EVERYTHING OLD IS NEW AGAIN

Julie Engwirda
Harneys
Hong Kong

Strachan Gray
Harneys
Hong Kong

Peter Ferrer
Harneys
BVI

"the Court of Appeal in *Salford Estates* drastically lowered the threshold applicable to debtors seeking to defeat a petition where an arbitration agreement is present. "

In the landmark 2014 decision of *Salford Estates (No. 2) Limited v Altomart Limited*[1], the English Court of Appeal held that where a debt arises under a contract containing an arbitration agreement, a winding up petition brought on that debt ought to be dismissed in favour of arbitration so long as the debtor merely does not admit that the debt is owed. The Court of Appeal added that this position could only be displaced by *"wholly exceptional"* circumstances. The ramifications of the decision on insolvency proceedings were significant and ever since, the interface between arbitration and insolvency has continued to demand attention from common law Courts worldwide.

Salford Estates marked a departure from the traditional approach taken by the Courts that regardless of the presence of an arbitration agreement, a winding up petition founded on a debt would only be dismissed or stayed if the debtor could show that it disputed the debt *"bona fide* and on substantial grounds".

The Court of Appeal emphasised that in turning away from this 'traditional approach', it was not undermining the unique nature of winding up petitions as class remedies undertaken in the public interest and in the interests of a company's creditors as a class. It was clear that insolvency proceedings remain fundamentally distinct in that regard from ordinary proceedings, such as damages claims.

Noting the discretionary nature of the winding up jurisdiction, the Court of Appeal placed significant weight on the "pro-arbitration" policy adopted in England. Specifically, it said that the discretion underpinning the jurisdiction to wind up companies should be exercised consistently with that policy. A central plank of this policy is the principle that parties are held to their contractual bargains to arbitrate, which in this context means preventing creditors from availing themselves of the Courts' insolvency jurisdiction to circumvent such bargains.

In reaching its decision the Court of Appeal in *Salford Estates* drastically lowered the threshold applicable to debtors seeking to defeat a petition where an arbitration agreement is present. It is plainly much easier for a debtor merely to say that an alleged debt is "not admitted", than to establish that it disputes the debt bona fide on substantial grounds.

The Expansion of the *Salford Estates* Position

The decision of the Court of Appeal, and the ensuing debate as to its merits, has exerted considerable influence on the development of the law in several prominent common law jurisdictions. Whilst initially it looked as though *Salford Estates* would find widespread favour across the majority of common law jurisdictions, a more complicated picture has emerged. Whilst Salford Estates is becoming more entrenched in some jurisdictions, a divergence between generally well-aligned common jurisdictions has emerged with 2020 being a particularly eventful episode in the arbitration/insolvency debate.

Singapore and Hong Kong

Following *Salford Estates,* both jurisdictions quickly joined England in substituting a lower threshold than the traditional test of a bona fide dispute on substantial grounds endorsing the "pro-arbitration" policy prevalent in both jurisdictions.

In Singapore, the *Salford Estates* approach was first endorsed in the 2016 judgment BDG v BDH[2]. The Court in *BDG* held that, where a petition is brought on a debt subject to an arbitration agreement, it will be stayed if the debtor can show, *prima facie,* that the debt is disputed and that it has complied with the relevant arbitration agreement.

In 2018, Hong Kong too moved towards the *Salford Estates* approach in the first instance decision *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd*[3]. Modifying slightly the English and Singapore approaches, the Hong Kong Court in *Lasmos* said that a winding up petition will generally be dismissed if: the debtor disputes the debt; disputes as to the debt are covered by an arbitration agreement and the debtor has taken steps to commence arbitration under that agreement.

Although there has been no major shift in Singapore's generally *"pro-arbitration"* stance since BDG, two Court

1 [2014] EWCA 575 Civ
2 [2016] 5 SLR 977
3 2018] 2 HKLRD 449

of Appeal judgments from April 2020 set Singapore on a slightly different path to that now firmly entrenched in England[4]. These judgments were given following challenges to *BDG/Salford Estates* in Singapore's lower Courts, giving the Court of Appeal the chance to clarify the law. Importantly, the path taken in Singapore has the effect of tilting the balance back in favour of creditors, marking a slight retreat from the *status quo ante*.

