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Case Comment

NAVIGATING THE CROSSROADS BETWEEN ARBITRATION AND INSOLVENCY IN A CROSS-BORDER CONTEXT

Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd [2025] HKCFI 2417

The interplay between insolvency and arbitration remains contentious, especially where winding-up petitions involve disputed debts subjected to an arbitration agreement. In *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 ("*Hyalroute*"), the Hong Kong Court of First Instance confronted this issue with an added cross-border element: the plaintiff sought an anti-suit injunction to restrain Cayman winding-up proceedings by invoking an arbitration agreement governed by Hong Kong law. This commentary critiques the court's interpretation of the arbitration agreement and argues that *Hyalroute* ultimately underscores the potential for inconsistent outcomes when both domestic and foreign regimes are engaged.

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I. Introduction[1]

1 While no commercial party wishes that they or their counterparty faces insolvency, both parties must nevertheless cater for such a possibility during contract negotiation. In turn, governing laws and

1 This note is written in the authors' own capacity. The opinions expressed in this note are entirely the authors' own views and do not reflect the views or positions of the Supreme Court of Singapore or Singapore Management University. The authors are grateful to Associate Professor Darius Chan and Timothy Lee for their
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modes of adjudication are chosen with the aim of leveraging on the well-established insolvency and/or arbitration regimes of certain jurisdictions. What pushes the limit of inferring parties' intention, however, is having to ask whether parties contemplated that their choices may result in a conflict between the two sophisticated regimes. A further question arises of whether they considered the complications of a winding-up petition when agreeing to arbitrate.

2 In *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd*[2] ("*Hyalroute*"), the Hong Kong Court of First Instance ("HKCFI") was tasked with deciding how Hong Kong law, the governing law of the arbitration agreement, interacts with the Cayman Islands' insolvency regime. In doing so, the HKCFI dismissed the plaintiff's application for an anti-suit injunction ("ASI") to restrain the defendant's commencement of winding-up proceedings in the Cayman Islands against the plaintiff.[3] Since then, the Hong Kong Court of Appeal ("HKCA") has also refused the plaintiff's renewed application for an interim ASI pending appeal.[4]

3 This commentary focuses on the HKCFI's decision because the HKCA was not required to closely examine the entirety of the lower court's judgment. The HKCA was tasked to determine, *inter alia*, whether "the appeal ha[d] a real prospect of success".[5] The court concluded that the plaintiff had "no reasonably arguable appeal" in respect of the plaintiff's defence against the debt.[6] With the plaintiff's application "fail[ing] at the first hurdle", further discussion by the HKCA was unnecessary.[7] The bulk of the HKCFI's decision was thereby untouched and remains the premise of this commentary.

4 By engaging with a cross-border element and its effect on the interplay between insolvency and arbitration, the HKCFI in *Hyalroute* sheds light on the legal and practical effects of dealing with multiple jurisdictions that adopt differing approaches.

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2 [2025] HKCFI 2417.

3 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [142].

4 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [30].

5 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [16(1)].

6 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [22]–[29].

7 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [15] and [26]–[29].

II. Facts in *Hyalroute*

5 The plaintiff, incorporated in the Cayman Islands, applied to the HKCFI for an ASI to restrain the defendant creditor from "presenting any winding-up petition against [the plaintiff] in the Cayman Islands" ("Cayman proceedings").[8]

6 To justify granting an ASI, the plaintiff submitted that the defendant's presentation of the Cayman proceedings would breach the arbitration agreement under clause 43.1 of the Term Facility Agreement between the parties.[9] The arbitration agreement was phrased in the following terms:[10]

> 43.1 Arbitration
>
> (a) Any dispute, controversy or claim arising in any way out of or in connection with this Agreement (including (i) any issue regarding contractual, pre-contractual or non-contractual rights, obligations or liabilities and (ii) any issue as to the existence, validity, breach or termination of this Agreement) (a "Dispute") shall be referred to and finally resolved by binding arbitration administered by the Hong Kong International Arbitration Centre ("HKIAC")
>
> ...
>
> (c) The seat of the arbitration shall be Hong Kong. This arbitration agreement shall be governed by the laws of Hong Kong ...

