ForeWord

This substantive edition features Articles which provide updates on recent developments in the company and insolvency, commercial and arbitration domains. Turning to the Case Reports section, various DVC members contribute to the changing state of play focusing mainly on the Company & Insolvency, Securities, Arbitration and Competition spheres.

An evolving panorama has seen various members take up new positions and headlining virtual conferences. You will find these featured in the Announcements segment.

Given the need to suspend Events this season, we have instead showcased a succession of Multimedia and CSR Initiatives that members have been involved in.

We open with a summary of how DVC re-engineered and adapted to the WFH/GAP era while the courts have been predominantly closed in Hong Kong.

Articles

In this 2 part discussion, Jose-Antonio Maurellet SC and Terrence Tai provide answers to a long-standing debate in relation to the approach the court adopts in the context of a winding-up petition based on a debt arising out of a contract containing an arbitration clause. Find out what the court had to say in the recent Asia Master case, and how this issue was definitively resolved in Singapore in the recent case of AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) [2020] SGCA 33. The position in Singapore has been conclusively determined by their apex court, the Court of Appeal, however in Hong Kong, the position is yet to be resolved categorically to the same degree. Jose-Antonio Maurellet SC, Terrence Tai and Look-Chan Ho weigh in with various decisions and provide clarity in respect of the two different jurisdictions.

Are privatisation schemes in Hong Kong restricted to companies incorporated in Hong Kong? Find out as Adrian Lai takes us through a deep dive discussion of the merits associated with the appointment of arbitrators as well as the problems surrounding “double-hatting” and conflicts. Part 1 of this Paper considers these issues as framed at the recent ISDS Reform Conference and will wrap up with Part II in the next edition of A Word of Counsel.

What are the crucial ingredients needed to prove there was proper notice (vs. actual notice) in the context of service in an arbitration? Find out what the key takeaways were from OUE Lippo Healthcare Limited v David Lin Kao Kun in an overview covered by Christopher Chain and Jasmine Cheung.

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Case Reports

Proffering examinations and commentary on recent case law, John Scott QC, SC, JP, Jenkin Suen SC, Terrence Tai, Rosa Lee and Look-Chan Ho produce comprehensive analyses which cover the Securities and Company & Insolvency areas. John Scott QC, SC, JP and Jenkin Suen SC successfully acted on behalf of the SFC in this novel decision which is legally significant as it examines for the first time the interplay between disclosure duties and the Safe Harbour Defence under the SFO. You can read more about this decision, co-authored by Tommy Cheung, here.

Why does Look-Chan Ho remark that this decision is yet another clarion call for urgent insolvency reform in Hong Kong? Find out as he analyses Re Joint Provisional Liquidators of Moody Technology Holdings Ltd where Terrence Tai acted for the applicants.

Hong Kong schemes of arrangement are effective tools to compromise debts governed by non-Hong Kong laws, as three recent cases show. Look-Chan Ho (who acted in 2 out of 3 of them) provides a helpful overview of these landmark cases here.

What was decided in the recent case of Re Lee Ming Cheung? Rosa Lee examines the findings and discusses how it was factually distinguishable from the case of Libertarian. Read more about this here.

Switching gears, a milestone judgment was handed down by the Competition Tribunal recently: find out which approach the Tribunal adopted to determine penalties for contravention of the First Conduct Rule in this pioneering decision where Connie Lee and Tommy Cheung appeared on behalf of the 9th respondent.

Announcements

Here, we chronicle recent announcements and changings of the guard.

Who are DVC’s new Head and Deputy Head of Chambers? Click here to find out.

As D & I initiatives have picked up steam globally, DVC’s members have increasingly been recognised for their efforts and achievements in this regard. Who was appointed an Asia Pacific Regional Forum Liaison Representative and Officer of the Diversity and Inclusion Council, for the International Bar Association (IBA)?

In addition to her appointment to the Nominations Committee of HKIAC, discover here who was also recently appointed to the Appointments Committee of the HKIAC and shortly thereafter appointed as a Co-Chair of a Women in Arbitration group also under the auspices of the HKIAC.

DVC is delighted to announce an exclusive collaboration with Westlaw Asia. If you think you’ve missed something, this is an ideal opportunity to catch up on leading developments, come away with key takeaways, and avoid pitfalls in the future.

Find out here who from DVC was recognised by the Doyle’s Guide for Maritime, Shipping & Transport Law 2020.

DVC’s Family specialists were singled out in the Doyle’s Guide for Family Law.

A number of specialists were also selected by Doyle’s for their expertise in Construction Law. Find out who debuted this year here.

In the first ever virtual Vis East Moot, DVC’s Winnie Tam SC, JP participated as a member of the all-female panel of arbitrators on 29 March 2020. Read more about this here.

Which of DVC’s competition specialists recently had their appointment to the International Competition Network extended by two years?

Which junior was recently appointed as an editor of the Dutiable Commodities Ordinance 2019? Browse this edition to find out.
The last announcement for this edition sees members authoring and co-authoring a series of Sector Booklets for 2020. Find out which recent developments might be reshaping niche spheres.

**Multimedia & CSR Initiatives**

We are currently at an evolutionary crossroads where the ability to adapt to a changing environment will be fundamental to success. Daniel Fung SC, Catrina Lam, John Hui and Sabrina Ho converge to consider for DVC and Cambridge Global Conversations the impact of AI for lawyers in this recent podcast. Will we play hostage to our own inventions?

Thematically, the next interlocking video features Daniel Fung SC as the guest speaker at a webinar organized by Peking University (BeiDa). Click here to view a video where he discusses the interplay between AI and Dispute Resolution.

He then analyses the effects that COVID-19 has had for lawyers and what this might mean geopolitically in terms of a shift in stewardship. Listen to his podcast: **Silver linings amidst COVID-19 here.**

DVC’s CW Ling, Chairman of the HK Mediation Council and HKIAC arbitrator, considers whether China can be forced to compensate other countries for the spread of COVID-19.

Zeroing in on CSR initiatives, find out how DVC answered the call to action ahead of International Women’s Day.

From setting up funds to delivering haz-mat suits and handing out oxygen masks, discover how DVC coordinated an extensive effort to help combat COVID-19 in Wuhan [here](https://example.com).

We hope you enjoy this edition of **A Word of Counsel.**

If you would like to read the 8th edition, please scan the QR Code below:
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Receiving commendation for being “an eloquent, hard-working and very fair advocate who doesn’t take bad points,” this silk is also noted for “always being on top of his material.” He is known for “standing his ground relentlessly”...and he comes with a warning: “Don't underestimate him.”

Chambers & Partners Asia-Pacific 2020
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A claim to recover trust property can constitute a “debt” founding a statutory demand – *Re Lee Ming Cheung*

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**Announcements**

New Head and Deputy Head of Chambers  
Who secured a new appointment to the Appointments Committee of the HKIAC?

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**Multimedia & CSR Initiatives**

Artificial Intelligence: a beautiful misfire or a helpful tool for lawyers going forward?

Podcast: Silver linings amidst COVID–19

Can China be forced to compensate other countries for the spread of COVID–19?

DVC helps frontline health workers in Wuhan

DVC’s recent CSR and Diversity & Inclusion initiatives

The interplay between AI and Dispute Resolution – a webinar

Crossword Puzzle
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- Terrence Tai
- Kevin Lau
- Tiffany Chan
- Tinny Chan

**Door Tenants**
- John Griffiths SC CMG QC
- Jeffrey P. Elkinson
- Jonathan Shaw
- Kelvin Kwok
The coronavirus has seen the majority of countries pulling up their drawbridges as a result, and though Hong Kong is not materially different, recent figures have attested to its resilience. At the time of writing, Hong Kong has only had 1,066 confirmed cases, 1,030 of whom have recovered and only 4 deaths have been recorded: remarkable in a city known for being one of the most overcrowded in the world, with a population of over 7.5 million.

That being said, the HK Judiciary and HK’s legal practitioners have had to adapt to the WFH era necessitated by GAP i.e. the General Adjournment Period. As many of you know this entailed the temporary closure of Court operations which took place in late January 2020.

On 22nd April, the Court issued a new Guideline which mandated that from 4 May onwards all Court proceedings would generally resume and all hearings, both civil and criminal, including trials would resume unless the Court made specific directions to the contrary. Jury trials would however only begin again after May. Further updates can be found here.

The Guidance Note for remote hearings for Civil Business and the High Court was issued in early April. This stated that remote hearings would be held through video-conferencing during GAP and applications would be disposed of on paper if and when suitable and appropriate, and as a first resort as far as possible.

“Where oral submissions are still necessary, the court will conduct remote hearings by means of available technology. A remote hearing can be conducted in and from any court room with VCF [video conferencing facilities] available, or in and from any court room where VCF can be made available.”

Modernising around the disruption, Mr. Justice Coleman’s recent decision in Cyberworks Audio Video Technology Limited (In Compulsory Liquidation) v Mei Ah (HK) Company Ltd [2020] HKCFI 347 which involved a teleconference to resolve the decision broke with protocol and was a welcome step forward to bring about a swift resolution during these unprecedented times. Click here to listen to a DVC podcast which contains a reference to this recent deployment and how this, and AI tools might assist the legal profession in the future.

DVC considered the types of cases that can be heard during GAP, and this included all interlocutory applications or appeals in the Court of First Instance; final hearings usually dealt with on written evidence (without live oral evidence) such as applications for judicial review; and all civil appeals and interlocutory applications including applications for leave to appeal in the Court of Appeal.

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How has DVC adapted to the new normal?

In a recent Judicial Review, involving the powers of the Independent Police Complaints Council, a remote hearing was conducted before Justice K. Yeung and this involved DVC’s Johnny Ma. The judge acknowledged the fact that the hearing was conducted smoothly and successfully. It should also be noted that this took place in the Judiciary’s Technology Court. This Court is curated to display e-documents and hear testimony from overseas witnesses.

Given that it was acknowledged as being successful, will future hearings be conducted in the same way?
Steps taken by DVC members

Many of DVC’s members lodged comprehensive written submissions to safeguard parties’ rights and interests during GAP. In fact, drafting and advisory works continued unaffected during this period.

DVC’s members also attended hearings in accordance with the Guidelines.

In the first ever Virtual Vis East Moot on 29 March 2020, DVC’s Head of Chambers, Winnie Tam SC, JP participated as a panel member, and this was conducted by deploying Zoom. This was supported by the Electronic Business Related Arbitration & Mediation (eBRAM). Further details in this regard can be found below.

DVC has also adopted Zoom and other alternative platforms, such as Skype (which offers end-to-end encryption) for client conferences given that confidentiality is of paramount importance to DVC.

DVC has produced podcasts and webinars which provide up-to-date content on COVID-19 and its intersection with the legal profession.

eBRAM Online Dispute Resolution

The launch of the eBRAM Online Dispute Resolution platform is additionally expected to digitalize commercial dispute resolution once deployed later this year and will be particularly relevant given that it circumvents the need for face-time, as in physical meetings. eBRAM is expected to bring about an efficient, cost-effective and safe online platform for deal-making, and for the resolution of cross-border commercial and investment disputes.

DVC’s Winnie Tam SC JP and Adrian Lai are both on the Board of Directors.

Sector Booklets 2020

DVC has launched a series of Sector Booklets designed to provide a primer for legal developments on the horizon and as a way to look back in 2019’s rear view mirror and consolidate some of last year’s and this year’s milestone cases and key takeaways. More information about how you can leverage these booklets can be found on page 52.

If there is a topic that sparks interest and you would like to hear more about this, please contact Aparna Bundro, Practice Development Director (aparnabundro@dvchk).
When can a creditor seek to wind up if there is an arbitration clause? – Re Asia Master Logistics Limited

Following the decision in Re Southwest Pacific Bauxite (HK) Limited [2018] 2 HKLRD 499 (“Lasmos”), there has been a lot of debate on the Court’s approach when dealing with a winding-up petition based on a debt arising out of a contract containing an arbitration clause. The decision of DHCJ William Wong SC in Re Asia Master Logistics Limited (“Asia Master”) seeks to provide clarification in this area of the law.

The debate

Traditionally, if a company failed to satisfy a statutory demand for payment of a debt, the petitioner could file a petition to wind-up the company. The company may then apply to dismiss or stay the petition on the ground that there is a bona fide dispute on substantial grounds. It was not permissible for the company to merely deny, without more, the existence of the debt. Under this approach, the company still has to demonstrate a bona fide dispute based on substantial grounds to stay or dismiss the petition whether or not there is an arbitration clause in the contract giving rise to the relevant debt (“Traditional Approach”).

