J's finding that there was no prima facie case of a cross-claim. This is not the subject of any challenge on this appeal. The appellant did not argue before the Court of Appeal that the Debt itself (even taking into account the cross-claim issue) was disputed on genuine and substantial grounds.

19. On 2 December 2022, the appellant applied to the Court of Appeal for leave to appeal as of right under section 3(1)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 (the "1967 Order") and leave to appeal under section 3(2)(a) of the 1967 Order, on the basis that there was a point of law of great general or public importance. Under section 3(1)(a) of the 1967 Order an appeal lies as of right from a decision of the BVI Court of Appeal if: (a) the decision is a final decision, and (b) the appeal "involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards".

20. The application for leave to appeal to His Majesty in Council was dismissed by Michel, Price-Findlay and Farara JJA on 24 April 2023.

21. On 15 November 2023, the Board gave permission to appeal, stating that the parties should also address the issue as to whether the appellant was entitled to appeal as of right.

22. The matters said by the appellant to constitute the alleged corporate raid have been the subject of other proceedings.

23. On 28 January 2021, proceedings raising the allegation were issued in the BVI High Court ("the BVI Proceedings"). Those proceedings were ongoing at the time of the hearing before Wallbank J at first instance and at the time of the appeal hearing before the Court of Appeal and were relied upon as giving rise to a cross-claim that exceeded the amount of the Debt.

24. On 20 July 2023, a claim was commenced in the English High Court in the tort of unlawful means conspiracy, further or alternatively the tort of conspiracy to injure, and in the further alternative a claim under Russian law for causing harm unlawfully ("the English Proceedings"). The respondent is a defendant to the English Proceedings and the appellant is a claimant, although the appellant does not itself advance a claim against the respondent in the English Proceedings.

25. On 24 July 2023, the BVI Proceedings were discontinued.

3. The Issues

26. The agreed issues for determination on the appeal are:

(1) As a matter of BVI law, what is the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross-claim (notwithstanding that dispute is not on genuine and substantial grounds)?

(2) Was the relevant test met or should the matter be remitted to determine whether this was the case?

(3) Did Wallbank J conclude that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late and, if he did so find, was he wrong to do so?

(4) Does the appeal fall within section 3(1)(a) of the 1967 Order? In particular, does "the appeal [involve] directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards"?

4. Issue (1): as a matter of BVI law, what is the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross-claim (notwithstanding that dispute is not on genuine and substantial grounds)?

(1) The relevant public policies

(i) Insolvency

27. The BVI inherited its insolvency jurisdiction from the United Kingdom. Its jurisdiction to bring about the liquidation of a company on the ground of insolvency is now to be found in the Insolvency Act 2003 ("the 2003 Act"). Section 162(1) provides that the court may appoint a liquidator of a company if:

> "(a) the company is insolvent".

The other two grounds are that it is just and equitable, or in the public interest, that a liquidator should be appointed. Although section 162(2) (now) lists some eight classes of person who may apply under subsection (1) for the appointment of a liquidator, overwhelmingly the main class of applicant under the insolvency ground is that of creditor. For that reason, petitions for winding up and liquidation applications on the insolvency ground are generally called creditors' petitions or applications, both in the UK and in the BVI.

28. A creditor is defined by section 9 of the 2003 Act as a person who has a claim against the debtor which would be an admissible claim in the debtor's liquidation (if a company). Insolvency is defined in section 8 of the 2003 Act as including both balance sheet and commercial insolvency, the latter meaning an inability of the company to pay its debts as they fall due (see section 8(1)(c)(ii)). A company is by section 8(1)(a) deemed to be insolvent if it fails to comply with the requirements of a statutory demand which has not been set aside under section 157 of the 2003 Act. Section 157(1)(a) provides that the court must set aside a statutory demand if (inter alia) it is satisfied that there is a substantial dispute as to whether the debt is owing or due.

29. Section 167 of the 2003 Act gives the court a range of discretionary powers on the hearing of a liquidation application, including making the appointment, adjourning or dismissing the application (even if a ground for appointment has been proved) and making such interim or other order as it thinks fit. Section 168 requires a liquidation application to be determined within six months after filing, subject to a power to extend. An application which has been neither determined nor extended is deemed to have been dismissed.

30. The UK's Insolvency Act 1986 achieves substantially the same outcomes in relation to a creditor's petition, albeit by the use of slightly different language and structure: see in particular sections 122 (grounds for winding up); 123 (inability to pay debts); 124 (application for winding up) and 125 (powers of court on hearing of petition). Nothing in the differences between the two statutory structures points to any difference in underlying policy, and the English authorities about the essential nature

and effect of the winding up petition are in the Board's view in principle fully applicable to the equivalent process in the BVI.

31. In both jurisdictions the date of the presentation of the winding-up petition (or, in the BVI the issue of the liquidation application) plays an important part in the liquidation process that follows, as marking the date of the commencement of the liquidation with important statutory consequences for the admissibility of debts and claims and the setting aside of transactions.

32. For present purposes the following aspects of the nature and effect of the process for the initiation of an insolvent liquidation may be said to be common to both the UK and the BVI. First and foremost it is a process which exists for the benefit of a class rather than just the individual applicant (or petitioner). The liquidation that it triggers is a statutory process designed and evolved over more than a century to bring about an efficient realisation of the company's assets and their fair distribution among all its stakeholders, generally pari passu as between unsecured creditors. For that purpose it is accompanied by a stay of individual claims, so as to avoid a rush to judgment or a race by competing creditors to seize or attach assets for payment of their own debts. For the same reason, payment in full of an applicant creditor's debt by the company while the application (or petition) is pending does not necessarily bring it to an end. The court may permit another unpaid creditor to be substituted as applicant or petitioner: see section 166 of the 2003 Act. Nor is it a private procedure. The rules provide for an application or petition to be advertised before it is heard, so that any stakeholder in the company can attend to support or oppose it: see section 165 of the 2003 Act.

33. Secondly the process of seeking and obtaining an order for the appointment of a liquidator (or a winding up order in the UK) does not require or involve any pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum. Thus for example the court's order creates no res judicata as between the applicant and the company: see *In re Vitoria* [1894] 2 QB 387, p 392 (a bankruptcy case, but reflecting the applicable general principle). The successful outcome of a winding up petition is not a judgment which can be executed: *In re A Company (No 000928 of 1991), Ex p City Electrical Factors* Ltd [1991] BCLC 514, 517. The liquidator is free to reject the applicant's proof of debt, in part or in whole: *In re Menastar Finance Ltd* [2002] EWHC 2610 (Ch); [2003] BCC 404, paras 44 to 45. If the debt is disputed by the liquidator that dispute may be referred to court or to arbitration: *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; (1990) 169 CLR 332, pp 342–343.

