

**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2019] SGHC 81**

Originating Summons No 1086 of 2018

Between

BWF

*... Plaintiff*

And

BWG

*... Defendant*

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**GROUND OF DECISION**

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[Arbitration] — [Agreement]  
[Arbitration] — [Restraint of Proceedings]  
[Companies] — [Winding Up]

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**BWF**

**v**

**BWG**

**[2019] SGHC 81**

High Court — Originating Summons No 1086 of 2018  
Valerie Thean J  
29 November 2018, 15 January 2019; 2 January 2019

26 March 2019

**Valerie Thean J:**

**Introduction**

1 Plaintiff (“BWF”) and defendant (“BWG”) signed a contract for the sale and purchase of crude oil. BWG subsequently formed the view that, despite its performance of its obligations under the contract, BWF had failed to pay its invoice of US\$30,245,600. There is no dispute that this sum of US\$30,245,600 remains unpaid. BWF informed BWG that it was entitled to various defences under the contract between parties, which also provides that disputes between parties should be referred to arbitration. Notwithstanding this, BWG served a statutory demand on BWF.

2 By the present originating summons, BWF sought to restrain BWG from bringing winding up proceedings against it, being of the view that the contract between parties obliged them to proceed to arbitration to deal with their various

disputes. After hearing parties, I granted the injunction sought by BWF. BWG has now appealed and I furnish my grounds of decision.

## **Background**

3 BWF is a Singapore-incorporated wholly-owned subsidiary of the national oil company of an Asian country.<sup>1</sup> BWG is a company incorporated under the laws of the Commonwealth of the Bahamas.<sup>2</sup>

4 Parties were introduced to each other by a Singapore-incorporated company dealing in fuels and related products (“BWX”). BWF’s case is that, in order to facilitate a wider transaction between BWG and BWX, between 10 to 13 April 2018, BWX, through its oil trader Mr Shi, approached BWF’s deputy director Mr Bui through a series of telephone conversations and WhatsApp chat messages to offer BWF a position as an intermediary between BWG and BWX. As such an intermediary, BWF’s role was to pay BWG upon payment by BWX,<sup>3</sup> and did not take on any of the operational, credit risks or liabilities related to the wider transaction. 400,000 net U.S. barrels of Lula normal crude oil (“the Cargo”) was to be sold by BWG to BWF and thereafter, by BWF to BWX using two separate agreements.

5 On 13 April, after Mr Bui confirmed BWF’s participation with Mr Shi, a trader in BWG’s employ, Mr Chew contacted Mr Bui by WhatsApp with what he termed a “Deal Recap”. This Deal Recap was then sent to Mr Bui over email, followed by an amended Deal Recap, a series of documents being exchanged from 19 to 24 April, and finally, a facsimile from BWG to BWF on 27 April 2018. This facsimile on 27 April is the contract (“the Contract”) upon which the

<sup>1</sup> Mr Bui’s 1<sup>st</sup> Affidavit, Joint Bundle of Cause Papers (“JBCP”) Tab 2, p 1.

<sup>2</sup> Mr Chew’s 1<sup>st</sup> Affidavit, JBCP Tab 4, p 2.

<sup>3</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, p 17.

invoice of US\$30,245,600, and later disputed statutory demand, rests. The Contract is silent on BWF's role as an intermediary and responsibility to pay BWG only when paid by BWX. Clause 12 stipulates that it is governed by English law and disputes are to be referred to arbitration in London. The onward contract between BWF and BWX (the "BWF-BWX Contract") was finalised by facsimile on 3 May 2018.<sup>4</sup> The price BWX was to pay BWF was US\$30,253,600. BWF's intended profit as intermediary was therefore the differential of \$8,000.

6 According to BWF, such intermediary deals are common in the industry, to enable traders to meet trade volume targets for the financial year; for the intermediaries involved, it is a way to gain experience in relation to new markets or new products.<sup>5</sup> On BWF's part, this transaction enabled it to satisfy the trade volume set by its parent company and to gain experience in trading crude oil. Mr Bui thought this would be useful to prepare for a future refinery project and to gain exposure to the Chinese market.<sup>6</sup> In some cases, there was also an industry practice to have a written side agreement. On 3 May 2018, Mr Bui requested Mr Shi to formalise the intermediary role and the pay when paid condition in a separate tripartite agreement.<sup>7</sup> Mr Shi responded, while reiterating that BWF would not be required to pay BWG pending receipt of payment from BWX, that BWG preferred not to have such a written agreement.

7 Prior to BWF being approached by BWX – and BWF contends, unknown to it – on 6 April 2018, Mr Muda, a trader at BWX, emailed BWG to propose a deal where BWG would purchase the Cargo on a delivered ex-ship

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<sup>4</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 119–128.

<sup>5</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 15.

<sup>6</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 16.

<sup>7</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 135.

basis<sup>8</sup> from BWX and sell it to BWF. Under this proposal, BWG would have to pay BWX within 30 days, and would be paid by BWF within 90 days of the Notice of Readiness (“NOR”) Date.<sup>9</sup> BWG agreed to the proposal on 13 April 2018, subject to the completion of the contractual documentation.<sup>10</sup> The written contract between BWX and BWG was finalised on 27 April 2018, the same date as the Contract. The effect of this series of contracts was that the same Cargo would originate with BWX and return to BWX.

8 On 24 April 2018, BWG sent its invoice to BWF for the sum of US\$ 30,245,600, stated to fall due on 11 July 2018,<sup>11</sup> on the premise that BWG discharged the Cargo at the contractually agreed destination port, Dongjiakou.<sup>12</sup> Subsequently, on 4 May 2018, BWF in turn sent its commercial invoice dated 24 April 2018 to BWX for the sum of US\$30,253,600, stated to fall due on 10 July 2018.<sup>13</sup> The parties now disagree over whether there is sufficient evidence of proper delivery of the Cargo.

9 BWX did not make payment to BWF, and BWF subsequently failed to pay the amount of US\$30,245,600 to BWG, that being the amount owed to BWG under the Contract, excluding interest accruals (“the Disputed Debt”).<sup>14</sup> By 3 July 2018, it became clear that BWX was unable to effect payment of the purported purchase price for the Cargo to BWF by 10 July 2018.<sup>15</sup>

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<sup>8</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 3, 106.

<sup>9</sup> Mr Chew’s 1<sup>st</sup> Affidavit, JBCP Tab 4, p 9.