7 The plaintiff's application was "interesting and novel".[11] Instead of seeking to stay the Cayman proceedings, an ASI was sought.[12] This litigation strategy can be read against the backdrop of a divergence between Hong Kong and English law on the treatment of winding-up petitions where an arbitration clause exists.[13] In gist:

> (a) Under Hong Kong law, winding-up petitions will generally "be stayed in favour of arbitration unless there is

8 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [2].
9 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [11].
10 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [53].
11 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [1].
12 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [5].
13 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [4]–[5].

abuse".[14] The position in Singapore is notably similar: winding-up proceedings will be stayed or dismissed if *prima facie* (i) the arbitration agreement is valid; and (ii) "the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in abuse of the court's process".[15]

(b) Under Cayman law, the position is similar to British Virgin Islands law: when a petition debt subject to an arbitration agreement is disputed, the court will dismiss or stay the winding-up petition if the debt is disputed on genuine and substantial grounds.[16] This is a "threshold inquiry".[17]

8 Furthermore, the plaintiff submitted that a foreign court's approach to either enforcing the arbitration agreement or staying foreign proceedings was irrelevant.[18] There was an underlying premise that only Hong Kong law should apply to determine breach.[19]

9 Conversely, the defendant submitted that the arbitration agreement was not breached because a Cayman court's winding-up order does not effectively determine parties' rights and obligations under Cayman law.[20] The defendant referred to the decision of the UK Privy Council ("UKPC") in *Sian Participation Corp v Halimeda International Ltd*[21] ("*Sian*") which held that "a creditor's winding-up petition does not … determine anything about the petition debt nor the petitioner's claim to be owed money".[22] A court either appoints a liquidator or makes a winding-up order "on a provisional assumption" of insolvency that

14 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [4].
15 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [56].
16 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [121]–[122].
17 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [121].
18 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [8(2)].
19 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [87(1)].
20 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [12(3)].
21 [2024] 3 WLR 937.
22 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [116], citing *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [88], [92] and [125].

may be rebutted "without that invalidating the liquidation process".[23] The liquidator can arbitrate the debt elsewhere.[24]

10 The defendant further submitted that there were strong reasons for declining the ASI. The Hong Kong courts should caution against effectively "shut[ting] out the [p]laintiff's home court from exercising its discretion under its public policy considerations".[25]

III. Holding in *Hyalroute*

11 The HKCFI dismissed the ASI application. The court adopted the following staged approach:

(a) As a starting point, any foreign proceedings that are in breach of an arbitration agreement may be restrained by an ASI.[26]

(b) The plaintiff must first show that clause 43.1, the arbitration agreement, was valid and enforceable.[27] This was not disputed.

(c) The plaintiff must then show that both the dispute on indebtedness *and* the Cayman proceedings fell within the subject matter scope of the arbitration agreement.[28] For the latter, the plaintiff must show that the Cayman proceedings had the effect of "finally resolving the dispute on the plaintiff's indebtedness".[29] This was based on a "proper construction of [c]lause 43.1 by applying Hong Kong law".[30]

(d) Even if the arbitration agreement was breached, the Cayman proceedings would not automatically be restrained.[31]

23 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [34].
24 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [88] and [94].
25 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [14(1)].
26 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [64].
27 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [66].
28 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [67]–[68].
29 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [72].
30 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [68].
31 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [131].

> The party resisting the ASI may show strong cause to not grant the ASI, such as when the merits of the defence amounts to being frivolous or an abuse of process.[32]

12 The HKCFI held that clause 43.1 was not breached, and in any event the ASI application would be dismissed because the plaintiff's defence was frivolous.[33] The latter finding was upheld by the HKCA, which rejected the plaintiff's renewed application because there was "no reasonably arguable appeal on the merits of the plaintiff's defence".[34]

13 This commentary focuses on three salient areas of discussion pertaining to the issue on breach, as first set out in the HKCFI's decision: (a) what the applicable principles are in granting an ASI where there is an arbitration agreement; (b) how the arbitration agreement should be interpreted; and (c) whether the foreign (winding-up) proceedings breached the arbitration agreement. To the extent that the HKCA made observations on these areas, they will also be discussed.