34. Thirdly the court proceeds to appoint a liquidator (or to make a winding up order) only on a provisional assumption that the company is insolvent, which may turn out to be untrue, without that invalidating the liquidation process. Probably the most spectacular recent example of such an outcome is the distributing administration (which is akin to a modern form of liquidation) of Lehman Brothers International Europe Ltd,

which turned out to have a substantial net surplus for distribution to members after all its creditors had been paid in full, with interest.

35. Fourthly, and in sharp contrast with the role of the court (or arbitrator) in proceedings for the enforcement of a debt, the court's powers on the hearing of a liquidation application (or winding up petition) are discretionary. That is not to say that the court's discretion is entirely unfettered. In principle, a petitioning creditor with an unpaid debt which is not genuinely disputed on substantial grounds is often described as being in substance entitled to an order, as a statutory right, ex debito justitiae: see *Bryanston Finance Ltd v de Vries* [1976] Ch 63, 78; *In re Crigglestone Coal Co Ltd* [1906] 2 Ch 327, p 337; and *In re Southard & Co Ltd* [1979] 1 WLR 1198, 1203, approved in *Ebbvale Ltd v Hosking* [2013] UKPC 1, para 25.

(ii) Arbitration

(a) The legislative background

36. Arbitration in the BVI is governed by the Arbitration Act 2013 ("the Arbitration Act") which came into force on 1 October 2014.

37. The Arbitration Act is heavily based on the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The Arbitration Act primarily applies to arbitrations where the place of arbitration is in the BVI. However, sections 18, 19, 43, 58 and 59 apply where the place of arbitration is outside the BVI (see section 6(3)).

38. Section 18 gives direct effect to article 8 of the Model Law which provides:

> "*Article 8. Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

39. Under section 18(4) where "the Court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action."

40. Article 8 of the Model Law is itself based on article II(3) of the New York Convention 1958 which provides:

> "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

41. The BVI acceded to the New York Convention on 25 May 2014.

42. In England and Wales the equivalent of section 18 of the Arbitration Act is section 9 of the Arbitration Act 1996 ("1996 Act"). It provides, so far as is relevant, as follows:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) …
>
> (3) …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

43. As both article 8 of the Model Law and article II(3) of the New York Convention recognise, arbitration agreements have both positive and negative aspects. The positive aspect is an obligation to arbitrate (rather than litigate) matters which fall within the arbitration agreement. The negative aspect is an obligation not to commence proceedings in respect of such matters in the courts or any other legal forum. As Lord Mance stated in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 WLR 1889, para 1:

> "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".

(b) The approach to the interpretation of section 18

44. The approach to the interpretation of provisions such as section 18 of the Arbitration Act was addressed by the Board in *FamilyMart China Holding Co Ltd v Ting Chuan* [2023] UKPC 33; [2024] Bus LR 190 ("*FamilyMart*") at para 31 in an advice delivered by Lord Hodge. That case was concerned with the equivalent Cayman Islands legislation, but what was there said may be adapted to apply to the Arbitration Act as follows:

> "31. Many countries which are contracting states to the New York Convention have implemented provisions like [section 18 of the Arbitration Act] in accordance with their obligations under the New York Convention. In *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2023] Bus LR 1305 ('*Gol Linhas*') the Board, in a judgment delivered by Lord Hamblen and Lord Leggatt, addressed the correct approach to the interpretation of [such provisions]. In para 21 of its judgment the Board referred to the judgment of the UK Supreme Court in *Enka Insaat* at para 126 in which it observed that more than 160 states had signed the New York Convention and stated:
>
> > 'The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states.' (Citations omitted)

> The Board went on to observe (para 74) that the meaning of a [BVI] statute is a question to be decided by applying the law of the [BVI] but that the international origin of the provision necessitated a particular approach to its interpretation. The Board stated (para 75):
>
> > 'As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350, in the interests of uniformity the words should not be given a local interpretation controlled by what he called "domestic precedents of antecedent date", but rather should be construed "on broad principles of general acceptation"; see also *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-282 (Lord Diplock). This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning.'
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> It is appropriate therefore to consider the jurisprudence of several countries as guides to the interpretation of [section 18 of the Arbitration Act] in so far as they have statutory provisions which are worded in a similar way to the [BVI] provision."

45. One of the issues addressed in detail in *FamilyMart* was the meaning of a "matter" which has been agreed to be referred to arbitration, or, in the language of section 18 of the Arbitration Act, "which is the subject of an arbitration agreement".

46. At paras 34 to 56 Lord Hodge reviewed the international authorities, concluding at para 57:

> "… the Board considers that there is now a general consensus among leading arbitration jurisdictions in the common law

> world that the domestic courts of countries that are signatories of the New York Convention respect and give priority to the autonomy of the parties to arbitration agreements. The statutory provisions of those countries provide for a mandatory stay of legal proceedings at the request of a party to an arbitration agreement when a matter in those proceedings is referrable to arbitration. There is also a broad consensus on how to approach the determination of matters which must be referred to arbitration".

47. Whilst recognising that "no judicial formula encapsulating the meaning of 'matter' should be treated as if it were a statutory text", Lord Hodge expressed the broad consensus on approach as follows:

> (1) "The court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration Agreement" (para 58).
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> (2) "The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim" (para 59).
>
> (3) "A 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the 'matter' is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought. The Board agrees with the statement of Sundaresh Menon CJ in para 113 of *Tomolugen* [2016] 1 SLR 373 that a 'matter' requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. The Board agrees with Foster J's third proposition in *WDR Delaware* that a 'matter' is something more than a mere issue

> or question that might fall for decision in the court proceedings or in the arbitral proceedings" (para 61).
>
> (4) "The exercise involving a judicial evaluation of the substance and relevance of the 'matter' entails a matter of judgment and the application of common sense. It is not a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay" (para 65).

48. A similar statement as to the proper approach is set out in Lord Hodge's judgment in the Supreme Court decision in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32; [2023] Bus LR 1359, paras 71 to 77. The judgment in that case was handed down on the same day as the advice in *FamilyMart.*

(c) The approach to interpretation of arbitration agreements

49. There is a broad international consensus that the approach to the interpretation of arbitration agreements should be pro-arbitration and expansive. As stated in *FamilyMart* at para 26:

> "… case law on interpretation is indicative of the respect which the courts of many jurisdictions give to the autonomy of parties to choose how they wish their disputes to be resolved. In *Enka Insaat ve Sanayi AS v OOO 'Insurance Co Chubb'* [2020] UKSC 38; [2020] 1 WLR 4117, ('*Enka Insaat*') Lord Hamblen and Lord Leggatt, giving the leading judgment of the court, stated (para 107):
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> > 'In *Fiona Trust & Holding Corpn v Privalov* [[2007] UKHL 40;] [2007] Bus LR 1719, the House of Lords affirmed the principle that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be

decided by the same tribunal" (see para 13, per Lord Hoffmann).

