Foreword

Viewed through the prism of recent legal developments, DVC’s authors converge to take you through articles and a variety of prominent cases, exciting Announcements and recent Event write ups - offering insights as to how the law may change and what to look out for.

Articles

In our Articles segment, Ian Pennicott SC argues for a streamlining and harmonisation in relation to the plethora of arbitration rules that currently exist. Ian questions whether there is any benefit to their multiplicity and advocates for a move towards uniformity, offering suggestions as to how this can be done.

Case Reports

We begin our Case Reports segment by scrutinising the issue of costs. Specifically, we ask can non-parties be compelled to pay costs? And who is the ‘real’ party to the litigation? In the landmark case of Big Island Construction (HK) Ltd v. Wu Yi Development Co Ltd [2018] HKCFI 899, Lawrence KF Ng and Kaiser Leung definitively answer this question and provide you with the key takeaways.

Weighing in on the same theme of costs, Alan Kwong and Stephanie Wong discern whether O62 r 17 RHC concerning interim certificates might have a narrower meaning than what is typically understood under the status quo. The position is now unequivocal as is set out in the case of Li Sin Man Seline & Lee Shu Han (the executors of the estate of Lee Sai Nam, deceased) v. Li Shu Chung & Ors.

In a noteworthy CFI judgment, DHCJ Anson Wong SC resolves the issue of joint and several liability as between owners of a multi-storey building. William Wong SC and Tommy Cheung examine the recent case of Wong Tak Man Stephen (Liquidator) v. Chang Ching Wai and reveal just how extensive liability may be for the incorporated owners following its winding-up.

What is the distinction between personal wrongs and corporate wrongs in the context of ‘oppression actions’? José-Antonio Maurellet SC and Jasmine Cheung analyse the Singapore Court of Appeal’s approach in the topical decision of Ho Yew Kong v. Sakee Holdings Ltd, noting the Court’s novel reformulation of the current test/framework.

Yang-Wahn Hew, Kerby Lau and Stephanie Wong provide insight into the case of Re Y & R Team where Clifford Smith SC and Kerby Lau acted for the Petitioner. One of the issues was whether a clause in the contract would bar the minority shareholder from bringing an action against the company. The authors look back at this case from 2017 through the lens of recent cross-border issues and a noticeable uptick in the number of jurisdiction clauses being litigated.

In Unravelling Malice, Lawrence KF Ng deconstructs the case of Jonathan Lu & Others v. Paul Chan Mo-Po & Another and considers what legal approach should be taken in relation to the issue of malice to rebuff a defence of qualified privilege.

In Back for Good? Connie Lee asks whether all forms of illegality are sufficient to defeat the change of position defence to unjust enrichment claims. Connie neatly summarises the actionable takeaways from the recent case of Arrows Ecs Norway AS v. M Yang Trading Limited and suggests how the panorama might change in the future.
In Stranger things: do third parties have a legitimate interest in an estate? Patrick Siu explores the issue of locus standi in the context of trustees in bankruptcy.

Switching gears, Vincent Chiu asks when is it justified to impose a prison sentence on a Judgment Debtor? He extracts the key findings from the case of Pong Seong Teresa & Ors v. Chan Norman and considers the burden of proof for examination orders.

Kevin Lau raises a third party distress signal when considering what a third party needs to show in order to retrieve goods seized by a landlord following distraint for rent in the case of Goldcrest Management Holdings Ltd v. Great Wish Corporation Limited. Will the law change?

Announcements

A slew of noteworthy Announcements feature this quarter including the roll out of a cavalcade of new tenants. Find out which insolvency specialist joined DVC and which landmark case landed an accolade amongst other significant announcements.

Events

Unpack the highlights from recent events in the Event Reports section. Headlining the events this quarter was the marque Juniors’ Cocktail - the first of its kind for DVC. This gave our Junior members a chance to plug into the conversations you want to have, and it saw a groundswell of interest and support in an event that was oversubscribed. If you attended the Juniors’ Cocktail but haven’t yet received your bottle of wine, here’s your final chance to collect by clicking on this link https://goo.gl/forms/b9A47H7ts4N0mrpB3 to complete our survey.

Cutting through the clutter on concurrent delays and other challenges in the construction industry context, Calvin Cheuk takes us through the issues that were ventilated at the Inaugural Construction Forum on 24 April 2018.

Is the company law ecosystem changing for the better? When and how can aggrieved shareholders petition the court for relief when affairs are considered unfairly prejudicial? Yang-Wahn Hew and Stephanie Wong answered these questions and more in an exclusive in-house presentation entitled Unfair Prejudice and Shareholders’ Winding-up delivered on 8th May at DVC.

Winnie Tam SC, JP presented a talk and lent her support to a seminar, sponsored by DVC and held in collaboration with the HKIAC’s new Women in Arbitration initiative. Winnie was also joined by DVC’s Catrina Lam, Teresa Wu, Sabrina Ho and Connie Lee.

We hope you enjoy this issue. Click here to review previous editions of A Word of Counsel.
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| 6 | A Word of Counsel |
Why are There so Many Sets of Arbitration Rules?

In this article, Ian Pennicott SC observes that there is a great deal of duplication in the multiplicity of international arbitration rules that are currently available and argues for their rationalisation and harmonisation. The article is based upon a talk given to the Chartered Institute of Arbitrators (East Asia Branch) Young Members Group in Hong Kong on 15 June 2017.

Introduction

The question posed by the title to this article is one that is often asked, but perhaps the question that ought to be asked and addressed is whether there really need to be so many sets of arbitration rules.

The past several decades, in particular, have seen a constant worldwide growth in the number of arbitral institutions catering for both domestic and international arbitrations. The inception of each new institution almost invariably triggers the creation of one or more sets of additional arbitration rules, as those responsible for setting up the new institution deem it appropriate to ensure that it has its own rules, rather than adopting a set of existing rules. Furthermore, once in play, each institution is virtually forced to update and publish new versions of its rules periodically, leading inevitably to even greater proliferation.¹

The primary focus of this article is the rules used in international (or non-domestic) arbitrations. It is recognised that the content of domestic arbitration rules may be influenced, if not necessitated, to a greater or lesser extent, by the provisions of local legislation within any particular jurisdiction.² It would not ordinarily be expected that international arbitration rules make any reference to the local legislation of any specific jurisdiction.

Features of arbitration rules

The author of a 2017 article in the Chartered Institute of Arbitrator’s journal³ states that “whilst each institution has its own rules, those provisions are becoming remarkably similar in their content.” A comparative analysis of a number of sets of arbitration rules points to the general correctness of this statement. If this is correct, then why is there not a greater push towards greater uniformity of arbitral procedures through the reduction of rather than an increase in the number of sets of arbitration rules? Conversely, however, a comparative analysis also shows that there are a number of quite significant differences between the various sets of rules. Such being the case, surely the elimination or reduction in the differences also justifies a move towards more uniformity?