A. Applicable principles in granting an anti-suit injunction in favour of arbitration

14 The HKCFI first established that where a foreign proceeding breaches an arbitration agreement, it will ordinarily be restrained unless there are strong reasons.[35] This can be distinguished from ASIs that are granted on other grounds. Here, the court is focused primarily on the enforcement of a "contractual promise not to sue in the foreign jurisdiction".[36] Therefore, "considerations of *forum conveniens* or comity are irrelevant".[37]

15 In the same vein, a foreign court's treatment of the arbitration agreement or whether it will stay the foreign proceedings is irrelevant in

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32 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [132], citing *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 at [105].

33 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [136]–[141].

34 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [21]–[29].

35 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [26(1)].

36 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [26(2)].

37 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [26(2)].

an application for a contractual ASI.[38] If a party had agreed to arbitrate, "it should not be allowed to invoke any other relevant jurisdiction".[39]

16 The test for breach in the present case was whether there was a *valid and binding* arbitration agreement between the parties with a scope covering the dispute.[40] It was clarified that "a dispute will exist unless there has been a clear and unequivocal admission not only of liability but also quantum".[41]

17 Once breach is proven, the defendant must show strong reasons for such breach in order to resist the ASI. While these may include "dilatoriness and other unconscionable conduct by the applicant", it ultimately depends on the facts and circumstances.[42] Typical reasons like unclean hands and delay "are rarely persuasive unless supported by compelling evidence".[43]

B. How the arbitration clause should be interpreted

18 Next, the HKCFI turned towards interpreting the arbitration agreement in accordance with Hong Kong law as the governing law.[44]

19 The plaintiff argued that the Cayman proceedings breached clause 43.1 because the proceedings determined the parties' rights and obligations under Hong Kong law.[45]

20 Conversely, the defendant argued that the real issue was whether the Cayman proceedings "finally resolved" the dispute, *ie*, the findings of

38 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [44].
39 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [47], citing *Linde GmbH v Ruschemalliance LLC* [2023] HKCFI 2409 at [61].
40 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [32], citing *Bank A v Bank B* [2024] 5 HKLRD 250 at [59].
41 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [40], citing *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] HKCU 1020 at [23(3)].
42 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [35].
43 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [36].
44 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [56].
45 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [74].

the Cayman proceedings constituted *res judicata* and led to issue estoppel under Cayman law.[46]

21 The HKCFI agreed with the defendant's characterisation. The court referred to *Re Lam Kwok Hung Guy*[47] ("*Guy Lam CA*"), where the HKCA linked finality to estoppel.[48] The HKCFI then recognised that clause 43.1 expressly incorporated the concept of final resolution, thereby engaging *res judicata* and estoppel.[49] The defendant was also correct to submit that "for a foreign judgment to give rise to an issue estoppel, the foreign legal system must regard the issues relied upon as forming the estoppel to formally have preclusive effect".[50]

22 It remains to be seen if HKCFI's construction of "finally resolved" will stand on appeal. The HKCA observed that the plaintiff's ground of appeal, that the HKCFI narrowly interpreted the scope of the arbitration clause, was "reasonably arguable".[51] However, a conclusion was unnecessary because the appeal had already failed on the issue of there being no "reasonably arguable appeal" regarding the merits of the plaintiff's defence.[52]

C. Whether Cayman proceedings breached arbitration clause

23 Finally, the court had to determine whether the Cayman proceedings gave rise to *res judicata* or estoppel.

24 This entailed "understand[ing] the nature and effect of the Cayman proceedings by reference to Cayman law".[53] The HKCFI clarified

46 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [75].
47 [2022] 4 HKLRD 793.
48 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [79], citing *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 at [68]–[70].
49 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [79]–[82].
50 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [99]–[100].
51 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [18].
52 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [28].
53 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [86(1)].

that whether the proceedings breached clause 43.1 was contingent on applying Hong Kong law, the governing law of clause 43.1.[54]

25 While Hong Kong law was expressly chosen, this did not incorporate an "absolute standard" that parties only refer to Hong Kong law.[55] Instead, construction by local law involves applying the "rules and implications of local common law, including the rules of the conflict of laws".[56] The HKCFI clarified that it was "not deferring to Cayman law or the Cayman court".[57]

26 Applying Cayman law, the Cayman winding-up proceedings only determined a "threshold question" of whether the dispute was genuine on substantial grounds.[58] A Cayman petition therefore "does not determine or resolve the substantive dispute concerning the plaintiff's indebtedness".[59] Because Cayman law did not regard the petition as preclusive, the defendant's commencement of the petition did not "finally resolve" the parties' dispute.[60] Accordingly, clause 43.1 was not breached.[61]

27 Again, the HKCA did not rule on this issue although the plaintiff indicated intention to appeal against it. The HKCA held that issues relating to applying Cayman law would fall under the appeal on the construction of clause 43.1.[62]

IV. Discussion

28 *Hyalroute*'s holding furthers discussion in three interconnected areas. Firstly, it sharpens the concept of finality in arbitration clauses.