Contrary to a submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the *Fiona Trust* case, has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, "is now firmly embedded as part of the law of international commerce". In his monumental work on *International Commercial Arbitration,* 2nd ed (2014), p 1403 Gary Born summarises the position as follows:

"In a substantial majority of all jurisdictions, national law provides that international arbitration agreements should be interpreted in light of a 'pro-arbitration' presumption. Derived from the policies of leading international arbitration conventions and national arbitration legislation, and from the parties' likely objectives, this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums)."""

(d) Application of these principles

50. The Arbitration Agreement provides as follows:

"The Parties agree that any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement (including a claim, dispute or difference regarding its existence, termination or validity or any non-contractual obligations arising out of or in connection with

> this Agreement) (a 'Dispute'), shall be referred to and finally settled by arbitration in accordance with the London Court of International Arbitration ('LCIA') Rules (the 'Rules') as in force at the date of this Agreement and as modified by this clause, which Rules shall be deemed incorporated into this clause."

51. The clause is drafted in broad terms intended to cover a wide range of disputes arising in connection with the Facility Agreement. It does not, however, seek to bar ancillary legal proceedings.

52. The Arbitration Agreement should be interpreted in a pro-arbitration and expansive manner and whether a "matter" is subject to that agreement should be approached following the guidance set out in *FamilyMart.*

53. The first point to be made is that it is common ground that a creditor's winding up petition is not an "action" within the meaning of section 18 (or a "claim" within the meaning of section 9 of the 1996 Act). The mandatory stay provisions do not therefore apply to the liquidation application.

54. This reflects the decision in *Salford Estates* which, on this issue, has been followed by the BVI courts. In particular, it reflects para 31 of Sir Terence Etherton C's judgment in *Salford Estates* in which he explained that a creditor relies on non-payment of a specific debt in a winding-up petition "as *evidence*" that the company "is unable to pay its debts as they fall due"; the petition "is not a claim for payment of the debt".

55. This distinguishes the present case from *FamilyMart* in which it was not disputed that applications to wind up a company on the just and equitable ground were "legal proceedings" so as to fall within the mandatory stay provisions of the equivalent Cayman Islands statute (see para 33).

56. *FamilyMart* recognises, however, that there may in appropriate cases be a pro tanto stay of proceedings (see para 60). It follows that even though the bringing of the proceedings may not engage the mandatory stay provisions, it is possible that issues may arise in the proceedings which do. The most obvious example would be if the proceedings involved the determination of a claim which was subject to the arbitration agreement.

57. In general, arbitration agreements are concerned with dispute resolution. They resolve disputes between the parties through the arbitration tribunal's determination of

disputed rights and obligations, including remedial rights. As *FamilyMart* makes clear, this may include claims for declaratory relief.

58. The general need for a determination of disputed rights and obligations is reflected in the approach in *FamilyMart* as to what constitutes a "matter" in respect of which legal proceedings are brought. As there stated at para 61:

> "A 'matter' is a substantial issue that is legally relevant *to a claim or a defence*, or foreseeable defence, in the legal proceedings, and is susceptible to be *determined* by an arbitrator as a discrete dispute" (emphasis added)."

59. The focus is on issues which are legally relevant to a claim or the defence to a claim – ie substantive issues. The focus is also on the issues which may be "determined" by the arbitration tribunal.

60. This is consistent with the stated object of the Arbitration Act which is to facilitate and obtain the fair and speedy "resolution of disputes" by arbitration (section 3(1)). A foundational principle of the Arbitration Act is that the parties to a dispute should be free to agree on "how the dispute should be resolved" (section 3(2)(a)). Further, as the heading of article 8 of the Model Law makes clear, it applies where there is a "substantive claim before court".

61. If no such "matter" arises in the legal proceedings then the mandatory stay provisions do not apply. If they do not apply, then the policy underlying them equally does not apply. That policy is to enforce the positive and negative aspects of arbitration agreements. Those are only engaged, however, in respect of a "matter" which is subject to the arbitration agreement.

62. It is not the policy of the Arbitration Act, or arbitration law more generally, to fetter the rights of parties in respect of matters which fall outside the scope of the arbitration agreement. The parties' freedom to choose to resolve their disputes by arbitration and how to do so is to be respected but that also means respecting the boundaries of the choice made. That is another important aspect of party autonomy.

63. Unless an arbitration agreement provides otherwise, it is not the policy of the Arbitration Act, or its English equivalent, to require a creditor to obtain an arbitration award before enforcing a debt which is completely undisputed, by a claim in court. Nonetheless the English courts have set a very low threshold for the identification of a dispute sufficient to require arbitration, and therefore a mandatory stay of any claim in court to enforce the debt, under section 9 of the 1996 Act. All that is necessary is that

the debt should not be admitted. It need not be denied, nor need any, let alone any substantial, grounds to be shown for disputing the debt: see *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki Shipping*"). The judgments of Henry LJ at p 750 and Swinton Thomas LJ at pp 762-763 explain that this low threshold was introduced in the 1996 Act on the deliberate policy ground of preventing the avoidance of a mandatory stay by the creditor seeking summary judgment in court proceedings to enforce the debt, on the assertion that there was no sufficient dispute of substance to require a trial (or therefore an arbitration). Since 1930, the predecessors to the 1996 Act had permitted this to happen because the predecessor to section 9 had included as a ground for resisting a stay the assertion that "there is not in fact any dispute between the parties with regard to the matter agreed to be referred". Thus a creditor could resist a mandatory stay on a basis very similar to that used to resist the dismissal of a winding up petition on the grounds that the debt was disputed, ie by showing that the debt was not genuinely disputed on substantial grounds. This was removed from what became section 9 in 1996. It was to take until 2013 (in *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083 (Comm) ("*Rusant*")) for the possible implications of this change in the threshold for a mandatory stay to seep through to the context of winding up.

(iii) Exclusive jurisdiction agreements

64. There are no equivalent mandatory stay provisions applicable to exclusive jurisdiction clauses. However, such clauses also have positive and negative aspects and the established approach under English law is to enforce that contractual bargain in the absence of strong reasons for departing from it – see *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 ("*Donohue*"). As Lord Bingham of Cornhill there stated:

> "24. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum".

65. Under English law the approach to interpretation of such clauses will be expansive for very much the same reasons as in relation to arbitration clauses. In particular, the presumption in favour of one-stop adjudication will generally equally

apply – see, for example, Briggs, *Civil Jurisdiction and Judgments,* 7th ed (2021) at para 23-08.

