EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC(COM) 2015/0089

BETWEEN:

L CAPTITAL KDT LIMITED

Applicant

and

RETRIBUTION LIMITED

Respondent

CLAIM NO. BVIHC(COM) 2015/0078

BETWEEN:

RETRIBUTION LIMITED

Applicant

and

L CAPTITAL KDT LIMITED

Respondent

Appearances:

Mr Oliver Clifton and with him Mr Mathew Neal for the Applicant/Respondent, L Capital KDT Limited

Ms Tina Asgarian and with her Mr Andrew Emery for the Respondent/Applicant, Redistribution Limited

2015: November 13;

2016: January 13; 25.

JUDGMENT

Application to appoint liquidators under Insolvency Act 2003 on ground of indisputable debt

- Application to set aside statutory demand - What is proper test as to whether debt disputed- What is effect on debt of arbitration clause- Section 18(1) Arbitration Act 2013

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- Whether debt disputed on genuine and substantial grounds -Whether application to*appoint liquidators an abuse of court's process -court's discretion under section 162 and 167 Insolvency Act.*

The Originating Applications

[1] FARARA J [Ag.]: On 13 November 2015 and 13 January 2016 I heard submissions on two separate but related Originating Applications. These were heard together with

the concurrence of counsel for both the Applicant and the Respondent. The first in time is the application by the Company, Redistribution Limited, in No. 78 of 2015 filed 26 June 2015 to set aside the statutory demand dated 12 June 2015 served on the Company ("the Set Aside Application"1)• The second is by the Applicant, L Capital KDT Limited ("LCap"), in No. 89 of 2015 filed 17 July 2015 for orders winding up the Respondent company and appointing joint liquidators ("the Liquidation Application"2)•

[2] Section 156 of the Insolvency Act, 2003 permits a company served with a statutory demand to apply to the court to have it set aside within 14 days of the date on which it was served on the company. Once such an application is made, the time for compliance with the demand ceases to run from the date on which the application was filed with the court -section 156(4). Accordingly, as from 26 June 2015, the time for the Company to comply with the statutory demand served on it by the Applicant ceased to run. The statutory demand claims that the Company is indebted to the LCap in the sum of S$3,923,013.47 (US$2,910,483.69). The particulars of the alleged debt are set out in detail in the statutory demand. But more about that later.

[3] It is unusual for the court to hear both an application to set aside a statutory demand and an application to wind up the company and appoint liquidators, at the same time. This is so because, where, as here, an alleged creditor of a company issues a statutory demand which is then challenged on the basis that alleged debt

1 See Tab 9

2 See Tab 1

is disputed on genuine and substantial grounds, that issue is usually resolved first before the issuer applies to the court to wind up the company on the basis of its insolvency. Indeed, the Set Aside Application, although filed first in time, was, for some reason, listed for hearing on 7 December 2015, while the Liquidation Application, made some 20 days after the Set Aside Application, was first listed for hearing on 16 September 2015. That being said, both matters came on for hearing before me on the same date, and were dealt with together. This was a sensible and convenient approach adopted by counsel, particularly, since the grounds in opposition to the appointment of liquidators are materially the same as the grounds relied on by the Company for setting aside the statutory demand.

[4] The Set Aside Application is supported by the First Affidavit of Elsa Ho Ching Yi, with Exhibit 11EHCY1-1", filed 26 June 20153; the Second Affidavit of Elsa Ho Ching Yi, sworn 30 July 2015 and filed as part of Exhibit "ECM 1"4; and the First Affidavit of Sim Kwan Kiat, with Exhibit 11SKK-111 filed 26 June 20155. In opposition thereto LCap filed (initially unfiled) the First Affidavit of Ravinder Singh Thakran sworn dated 16 July 2015, which, together with its Exhibit "RST-1"6, was filed as Exhibit "AA-1"7 to the First Affirmation of Alexia Adda filed 16 July 20158• LCap also filed the First Affidavit of Thia Shen Yi, an advocate and solicitor of the Supreme Court of Singapore, sworn 16 July 2015 with Exhibit "TSY-1"9, relating to issues of Singapore law, in response to the First Affidavit of Sim Kwan Kiat10 filed in support of the Set Aside Application.

[5] The Liquidation Application is supported by the First Affidavit of Ravinder Singh Thakran filed 26 August 201511.

3 See Tab 10 and 11

4 See Tab 20 pages 1 to 4

5 See Tabs 12 and 13

6 See Tab 16

7 See Tab 15

8 See Tab 14

9 See Tabs 17 and 18

10 See Tab 12

11 See Tab 6

[6] The Company filed, on 4 September 2015, a Notice in Opposition to the Liquidation Application, pursuant to Rule 164(a) of the Insolvency Rules 201512, asking the court to dismiss the Liquidation Application on several grounds. These grounds are that the Company is not indebted to the Applicant and, alternatively, any dispute as to the alleged debt should be decided by arbitration. In the further alternative, the Company asserts that the alleged debt is said to arise under the Indemnity clause of the Amended and Restated Shareholders Agreement which does not apply, the debt has not crystallised and, accordingly, there is no liquidated debt pursuant to which a claim can be made under the indemnity clause. The Notice of Opposition also contends that the application is an abuse of the process of the court, it is defective as it does not contain the mandatory statements required by Rule 155(2)(b) of the Insolvency Rules, and the Company is solvent. The Notice of Opposition is verified by the First Affidavit of Eleanor Morgan filed 4 September 201513 filed (without the permission of the Court) evidence in reply to the Notice of Objection14. Any opposition by the Company to the filing of this evidence was not maintained before me.

[7] There were some irregularities and lateness, on both sides, in the filing of affidavits, including in January 2015 just before the adjourned hearing. No objection to these irregular filings were maintained before me. Learned counsel for both parties adopted a sensible and pragmatic approach to these matters. Accordingly, all affidavits filed on either side are admitted into evidence and are property before me for consideration, subject to any submissions regarding relevance and proof of certain facts.

[8] The consents of Mr Cosimo Borrelli and Ms Nilani Perera to act as liquidators of the Company, if appointed by the court, are at Tab 3 of the Hearing Bundle. Also included at Tab 3 is a letter dated 14 August 2015 from Mr David Abednego, Director - Insolvency Division of the Financial Services Commission, to the effect

12 See Tab 5

1·3 seeTab 7

that the written notice issued by or on behalf of LCap satisfies the requirements of section 483 of the Insolvency Act 2003.