54 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [86(2)].
55 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [102].
56 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [92], citing *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 298.
57 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [104].
58 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [121(1)].
59 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [114] and [121(2)].
60 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [126(1)]–[126(2)].
61 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [126(3)] and [127].
62 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at [19]–[20].

Secondly, it clarifies when foreign law assists the analysis of foreign insolvency proceedings. These two takeaways are influenced by the outcome of the third area, which concerns competing approaches for winding-up petitions where the disputed debt is subject to arbitration.

A. Construction of "finally resolved"

29 The authors argue that clearer language is needed to ascertain whether issues that do give rise to estoppel are excluded from the scope of the arbitration agreement. For instance: clause 43.1 indeed states that the arbitral award will be final and binding. However, the ability to bind is already the expected outcome for any issue decided by the tribunal, and not necessarily an indicator that the issue must lead to estoppel. Otherwise, tribunals would not have any power in ruling on threshold issues like those in insolvency proceedings if it is suggested that the absence of estoppel has bearing on the finality of an award. Instead, the term "finally resolved" should be construed as a tribunal's final decision on the underlying issue.

30 The starting point of upholding parties' intention is to consider the express language of the arbitration clause.[63] An arbitration clause has both a positive obligation to resolve disputes by arbitration and a negative obligation not to commence proceedings elsewhere.[64] Commencing proceedings outside the contractual forum breaches the negative obligation, even if parties complied with the positive obligation to arbitrate.[65]

31 The main issue was whether the Cayman proceedings had the effect of "finally resolving" the dispute outside the contractual forum.[66] On a strict reading, the inclusion of "finally" in clause 43.1 qualified the obligations accordingly:[67]

> (a) There is a positive obligation to have disputes *finally* resolved by arbitration; and

63 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [69].

64 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [70].

65 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [70].

66 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [71].

67 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [70].

> (b) There is a negative obligation that "precludes the parties from having disputes *finally* resolved in a non-contractual forum".

32 The court had to decide whether an issue's finality was relevant or distinct from the concept of estoppel.[68] Referring to *Guy Lam CA*, the HKCFI observed that deciding a dispute relates to the capability of the process to raise estoppel.[69] Additionally, the court interpreted "finally resolved" to "emphasise the finality of the resolution of [parties'] disputes by arbitration".[70] The court also referred to the remainder of clause 43.1 to illustrate this:[71]

> (e) Any award of the Tribunal … shall be *final and binding* on the parties …
>
> (f) The parties *waive any right* to apply to any court of law and/or other judicial authority to …
>
> [emphasis added]

33 Accordingly, the court upheld the express wording of clause 43.1 by incorporating the concepts of *res judicata* and estoppel.[72]

34 The authors observe that including "finally resolved" in an arbitration clause is not novel. In *Re Simplicity v Vogue Retailing (HK) Co Ltd*[73] ("*Re Simplicity*"), the HKCA dealt with a similarly-worded arbitration clause. Referring to *Guy Lam CA*, the HKCA held that the negative promise was an "agreement not to present an insolvency petition unless and until the underlying dispute has been resolved by the agreed mechanism".[74] Crucially, "a petitioner seek[ing] a winding-up order on the basis of no *bona fide* dispute of the debt on substantial grounds" was effectively seeking the court's determination, thereby breaching the negative obligation.[75] However, the court did not go further to consider

68 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [75]–[76].
69 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [79].
70 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [79].
71 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [83].
72 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [84].
73 [2024] 2 HKLRD 1064 at [8].
74 *Re Simplicity v Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064 at [35(1)], citing *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 at [63], [65] and [70].
75 *Re Simplicity v Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064 at [35(1)], citing *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 at [63], [65] and [70].

the specific breach; the debtor-company's appeal was ultimately dismissed on a lack of proper evidence to dispute the debt.[76]

35 By contrast, *Hyalroute* seemed to introduce an additional requirement to the finality of resolution by requiring estoppel. If the HKCFI adopted the approach in *Re Simplicity*, the defendant's commencement of the Cayman proceedings would breach clause 43.1. A breach would arise because the defendant is essentially seeking a winding-up order in the Cayman courts on the same basis of no *bona fide* dispute of the debt on substantial grounds.