As discussed in the 2017 article referred to above, one of the underlying purposes of arbitration rules in an international context is, in effect, to bridge the gap between the common law and civil law systems in their approaches to procedure. In other words, the rules seek to provide a framework within which arbitrators, practitioners and parties from both common law and civil law systems can operate, and feel reasonably comfortable in doing so. There is no reason why a move towards uniformity should in any way affect this entirely understandable and laudable purpose.

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¹ This article first appeared in the April 2018 edition of Asian Dispute Review.

² See, for example, the English Institute of Arbitration’s arbitration rules.

That said, and contrary to the position in domestic arbitration, it is difficult to discern any justification for having so many sets of arbitration rules, other than self-interest on the part of the various arbitral institutions. This multiplicity is of no identifiable benefit to anyone involved in the arbitral process. International arbitration practitioners based in Asia may easily find themselves advising at any one time on arbitrations governed by the ICC Rules of Arbitration (2017)\(^4\) (the ICC Rules), the UNCITRAL Arbitration Rules (2013)\(^5\) (the UNCITRAL Rules), the SIAC Rules (2016)\(^6\) and the HKIAC Administered Arbitration Rules (2013)\(^7\) (the HKIAC Rules) to name but four possibilities among many others. On any objective basis, such a situation cannot be regarded as satisfactory.

Which set of arbitration rules applies to or governs a dispute will usually be determined by what is provided for in the parties’ arbitration agreement. If the arbitration agreement is silent and a dispute arises, then, in the interests of efficiency, the parties may be wise to attempt to reach agreement on which set of rules to adopt and use. What detailed thought, if any, is given by those responsible for drafting arbitration clauses or agreements as to which set of arbitration rules should apply to any dispute that may arise is unclear. Whilst it is not the purpose of this article either to criticise or promote any particular set of rules, the fact is that whilst (as mentioned above and discussed further below) there are many similarities of content in the various sets of rules, there are also some potentially important differences that parties ought to consider prior to adopting any particular set of rules. For example, is any specific consideration given to the number of arbitrators that should be appointed to determine a dispute? Under the UNCITRAL Rules,\(^8\) in the absence of any agreement on one arbitrator, three arbitrators will be appointed, whereas under the ICC Rules,\(^9\) in the absence of any agreement on the number of arbitrators, a sole arbitrator will be appointed, save where it appears to the ICC Court that the dispute is such as to warrant the appointment of three arbitrators. It is this type of rather fundamental difference, together with the self-evident similarities between the sets of rules, that ought to drive a path to greater harmonisation.

**Commonalities between arbitration rules**

It is, of course, wholly unsurprising that despite the varying lengths and the precise manner in which they are presented or formulated, all sets of arbitration rules cover certain key or core topics.

With a primary focus on the four sets of arbitration rules mentioned above, there is a good deal of common ground, despite the precise wording used, in the following topics (among others):

1. commencement of the arbitration;
2. appointment of arbitrator(s);
3. challenge and replacement of arbitrator(s);
4. repetition of hearings in the event of the replacement of an arbitrator;
5. exclusion and limitation of liability of the arbitrator(s);
6. seat, venue or place of the arbitration;
7. language of the arbitration;
8. written statements or submissions;
9. jurisdictional pleas;
10. interim or conservatory measures;
11. evidence and witnesses;
12. tribunal-appointed experts;
13. hearings;
14. the form of the award;
15. correction and interpretation of the award;
16. deposit and security for the arbitrator’s fees and other costs; and
17. definition and allocation of the costs of the arbitration.

\[\text{“it is difficult to discern any justification for having so many sets of arbitration rules other than self-interest”} \]
In all of these areas, and no doubt others, there is more than sufficient common ground to provide a solid foundation for a uniform set of rules.

**Common differences between arbitration rules**

Conversely, however, it must be acknowledged that there are topics within the various sets of arbitration rules that are either dealt with very differently or are covered in one or more sets of rules but not covered at all in other sets. To some extent, but by no means entirely, the omissions are likely to reflect a number of recent trends in arbitration and it may be that certain sets of rules have not ‘caught up’, rather than there being any fundamental difference of view as to the inclusion or exclusion of a particular provision. Where, however, there is a significant difference or an omission, then any attempt at harmonisation would require rational debate and a view to be taken on whether any particular topic should be included at all and, if it is to be included, how it should be dealt with. Some illustrative examples include the following.

1. The ICC Rules,10 the SIAC Rules11 and the HKIAC Rules12 all cover the related topics of joinder of additional parties, multiple contracts and consolidation of arbitrations. These are not covered in the UNCITRAL Rules. Similarly, the ICC Rules,13 the SIAC Rules14 and the HKIAC Rules,15 but not the UNCITRAL Rules, make provision for an expedited form of procedure.

These matters reflect the new trends referred to above and, despite their omission from the UNCITRAL Rules, it seems unlikely that there would be any serious debate that these topics should be covered by appropriate rules in any harmonisation exercise.

2. More controversially perhaps, the ICC Rules alone set out detailed requirements for ‘Terms of Reference’ to be drawn up by the arbitral tribunal.16 Given the prior service of a ‘Request for Arbitration’ and ‘Answer to the Request; Counterclaims’,17 or similar documents under other sets of rules, and given that no other set of rules requires ‘Terms of Reference’ as a jurisdictional tool, it would appear to be difficult to sustain a contention that ‘Terms of Reference’ are a necessity. On the contrary, they are clearly not regarded as a necessity by the majority of those responsible for drafting the other sets of arbitration rules, and the debate during any harmonisation process may well see ‘Terms of Reference’ jettisoned.

3. Article 34 of the ICC Rules requires the arbitral tribunal to submit an unsigned draft of the award to the ICC Court. The Court may not only require modifications to the form of the award but, without affecting the tribunal’s liberty of decision, also draw points of substance to the attention of the tribunal. Article 32.3 of the SIAC Rules is to very similar effect. Neither the UNCITRAL Rules nor the HKIAC Rules contain any requirement at all for the submission of the award to anybody other than the parties, whether in respect of the form of the award or its substance.

Whilst scrutiny of the form of the award may arguably have some merit, it seems unlikely that questions of substance are for anybody other than the arbitral tribunal, even with the qualification mentioned.