<sup>10</sup> Mr Chew’s 1<sup>st</sup> Affidavit, JBCP Tab 4, p 10.

<sup>11</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, p 26.

<sup>12</sup> Mr Chew’s 1<sup>st</sup> Affidavit, JBCP Tab 4, p 16; BWF’s Written Submissions pp 24, 26.

<sup>13</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, p 26.

<sup>14</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 3, 43.

<sup>15</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, p 28; Mr Chew’s 1<sup>st</sup> Affidavit, JBCP Tab 4, p 17.

10 On the morning of 4 July, Mr Bui and a colleague from BWF met with a BWG representative, Mr Chew. Mr Bui and his colleague state on affidavit that Mr Chew revealed that BWG had purchased the Cargo from BWX, and had procured Credit Agricole to issue a letter of credit to BWX, which had paid out 30 days after the purported NOR.<sup>16</sup> BWX had therefore received US\$30 million from BWG.<sup>17</sup> This was the first time, Mr Bui states, that he had any inkling that the series of deals were in fact a financing transaction pursuant to which BWG loaned US\$30 million to BWX. Mr Bui decided then that it was crucial for the tripartite agreement to be recorded in writing, and made the request.<sup>18</sup> Representatives from BWX, BWF and BWG met for this purpose.<sup>19</sup> At the conclusion of the meeting, BWX stated that it would follow on with an instalment payment proposal for payment to BWF.<sup>20</sup> Matters between BWF and BWG, on the other hand, remained unresolved as Mr Bui rejected Mr Chew's request to pay BWG before BWF was paid by BWX.

11 On 6 July 2018, BWX sent a proposed repayment schedule to BWF. This was forwarded by BWF to BWG.<sup>21</sup> BWG refused to accept any change in contractual terms for payment, and sent payment reminders instead to BWF on 9 and 12 July 2018.<sup>22</sup>

12 On 12 July 2018, BWF sent an email to BWG stating that they would like to settle the matter amicably and would write to BWG on a “without

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<sup>16</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 30.

<sup>17</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 29–30.

<sup>18</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 30.

<sup>19</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 31–32; Mr Chew's 1<sup>st</sup> Affidavit, JBCP Tab 4, pp 19–20.

<sup>20</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 32; Mr Chew's 1<sup>st</sup> Affidavit, JBCP Tab 4, p 22.

<sup>21</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 33; Mr Chew's 1<sup>st</sup> Affidavit, JBCP Tab 4, p 22.

<sup>22</sup> Mr Chew's 1<sup>st</sup> Affidavit, JBCP Tab 4, pp 7, 107–110.

prejudice” basis. On the same day, BWF entered into a settlement agreement with BWX (“the Settlement Agreement”), providing for payment of the sum of USD 30,253,600 in four instalments.<sup>23</sup>

13 Concurrently and separately, Mr Bui had discussed the matter with Ms Li, a Senior Manager at a Chinese state-owned oil trading company, who made investigations which included conversations with Mr Xu Yuan, the general manager of Hai Yuan Trading Pte Ltd, a wholly owned Singapore incorporated subsidiary of Haike Chemical Group Ltd (“Haike”), an independent oil refiner in China, on 16 and 21 August 2018.<sup>24</sup> Ms Li affirmed an affidavit to the effect that Hai Yuan was the receiver named in the NOR tendered by BWG to BWF.<sup>25</sup> Hai Yuan, being the procurement arm of Haike, purchases crude oil for importation into China, which is then utilised as feedstock by Haike’s refinery. The contention was that this transaction in question involved the purchase of cargo from Petrobas, to Hai Yuan, and on to Haike. Unauthorised copies of the documents had been made by an employee of Haike, which were then used as source documents to create the documents that were used in this case. Ms Li believed that the present transaction was a phantom trade, creating only an impression of a physical trade, in order for BWX to obtain a loan from BWG.<sup>26</sup>

14 On 13 August 2018, BWG served a statutory demand under s 254 of the Companies Act (Cap 50, 2006 Rev Ed) (“the Companies Act”) (“the Statutory Demand”) on BWF.<sup>27</sup> BWF responded on 20 August 2018 to dispute the debt claim, requesting that the dispute be referred to arbitration, and for BWG to

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<sup>23</sup> Mr Bui’s 1<sup>st</sup> Affidavit supporting winding up application, p 19.

<sup>24</sup> Ms Li’s 1<sup>st</sup> Affidavit, JBCP Tab 6, pp 2–3.

<sup>25</sup> Ms Li’s 1<sup>st</sup> Affidavit, JBCP Tab 6, p 3.

<sup>26</sup> Ms Li’s 1<sup>st</sup> Affidavit, JBCP Tab 6, p 5.

<sup>27</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 3, 42.



desist from winding-up proceedings. Solicitors further corresponded without a successful resolution, and on 3 September 2018, BWF filed an originating summons to set aside the Statutory Demand, and to ask for an injunction to restrain winding up proceedings.

15 In the meanwhile, BWX breached the Settlement Agreement with BWF on 10 August 2018, when the first instalment of US\$5,000,000 fell unpaid. BWF exercised its rights pursuant to Clause 4 of the Settlement Agreement on 17 August 2018, entitling BWF to treat the entire Settlement Sum as falling due and owing on 10 July 2018.<sup>28</sup> Subsequently, BWF's solicitors served BWX with a letter on 30 August 2018 requiring payment of the sums outstanding under the Settlement Agreement. After the failure of BWX to pay or make any offer to secure or compound the debt to the satisfaction of BWF, BWF filed CWU 260/2018 on 1 November 2018 to wind-up BWX. As at 2 January 2019 when I dealt with this application, CWU 260/2018 had been stayed by another judge pending the outcome of an application brought by BWX under s 211B of the Companies Act.

### Issues

16 The Contract contained a dispute resolution clause which stipulated that issues should be construed in accordance with English law, and disputes referred to arbitration in London. Clause 12 ("the arbitration clause") read as follows:<sup>29</sup>

THIS CONTRACT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH ENGLISH LAW. ANY DISPUTE, DIFFERENCE OR CLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING ANY QUESTION REGARDING ITS EXISTENCE, VALIDITY OR TERMINATION,

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<sup>28</sup> Mr Bui's 1<sup>st</sup> Affidavit supporting winding up application, p 4.

<sup>29</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 110.