36 Instead, an inquiry on estoppel necessitated a finding on how Cayman law viewed the Cayman winding-up petition.[77] The characterisation of the defendant's petition as a threshold inquiry under Cayman law therefore mattered: the winding-up court's examination of whether the debt was disputed on genuine and substantial grounds was only a threshold one and did not have a preclusive effect to find estoppel.

37 The authors respectfully argue that *Re Simplicity* is more consistent with parties' intention.

38 The issue should be viewed against the backdrop of the *Fiona Trust* presumption, which states that parties presumably intend to resolve all disputes related to the contract under the same forum.[78] Accordingly, even disputes which do not lead to estoppel should also fall under the scope of the arbitration agreement. Maintaining the scope of "finally resolved" to concern all substantive issues would preserve the law of the arbitration agreement as the only applicable law. *Re Simplicity*'s functional reading also matches business expectations that arbitration governs all debt-related disputes, even those provisionally determined. It would not matter whether the courts view them as threshold or giving rise to estoppel.

39 Unless parties clearly intend otherwise, the authors respectfully argue against adopting *Hyalroute*'s understanding of "finally resolved". As seen in *Hyalroute*, there are distinct consequences in systems that treat liquidation as a mere provisional finding. The next section will focus on whether the foreign proceeding in question "finally resolved" the debt.

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76 *Re Simplicity v Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064 at [45].

77 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [99].

78 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 at [13].

B. Role of foreign law when analysing foreign winding-up proceedings

40 The authors agree with the court's understanding of when Cayman law is to be referred when determining if the Cayman proceedings had the effect of *res judicata*/estoppel.

41 The plaintiff's case is ultimately grounded in its underlying purpose for pursuing an ASI instead of applying for a stay of proceedings before the Cayman courts. Knowing the divergence in approaches between *Guy Lam CA* and *Sian*, the plaintiff likely expected the HKCFI, in applying Hong Kong law, to find that the winding-up petition was in breach of the arbitration agreement.

42 The HKCFI did not however pursue such an outcome: the court recognised that "for a foreign judgment to give rise to an issue estoppel, the foreign legal system must regard the issues relied upon as forming the estoppel to formally have preclusive effect".[79] It was therefore impossible not to apply the law of the foreign jurisdiction for the specific purpose of determining whether *res judicata* would arise as a matter of Hong Kong law.[80]

43 Some may postulate that parties did not expect their choice of Hong Kong law to entail applying Cayman law in certain scenarios such as *res judicata* of *foreign* judgments. Critics of the HKCFI's approach may further argue that it disregards parties' express choice of law governing the arbitration agreement and reallocates the risk that parties assigned to the governing law. Doing so could undermine the predictability that was bargained for.

44 However, the parties' choice of governing law also includes that system's conflict of laws rules.[81] Under Hong Kong law, estoppel by a foreign judgment is to be assessed with respect to what the foreign judgment characterises as estoppel.[82] This is not *renvoi* and does not displace the primacy of the chosen law.[83]

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79 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [99].

80 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [99].

81 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [92].

82 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [100].

83 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [96].

45 The authors therefore agree with the HKCFI that the choice of governing law is respected by first applying Hong Kong law (as the governing law) to interpret the clause. Only thereafter does foreign law help to establish the effect of the foreign proceeding as a *predicate* fact. Accordingly, the court made its own finding on that foreign law.[84]

46 It is generally uncontentious that a system's body of laws also includes its conflict of laws rules. The upshot of such an approach, however, is that it misses the divergence in how jurisdictions deal with winding-up petitions where there is a disputed debt subject to an arbitration agreement.[85]

47 Given the differing approaches, *Hyalroute* suggests that the way forward may simply require parties to explicitly state whether "final resolution" encompasses findings that could give rise to issue estoppel, regardless of how any foreign forum characterises its process. In the absence of so, the outcome would likely mirror that in *Hyalroute*: the court must find difficulty reading into a template arbitration clause an absolute standard of applying Hong Kong law without reference to its conflict of laws rules.[86]

C. Interplay between arbitration and insolvency

48 The discussion thus far hinges on whether Hong Kong will continue to adopt the position that the question of breach depends on how the foreign forum characterises its own winding-up process. However, the practical takeaways from the previous two sections will be lessened if a convergence in approaches arises. The challenge however is that the ongoing divergence appears unlikely to budge anytime soon, and this can be seen from the course that it has run thus far.