[9] In satisfaction of the formal requirements under the Insolvency Rules relating to an application to appoint liquidators, the Applicant filed the First Affidavit of Nkwame Wheatley, with Exhibit 11NW1"15 , as proof of service on the Company at its registered office on 24 July 2015 of the Originating Application and certain other document listed at paragraph 4 of said affidavit. LCap also filed on 9 September 2015, the First Affidavit of Kim Pemberton exhibiting copies of the advertisement of the Originating Application in the BVI Beacon Newspaper and in the Official Gazette of 20 August 2015. Also filed on 10 September 2015 by LCap is the First Affidavit of Lucy Hannett, addressing certain technical points raised regarding compliance by the Applicant with Rule 255(2)(b)(ii) of the Insolvency Rules 2015. Ms Hannett also sought to update the court regarding certain decisions of the Singapore High Court in related matters, (Exhibit "LH1)"16.

Technical Points

[10] The Company, in its Skeleton Argument lodged 15 September 201517, raised two technical objections to the Liquidation Application. These were: (i) the Originating Application did not comply with Rule 155(2)(b) of the Insolvency Rules, in that it did not contain the required mandatory statements by the Applicant about the insolvency practitioners it proposed for appointment as the liquidators; and (ii) the Originating Application, at paragraph 27, refers to the Company having assets in Hong Kong and, in breach of Rule 165(1) of the Insolvency Act 2003, the Applicant did not advertise the Liquidation Application in Hong Kong, but only in BVI. However, as matters progressed before me, neither of these technical objections were pursued by the Company, notwithstanding paragraph 49 of its Skeleton Argument.

15 See Tabs 22 & 23

16 See Tabs 26 & 27

1 7 See paras 39 to 47)

The Transactional Agreements

[11] The facts are for the most part not controversial. The Company was incorporated under the laws of the BVI on 30 July 200918. Prior to 30 January 2013 the company, Kudeta Limited (11KDT BVI"), which in turn owned a number of underlying subsidiary companies, including Iconic Locations (S) Pte Ltd ("lconic11 formerly known as Ku De Ta SG Pte Ltd) and Nine Squares Pty Ltd ("Nine Squares). The Applicant, LCap, is a limited liability company incorporated in Mauritius on 19 December 20121s.

[12] On 30 January 2013, LCap entered into the following agreements for the investment by it in new and existing shares of KOT BVI:-

(a) A convertible loan agreement between KOT SG, as borrower, LCap (the Applicant), as lender; and KOT BVI, Retribution (the Company), Essence Investments Ltd, Karl Patel, Chris Au and Harry Associates as guarantors ("the CLA"). Pursuant to the terms of the CLA, LCap would lend KOT SG S$10,000,000 which would be convertible into shares of KOT SG, which would, in turn, be transferred to KOT BVI by LCap in exchange for shares of KOT BVI;

(b) A sale and purchase agreement by and between LCap, as purchaser, Essence Investments Ltd, as vendor, and Jason Cohen and Yew Kuan Cheong as guarantors ("the SPA"). Pursuant to the terms of the SPA, LCap would purchase existing shares of KOT BVI owned by Essence Ltd representing a 27.5% equity interest in KOT BVI upon the conversion of the convertible loan; and

(c) A shareholders agreement by and between LCap and Retribution (the Company) as shareholders, and certain individuals listed at Schedule

1 to the SHA and defined, together with Retribution, as the "warrantors".

[13] Pursuant to the terms of these agreements, after January 2013, LCap transferred S$9,500,000 in three tranches to KOT SG, having deducted S$500,000 for payment of its legal fees for entering into the investment.

18 See Tab 8 page 46

19 See Tab 11 page 239

[14] On 31 December 2013, certain amended transaction documents were entered into by the parties to the original transaction documents. They are:-

(a) An amended and restated convertible loan agreement by and between KDT SG, as borrower, LCap, as lender, and KDT BVI, the Company, Essence Investments Ltd, Kart Patel, Chris Au and Harry Apostolides as guarantors;

(b) A novation agreement. Pursuant to the terms of the Novation Agreement, KDT BVI would replace KDT SG as the original borrower under the CLA and the Amended CLA; and

(c) An amended and restated shareholders agreement by and between KDT SG, KDT BVI, the Company, Essence Investments Ltd, Karl Patel, Chris Au and Harry Apostolides (the ARSHA").

[15] As at 30 January 2014, the Company owned 49% of the legal and beneficial ownership of KDT BVI, and LCap owned the remaining 51%.

The Proceedings in Singapore and the Debt

[16] The background and details of the legal proceedings in Singapore are summarised in the parties skeleton argument. In brief, there were two proceedings brought in Singapore of relevance to this matter and, particularly, the alleged debt giving rise to the statutory demand and the Liquidation Application. They both concern 'the Bali Partnership', a reference to a partnership agreement entered into in or about 2000 between Authur Chondros, Guy Neale, Aki Kotzamichalis and Made Wiranatha. This partnership apparently owns and operates a restaurant, bar and club in Bali known as 'Ku De Ta Bali'. Initially, 'Ku De Ta' was registered as a trade mark in Indonesia and Australia. Subsequent to 2004, Nine Squares, whose two shareholders and directors were Arthur Chondros and Daniel Ellaway, applied for international registration of the Ku De Ta name and trade mark, including in Singapore. Apparently, the steps taken to register the name as a mark in Singapore were carried out without the prior knowledge of the original members of the Bali Partnership. The Singapore Court of Appeal subsequently found that Nine Squares registered the Singapore trademark on trust for the Bali Partnership. It is the damages and legal expenses incurred separately in these proceedings, that forms the basis of the alleged debt in the Liquidation Application.

[17] In the first proceedings, Suit 955 of 2010, the Bali Partnership brought a claim against KOT SG and, in the second, Suit 314 of 2011, it brought a claim against Nine Squares. The Bali Partnership lost both suits at first instance and appealed the decisions. The Singapore Court of Appeal partly allowed the appeal in Suit 955 of 2010. In respect of this action, KOT SG had incurred legal expenses of S$230,318.3720, which it did not recover from the Bali Partnership. This is one element of the alleged debt in the Liquidation Application. The second element arises from the judgment of the Singapore Court of Appeal on 22 December 2014 in the appeal from the decision in Suit 314 of 2014, whereby the Court of Appeal ordered Nine Squares to account to the Bali Partnership for profits derived from the exploitation of the trade mark in Singapore, and licence fees which had accrued or may have accrued to Nine Squares under various agreements. These amounted to the sum of S$3,642,695.1021 in damages.