SHALL BE REFERRED TO AND FINALLY RESOLVED BY  
ARBITRATION IN LONDON TO THE EXCLUSION OF ANY  
OTHER FORUM OR JURISDICTION IN ACCORDANCE WITH  
THE ARBITRATION ACT 1996, OR ANY STATUTORY  
MODIFICATION THEREOF...

[emphasis added in italics]

The “Deal Recap”, sent by BWG to BWF on 13 April, also contained a similar direction: “Law and Arb: English Law, London Arb”.<sup>30</sup>

17 BWF submitted that in the present case, where a claim for a disputed debt falls within the scope of an arbitration clause, the applicable standard for determining whether an injunction should be granted to restrain the commencement of winding up proceedings is whether there is a *bona fide prima facie* dispute that is subject to an arbitration agreement.<sup>31</sup> This was the standard applied by the High Court in *BDG v BDH* [2016] 5 SLR 977 (“*BDG*”).

18 BWG, on its part, contended that notwithstanding the arbitration clause, the correct standard is that of a triable issue. This standard, accepted by our courts as the standard generally used for an injunction to restrain winding up proceedings, is no more than that for resisting a summary judgment application (see *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd* [2014] 2 SLR 446 (“*Chimbusco*”) at [16]). Where one can demonstrate “a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence”, a stay should be granted (see *Chimbusco* at [31]). A court would have to examine the affidavit evidence to determine whether a dispute exists, and consider whether on such material, an arguable case could be made meriting the holding of a trial of the issues. As stated by the Court of Appeal in *Chimbusco* at [30] in the context of bankruptcy proceedings:

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<sup>30</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, p 20.

<sup>31</sup> BWF’s Written Submissions, p 8.

... The court must examine *all the facts* to ascertain whether the “genuine triable issue” test in para 144 of the Practice Directions is satisfied. The upshot of this is that the court will only set aside a statutory demand (and thereby require a creditor to initiate a civil suit if he wishes to pursue the claimed debt further) where the debtor is able to adduce evidence on affidavit that raises a triable issue.

[emphasis in original]

This was applied by the High Court in *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250 (“VTB”).

19 This then formed a prefacing issue in this case, the lens through which all other matters raised by BWF and BWG were considered.

20 The substantive defences raised by BWF were the following:

- (a) that the parties had a common understanding of a “pay-to-be-paid” arrangement where payment to BWG would only be due after BWF had first received payment from BWX;
- (b) that the Contract specified documents necessary to trigger BWF’s alleged payment obligations, and BWG failed to present BWF with these, such that the payment obligation has not arisen;
- (c) that BWG did not have the requisite documents showing proof of title to the Cargo which the Contract also specified; and
- (d) that the BWG-BWF contract was part of a sham transaction to disguise a loan from BWG to BWX, and therefore unenforceable as a sale of goods contract. This contention was related to the allegations summarised above at (b) and (c) that BWG never presented the

necessary documents to BWF, and that BWG never obtained good title to the Cargo.

21 BWG, aside from characterising BWF's potential defences as bare assertions, countered with two additional arguments:

- (a) BWF had admitted to the Disputed Debt in correspondence;<sup>32</sup> and
- (b) BWF's action in bringing CWU 260/2018 against BWX amounted to an admission under s 17 of the Evidence Act (Cap 97, Rev Ed 1997), and raised an estoppel under s 31 of the same Act.<sup>33</sup> This contention had variations more fully detailed below.

## Decision

22 I held that the existence of a *bona fide prima facie* dispute was sufficient for the court to grant the injunction sought. While a clear admission on liability and quantum or other abuse of court process would disentitle BWF to the benefit of the arbitration clause, such was not the case here. At the same time, in view of the variance in High Court decisions on the applicable standard, I considered whether the other defences raised substantive triable issues. I also concluded that they did. In respect of CWU 260/2018 brought by BWF against BWX, I was of the view that these proceedings had no bearing on the application. I therefore granted the injunction sought. My reasons follow.

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<sup>32</sup> Legal Submissions for BWG, pp 10–11.

<sup>33</sup> BWG's Written Submissions on CWU 260/2018, tendered on 29 November 2018, p 2.

***The applicable standard***

23 I start with the threshold issue of the applicable standard for an injunction in these circumstances.

***Bona fide prima facie dispute***

24 In *BDG*, the High Court rejected the standard of triable issues in favour of that of a *prima facie* dispute. Agreeing with the approach of the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 (“*Salford*”), the court held that so long as there was a *prima facie* dispute that was subject to an arbitration agreement, and there were no indications that issues were not raised *bona fide*, the court should grant an injunction to restrain winding up proceedings (see [21] and [23] of *BDG*).

25 The court observed, at [22], that while the objective of the triable issue standard was “to ensure that winding-up is not staved off on flimsy or tenuous grounds”, that objective was less pressing in the face of an arbitration clause where the “countervailing concern is to hold parties to their agreement if they have made a bargain that disputes are to be arbitrated...”. Although the learned judge acknowledged the possibility that the lowered standard of a *prima facie* dispute may cause an increase in the number of applications by companies desperate to fend off their creditors and stymie the winding-up regime in Singapore, he noted at [23] that: first, if issues were not raised *bona fide*, then there would be no *prima facie* dispute; and secondly, any apparent injustice suffered by the creditors would have to be assessed in the context of the bargain struck between the creditors and the company in the agreement containing an arbitration clause.

26 Following this decision, Harris J in the Hong Kong Court of First Instance took the same position in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCU 702 (“*Lasmos*”).

*Substantial dispute*

27 In *VTB*, the defendant opposed a winding up application by the plaintiff on the basis that there was a disputed debt between them that was governed by an arbitration agreement. It was argued that the Court of Appeal decision of *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 (“*Metalform Asia*”) was binding on the High Court. *Metalform Asia* concerned a debtor company seeking an injunction to restrain a winding up application by a creditor of an undisputed debt. There, the appellant argued that it had a *bona fide* cross-claim on substantial grounds which exceeded the undisputed debt, and that an injunction should be granted on that basis. The learned judge found, at [58], that:

... *Metalform* stands for the principle that *even if* there is a dispute between the parties which goes to the crux of the applicant-creditor’s winding up petition *and* such dispute is governed by an arbitration agreement, the standard of proof is that of triable issues.