49 It is trite that not every subject matter is arbitrable. However, the answer is not as straightforward where there is a disputed debt that is subject to an arbitration agreement. Against this backdrop, two competing approaches appear to be increasingly entrenched in common law.

84 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [104].

85 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [4]–[5].

86 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [102].

50 First, the UKPC's decision in *Sian* departed from the English Court of Appeal's earlier decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*[87] ("*Salford Estates*"). In *Salford Estates*, the English Court of Appeal held that it would be inconsistent with Parliament's intentions in passing the Arbitration Act 1996[88] to undertake summary judgment proceedings to assess liability for a disputed debt in a winding-up petition.[89] The creditor had already agreed to submit debt-related disputes to arbitration.[90] Accordingly, the courts should "exercise [their] discretion" to stay the winding-up proceedings, "save in wholly exceptional circumstances".[91]

51 By contrast, *Sian* held that the courts should not stay or dismiss a creditor's winding-up petition merely because the debt falls within an arbitration (or exclusive jurisdiction) clause. The petition should proceed unless the debtor shows that the debt is genuinely disputed on substantial grounds.[92] The Board's rationale is that insolvent liquidation is a collective, non-adjudicatory process:[93] the court neither pursues nor determines the creditor's claim as to liability or quantum. There is no *res judicata* created between the petitioner and the company.[94] The court appoints a liquidator (or makes a winding-up order) only "on a provisional assumption of insolvency", which may later prove false without the process being invalidated.[95] Arbitration and insolvency therefore operate in parallel: the insolvency court intervenes only where there is a real dispute, while any merits determination remains for the agreed arbitral tribunal.

52 Hong Kong and Singapore take a different approach.

53 In Hong Kong, the court starts with construing the wording of the arbitration clause to determine if the foreign winding-up proceedings have breached the clause.[96] Following *Hyalroute* (affirming *Guy Lam CA*), winding-up decisions can result in breach when they determine issues and lead to estoppel where the usual conditions are met.[97] However,

87 [2015] 1 Ch 589.
88 (c 23) (UK).
89 *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 1 Ch 589 at [40].
90 *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 1 Ch 589 at [40].
91 *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 1 Ch 589 at [39].
92 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [126].
93 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [32].
94 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [33].
95 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [34].
96 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [52].
97 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [49(2)].

insolvency proceedings are not always automatically dismissed or stayed. The court factors a range of considerations, with "strong cause … needed to depart from" the arbitration agreement.[98] For instance, when "the merits of the defence [are] so bad that it borders on frivolous or the abuse of process".[99]

54 In the Singapore Court of Appeal ("SGCA") case of *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*[100] ("*AnAn*"), the court held that a *prima facie* standard applies when adjudicating a disputed debt or a cross-claim subject to arbitration.[101] Two requirements must be fulfilled: the arbitration agreement between parties is valid; and the dispute is covered by the scope of the arbitration agreement, provided that the dispute is not raised as an abuse of process.[102] The SGCA's decision considered and remains largely aligned with the views espoused in *Salford Estates*.[103]

55 Much has been written on the relative merits of these approaches and the authors add only a modest contribution to that discussion.[104] This commentary accordingly only focuses on two questions whose pre-existing discussion has been advanced by the analysis in *Hyalroute*:

> (a) Firstly, the "no determination" question concerning the effect of an insolvency court's findings on the winding-up petition: does a finding of no *bona fide* dispute on substantial grounds itself determine issues and thereby lead to estoppel, or does it otherwise clash with parties' promise to arbitrate?

98 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [131].

99 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [132].

100 [2020] 1 SLR 1158.

101 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [56].

102 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [56].

103 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [30]–[31].