In Lasmos, the Court held that a company responding to a winding up petition based on a debt arising out of a contract containing an arbitration clause would no longer need to show a bona fide dispute on substantial grounds when applying to stay or dismiss the petition. The Court will generally dismiss the petition if (i) the company disputes the debt, (ii) the contract under which the debt purportedly arises contains an arbitration clause which covers any dispute relating to the debt, and (iii) the company has taken steps required under the arbitration clause to commence the dispute resolution process and files an affirmation demonstrating this (“Lasmos Approach”).

In Asia Master, following a comprehensive review of the authorities and the justification for and against the
Lasmos Approach, the Court effectively affirmed the Traditional Approach and came to the view that in all cases where a company that intends to dispute a debt, the company must show that there is a *bona fide* dispute on substantial grounds. In other words, the company cannot simply deny the debt and rely on arbitration clause in the contract giving rise to the relevant debt.

**The facts and decision in Asia Master**

A winding up petition was presented against the subject company. The company did not dispute the subject debt and attempted to raise a counterclaim, which the company was not able to substantiate. In a last-ditch effort to resist the petition, the company relied on an arbitration clause in a fixture note which gave rise to the subject debt in order to resist the petition.

The Court rejected the argument based on the arbitration clause primarily on the basis that the company had not commenced arbitration proceedings. Accordingly, even if the Lasmos Approach were applicable, the Court would still make a winding-up order. Nonetheless, the Court went on to discuss the justifications for and against the Lasmos Approach and made a number of observations in an attempt to resolve this important debate.

**The Court’s reasoning in Asia Master**

The Court identified and rejected two potential justifications for the Lasmos Approach, namely (1) it gives effect to the parties’ freedom to contract ("Contractual Justification"), and (2) it is consistent with the development in other common law jurisdictions ("Comparative Justification").

The Court rejected the Contractual Justification on the basis that a winding-up petition did not come within the scope of the creditor-petitioner’s obligations to arbitrate to begin with. This is because the determination of a winding-up petition does not resolve disputes over liability. If a creditor attempts to improperly invoke the Court’s jurisdiction to “determine or resolve” a dispute, the Court has the power to prevent and punish abuse of process.

The Court rejected the Comparative Justification. After reviewing a number of English and Singaporean authorities, the Court concluded that the Lasmos Approach was far from settled under the law of these two jurisdictions. The Court also noted that the hesitancy by the Singapore courts to stay or dismiss winding-up proceedings on the mere say-so of the debtor-company would suggest otherwise.

Crucially, the Court observed that the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("Ordinance") gives the Courts a flexible discretion in deciding whether or not to wind up a company. It would be wrong to dismiss or stay a winding-up petition just because the conditions in Lasmos were satisfied because this would be an unprecedented fetter on the Court’s hitherto discretion to make a winding-up order. Accordingly, the Court did not follow the Lasmos Approach and restated the law as follows:

"First, where a debtor–company intends to dispute the existence of a debt, he must show that there is a *bona fide* dispute on substantial grounds. It should not suffice for the debtor–company to merely deny the debt. This test would apply in all cases whether or not the debt had arisen from a contract incorporating an arbitration clause.

Secondly, the existence of an arbitration agreement should be regarded as irrelevant to the exercise of discretion."
Thirdly, the fact that arbitration proceedings have commenced or would be commenced may be relevant evidence that there is a bona fide dispute. However, this alone would not be sufficient to prove the existence of a bona fide dispute on substantial grounds.

Fourthly, where the creditor-petitioner petitions in circumstances where it knows there to be a bona fide dispute over the debt on substantial grounds, it runs the risk of being liable to pay the debtor-petitioner’s costs on an indemnity basis. It would also be at risk of liability under the tort of malicious prosecution.”

Commentary

The Court’s observations on Lasmos are obiter in nature and an appellate Court’s decision is needed before the debate can be conclusively resolved. However, the Court’s approach in Asia Master has certainly made it much more difficult for insolvent companies to rely on the Lasmos line of authorities to easily resist a winding-up petition when there are in fact no bona fide disputes on substantial grounds.

José-Antonio Maurellet SC and Terrence Tai authored this Article.
Can a creditor seek to wind up if there is an arbitration clause (Part 2) – the last word in Singapore. AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) [2020] SGCA 33

The Court’s approach when dealing with a winding-up petition based on a debt arising out of a contract containing an arbitration clause has generated a lot of debate in the common law world. Since the publication of our commentary on Re Asia Master Logistics Limited [2020] HKCFI 311 ("Asia Master"), the Singaporean Court of Appeal has handed down its decision in AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) [2020] SGCA 33 ("AnAn Group") which sets out the Singaporean answer to this important question.

The debate

A debtor company normally needs to raise a bona fide dispute in order to obtain a stay or dismissal of the winding-up petition.

However, in Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2015] Ch 589 ("Salford"), the English Court of Appeal held that, if the dispute in relation to the debt is subject to an arbitration agreement and the debt is disputed, the English courts ought to dismiss or stay the winding-up application, save in “wholly exceptional circumstances”.

Following the decision in Salford, there have been conflicting decisions in common law jurisdictions in relation to the applicable standard of review in cases where a dispute which is the subject of an arbitration agreement is raised in the context of winding-up proceedings.

While some decisions have followed or modified Salford and favoured the prima facie standard of review, other decisions favoured the retention of the traditional test...

While some decisions have followed or modified Salford and favoured the prima facie standard of review, other decisions favoured the retention of the traditional test... notwithstanding the presence of an arbitration clause which governs the dispute.

While some decisions have followed or modified Salford and favoured the prima facie standard of review, other decisions favoured the retention of the traditional test...

As noted in our commentary on Asia Master, this conflict between the traditional approach and the Salford approach can also be seen in Hong Kong – with the Salford approach being adopted by the Court in Re Southwest Pacific Bauxite (HK) Ltd [2018] 2 HKLRD 449 ("Lasmos") and being doubted in the obiter remarks of the Hong Kong Court of Appeal in But Ka Chon v Interactive Brokers LLC [2019] HKCA 873 and Asia Master.
Pursuant to an agreement, AnAn Group (Singapore) Pte Ltd (“AnAn”) agreed to sell and VTB Bank (Public Joint Stock Company) (“VTB”) agreed to purchase global depository receipts (“GDRs”) in a company known as EN+. AnAn was then obliged to repurchase the GDRs from VTB at a later date at a pre-agreed rate. In substance, the agreement was a loan from VTB to AnAn, and the EN+ GDRs acted as collateral for the loan.

Under the agreement, AnAn was obliged to maintain sufficient collateral, which would be affected based on the prevailing value of the EN+ GDRs which it had sold to VTB. The agreement further provided that any dispute arising out of or in connection with it was referable to arbitration.

A few months after VTB’s purchase of the EN+ GDRs from AnAn, the prices of the GDRs plummeted. As such, VTB issued a notice to AnAn, requiring the latter to top up a cash margin to meet the shortfall in collateral. After AnAn failed to do so, VTB sent a calculation notice to AnAn, stating that approximately US$170m was owed to it by AnAn. This figure was calculated by subtracting the Net Value of the EN+ GDRs from the purchase price of the GDRs.

Later, VTB served a statutory demand for the sum of approximately US$170m, which AnAn failed to repay within three weeks. On the basis of the unsatisfied statutory demand, VTB initiated winding-up proceedings against AnAn.

The Judge rejected the disputes raised by AnAn in relation to the debt, finding that they were not raised bona fide. Accordingly, the Judge ordered the winding up of AnAn. AnAn appealed against the Judge’s decision.

The Singaporean Court of Appeal allowed AnAn’s appeal. The Court held that the prima facie standard of review is to be adopted. As such, the winding-up proceedings would be stayed or dismissed if the debtor could show that there was an arbitration clause and that the dispute relating to the debt is caught by that clause, provided that the dispute is not being raised in abuse of the court’s process.

**The Court’s reasoning in AnAn Group**

*First*, the Court reasoned that by adopting the prima facie standard of review would promote coherence in the law concerning stay applications.

If a creditor claimed for a debt simpliciter before the court, the debtor would only have to demonstrate that
there was an arbitration clause and that the dispute relating to the debt is caught by that clause. If the same debt was relied on as the basis for presenting a winding-up application, the debtor would be required to demonstrate a substantial and bona fide dispute. There was no principled basis to apply differing standards to what was really the same disputed debt. If the applicable standard of review would depend solely on the creditor’s tactical choice, creditors could abuse the court’s winding-up jurisdiction in order to avoid arbitration.

**Secondly**, the Court opined that replacing the triable issue standard with the *prima facie* standard would give effect to the principle of party autonomy. Under the triable issue standard, the court would have to critically consider the merits of the debtor’s defences, in spite of the parties’ agreement that such disputes ought to be determined by an arbitrator, who might well arrive at a different conclusion on the merits from the court. A party did not lose his genuine desire for recourse to arbitration just because his case appeared weak, and arbitration may have been preferred for the procedural advantages which may not be available were the matter to be determined by the courts.

**Thirdly**, the Court stated that the triable issue standard presented uncertainty. The alleged debtors would have to show that there was a bona fide dispute. This may lead to significant costs being incurred by the parties before the courts, even though the substantive dispute was properly referable to arbitration. By contrast, the *prima facie* standard exhorts limited judicial intervention, viz. the court is merely required to determine whether it appears on a *prima facie* basis that there is an arbitration clause and that the dispute is caught by the clause.

To check against the abuse of this lower standard of review, the Court held that a stay would not be granted notwithstanding that the *prima facie* standard has been met if the application for a stay amounts to an abuse of process. The Court also observed that the abuse of the court’s process can manifest itself in a multitude of scenarios, and that the threshold for abusive conduct is very high. An example of an abuse of process would be where the debt had been admitted as regards both liability and quantum.

**Concluding remarks**

- The position in Hong Kong remains unsettled and it is doubtful whether the Hong Kong Court of Appeal will follow the decision in AnAn Group.
- What is clear is that AnAn Group offers some support to the Salford/Lasmos line of authorities and will no doubt be relied upon by debtor companies seeking to oppose winding-up petitions on the basis that there is an arbitration clause in the relevant agreement giving rise to the debt in question.

José-Antonio Maurellet SC and Terrence Tai authored this Article.
Arbitration vs. Winding-Up Petition: Who wins? What is the law now?

Mr Justice Harris in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 (more generally known as “Lasmos”) held that, where a creditor presents a winding-up petition based on a disputed debt which is covered by an arbitration clause, the Court would generally dismiss the petition, absent exceptional circumstances. Examples of exceptional circumstances include circumstances which would justify the appointment of provisional liquidators and invoking the insolvency look-back provisions to avoid antecedent transactions.

A recent flurry of post-*Lasmos* cases have led some commentators and the Singapore court to suggest that the position in Hong Kong is now unsettled. But we should not overlook the fact that *Lasmos* remains firmly the law at first instance in Hong Kong. If the Hong Kong Court of Appeal revisits *Lasmos*, the recent Singapore Court of Appeal decision in *AnAn Group (Singapore) v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 provides a lesson of what not to do because, with great respect, the Singapore decision appears in all practicality to be a self-contradiction.

Hong Kong law post-*Lasmos*

The *ratio decidendi* in *Lasmos* is that where there is an arbitration clause covering the disputed petition debt, the petition would be dismissed or stayed absent exceptional circumstances, provided the company has taken steps to commence arbitration.

The position is to be contrasted to a situation where the petition debt is disputed and there is no arbitration clause. In such a case, the court’s general approach is to dismiss the petition only if the debt is subject to a bona fide dispute on substantial grounds.

There is not a single post-*Lasmos* case whose *ratio* questions *Lasmos*.

For present purposes, there are three relevant post-*Lasmos* cases.

In *Re Sit Kwong Lam* [2019] 2 HKLRD 924, Peter Ng J expressed the view that the Lasmos approach would mean curtailing the creditor’s statutory right to present a winding-up petition, and therefore the arbitration clause would be unenforceable as a matter of public policy (*Re Greater Beijing Region Expressways Ltd* [1999] 4 HKC 807 (“GBRE”). But this view was strictly obiter because the actual decision there was that the parties’ agreement contained no arbitration clause at all. The Court of Appeal then upheld the decision and expressed no view on the correctness of Lasmos ([2019] 5 HKLRD 646).
In But Ka Chon v Interactive Brokers LLC [2019] 4 HKLRD 85, the Court of Appeal expressed some reservations about the correctness of Lasmos, in particular whether the discretion under the insolvency legislation should be exercised only one way to substantially curtail the creditor’s right to present a winding-up petition. But this view was strictly obiter because the debtor there had taken no steps to commence arbitration.