[18] It is the Applicant, LCap's case that, "arising from the matters and facts existing at the time when LCap became a shareholder of KOT BVI, the costs and liabilities resulting from [these two legal proceedings in Singapore] are S$280,318.37 in respect of KOT SG and S$3,642,695.10 in respect of Nine Squares {together the "debt"). The existence and

quantum of the Debt is not disputed.2"2 While the facts and circumstances giving rise to these two liabilities, one of KOT SG and the other of Nine Squares, are not disputed by the Company, they contend that there really is no debt owed to the Applicant capable of founding an application to appoint liquidators.

20 **(see** invoices at Tab 11 pages 179 to 189)

21 See Tab 16 page 264

22 See Applicant's skeleton argument para 13.

The Issues

[19] The main issue for the court's determination, both in the Set Aside Application and in the Liquidation Application, is whether there is a debt, that is, whether the alleged debt is disputed on genuine and substantial grounds. This involves construing the indemnity provision at clause 5.2(a) of the ARSHA. Important to this consideration, is what is the correct test to be applied in BVI in determining whether a debt is disputed on substantial grounds. Secondly, whether, this being a matter of construction of the ARSHA, the Liquidation Application is an abuse of process in that the parties are bound to have this issue first decided by arbitration in Singapore, pursuant to the arbitration agreement in the ARSHA. Thirdly, in the event that the court accepts there is a debt capable of founding an application for appointment of liquidators, is the Liquidation Application for an improper motive; and, fourthly, ought the court, in the exercise of its discretion under section 167 of the Insolvency Act 2003, to appoint liquidators of Retribution.

The Indemnity and Arbitration Clauses

[20] Clause 5.2(a) 23 of the ARSHA provides as follows:-

"ln addition to and without prejudice to all rights and remedies available to LCap under this Agreement and in law, each of the company and the Warrantors hereby jointly and severally undertakes to keep LCap and its Affiliates fully and effectively indemnified against any and all losses, costs, damages, claims, demands, actions, proceedings, liabilities and expenses whatsoever (including but not limited to all legal costs or attorney's fees on a full indemnity basis) which any of them may suffer, incur or be made liable for after LCap has become a Shareholder of the Company, if loss arises from or is connected to:

(a) Any civil, criminal, arbitral, administrative or other proceeding or action threatened or instituted by any third party (including governmental authority) against any Group Company or Warrantor, including all proceedings disclosed to LCap and regardless of whether such proceedings are known or unknown as of the date hereof to any Party or its Affiliates;

...where such losses, costs, damages, claims, demands, actions, proceedings, liabilities and expenses arise by reason of a matter or fact existing as at the Effective Date".

[21] At clause 1.1 the terms "Affiliate"24 and "Group" and "Group Companies"25 are defined as follows:-

"Affiliate" means, in respect of any entity, any natural person or firm, corporation, partnership, association, trust or other entity which is directly or indirectly controlled by or is under common control with the subject entity and a natural person or entity which has an entity as an affiliate under the foregoing shall also be deemed to be an affiliate of such entity.

For the purposes hereof, the term "control" shall mean the possession, directly or indirectly of:

(a) the beneficial ownership or power to direct the vote of more than 50% of the votes entitled to be case; or

(b) the power to direct or cause the direction of the management and policies of any such entity or the power (contractual or otherwise) to veto major policy decisions in respect of that entity.

and references to **"Affiliated"** shall be construed accordingly

"Group" and "Group Companies" means the Company, KOT SG, KT Entertainment Pte. Ltd, and all the subsidiaries of the Company including, without limitation, Ku De Ta (Thailand) Co. Ltd, Ku De TA Pty Ltd, Kudeta Limited (incorporated in the UK), Nine Squares Pty Ltd, SAS Ku De Ta, Temple Trees Ltd, the corporate holding structure of which as the Effective Date is set out in Schedule 9 and "Group Company" means any one of them

[22] Pursuant to clause 44.126, the ARSHA is governed by the laws of Singapore. By clause 44.2 any dispute or difference between the parties to the ARSHA "as to **construction of this Agreement** or any matter of whatsoever nature arising thereunder or in connection therewith, including any question regarding its existence, validity or termination," shall be referred to arbitration in accordance

24 See Tab 11 page 75

25 See Tab 11 page 78

with the SIAC Rules. The place of the arbitration is Singapore. The only matters specifically excluded from the scope of the arbitration agreement, are disputes or differences relating to {a) any purely commercial matters relating to any deadlock, or {b) the determination of Fair Market Value pursuant to the ARSHA. It is readily apparent that the arbitration clause is very wide in its scope and intended application.

What is the correct test?

[23] Before me, Mr Clifton, learned counsel for LCap, relied on the test as formulated by Byron, CJ {as he then was) in**Sparkasse Bregenz Bank AG v Associated Capital Corporation** • BVI Civil Appeal No:10 of 2002. In a judgment delivered 18 June 2003, the learned judge states27, as settled law-

"The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding. A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company. If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to

27 See page 2

present the petition, accordingly the presentation of such petition would be an abuse of the process of the Court. The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved by actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court."

[24] I have quoted this passage in full because it encapsulates most, if not all, of the salient principles relating to the jurisdiction of the Companies Court (the Commercial Court) pertaining to applications for appointment of liquidators over insolvent companies. It formulates the test applicable in relation to disputes over a debt, the standing of an applicant to bring winding-up proceedings, the role and function of the Court in relation to such proceedings and, in particular, principles relating to abuse by an applicant of the Court's process in bringing the application. This formulation of the test and applicable principles, which has been adopted and applied in cases in this

jurisdiction, was distilled from a number of authoritative English cases, including the well-known case of **Mann v Goldstein** (1968) 2 AER 769.

[25] The principles, as formulated in **Sparkasse,** were applied in **Vendort Traders Inc v Evrostroy Grupp LLC** BVI Civil Appeal No: 41 of 2012, a decision of the Eastern Caribbean Court of Appeal delivered 26 May 201428• This case concerned, inter alia, a disputed debt which had been the subject of arbitration proceedings before the London Court of International Arbitration, resulting in an award in favour of the respondent company. The company then issued a statutory demand for the amount of the award. An application to set aside the statutory demand was unsuccessful at first instance. The appeal concerned whether the debt was disputed on a number of grounds. It was argued on appeal that since the award had not been enforced in BVI, there could be no basis for a statutory demand, and also that the award was procured by fraud and its enforcement was

28 See pages 2 through 3 and paragraphs 21 to 22

part of a fraudulent scheme. The Court of Appeal held that the enforcement of a foreign arbitral award under section 28 of the then Arbitration Act Cap 6, was not a necessary prerequisite to presentation of a statutory demand or a winding up petition. Additionally, the Court agreed with the judge at first instance that the appellant was estopped, save in exceptional circumstances, from re-litigating the issues which had already been decided by the arbitral tribunal.