104 See Darius Chan & Sidharrth B Rajagopal, "To Stay or Not to Stay? Clash of Arbitration and Insolvency Regimes" (2021) 38(4) *Journal of International Arbitration* 457; Andrew Chan *et al*, "Cross-Border Insolvency and its Impact on Arbitration" (2014) 26 SAcLJ 999; Shaun Matos, "Arbitration Agreements and the Winding-Up Process: Reconciling Competing Values" (2023) 72(2) *International and Comparative Law Quarterly* 309; and Neo Yu Fan & Chong Kai Sheng, "A Tale of Two Regimes: Arbitration and Insolvency from the Privy Council to Singapore" (2025) 37 SAcLJ 595.

(b) Secondly, the question of a creditor's standing: where the debt is disputed and arbitrable, is the petitioner entitled to bring the petition at all if there has yet been arbitration?

(1) "No determination" question

56 In essence, the outcome of *Hyalroute* turned on the Cayman court's answer to the "no determination" question. This was despite the HKCFI's finding that as a matter of domestic insolvency law, an insolvency court's finding on a winding-up petition does determine issues and breaches the arbitration agreement.[105]

57 To understand why the Cayman court would adopt such a position, the approach in *Sian* must be further broken down.

58 In *Sian*, the UKPC held that winding-up is not caught by the stay provision because it "does not resolve or determine anything about a petitioner's claim to be owed money by the company".[106] Further, because the creditor has not agreed to refer the winding-up to arbitration, it does not offend the negative obligation not to have it resolved by court process.[107]

59 *Sian* further distinguished the legislative outlaw of summary judgments of claims covered by an arbitration clause from a summary enquiry into whether a debt is genuinely disputed on substantial grounds.[108] Both winding-up and summary judgment involve a summary process; the latter however leads to a judgment, while a winding-up petition does not.[109]

60 On the other hand, *Hyalroute* and *AnAn* provide strong counterarguments.

61 In *AnAn*, the SGCA held that the court will risk "undercutting the parties' pre-dispute bargain … if the court directs, on the basis that no triable issues are demonstrated by the alleged debtor, that the debtor

105 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [49(2)].
106 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [53] and [88].
107 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [89] and [91]–[92].
108 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [96].
109 *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [96].

be wound up".[110] The court rejected the reasoning in *Dayang (HK) Marine Shipping Co, Ltd v Asia Master Logistics Ltd*[111] that winding-up would not breach the arbitration agreement as it only places the resolution of the disputed debt in the hands of the liquidator.[112] The SGCA warned that doing so effectively "offload[s] the decision-making function" of the tribunal to the liquidator through the proof of debt process.[113] Regardless of whether the liquidator or the court decides the dispute, what is omitted is the "parties' agreed method of dispute resolution, *ie*, arbitration".[114]

62 The SGCA then set out the practical harms of making a winding-up order before arbitration commences: directors would become "*functus officio*", control would vest in a liquidator who may choose not to arbitrate, and "there may be several practical difficulties with requiring the defendant-debtor to seek mirror image declarations of non-liability".[115] More crucially, the debtor has to "undertake a circuitous route to arbitrate its dispute", which "not only results in increased uncertainty and unnecessary costs but could also result in the unnecessary winding-up of companies".[116] This approach risks rendering arbitration nugatory in practice.[117]

63 *Hyalroute* clarifies that, as a matter of domestic insolvency law, winding-up proceedings based on a disputed debt would in themselves determine the dispute and therefore contravene an arbitration clause. Following *Guy Lam CA*, a Companies Court's finding of no *bona fide* dispute on substantial grounds can amount to a determination of an issue, capable of issue estoppel.[118] Even if a monetary judgment is not awarded, the HKCFI in *Hyalroute* adds that the determination could

110 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [79].

111 [2020] HKCU 494.

112 See *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [79], citing *Dayang (HK) Marine Shipping Co, Ltd v Asia Master Logistics Ltd* [2020] HKCU 494 at [71]–[72] and [76].

113 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [79].

114 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [79].

115 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [80].

116 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [80].

117 See Darius Chan & Sidharrth B Rajagopal, "To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes" (2021) 38(4) *Journal of International Arbitration* 457 at 477.