In Re Asia Master Logistics Ltd [2020] HKCFI 311, DHCJ William Wong SC commented that the existence of an arbitration clause should be regarded as irrelevant to the Court’s exercise of discretion when dealing with a disputed petition. Again this comment was strictly obiter because the debtor there had taken no steps to commence arbitration.

Therefore, at least at first instance, Lasmos remains the law of the land.

Potential appellate review of Lasmos – issues to be resolved

Should the Court of Appeal seek to review the correctness of Lasmos, the key open issues are:

First, what is the precise scope of the GBRE decision? At present the most serious challenge to Lasmos is the notion extended from GBRE that a creditor’s statutory right to present a winding-up petition cannot be curtailed by an arbitration clause.

Second, is Lasmos consistent with the Court of Appeal decision in Joseph Ghossoub v Team Y&R Holdings Hong Kong (HCMP 3136/2016, unreported, 21 July 2017) (“Team Y&R“)? Team Y&R refused to enforce the exclusive jurisdiction clause in a shareholders’ agreement requiring allegations in an unfair prejudice petition to be resolved in the English court because the Court of Appeal reasoned that enforcing the jurisdiction clause would fetter the petitioner’s statutory right as a minority shareholder to present an unfair prejudice petition.

Third, assuming Lasmos is correct in principle, what is the proper level of review of the debt dispute? DHCJ William Wong SC in Asia Master hinted that his Lordship’s main concern was not with the correctness of Lasmos as such, but with the proper level of review needed.

What not to follow: the Singapore approach

The AnAn decision is meant to be the definitive word on this topic in Singapore.

The Singapore approach is in brief as follows:

(a) Where a creditor presents a winding-up petition and the debtor disputes the petition debt, the Singapore court will apply the prima facie standard of review such that the court will dismiss or stay the petition if (i) there is a valid arbitration agreement between the parties; and (ii) the dispute falls within the arbitration agreement, provided the debtor’s dispute is not an abuse of the court’s process. Under this prima facie standard of review, the court will not consider the merits of the dispute.

(b) Abuse of the court’s process is a control mechanism which addresses the debtor’s abusive conduct and the threshold for abusive conduct is very high. An example of such abusive conduct is where the debtor seeks to stave off substantiated concerns which justify the invocation of the insolvency regime, such as when assets have gone missing and there is an urgent need to appoint independent persons to investigate and recover the assets, or when there had been fraudulent preferences. In determining the existence of any such abuse of process, the court does not engage in examining the merits of the parties’ dispute (at [99]).

(c) Where the prime facie standard of review is met, the court would ordinarily dismiss the petition. But the court would be prepared to only stay the petition if the “creditor is able to demonstrate legitimate concerns about the solvency of the company as a going concern, and that no triable issues are raised by the debtor” (at [111] (original emphasis)).
With great respect, the Singapore approach is hard to follow and appears to be self-contradictory in practice.

With great respect, the Singapore approach is hard to follow and appears to be self-contradictory in practice.

First, the court emphasised throughout that, when applying the *prima facie* standard of review, the court would not concern itself at all with the merits of the parties’ dispute. But when deciding the precise form of order once the *prima facie* standard of review is met (namely, whether to dismiss or stay the petition), the court is bound to consider if the creditor has demonstrated (a) legitimate concerns about the debtor’s solvency and (b) the absence of triable issues raised by the debtor. In practice, the petitioning creditor will of course do his best to prove the company’s insolvency and the frivolity of the company’s dispute in order to avoid a dismissal of the petition. Therefore, in practice, the court’s determination is bound to descend into the merits of the parties’ dispute, despite the court’s aspiration to stand above the merits.

Secondly, the court emphasised that a creditor needs to cross a high threshold in order to prove that the debtor’s opposition to the petition amounts to an abuse of process. One of the examples given is drawn from Lasmos concerning the appointment of provisional liquidators. This seems extraordinary. Provisional liquidators are often appointed to preserve assets and displace the existing management over the company’s strenuous opposition. In appointing provisional liquidators and overruling the company’s opposition in such situation, case-law does not label the company’s opposition as abuse of process (eg *Revenue and Customs Commissioners v Rochdale Drinks Distributors Ltd* [2012] STC 186). It seems that the Singapore approach has in effect created a new category of abuse of process, while intending it to be a very high threshold.

The truth is that the *prima facie* standard of review may be too extreme in an insolvency context, and thus the Singapore court sought to temper it with some gatekeeper. But in the gatekeeping exercise the court seems to have inadvertently constructed a consequence that it specifically hoped to avoid: “parties would effectively be granted a backdoor to argue on the merits of the dispute, even though the *prima facie* standard precisely prevents such arguments from being raised or entertained” (at [99]).

**Conclusion**

As a matter of stare decisis, Lasmos remains firmly the law at first instance in Hong Kong. Should the Court of Appeal revisit Lasmos, it must also revisit GBRE and Team Y&R.

Revisiting Lasmos requires a balancing exercise. As the Singapore court aptly put it, “balanced against the company’s interests are the interests of its creditors, both individually and collectively”.

With great respect, the Singapore answer to this balancing exercise appears in all practicality to be a self-contradiction. Let’s see if the Hong Kong Court of Appeal will get things right.

Look-Chan Ho acted for the petitioner in *Re Sit Kwong Lam* and authored this Article.
For a number of reasons, in recent months there has been a spate of privatisations of Hong Kong listed companies by way of schemes of arrangement sanctioned by the Court under sections 673 and 674 of the Companies Ordinance (Cap. 622) (“Cap. 622”): see, for example, *Re Hong Kong Aircraft Engineering Co Ltd* [2019] HKCFI 64, *Re China Power Clean Energy Development Company Limited* [2019] HKCFI 2098 and *Re Doh Chong Hong Holdings Limited* [2020] HKCFI 274.

These Hong Kong listed companies were all incorporated in Hong Kong, but is the statutory regime restricted to those listed companies which are incorporated in Hong Kong?

**Which companies can be subject to sections 673 and 674 of Cap. 622?**

The answer lies in section 688 of Cap. 622, which stipulates that a “company” in the relevant Division means “a company liable to be wound up under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)” (“Cap. 32”). In other words, section 673 and 674 of Cap. 622 can apply to companies liable to be wound up under Cap. 32.

**What does “liable to be wound up under Cap. 32” mean?**

 Needless to say, a Hong Kong incorporated company can be wound up under Cap. 32 and would thus fall within section 688 of Cap. 622. As for foreign companies, including registered non-Hong Kong companies, insofar as these are considered as “unregistered companies” under s.326 of Cap. 32, the jurisdiction to wind up these companies is derived from section 327 of Cap. 32. This provides that any unregistered company may be wound up under Cap. 32 with certain specific exceptions.

It is also well-established that the court’s jurisdiction to wind up an unregistered company will not be exercised unless three core requirements are satisfied (the “3 Core Requirements”), namely:

(a) There must be a sufficient connection with Hong Kong;

(b) There must be a reasonable possibility that the winding-up order would benefit those applying for it; and

(c) One or more persons interested in the distribution of the company’s assets must be persons over whom the court is able to exercise jurisdiction.

This begs the question: in deciding whether a company is liable to be wound up under Cap. 32 within the context of section 688 of Cap. 622, do the 3 Core Requirements need to be satisfied?

The question was answered in *Re LDK Solar Co., Ltd (in provisional liquidation)* [2015] 1 HKLRD 458 at §§833-36 (albeit in the context of a creditors’ scheme), where, following the approach of Lawrence Collins J (as Lord Collins of Mapesbury NPJ then was) in *Re Drax Holdings Ltd* [2004] 1 BCLC 10, G Lam J held that companies liable to be wound up under Cap. 32 include unregistered companies pursuant to sections 326 and 327 of Cap. 32. On the other hand, the 3 Core Requirements go to the exercise of discretion rather than existence of jurisdiction.

This article was authored by José-Antonio Maurellet SC and Jasmine Cheung
As such, the 3 Core Requirements do not limit the Court’s jurisdiction under sections 673 and 674 of Cap. 622. Indeed, as explained at §27 of *Re Drax Holdings* (supra.), any other result would lead to very odd and artificial consequences, since schemes of arrangement are used in many circumstances having nothing to do with insolvency. One such example is privatisation schemes.

Are there other requirements for foreign-incorporated companies to invoke sections 673 and 674?

The above, however, does not mean that any unregistered company within the meaning of Cap. 32 can automatically invoke sections 673 and 674 of Cap. 622.

Like the jurisdiction to wind up a foreign company which often used to be described as an “exorbitant” jurisdiction, the Hong Kong court’s jurisdiction to sanction a scheme of arrangement in relation to a foreign company can only be exercised where there is sufficient justification for the Hong Kong court to do so.

In this context, the test formulated by the Courts is not the 3 Core Requirements as applied in winding up cases but simply whether is a “sufficient connection with Hong Kong”: see *Re LDK Solar* (supra.) at §44.

What is necessary to establish sufficient connection in Hong Kong?

The short answer is “it depends”. In the words of G Lam J in *Re LDK Solar* (supra.) at §46, “it is a matter of judgment to be made in the light of the evidence presented to the court in a particular case... in the light of the object and purpose of the jurisdiction invoked”.

For example, in the context of a creditors’ scheme, factors include the governing law of the relevant debt, the domicile of creditors and whether the foreign company is registered in Hong Kong: see *Re LDK Solar* (supra.) at §63.

It was also held in *Re Winsway Enterprises Holdings Limited* [2017] 1 HKLRD 1 at §32 by Harris J that the fact that a foreign company is listed in Hong Kong constitutes a material connection with Hong Kong, as do various other ancillary matters such as the existence of a registered office, staff, books and accounts, shareholders and shareholder meetings in Hong Kong.

While it is expected that the fact that a foreign company is listed in Hong Kong would be a factor of even greater significance in the context of a privatisation scheme, much will depend on the circumstances, such as perhaps the proportion of shares held by shareholders domiciled in Hong Kong.

It would appear to be the case that no attempt has yet been made to privatise through a Hong Kong scheme a company not incorporated in Hong Kong. There is therefore some uncertainty of course as to how if at all the Courts would approach such a scheme. Based on the authorities which pertain to creditors’ scheme it would seem that in principle this is something which can be considered in appropriate circumstances. One factor to consider might be the effectiveness of such a scheme in particular under the laws of the place of incorporation of that company and perhaps also the law where some of the shareholders are located.

Key takeaway

All in all, this tends to suggest that privatisation schemes under sections 673 and 674 of Cap. 622 are arguably not restricted to companies incorporated in Hong Kong: many foreign-incorporated Hong Kong listed companies might well be able to take advantage of the statutory scheme provided they have a sufficient connection to Hong Kong, assuming that the approach taken by the Hong Kong courts in question relation to the creditors’ schemes is adopted in privatisation schemes.

This Article was authored by José-Antonio Maurellet SC and Jasmine Cheung.
Minority Discount in Non Quasi-Partnerships?

Valuation of a party's shareholding for the purpose of a buy-out order by the Court has become a subject of interest in its own right, with various rules and principles having been developed in this context. For example, it is well-established that the general rule is that no minority discount is applicable for a minority shareholding in a quasi-partnership company: see CVC v Demarco [2002] BCLC 108 (PC) per Lord Millett at §41, as cited in a number of Hong Kong cases. The rationale for this is that the valuation of shares in a quasi-partnership, like in the case of a true partnership, is based on a notional sale of the company as a whole to an outside purchaser, rather than direct sale of the outgoing partner's share to the continuing partners (see CVC at §42).

What about the situation in the case of a private company which is not a quasi-partnership? This was a question expressly left open by the Hong Kong Court of Appeal in the recent decision of Re Minloy Limited [2019] HKCA 461 (Unrep., CACV 9/2017, 24 April 2019) at §69.

The Singapore Court of Appeal, on the other hand, had to grapple with this precise question in the case of Senda International Capital Ltd v Kiri Industries Ltd and others [2020] SGCA(I) 01, where an order had been granted by the Court for Senda International Capital Ltd (“Senda”) to buy out the shareholding of Kiri Industries Ltd (“Kiri”) in the subject company, which was found not to be a quasi-partnership. At first instance, it was held, inter alia, that in valuing Kiri’s shareholding, a minority discount for lack of control should not be applied. Senda appealed against this decision.

The Court of Appeal began by confirming the general principle it laid down in the earlier decision of Thio Syn Pyn v Thio Syn Kym Wendy and others and another appeal [2019] 1 SLR 1065 that there was no presumption that a minority discount applied in the context of non quasi-partnerships, and the court has to look at all the facts and circumstances of the case in arriving at its decision (§35). This general principle had been laid down following an extensive review of relevant case law and legal literature, which led to the conclusion that there was no overarching principle or legal policy justifying such a presumption: see Thio Syn Pyn at §§17-33.