[emphasis in original]

*Vinmar*

28 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (“*Vinmar*”) is a decision of the Court of Appeal that was not brought to the attention of the Court in *VTB*. I was of the view that it followed from *Vinmar* that the relevant standard ought in principle to be that of a *bona fide prima facie* dispute.

29 I start with reference to party autonomy, first emphasised by the Court of Appeal in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (“*Tjong Very Sumito*”) at [28]:

An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore...More fundamentally, *the need to respect party autonomy (manifested by their contractual bargain)...has been accepted as the cornerstone underlying judicial non-intervention in arbitration ...*

[emphasis added in italics]

30 In *Tjong Very Sumito*, the Court of Appeal held at [46] that in situations involving a stay of court proceedings in favour of arbitration under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”), a “merely asserted dispute suffices to warrant a stay of court proceedings without any inquiry into the genuineness or merits of the defence”. The Court declined to investigate the merits of a defence on the basis that a dispute exists as long as one party disputes or denies a claim, regardless of how easily that party can be proven wrong (see [44] of *Tjong Very Sumito*). In the words of Saville J in *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd’s Rep 265 at 268, which was cited in *Tjong Very Sumito* at [44]:

... 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 be easily and immediately 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. ...*

[emphasis added in italics]

31 The example makes clear that where parties have an agreement to refer disputes arising out of their contract to arbitration, and any dispute occurs within the ambit of that arbitration clause, even one easily resolved, their contractual bargain should be given effect.

32 This emphasis on party autonomy was affirmed in the Court of Appeal’s more recent decision of *Vinmar*.

33 In *Vinmar*, the Court of Appeal decided to depart from previous authorities laid down by the Court. It held that where there was an exclusive jurisdiction clause, Singapore courts, when considering whether there was strong cause to refuse a stay (“the strong cause test”), should disregard the merits of the parties’ cases. This marked a departure from a long line of Singapore decisions that began with *The Jian He* [1999] 3 SLR(R) 432 (“*The Jian He*”). *The Jian He* line of decisions held that a relevant factor under the strong cause test was whether the party seeking a stay had a genuine defence (see [84]–[94] of *Vinmar*).

34 The court highlighted that “the rule in *The Jian He* is inconsistent with the central principle of party autonomy that pervades the law in this field”, and that dismissing an application for a stay of proceedings based on an exclusive jurisdiction clause simply because there is no genuine defence would fail to give effect to the parties’ agreement (see [114] of *Vinmar*). The Court of Appeal also alluded at [119] to the desirability of coherence in the law achieved by aligning the law governing exclusive jurisdiction clauses, *forum non convenience* and International Arbitration Act applications: across these various areas, the merits of the defence would be irrelevant on the issue of a stay.

35 This principle of party autonomy is relevant to the facts at hand, unless the insolvency context prevents its application. Would the interfacing issue of the company winding up regime pose a countervailing point of principle? *Chimbusco* explains at [22] that a bankruptcy court should be able to have recourse to the summary judgment standard in order to protect the interest of a meritorious creditor; otherwise, a creditor would have to incur additional costs



by having to safeguard his interests in different proceedings. If a bankruptcy court were to dismiss outright a bankruptcy application on the strength of a shadowy case, the creditor would be put to the further expense and inconvenience of filing a writ and a statement of claim and making a summary judgment application, whereupon the very same issues that were canvassed before the bankruptcy court would have to be rehearsed in detail. That is the rationale behind the use of the substantive defence standard. Where parties have agreed to an arbitration clause, however, this principle is not in play: there is another that must be considered. This is that parties have chosen, ahead of disputes arising, how they would wish such disputes to be dealt with. In absence of contrary intent, such disputes must include any that would create cause, or give *locus standi* on the part of a creditor, to wind up the other party. To put the point another way, *Tjong Very Sumito* suggests it is an abuse of process to resort to judicial facilities where parties have agreed otherwise (see [19], [71]). A creditor who wishes to file winding up proceedings knowing that the debt which is its premise is the subject of a dispute which was earlier agreed to be arbitrated, would be misusing judicial facilities if good reason to renege upon his contractual bargain is absent. The principle in focus where an arbitration clause is engaged is that of party autonomy, and it extends into the insolvency context. To hold otherwise, as pointed out by Sir Terence Etherton C in *Salford* at [40], would encourage parties to bypass the arbitration agreement as a standard tactic by presenting a winding up petition, thereby pressuring the alleged debtor with the draconian threat of liquidation.

36 One issue remains, which is whether *Metalform Asia* is binding on the High Court on this very question. *VTB* held that it was. In *Metalform Asia*, there was a cross-claim that was to be referred to arbitration; it was on this basis that the court decided that winding up proceedings should be restrained to allow for the arbitrator to first determine the quantum of the cross-claim, and whether it

was equal to or in excess of the undisputed debt (see *Metalform Asia* at [89]). The Court of Appeal decided that the applicable standard to stay court proceedings in situations where there was a genuine cross-claim, was the “unlikely to succeed” standard (see *Metalform Asia* at [87]), which has been subsequently noted to be no different from the triable issues standard (see *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [26]; *VTB* at [55]).

37 In *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 A.C. 854, Lord Denning describes the task of distinguishing between *ratio decidendi* and *obiter dicta* as “formidable” and, in certain cases where appellate courts write single judgments, “exceedingly difficult” for lower courts. In my respectful opinion, *Metalform Asia*’s *ratio* could be distilled into the following: the existence of security does not reduce the quantum of a cross-claim, a partially secured cross-claim was still a cross-claim for the amount claimed; a cross-claim calls into question the *locus standi* of a creditor to wind up a company on the same basis as a disputed debt; and that the standard applicable where an application was made to stay a winding up petition on the basis of a serious cross-claim on substantial grounds, being “unlikely to succeed”, ought also to be the standard applicable in deciding an application to restrain the filing of a winding-up petition. The significance of an arbitration clause was not directly engaged in *Metalform Asia*; dealing with the arbitration clause in the cross-claim was not a necessary step to the Court of Appeal’s decision. No arguments were mounted on the significance of the cross-claim’s submission to arbitration with regard to the applicable standard for granting injunctions. Both parties in *Metalform Asia* had agreed that the arbitrator was the proper adjudicator for the cross-claim issue (see [89] of *Metalform Asia*).

38 I held, therefore, that the relevant standard was that of a *bona fide prima facie* dispute. I turn, then, to explain why this standard was met on the facts of this case.