118 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [49], citing *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 at [67]–[73].

still in principle lead to estoppel "on the precise issues decided, if the usual conditions are satisfied".[119] This directly engages *Sian*'s reasoning as reproduced in para 59 above.

64 Therefore, the HKCFI tackled the problem in a way that matters in theory and practice. It rejected *Sian* in principle but also applied *Sian* in substance. Where the analysis turns on a foreign court's understanding of determination, parties' contractual risk allocation is externalised. Divergent results for identical conduct are produced: what constitutes breach in a regime that treats a finding of no *bona fide* dispute as decisive, will not in another regime that treats winding-up petitions as merely a threshold inquiry.

(2) Question of creditor's standing

65 Next, the anterior question in *Hyalroute* was whether the defendant was firstly entitled to bring the winding-up petition. Presumably, its standing was not in issue. This reflects the *Sian* line of reasoning that the right of a "creditor" to bring a winding-up petition does not depend on a judicial finding that that debt exists if the debt can be proved (or rejected) later in arbitration/the proof-of-debt process.

66 By contrast, the countervailing view provided by Singapore is that arbitrability operates as a gateway to a winding-up petition. In *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd*[120] ("*Founder Group*"), the SGCA held that "a claimant who relies on a disputed debt subject to arbitration cannot claim to have status as a creditor".[121] This is fortified by *AnAn*'s earlier holding that the insolvency regime is not even engaged at the point when a dispute arises in relation to the disputed debt; the arbitration of the disputed debt is a "necessary precondition" to invoking the insolvency regime.[122] Accordingly, the claimant cannot be considered to be a creditor with standing to bring a winding-up petition "until that dispute has been resolved in arbitration in the claimant's favour".[123]

67 In the authors' view, the divide on a creditor's standing affects sequencing and risk allocation. Singapore's approach safeguards the

119 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCFI 2417 at [49], citing *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 at [67]–[73].

120 [2023] 2 SLR 554.

121 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [35].

122 *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [71].

123 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [36].

arbitral bargain,[124] and curbs use of the petition's "draconian" leverage to force payment from the debtor.[125] *Sian*'s willingness to proceed on a provisional finding of insolvency prioritises speed in genuinely distressed cases. But that urgency can arguably be addressed within *AnAn*'s abuse exception: the court may still engage the insolvency regime where the debtor is "stav[ing] off substantiated concerns" such that the insolvency regime can be justifiably invoked.[126] For example, where there are missing assets, suspected fraudulent preferences, or the need to invoke avoidance powers under Singapore's Insolvency, Restructuring and Dissolution Act 2018.[127]

68 Ultimately, these are difficult questions that turn on the facts of each case, and how the forum in question chooses to balance between the seemingly competing objectives of arbitration and insolvency.[128]

V. Conclusion

69 *Hyalroute* can be viewed as a cautious yet significant attempt to deal with competing approaches. The HKCFI respected the ongoing divergence across jurisdictions by not attempting to collapse it. It instead focused on the more context-specific issue of dealing with arbitration in light of insolvency proceedings in a separate jurisdiction. What remains to be seen is how the issues on the construction and breach of the arbitration agreement will be clarified by an appeal or otherwise.

70 In closing, three takeaways can be gleaned from *Hyalroute* as it stands. Firstly, it is desirable for parties to expressly state that "finally resolved" is to be assessed solely under the law governing the arbitration agreement. Secondly, parties must be cognisant that choosing a governing law may import that system's conflict of laws rules in the relevant context. Thirdly, the fault line is likely to persist as both regimes claim a contested principled high ground.

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124 *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [75]–[82].

125 *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [30].

126 *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [99(c)], citing *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 at [29]–[30].

127 2020 Rev Ed. See *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [99(c)], citing *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 at [29]–[30].

128 *AnAn (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [71]; *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 at [89]–[93].

71 *Hyalroute* underscores the potential for inconsistent outcomes, contingent on: (a) the approach of the domestic forum; (b) the stance of the foreign forum; and (c) how the domestic forum balances between the two. While uncertainty is undesirable, it is perhaps inevitable. Should a normative choice be required, the authors contend that the *Guy Lam CA*/*AnAn* approach is preferable as it safeguards the arbitral bargain without foreclosing urgent insolvency provision. Nevertheless, *Sian* remains a respectable articulation of a different, policy-sensitive balance.