[26] Learned counsel for LCap also relied on the decision of the Court of Appeal in **Angel Wise Limited v Stark Moly Limited**· BVI Civil Appeal No: 30 of 2010, delivered 13 February 2012, as authority for the principle that, in assessing whether a debt is disputed on genuine and substantial grounds, it is proper for the Court to consider and evaluate conflicting expert evidence as to the recoverability of the alleged debt under the applicable laws of the foreign State. In particular, reliance was placed on this statement of principle in the judgment of the Court of Appeal delivered by Edwards JA29.

"To determine whether it was a substantial dispute would require an evaluation of the affidavit evidence of the experts in my view. To determine whether the appellant would suffer substantial injustice required the learned trial judge to carry out a preliminary assessment of the facts on which the injustice is raised. Otherwise, the judge would be obliged to accept what was in the affidavits even where he discerned that it is spurious, blustering, lacking in genuineness or devoid of substance."

[27] Specifically as it relates to the applicability of an exclusive jurisdiction clause or arbitration clause, where a debt is disputed, Mr Clifton for LCap submitted that the Court need not take either of these provisions into account. He relied, in support of his submission, on this passage from the judgment of Bannister J in**Alexander Jacobus De Wet v Vascon Trading Limited** BVIHC {COM) 2011/0129 delivered 6 December 2011, at paragraph [16], viz-

"Although I am satisfied that the case [referring to **Pioneer Frieght Futures Company Limited v Worldlink Shipping, Ltd, Samoa]** was

29 See para 22

rightly decided on its facts, I consider [that] my analysis in [paragraphs

[16] and [171] was wrong. On reflection, I consider that Ms Robey's submissions were correct. I agree that the Court must first decide, on the evidence before it, whether there is a dispute at all. If the evidence (as in this case) discloses no ground at all for challenging the debt, then it is irrelevant that there may be an exclusive jurisdiction or arbitration provision. It seems to me that in so far as I held otherwise in **Pioneer** I was misinterpreting, rather than following, the decision of the Court of Appeal in **Sparkasse Bregenz Bank AG."**

[28] In her submissions, Ms Asgarian, learned counsel for the Company, argued for a different test concerning the applicability of an arbitration clause to the issue of whether the debt is disputed on substantial grounds. She did so in reliance principally on two authorities. The first is the decision of the English Court of Appeal in **Salford Estates (No.2) Limited v Altomart Limited** [2014] EWCA 1575 Civ. The Chancellor, Sir Lawrence Etherton, at paragraph 20, after citing the first instance judge's reference to the decisions in **Rusant Limited v Traxys Far East Limited** [2013] EWHC 4083 and in **Halki Shipping v Sopex Oils** [1998] WLR 726, went on to state, at paragraphs 20 and 21:-

"20. In *Rusant* Warren J made an order restraining the presentation of a winding up petition based on a statutory demand for payment of a loan and interest pursuant to a contract containing an arbitration agreement. He did so because, even though there was no bona fide defence to the alleged debt, the arbitration agreement and section 9 trumped the decision he would otherwise have made to dismiss the application to restrain the presentation of the petition." (emphasis added)

"21. *Halki Shipping* concerned a claim for demurrage under a charterparty, which contained an arbitration agreement. The defendant, which did not admit liability, applied for a stay pursuant to section 9 of the 1996 Act. The Court of Appeal dismissed the appeal from an order of Clarke J granting the defendant's application. The majority, ...held that there is a "dispute" for the purposes of the 1996 Act when a claim is not admitted as due and payable. **Accordingly, unless the arbitration agreement is** null and **void, inoperative or incapable of being performed within section 9(4) of the 1996 Act, the mandatory stay provisions** in **section 9(1) and (4) are engaged, even if, absent an arbitration agreement and section 9,**

the claimant could have obtained summary judgment. In the present case, the Judge referred to Henry LJ's approval of the statement of Clarke J in *Halki Shipping* that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration." (emphasis added)

[29] Learned counsel in her submissions, referred the court to the stance taken by counsel for **Salford Estates 30** to the effect that, in accordance with established jurisprudence, the court should only stay or dismiss a petition based on an unpaid debt in favour of an arbitration agreement, where the debt is bona fide disputed on substantial grounds. At paragraphs 39, 40 and 41 of the judgment, the Chancellor opines:-

"39. My conclusion that the mandatory stay provision in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. IA 1986 s. 122(1) 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 paragraph [19] pf *Rusant."* (emphasis added)

"40. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement - as standard tactic - to by-pass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay 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."** (emphasis added)

"41. There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted. In accordance with the decision in *Halki Shipping*, that is

30 See para 25

sufficient to constitute a dispute within the 1996 Act irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under IA 1986

s. 122(1)(ij, it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds."

[30] These are very compelling and authoritative statements of principle, but are they applicable to the relevant statutory provisions in the BVI?. It is therefore convenient to now refer to those statutory provisions. Section 18 (adopting Article 8 of the UNCITRAL Model Law) of the Arbitration Act, 2013 in the Virgin Islands provides, in relevant parts-

18(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.** (emphasis added)

(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.

(4) Where the Court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action.

[31] Section 18(1) is in the same mandatory terms as section 9 of the English 1996 Act referred to in **Salford.** It is the submission of Ms Asgarian that, where a debt is disputed, and there is a valid arbitration agreement which governs that debt, the test is not whether the debt is bona fide dispute on substantial ground under the Insolvency Act. The test is much lower. In**Halki Shipping v Corporation v Sopex Oils Ltd** [1998] 1 WLR 726 Hirst LJ at page 737A-C, cited with approval the following passages from the judgment of Saville J in *Hayter v Nelson* -

"In my judgment in this context neither the word 'disputes' nor the word 'difference' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can easily and immediately be demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word 'disputes' or the word 'differences' should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the court should endeavour to avoid that consequence by construing

these words in arbitration clauses so as to exclude all such cases, but to my mind there are at least three answers to such suggestions."

[32] Applying these clear principles to this matter, Ms Asgarian submits that unless LCap can bring its case within the limited exceptions in section 18 (1) of the 2013 Act, of which there has been no suggestion that they can, the Liquidation Application must fail. This is a compelling submission made on the basis of the English authorities.

[33] This brings me to the very recent decision of the Court of Appeal in **Jinpeng Group Limited v Peak Hotels and Resorts Limited** • BVI Civil Appeals Nos: 25 of 2014 and 3 of 2015. The judgment of the Court was delivered 8 December 2015 in respect of both appeals, consolidated for the purpose of hearing. On the First Appeal (No. 25 of 2014) the Court allowed the appeal against the decision of Bannister J whereby he struck out the appellant's Originating Application and set aside the appointment of provisional liquidators, who were accordingly reappointed with powers under a new order made by the Court of Appeal. Also, the Originating Application for appointment of liquidators of the respondent was restored for further hearing by the Commercial Court.