4. A potentially difficult area concerns the fees and remuneration of the arbitral tribunal. Without going into detail, art 38 of and Appendix III to the ICC Rules provide for the arbitral tribunal to be remunerated on the basis of scale fees, such fees being set by reference to the amount in dispute. The ICC Court retains a discretion to modify the amount payable to the tribunal in certain circumstances, as appropriate. Article 36 of and the Schedule of Fees to the SIAC Rules are to similar effect. The HKIAC Rules contain provisions allowing the tribunal to be remunerated, at the parties’ option, on an hourly rate basis or on a scale fee (see art 10 and Schedule 2). The UNCITRAL Rules are silent as to the basis on which the tribunal is to be remunerated, providing...
simply that the tribunal’s fees are to be fixed by the tribunal itself, and that such fees should be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrator(s) and any other relevant circumstances of the case (see arts 38 and 39).

Scale fees have the benefit of giving a reasonable degree of certainty to the parties as to the amount of fees due to the arbitral tribunal, but may be regarded as unfair if a matter has a high value but limited complexity, or a low value but a high level of complexity. Payment on the basis of an hourly rate carries with it a degree of uncertainty, but has the benefit of knowing that the tribunal is getting paid for the work it has actually done. It may be thought that the flexibility offered by the HKIAC Rules provides the right answer.

What needs to happen

There are a number of compelling arguments in favour of greater uniformity and harmonisation in arbitration rules utilised for international disputes. From the point of view of arbitrators, practitioners and parties, there is little if anything to be said in favour of the many and disparate sets of arbitration rules in current use. There is much common ground in respect of many of the key procedural topics, such that agreement could be readily and swiftly achieved. There are other matters that undoubtedly merit debate and detailed consideration, but there is clearly scope for consensus. Where, however, such consensus cannot be achieved, then the rules may be drafted with options made available to the parties.

In practical terms, what needs to happen is broadly twofold. Firstly, the self-interest of the many organisations producing arbitration rules needs to be set aside. Secondly, a respected body, such as UNCITRAL, needs to take the lead in a push for harmonisation. Where there’s a will, there’s a way!

1 A good example is the Rules of the Singapore International Arbitration Centre (SIAC). Set up in 1991, the SIAC has published a new set of arbitration rules, based in large measure on the UNCITRAL Rules, in 1991 and 1997 and then every three years, in 2007, 2010, 2013 and 2016.

2 For example, the Hong Kong International Arbitration Centre Domestic Arbitration Rules (2014) of necessity make numerous cross-references to the primary arbitration legislation in Hong Kong, namely the Arbitration Ordinance (Cap 609) and also expressly applies the Interpretation and General Clauses Ordinance (Cap 1), neither of which would have any place in a set of international arbitration rules.

3 Ismail Selim, The Synergy between Common Law and Civil Law under UNCITRAL and CRCICA Rules (2017) 83 Arbitration 402-411. The primary focus of that article is the Rules of the Cairo Regional Center for International Commercial Arbitration (2011), which are based on the UNCITRAL Arbitration Rules (2010) but modified “to accommodate the needs of its users and in light of [the CRCICA’s] role as an arbitral institution and an appointing authority”.

4 Comprising articles 1-41 and Appendices I-V, and running to 75 pages.

5 Comprising articles 1-43 and an Annex, and running to an economical 32 pages (ignoring the treaty-based Investor-State Arbitration Rules).

6 Comprising rules 1-41 and schedule 1, and running to 50 pages, these rules have much in common with the UNCITRAL Arbitration Rules.

7 Comprising articles 1-43 and schedules 1-4, and running to 62 pages.

8 Article 7.1.

9 Article 12.2.

10 Articles 7-10.

11 Articles 6-8.

12 Articles 27-29.

13 Article 30.

14 Article 5.

15 Article 41.

16 Article 23.

17 Articles 4 and 5 of the ICC Rules.
Following their ultimate success in the Court of Final Appeal ((2015) 18 HKCFAR 364), the Wu Yi parties applied to the Court of First Instance to make Ben Lee, a director of Big Island Construction (HK) Ltd (the Non-party), to be personally liable for their costs in, inter alia, the Court of First Instance. In a recent 2nd stage judgment handed down on 26 April 2018 (the 2nd Stage Judgment), which followed the 1st stage judgment handed down on 29 July 2016 (the 1st Stage Judgment; collectively, the Judgments), Madam Justice Au-Yeung (the Judge) ordered the Non-party to personally bear the costs of the Wu Yi Parties in the Court of First Instance.

What does the two stage process entail?

The order was made pursuant to section 52A of the High Court Ordinance (Cap. 4) (the “HCO”). The section confers a wide discretion on the Court to determine “by whom and to what extent” costs of and incidental to the proceedings before the court are to be paid. The court only has to be satisfied, in the exercise of its discretion, that it is “in the interests of justice” to make an order to award costs against a non-party.

The Judgments applied Sun Focus Investment Ltd v. Tang Shing Bor [2012] 5 HKLRD 853 and confirm that an application under section 52A of the HCO is a summary procedure which involves a 2-stage process:

1. In the 1st stage, the Court considers whether the party should be joined for the purposes of costs. At this stage, the court will only refuse the joinder if it is plain and obvious that the application amounts to an abuse of process. The applicant does not need to show an “arguable” case, nor is it open to the non-party to challenge the application on the ground that it has “no real prospect of success”.

2. In the 2nd stage, the Court will consider the matter further and decide whether to order the non-party to personally bear the costs. The overall consideration will always be whether it would be in the interests of justice to do so. In this stage, the court will only make an order of costs against a non-party in plain and straightforward cases.

The Judge applied the dictum of Bokhary PJ (as he then was) in The Liberty Container (2007) 10 HKCFAR 256 at §§28 & 30 and Lord Brown in Dymocks Franchise Systems (NSW) Pty Ltd v. Todd & Ors [2004] 1 WLR 2807 at §§25(3) and 29, in which it was held that where a non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs, since the said non-party is regarded as “the real party” to the litigation. In the present case, the Judge held that the Non-party was the real party to the litigation, on the basis that he had control and management of the actions, funded the litigation, would have benefitted financially from the actions, and had caused the losing party to pursue a false claim or defence in the action.
Whilst the Judge observed that there was delay by the successful parties in taking out the applications under section 52A of the HCO, and that there was a lack of warning to the Non-party that they were minded to take out such applications in due course, the Judge held that there was no prejudice caused to the Non-party, and that the lack of warning in itself was irrelevant in view of the litigation misconduct of the Non-party. Furthermore, any prejudice arising from delay could have been remedied by reducing the amount of interest that the successful parties could charge.

In the interests of justice, the Judge made an order that the Non-party do bear the costs of the Wu Yi Parties personally.