***Application of the threshold standard on the facts***

39 What may form the content of a *prima facie bona fide* dispute? Taking reference from the Court of Appeal's preference, highlighted in *Vinmar* at [119], for coherence in the law relating to exclusive jurisdiction, *forum non convenience* and arbitration applications, I am of the view that I should draw guidance from the Court of Appeal's articulation of the approach to be applied in *Tjong Very Sumito* and *Vinmar*. These decisions make clear that a court need not be concerned with the merits of parties' arguments when considering whether there is a *bona fide prima facie* dispute. Mere allegations of dispute would not suffice; only where an applicant for a stay is guilty of an abuse of process would the Court decline to grant a stay (see *Tjong Very Sumito* at [59]; *Vinmar* at [131]). In *BDG*, the High Court considered and dismissed contentions made on abuse of process, at [32]. An example of abuse raised in *Tjong Very Sumito* at [59] and [61], which was subsequently affirmed in *Vinmar* at [131], was that of an applicant who had made a clear and unequivocal admission as to both the liability and quantum of a claim, but seeks a stay for no reason other than its alleged inability to pay. Such an applicant cannot be said to have raised issues *bona fide*, and his application for a stay would be refused. As the Court of Appeal noted, the threshold for abusive conduct is very high, and would only occur in exceptional situations (see *Vinmar* at [131]).

40 English and Hong Kong authorities do not differ. Explaining the effect of *Salford* at [10] of *Eco Measure Market Exchange Ltd v Quantum Climate*

*Services Ltd* [2015] BCC 877, Alan Steinfeld QC sitting as a deputy High Court judge in the Chancery Division stated:

What the Court of Appeal decided in clear terms in the *Salford Estate* case was that, where there is an arbitration clause, it is sufficient to show that the debt is ‘disputed’ and for that it is sufficient to show that the debt is not admitted.

Reasons could also arise out of the insolvency context. Harris J in *Lasmos*, at [29]-[30], reiterated *Salford*’s approach that arbitration clauses are relevant to the court’s exercise of discretion, they do not oust the winding up jurisdiction. Therefore, “exceptional” circumstances could still exist for the continuation of winding up proceedings. For example, there could be an urgent need to appoint independent persons to investigate potentially misappropriated assets that were missing from the company, or a substantial concern that there had been fraudulent preferences, or a need to engage the statutory avoidance provisions.

41 Of the various issues raised in this case, two had potential to “exclude the existence of a dispute”, as framed by *Tjong Very Sumito* at [61]. The first is the contention by BWG that BWF had made an admission. I turn, first to this.

*Whether BWF has made an admission*

42 The Court of Appeal made clear in *Tjong Very Sumito* at [63], that an admission must be clearly stated, and must extend to both liability and quantum. This approach is premised on the wish to limit judicial intervention in arbitration: “Even admitted (but unsatisfied) claims may evolve into disputes that warrant arbitration in accordance with the existing agreement to arbitrate.”

43 BWG argued that BWF had admitted to the Disputed Debt in correspondence with it,<sup>34</sup> relying primarily on a repayment proposal made in an

email dated 6 July 2018 from BWF.<sup>35</sup>

44 In the present case, a perusal of the email highlighted by BWG reveals that BWF considered that its liability was conditional upon payment in the first instance by BWX. This has been consistently maintained since the commencement of the dispute, and is made clear by the same email of 6 July which BWG's case stands on:<sup>36</sup>

Right now, [BWX] is delaying payment. As you know our agreement is that [BWF] will only pay to [BWG] if it is paid by [BWX]. If [BWX] does not pay, [BWF] will not pay either. As informed to Mr Muhammad, we have received [BWX]'s offer per your request during Wednesday's meeting between all three parties. Please see attached. [BWX] has also told us that your side is agreeable to accept rescheduled payments.

...

As [sic] next step, please confirm [sic] [BWX]'s payment terms are acceptable to [BWG]? If acceptable to [BWG], or if you have counter, [BWF] can communicate your confirmation to [BWX]

...

This difficult situation is because [BWX] is defaulting on its obligations to both of our companies. We hope we can settle this matter soon and that it will not affect the relationship between our companies.

45 This qualification as to BWF's liability was reiterated on 12 July:<sup>37</sup>

[BWF] will honour all its legal obligations. However, we do not agree that we are liable to pay [BWG] any sums at this stage. Among other things, we have not received any payment from [BWX].

We would like to settle this amicably, and will write to you on a "without prejudice" basis in this regard...

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<sup>34</sup> Legal Submissions for BWG, pp 4, 10.

<sup>35</sup> Legal Submissions for BWG, p 10.

<sup>36</sup> Mr Chew's 1<sup>st</sup> Affidavit, Tab 4, pp 230–234.

<sup>37</sup> Mr Chew's 1<sup>st</sup> Affidavit, JBCP Tab 4, pp 22, 242.

46 BWG also contended that another instance of BWF's admission stemmed from a WhatsApp conversation between Mr Bui and Mr Shi, where Mr Bui stated "I don't think we can come out with money...to pay them".<sup>38</sup> Nevertheless, Mr Bui is immediately reassured by Mr Shi: "u can reject immediately". Mr Shi also reiterated in the same conversation that BWG was "approaching [BWX] management for solution", and reassured Mr Bui that "no way [BWF] pay before receiving money".

47 I therefore find that there is no admission by BWF arising out of the parties' correspondence. BWF made clear that its payment would be conditional upon BWX's.

*Any other possibility of abuse*

48 The existence of an admission was one example of an abuse of process, mentioned in *Tjong Very Sumito* at [59] and *Vinmar* at [131]. At the oral hearing of arguments, BWG raised new arguments premised on BWF's application to wind up BWX CWU 260/2018, contending that this amounted to an admission, premised upon estoppel.<sup>39</sup> As this was raised for the first time at the hearing and the facts of CWU 260/2018 were not before the court, I allowed further written submissions on this point. In due course, four new arguments were raised instead. Counsel for BWG appeared to concede that estoppel was inapplicable, and that his four new arguments did not affect the validity of BWF's argument that their liability to pay was triggered only when paid by BWX.<sup>40</sup> BWG's four supplementary issues were as follows: waiver by election; approbation and reprobation; lack of clean hands on BWF's part; and abuse of process. After

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<sup>38</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, p 143.

<sup>39</sup> BWG's Written Submissions on CWU 260/2018, tendered on 29 November 2018.