Applying this general principle to the facts of Senda International v Kiri Industries, the Court of Appeal upheld the first instance decision that no minority discount should be factored into the valuation of Kiri’s shareholding, taking into account the below:

(a) Despite breaches by both Senda and Kiri, Senda’s oppressive conduct was directed at worsening the position of Kiri as shareholders to compel them
to sell out, and it was Senda’s conduct which was entirely responsible for precipitating the breakdown in the parties’ relationship (§38). This appears to be the crucial factor.

(b) Unlike in *Davies v Lynch-Smith* and others [2018] EWHC 2336 (Ch), where the minority shareholder did not provide anything more than nominal value for his shares, here Kiri was the party which secured the investment opportunity and brought Senda into the picture. Kiri had also provided significant financial and management contributions, even if over the years the same were outweighed by Senda’s (§40).

(c) As to Senda’s point that Kiri did not contribute to the growth of the business in any substantial way, it was held that Kiri did play an active role in management for some time, and there was no evidence that thereafter Senda complained about Kiri taking a back seat. In fact, Senda excluded Kiri from management (§43).

(d) There was also no justification for concluding that Kiri would obtain a windfall if a minority discount were not applied (§44).

(e) On the other hand, Senda would benefit from the buy-out, as its shareholding in the subject company would increase from 62.43% to 100% i.e. full ownership (§45).

In light of the variety of factual permutations that may arise in private companies which are not quasi–partnerships, a fact-sensitive, context-specific approach seems to be a sensible one.

This decision illustrates the fact-sensitive nature of the enquiry. Given the surprising dearth of authority in Hong Kong on this point, these recent Singapore decisions shed valuable light on the proper approach in valuing minority shareholdings in non quasi–partnership private companies. In light of the variety of factual permutations that may arise in private companies which are not quasi–partnerships, a fact-sensitive, context-specific approach seems to be a sensible one.

This Article was authored by José-Antonio Maurellet SC and Jasmine Cheung.
What should the plaintiff do if the defendant in an arbitration does not take part in the arbitration proceedings, then subsequently resists enforcement on the basis that he was not given proper notice?

This situation arose in *OUE Lippo Healthcare Limited v David Lin Kao Kun* [2019] HKCFI 1630. In this case, the Defendant (“Lin”) did not take part in Singapore arbitration proceedings, even though all the documents had been served to his Shanghai address (the “Shanghai Address”), the contractually stipulated address for service. When the Plaintiff (“OUE Lippo”) sought to enforce the award in Hong Kong, Lin claimed, *inter alia*, that he had no actual notice of the arbitration proceedings or the arbitral award.

In finding as a matter of fact that proper notice had been given to Lin, Coleman J took into account, *inter alia*, the following factors:

(a) The Shanghai Address was the contractually agreed address for service of notices and had also been listed as Lin’s address in subsequent contracts (§§80, 81).

(b) There is evidence that Lin was in fact using the Shanghai Address, and that Lin’s wife lived at the Shanghai Address (§82). In particular, OUE Lippo’s legal representatives had personally attended the Shanghai Address and observed indicia of Lin’s use and occupation, such as the existence of recent letters addressed to Lin in the mailbox.

The concept of ‘proper notice’ may be different from ‘actual notice’ and brings into play questions of fairness. Proper notice is usually concerned with an assessment of whether the notice is likely to bring the relevant information to the attention of the person notified. That may take into account any contractually agreed notice provisions, any agreed dispute resolution mechanism and relevant institutional rules. It is a question of fact.
(c) Lin is one of the owners of the Shanghai Address as a matter of public record (§82).

(d) Lin’s legal representatives had earlier deposed that Lin could effectively be served at the Shanghai Address, and that the address remains his residential address on public record (§83).

(e) Lin had not deposed to having no use of or access to the Shanghai Address (§87).

The key takeaway is that, when faced with a defendant who appears to be evading service in an arbitration, it is all the more important to make all reasonable efforts to give notice to the defendant, bearing in mind any contractually agreed notice provisions, agreed dispute resolution mechanism and relevant institutional rules, in order to avoid enforcement difficulties. Further, given that proper notice is a question of fact, extensive evidence from different sources, such as public records, site visits and a detailed examination of the defendant’s previous conduct, is crucial.

...given that proper notice is a question of fact, extensive evidence from different sources such as public records, site visits, and a detailed examination of the defendant’s previous conduct is crucial.

This Article was authored by Christopher Chain and Jasmine Cheung.
Appointment of Arbitrators and Related Issues

This Article was authored by Adrian Lai

I. PURPOSE

1. This paper is to facilitate the discussion in the session on “Appointment of Arbitrators and Related Issues” at the ISDS Reform Conference, which will cover the topics of (a) examining the pros and cons of various methodologies in the appointment of arbitrators;

(b) exploring how the ISDS reform should tackle the issues of “double hatting”, issue conflicts and improving the arbitrator challenge procedures; and

(c) examining the desirability (or undesirability) of replacing ad hoc arbitrators with full-time judges.

II. BACKGROUND

2. In July 2017, the United Nations Commission on International Trade Law (UNCITRAL) entrusted the Working Group III (the Working Group) with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS Reform). The mandate given to the Working Group include:

The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.2

3. At the 34th and 35th sessions of the Working Group, various topics of the current ISDS system were identified for further discussion at the following session. In the “Note by the Secretariat” on “Possible reform of investor-State dispute settlement (ISDS)”, it was stated:

Concerns commonly expressed about the existing ISDS regime include (i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties (“party-appointment”), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns ... have been said to undermine the legitimacy of the ISDS regime and its democratic accountability .... These concerns fall within two broad categories: those concerning the arbitral process and outcomes ... and those relating to arbitrators/decision-makers....

4. The deliberations at the aforesaid two sessions were followed up at the 36th session of the Working Group. As to the concerns pertaining to arbitrators and decision-makers, the following specific concerns were identified at the 36th session: (a) the standards of independence and impartiality required of individual arbitrators, and the observation that those standards might be insufficiently clear in scope and homogeneous in practical application; (b) the existence of issue conflicts and double hatting; (c) the challenge mechanism and its limitations; (d) the limitations of the party-appointment mechanism as regards ensuring competence and qualifications

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1 Adrian Lai, Barrister; Deputy Secretary General of Asian Academy of International Law.


of arbitrators; (e) impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators on the perception of bias; (f) limited number of individuals repeatedly appointed as arbitrators; and (g) lack of diversity in terms of gender, age, ethnicity and geographical distribution of appointed arbitrators.4

5. This discussion paper is not intended to cover all concerns identified above. Instead, it selects some of them and organises the discussion under the following topics: (a) “The Arbitrator Appointment System”, (b) “Concerns about ad hoc Arbitrators”, and (c) “Replacing ad hoc arbitrators with full-time judges?”

III. CONCERN 1: The Arbitrator Appointment System

A. Party-appointment system

6. In ISDS cases, parties play a major role in appointing the arbitrators. Typically, for a 3-member arbitral tribunal, each party appoints one arbitrator initially. Then the presiding arbitrator will be agreed by the disputing parties directly, or selected by the party-appointed arbitrators.

7. From the parties’ own perspective, the party-appointment system allows parties to select their own preferred arbitrators according to their own criteria. Whilst the parties may have by agreement identified the qualities that an arbitrator should meet; parties, however, may attach different weight to different criteria, and come up with their own preferred choices. The parties’ right to appoint their own preferred arbitrators is regarded as a fundamental right in the ISDS arbitral process enshrining the party’s autonomy principle.

8. It is argued that parties generally have a high level of trust and confidence in the arbitrators they appoint and hence tend to be more willing to accept the arbitral awards delivered by the tribunals.5

9. The use of the party-appointment system in the context of ISDS, however, is not free from attack.

10. Firstly, it is said that ISDS cases require expertise in matters of both public and private international law and hence an arbitrator in ISDS cases should include the ability to take into account relevant issues of public interest or public policy, which are usually at stake in ISDS cases. However, it cannot be ensured that parties, in appointing the arbitrators of their own choices, will take that into account. This is exacerbated by the lack of transparency in the appointment process as parties are not obliged to disclose their appointment strategies to the other party. This reinforces the concern (or perception) that a party may appoint its preferred arbitrator without paying due regard to his/her ability to take into account public interest concerns.

11. Secondly, it is argued that there is an inherent flaw in the party-appointment system which cast doubts (whether as a matter of perception or otherwise) on the independence or impartiality of the appointed arbitrators. For example, ex parte interviews are likely to be conducted prior to appointment and a party-appointed arbitrator may be perceived to be more readily to side with the party appointing him.

12. The perceived bias on the part of the party-appointed arbitrators is reinforced by the situations of (a) dissenting opinions in ISDS cases and (b) repeated appointments.

a. Dissenting Opinions

13. With respect to dissenting opinions, an empirical study has been done on 150 publicly reported ISDS decisions. Amongst the decisions studied, there were 34 cases (22%) in which party-appointed arbitrators issued dissenting opinions. It is also worth noting that nearly all of those 34 dissenting opinions were issued by the arbitrators appointed by the parties that lost the case in whole or in part.7 The statistical

5 Alison Ross, Paulsson and van den Berg presume wrong, says Brower, GLOBAL ARB. REV., 6 February 2012.
6 Pre-appointment interviews, under the current system, are limited to availability and conflict and cannot address the merits of the case. E.g. see Practice Notes for Respondents in ICSID Arbitration 2015 p.18.
information, some argue, gives rise to the concern about the independence and impartiality of party-appointed arbitrators.

14. Another front of attack against the party-appointment system is that arbitrators in ISDS cases are often characterised as favouring States or investors (“pro-State/pro-investor” arbitrators) based on their previous appointments. Statistical information suggests that some arbitrators are consistently appointed by claimant-investors (as frequent as 50 times) and some by respondent-States (as frequently as 82 times).8

15. On the one hand, the perception of bias on the part of the party-appointed arbitrators undermines the public confidence in the ISDS regime. It is also said that party-appointment system leads to polarisation in tribunals, where the ultimate responsibility for deciding the case rested with the presiding arbitrator.

16. On the other hand, it is argued that the alleged bias of party-appointed arbitrators is merely a perception rather than reality. Firstly, arbitrators are not randomly-selected and one must not assume that parties would select unsuitable candidates to take on appointments. Secondly, the fact that dissenting opinions are given is not itself indicative of bias. On this, there does not appear to be consensus as to what the “correct” level of dissenting opinion should be, and whether the existence or level of dissenting opinions can indicate bias. In fact, some argues that dissenting opinions are a significant feature of international dispute settlement and play a critical role in fostering the legitimacy of international arbitration.9

Thirdly, statistics indicate that issuing a dissenting opinion reduces the chances of reappointment as a presiding arbitrator.10

Fourthly, the majority of ISDS cases are decided unanimously, indicating that in majority of cases, either the investor-appointed arbitrator is agreeing to reject the investor’s claims or the State-appointed arbitrator is agreeing to find against the State.11 On this, it is noted that the more recent studies suggested that the dissent rate is only in the range of 14.4%–17% for ISDS cases.12

b. Repeated appointments

17. The issue of repeated appointments are in two aspects: (1) repeated appointments generally which give rise to problems like lack of diversity in appointments; and (2) repeated appointments by the same law firm or party.

i. Repeated appointments generally

18. There has been a concern that in the ISDS context there is a lack of diversity in arbitrators appointments and as a result majority of arbitrator appointment goes to a small group of individuals.

19. Statistics speak for themselves: of the 372 individuals appointed to ICSID tribunals from 1972 until 2011, 37 were appointed to around 50% of the cases, and approximately one third had background education from only 5 universities,13 and the top five arbitrators took up more than 11% of all arbitral appointments.14

20. Repeated appointments of a small group of arbitrators has contributed to the concern of the lack of diversity in the pool of arbitrators and indirectly creates an invisible barrier deterring young practitioners transitioning themselves from advocates to arbitrators. Repeated appointments also reinforce the perception that arbitrators in ISDS context are either “pro-investor” or “pro-State”, which undermines the integrity and legitimacy of the ISDS system. See §13 above.

21. Despite the foregoing, it has to be stressed that there is no empirical evidence on how repeated appointments, if at all, affect the arbitrators’ independence and impartiality.