The decisions reaffirmed that a debtor facing a winding up petition need only satisfy the *"prima facie"* threshold in respect of a debt covered by an arbitration agreement (akin to Salford Estates). However the Court of Appeal took a notable step away from Salford Estates in emphasising that the Singapore Courts retain a discretion to decline to stay a petition in favour of arbitration where the raising of an alleged *prima facie* dispute amounts to an abuse of process. This is a significantly wider concept than the 'wholly exceptional circumstances' standard applied in England post-Salford Estates. It is certainly a creditor-friendly move, and appears to make it harder for a debtor in Singapore to dispute a debt on spurious grounds, with the result that the matter is referred to arbitration.

Although notable, these recent decisions do not indicate that the broad *Salford Estates* approach is under imminent threat in Singapore, but the Singapore Courts have demonstrated that the approach is open to modification. The same cannot be said in Hong Kong.

Hong Kong is the common law jurisdiction where there has been the most marked pushback against the *Salford Estates* approach adopted in *Lasmos*. Since *Lasmos* was decided in 2018, several Hong Kong Courts expressed doubt about its reasoning. In 2020, this debate intensified, with the forthright first instance judgment in *Re Asia Master Logistics Limited*[5]. Whilst not overturning *Lasmos*, this judgment attacked in detailed and uncompromising terms the rationale underpinning that decision and *Salford Estates* and explicitly called on the Court of Appeal to overturn *Lasmos*.

The judgment criticised what it saw as a misunderstanding about the true effect of arbitration agreements, whilst raising concerns that they unduly constrained the effective exercise of the Courts' longstanding insolvency jurisdiction. Although *Lasmos* is still good law in Hong Kong (for now) it remains to be seen how long that will be case in light of the Courts' evident concern about its effects.

Cayman Islands

Before *Salford Estates,* there had been conflicting Cayman decisions concerning the insolvency/arbitration question. Although there was authority indicative of the "pro-arbitration" stance[6], subsequent decisions appeared to swing the pendulum back in favour of petitioning creditors [7].

Since *Salford Estates,* however, that trend is in reverse. Although the relevant authorities deal with petitions brought on the just and equitable ground (rather than insolvency) and must therefore be treated with caution, it now appears to be accepted that where disputes arise under contracts containing arbitration agreements, such disputes should ordinarily be referred to arbitration if they can be "hived off" from those aspects of the winding up process which fall within the exclusive jurisdiction of the Court. These judgments appear open in principle to the idea that such disputes could include (along *Salford Estates* lines) the question of whether a debtor has a substantial dispute to a contractual debt.

British Virgin Islands

If the pro-arbitration trend in the Cayman Islands could be characterised as subtle, it has been much bolder in the British Virgin Islands **(BVI).** In July 2020, two judgments from the BVI's (first instance) Commercial Court have seen the jurisdiction sprint towards adopting Salford Estates in the most pronounced fashion since *Lasmos* in Hong Kong and *BDG* in Singapore.

Before 2020, the BVI was seen as a more "creditor-friendly" jurisdiction than "pro-arbitration" England in this area. In 2014-2015, two Court of Appeal judgments (on appeal from BVI) took a hard-line approach in rejecting *Salford Estates* and stating that, for the purposes of BVI law, a private agreement to arbitrate could not dilute or remove the requirement that a debtor wishing to defeat a winding up petition had to demonstrate a bona fide and substantial dispute to the petitioning debt[8] . In one judgment in particular[9], the Court of Appeal characterised Salford Estates as an unwarranted innovation striking at the core of the BVI Courts' well-established insolvency jurisdiction.

These judgments, especially coming from the Court of Appeal, appeared to put the matter to rest and marked the BVI as divergent from other common law jurisdictions. That changed, however, following two 2020 Commercial Court judgments, which have re-opened the arbitration/insolvency debate in the BVI and appear to align that jurisdiction far more closely with the "pro-arbitration" position than was previously thought likely[10].