<sup>40</sup> BWG's Further Written Submissions, dated 13 December 2018.

considering these submissions and CWU 260/2018, I was of the view that they did not assist BWG. I explain briefly why.

#### Waiver by election

49 It was common ground that three requirements were necessary before waiver by election could apply: (i) a concurrent existence of two inconsistent sets of legal rights; (ii) knowledge of the facts which have given rise to the two sets of rights as a prerequisite to election; and (iii) an unequivocal representation by the party making the election in relation to the right or remedy being waived (see *UAM v UAN* [2018] 4 SLR 1086 at [45]).

50 In my view, there was no inconsistency in BWF's assertion of its rights. The essential factual material supporting its winding-up claim against BWX was the Settlement Agreement that was entered into, rather than a claim for price under the BWF-BWX Contract for the delivery of the Cargo. As to knowledge, it appears that BWF only came to a new understanding of the underlying transaction around August 2018. More importantly, it is at once plain that the steps taken by BWF to enforce its rights against BWX did not at any point in time amount to an unequivocal representation that it would *waive* any rights it possessed.

#### Approbation and reprobation

51 There is no dispute that the doctrine of approbation and reprobation, as stated by Belinda Ang J in *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 538 at [31], entails that a person who, "having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit". While no judgment has yet been obtained in this case, BWG argued that following the

English decisions such as *Express Newspapers v News (UK) Ltd* [1990] 1 WLR 1320, and *Twinsectra Limited and Haysport Properties Limited v Lloyds Bank Plc* [2018] EWHC 672 (Ch), English law has embraced a version of the doctrine of approbation and reprobation that has been extended to be of general application (“the extended doctrine”).<sup>41</sup> This extended doctrine would not be limited to situations where the relevant benefit was obtained in a prior judgment, and could be applied to situations where inconsistent positions are taken. Reliance was also placed on the decision of *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 where Steven Chong J (as he then was) frowned upon inconsistent positions being taken across cases even where the doctrine did not strictly apply. It was BWG’s position that, even if the doctrine were not strictly applicable, the court should take a dim view of BWF taking inconsistent positions in CWU 260/2018 and the present proceedings.<sup>42</sup>

52 Two distinctly inconsistent positions would be required to have been adopted in CWU 260/2018 and in this application for this issue to merit consideration at all. But BWF’s premise of its action against BWX in CWU 260/2018 was not a claim for price under the BWF-BWX Contract. BWF was in CWU 260/2018 relying on the Settlement Agreement, which is a separate contract altogether between BWF and BWX. BWF’s assertion that the underlying contracts between BWG and BWX could be suspect was not therefore inconsistent. For completeness, I also considered whether an argument could be made that BWF’s arguments in this setting aside would suggest that the Settlement Agreement wholly lacked consideration, because the Settlement Agreement, which is the premise for CWU 260/2018, compromises previously assumed liability arising out of the BWF-BWX Contract. However, CWU

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<sup>41</sup> BWG’s Further Written Submissions, pp 23-24.

<sup>42</sup> BWG’s Further Written submissions, p 27.



260/2018 is at a preliminary stage, as is this dispute between parties. No assertion has yet been made by BWF in respect of the consideration for the Settlement Agreement nor has BWX or any party in the CWU made any assertion that the Settlement Agreement is not valid in any way that BWF has been required to counter. And perhaps rather fundamentally, BWF does not seek to prove any assertion – whether inconsistent or otherwise – in the present application, but merely to make the point that the proper forum to look into or make findings on any such assertions would be arbitration. Whether, at that point, BWF may advance its contentions, is an issue to be dealt with under English law by an arbitrator in London.

#### Lack of clean hands

53 BWG argued that BWF should be denied its requested injunction as it had acted inequitably in denying that it owed BWG the Disputed Debt, commencing winding-up proceedings against BWX despite maintaining that it did not owe BWG for the same Cargo, and initially refusing to present the affidavit that it had filed in support of CWU 260/2018 on the basis that those proceedings were irrelevant to the present decision.<sup>43</sup> To make such an argument, BWG must demonstrate that BWF's conduct was related to the equity sued for, and reflected "a depravity in the legal as well as moral sense" (see the Court of Appeal's guidance in *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32 at [92]). I am of the view that at this stage, BWG's assertions concerning BWF's purportedly inequitable conduct falls far short of the required standard.

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<sup>43</sup> BWG's Further Written Submissions, p 28.

### Abuse of process

54 To support contentions on abuse of process, BWG sought to rely upon *Beckett Pte Ltd v Deutsche Bank AG and another* [2011] 1 SLR 524, where a party commenced Indonesian proceedings in order to undermine the pending judgment of the Court of Appeal, and *Chandra Winata Lie v Citibank NA* [2015] 1 SLR 875, where a plaintiff attempted inconsistent pleadings, in circumstances where he knew or ought to know the facts, in a manner that offends common sense. Neither is applicable here. It is clear from *Vinmar* at [129], that while the concept of abuse of process pervades the whole law of civil procedure, a court in considering this issue in the context of a *prima facie* dispute, would not easily find that there has been an abuse of process. Abuse of process is a high threshold to be met in exceptional circumstances. BWG's attempt to use abuse of process here, as a band-aid of sorts, was not persuasive.

### ***Substantive defences raised by BWF***

55 The conclusions above were sufficient to conclude that parties ought to proceed to arbitration on the *bona fide prima facie* threshold. In view of the variance in High Court judgments on the applicable standard, however, I also considered if any of the substantive defences raised triable issues. I concluded that each of them did, and I explain accordingly.

### *Collateral agreement to pay only when paid*

56 BWF relied on a common understanding of a pay-to-be-paid arrangement where payment to BWG would only be due after BWF had first received payment from BWX. BWF relied on chat logs from 13 April 2018 and 3 May 2018 that recorded conversations between Mr Bui and Mr Shi, who were acting on behalf of BWF and BWX respectively, to demonstrate that it had been

operating under the assumption that the pay-to-be-paid arrangement was always in place.<sup>44</sup>

57 BWG disputes this, arguing that BWF’s defence is contradicted by the terms of the BWG-BWF contract, which state that BWF had to pay not later than 90 calendar days after the date the NOR was tendered at the discharge port.<sup>45</sup> Its case is that BWF’s claim of a common understanding is excluded by the terms of an entire agreement clause contained in the written agreement between BWG and BWF.<sup>46</sup> Clause 15E of the written agreement states:<sup>47</sup>

THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN BUYER AND SELLER CONCERNING THE SUBJECT MATTER HEREIN AND SUPERSEDES ALL PREVIOUS REPRESENTATIONS, WARRANTIES, CONDITIONS, AGREEMENTS, UNDERSTANDINGS AND NEGOTIATIONS, WHETHER ORAL OR IN WRITING, CONCERNING THE SAME.