22. Repeated appointments of a small group of arbitrators have also raised problems of availability and increased costs by lengthening proceedings, which is beyond the scope of this discussion paper.

   ii. Repeated appointments by the same law firm or party

23. Repeated appointments by the same law firm or party as arbitrators are an “Orange List”6 matter that ought to be disclosed by the arbitrator(s) concerned under the IBA Guidelines on Conflict of Interest in International Arbitration (the IBA Guidelines):

   3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

   3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

   3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

24. Repeated appointments by the same law firm or party per se, however, do not without more lead to the conclusion of existence of justifiable doubts on the arbitrator’s impartiality or independence. The IBA Guidelines provide:

   Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator’s impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act.15

25. The above proposition is illustrated in the following cases. In Tidewater Inc. & Ors v The Bolivarian Republic of Venezuela, the two unchallenged arbitrators considered that “[t]he starting-point is that multiple appointments as arbitrators by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function” and that “[r]epeated appointments may be as much the result of the arbitrator’s independence and impartiality as an indication of justifiable doubts about it”.16

26. Similar conclusion was reached in Universal Compression International Holdings SLU v The Bolivarian Republic of Venezuela,17 in which a party-nominated arbitrator was challenged on grounds of multiple appointments by the same law firm/party. The chairman dismissed the challenge and held:

   In this case, no objective fact has been presented that would suggest that [the challenged arbitrator’s] independence or impartiality would be manifestly impacted by the multiple appointments by Respondent. [The challenged arbitrator] has been appointed in more than twenty ICSID cases, evidencing that she is not dependent – economically or otherwise – upon Respondent for her appointments in these cases.

1 Possible reform of investor-State dispute settlement (ISDS) - Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS (advance copy), (A/CN.9/WG.III/WP.151) ¶42.


16 Tidewater Inc. & Ors v The Bolivarian Republic of Venezuela (Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator), ICSID Case No. ARB/10/5, 23 December 2010, §§60–61.

17 Universal Compression International Holdings SLU v The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators), ICSID Case No. ARB/10/9, 20 May 2011.
Claimant also claims that [the challenged arbitrator] ‘will not be learning of Venezuela’s actions and its defences afresh in the present case – because she has already been exposed to them’ in the other three cases. Claimant’s assertions, however, are speculative and do not identify what evidence or arguments, if any, may be presented in those other arbitrations that would in Claimant’s view ‘unjustifiably influence [the challenged arbitrator], negating her ability to judge the present case independently and impartially’.

In conclusion, the Chairman finds that the appointment of [the challenged arbitrator] on three prior occasions by Venezuela does not indicate a manifest lack of the required qualities.18

27. Supporters of the aforesaid proposition argue that given the relatively narrow pool of arbitrators available in the ISDS system, any restrictions against repeated appointments by the same law firm or party would render the existing ISDS system unworkable. On this, the following observation is made in the IBA Guidelines:

It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals.

If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.19

28. However, the arbitral tribunal in OPIC Karimum Corporation v The Bolivarian Republic of Venezuela20 took a different view:

It is suggested by the arbitrators in Tidewater that multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge. We do not agree. In our opinion, multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor–State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention. The suggestion by the arbitrators in Tidewater that multiple appointments are likely to be explicable on the basis of a party’s perception of the independence and competence of the oft appointed arbitrator is in our view unpersuasive. In a dispute resolution environment, a party’s choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute. In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.21

29. Another concern that may arise from repeated appointments by the same law firm or party is that where the arbitrator concerned is appointed on multiple arbitrations having related issues, whether such repeated appointments would give rise to justifiable doubt on his/her impartiality or independence.

30. The chairman in the Universal Compression International Holdings SLU case did not consider repeated appointments...
in such context would give rise to any concern. He held:

The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations. As was stated in *Suez Sociedad General de Aguas de Barcelona S.A. et al., and InterAguas Servicios Integrales del Agua S.A. v Argentine Republic, Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*... the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case. It is evident that neither [the challenged arbitrator] nor her co-arbitrators will be bound in this case by any factual or legal decision reached in any of the three other cases.

31. Similar observation was made in *Electrabel SA v Republic of Hungary*, in which the unchallenged arbitrators observed:

... Investment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations. For example, every ICSID arbitration relates to the same ICSID Convention, just as many treaty arbitrations relate to the same Vienna Convention. As for governmental decrees and contractual wording, it is commonplace for arbitrators to review the same legislation or standard form of contract, such as tFDIC, the NYPE form of time charterparty or the Bermuda excess insurance form. We do not consider that Article 57 can now be interpreted, after more than forty years, effectively to outlaw widespread practices so long accepted by users and practitioners generally, particularly when such practices have helped to establish a growing body of specialist and experienced international arbitrators, so long desired by users.

32. On the other hand, in the case of *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v Republic of Kazakhstan*, the challenge on grounds of repeated appointments was successfully made. The unchallenged arbitrators therein, whilst considered that repeated appointments alone did not indicate a manifest lack of independence or impartiality on the part of the challenged arbitrator, considered that the facts of the multiple arbitrations were basically identical and concluded that a reasonable and informed third party would find it highly likely that the challenged arbitrator could not be completely objective and open-minded, but would be prejudiced.

33. It is also argued that the concern about arbitrators’ independence and impartiality is linked to the economic significance of such repeated appointments to the arbitrators concerned: it has been reported that on average an arbitrator’s compensation per ISDS case can be conservatively estimated as in excess of USD 400,000 (less expenses). It, to some extent, reinforces the concern about an arbitrator’s impartiality and independence arising from repeated appointments.

34. On the whole, there is concern, whether as a matter of fact or perception, about the quality, independence and impartiality of party-appointed arbitrators. It is generally agreed that the concern, even only as a perception, ought to be addressed to maintain public confidence in the arbitral process and the whole ISDS regime.
A Landmark Decision by the Market Misconduct Tribunal on the Duty of Disclosure of an Incomplete Takeover Proposal and the Safe Harbour Defence under the Securities and Futures Ordinance

This Case Report was authored by John Scott SC, QC, JP, Jenkin Suen SC and co-authored by Tommy Cheung

A. Overview

The recent report handed down by the Market Misconduct Tribunal (the “Tribunal”) on 18 March 2020 (the “Report”) dealt with at least three important areas of law:

(1) It examined the duty of disclosure under Part XIVA of the Securities and Futures Ordinance (Cap 571) (“SFO”) of a proposal to acquire the shares of a listed company that was incomplete (in the sense that the acquisition was yet to take place) (the “Acquisition Proposal”);

(2) It dealt with the safe harbour defence provided by section 307D(2) of the SFO (the “Safe Harbour Defence”); and

(3) It considered the duties of executive directors (“EDs”), non-executive directors (“NEDs”) and independent non-executive directors (“INEDs”) in these circumstances under section 307G of the SFO.

The Report is comprehensive, and readers are invited to consult the Report for details. By way of an overview, the Tribunal ruled that:

1. The knowledge of the Acquisition Proposal was acquired by the chairman of the listed company, Magic Holdings International Limited (“Magic”), in the capacity as officer (as opposed to shareholder) at the meeting of 27 April 2013, and such knowledge was attributable to Magic. In breach of section 307B(1) of the SFO, Magic did not disclose the Acquisition Proposal, which constituted inside information, as soon as reasonably practicable after the same had come to its knowledge;

2. The Safe Harbour Defence does not apply because the confidentiality of the inside information was not preserved, nor had reasonable precautions been taken by Magic to preserve the confidentiality of the inside information. Hence, Magic was in breach of the disclosure duties; and

3. Having considered the respective knowledge, skills and experience of the EDs, NEDs, and INEDs as well as their roles in Magic, the chairman and the company secretary (both of whom were
executive directors) had, in contravention of section 307G(2)(a) of the SFO, failed to exercise the skill and diligence required of them in carrying out their functions as directors of Magic, thereby resulting in the breach by Magic. Further, the chairman, the company secretary, She and Luo (as executive directors), and Sun Yan (as non-executive director) had not taken reasonable measures from time to time to ensure that proper safeguards existed to prevent Magic’s breach of the disclosure requirement, in breach of section 307G(2)(b) of the SFO.

B. Background

A summary of the background of this case is as follows. Magic is a Cayman Islands incorporated company, with shares listed on the Main Board of The Stock Exchange of Hong Kong Limited (stock code: 1633). The 2nd to 10th Specified Persons were members of the board of directors (the “Board”) of Magic. In particular, Tang, She and Luo (the 2nd to 4th Specified Persons) were the three founders of Magic (the “Three Founders”) and together they held close to 30% of the issued share capital of Magic. Tang (the 2nd Specified Person) was the chairman of the Board, and Cheng (the 5th Specified Person) was the company secretary. She and Luo (the 3rd and 4th Specified Persons) were EDs responsible for the day to day management of Magic.

Since early March 2013, Magic and L’Oreal SA (“L’Oreal”) had discussions relating to L’Oreal’s proposal to acquire the shares of Magic, i.e. the Acquisition Proposal. Meetings were held and email correspondence was exchanged. Most notably, on 27 April 2013, a meeting was held among BNP Paribas, L’Oreal and the Three Founders. During the meeting, the Three Founders confirmed their willingness to sell their shares in Magic to L’Oreal.

By 13 May 2013, all the institutional investors of Magic were informed of the potential share offer and had signed non-disclosure agreements. Yet, only on 2 August 2013, Magic made an announcement that it was in the course of negotiating a possible transaction with a third party which could lead to an offer for all issued shares of Magic, and that Magic was also approached by another potential offeror.
The Securities and Futures Commission ("SFC") argued that Magic failed to disclose to the public information concerning the Acquisition Proposal which constituted inside information as soon as reasonably practicable after the said inside information had come to its knowledge, contrary to section 307B(1) of the SFO. Further, the failure to take any steps to ensure timely disclosure on the part of the 2nd to 5th Specified Persons also amounted to negligent conduct in breach of section 307G(2)(a) of the SFO. Finally, the 2nd to 10th Specified Persons failed to take reasonable measures to ensure that proper safeguards existed to prevent a breach of a disclosure requirement by Magic, in breach of section 307G(2)(b) of the SFO.

C. Issue 1 – Whether Magic was in breach of the disclosure duties

One interesting aspect of this case is that the Three Founders had dual capacities in the sense that they were at all material times both shareholders and directors of Magic. As such, a key theme of Magic’s defence is that, notwithstanding the Three Founders’ knowledge of the Acquisition Proposal, such knowledge was acquired by them in the capacity as shareholders (but not directors), and hence no knowledge could be attributed to Magic.

The Tribunal ruled that the Three Founders’ knowledge acquired in the earlier negotiations of the Acquisition Proposal was acquired only in their capacity as shareholders. However, when Magic’s chairman started to approach other institutional investors by agreeing to do so at the meeting of 27 April 2013, he did so in the capacity as Magic’s officer with the knowledge of the Acquisition Proposal. As such, the chairman’s knowledge should be attributed to Magic.

Magic therefore acquired knowledge of the Acquisition Proposal on 27 April 2013. Yet, an announcement was only published on 2 August 2013. Given these circumstances, unless the Safe Harbour Defence applies, Magic was in breach and would be liable.

D. Issue 2 – Whether the Safe Harbour Defence applied

As already canvassed above, of particular relevance in the present case was the availability of the Safe Harbour Defence. To rely on the Safe Harbour Defence, two requirements had to be satisfied, namely (i) the confidentiality of the information is preserved and (ii) Magic has taken precautions to preserve the confidentiality of the information.

There is no direct evidence that the confidentiality of the inside information was not preserved. Nevertheless, after considering the movement of Magic’s share price as well as three very specific enquiries made to the directors of Magic, in which L’Oreal was named specifically, the Tribunal was of the view that it is likely that there was a leakage of information, at least about the interest of L’Oreal to acquire Magic. Hence, the first requirement was not satisfied.

As regards whether reasonable precautions to preserve the confidentiality of the inside information (namely the Acquisition Proposal) were taken by Magic, the Tribunal considered extensively Magic’s conduct against the measures set out in Paragraph 60 of the SFC’s Guidelines, and answered the question in the negative and held that the second requirement was not satisfied.

In the circumstances, the Safe Harbour Defence did not apply and Magic was held liable.

E. Issue 3 – Whether the directors were in breach

As regards the directors’ liabilities, the Tribunal noted...
that, although the 2nd to 10th Specified Persons were at all material times directors of Magic, their knowledge, skills and positions in Magic were different. That provides an excellent opportunity for the Tribunal to analyse their duties under section 307G of the SFO, taking into account the duties at common law prior to the enactment of section 465 of the Companies Ordinance (Cap 622).

Placing considerable emphasis on the fact that the chairman and the company secretary of Magic were experienced and professionally qualified, and taking into account the relevant circumstances, the Tribunal came to the conclusion that, in breach of section 307G(2)(a), the chairman and the company secretary had failed to exercise the skill and diligence required of them in carrying out their functions, and it was their negligent conduct which resulted in the breach by Magic of its disclosure duties.