Key takeaways from these decisions

1. Practitioners should properly advise their clients (particularly directors of companies or funders of litigation) to be well aware of the serious possibility that, should the litigation fail, the successful party may be able to seek and obtain an order that a non-party (e.g. individual director or funder) be personally liable for costs pursuant to section 52A of the HCO, if such non-party could be regarded as “the real party” to the litigation.

2. The Courts have made it clear that a non-party costs order can be made against a director even if he had acted in good faith and without impropriety (§12 of the 1st Stage Decision, applying Goodwood Recoveries Ltd v. Breen [2006] 1 WLR 2723 at §59 per Rix LJ).

3. If there is an anticipated application for costs against a non-party pursuant to section 52A of the HCO, practitioners should properly advise their clients to warn such non-party at the earliest opportunity of the possibility that a costs order may be sought against him or her. This will lay the proper groundwork for an anticipated application and negate any suggestion that the non-party was prejudiced by a lack of warning.

Lawrence K F Ng and Kaiser Leung represented the Wu Yi Parties in the 1st Stage Application.

Lawrence K F Ng represented the Wu Yi Parties in the 2nd Stage Application.

Lawrence K F Ng and Kaiser Leung co-authored this Case Report.

Click here for the 1st Stage Judgment and the 2nd Stage Judgment.
Taxation: Whole or in Part?
The Anatomy of *Li Sin Man Seline & Lee Shu Han (the executors of the estate of Lee Sai Nam, deceased) v. Li Shu Chung & Ors* HCA 1711/2009

In her Ladyship’s Decision dated 19th June 2018, the Hon. Lisa Wong J discussed the legal principles governing the issue of interim certificates pursuant to Order 62, rule 17 of the Rules of High Court.

**Background**

The Plaintiff and Defendants by Counterclaim (i.e. the Father, Seline Li and a company named Yuen Hing, (collectively the "Receiving Parties") were successful in the Action, and the Court awarded a set of costs in their favour against the Defendant and Plaintiff by Counterclaim (i.e. Ken Li) (the "Paying Party").

The amount of costs claimed by the Receiving Parties and the amount of costs objected to by the Paying Party were as follows:

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<th>Amount of Costs Claimed</th>
<th>Amount Of Claimed Costs Objected to</th>
<th>Amount of Costs Payable if All Objections were Upheld</th>
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<tbody>
<tr>
<td>2nd Bill</td>
<td>$6,889,550.30</td>
<td>$2,465,751.90</td>
</tr>
<tr>
<td>3rd Bill</td>
<td>$6,945,881.90</td>
<td>$2,541,548.70</td>
</tr>
<tr>
<td>4th Bill</td>
<td>$47,878.50</td>
<td>$22,487.30</td>
</tr>
<tr>
<td>5th Bill</td>
<td>$121,378.40</td>
<td>$53,205.10</td>
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At the first call-over hearing, the Master issued an interim certificate ordering the Paying Party to pay the Receiving Party the amount of costs on the basis that all his objections would eventually be upheld.

The Paying Party appealed against the Master’s decision.
Decision

The Hon Lisa Wong J held that it was not open to a taxing master to grant an interim certificate in respect of “partially undisputed” costs, and the interim certificate might only cover individual items that have been examined and decided.

Under O.62, r.17(1), a taxation master may only issue “an interim certificate for any part of those costs which have been taxed.”

Whilst there is no statutory definition as to what constitutes “taxation”, in Re Grant, Bulcraig & Co. [1906] 1 Ch 124, 128, Farwell J held that taxation was “[t]o deal seriatim with each item by way of allowance or disallowance.”

The taxation under O.62, r.17(1) should be understood as an “item-by-item” adjudication process. The interim certificates may only cover individual items, in respect of which the Court has made a decision.

Key findings

Some practitioners take the view that the purpose of O.62, r.17(1) is to enable the successful party to receive part of the costs to which it is entitled as early as possible. However, in light of the said decision, the application of O.62, r.17(1) is narrower than it seems.

It appears that at call-over hearings, the Court may only grant an interim certificate in respect of those items that are wholly unopposed, and the procedure of O.62, r.17(1) is practically confined to situations where the taxation procedure is part-heard.

Alan Kwong and Stephanie Wong, were instructed by the Plaintiff in the original action and the 1st to 3rd Defendants by counterclaim.

Frances Lok, was instructed by the 4th Defendant
A Solid Foundation: *Building* on case law and shoring up the Construction of s34 of the Building Management Ordinance

The Court of First Instance judgment of *Re Incorporated Owners of Foremost Building* [2005] 3 HKLRD 509 left open an important issue concerning the proper construction of s.34 of the Building Management Ordinance (Cap.344) ("BMO"), which is a provision unique to Hong Kong. In a recent landmark case *Wong Tak Man Stephen (Liquidator) v. Chong Ching Wai* [2017] 5 HKLRD 758, Deputy High Court Judge Anson Wong SC delivered a concise judgment clarifying the legal effect of s.34 of the BMO. The learned Judge, after examining the legislative history of s.34 of the BMO and taking into account cases on s.17(1) of the BMO, held that owners of a multi-storey building are jointly and severally liable for all the debts and liabilities of the incorporated owners ("IO") upon its winding-up, and they could be pursued individually for the whole amount.

Nuts and bolts (of the case)

The Plaintiffs were the joint and several liquidators of the IO of Nos. 6, 6A, 6B, 8, 10, 12, 14 & 16 Wing Kwong Street ("Building") while the 1st and 2nd Defendants (The "Defendants") were two of the owners of the Building. In the period between 2007 and 2009, the IO engaged Chi Fu Construction Company to perform refurbishment work at the Building ("Refurbishment Work"). Subsequently, Chi Fu brought a claim against the IO for the outstanding payment of the Refurbishment Work, and obtained a default judgment against the IO in the sum of HK$1,143,567.50, together with interest and costs (The "Judgment Debt").

A winding-up petition was presented against the IO on the basis of the Judgment Debt, and the IO was ordered to be wound up. The Plaintiffs attempted to recoup contributions from the owners of the Building for the purpose of satisfying the IO’s debts and liabilities, yet a substantial number of the owners (including the Defendants) failed to contribute to the Refurbishment Work and/or the contingency fund set up by the Plaintiffs.

The Plaintiffs then issued the originating summons against the Defendants seeking (i) a declaration that the Defendants should be jointly and severally liable for all debts and liabilities of the IO, and (ii) an order that the Defendants do pay the outstanding sum of the Judgment Debt to the Plaintiffs.

The case turned on the construction of s.34 of the BMO, which provides that “[i]n the winding-up of a corporation under section 33, the owners shall be liable, both jointly and severally, to contribute, according to their respective shares, to the assets of the corporation to an amount sufficient to discharge its debts and liabilities.”