[34] In coming to its decision, the Court of Appeal held, applying the test in **Sparkasse,** that while it was correct that the winding up court should not be used to resolve disputes about debts or to decide issues of fact on a summary basis, nevertheless the Court has a duty to carry out a preliminary investigation of the facts to determine whether a dispute raised in relation to a debt in the winding up proceedings, is one which has been raised on genuine and substantial grounds. As regards an agreement to submit disputes to determination by arbitration, the Court held at No.5 as follows:

"5. While the arbitration clauses in this case are designed to resolve disputes between the contracting parties, once the appellant submitted this dispute to the court as the basis of a creditor's winding up application, it became an issue between the respondent and its creditors over the company's ability to pay its debts as they fall due. **This form of proceeding is not covered by the arbitration clauses** in the **agreements or section 18(1) of the Arbitration Act.** Therefore the court should not grant an automatic stay of the application under section 18(1) just because the respondent has raised a dispute over the appellant's status to apply for a winding up order. Furthermore, a creditor does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order. The statutory jurisdiction under section 162(1){b) of the Insolvency Act, 2003 is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds." **Salford estates (No2) Ltd v Altomart Ltd (No2)** [2015] 3WLR 491 applied. (emphasis added)

[35] Perhaps this last word, 'applied', was mistakenly used in drafting the Head Note, and the word 'distinguished' or the term 'not followed' ought to have been used by the

draftsman. The Court's consideration of the dicta in **Salford** appears from paragraph [46) of the judgement delivered by Webster JA. Here the learned judge quotes from the salient passages at paragraphs 39, 40 and 41 of the Chancellor's judgment. At paragraph [47] Webster JA continues in these terms:-

"[47) 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." {emphasis added)

[36] My reading and understanding of this decision is, firstly, that the Court of Appeal declined to apply the principles in **Salford** relative to an application to wind up a company under section 162{1){b) of the Insolvency Act 2003. Secondly, the Court reaffirmed the principle that an applicant for appointment of liquidators on the ground of an unpaid debt must show that the debt is not disputed on genuine and substantial grounds. Thirdly, in order to determine this question, in circumstances where the debt is disputed, the court must carry out a preliminary investigation of the evidence before it to determine whether the dispute has been raised on genuine and substantial grounds. Fourthy, the position in BVI has not changed to that in **Salford,** where there is an automatic stay or dismissal of the winding up proceedings purely because the debt is disputed and that dispute falls under an applicable arbitration agreement. Fiftly, the reasoning on which the Court came to that conclusion, and to not apply **Salford,** is that the principle of a debt being disputed on genuine and substantial grounds is, by now, too firmly a part of BVI jurisprudence to require a creditor, applying to appoint liquidators, to prove 'exceptional circumstances', such as the exceptions under section 18(1) of the Arbitration Act 2013. And sixtly, once an application is made to the Companies Court to appoint liquidators on the basis of an unpaid debt, the matter then falls squarely within the winding up jurisdiction and procedure, to which an arbitration clause does not apply, as it becomes a class remedy on behalf of itself and all creditors of the company, each of whom is entitled to appear on the hearing of the application to appoint liquidators.

[37] The decision of the Court of Appeal on this issue is clearly stated at paragraph [49] of the judgment:-

"[49] The debt in the case at bar is not disputed on genuine and substantial grounds and it falls under the terms of the arbitration clauses. Therefore, the court has a wide

discretion under section 162 of the Insolvency Act, 2003 to stay or dismiss the Originating Application and to force the parties to resolve the dispute by arbitration. However, the appellant does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order. It has to show that the dispute is not on genuine and substantial grounds and leave it to the court to exercise its discretion under section 162 on the usual bases."

[38] Webster JA, at paragraph [50] of the judgment, goes on to provide some guidance on how a court should exercise its discretion under section 162(1)(b), in circumstances where, as here, there is reliance on an arbitration clause under which the disputed debt falls. It is to be noted that in **Peak,** not only was the debt caught by the arbitration clause, but arbitration proceedings where already underway in Hong Kong. The learned judge found that, while the issue before the arbitral tribunal did not make the debt disputed on genuine and substantial grounds, it was a factor that favoured a stay pending the outcome of the arbitration31However, this had to be balanced against, on the peculiar facts of that case, the treasury bonds having gone missing in circumstances which the Court found unacceptable. This favoured the making of an order appointing independent persons to be responsible for investigating what had happened, with a view to recovery of the treasury bonds. The learned judge concluded in these terms:

"I would also add that if the appellant is required to prove exceptional circumstances to continue the Originating Application in accordance with the judgment in the **Salford Estates** case, which I have found that it does not have to do, I find that special circumstances exist in this case having

31 See para 50 (a).

regard to the allegations made against Mr. Amanat and the missing assets."

[39] Ms Asgarina for the Company submits that **Peak** does not prevent this court from applying the principles and ratio in both **Salford** and **Halki.** She also submits that **Peak** can be distinguished, as it is a case concerning winding up on the just and equitable principle and not on the basis of the company's insolvency, as is the ground in this matter. She submits further, that the reliance by the Court of Appeal on the decision in**C-Mobile Services limited v Huawei technologies Co. Limited** [BVIHCMAP 2014/0017 {delivered 15 September 2015) was misplaced, as that case dealt with the provisions at section 6 of the now repealed Arbitration Act Cap 6, which provision was not in similar mandatory terms as section 18(1) of the 2013 Act. Accordingly, the court in BVI is now bound to give effect to section 18(1) of the Arbitration Act 2013 when exercising its discretion under sections 162(1) and 167 of the Insolvency Act 2003, as to whether to appoint liquidators.

[40] In my view, there is considerable force in these submissions. However, this court is bound to follow the decision of the Court of Appeal in **Peak.** This is the difficulty Ms Asgarian faces as it relates to the test which this court must apply in determining whether the debt in this case is disputed on genuine and substantial grounds. In fact, Webster JA dealt with the corresponding provisions in the old and current Arbitration

Act from paragraph [38] onward of the judgment of the Court of Appeal. At paragraph [40] the learned judge observed that the new section 18(1) is wider in scope than the repealed section 6(2) in at least two ways, the second of which is that the new provision does not contain the words 'or that there is not in fact any dispute between the parties', found in section 6(2) of the old Act. Accordingly, section 18(1) is in line with the corresponding provision in the English Arbitration Act 1996 and the UNCITRAL Model Law.

