



COMPANIES JUDGE STRIKES OUT WINDING-UP PETITION IN FAVOUR OF ARBITRATION

Richard Keady & Jenny Zhuang

On 22 January 2018, the Honourable Mr Justice Harris struck out a winding-up Petition presented by Lasmos Limited ("Lasmos") against Southwest Pacific Bauxite (HK) Ltd (the "Company") in favour of arbitration.

Lasmos and the Company are shareholders in a joint venture company and a dispute had arisen between them, where Lasmos alleged the Company failed to pay for services it rendered to it under a management services agreement (the "Agreement"). The Agreement contained an arbitration clause.

In ignorance of the arbitration clause, Lasmos issued the Petition based on what it says was an undisputed debt, although the Company never admitted the debt. The Company applied to dismiss the Petition in favour of arbitration.

The existing position under Hong Kong law, following a string of decisions, was that the test for striking out a winding-up petition (for example, on the ground that there is an arbitration agreement), is the same as that for determining a petition, i.e., that the debt must be disputed on substantial grounds.

However, Mr Justice Harris acknowledged that this was a developing area of law and the recent trend in Hong Kong was to give effect to arbitration clauses and to uphold parties' autonomy to agree the means by which they resolve disputes consistent with section 3 of the Arbitration Ordinance (Cap. 609).

In England, the current position is that if an alleged debt arising under an agreement

contained an arbitration clause is not admitted, the petition should be dismissed immediately. In Singapore, the Courts adopted a more cautious approach and adjusted the test such that it is necessary for the company to demonstrate that there is a *prima facie* dispute and that there has been *prima facie* compliance with the relevant dispute resolution clause.

Drawing inspiration from the English and Singaporean authorities, Mr Justice Harris formulated a new test for Hong Kong; if a company disputes a debt relied on by the petitioner, and the dispute is covered by an arbitration clause and the company takes steps to commence the dispute resolution process, the petition should generally be dismissed (barring exceptional cases). This departure from the traditional approach should be welcomed by the legal community as the Hong Kong Court continues to demonstrate its commitment to uphold freedom of contract, and to give effect to valid arbitration agreements.

In this particular case, the Petition was struck out. His Lordship also observed that even if the old test was applied, the same conclusion would have been reached based on the evidence presented.

The Company was represented by Mr Richard Keady and Ms Jenny Zhuang of Bird & Bird, and Counsel Christopher Chain of Des Voeux Chambers.

ABOUT THE AUTHORS



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Richard leads the Firm's International Dispute Resolution Group in the Asia Pacific region.

Richard focuses on handling litigation, international arbitration and investigations for clients operating in highly regulated environments including the financial services, telecommunications, energy, aviation and life sciences sectors.

He acts for governments, multi-national corporations, professional services firms and high-net worth individuals across the region. He has been resident in Hong Kong for over 17 years and during that time has acted in some of the region's highest profile disputes.



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Jenny is a Managing Associate in our Dispute Resolution practice, based in Hong Kong.

With extensive experience in both litigation and international arbitration, Jenny's practice focuses on commercial disputes in the financial services, insurance and tech & comms sectors. She has advised and acted for both plaintiffs and defendants on a wide range of commercial disputes such as shareholders' disputes, professional indemnity and insurance matters, mis-selling claims, corporate insolvency, employment disputes, fraud, corruption, asset tracing and preservation, defamation claims, data privacy disputes and disputes involving trade secrets and confidential information.

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