66. Although there is no statutory context, in considering whether a creditor's winding-up petition should be stayed as it involves a claim which falls within the scope of an exclusive jurisdiction clause, similar issues will arise as in relation to an arbitration agreement. In particular, does the bringing of the petition, or the resolution of issues within the petition proceedings, involve a breach of the exclusive jurisdiction clause? This will depend on the proper interpretation of the exclusive jurisdiction clause. The reason for granting a stay in relation to such clauses is the parties' contractual bargain - pacta sunt servanda. If there is no breach of the clause then there is no basis for a stay. As with arbitration agreements, most generally worded exclusive jurisdiction clauses are concerned with dispute resolution and the determination of disputed rights and obligations. As Lord Bingham stated in *Donohue* their function is to confer exclusive jurisdiction "to rule on claims" between the parties.

(2) The Threshold Question: what is a Disputed Debt?

67. As already noted, the courts of the UK and the BVI are at one on the question what is a disputed debt, so as to disable the creditor from seeking winding up (or the appointment of a liquidator) on the insolvency ground, relying upon non-payment. The debt must be the subject of a genuine dispute on substantial grounds. If it is, then the winding up petition (or the liquidation application) will generally be dismissed (unless a substitute petitioner or applicant with an undisputed debt is available to carry it forward). *Mann v Goldstein* [1968] 1 WLR 1091 is usually cited as the leading English authority for this test. It is based upon dicta of Lord Greene MR in *In re Welsh Brick Industries* [1946] 2 All ER 197.

68. In the BVI the same test was laid down in *Sparkasse Bregenz Bank AG v In the matter of Associated Capital Corporation* BVIHCVAP2002/0010 (18 June 2003) ("*Sparkasse*"), following *In re Taylor's Industrial Flooring Ltd* (1990) BCC 44. It has been adopted in most, if not all, those common law countries which operate a winding up jurisdiction similar to that of the UK.

69. A similar test has been applied where the contract creating the debt contains an exclusive jurisdiction clause providing for disputes to be litigated in a jurisdiction other than that of the insolvency court. In *BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997 ("*BST Properties*"), the Court of Appeal held that the presence of an exclusive jurisdiction clause in favour of Hungary did not preclude the Companies Court in England from deciding whether a debt created by a contract which included the exclusive jurisdiction clause was genuinely disputed on substantial grounds. In

particular, it was irrelevant that the company might have been able to have stayed an English action to enforce the debt on the basis of the exclusive jurisdiction clause.

70. A similar threshold had also been applied, at least in England between 1930 and 1996, to determine when proceedings to enforce a debt covered by an arbitration clause should be subjected to a mandatory stay. But, as noted above, this threshold was deliberately lowered in 1996, so as to enable the defendant to a debt enforcement claim to obtain a mandatory stay in favour of arbitration by the mere non-admission of the debt. And the same statutory intent may be discerned in the Arbitration Act since section 18 closely follows the rubric of the English section 9.

(3) Salford Estates

71. *Salford Estates* was the first occasion when the (by then) different threshold tests for a mandatory stay under section 9 of the 1996 Act and the dismissal of a winding up petition on the ground of a disputed debt came into collision at an appellate level. The claimant was the lessor seeking to recover service charges under a lease which contained an arbitration clause. The lessor had already obtained a detailed arbitration award resolving various issues of construction under the lease and quantifying the amount then due, which the lessee eventually paid. The lessor demanded further sums falling due thereafter, based upon the resolution of those issues, to which there was no genuine defence on substantial grounds, but the lessee company failed to pay, so the lessor presented a winding up petition. The lessee sought a stay under section 9 of the 1996 Act.

72. At first instance the judge held that section 9 applied to the winding up petition. Applying *Halki Shipping* and *Rusant* he dismissed the petition. In the latter case Warren J had held that a creditor's winding up petition necessarily involved a claim by the petitioner to be a creditor, and therefore fell within section 9 of the 1996 Act. He therefore restrained presentation of the petition. Alternatively he would have exercised a discretion not to wind up the company.

73. On appeal in *Salford Estates* the Court of Appeal held that a creditor's winding up petition neither was nor included a claim within the meaning of section 9. The only judgment was given by Sir Terence Etherton C. His reasoning, which is not challenged on this appeal, may be shortly summarised. First, the basis of a creditor's petition is that the company is either balance sheet insolvent or unable to pay its debts. Secondly, the assertion by the petitioner that it has an unpaid debt owing by the company is only by way of evidence of the company's inability to pay, not a claim to recover the debt. Thirdly, the making of a winding up order might or might not lead to the creditor being paid the amount stated to be due in the petition. That would depend upon the outcome of the liquidation. Fourthly, it is an abuse of process to present a petition to put pressure

on a company to pay a genuinely disputed debt, whereas no such stigma attached to a claim for payment of a debt. Fifth, where a petition was based upon a series of debts, only some of which were subject to an arbitration clause, section 9 would be unworkable. Finally:

> "it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts." (para 35).

74. But at para 39, he continued:

> "My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Warren J in the *Rusant* case, at para 19."

75. Embodied within that passage is the primary reasoning for it, which is that the legislative policy embodied in the 1996 Act extends to prohibiting the continuation of proceedings to which the mandatory stay provided by section 9 does not apply. It is also implicit that the discretion to wind up would be virtually illusory where the debt relied upon by the petitioner was merely not admitted, even if not genuinely disputed on substantial grounds. There would in such circumstances be, in substance, virtually a mandatory stay of the petition, unless a different petitioner could be substituted.

76. The Chancellor added the following additional reasoning. First, that it would be anomalous for the Companies Court to undertake a "summary judgment type analysis" to see whether the debt was genuinely disputed on substantial grounds if, in the light of *Halki Shipping*, it was a purpose of the 1996 Act to prohibit claims in court based upon summary judgment. Secondly, exercising a discretion to wind up would encourage parties to arbitration agreements to bypass the arbitration agreement and the 1996 Act as a standard tactic by presenting a winding up petition. Finally:

> "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." (para 40).

(4) Subsequent judicial and academic treatment of Salford Estates

77. As a binding decision of the Court of Appeal, *Salford Estates* has generally been followed at first instance in England, albeit not without occasional misgivings. There is brief reference to it by the Court of Appeal in *Revenue and Customs Comrs v Changtel Solutions UK Ltd* [2015] EWCA Civ 29; [2015] 1 WLR 3911, para 48, but that was a case about whether the question whether a petitioner's debt was genuinely disputed on substantial grounds should be determined in the Tax Tribunal or in the Companies Court.

78. In *Fieldfisher LLP v Pennyfeathers Ltd* [2016] EWHC 566 (Ch) Nugee J applied *Salford Estates* to a petition for administration because, like a creditor's winding up petition it required the creditor to show that the company was unable to pay its debts. The petitioning solicitors were suing on a conditional fee agreement containing an arbitration clause. Nugee J accepted that, even though section 9 was not engaged, in accordance with *Salford Estates* the policy of the 1996 Act favoured a discretionary stay save in exceptional circumstances, but he did so without much enthusiasm: see para 37.