Proper Construction

DHCJ Anson Wong SC was of the view that there were two competing interpretations of s.34 of the BMO and that the difference between the two interpretations lay in where the risk of non-payment fell. The first one was that s.34 of the BMO allowed the owners to be pursued individually, but only to the extent of his/her proportionate ownership of the shares in the building, whereas the second was that the owners were jointly and severally liable for all of the IO’s debts and liabilities, with the result that they could be pursued individually for the whole amount, thereby enabling them the right to sue each other for contributions.

The learned Judge, after examining s.34 of the predecessor Ordinance (the Multi-Storey Buildings (Owners Incorporation) Ordinance) and taking into account cases on s.17(1) of the BMO, held that the second interpretation was the correct one. His reasoning was as follows:
On a proper construction of s.34 of the BMO, owners were jointly and severally liable for all the IO’s debts and liabilities, and they could be pursued individually for the whole amount. The owners then had the right to sue each other for contributions, such that their proportion of the liability was equivalent to the share in the building. To construe the section otherwise would be tantamount to passing the risk of non-payment by some owners to the creditors, thereby making the liquidation process very expensive and time-consuming.

The addition of the phrase “both jointly and severally” to s.34 of the BMO in 1993 evinced a clear intent by the legislature to create a scheme of joint and several liability on the part of the owners. In addition, the phrase “according to their respective shares” did not limit the owner’s liability vis-à-vis the creditors, but rather spelt out the contribution liabilities amongst the owners inter se.

The above construction was also consistent with the meaning and effect of s.17(1) of the BMO. Where a creditor sought leave to execute a judgment or order against the IO against any owner under s.17(1)(b) of the BMO, that owner’s liability was not limited to his proportionate share in the building. This showed that the legislative intent was to favour the interests of the creditors as compared to the owners.

What this means for you

This unprecedented decision handed down by DHCJ Anson Wong SC has provided a neat and succinct clarification of the proper construction of s.34 of the BMO. Since owners in a multi-storey building are jointly and severally liable for all the debts and liabilities of the IO upon its winding-up, owners and those acting for the owners should consider seeking legal advice whenever a winding-up petition is being presented against the IO. Failure to take the proper legal steps to deal with the winding-up petition might expose the owners to extensive liabilities. By way of example, there is a possibility that the liquidator of the IO would enforce the entire sum of the IO’s debts and liabilities against a particular owner, potentially causing the bankruptcy or winding-up of that owner. It might seem harsh to that single owner, however when the Court is faced with difficult scenarios of this kind, DHCJ Anson Wong SC remarked the court "must apply the law" and give effect to legislative intent.

Tommy Cheung as led by William Wong SC appeared on behalf of the Plaintiffs.
What is the difference between personal and corporate wrongs?

*Ho Yew Kong v. Sakae Holdings Ltd* [2018] SGCA 33

In the very recent judgment of the Singaporean Court of Appeal (“SGCA”) in *Ho Yew Kong v. Sakae Holdings Ltd* [2018] SGCA 33, the Court tackled the thorny issue of the relationship between “oppression actions” brought by a member of a company in his personal capacity (similar to unfair prejudice petitions in Hong Kong) and derivative actions brought by a member of a company in the name of the company. The same issue had been considered by our Court of Final Appeal in *Re Chime Corp Ltd* (2004) 7 HKCFAR 546, a decision which was discussed in *Sakae Holdings*.

The SGCA confirmed the distinction between personal wrongs, which should be redressed through oppression actions, and corporate wrongs, which should be vindicated in derivative actions ([93]). Although the court may grant relief to a company even in the former type of action, an oppression action should generally not be permitted in the case of a corporate wrong ([119]). This is largely in line with the approach in Hong Kong as stated in cases such as *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 and *AR Evans v. Novel* [2012] 4 HKLRD 511 As the SGCA observed, the difficult exercise in any given case was to ascertain whether a claim is based on a personal wrong or a corporate wrong where it contained features of both types of wrongs ([93]).

In *Re Chime Corp Ltd*, Lord Scott of Foscote NPJ reasoned that the distinction was between cases where the nature of the complaint was misconduct (to the prejudice of the company) and cases where the nature of the complaint was mismanagement (to the prejudice of the shareholder) ([48]).
Noting criticisms of this distinction as being artificial, unrealistic and uncertain ([101]), the SGCA set out its own analytical framework at [116] to ascertain whether a claim pursued as an oppression action was an abuse of process as follows:

(a) Injury

(i) What is the real injury that the plaintiff seeks to vindicate?
(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) Remedy

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?
(ii) Is it a remedy that can only be obtained under s.216 [i.e. the oppression action]?

While the distinction between a personal wrong and a corporate wrong may not always be clear, as the SGCA itself recognised at [115], this test takes into account both the essential remedy sought by the plaintiff and the real injury the plaintiff seeks to vindicate as opposed to resorting to the vague distinction between misconduct and mismanagement. It remains to be seen whether the Hong Kong courts will take into account the approach of the SGCA in *Sakae Holdings* in future cases concerning the interaction between unfair prejudice petitions and derivative actions.

José-Antonio Maurellet SC and Jasmine Cheung co-authored this case report.
How do jurisdiction clauses affect winding-up and shareholders’ petitions?

Readers will no doubt recall that in the second edition of the DVC Newsletter, the case of *Lasmos Ltd v. Southwest Pacific* (authored by Christopher Chain and Look-Chan Ho) regarding the effect of arbitration agreements on winding-up petition was discussed. In brief, it was held that where there is an arbitration agreement covering the underlying dispute, the Court will generally defer to the agreement and dismiss the petition.

This Case Report continues that theme and explores the other side of the coin, namely how jurisdiction clauses affect winding-up/ shareholders’ petitions.

This was the issue in the recent Hong Kong case of *Re Team Y&R Holdings Hong Kong Ltd.* CACV 6/2017, 21 July 2017 (involving some members of Chambers) with the same factual background as the well known UK Supreme Court’s judgment dated 4 November 2015 in *Makdessi v. Cavendish Square* [2016] A.C. 1172 (“the Makdessi case”). The main concern in the Makdessi case was whether a sale and purchase agreement (“SPA”) where Mr. Makdessi and Mr. Ghossoub had agreed to sell their shares in an advertising and marketing company named Team Y&R Holdings Hong Kong Ltd. (“the Company”) to Cavendish Square, a company in the WPP group of companies, the world’s largest market communications services group. The Makdessi case was particularly concerned with whether certain provisions in the SPA were unenforceable penalty clauses.

The anatomy of the *Re Y & R Team* case is an interpretation of jurisdiction agreements, more specifically whether an exclusive jurisdiction clause can undermine/erode a statutory right to present an unfair prejudice petition. The authors are looking back at this case from 2017 given that there has been a recent noticeable uptick in the number of cases involving cross-border issues and/or jurisdiction clauses.