58 The issue was whether this entire agreement clause obviated BWF’s argument of collateral contract. The Contract was governed by English law. I had regard to the expert opinion of Sudhanshu Swaroop QC. He opined that the purpose of an entire agreement clause, as stated in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] 2 WLR 1603 at [14], is to nullify “prior collateral agreements relating to the same subject matter”. Similarly, the UK Court of Appeal in *AXA Sun Life Services plc v Campbell Martin Ltd and others* [2011] EWCA Civ 133 (“*AXA Sun*”) stated that “an entire agreement clause ... in a signed written agreement is effective in accordance with its terms.” Nevertheless, English decisions have yet to consider the novel question of the significance of an entire agreement clause contained in an unsigned

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<sup>44</sup> BWF’s Written Submissions, pp 17-18.

<sup>45</sup> Legal Submissions for BWG, p 24.

<sup>46</sup> Legal Submissions for BWG, p 24.

<sup>47</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, p 56.

contract. As was reasoned in *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [170], a party is taken to have “read and understood” the terms and conditions in an entire agreement clause when it signs it. In his opinion, the circumstances surrounding the conclusion of the written contract and the parties’ reasons must be carefully scrutinised before the legal effect of an entire agreement clause could be determined.

59 BWG did not file an affidavit on English law, but nonetheless disagreed with Swaroop QC’s contention that the entire agreement clause may not be applicable in the light of the lack of a signature in the Contract.<sup>48</sup> Counsel argued that insufficient weight was given to the fact that the provisions in the Contract would be final and binding unless it received a response within two working days on any disagreement with the stipulated terms.

60 The effect of an entire agreement clause must necessarily be a matter of contractual interpretation and must therefore depend upon the entire contract and its context. In this case, BWF takes the position that the main terms were first agreed on 13 April, and the 27 April email contained pro forma details. Based on the (unrefuted) opinion of Swaroop QC, it was clear that it was possible at English law, despite the entire agreement clause, to raise BWF’s contentions of a side tripartite agreement. While BWG denied that it was party to this side agreement, Mr Chew only approached Mr Bui after matters were first designed by Mr Shi. Mr Shi, who brokered the deal between parties, may have had BWG’s authority to so conclude. It is crucial that the role of Mr Shi, who brokered the deal between BWF and BWG, be properly understood. He was in direct communications with Mr Bui and Mr Chew during the April period of negotiation, up to the conclusion of the written BWF-BWX Contract on 3 May 2018,<sup>49</sup> and appeared to be negotiating on behalf of both BWX and BWG

<sup>48</sup> Legal Submissions for BWG, p 34.

in the various discussions. Whether a common understanding existed between the three parties was therefore a triable issue.

*Clause 8.1 of the Contract*

61 While BWF’s argument on a common understanding was premised on a side agreement, two arguments were premised on the Contract itself, which BWF contended had not been performed. The first contention concerned the shipping documents specified by the Contract. BWF contended that BWG had failed to present the Certificate of Quality and the relevant NOR that were required to trigger BWF’s obligation to make payment to BWG, pursuant to Clause 8.1 of the written contract.<sup>50</sup> Clause 8.1 states the following:<sup>51</sup>

...THE PAYMENT OF INVOICES FOR THE PRICE OF THE OIL TO BE SUPPLIED UNDER THIS AGREEMENT SHALL BE MADE BY BUYER... NOT LATER THAN **NINETY (90)** CALENDAR DAYS AFTER NOTICE OF READINESS DATE (N.O.R) TENDERED AT DISCHARGE PORT (N.O.R DATE SHALL COUNT AS DAY 0) AGAINST THE PRESENTATION OF SELLER’S COMMERCIAL INVOICE (PDF/EMAIL ACCEPTABLE) AND USUAL SHIPPING DOCUMENTS...

[emphasis in original]

62 “Usual shipping documents” are further defined in Clause 8.1:

IN THIS AGREEMENT, “USUAL SHIPPING DOCUMENTS” MEANS, COPIES OF NON-NEGOTIABLE BILLS OF LADING PLUS CERTIFICATE(S) OF QUANTITY, QUALITY AND ORIGIN (OR EQUIVALENT DOCUMENTS) ISSUED AT THE LOADING TERMINAL ...

63 In response, counsel for BWG contended that certificates of quality and quantity were not required pursuant to its provision of a non-negotiable bill of

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<sup>49</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 17, 130–140.

<sup>50</sup> BWF’s Written Submissions, p 28.

<sup>51</sup> Mr Bui’s 1<sup>st</sup> Affidavit, JBCP Tab 2, p 48.

lading as a sufficient substitute and that the presentation of the usual shipping documents was not a condition precedent to trigger BWF's payment obligations. It is clear, however, that on the plain wording of Clause 8.1, that at the very least, BWG was obligated to provide the requisite Certificate of Quality before payment would be due. Regarding the substitution of a non-negotiable bill of lading, counsel for BWG relied on sub-clause A8 of the International Chamber of Commerce's International Commercial Terms of 2000 ("INCOTERMS 2000") for the proposition that a non-negotiable bill of lading would be sufficient as a "usual transport document".<sup>52</sup> But sub-clause A8 states the following:

The seller must provide the buyer at the seller's expense with the delivery order and/or the usual transport document (for example a *negotiable bill of lading*, a non-negotiable sea waybill ...

[emphasis added in italics]

64 There is no mention of non-negotiable bills of lading being sufficient. There are key differences between negotiable and non-negotiable bills of lading. For instance, where a non-negotiable bill of lading is used, the consignee needs to produce the bill of lading to obtain delivery from the carrier (see Indirra Carr, *International Trade Law* (Routledge, 5<sup>th</sup> Ed, 2014) at p 384). On its face, Clause 8.1 had not been complied with.