79. English courts at first instance have differed over whether the *Salford Estates* principle applies where a winding up petition is opposed on the grounds of an exclusive jurisdiction clause. In *Al Kuwari v Cantervale Ltd* [2022] EWHC 3490 (Ch), ICC Judge Prentis regarded the policy imperatives to be identical as between an arbitration clause and an exclusive jurisdiction clause, and followed *Salford Estates* in preference to the earlier *BST Properties* case. By contrast in *Hex Technologies Ltd v DCBX Ltd* [2023] EWHC 537 (Ch); [2023] ILPr 35 Deputy Insolvency and Companies Court Judge Addy KC declined to stay the petition, on the basis that there was no policy behind exclusive jurisdiction clauses sufficiently like that which *Salford Estates* identified in the 1996 Act to detract from the authority of *BST Properties.* The same course was followed more recently in *City Gardens Ltd v Dok82 Ltd* [2023] EWHC 1149 (Ch).

80. The insolvency courts of Malaysia and Singapore have largely followed *Salford Estates* on the basis of similarly worded legislation, but without contributing further to the reasoning: see (in Malaysia) *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365 and *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2023] 7 MLJ 155 (and in Singapore): *AnAn Group (Singapore) PTE Ltd v VTB Bank* [2020] SGCA 33 and *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGCA 40.

81. In Hong Kong by contrast there have been divergent decisions. In *In re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 (commonly known as *Lasmos*) Harris J applied the *Salford Estates* analysis, but with the added condition for a stay that the company should actually have taken the requisite steps to start the arbitration process. In *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 ("*Guy Lam*") the Hong Kong Court of Final Appeal applied substantially the same approach where there was an exclusive jurisdiction clause, subject to exceptions if there was a risk of prejudice to other creditors or where the supposed dispute about the debt bordered on the frivolous or abusive. This approach has been endorsed by two recent Hong Kong Court of Appeal decisions – *In re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299 ("*Simplicity*") and *In re Shandong Chenming Paper Holdings Ltd* [2024] HKCA 352 ("*Shangong*").

82. In *Dayang (HK) Marine Shipping Co Ltd* v *Asia Master Logistics Ltd* [2020] HKCFI 311 ("*Dayang*") William Wong SC siting as a deputy judge held that what he called the "*Salford Lasmos*" approach should not be adopted. His decision on that point was obiter since the company seeking a stay had not taken steps to commence an arbitration. His reasoning was that, first, the presentation of a winding up petition is not a claim seeking the determination of any dispute about the debt, so that it is not in breach of the agreement to have disputes determined by arbitration. Secondly, the process by which the Companies Court decides whether the petitioner has standing to present the petition is not analogous to summary judgment proceedings in a claim to enforce a debt by action. Thirdly, the risk of an abusive petition (where there is a genuine dispute as to the debt) can be met by an order for indemnity costs. Fourthly, the *Salford Estates* approach imposes an unprecedented fetter upon the court's discretion to wind up.

83. *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873 was another Hong Kong case in which the company with the benefit of an arbitration clause failed to have a winding up petition stayed due to failure to take steps to commence an arbitration. Nonetheless the Court of Appeal expressed its own doubts about the *Salford Lasmos* approach. The particular reasons given (obiter) by Kwan V-P were, first, that nothing in the Hong Kong Arbitration Ordinance, nor in its travaux preparatoires, contemplated a large curtailment of the court's existing statutory discretion to wind up, where no mandatory stay was provided. Secondly the Eastern Caribbean Court of Appeal had in

Jinpeng declined to follow *Salford*, within a statutory and policy framework indistinguishable from that applicable in Hong Kong.

84. In the recent decisions of *Simplicity* and *Shandong* the Court of Appeal held that the approach set out in *Guy Lam* in relation to petition debts covered by an exclusive jurisdiction clause should also apply to debts covered by an arbitration agreement.

85. *Jinpeng* was of course an appeal from the BVI. It is the leading authority there for the continued adoption of the traditional approach that a liquidator should ordinarily be appointed on the application of an unpaid creditor in the absence of a genuine dispute about the debt on substantial grounds, and was followed both by the judge and the Court of Appeal in the present case. The only judgment was given by Webster JA (Ag). He held that there was a dispute between the company and the applicant which fell within an arbitration clause in an agreement between them, but that it fell short of a genuine dispute on substantial grounds. Accordingly, pursuant to the *Sparkasse* case, liquidators ought to be appointed. He agreed with the conclusion in *Salford Estates* that a creditor's application for the appointment of a liquidator did not fall within section 18 of the Arbitration Act, so that it was not subject to a mandatory stay. Having cited passages in the Chancellor's analysis he continued:

> "The position outlined by the Chancellor in these passages comes close to the automatic stay position which is now firmly a part of the learning in connection with section 18 of the Arbitration Act. He is saying in very clear terms that a winding up application based on a debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances. However, I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the *C-Mobile* case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction under section 162(1)(b) is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds."

86. Academic commentary has, if anything, been even more mixed. Broadly supportive of the *Salford Estates* outcome are Shaun Matos, "Arbitration agreements

and the winding-up process: reconciling competing values" (2023) 72 ICLQ, 309-332 and Gill & Gass, "One step forwards – two steps sideways" [2021] LMCLQ 6. Following and developing Deputy Judge Wong's critique in *Dayang* is Claudia Quek, "The insolvency versus arbitration conflict: determined, resolved and finally settled?" (2021) 137 LQR 34. Equally critical of *Salford Estates*, but for different reasons, are Leung & Cheung, "To stay or not to stay - asking the right questions: Re Guy Kwok-Hung Lam" [2022] 8 JBL, 653-667.

87. The academic commentators are generally aligned in thinking that the same principles ought to apply when either an arbitration clause or an exclusive jurisdiction clause are relied upon to stop a creditor's petition. More than one of them introduce the suggestion that to apply *Salford Estates* is liable to hinder rather than promote a pro-arbitration policy, since prospective creditors might resist the inclusion of an arbitration clause in their contracts if this has the effect of reducing, or making slower and more expensive, their remedies in the event of an insolvency of the debtor.

(5) The way forward

88. The Board considers that *Salford Estates*, and the cases which have followed it, were wrong to introduce a discretionary stay of creditors' petitions (or, in the BVI, liquidation applications) where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement. Our reasoning is as follows. The starting point is the perception, rightly arrived at in almost all the relevant cases including *Salford Estates*, that a creditor's winding up petition (or similar liquidation application) does not trigger the mandatory stay provided for by article 8 of the Model Law, or by the various statutory provisions for a mandatory stay which implement it, such as section 9 of the 1996 Act or section 18 of the Arbitration Act. This is because a winding up petition (or similar liquidation application) is simply not a claim of the type caught by those provisions. This is not just a matter of language. It is because such a petition or application does not seek to, and does not, resolve or determine anything about the petitioner's claim to be owed money by the company. Nor is the existence or amount of the debt a matter or issue for resolution in those proceedings.