Pending the hearing of the Makdessi case by the UK Supreme Court, Mr. Ghossoub had presented a petition under s. 724 *Companies Ordinance (CAP. 622)* complaining of unfairly prejudicial conduct of the Company by *inter alia* Cavendish and WPP, and seeking an order that his shareholdings be bought out without any discount for the fact that his shareholding was a minority shareholding.
The Respondents issued a summons to stay the petition pending determination of the issues raised therein by the High Court of Justice of England and Wales. They claimed that the allegations in the Petition consisted of or gave rise to issues or disputes which fell within exclusive jurisdiction clauses in the SPA, and in a Service Agreement whereby Mr. Ghossoub had been employed as the sole chief executive of the Company (“the SA”).

The Respondents’ application was dismissed by LePichon DHCI. in [2016] 3 HKLRD 778. Aggrieved by this decision, the Respondents obtained leave to appeal, and appealed, to the Court of Appeal, which members (Lam VP and Kwan JA) handed down their decision in Re Team Y&R Holdings Hong Kong Ltd, CACV 6/2017, 21 July 2017.

While the Court of Appeal covered several issues, the focus of this Case Report is the reasoning behind, and the impact of their decision that the exclusive jurisdiction clauses in the SPA and the SA were unenforceable as they fettered the Petitioner’s statutory right to present an unfair prejudice petition.

When will an exclusive jurisdiction clause fetter a statutory right to present an unfair prejudice petition?

At first instance, LePichon DHCI held that the exclusive jurisdiction clause in the SPA would apply to the complaint in the petition relating to the non-declaration and non-distribution of dividends, and went on to hold that the same clause would not be enforced, as it fettered the statutory right of the petitioner as a minority shareholder of the Company to present an unfair prejudice petition. In particular:

- the decision in Re Greater Beijing Region Expressways Ltd [1999] 4 HKC 807 (“GBRE”) was authority to the effect that the right of a contributory to petition for winding-up is a statutory right which cannot be deprived of by the terms of the articles of association or some private agreement between shareholders, and that an agreement which purports to bind future shareholders operates beyond a personal contract, and would be struck down if its tenor were against the policy in the companies legislation;
- no distinction could be drawn between the right to present a winding-up petition, and the right to present an unfair prejudice petition, since both were rights conferred by statute for the protection of shareholders; and
- the exclusive jurisdiction clause was inoperative given public policy considerations, and to the extent that it fettered the Petitioner’s statutory right to present an unfair prejudice petition.

On appeal by the Respondents, it was argued inter alia that there was no such fetter, since:

- The Hong Kong petition could be stayed for substantive complaints in the petition to be determined by the English courts pursuant to the exclusive jurisdiction clauses. If the complaints were established, he could then seek a lifting of a stay and ask the Hong Kong court to grant the relief sought in the petition. In doing so, the Respondents sought to draw an analogy with the principle that unfair prejudice petitions, or winding-up petitions by shareholders of solvent companies on the just and equitable ground, would be stayed by the courts, with the underlying complaints in the petitions being directed to be determined by arbitral tribunals pursuant to arbitration agreements. Thereafter, if the complaints were made out and where appropriate, the matter would be brought back to the court for the granting of relief: see Fulham FC Football Club (1987) Ltd v. Richards [2012] Ch 333; Re Quiksilver Glorious Sun JV Ltd [2014] 4 HKLRD 759 (a decision of Harris J.); Tomolugen Holdings Ltd v. Silica Investors Ltd [2016] 1 LRC 147; WDR Delaware Corporation v. Hydrox

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1 The learned Deputy High Court Judge had distinguished this case at Paragraph 84 of her judgment on the basis that “the issue of arbitrability was at the core of Fulham and necessarily coloured its approach”, and did not consider it to be of particular relevance.
Holdings Pty Ltd [2016] FCA 1164.

- It was also the case, the argument went, that as there is no statutory provision or rule of public policy which has the effect of rendering the arbitration agreement void or unenforceable (insofar as it purports to bind the parties to an arbitral determination of the unfair prejudice issues), there was no express or implied statutory restriction which prohibited the reference of the substance of an unfair prejudice petition to be determined by a foreign court, in this instance, the High Court of England and Wales. This was because there was no difference in principle for construing arbitration and exclusive jurisdiction clauses, such that the courts in both cases should seek to hold the parties to their contractual bargain unless there is good reason otherwise.

- GBRE was distinguishable as it concerned a winding-up, and not (as in this case) an unfair prejudice, petition. Both situations are different since the latter generally does not engage the public policy considerations in bringing into effect a statutory regime which impacts the rights of creditors, or imposes safeguards the benefit of third parties.

"apart from the Hong Kong Court, no other tribunal had jurisdiction to determine the petition for unfair prejudice"

What did the Court of Appeal decide?

The Court of Appeal disagreed and held that:

- there was a distinction between arbitration and exclusive jurisdiction clauses in the context of an unfair prejudice petition because the English court did not appear to have jurisdiction to determine a claim for unfair prejudice in respect of a company incorporated in Hong Kong, quite apart from granting the buyout relief sought in the petition;

- parties are not at liberty to confer jurisdiction on the court by agreement where there is no jurisdiction, unlike in an arbitration agreement in which parties can (subject to the issue of arbitrability) agree to refer whatever dispute to be determined by a consensual dispute resolution process;

- Fulham FC, Quiksilver, and WDR Delaware were all distinguishable as they concerned the question of arbitrability, and that it was in that context that the decisions considered and decided that there was no statutory restriction or rule of public policy that had the effect of rendering the arbitration agreement void or unenforceable, insofar as it purported to bind the parties to submit disputes of unfair prejudice to arbitration;

- apart from the Hong Kong Court, no other tribunal had jurisdiction to determine the petition for unfair prejudice;
Pausing here, we should point out that the Respondents applied for leave to appeal to the Court of Final Appeal in relation to the “fetter issue” which was eventually refused by the Court of Appeal by its decision dated 24 November 2017. One of the points in the leave application was that the English Courts in paragraph 97 of a decision dated 6 October 2017 [2017] EWHC 2401 (Comm) refusing to grant an interim injunction in the anti-suit proceedings expressed a view contrary to that of the Hong Kong Courts on the “fetter issue”.