As regards the duty to take reasonable measures from time to time to ensure that proper safeguards existed to prevent Magic’s breach of the disclosure requirement under section 307G(2)(b), the chairman, the company secretary, She and Luo (as executive directors), and Sun Yan (as non-executive director) were in breach. However, the INEDs were found not to have been in breach. Among them, Chen and Thomas Yan, had taken a more proactive approach (e.g. by proposing internal control review). As regards the remaining INEDs, the Tribunal attached weight to the fact that they were appointed to bring to Magic their scientific and technical skills and knowledge and in view of their lack of business experience and the relatively short period of time between the commencement of Part XIVA of the SFO and the incident triggering disclosure, the Tribunal was not prepared to find them in breach of the duty to take all reasonable measures to ensure that proper safeguards existed to prevent the breach of Magic’s disclosure requirement, and were not in breach.

F. Conclusion

This decision is legally significant as it examines for the first time the interplay between disclosure duties and the Safe Harbour Defence under the SFO. It is also potentially of wider implication because of the Tribunal’s extensive analysis of the duties of directors under the SFO. Readers are invited to read the facts and analysis of this important decision in full.

John Scott QC, SC, JP and Jenkin Suen SC acted for the Securities and Futures Commission, and they (together with Tommy Cheung) co-authored this Case Report.
Non-Recognition of Bermuda Solvent Liquidation: Re Sturgeon Central Asia Balanced Fund Ltd

In Re Sturgeon Central Asia Balanced Fund Ltd [2020] EWHC 123 (Ch), the English court essentially confirmed and bolstered what the Hong Kong court held two years ago – that a foreign solvent liquidation is not entitled to cross-border insolvency assistance.

The Hong Kong position before Sturgeon

In Re Joint Liquidators of Supreme Tycoon Ltd [2018] HKCFI 277; [2018] 1 HKLRD 1120, Harris J suggested that a foreign solvent liquidation would not be entitled to recognition at common law and declined to follow the Singapore court’s decision in Re Gulf Pacific Shipping [2016] SGHC 287 in respect of the latter’s approval of the US Bankruptcy Court’s decision in In re Betcorp Limited, 400 BR 266 (Bankr D Nev 2009). In Betcorp, the US Bankruptcy Court recognised an Australian members’ voluntary liquidation under Chapter 15 of the US Bankruptcy Code.

In Supreme Tycoon, Harris J reasoned as follows:

“If the foreign liquidation is a solvent liquidation (for instance, a members’ voluntary liquidation), it would not fall within the principle of modified universalism. A foreign solvent liquidation is not a collective insolvency proceeding, and is more akin to the “private arrangement” the Privy Council was referring to [in Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36; [2015] AC 1675]. In this connection, with respect, I agree with Lord Neuberger’s dissenting observations in Singularis. Accordingly, unlike the Singapore court [in Gulf Pacific Shipping], I would not rely on the US Bankruptcy Court’s decision in In re Betcorp Limited which concerns an Australian members’ voluntary liquidation being recognised under Chapter 15 of the US Bankruptcy Code. At any rate, it appears that Betcorp is a controversial decision even from the perspective of the UNICITRAL Model Law on Cross-Border Insolvency: see Look-Chan Ho, Cross-Border Insolvency: A Commentary on the UNICITRAL Model Law, pp 185–189; UNICITRAL Guide to Enactment and Interpretation of the UNICITRAL Model Law on Cross-Border Insolvency (2013) at [73].” (Supreme Tycoon at [17] (footnotes omitted)).
The English position after Sturgeon

The material facts are in brief these. Sturgeon Central Asia Balanced Fund Ltd ("the Company") is a fund incorporated in Bermuda. The majority of the Company’s assets were managed in England. In March 2018, the Bermuda court wound up the Company on a shareholder’s petition on just and equitable grounds. The petition argued that there had been a serious breakdown in the basis on which the Company was set up and investors were being denied their rights. The evidence before the court suggested that the Company was solvent throughout.

In May 2019, the provisional liquidators of the Company appointed by the Bermuda court ("Liquidators") obtained recognition in England under the Cross-Border Insolvency Regulations 2006 ("CBIR") which implemented the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") in Great Britain. The Liquidators obtained the recognition order through an ex parte without notice application.

Subsequently a former director of the Company applied to terminate the recognition order. The court treated the application as a review application analogous to the return date of an ex parte application for an injunction.

The court granted the application and terminated the recognition order because the court concluded that a solvent liquidation falls outside the Model Law, and thus CBIR. The key parts of the court’s reasoning are as follows (at [117], [119] and [121]):

“It would be contrary to the stated purpose and object of the Model Law to interpret ‘foreign proceeding’ to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency but have the purpose of producing a return to members not creditors...

The foreign procedure must relate to the resolution of insolvency or financial distress...

From a Hong Kong law perspective, this English decision probably cements the common law view that a foreign insolvent liquidation will not be entitled to recognition and assistance.

[A] wrong turn was made in Betcorp as it was not an insolvent liquidation but a solvent liquidation. It was necessary to go one step further and ask whether the company was insolvent or in severe financial distress.”

In coming to this conclusion, the court also took account of academic criticisms of Betcorp in Look-Chan Ho (ed), Cross-Border Insolvency: A commentary on the UNCITRAL Model Law (4th ed, 2017); Look-Chan Ho, Cross-Border Insolvency: Principles and Practice (2016); and Richard Sheldon (ed), Cross-Border Insolvency (4th ed, 2015).

Summary

From a Hong Kong law perspective, this English decision probably cements the common law view that a foreign solvent liquidation will not be entitled to recognition and assistance.

It remains to be seen whether the Singapore common law will move in the same direction.
Recognising Foreign Soft-Touch Provisional Liquidation and Bypassing Legend? – *Re Joint Provisional Liquidators of Moody Technology Holdings Ltd*

The Court may not exercise its statutory power to appoint soft-touch provisional liquidators, but the Court routinely exercises its common law power to recognise foreign soft-touch provisional liquidators. Is this common law development legitimate?

According to DHCJ William Wong SC in *Re Joint Provisional Liquidators of Moody Technology Holdings Ltd* [2020] HKCFI 416, the answer is a resounding ‘yes’.

This judgment provides the most detailed reasons yet reaffirming and explaining the soundness of Harris J’s practice in this area. The judgment also answers any concerns in relation to the Hong Kong recognition regime which may be raised based on the Court of Appeal’s decision in *Re Legend International Resorts* [2006] 2 HKLRD 192.

**Legal backdrop**

*Legend* held that the Court could not appoint provisional liquidators for the sole purpose of granting them restructuring powers.

Indeed Harris J used this creative solution of recognition to facilitate the restructuring in *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165.

One might doubt if this development of the recognition regime is legitimate in light of *Legend*.

In *Moody*, DHCJ William Wong SC concluded that any such doubt is unwarranted.

**The facts and decision in Moody**

The subject-matter company is a company registered in Bermuda and listed in Hong Kong. In October 2019, due to financial distress, the company went to provisional liquidation in Bermuda on a soft-touch basis in the sense that the provisional liquidators (“PLs”) were appointed for the purposes of restructuring only.

The PLs then applied for recognition and assistance in Hong Kong to progress their functions. The Court duly granted the recognition order, in line with the precedents set by Harris J. It was therefore a routine application followed by a conventional recognition order.

This Case Report was authored by Look-Chan Ho and Terrence Tai
The Court’s reasoning in *Moody*

Granting a routine recognition application would not ordinarily merit a detailed judgment. Nevertheless, the Court saw fit to provide detailed reasons because the Court had in mind two matters pertinent to the development of the Hong Kong recognition regime, namely (i) the many recent cross-border insolvency developments in Hong Kong and elsewhere, and (ii) the increasing peculiarity of *Legend* in the common law world.

Thus the Court’s detailed reasoning takes note of the many international developments, clarifies the scope of *Legend*, and rationalises the Hong Kong recognition regime.

In brief, the Court reasoned as follows:

- First, on a proper understanding of the notion of recognition, the fact that the Hong Kong Court may not appoint domestic soft-touch provisional liquidators cannot constitute a bar to recognising and assisting foreign soft-touch provisional liquidators. This is because foreign provisional liquidators recognised in Hong Kong will not be acting as, acting in the capacity of, or having the status of provisional liquidators appointed by the Hong Kong Court. This is supported by the English Court of Appeal decision in Candey Ltd v Crumpler [2020] EWCA Civ 26 where the English Court of Appeal held that foreign insolvency officeholders recognised by the English court under the British implementation of the UNCITRAL Model Law on Cross-Border Insolvency would not be acting as, acting in the capacity of, or having the status of English insolvency officeholders. The reasoning in Candey applies mutatis mutandis to the common law recognition regime.

- Second, since the Hong Kong recognition regime subscribes to the notion of modified universalism, the Court approved the proposition that the logical conclusion of universalism is that “recognition may be given even though there does not exist under local insolvency law a procedure equivalent to the foreign insolvency proceeding” (Look–Chan Ho, Cross-Border Insolvency: Principles and Practice (Sweet & Maxwell, 2016), p. 142).

This proposition finds support in the Jersey decision in *Tacon v Nautilus Trust Company Limited* [2007] JRC 107 and the English decision in *Banque Indosuez SA*
v Ferromet Resources Inc [1993] BCLC 112. In Tacon, the Jersey court recognised a provisional liquidator appointed by the BVI court even though Jersey law did not have a provisional liquidation procedure. In Banque Indosuez, the English court was prepared to assist the operation of Chapter 11 proceedings even though English law did not have a debtor-in-possession regime.

Third, as soft-touch provisional liquidation and Hong Kong provisional liquidation differ only on the scope of the provisional liquidators’ powers, they differ only in degree, not in kind. Both are species of collective insolvency proceedings. Refusing to recognise foreign soft-touch provisional liquidation on the basis that Hong Kong domestic law does not have soft-touch provisional liquidation will create discriminatory consequences:

“This is demonstrated in Re Joint Liquidators of Supreme Tycoon Ltd [2018] HKCFI 277, [2018] 1 HKLRD 1120 which held that a BVI voluntary liquidation is eligible for recognition in Hong Kong. In the course of his Lordship’s reasoning, Harris J. (at §16) approved the following proposition in Look-Chan Ho, Cross-Border Insolvency: Principles and Practice (Sweet & Maxwell, 2016), p. 230:

“It is suggested that the discrimination against non-court appointed officeholders is unhelpful. Insolvency representatives may be officers of the court without court appointment and they need the same information for the performance of their functions as their court-appointed counterparts.”

In other words, Supreme Tycoon stands for the proposition that, in determining whether recognition and assistance should be granted to foreign officeholders, Hong Kong Courts would not countenance any discrimination based on the mode of their appointment abroad. Just as it would be wrong to discriminate against foreign officeholders appointed out-of-court, so it would be wrong to discriminate against foreign provisional liquidators appointed on a soft-touch basis.”

Fourth, in recognising foreign provisional liquidators appointed in the company’s country of incorporation and granting them restructuring powers, the Hong Kong Court is merely recognising the provisional liquidators’ status as agents of the company, and giving effect to their management and governance powers under the law of the company’s incorporation. This is orthodox and in accordance with well-established principles of private international law.

Therefore, recognising and assisting foreign soft-touch provisional liquidators are fully consistent with Hong Kong domestic insolvency law, private international law and cross-border insolvency policy.

Commentary

- Many an applicant issuing a standard recognition application may take for granted the recognition practice developed by Harris J and no longer be concerned about its underlying premise. The Court’s detailed and extensive reasoning in the present case is therefore a most welcome reaffirmation that the recognition regime developed by Harris J is intellectually sound, pragmatic, and makes perfect policy sense.

- In a way, this decision is yet another clarion call for urgent insolvency reform in Hong Kong. It is as much astonishing as it is disquieting that Hong Kong-run companies often need to leverage offshore regimes to conduct debt restructuring in Hong Kong.

Terrence Tai acted for the applicants.

Look-Chan Ho authored this Case Report.
Gibbs is no bar to Hong Kong schemes compromising debts governed by Mainland and foreign laws – Agrokor, China Lumena and China Singyes Solar

This Case Report was authored by Look-Chan Ho

Hong Kong schemes of arrangement are effective tools to compromise debts governed by non–Hong Kong laws, as three recent cases show, namely, In re Agrokor d.d., 591 B.R. 163 (Bankr. S.D.N.Y. 2018); Re China Lumena New Materials Corp [2020] HKCFI 338; and Re China Singyes Solar Technologies Holdings Ltd [2020] HKCFI 467.

Such schemes are effective despite the old common law Gibbs rule (so called because it derives from the English Court of Appeal decision in Antony Gibbs & Sons v La Société Industrielle et Commerciale Des Métaux (1890) 25 QBD 399)). The Gibbs rule states that the question of whether an obligation has been discharged is governed by its proper law. The effect of the Gibbs rule is thus that creditors whose claims are governed by foreign law may, notwithstanding a Hong Kong scheme compromising their claims, enforce their claims against the company in a foreign court.