[41] This is a most important consideration, especially since it is, and continues to be, the official stated policy and objective in the BVI, which led to the repeal of the old Act and the promulgation of the new, to adopt, almost entirely, the UNCITRAL

Mode Law provisions. As appears at paragraph [41] of the judgment, it is now the

clear position in England, based upon an almost identically worded provision to the BVl's section 18(1), that "merely asserting a dispute in the court proceedings is enough to get an automatic stay". This is the effect of the decisions in **Halki Shipping Corp v Sopex Oils Ltd** which was followed in the BVI in **Applied Enterprises v lnterisle Holdings Ltd et al.**

[42] It is to be observed further, that the clear approach taken by the Court of Appeal in the judgment in **Peak** was to (i) conclude that even though the application in that case was on the just and equitable ground, it was still a ·creditor's application' which was seeking a ·collective remedy on behalf of itself and all other creditors3'2;

(ii) once the appellant had ·submitted [the] dispute to the court as the basis of a creditor's winding up application it became an issue between the [company] and its creditors over the company's ability to pay its debts as they fall due'; (iii) this form of proceedings in the Companies Court is not covered by the arbitration clauses or section 18(1) of the 2013 Act; and (iv) in such circumstances, the court cannot grant an automatic stay under section 18(1)33.

[43] The upshot of this is that, while I have some sympathy for the submissions of Ms Asgarian on this most important aspect, this court is bound by the decision in **Peak,** which is more recent in time to the decision in **Applied Enterprises.** This is so notwithstanding that, in this matter, there is no suggestion that the arbitration agreement in clause 44 of the ARSHA is null and void, inoperative or in any way incapable of being performed, so as to bring this matter within the exceptions in section 18(1) of the 2013 Act. Based on **Peak, a** party to an arbitration agreement may be able to avoid its strict contractual effect requiring all disputed to be resolved by arbitration proceedings, purely by bringing proceedings before the Companies Court to wind up another contracting party on the basis of an undisputed debt.

32 See para 44

33 See para 45

[44] It is my view that section 18(1), coming as it does in modern arbitration legislation which seeks to create and to provide a comprehensive legal and modern framework for attracting and dealing with arbitral disputes from around the world, and to provide the platform from which to launch the BVI as an international arbitration centre, was intended specifically to limit further the jurisdiction and power of the court to intervene in and determine matters which clearly fall within the four corners of an arbitration agreement, by which the parties have decided, as a matter of contract, to have all disputes determined only by arbitration, however minor or indefensible their dispute or difference maybe.

Is the debt disputed on genuine and substantial grounds?

[45] The parties have posited before me two different interpretations of the Indemnity clause in the ARSHA. On LCap's version, the debt is not disputed on genuine and substantial grounds. In short, they contend that the interpretation posited by the Company is wrong, obscure and unsustainable, and is not supported by evidence of Singapore law. They rely on the plain meaning of the words in the Indemnity clause, and the application of the definitions of 'Affiliate' and 'Group' and 'Group Companies' in section 1.1. Furthermore, LCap submits that the interpretation contended for by the Company is not supported by its own evidence, particularly, the affidavit evidence of Elsa Ho Ching Yi and Sim Kwan Kat. Accordingly, there is no basis, other than a bare denial of the debt, and the Liquidation Application is not being opposed on any genuine and substantial grounds.

[46] As to the Indemnity clause giving rise to the debt in the circumstances of this case, LCap submits that both Nine Squares and KOT SG are subsidiaries of KOT BVI. In the case of Nine squares, indirectly through a BVI company, Temple Trees Ltd, and in the case of KOT SG through KOT BVl's direct ownership. This is borne out by the organizational chart provided to the Court and accepted by both counsel as being correct. It is also submitted that both Nine Squares and KOT SG are 'Affiliates' of LCap pursuant to the definition of that term in clause 1.1, and the correct interpretation of the Indemnity clause.

[47] They also rely on the fact that, at Schedule 28 to the ARSHA, under the heading 'Litigation', the two legal proceedings in Singapore which are said to have given rise to the debt, are listed, that is, Suits Nos. 314 of 2011 and 955 of 2010. Accordingly, LCap submits that there is no basis upon which the debt can be genuinely disputed.

[48] Ms Asgarian, on the other hand, submits that the debt is disputed on genuine and substantial grounds. That dispute relates to the construction of the Indemnity clause in the ARSHA. She too relies on the definition of the term 'Affiliate' and 'Group' and 'Group Companies' in clause 1.1. She submits that the debt does not arise simply because Nine Squares and KOT SG have a judgment debt against them, or has incurred legal expenses in defending the action.

[49] Ms Asgarian also submits that neither sum, the judgment debt or the costs expended in proceedings with the Bali Partnership, represent a liability or direct loss to LCap. These debts are said to arise simply by virtue of a right to be indemnified by the Company under the Indemnity clause in relation to liabilities of LCap's two Affiliates.

[50] In the First Affidavit of Mr Thakran, who is a director of LCap, he deposes that LCap was incorporated 'as a vehicle for the purpose of acquiring a controlling interest in the Group Companies', as this term is defined in the SHA34. He opined at paragraph 8, that "KOT SG and Nine Squares are Affiliates of LCap11 This conclusion is based upon his interpretation of the word 'control' used in the definition of 'Affiliate' in clause 1.1. Likewise, at paragraph 21 he purports to give evidence of the 'intention' of the parties at the time of entering into the SHA and ARSHA, particularly as it relates to the applicability of the indemnities, on the basis that Suits 955 and 314 had been specifically disclosed in the SHA. He concludes by stating: "While LCap may have to account for the sums it receives under clause 5.2{a) to Nine Squares and/or KOT SG, that is entirely independent of, and does

34 **See Para** 7

not affect LCap's contractual entitlement to recover such sums from the Warrantors under Clause 5.2(a}."

[51] Both the Nine Squares Suit and the KOT SG Suit, were listed under 'Specific Disclosures' at Schedule 28 to the ARSHA. The final outcome of each action is not in dispute and the supporting documents were exhibited as part of "RST-1"35.