The judgments could not, being first instance, overturn those given by the Court of Appeal beforehand, but deviated in the approach previously taken by the BVI Courts. In a reversal of that approach, the Commercial Court took the view that the question of whether a debt was disputed on substantial grounds should ordinarily be referred to arbitration where the parties had agreed to resolve their disputes in that forum.

The Commercial Court stated that, because in both cases there was no evidence of existing creditors other than the petitioner, the collective nature of winding up was of little relevance. The Court (controversially) further added

4 *AnAn Group (Singapore) Pte Ltd v VTB Bank [2020]* SGCA 33*; BWG v BWF* [2020] SGCA 36
5 [2020] 2 HKLRD 423
6 *Times Property Holdings Limited* [2011] CILR 223
7 *Re Duet Real Estate Partners 1 LP* (unreported, 07.062011); *Re Ebullio Commodity Master Fund L.P.* (unreported, 24.052013)
8 *C-Mobile Services Limited v Huawei Technologies Co. Limited* (BVIHCMAP 2014/0017); *Jinpeng Group Limited v Peak Hotels and Resorts Limited* (BVIHCMAP2014/0025; BVIHCMAP2015/0003)
9 *Jinpeng Group Limited,* ibid.
10 *Rangecroft Ltd v Lenox International Holdings Ltd* (BVIHC (COM) No 37/2020, unreported, 06.07.2020); *IS Investment Fund SPC v Fair Cheerful Ltd* (BVIHC (COM) No 3/2020, unreported 16.07.2020)

that a relevant consideration was whether the petitioner had failed, without good reason, to issue a statutory demand before bringing its petition (despite there being no requirement to do so under BVI law). As both are perfectly normal scenarios in the BVI, the ramifications of these judgments could extend to the majority of insolvent winding up scenarios in BVI and impact other long-standing BVI authorities that govern insolvency practice.

These decisions therefore marked a significant departure in the BVI, and as such it was in that jurisdiction that 2020's most intriguing "pro-arbitration" developments occurred. Indeed, the rationale in the Commercial Court decisions was explicitly framed in "pro-arbitration" public policy terms.

What Does the Future Hold?

Although the debate as to the interplay between insolvency and arbitration seems settled in England, there remains considerable scope for further developments in other jurisdictions in this important area of law, and the current economic climate supports further development.

In the Cayman Islands, the time appears ripe for a decision considering the effect of an arbitration agreement in the context of an insolvent, as opposed to a just and equitable, petition. Commercial parties with an interest in the Cayman Islands will welcome such guidance from the Court. Whether that tracks developments elsewhere or forges an entirely new path is to be seen.

In Singapore, following the decisions of 2020 it seems likely that the coming years will see further judicial exploration of the exact extent of the Singapore Courts' appetite to embrace a pro-creditor divergence from *Salford Estates,* and exactly how far the 'abuse of process exception' goes.

Without a doubt, though, it seems that Hong Kong and the BVI will be the two most progressive jurisdictions in the near future. In the BVI, time will tell whether the Commercial Court's sudden lurch towards a "pro-arbitration" policy is challenged and whether the law will continue to develop in that direction, or revert to its previous stance. There has been much discussion (and criticism) amongst the BVI legal community on the recent developments in this area, which will ultimately have to be resolved at appellate level.

As for Hong Kong, this matter has little troubled the Courts since *Re Asia Master.* To the extent that it has, the Courts have continued to stress the discretionary nature of their power in a manner seemingly intended to stress that the approach in Hong Kong is different to the one followed in England[11]. When the matter comes before the Court of Appeal, as it surely will, practitioners will be intrigued to see whether *Lasmos* is retained or modified, or even jettisoned altogether.

However matters develop in each jurisdiction, it appears likely that the common law position, already fragmented, will continue to diverge between jurisdictions in unpredictable ways. Given the current economic climate it is anticipated that the Courts of all jurisdictions will increasingly have to determine whether creditors must submit to arbitration rather than invoking the class remedy that liquidation provides. This raises important public policy issues that may be the impetus for jurisdictions that are currently wavering to move away from *Salford Estates,* or reaffirm their adherence to it.

11 E.g. Re *Milestone Builder Engineering Limited* (unrep., 23.10.2020), [2020] HKCFI 2669