These recent cases show how the Gibbs rule can be overcome in scheme practice, namely:

(i) a foreign court’s refusal to recognise the Gibbs rule: Agrokor;
(ii) creditors’ submission to the scheme jurisdiction: Singyes and Lumena;
(iii) sufficient creditors’ support of the scheme: Singyes and Lumena.

How is the Gibbs rule relevant to the Hong Kong scheme jurisdiction?

The Gibbs rule has no relevance to the scope of the Hong Kong scheme jurisdiction because the Hong Kong Court has jurisdiction to sanction schemes compromising debts governed by the law of any jurisdiction.

The Gibbs rule, however, is relevant to the exercise of the Hong Kong scheme jurisdiction because, before sanctioning a scheme, the Hong Kong Court would need to be satisfied that the scheme is effective in all relevant jurisdictions so that the Hong Kong Court’s sanction order would not be in vain. In other words, if the Gibbs rule has the effect that the Hong Kong scheme would not be effective in the relevant foreign jurisdictions, the Hong Kong Court might not sanction the scheme.

Below is a brief review of how recent cases overcame the Gibbs rule.
Agrokor – Croatian restructuring compromising English and New York law-governed debts

Agrokor d.d. and its debtor affiliates ("Debtors") were subject to Croatia insolvency proceedings pursuant to which a restructuring plan was approved by the Croatian court ("Settlement Agreement"). About 64% of the debts compromised by the Settlement Agreement were governed by English law; the rest were governed by New York law. As the Debtors had creditors in the US, the Debtors requested the US Bankruptcy Court to recognise and enforce the Settlement Agreement under Chapter 15 of the US Bankruptcy Code.

Judge Glenn duly granted the recognition sought and concluded that the Gibbs rule would not prevent the US Bankruptcy Court from extending comity to the Croatian insolvency proceedings.


Judge Glenn reasoned that the Gibbs rule is premised on a misconception which is fundamentally inconsistent with insolvency principles:

"[T]he parties to a contractual relationship governed by the law of a jurisdiction adhering to the Gibbs rule should be attributed with the expectation that their claims might be discharged in proceedings in a jurisdiction where the debtor has an established connection based on residence or ties of business…"

Look–Chan Ho criticizes the notion that insolvency proceedings should be characterized as contractual issues... [T]he Gibbs rule centers around the idea of a party’s contractual or consensual choice to be bound to a certain forum’s rules.

A theoretical and practical issue with applying such a contractual analysis in the context of insolvency proceedings, as Look–Chan Ho and others argue, is that bankruptcy discharges by their very nature imply diverging from the terms of most of the debtor’s prepetition contracts. The primary disputes in a
bankruptcy are ordinarily not about the rights of a single creditor against the debtor; insolvency proceedings are collective proceedings in which the rights of all creditors are determined for a slice of a pie that is not big enough to repay all creditors in full.

Additionally, as Look-Chan Ho notes, framing the issue of which law should govern a creditor’s rights in a bankruptcy as a solely contractual issue between two parties overlooks orthodox English classification of bankruptcy as an in rem proceeding. The Gibbs rule’s contractual analysis seems to be based on the contractual parties’ expectations; but if parties’ expectations created the rule, is it realistic for creditors to multinational corporations to expect that, in the context of an insolvency proceeding, their contractual bargain will ultimately prevail? ...

As Justice Ramesh argues, a fundamental problem with the use of the Gibbs rule in international insolvency cases is that it mischaracterizes the discharge of debt as a contractual issue, rather than as a bankruptcy or insolvency law issue...

The Court agrees with Justice Ramesh that a creditor’s autonomy is relevant in the context of an insolvency proceeding only to the extent that it does not impede the underlying public policy that governs a collective insolvency or bankruptcy proceeding.”

It follows from this clear and authoritative judgment that, when the Hong Kong Court considers whether a Hong Kong scheme compromising foreign law governed debts will be effective in the US, the Gibbs rule will not be an obstacle. The Gibbs rule will not prevent the US Bankruptcy Court from recognising the Hong Kong scheme under Chapter 15.

Prior to Agrokor, there was a practice of adducing expert evidence to the Hong Kong Court about the possibility of Chapter 15 recognition of Hong Kong schemes (eg Re Winsway Enterprises Holdings Ltd [2017] 1 HKLRD 1). Agrokor has now rendered such practice redundant.

Singyes – compromising English and New York law-governed debts

Singyes concerned a Hong Kong scheme compromising convertible bonds governed by English law and notes governed by New York law.

In considering whether to sanction the scheme, Harris J had to consider whether the scheme would be effective in England and the US.

Harris J concluded that the scheme would be substantially effective in these jurisdictions even though there was no application to the English and US court for recognition of the Hong Kong scheme. His Lordship reasoned thus:

(a) 100% of the holders of the convertible bonds had acceded to the restructuring support agreement and voted in favour of the scheme. This thus came within an exception to the Gibbs rule, namely submission to the scheme jurisdiction. Accordingly, the scheme would be effective in England.

(b) More than 99% of the holders of the notes had acceded to the restructuring support agreement and voted in favour of the scheme. The remaining creditors had not come forward and there was no reason to believe that any of them would try to enforce their pre-scheme claims in the US. Therefore the risk of adverse enforcement by a dissenting creditor in the US would be de minimis.
**Lumena – compromising Mainland law-governed debts**

*Lumena* concerned a Hong Kong scheme compromising debts governed by Hong Kong and Mainland law; the latter accounted for about 42% of the company’s total indebtedness.

In considering whether to sanction the scheme, Harris J had to consider whether the scheme would be effective on the Mainland. Harris J had in mind the possibility of the Mainland court applying something equivalent to the *Gibbs* rule in respect of the Mainland law-governed debt.

Harris J concluded that the scheme would be substantially effective on the Mainland for two reasons.

**First**, all of the Mainland law-governed debt was held by the Zhejiang branch of the China Development Bank (“CDB”). Although CDB’s Zhejiang branch did not attend the scheme meeting, CDB’s Hong Kong branch had voted in favour of the scheme in respect of its Hong Kong law-governed debt. Therefore, CDB had submitted to the Hong Kong scheme jurisdiction, thereby triggering the exception to the *Gibbs* rule mentioned above.

**Second**, although CDB’s Zhejiang branch did not attend the scheme meeting, they had written to the company expressing their support of the scheme. There was therefore no reason to think that CDB’s Zhejiang branch would try and enforce its pre-scheme claim in the Mainland court.

**Commentary**

- While the Gibbs rule continues to be valid in England and possibly in Hong Kong, these cases show that it often does not pose a practical obstacle to the success of international restructuring.

- But the Gibbs rule does present practical inefficiencies, such as the need for parallel insolvency proceedings in different jurisdictions. Indeed DHCJ William Wong SC recently highlighted the inefficiencies of parallel schemes in *Re Da Yu Financial Holdings Ltd* [2019] HKCFI 2531.

- Pending legislative removal or judicial abandonment of the Gibbs rule, practitioners will continue to work around this antiquated rule.

Look-Chan Ho acted for (i) the provisional liquidators and the company in *Re China Lumena New Materials Corp.*, and (ii) the company in *Re China Singyes Solar Technologies Holdings Ltd.*
In Competition Commission v. Wing Hing Construction Company Limited & Ors [2020] HKCT 1, the Competition Tribunal had to decide for the first time:-

(1) whether the Australian “instinctive synthesis” approach or the EU/UK multi-step approach should be adopted in determining the penalty for contravention of the first conduct rule in respect of price fixing and market sharing; and

(2) whether the civil or the criminal approach on costs should be applied.

In the Judgment handed down on 17 May 2019: [2019] 3 HKLRD 46 https://dvc.hk/en/news/cases-detail/competition-bid-rigging-in-hongkong-tip-of-the-iceberg, the Tribunal had found all 10 Respondents who were contractors approved by the Hong Kong Housing Authority liable for contravening the First Conduct Rule by engaging in market sharing and price fixing. They were found to have allocated the floors they would work on and used a joint flyer setting out basic packaged prices in providing decoration works in Phase 1 of On Tat Estate between June and November 2016.

In January 2020, the Tribunal heard arguments on whether the Australian “instinctive synthesis” approach (by the 2nd, 3rd and 9th respondents) or the EU/UK multi-step approach should be adopted in determining the appropriate penalty.

After a 3-day hearing, the Tribunal handed down a very comprehensive judgment today [2020] HKCT 1 and held that:-

(1) The similarities in the legislative provisions with those in Australia do not necessarily indicate a legislative intention that the Australian approach should be followed. Since the Ordinance modeled the conduct rules and the efficiency defence on the EU equivalents, and given that the statutory cap in section 93(3) of the Ordinance is closer to Singaporean legislation (which adopted a model similar to that in the EU and the UK), there are grounds upon which to follow the EU/UK Multi-step approach.

(2) In particular, where competition law is still a nascent subject, a structured methodological approach is necessary to provide the desirable level of certainty, clarity and transparency in the assessment of the pecuniary penalty.

(3) The determination of the pecuniary penalty under the Competition Ordinance in Hong Kong should be approached by way of reference to the 4 main steps:-
This judgment is a significant landmark decision in that it laid down for the first time the proper approach the tribunal should adopt in determining the pecuniary penalty involving a breach of the First Conduct Rule...

Step 1: determining the Base Amount

Step 2: making adjustments for aggravating, mitigating and other factors

Step 3: applying the statutory cap

Step 4: applying cooperation reduction and considering plea of inability to pay, if any.

(4) Applying the aforesaid approach, the Tribunal imposed a pecuniary penalty ranging from around HK$130,000 to HK$740,000 on the respective respondents.

(5) In reaching the final amount of pecuniary penalty and recognizing that the penalty is sought against the 1st and 9th respondents without joining their sub-contractors, the Tribunal reduced the Base Amount by one-third for these two respondents to reflect their role as only part of the undertaking in question. In particular, the Tribunal took into account the fact that the association of the respondents and their sub-contractors was an ad-hoc, temporary one; they were not companies in a group or individuals in partnership and it would be unsafe to assume they would be able to recoup what they had to pay from the subcontractors.

(6) Insofar as costs is concerned, the mere fact that the proceedings involve the determination of a criminal charge does not necessarily suggest that for all purposes and in all contexts, contravention of the conduct rules is to be regarded as a criminal offence or that the proceedings are to be regarded as a criminal trial and sentencing. Accordingly the civil approach on costs should be applied.

(7) Given that this is one of the first cases in the Tribunal, and that more costs would have been incurred because of the novelty of the law than otherwise, the Tribunal further reduced the costs payable by the respondents to the Commission by 20%.

(8) The Tribunal also declined to grant a certificate for three counsel and to award any sum in respect of the Commission’s costs of investigation on the basis that the Commission had not provided any evidential basis to justify the same.

Key Takeaways

- This Judgment is a significant landmark decision in that it laid down for the first time the proper approach the Tribunal should adopt in determining the pecuniary penalty involving a breach of the First Conduct Rule and costs in these enforcement actions brought by the Commission.

- However, it also left unanswered some questions which could only be addressed on another occasion. For example, whether the Duration Multiplier can be less than 1 to reflect the duration upon which the contravention had taken place (i.e. less than 1 year) in future cases; and whether in calculating the turnover of the undertaking that comprised each of the 1st and 9th respondents and their respective sub-contractors, one should include the turnover of these sub-contractors as well.

Connie Lee and Tommy Cheung acted for the 9th Respondent.
A claim to recover trust property can constitute a “debt” founding a statutory demand – Re Lee Ming Cheung

In Re Lee Ming Cheung [2020] HKCFI 297, DHCJ Le Pichon confirmed that a claim by a beneficiary to recover trust property can, in appropriate cases, constitute a “debt” founding a statutory demand for the purpose of bankruptcy proceedings.

The debtor/applicant in this case applied for an order that the bankruptcy petition against him be adjourned or stayed pending the determination of his appeal from the decision of DHCJ William Wong SC dismissing his application to set aside the statutory demand on which the bankruptcy petition was based.

As one of his grounds of appeal, the debtor contended that the petitioner/respondent’s claim could not found a statutory demand or a bankruptcy petition as it was not a liquidated claim, but one against the debtor as trustee for breach of trust. In those circumstances, it was argued that the appropriate remedy lay in an account.