89. The contractual obligation embodied in the typical arbitration agreement is to refer disputes to arbitration for resolution. The negative obligation is not to have them resolved by any court process. Thus the presentation of a winding up petition (or similar liquidation application) does not offend the negative obligation at all. It is simply not something which the creditor has agreed not to do.

90. Nor are the policies underlying the arbitration legislation which implement the Model Law in any way offended or infringed by a party to an arbitration agreement seeking the liquidation of a debtor party which fails to pay the debt. There is a policy of

insolvency legislation that the liquidation route should not be pursued, or even threatened, against a company which genuinely disputes the debt on substantial grounds. Where there is such a dispute, the policy is that the creditor should first establish his claim, by having that dispute resolved in its favour, either by a judgment in court or, if there is an applicable arbitration agreement, by an arbitral award.

91. The clearest legislative signal about the boundary of the policy that a party to an arbitration agreement should arbitrate is the extent of the mandatory stay provision which implements article 8 of the Model Law. That identifies the extent of the negative obligation: not to seek resolution of a dispute in court. A winding up petition or similar application lies outside both that boundary and therefore the extent of the underlying policy.

92. None of the general objectives of arbitration legislation (efficiency, party autonomy, pacta sunt servanda and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose. Party autonomy and pacta sunt servanda are not offended because seeking a liquidation is not something which the creditor has promised not to do. And by ordering a liquidation the court is not resolving anything about the debt, nor interfering with the resolution of any dispute about it.

93. Above all there is nothing anti-arbitration in this conclusion. In most agreements where one party is likely to be the creditor, (such as any typical loan agreement), it is that party which will generally have the whip-hand in choosing or vetoing the detailed terms of the agreement. Such a party is much more likely to agree to include an arbitration clause if it does not impede a liquidation where there is no genuine or substantial dispute about the debt. And where there is such a dispute, then arbitration will prevail as the means of resolution.

94. The reasoning in *Salford Estates* calls for review against those considerations. The Board has already observed that the Court of Appeal arrived correctly at first base: namely by concluding that a creditor's winding up petition is not subject to a mandatory stay under section 9. But the Chancellor then just assumed, without further analysis, that the policy inherent in the 1996 Act went further into the prohibition of court proceedings than did section 9 itself. He simply said:

> "It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act."

With great respect the Board considers that assumption to have been wrong, at least in relation to winding up (or liquidation) proceedings on the insolvency ground, for the reasons already given. The legislative policy embodied in the 1996 Act, and in all similar legislation founded upon the Model Law, is that claims or matters within the scope of an arbitration agreement should be resolved in arbitration and not resolved in court. But nothing about a debt covered by an arbitration agreement is resolved in winding up or liquidation proceedings in court. The legislative policy therefore stops short of such proceedings.

95. *FamilyMart* confirms rather than undermines that analysis. Although there is a superficial family likeness between a creditor's winding up petition and a contributory's petition for winding up on the just and equitable ground, the two types of proceedings are in substance quite different. A contributory's petition has to show circumstances, usually inequitable conduct by other shareholders, which make it just and equitable to wind up the company, and that conduct has to be pleaded in detail and, if disputed, proved bell, book and candle at a trial. Any dispute about it has to be resolved in the winding up proceedings. Even though the proceedings are not, viewed as a whole, a claim which can be arbitrated, those disputes are likely to raise distinct matters which can be resolved by a declaratory arbitral award, while the winding up proceedings are stayed, whether under an applicable provision for a mandatory stay (not applicable here) or (possibly) as a matter of case management discretion.

96. Nothing in the remainder of the reasoning in *Salford Estates* remedies what the Board considers to be an impermissible and unexplained leap in the reasoning of the Court of Appeal as to the extent of the legislative policy behind the 1996 Act. The first point made by the Chancellor was the apparent anomaly between the clear legislative policy to outlaw summary judgment of claims covered by an arbitration clause and the similar summary process undertaken by the Companies Court in assessing whether the petitioner's debt is genuinely disputed on substantial grounds. It is true that both have a common element of summary process - ie one which looks to see whether there is an issue which needs to be tried. But there the similarity ends. Summary judgment is, as its name implies, a means of resolving a claim by final resolution in a judgment. But the light touch used by the Companies Court resolves nothing either way, and does not lead to a judgment or anything similar.

97. The remaining reasoning advanced by the Court of Appeal concerns the temptation to bypass an applicable arbitration agreement, or the use of an improper threat to present a petition as a means of applying pressure on a company to pay the debt, or to have to establish a genuine and substantial dispute to the debt in an inappropriate forum. In the Board's view neither of these concerns does anything to bridge the gap in the reasoning about the supposed extent of the legislative policy. They are concerns well-known in the Companies Court, in relation to bypassing the need for litigation about disputed debts in ordinary claims in court, and applying improper pressure otherwise than by threatening an ordinary claim to recover the debt. They are

treated by the Companies Court (or similar insolvency court) as types of abuse of process, and orders for indemnity costs are commonly visited upon the perpetrators. There is nothing peculiarly "anti-arbitration" about such conduct.

98. It has already been noted that there is nothing in the decisions around the common law world which have followed *Salford Estates* which adds significantly to the reasoning given by the Chancellor. The Board broadly shares the concerns expressed by Deputy Judge Wong SC in the *Dayang* case and in the academic articles which have developed those concerns.

99. Accordingly, the Board concludes that, as a matter of BVI law, the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds. This conclusion applies to a generally worded arbitration agreement or exclusive jurisdiction clause. Different considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application.

5. Issue (2): was the relevant test met or should the matter be remitted to determine whether this was the case?

100. In the light of our conclusion that *Salford Estates* was wrongly decided and that the traditional test for a disputed debt of whether it is genuinely disputed on substantial grounds should be applied, it follows that Wallbank J and the Court of Appeal applied the correct test, as set out in *Jinpeng*. No challenge is made to Wallbank J's decision that the appellant failed to show that the Debt was disputed on genuine and substantial grounds and so no question of remission arises.

6. Issue (3): did Wallbank J conclude that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late and, if he did so find, was he wrong to do so?

(1) The procedural chronology

101. On 2 October 2020, the appellant was served with the liquidation application. This was originally listed for a hearing on 30 November 2020. On Wednesday, 25 November 2020, the appellant's lawyers indicated in correspondence that the liquidation application should not be permitted to proceed due to the Arbitration Agreement. On 27 November 2020, the appellant filed a Notice of Opposition (the "NOO"). The NOO did not refer to the Arbitration Agreement.

