

Latham & Watkins [Litigation & Trial](#), [Structured Finance](#), and [Restructuring & Special Situations Practices](#)

18 May 2023 | Number 3108

## Hong Kong Court of Final Appeal Rules on Exclusive Jurisdiction Clauses in Insolvency

***A bankruptcy petition should not proceed if the debt is disputed and subject to an exclusive jurisdiction clause in favour of a foreign court.***

The Hong Kong Court of Final Appeal (CFA) has ruled that if a bankruptcy petition is disputed and the disputed debt arises from an agreement containing an exclusive jurisdiction clause (EJC) in favour of a foreign court, the dispute should be resolved in accordance with that EJC. In particular, the Hong Kong courts should decline jurisdiction in a bankruptcy (and by extension, a winding-up) petition pending resolution of the dispute in a foreign court, absent countervailing factors such as the risk of the debtor's insolvency affecting other parties, the debtor's reliance on a frivolous defence, or an abuse of process.

In light of this decision, parties (including lenders and creditors) should consider the appropriate dispute resolution clause in their agreements and contracts if they wish to invoke the Hong Kong courts' bankruptcy jurisdiction.

### Background and Decision

In *Guy Kwok-Hung Lam v. Tor Asia Credit Master Fund LP* [\[2023\] HKCFA 9](#), the respondent (Lam) provided a personal guarantee in favour of the appellant (Tor Asia) under a credit and guaranty agreement (the Agreement). The parties agreed to submit to the exclusive jurisdiction of the New York courts for all legal proceedings arising out of or relating to the Agreement or the transactions contemplated thereby. In May 2020, Tor Asia served a statutory demand on Lam which was not met, and a bankruptcy petition was presented in Hong Kong a month later. While the bankruptcy petition was pending, Lam commenced proceedings in New York against Tor Asia, disputing that an event of default had occurred under the Agreement. In July 2021, the Court of First Instance (CFI) accepted the bankruptcy petition, and Lam was adjudged bankrupt. Lam appealed to the Court of Appeal (CA), which set aside the bankruptcy order and dismissed the petition in August 2022. Tor Asia then appealed to the CFA.<sup>1</sup>

The CFA agreed with the approach that the CA adopted and unanimously dismissed Tor Asia's appeal. In its judgment, the CFA first noted that the CFI's jurisdiction in a bankruptcy matter is conferred by the Bankruptcy Ordinance (Cap. 6) and cannot be excluded by contract. Therefore, the CFI's jurisdiction is not affected by parties referring their disputes to a foreign court, but instead informs the CFI regarding its discretion to decline to exercise its jurisdiction.<sup>2</sup> The CFA also noted that the CFI may decline to exercise

its jurisdiction in favour of another forum in certain classes of cases, for example, a bankruptcy or winding-up petition (i) in which the issue of *forum non-conveniens* may arise, or (ii) based on a debt covered by an arbitration or EJC provision in the contract under which the petition debt arises.<sup>3</sup>

The CFA also noted an “established approach” in which absent an EJC or an arbitration agreement, a petitioner will ordinarily be entitled to a bankruptcy or winding-up order if the petition debt is not subject to a bona fide dispute on substantial grounds. However, if an EJC is involved, the CFA held that such an approach was not appropriate — absent countervailing factors such as the risk of the debtor’s insolvency affecting other parties, the debtor’s reliance on a frivolous defence, or an abuse of process, the petition should be dismissed.<sup>4</sup>

With regard to public policy considerations in relation to bankruptcy, such as fairness to all creditors, the CFA pointed out that if the petition debt is disputed, these considerations may only be relevant to a lesser extent to prevent a debtor from mounting a completely frivolous defence or an abuse of process. Their significance is also diminished if the petition is brought by one creditor and no evidence exists of a creditor community at risk. The public policy interest in holding parties to their agreements is also relevant. In this case, the CFA noted that Tor Asia could have sued on the debt and applied for summary judgment in New York. Although the timing of subsequent bankruptcy proceedings in Hong Kong may be delayed, the absence of other creditors pursuing Lam indicated that the public interest was unlikely to be affected.<sup>5</sup>

## Commentary

This decision will likely impact the enforcement strategy of lenders and creditors with a debt claim against a borrower or obligor with a Hong Kong connection if the agreement contains an EJC. Although the CFA judgment relates to an individual bankruptcy, the same approach will likely also be adopted in a Hong Kong winding-up proceeding against a company. This issue could also be relevant to the ongoing debate on whether a bankruptcy or winding-up petition can be presented (or should be stayed or dismissed) if the underlying debt arises from an agreement governed by an arbitration clause. This area of the law remains in flux with a number of differing judicial opinions in other common law jurisdictions. While the CFA did not expressly determine its position with respect to an arbitration clause, the same principles would likely apply; a future appellate court decision could help clarify the ongoing uncertainty.

From a drafting standpoint, parties should carefully consider the appropriate dispute resolution provision for their agreements. For parties dealing with an obligor with a Hong Kong connection, a non-exclusive jurisdiction clause, or a hybrid clause permitting the option to arbitrate or litigate in other jurisdictions, would likely provide greater flexibility than an EJC from a future enforcement perspective.

On a related note, for agreements involving parties (or assets) domiciled or located in Mainland China, the recent legislation<sup>6</sup> passed to enable reciprocal enforcement of judgments between Hong Kong and Mainland China removes the previous requirement for the relevant judgment to arise from a contract containing an EJC.

---

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Derek S. H. Chua**

derek.chua@lw.com  
+852.2912.2515  
Hong Kong

**Dominic Geiser**

dominic.geiser@lw.com  
+852.2912.2738  
Hong Kong

**Howard K. H. Lam**

howard.lam@lw.com  
+852.2912.2570  
Hong Kong

**Posit Laohaphan**

posit.laohaphan@lw.com  
+852.2912.2698  
Hong Kong

**Raymond C. F. Cheng**

raymond.cheng@lw.com  
+852.2912.2687  
Hong Kong

**Flora F. W. Innes**

flora.innes@lw.com  
+852.2912.2643  
Hong Kong

**Tsun Ming (Truman) Mak**

truman.mak@lw.com  
+852.2912.2735  
Hong Kong

**Hoi Lam (Karen) Wong**

karen.hl.wong@lw.com  
+852.2912.2725  
Hong Kong

**You Might Also Be Interested In**

[Hong Kong Court Confirms the Proprietary Nature of Cryptocurrencies but Denies Clients' Proprietary Claims](#)

[Hong Kong Court Sets Aside Arbitral Awards Under Exceptional Circumstances](#)

[New Law to Expand Reciprocal Recognition and Enforcement of Civil Judgments Between Mainland and Hong Kong](#)

---

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's Client Alerts can be found at [www.lw.com](http://www.lw.com). If you wish to update your contact details or customize the information you receive from Latham, [visit our subscriber page](#).

**Endnotes**

---

<sup>1</sup> CFA judgment, [8] to [9], [15] to [20].

<sup>2</sup> CFA judgment, [85].

<sup>3</sup> CFA judgment, [87].

<sup>4</sup> CFA judgment, [96], [105].

<sup>5</sup> CFA judgment, [98] to [99], [101] to [103].

<sup>6</sup> The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance. See also our previous [Client Alert](#).