

Party Autonomy Prevails: The Hong Kong Court Refines the Genuine Intention to Arbitrate Test

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The Facts

In *Re Xu Peixin*, the petitioner, Fruitful Worldwide Limited, sought a bankruptcy order against the debtor, Mr. Xu Peixin, claiming approximately HK\$28.9 million under a personal guarantee. The guarantee related to an investment agreement dated 17 May 2017 among the petitioner, Bliss Chance Global Limited, and Bison Capital Financial Holdings Limited. Bliss Chance allegedly failed to pay dividends due in 2020, prompting Fruitful Worldwide to issue a statutory demand in November 2020 and, four years later, to file a bankruptcy petition.

The debtor opposed the petition and disputed the debt on two main grounds. First, he relied on the guarantee's arbitration clause, which required disputes to be resolved by arbitration under the HKIAC Rules. Second, he alleged a bona fide dispute on substantial grounds, contending that the overall investment arrangement had violated Mainland regulatory law and was therefore unenforceable on public policy grounds in Hong Kong.

After the petition was filed, the debtor expressed a wish to arbitrate and eventually commenced arbitration in June 2025. The petitioner argued that this post-petition reliance on arbitration was not genuine and that the debtor was merely attempting to delay the inevitable. Mr. Justice Harris, however, dismissed the petition on 27 November 2025 and ordered the petitioner to pay the debtor's costs.

The Law

Harris J reaffirmed the principles set out by the Court of Final Appeal in *Re Guy Lam v Lam Kwok Hung* (2023) 26 HKCFAR 119 and later developed in *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064. These authorities stress that when a petition debt arises under a contract containing an arbitration clause, the court must strike a balance between two competing policy objectives: (i) upholding party autonomy under arbitration agreements, and (ii) safeguarding the public interest inherent in insolvency law. Whether to stay or dismiss insolvency proceedings depends on a multi-factorial assessment, with the debtor's genuine intention to arbitrate an important though not decisive factor.

In line with his own earlier reasoning in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 (Lamos), Harris J reiterated that the policy favouring arbitration is engaged once parties have agreed to arbitrate, not merely when arbitration has formally commenced. Harris J emphasised flexibility, holding that while the clearest way to demonstrate an intent to arbitrate is by serving a notice of arbitration, this is not the only method. A debtor may also demonstrate genuine intention by promptly writing to the creditor to dispute the debt and inviting the creditor to arbitrate, particularly where the creditor is the natural claimant.

The court further clarified that the relevance of an arbitration clause is not extinguished by the presentation of a petition. A debtor's opposition notice, coupled with a reasoned proposal for arbitration, may suffice to demonstrate genuine intention. The earlier and more coherent the debtor conveys this desire, the stronger the case for the court to decline to exercise its insolvency jurisdiction.

In this instance, the debtor's solicitors delayed for around six months after filing the notice of opposition before proposing arbitration. Harris J acknowledged that the delay gave the petitioner grounds to allege tactical behaviour, but ultimately accepted that the subsequent commencement of arbitration and the debtor's consistent stance demonstrated sufficient sincerity. The judgment further records that, following the opposition notice, the debtor's solicitors wrote to the petitioner proposing arbitration, which led to exchanges over who should initiate the arbitration proceedings. This detail reinforces the court's view that genuine intention can be evidenced through correspondence as well as formal filings.

On the substance of the dispute, Harris J dismissed the debtor's foreign illegality argument. Harris J reviewed the doctrine established by *Foster v Driscoll* (1929) 1 KB 470, *Regazzoni v KC Sethia* [1958] AC 301, and *Ryder Industries v Chan Shui Woo* (2015) 18 HKCFAR 544, holding that a contract governed by Hong Kong law is voided for foreign illegality only if both parties intended to perform acts known to be unlawful in the relevant foreign jurisdiction. The debtor's evidence failed to show that he knew, at the time of contracting, that the arrangement would contravene Mainland law. The debtor's argument was therefore characterised as after-the-fact and substantively weak. Instead, the only non-frivolous issue raised was an estoppel contention based on oral assurances allegedly made by Huarong's former general manager that the guarantee would not be enforced.

Comments

This decision makes an important contribution to Hong Kong's developing jurisprudence on the intersection of arbitration clauses and insolvency proceedings. Harris J's reasoning illustrates a measured and pragmatic approach to the "genuine intention to arbitrate" requirement introduced in *Guy Lam* and refined in *Simplicity & Vogue*. The judgment makes clear that the courts will focus on the substance of a debtor's conduct rather than the speed or technical form of steps taken. What matters is the debtor's sincere reliance on the arbitration agreement as the agreed dispute-resolution mechanism, not procedural manoeuvring.

At the same time, the decision cautions debtors against inaction and delay. While the burden to show genuine intention is not heavy, the longer a debtor waits to invoke arbitration, the greater the risk that the court may treat the reliance as tactical. The practical lesson is that debtors served with statutory demands should swiftly state their intention to arbitrate and invite the creditor to initiate arbitration, rather than waiting until a petition is filed.

The judgment also reaffirms the principle that the presence of an arbitration clause does not automatically preclude insolvency proceedings. The court retains discretion, guided by public policy and the bona fides of the dispute. However, absent frivolous defences or wider insolvency considerations, the court will generally defer to arbitration, preserving the autonomy of commercial parties and avoiding the misuse of insolvency mechanisms as a debt-collection shortcut.

From a substantive standpoint, the case underscores the narrow scope of foreign illegality under Hong Kong law. Mere overlap with Mainland regulatory infractions is insufficient; there must be a mutual intention to effect illegality. This strengthens certainty for cross-border commercial transactions that use Hong Kong law as their governing framework.

Viewed in its entirety, *Re Xu Peixin* confirms Hong Kong's consistent adherence to an arbitration-friendly policy while maintaining the integrity of its insolvency regime. It provides practical guidance on how the courts will assess genuine intention to arbitrate: timely engagement, coherent correspondence, and a clear wish to hold the creditor to the arbitration clause will suffice, even if formal proceedings are initiated later. For creditors, the case also serves as a reminder that resorting to the bankruptcy court where an arbitration clause governs the debt may expose them to dismissal and an adverse costs order. The result is a coherent and commercially realistic judgment that strengthens Hong Kong's reputation as a jurisdiction that both supports arbitration and ensures that insolvency procedures are not used to sidestep it.



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