102. At a hearing on Monday, 30 November 2020, Wallbank J adjourned the application and gave directions for further evidence to be filed by the appellant by 18 December 2020 and by the respondent by 26 January 2021, with no further evidence to be filed by either party without permission. The adjourned hearing was listed for 4 February 2021. On 30 January 2021, the appellant issued a strike out application including supporting evidence which exhibited the claim form and particulars of claim in the BVI Proceedings. One of the grounds relied on in support of the strike out application was the existence of the Arbitration Agreement. On 3 February 2021, the appellant served further evidence in the liquidation application, without permission.

103. The hearing on 4 February 2021 was adjourned with agreed directions (without prejudice to any argument that the respondent might make in respect of the strike out application being late). The liquidation application was re-listed for 20 April 2021. On 5 February 2021, the appellant issued an application for permission to rely on the additional evidence (which had been filed on 1 February and 3 February 2021).

104. On 19 March 2021, the appellant filed an amended NOO, which included the argument that "…aspects of each of the disputes described above in any event fall within the scope of one or more arbitration clauses and ought properly to be resolved in the context of an arbitration.". On 23 March 2021, the appellant filed a re-amended NOO including the same point. No permission had been given for the appellant to amend or re-amend its original NOO.

(2) The judgment of Wallbank J

105. In his oral judgment of 19 May 2021 Wallbank J rejected the appellant's reliance on the Arbitration Agreement in the following terms:

> "Sian's reliance on the arbitration agreement in the loan agreement is a hopeless objection. Why? Well, it was raised late. Sian was aware of the point sufficiently early, but chose not to use it. They then changed their mind and sought to introduce it via a strike out application. Secondly, Sian failed to commence an arbitration. They invoked the arbitration agreement, but they have not sought to bring one. Instead they have started claims on matters that would require arbitration on their case, or might require arbitration on their case, but they haven't done so in arbitration. And thirdly, Sian's reference to the Arbitration Agreement is entirely academic; Fourthly, it is not the law that the existence of an Arbitration Agreement means that a creditor cannot invoke a collective remedy of liquidation; Fifthly, there is no mandatory stay of

> liquidation proceedings in favor of arbitration. We get that from *Jinpeng Group Limited v. Peak Hotels and Resorts Limited* at paragraph 45."

(3) The judgment of the Court of Appeal

106. The Court of Appeal considered that Wallbank J had refused to allow the appellant to rely on the Arbitration Agreement because the point had been raised late and that no error had been shown as to the exercise of his discretion so to rule. Although no reference to these matters had been made by Wallbank J, the Court of Appeal relied on section 18 of the Arbitration Act (which requires a party to "an action" to request a referral to arbitration when submitting the first statement on the substance of a dispute) and rule 164 of the BVI Insolvency Rules (which requires a notice of objection to be filed no later than seven days before the date of the hearing) as justifying the decision which it understood Wallbank J to have made.

(4) What did Wallbank J decide?

107. The Board is not satisfied that Wallbank J did dismiss the Arbitration Agreement on the prior and independent ground that it had been raised too late. First, this is only one of five rolled up reasons given by Wallbank J for dismissing the appellant's reliance on the Arbitration Agreement. Secondly, Wallbank J goes on to consider the effect of the Arbitration Agreement and concludes that it should not affect the exercise of the court's discretion in the light of the *Jinpeng* decision. Thirdly, lateness is a factor of potential relevance in relation to the exercise of the court's discretion as to the effect to be given to an arbitration agreement in a liquidation application. Fourthly, had Wallbank J intended to rely on lateness as an independent ground of decision he would surely have had to identify the extent of the lateness and to address whether there was any good reason for it and the degree of prejudice suffered, if any. He did not do so. Fifthly, the importance of doing so is highlighted by the Court of Appeal's retrospective justification of the decision apparently made. The Court of Appeal placed considerable reliance on section 18 of the Arbitration Act but it is common ground between the parties that this does not apply to a winding up petition or liquidation application as neither is "an action", as was held in *Jinpeng*. As to the reliance on rule 164, this ignores the fact that a NOO was filed long before the hearing date and that the relevant issue was one of amendment of the NOO.

108. For all these reasons, the Board concludes that Wallbank J did not decide that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late and that the Court of Appeal erred in concluding otherwise.

7. Issue (4): does the appeal fall within section 3(1)(a) of the 1967 Order? In particular, does "the appeal [involve] directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards"?

109. Issues arising under section 3(1) have commonly been referred to as raising the question of whether "the value threshold" has been met.

110. It is well established that "the provisions governing appeals as of right are normally to be strictly construed". This is because the "absence of an appeal as of right is not the end of the road" as the appellant can seek and obtain leave from either the local court or the Privy Council – see *Jacpot Ltd v Gambling Regulatory Authority* [2018] UKPC 16, para 7 per Lord Sumption.

111. It is also well established that the value threshold must be approached from the perspective of the appellant - see *Lakhamshi v Furniture Workshop* [1954] AC 80, p 88.

112. Authoritative guidance as to how the value threshold falls to be applied is provided by the advice of the Board given by Lord Wilberforce in *Fletcher v Income Tax Commissioner* [1972] AC 414. That case concerned a provision in the Constitution of Jamaica in materially similar terms to section 3(1)(a) of the 1967 Order. The issue was whether the relevant value was the amount on which the appellant had been held liable in income tax (£145) or the amount of the receipts for which his liability for income tax was being assessed (£1,720). The Board held that it was the former. As Lord Wilberforce explained at p 419G-H:

> "Whether an appeal is competent under a provision such as this (which has existed and exists in the same form in many other jurisdictions) must be decided upon the basis of the judgment against which it is sought to appeal, and depends upon whether that judgment affected the interest of the party prejudiced by it to an extent not less than the specified amount. This was clearly laid down by this Board in *Macfarlane* v. *Leclaire* (1862) 15 Moo. P.C.C. 181, which has repeatedly been followed and applied."

113. The appellant contends that the petition (and now the appeal) involves "directly or indirectly" the respondent's "right" against the appellant (i) to be paid the Debt and/or (ii) to invoke the collective winding-up process on the basis of the Debt.

114. The question is whether the judgment upholding the judge's order to appoint liquidators affects the appellant's interests to the extent of at least £300. The Board considers that it does not.

115. Wallbank J relied upon the unpaid Debt, and the absence of any genuine and substantial dispute, as evidence that the appellant was insolvent. He did not need to, and did not, purport to make any determination of either the duty to pay or the right to be paid. The respondent will still need to prove for the Debt in the liquidation. As explained in para 33 above, the process of seeking and obtaining an order for the appointment of a liquidator (or a winding up in the UK) does not require or involve any pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum.