- the situation was more akin to certain Australian cases cited by the Petitioner, which held that the non-availability of remedies under a protective Australian statute in the nominated foreign court constituted “strong cause” for not enforcing an exclusive jurisdiction clause, it being undesirable that the clause should circumvent statutory protection for investors and against misleading or deceptive conduct: see Commonwealth Bank of Australia v. White (No 1) [1999] 2 VR 681 at §§87 to 91; Quinlan v. Safe International Försäkrings AB [2005] FCA 1362 at §§49(f) and 50);

- there was, in the present context, no distinction between allegations of unfair prejudice and winding-up petitions, since the Court of Appeal had held in GBRE that company legislation gives an important right to contributories to protect their interest in the company, in that they have the right to present a petition for winding-up and the right to petition for relief on the grounds of unfair prejudice; and

- the correct approach was not simply to consider whether there was a personal contract or something more, but rather whether the statutory right affected was:

  - a personal right of the shareholder (as was the case in GBRE); or
  - a right of the company exercisable by the shareholders in general meeting.

As the statutory right of the Petitioner was (as it was in GBRE) a personal right of the shareholder, this right would be fettered if the exclusive jurisdiction clause in the SPA is enforced. The Court of Appeal therefore agreed that such clause should not be given effect, insofar as it fetters the statutory right of the petitioner.

As there was no appeal to the Court of Final Appeal2, the Court of Appeal’s judgment is binding authority for the proposition that an exclusive jurisdiction clause may be held unenforceable as it fetters the Petitioner’s statutory right to present an unfair prejudice petition, while an arbitration clause does not.

**Actionable Takeaways**

Practitioners and clients should therefore be aware of the following issues when considering choice of forum provisions:

- an exclusive jurisdiction clause in favour of other forums may be held to be unenforceable if the underlying allegations fall to be decided in an unfair prejudice petition concerning a Hong Kong company;

- the same situation does not however arise where the parties have agreed to submit the matter to arbitration and;

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2 Pausing here, we should point out that the Respondents applied for leave to appeal to the Court of Final Appeal in relation to the “fetter issue” which was eventually refused by the Court of Appeal by its decision dated 24 November 2017. One of the points in the leave application was that the English Courts in paragraph 97 of a decision dated 6 October 2017 [2017] EWHC 2401 (Comm) refusing to grant an interim injunction in the anti-suit proceedings expressed a view contrary to that of the Hong Kong Courts on the “fetter issue”.

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- The rights of shareholders which are protected by statute cannot be eroded by agreements which purport to confer jurisdiction where there is none, but the same approach does not necessarily apply to arbitration agreements as they are part of a consensual dispute resolution process.

What legal approach should be taken on the issue of malice to rebut a defence of qualified privilege?

In this important recent decision, in unanimously allowing the Plaintiffs’/Appellants’ appeal, the Court of Final Appeal laid down a definitive ruling on the meaning of malice in the context of the qualified privilege defence. The judgment was given by Lord Reed NPJ, with whom Ma CJ, Tang and Fok PJJ and Chan NPJ agreed.

Malice does not necessitate ‘bad intent’

The Court agreed with Lord Nicholls’ exposition in *Cheng & Another v. Tse Wai Chun* (2013) 3 HKCFAR 339 (at 355) that “express malice is to be equated with use of a privileged occasion for some purpose other than that for which the privilege is accorded by the law”, which, as the Court observed, is consistent with Lord Diplock’s analysis in *Horrocks v. Lowe* [1975] AC 135 (at 149) that “[t]he defendant uses the occasion for some other reason he loses the protection of the privilege.” In other words, it simply is what is not covered by qualified privilege.

The Court acknowledged that issues concerning the defendant’s state of mind in relation to the truth or falsity of what is communicated sometimes caused particular difficulty in practice, but emphasised that in relation to such issues, evidence bearing on the defendant’s knowledge or belief as to the truth or falsity of what is communicated is only relevant in so far as it affects the critical question of whether the defendant used the occasion for a purpose other than that for which the privilege was accorded. The Court further observed that the defendant’s knowledge that the matter was false at the time when he communicated it, or his recklessness as to whether it was true or false, will generally be conclusive evidence that he did not make the communication for a proper purpose, and that “recklessness” is to be understood in the sense described by Lord Diplock in *Horrocks v. Lowe*: that is to say, “without considering or caring whether it be true or not” (at 150).

Truth if you dare

As the Court observed, the Court of Appeal was influenced by the approach to malice adopted in the High Court of Australia by Gaudron, McHugh and Gummow JJ in their joint judgment in *Roberts v. Bass* (2002) 212 CLR 1, including in particular the proposition that recklessness as to the truth of a defamatory imputation was sufficient to support a finding of malice only if it amounted to wilful blindness: less serious recklessness, such as indifference to the truth or falsity of the imputation, could support a finding of malice only if presented with some other state of mind, such as gross, unreasoning prejudice, or anger.
Authoritative position

The Court held that if the authors of the joint judgment intended to introduce into the general law of defamation a distinction between different kinds of recklessness, or to interpret Lord Diplock’s speech in *Horrocks v. Lowe* as having adopted such a distinction, then that approach should not be adopted so far as the law of Hong Kong is concerned, as Lord Diplock’s analysis is clear, and remains authoritative under Hong Kong law.

**Lawrence K F Ng** (led by Andrew Caldecott QC and Gerard McCoy SC) appeared for the Plaintiffs/Appellants in the Court of Final Appeal.

To read more about defences of qualified privilege authored by Lawrence K F Ng (in the context of building management) Click [here](#).
Back for good? Can it be said that all forms of illegality are sufficient to defeat the Change of Position Defence to Unjust Enrichment Claims?

In Arrows Ecs Norway AS, [2018] HKCFI 975, the Hong Kong High Court’s Anderson Chow J held that as Tinsley v. Milligan (HL) [1994] 1 AC 3401 remains binding in Hong Kong, he should accept the correctness of the frequently criticised proposition laid down in Barros Mattos Junior v. MacDaniels Ltd [2005] 1 WLR 247:-

“Unless the illegality was so minor as to be ignored on the de minimis principle, an innocent recipient of stolen money could not rely on the defence of change of position where the recipient’s actions of changing position were treated as illegal.”

In good faith?

Anderson Chow J granted summary judgment in respect of the Plaintiff’s claim in the total sum of US$4,188,175 against the 5th, 10th, 11th and 13th to 15th Defendants (the “Relevant Defendants”). The various sums of money totalling US$4,188,175 were received by them, as second level recipients, from a bank account of the 2nd Defendant which the Plaintiff says represent a portion of the money which it was induced by fraud to transfer to the said bank account. The Relevant Defendants relied on the defence of change of position in that they had received the funds and subsequently paid them out in good faith and in the usual course of their money changing business.