65 BWF's second contention, related to the first, was to whether BWG had title to the Cargo it sought to sell in the Contract. BWF contended that BWG had not tendered any evidence that BWG had obtained good title to the Cargo, or that delivery of the Cargo was in fact made to BWF. On the wording of Clause 8.1, without proper delivery of the Cargo, payment would not be due.<sup>53</sup>

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<sup>52</sup> Legal Submissions for BWG, p 15.

<sup>53</sup> BWF's Written Submissions, pp 26–27.

BWF took the position that it was not shown that BWG originally had title to the Cargo it purported to sell to BWF. Copies of a non-negotiable bills of lading were insufficient to demonstrate title.<sup>54</sup> Under Singapore law, an original bill of lading serves as a document of title (see *APL Co Pte Ltd v Voss Peer* [2002] 2 SLR(R) 1119 at [48]; *The “Cherry” and others* [2003] 1 SLR(R) 471 at [27]). As BWG delivered only copies of the non-negotiable bills of lading, not the original, such bills would, absent exceptional circumstances, be insufficient to constitute a document of title.

66 In response, BWG sought to argue that the doctrine of waiver by election applied because of emails sent by BWF between and on 17 April 2018 and 19 April 2018, 23 April 2018, and 24 April 2018 enclosing copies of the documents.<sup>55</sup> For instance, BWG argued that BWF had acknowledged and accepted the adequacy of the loadport documents on 23 April 2018 by stating “Please find below discharge instructions for the subject delivery for vessels [*sic*] kind compliance. Please forward the same to the Master of subject vessel”.<sup>56</sup> Nevertheless, in the next line, BWF states “Kindly email us [*sic*] following cargo documents urgently”, before proceeding to name the Cargo Manifest, the Certificate of Quality, the Certificate of Quantity and the Certificate of Origin. BWF has accordingly not made an unequivocal representation that it would accept the adequacy of the loadport documents; such an unequivocal representation is a necessary pre-requisite for the operation of the doctrine of waiver by election (see above at [49]).

67 Rather interestingly, BWG’s response to BWF’s reliance on a side agreement was to contend that the Contract was the entire agreement, whereas

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<sup>54</sup> BWF’s Position Paper No 3, p 3.

<sup>55</sup> Legal Submissions for BWG, pp 21–23.

<sup>56</sup> Legal Submissions for BWG, p 21.

BWG's response to BWF's reliance on the Contract was that the express provision of Clause 8.1 did not matter. Triable issues were made out regarding BFG's title to the Cargo and the shipping documents used to trigger the payment condition specified in Clause 8.1.

*Whether the transaction was a disguised loan*

68 Undergirding BWF's two contentions on Clause 8.1 was a more serious one, that BWX and BWG had engineered a circuitous transaction with BWF interposed as an intermediary trader, such that an amount of US \$29,945,600 could be round-tripped from BWG to BWX.<sup>57</sup> It was in fact a disguised loan transaction. Such a transaction, BWF claimed, would be tainted with illegality as being a contract for an unlawful purpose or commission of a tort.<sup>58</sup>

69 BWF filed affidavits from Mr Bui and Ms Li to contend that BWX had procured a set of transaction documents that were doctored from copies of documents used in the importation of cargo into China from Petrobas, to Hai Yuan, and on to Haike.<sup>59</sup> These purportedly misappropriated documents were to be tendered for payment under a letter of credit that BWG had established to "pay" for the Cargo. Ms Li, in particular, affirmed conversations with Hai Yuan's general manager, a Mr Xu Yuan suggesting that Hai Yuan was the receiver named in the NOR tendered by BWG to BWF, and that the fake documents arose from unauthorised copies made by an employee of Haike.

70 BWG disputed BWF's claims, arguing that BWF had failed to adduce any evidence in support of its case, and that the mere fact that the Cargo was initially sold and bought by the same party is insufficient to render a contract

<sup>57</sup> BWF's Written Submissions, p 30.

<sup>58</sup> BWF's Written Submissions, p 33.

<sup>59</sup> Mr Bui's 1<sup>st</sup> Affidavit, JBCP Tab 2, pp 36–37; Ms Li's 1<sup>st</sup> Affidavit, Tab 6, pp 4– 5.



illegal. While the evidence is rather thin on this point, and the illegality point is not properly framed, this defence is consonant with the first three raised. Clearly there is a triable dispute between parties.

## Conclusion

71 In summary, I held that BWF should be granted an injunction to restrain BWG from taking out winding-up proceedings. BWF's additional prayer for the Statutory Demand to be set aside was not granted as this is a remedy appropriate to individuals confronting the threat of bankruptcy proceedings (as permitted by Rule 97(1) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed)), rather than to companies dealing with threatened insolvency proceedings (see *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [5] and [9]).

72 Costs were ordered in favour of BWF. BWF asked for these to be ordered on an indemnity basis, on the footing that the Court of Appeal in *Tjong Very Sumito* decided that where a stay or injunction has been awarded as a remedy for a breach of an arbitration clause that had caused the innocent party reasonably to incur costs, those costs should ordinarily be awarded on an indemnity basis. The premise for the Court of Appeal's position, explained by Colman J in *A v B (No 2)* [2007] 1 Lloyd's Rep 358 at [15] (and referred to in *Tjong Very Sumito* at [19]), is that a defendant who deliberately ignores an arbitration clause so as to derive from its own breach of contract an unjustifiable procedural advantage misuses judicial facilities; and such behaviour merits judicial discouragement. This rationale did not apply on the facts of this particular application. In this specific winding-up context, parties transacted against a backdrop where there was a variance in High Court decisions on the effect of an arbitration clause. I therefore fixed costs on the standard basis on the basis that costs followed the event.

73 Coming then to the costs order made, a major component of the costs related to disbursements for Swaroop QC's bill for an opinion on English law on the effect of a tripartite side agreement where an unsigned contract contained an entire agreement clause. Because the Contract was premised on English law, and BWG was relying on the entire agreement clause within the Contract in pressing on with its threat of liquidation, this was a reasonable disbursement. In addition, further submissions and an adjournment resulted from BWG raising for the first time an admission and estoppel argument premised on CWU 160/2018 at the first special date oral argument. Taking the various matters into consideration, costs for this application and Summons 5411/2018 (for which orders were obtained by consent), were fixed in the round, including disbursements, at \$40,000.

Valerie Thean  
Judge

Kendall Tan, Ting Yong Hong (Rajah & Tann Singapore LLP) for the plaintiff;  
Nish Shetty, Keith Han (Cavenagh Law LLP) for the defendant.

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