[52] Regarding expert evidence as to Singapore law, LCap relies on the First Affidavit of Thio Shen Yi, who is an advocate and solicitor of the Supreme Court of Singapore, appointed to the rank of Senior Counsel in 2008, and who served as President of the Law Society of Singapore. He opines at paragraph 8, that the Company is disputing its liability for the debt "by taking **a narrow** interpretation of its obligation under Clause 5, 2(a} of the ARSHA." (emphasis added). He avers that under Singaporean law, 'the settled principles of construction applicable to commercial contracts apply equally to indemnity clauses.3"6 Other principles, relied

on by him in coming to his conclusion, are that the clause must be construed in light of the factual matrix relating to the deed or agreement, and the agreement must be construed as a whole. Applying these principles, he opined that, on a true construction

of the Indemnity clause, Nine Squares and KOT SG are both 'Affiliates' of LCap, "based on the language and commercial purpose of the

ARSHA"37. He pointedly disagrees with the meaning given to the term by Mr Sim

at paragraph 34 of his First Affidavit. In Mr. Thio view, nothing in the definition at clause 1.1 excludes entities which LCap may gain control of as a result of entering into the ARSHA.38

[53] Likewise, in his opinion, the factual matrix surrounding the entering into by the parties of the ARSHA, supports or confirms his interpretation of 'Affiliates'. He states that it was clearly the intention of the parties for LCap to be able to make a claim under clause 5.2(a}, as its 'Affiliates' are not parties to the ARSHA

35 See Tab 16 pages 552 to 661

36 See para 9

37 See para 14

38 See para 15

themselves, and cannot invoke the indemnity clause on their own.39 He also opines that this interpretation of the relevant provisions is more in keeping with his understanding of the 'commercial purpose' of the ARSHA, under which LCap acquired the majority shareholding in the Group Companies, despite being aware of the on-going litigation involving Nine Squares and KOT SG at the time of the transactio4no. Finally, Mr Thio concludes that Clause 5.2(a) "was designed to provide full protection to LCap against such foreseeable financial risks [from the

two Suits] in acquiring these entities. This would explain why the indemnity was drafted in such wide terms ..."41. In his view, there can be no dispute that LCap is entitled to be indemnified by the Company for all losses suffered by Nine Squares and KOT SG.42

[54] In support of its Set Aside Application, the Company filed the First Affidavit of Sim Kwan Kiat on 26 June 20154•3 Mr Sim (as he has been referred to) is a partner in the law firm of Rajah & Tann Singapore LLP, the solicitors for the Company in Singapore. He is a solicitor of the Supreme Court of Singapore and also admitted to practice in New York, USA. However, his First Affidavit is not made in the capacity of an independent expert giving evidence of foreign law but, as he states, as one of the solicitors having conduct of this matter in Singapore for Retribution. He expressly deposed that he is 'duly authorised by Retribution to make this affidavit.' Accordingly, to the extent that his First Affidavit expresses opinions on the laws of Singapore applicable to the interpretation of the Indemnity clause, they are not and cannot be considered as 'expert' evidence. At paragraph 13 of his First Affidavit, Mr Sim remarks that the claim by LCap to be indemnified is based on the premise that somehow LCap is liable for that sum, when in fact LCap is not liable for the judgment debt of S$3,642,695.10, only Nine

Squares. In the same vein, at paragraph 19, he opines that "[a]n indemnity claim can be made only for loss actually suffered."

39 See para 20

40 See para 21

41 **See para 21(b}**

42 **See para 24**

43 See Tab 12

[55] Regarding the definition of 'Affiliate,' Mr Sim also opines that LCap has not identified an affiliate which has suffered losses and costs arising from the two Suits in Singapore, and any construction of the term 'Affiliates', which leads to a conclusion that LCap should be liable for losses by its affiliates, would be absurd,

"as the relevant warrantors would be exposed to overlapping claims by both LCap and its Affiliates for the same losses."44 In his view,45 Nine Squares and KDT SG

cannot be construed as affiliates of LCap, as the term is not intended to include entities that LCap attained control of**as a result of the ARSHA, such as Nine Squares or KDT SG,"** (emphasis added)

[56] In his Second Affidavit filed as part of Exhibit "CH-1" to the First Affidavit of Catriona MacKay Hunter, Mr Sims confirms that under the laws of Singapore the test to be applied when interpreting contracts, is substantially the same as it is under English law46. He helpfully exhibits a copy of the decision of the Singapore Court of Appeal (its highest court) in Y.E.S.*F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known* as *Soup Restaurant Causeway Point Pte Ltd)* [2015]SGCA 55, delivered on 2 October 2015. By this decision, the Singapore Court of Appeal affirmed its prior decision in*Fairview Developments Pte Ltd v Ong* & *Ong and anor* [2014] 2 SLR 318 (SGCA} at [47] to [49], that the court's role in contractual interpretation is to give effect to the intentions of the parties as objectively ascertained.47

[57] The Singapore Court of Appeal also affirmed the applicability, under the laws of Singapore of the principles recently restated in the decision of the English Supreme Court in **Arnold v Britton** [2015] 2WLR 1593. In this case, Lord Neuberger formulated seven principles or factors to be borne in mind when construing a contractual provision48 It is not necessary for me, in coming to my

44 See para 23 45 See para 24 46 See para 7 47 See para 8

48 See paras 16 to 23.

conclusion on this issue, to fully set out these seven factors here. Suffice it to be said, that the court must, first and foremost, ascertain what the parties meant 'through the eyes of a reasonable reader'. The less clear the words to be construed are, the more readily the court can depart from their natural meaning, but this ought not to involve the court in an exercise of searching for drafting infelicities, in order to facilitate a departure from the natural meaning. As regards the principle of 'commercial common sense' or the ·commercial purpose', this, if useful, ought not to be deployed retrospectively, but must be ascertained, as it could or would have been perceived by the parties or by reasonable people, at the time the contract was entered into. However, a court must be slow to reject the natural meaning of the words used by the parties so as to take into account the commercial common sense, because it appears to be a very imprudent term for one of the parties to have agreed.

[58] The parties through their counsel have accepted that **Arnold v Britton** is good law in Singapore. With these principles in mind, I now tum to my determination of whether the debt is disputed on genuine and substantial grounds.

[59] In the instant matter, this court is not concerned, as in **Peak,** with matters or agreements relied on to say the debt is disputed, which do not apply or are not relevant to the issue of the existence of the debt itself. This matter rest squarely on the interpretation of provisions in the ARSHA, specifically clause 5.2(a), and the meaning of the words and phrases 'Affiliates', and 'Group' and Group 'Companies', in section 1.1.The parties have advanced two different interpre tations. Ms Asgarian on behalf of the Company submits that its interpretation is the only one that makes commercial sense. She submits that it cannot mean that the two companies, namely, Nine Squares and KOT SG, acquired by LCap after entering into the ARSHA, are included in the definition of 1 Affiliates,'so as to make the Company liable under the Indemnity clause for their liabilities in or arising from the two Singapore Suits, even where these proceedings were disclosed in Schedule 28 to the ARSHA. She also submits that, there being a genuine dispute regarding the interpretation of the contractual provisions, there is a bona fide dispute on genuine and substantial grounds. Accordingly, the debt cannot ground an application to wind up the Company. On the other hand, Mr Clifton argued that the meaning of the words used are clear, and the definition of 'Affiliates' clearly encompasses the two companies, Nine Squares and KDT SG.