In response, it was submitted on behalf of the petitioner that both the English case of Barnett v Creggy [2017] PNLR 4 and the Hong Kong Court of Final Appeal authority of Libertarian Investments Ltd v Hall (2013) 16 HKCFAR 681 supported the proposition that the petitioner’s claim being one for breach of trust could constitute a liquidated claim. In particular, the petitioning debt was a claim for investment proceeds held on trust and those proceeds were capable of being ascertained as a mere matter of arithmetic, based on the market data of the relevant shares.

DHCJ Le Pichon found for the petitioner. She held that the nature of a claim to recover trust property was restitutionary in nature, to restore the trust fund to what it should be. In that regard, it was no different from a claim at common law for a fixed sum of money provided the amount was a sum certain and capable of precise quantification by arithmetical calculation.

Further, as the debtor repeatedly admitted and acknowledged the petitioning debt to be due and payable, it was factually distinguishable from the case of Libertarian where the order for equitable compensation could only be made after there had been a trial.

Rosa Lee acted for the petitioner in this case.
Announcements

New Head & Deputy Head of Des Voeux Chambers

DVC is delighted to announce that Winnie Tam SC, JP has been appointed the new Head of Chambers. Ian Pennicott SC, QC took over as DVC’s Deputy Head of Chambers with effect from 5th March 2020.

DVC is grateful to John Scott QC, SC, JP for his laudable and unwavering stewardship of Chambers over the course of the last decade.

Latest in a series of new appointments

DVC’s Head of Chambers, Winnie Tam SC, JP has been appointed to the Appointments Committee of the Hong Kong International Arbitration Centre, effective 2nd May. This is a position in addition to her current appointment to the Nominations Committee of HKIAC which commenced in November 2018, following significant reforms in the governance of the HKIAC.

The Appointments Committee falls under the auspices of the HKIAC Council. Members of the Committee are empowered to appoint and confirm arbitrators, emergency arbitrators, mediators and experts, to determine the number of arbitrators, to fix the costs of arbitrations and review and admit members to the HKIAC’s panels and lists of arbitrators.

Winnie Tam SC, JP has also taken on the mantle of Co-Chair of Women In Arbitration, a group set up under the auspices of the HKIAC to promote and advance women in the international arbitration sphere.

On the diversity and inclusion front, Winnie Tam SC, JP has been inducted by the IBA as the Asia-Pacific Regional Forum Liaison Representative and Officer for the D & I Council.
DVC is delighted to announce an exclusive collaboration with Westlaw Asia

DVC has partnered with Westlaw Asia to feature a body of noteworthy case reports authored by DVC’s barristers from 2018 to date. These are showcased on both DVC’s website and on Westlaw’s platform.

DVC’s barristers have been at the coalface of many of the major (and minor) trends in the lion’s share of different sectors, including administrative & public law, arbitration & mediation, chancery, commercial law, company law and insolvency, competition, construction, criminal, employment & anti-discrimination, family, intellectual property, insurance, international trade, land and planning, securities and tax law. And you can find summaries of recent and seminal case law captured and consolidated [here](#).

If you think you’ve missed something, this is an ideal opportunity to catch up on leading developments, come away with key takeaways, and avoid pitfalls in the future.

DVC’s Case Reports and Articles can be found archived under the Journals tab / Hong Kong Journals / Des Voeux Chambers – A Word of Counsel

Doyles Latest Rankings for Maritime, Shipping & Transport Law 2020

All of Doyles latest Senior Counsel to be recognised under the Leading category for Maritime, Shipping & Transport Law Barristers – Hong Kong, 2020 hail from Des Voeux Chambers. Included in this category are: Charles Sussex SC, Clifford Smith SC and Douglas Lam SC.

Christopher Chain is also acknowledged as a Leading Junior in the same category.
Standout Family barristers included in this year’s Doyles Guide 2020

DVC’s John Scott QC, SC, JP has been recognised by the Doyles Guide 2020 in the Recommended category for Senior Counsel.

Mairead Rattigan is accredited in the Preeminent Junior Counsel category, and Frances Irving received acclaim as a Leading Junior Counsel.

Doyles Guide 2020 - Estates & Probate Litigation

DVC’s Frances Lok and Kerby Lau have been recognised in the Doyles Guide 2020 for Estates & Probate Litigation in the Recommended Junior Counsel category.
Who was recognised by Doyles’ Guide for Construction & Infrastructure Litigation – and who debuted this year?

Ian Pennicott QC, SC has been recognised in the Preeminent Senior Counsel category by the Doyles Guide for Leading Construction & Infrastructure Litigation Barristers – Hong Kong, 2020, and he is joined by Anthony Houghton SC who received acclaim in the Leading Senior Counsel bracket and John Scott QC, SC, JP who was recognised in the Recommended Senior Counsel bracket.

Calvin Cheuk is accredited in the Leading Junior Counsel category, while David Tsang is acknowledged in the Recommended Junior Counsel category and Kaiser Leung makes his debut this year – also in the Recommended Junior Counsel category for Construction.
First Ever Virtual Vis East Moot

DVC’s Head of Chambers, Winnie Tam SC, JP participated as a member of the all-female panel of arbitrators on 29 March 2020 in the first ever Vis East International Mooting Competition held in cyberspace with a technical control centre in Hong Kong. The panel was chaired by the Chairman of London Centre of International Arbitration.

The winner of the moot was a team from The Chinese University of Hong Kong.

Extended appointment to the International Competition Network

Catrina Lam’s appointment as a Non-Governmental Adviser to the International Competition Network (ICN) has been extended by two years.

The International Competition Network (ICN) provides antitrust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern.

Who is the new annotator of the Dutiable Commodities Ordinance?

DVC’s Sabrina Ho is the author/annotator of the Dutiable Commodities Ordinance (Cap 109) which can be found in the Annotated Ordinances of Hong Kong 2019 published by LexisNexis, Butterworths.
Announcements

Sector Booklets 2020

We bring you an overview of the latest cases and developments in DVC’s inaugural Sector Booklets. Covering Administrative & Public Law, Arbitration & Mediation, Chancery, Commercial, Company & Insolvency Law, Competition Law, Construction, Criminal, Family, Employment Law, Intellectual Property, Securities and Tax Law, these booklets share strategic insights and foresights into the state of play in these multiple practice areas. Look out also for some outliers and differing approaches adopted by the Courts across a number of jurisdictions.

If any of these topics trigger an interest in a niche area that you would like to see covered by way of a webinar, please contact DVC’s Aparna Bundro, Practice Development Director, at aparnabundro@dvchk or on 3413 0600.
Multimedia & CSR Initiatives

Artificial Intelligence: a beautiful misfire or a helpful tool for lawyers going forward?

We are currently at an evolutionary crossroads where the ability to adapt to a changing environment will be fundamental to success.

Members from DVC including Catrina Lam, John Hui and Sabrina Ho converge to consider for DVC and Cambridge Global Conversations (CGC) the impact of AI for lawyers. Will we play hostage to our own inventions?

To conclude, Daniel Fung SC, CGC’s Founding Chair, wraps up with a robust analysis of how the black swan of 2020, namely the coronavirus, intersects with many of our most pressing existential challenges today.

Click the link below to listen to the podcast:

Spotify>
Silver linings amidst Covid-19

Can China be forced to compensate other countries for the spread of COVID-19 through legal or arbitral processes?

CW Ling, Chairman of The Hong Kong Mediation Council and HKIAC arbitrator, shared his views on the viability of legal claims that are being brought by various governments and groups around the world against the PRC government. During the RTHK interview, he highlighted issues of state immunity and limitations of international arbitration, citing the South Sea arbitration case (2015) as an example.

Click here to listen to the podcast.

Click here to watch his take.
Multimedia & CSR Initiatives

DVC helps frontline health workers in Wuhan

Since the outbreak of the COVID-19 epidemic, DVC has closely monitored the situation in mainland China. When Chambers learned that the frontline hospitals in Wuhan were short on medical supplies, members took immediate action to purchase and donate medical supplies.

The total amount Chambers has donated as a collective is approximately HK$280,000. Using these funds, DVC has successfully delivered three batches of medical supplies to eight Wuhan frontline hospitals.

These deliveries included:

(1) 500 coveralls delivered to Wuhan Tianyou Hospital;

(2) 1,000 hazmat suits delivered to the same hospital in batches;

(3) 21 oxygen generators delivered to seven other hospitals in Hubei.

Search QR Code: Chambers also donated HKD 40,000 to the Peking University Hubei Alumni Association for further action.

DVC has set up a Donor-advised Fund (DAF) with the Philanthropreneur Foundation. After purchasing the 21 oxygen generators, the remaining funds were used to purchase other materials for hospitals in Hubei.

Now that the epidemic has ebbed somewhat, we look forward to the resumption of exchanges between Mainland China and Hong Kong in the near future.
DVC's recent CSR and Diversity & Inclusion initiatives

In support of International Women's Day on 8 March 2020, DVC made a donation to Hong Kong's homegrown charity, Mother's Choice.

International Women's Day is a global day celebrating the social, economic, cultural and political achievements of women.

DVC is a staunch supporter of Diversity & Inclusion and viewed International Women’s Day as an opportunity to both acknowledge women and to answer a call to action.

Various initiatives have been undertaken by DVC’s members in the Diversity & Inclusion space. Rachel Lam SC took silk in 2019, Winnie Tam SC, JP took on the stewardship of DVC as the newly installed Head of Chambers, in addition to a series of other appointments. These included a position as the Asia Pacific Regional Forum Liaison Representative and Officer to the D&I Council for the IBA, her appointment to the Appointments Committee of the Hong Kong International Arbitration Centre, her current appointment to the Nominations Committee of HKIAC which began in November 2018, following significant reforms in the governance of the HKIAC. And most recently Winnie Tam SC, JP took on the mantle of Co-Chair of Women In Arbitration, a group set up under the auspices of the HKIAC to promote and advance women in the international arbitration scene. Other female members of Chambers have been involved in the mentoring programme launched by WILHK (Women in Law Hong Kong).

Mother’s Choice was selected because the charity’s mission tied in with a common vision to empower women and move the needle on women’s rights.

A recent study by Bain & Company conservatively estimated that the majority of the 7,000 crisis pregnancies in Hong Kong each year relate to single girls under the age of 25. Almost 4,000 children in HK live in institutional care, with hundreds more without safe, loving or permanent homes.
DVC’s Daniel Fung SC conducted a webinar on Artificial Intelligence and the future of Dispute Resolution beamed to over 150 law students at Peking University (Beida) on 9 May 2020.

The interplay between Artificial Intelligence and Dispute Resolution

A webinar presented by DVC’s Daniel Fung SC for Peking University

DVC’s Daniel Fung SC produced and presented a webinar for upwards of 150 law students at Peking University (Beida) on 9 May where he considered the interplay between Artificial Intelligence and Dispute Resolution and specifically how this is rapidly changing in a world that is facing a pandemic/health crisis.

He began with a nod to Professor Richard Susskind, Chief Technology and adviser to the Lord Chief Justice of England and his contribution to AI in the legal sphere, noting his often prescient commentary on what the future holds for lawyers.

Daniel emphasised that this was particularly important as we are in the midst of a revolution which is impacting the delivery of justice in light of the Covid-19 lockdown. The question of access to the courts and the question of access to dispute resolution for arbitration and ADR generally, becomes critical.

What will happen when we emerge from this health crisis? Will there be a ‘next’ normal?

Click this link to view the video in full where he addressed various nuanced questions raised by the students, including the fascinating question as to how the role of the lawyer is changing.
DVC's Crossword Puzzle

Be the first to complete this interactive crossword. Send the completed crossword to aparnabundro@dvc.hk.

All answers can be found in this edition of A Word of Counsel.

Scan the QR code below to unlock the questions to this puzzle.
DVC's standout members are variously recognised for being exceptionally good for being "quick on [their] feet" and "for having the ear of the judge" and for being "relentless", "eloquent and well-liked" and "not afraid of a scrap."

CHAMBERS & PARTNERS
ASIA-PACIFIC (2020)

GET IN TOUCH

If there are any topics you would like to see covered in upcoming editions of DVC’s newsletter, please contact our Editor Tom Ng (tomng@dvc.hk) or Practice Development Director, Aparna Bundro (aparnabundro@dvc.hk)

Des Voeux Chambers, 38/F Gloucester Tower
The Landmark, Central, Hong Kong
+852 2526–3071
newsletter@dvc.hk
www.dvc.hk
linkedin.com/company/des-voeux-chambers

DVC’s members supply bullet-pointed takeaways from milestone judgments in 2019 and from the 1st quarter of 2020 across a panoply of practice areas in these inaugural Sector Booklets.

If any of these topics trigger an interest in a niche area that you would like to see covered by way of a webinar, please contact DVC’s Aparna Bundro, Practice Development Director, at aparnabundro@dvc.hk or 3413 0600.

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