116. As Lord Hoffmann stated in *Wight v Eckhardt Marine GmbH* [2003] UKPC 37; [2004] 1 AC 147:

> "26. …It is first necessary to remember that a winding up order is not the equivalent of a judgment against the company which converts the creditor's claim into something juridically different, like a judgment debt. Winding up is, as Brightman LJ said in *In re Lines Bros Ltd* [1983] Ch 1, 20, 'a process of collective enforcement of debts'. The creditor who petitions for a winding up is 'not engaged in proceedings to establish the company's liability or the quantum of the liability (although liability and quantum may be put in issue) but to enforce the liability'.
>
> 27. The winding up leaves the debts of the creditors untouched…."

If the winding up or appointment of a liquidator leaves the debt of the appellant untouched then it does not affect the appellant's financial interest to the extent of £300 or at all.

117. A similar point was made in the recent decision of the Cayman Islands Court of Appeal in *In re Virginia Solution SPC Ltd* (unreported) 10 November 2023 ("*Virginia Solution*"). That case involved an appeal by a shareholder against the discharge of a winding up order that had been made on the grounds that it had been just and equitable to do so. The applicant relied on its claim to share in the company's surplus assets as a valuable right that the appeal would involve. The court held (per Martin JA, with whom Goldring P and Moses JA agreed) that it would not do so, explaining as follows:

> "9. … To establish that it is entitled to leave as of right, Valley must bring its claims concerning surplus assets in the liquidation and costs under this limb. In my judgment, it cannot do so in either case. The focus of the limb is on claims or questions which are directly or indirectly 'involved' in the putative appeal. This implies matters which are in dispute, and which will be directly or indirectly resolved by the outcome of the appeal….
>
> 10. So far as concerns the right to share in the surplus assets of the Company, the right derives from Valley's shareholding in the Company – which is not in dispute, and which Valley will retain if the company is not wound up. It follows that Valley's entitlement to share in the assets of the Company is not directly or indirectly the subject of a claim or question: *the underlying right represented by its shareholding will remain whatever the outcome of the putative appeal.*" (Emphasis added).

Similarly, in the present case the appellant's underlying debt will remain whatever the outcome of an appeal.

118. The BVI Court of Appeal's judgment of 24 April 2023 refusing permission to appeal in this case is to the same effect. As stated in the judgment of Farara JA (with which the other Justices agreed):

> "27 …it does not follow that once the winding-up was ordered because of an unpaid debt of US$226 million that the value threshold test is met. Further the fact that the intended appeal relates to large sums in general terms is not relevant. It was not in dispute between the parties, either in the court below or in the appeal or before this Court at the hearing of the application for leave to appeal, that the debt of US$226 million was in fact due and owing. The issue which confronted the learned judge was whether this debt was disputed on genuine and substantial grounds. The judge found it was not….
>
> 28. This Court found that the judge in the court below did not make any determination concerning Sian's interest in any property. The intended appeal therefore cannot 'involve

> directly or indirectly a claim to or question respecting property ... of the value of £300'".

119. The *Virginia Solution* case provides a further reason why the making of a winding up order or appointment of a liquidator order does not engage the value threshold. In that case the appellant was the party seeking a winding up order. In the present case the appellant is the party against whom the order is sought. From either perspective the "right" engaged is not one on which a value can be placed. As Martin JA said at para 7:

> "… The matter in dispute on the putative appeal to the JCPC … will be whether or not a winding up order should have been made. Valley's interest in that matter does not, in my view, have a value capable of being identified in monetary terms. Even if it had been successful in establishing that all the elements necessary to give the court jurisdiction to make a winding up order on the just and equitable ground were present, Valley would have had no right to such an order – it being always in general terms a matter for the court's discretion whether or not to make such an order… …Valley's right is to have its application to the court properly determined; and, as in *Jacpot*, that right is no different in kind from the right which any person with a relevant interest has to see the law applied. The right cannot be valued, and so cannot be said to be greater in value than the statutory threshold."

The making of a winding up order or appointment of a liquidator on a creditor's petition is also a matter for the court's discretion.

120. Further, if the appellant's case were accepted it would mean that there would be an appeal as of right in virtually every creditor's petition for winding up or appointment of a liquidator since the evidence will almost invariably involve debts of at least £300. Moreover, such appeals would be second appeals against a judge's exercise of discretion. This would not reflect a strict construction of the value threshold provisions.

121. For all these reasons the Board agrees with and upholds the conclusion of the Court of Appeal that the appeal does not fall within section 3(1)(a) of the 1967 Order and does not give rise to an appeal as of right.

8. Conclusion

122. The Board concludes:

(1) As a matter of BVI law, the correct test for the court to apply to the exercise of its discretion whether to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds.

(2) The relevant test was correctly applied by Wallbank J and the Court of Appeal and no question of remission arises.

(3) Wallbank J did not conclude as an independent ground of decision that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late.

(4) The appeal does not fall within section 3(1)(a) of the 1967 Order as it does not "[involve] directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards".

123. It follows that the Board will humbly advise His Majesty that the appeal be dismissed.

124. There remains the question whether the Board should make a *Willers v Joyce* direction, namely that *Salford Estates* should no longer be followed in England and Wales, and that this decision of the Board, so far as it holds that *Salford Estates* was wrongly decided, now represents the law of England and Wales. In *Willers v Joyce (No 2)* [2016] UKSC 44; [2018] AC 843 a unanimous nine justice panel of the Supreme Court decided that, in an appropriate case, this is something which the Board has jurisdiction to do, so as to resolve what had previously been an unsatisfactory question for the English courts as to whether it was a foregone conclusion that the view of the Board would, in due course, eventually prevail over an otherwise binding English decision.

125. The Board considers that such a direction should be given. Our conclusion that *Salford Estates* was wrongly decided was not merely a conclusion about the law of the BVI. It was a conclusion about English law, even though informed in its reasoning by the study of overseas decisions and academic writings, as decisions about English law often are. The Board is aware that it is the current practice of the Companies Court in

England and Wales to follow *Salford Estates* in exercising a supposed discretion to stay or dismiss a creditors' winding up petition on the ground that the petitioner's debt is covered by an arbitration clause, without being shown to be genuinely disputed on substantial grounds. The Board's view is that this should cease and it so directs.

126. This direction will also resolve the parallel issue whether an exclusive jurisdiction clause should have the same effect. In the Board's view the underlying policy in relation to arbitration clauses and exclusive jurisdiction clauses is the same. The presence of an exclusive jurisdiction clause applicable to the debt relied upon by the petitioner should not lead to the stay or dismissal of the petition unless the debt is genuinely disputed on substantial grounds.

127. This direction applies where there is a generally worded arbitration agreement or exclusive jurisdiction clause. Different considerations would arise if the agreement or clause was framed in terms which applied to a creditor's winding up petition.