[60] In my view, the starting point is that it is not the proper role of the Companies Court to be construing contractual terms in an agreement, which are clearly relevant to the issue of whether there is a debt, in order to ascertain whether the debt is disputed on genuine and substantial grounds, unless the language is capable of only one interpretation, which supports the existence of a debt. This is especially problematic where that construction of necessity involves applying foreign law, and deciding between conflicting opinions as to how the provision would be interpreted under the foreign law. This concern is minimised somewhat by the clear position reached, based on the very recent decision of the highest court in Singapore in the **Y.E.S F&B Group** case, that the principles formulated in **Arnold v Britton** apply in Singapore.

However, each 'expert' is contending for an interpretation based both on the natural meaning of the words used in the Indemnity clause and the commercial sense of the agreement.

[61] Is the meaning of clause 5.2(a) clear from the natural meaning of the words? It is clear that Retribution is a 'Warrantor', together with the individuals listed in Schedule 1 to the ARSHA. Thus, in construing clause 5.2(a) it is one of the companies which are jointly and severally potentially liable to indemnify LCap and its Affiliates against any and all losses, costs, damages, liabilities and expenses, including legal costs and attorney's fees on a full indemnity basis, arising from or in connection with civil and other proceedings against any Group Company or Warrantor. Such proceedings are specifically said to include "all legal proceedings disclosed to LCap11 • This would cover the proceedings disclosed in Schedule 28 to the ARSHA, that is, Suits 955 and 314 in Singapore. It is also clear, on the language used, that the two proceedings in Singapore, as disclosed, were against a 'Group Company' as the term is defined in clause 1.1. This definition expressly includes KDT SG and, as a subsidiary of KDT BVI, Nine Squares. All this seems quite clear on the natural meaning of the words used in clause 5.2(a).

[62] The next matter to be considered is the meaning and application of the term 'Affiliates', since, under clause 5.2(a) it is not only LCap which KDT BVI and the Warrantors (including Redistribution) is to keep indemnified, but also the Affiliates of LCap. It is clear from this definition that a company which is controlled directly or indirectly by LCap, is an 'affiliate' of LCap. The only issue is whether that definition was meant or is to be construed as including 'affiliates' acquired by LCap after the ARSHA was entered into, including those companies which it was contemplated under the ARSHA, would be acquired by LCap pursuant to its terms. Indeed, this is the very issue raised by Mr Sim in his First Affidavit, in particular, at paragraph 2449. While the definition of the term 'Affiliate' does not expressly exclude companies which may become an 'affiliate' of LCap post entering into the ARSHA, it may, in my view, be open to such an interpretation applying the commercial purpose principles articulated in **Arnold v. Britter,** on the basis that this was not what the parties intended, and had they so intended they would have expressly said so. Indeed, Mr. Thio in his First Affidavit filed by LCap, refers to or classifies this as a 'narrow' interpretation, but does not say it is unarguable.

[63] In my judgment, this is not a specious or frivolous argument. It is arguable on taking a certain approach to the interpretation of the term 'Affiliates' in clause 1.1 against the commercial context of the ARSHA. As such, this is not, in my view, an issue for determination by the Companies Court on the presentation of an application to appoint liquidators. In short, it is my considered opinion, and I so find, that the debt as claimed, both in the statutory demand and in the Liquidation Application, is disputed by the Company, Retribution, on genuine and substantial grounds. Accordingly, the Liquidation application must be dismissed.

49 See Tab 12 page 272

Is the liquidation application an abuse of the court's process?

[64] Having concluded above that the debt is disputed on genuine and substantial grounds, the Liquidation Application is clearly an abuse of the process of this Court, as this is not a matter for the determination of this court, but for an arbitral tribunal under clause 44 of the ARSHA.

The court's discretion under sections 162(2) (a) and section 167

[65] The exercise of the court's discretion under sections 162 and 167 of the Insolvency Act 2003, on the hearing of an application to appoint liquidators, is very wide. Pursuant to section 167(1) {b) the court may dismiss an application even where it is satisfied on the evidence that a ground for appointment of liquidators has been proved. I have concluded that I am not satisfied that the sole ground relied on by the Applicant in the Liquidation Application, that is, insolvency, has been made out as defined in section 8 of the Act, as the debt is disputed on genuine and substantial grounds. Furthermore, there is not, independent of the allegation of an indisputable debt, any evidence that the Company is unable to pay its debts as they fall due. Retribution is a solvent company, and there is no evidence before me pointing to any matters which have occurred in relation to the Company or its assets that require or justify the appointment of independent persons, such as liquidators, to investigate, as was the case in **Peak.**

[66] If I am wrong in my conclusion as to the debt, I would not, in exercise of my discretion under section 167 of the Insolvency Act, have appointed liquidators in all the circumstances of this case. This is taking into account the specific powers of the court under section 18(1) of the Arbitration Act 2013, and the arbitration agreement at clause 44 of the ARSHA. It is clear to me from that provision, that the parties to the ARSHA expressly agreed to resolve all their disputes through the process of arbitration, and not to have a party, without using the arbitral mechanism mandated by that clause, take the draconian step of applying to wind up another corporate party. This principle of international arbitration is now inimical to the stature ascribed to parties who have agreed to resolve their disputes,however unmerited or seemingly indefensible, out of the court process, and through the contract mandated process and internationally recognised system of arbitration. The BVI has now moved into that international arena boldly, as a new and emerging centre for international arbitration. The role of the courts to decide disputes caught by an arbitration agreement, have proportionately been

diminished and limited. In my view, it behoves the courts, including this Commercial Court, to support this process and to not hinder, in any way, its developmentand concretization, except in the most clearest of circumstances, which this case is not.

Conclusion

[67] For the reasons advanced and conclusions reached above, I make the following orders:

(1) The statutory demand dated 12 June 2015 by the Applicant, L Capital KOT Limited to Retribution Limited is set aside;

(2) The Originating Application filed by L Capital KOT Limitedon 17 July 2015 for appointment of liquidators of Retribution Limited is dismissed.

(3) The Respondent, Retribution Limited, shall have its costs of both the Setting Aside Application and the Liquidation Application to be assessed if not agreed.

Commercial Court Judge (Ag)