Applying Barros Mattos, Anderson Chow J held that by reason of their non-compliance with the licensing and customer due diligence requirements imposed by the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance Cap. 615, the Relevant Defendants could not rely on the defence of change of position in that they had received the funds and subsequently paid them out in good faith and in the usual course of their money changing business.
money service business or such business which was being carried out in an illegal manner. The change of position defence was not open to the Relevant Defendants given that they were the “wrongdoers” as referred to in *Lipkin Gorman v. Karpnale* [1991] 2 A.C 548 (HL). In light of the “illegality”, the Relevant Defendants also did not act “in good faith” and it would be inequitable, unconscionable, or unjust to allow them to deny restitution to the Plaintiff.

So, in Hong Kong, the answer is “yes”. Unless the same can be regarded as de minimis, any form of illegal conduct will defeat the change of position defence to unjust enrichment claims. This is the case even if it only involves the breach of an unrelated technical regulation and/or does not involve a wrongdoing committed vis-à-vis the Plaintiff.

**Look out for...**

This is however subject to an appeal by the Relevant Defendants in *Arrows Ecs Norway AS*. The Court of Appeal may well review whether Lord Goff’s reference to a “wrongdoer” in *Lipkin Gorman* should be taken as referring to all forms of illegal conduct i.e. the proposition assumed in *Barros Mattos* which is a non-binding English first instance decision. It also remains to be seen whether the Court of Appeal take the opportunity to consider the applicability and effect of *Patel v. Mirza* on the change of position defence².

Anson Wong SC appeared as Lead Counsel for the Plaintiff.

Connie Lee appeared for the Relevant Defendants and authored this Case Report.

"Will the court consider the applicability and effect of *Patel v. Mirza*?"

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² It has been said that the Court of Appeal is bound by *Tindley v. Milligan*. The correctness of which in view of *Patel v. Mirza* may well have to be reviewed by the Court of Final Appeal: [2018] HKCFI 975, [28].
Stranger things: do third parties have a legitimate interest in an estate?

In the decision of *Re: Lee Siu Fung, Siegfried (a discharged bankrupt)* [2018] HKCFI 939 the Honourable Mr. Justice Godfrey Lam explored the issue of locus standi of third parties in seeking discovery against, and removal of, trustees-in-bankruptcy.

The two applicants were respectively the brother and son of the discharged bankrupt, whereas the respondents were the trustees-in-bankruptcy. The respondents previously obtained an order for examination against the discharged bankrupt as well as the two applicants. Separately, the applicants took out an application to remove the respondents as trustees, alleging that the respondents might have used illegitimate funding in administering the bankruptcy.

In support of their removal application, the applicants applied for specific discovery against the respondents in respect of documents relating to the funding of the bankruptcy’s administration. The discovery application was dismissed on the ground that the applicants lacked legitimate interest (*Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 applied).
The learned Judge did not find it necessary to rule that the applicants had no standing in the removal application altogether. Instead, he ruled that the applicants had no legitimate interest in relation to removal on the ground concerning the source of funding. The documents sought were therefore not necessary for the fair disposal of the matter.

A more general proposition can be found at paragraph 24 of the decision, where the learned Judge said “[t]his is not to say the court is not interested or may not inquire into the conduct of its officers, but that a stranger to the estate has no standing to impugn the way in which its administration is funded.”

Patrick Siu represented the Respondents.

“a stranger to the estate has no standing...”
Spotlight on Order 49B: When is it justified to impose a prison sentence on a Judgment Debtor?

Although we have seen a few cases relating to Judgment Creditors who successfully applied for orders of imprisonment against Judgment Debtors, it can still be said that they are in the relative minority. In this regard, the case of *Pong Seong Teresa & Ors v. Chan Norman* [2018] HKCFI 788 is somewhat of a rarity as it differentiates itself from the (Order 49B) millieu.

*Pong Seong Teresa & Ors v. Chan Norman* [2018] HKCFI 788 (the *Chan Norman* case) is a recent addition to the few cases in which the Judgment Creditors successfully applied for an order of imprisonment against the Judgment Debtor following an examination hearing under Order 49B of the Rules of High Court. The Judgment Debtor was sentenced to 1-month imprisonment as the court found that 2 out of the 3 grounds of imprisonment under O.49B r.1B had been established.

This case offers insight into how the court breaks down each of the 3 grounds to determine that a 1 month prison sentence was warranted in the circumstances.

**Deep dive into the *Chan Norman* case**

The Judgment Debtor was the defendant in the trial as well as in the appeal of an action restraining him from harassing, threatening or pestering the plaintiffs. This included shouting, or directing obscenities at them, taking photos of them without consent, and/or causing damage to their residence. The court granted an injunction against the defendant on both grounds, and awarded costs to the plaintiffs.

At the taxation hearing, the parties agreed by way of consent summons that the costs payable by the Judgment Debtor would be HK$1.3 million.

A post-judgment Mareva injunction was obtained against the Judgment Debtor, as well as a prohibition order and an examination order under Order 49B, in order to assist enforcement and obtain more information in respect of the Judgment Debtor’s assets.

The Judgment Debtor failed to show up on numerous occasions for the examination hearing, and warrants were issued for his arrest. The bailiffs arrested the Judgment Debtor and brought him before Madam Justice Barnes, who
made standard disclosure orders against him (i.e. production of bank account statements, salary records, tax returns, etc.). Two examination hearings were then carried out.

At the first examination hearing, the Judgment Debtor maintained that his bank accounts were frozen (presumably due to the Mareva injunction) and hence he was financially incapable of obtaining the relevant documents from the banks and authorities. Master J. Wong (who conducted both examination hearings) ordered that the Judgment Debtor prepare a number of authorisation letters for the solicitors for the Judgment Creditors to obtain the documents from the relevant institutions. However, the Judgment Debtor failed to properly endorse the letters.

**What are the legal principles in respect of obtaining an examination order under O.49B?**

A Judgment Creditor needs to show that (i) there is a judgment for the payment of a specified sum of money and (ii) such judgment sum is wholly or partly unsatisfied.

The ambit of the order is wide: the judgment debtor is required to make full disclosure of his assets, liabilities, income and expenditure and of the disposal of any assets or income and is compelled to answer all questions put to him.

However, what happens when a Judgment Debtor resists the order?

Order 49B can be deployed and it includes a punitive sanction in the form of imprisonment where there is non-compliance. A maximum sentence of 3 months can be imposed where the Judgment Debtor fails to make disclosure of the whereabouts of his assets, or if it is shown that he has disposed of his assets with a view to avoiding satisfaction of the judgment, or if it is found that he has the means to wholly or partially satisfy the judgment.

Importantly, the standard of proof is a criminal one; the plaintiff must establish the Judgment Debtor’s guilt beyond a reasonable doubt.

**Key findings**

Upon the Judgment Creditors’ application for imprisonment, Master J. Wong found that 2 out of 3 grounds under r.1B were satisfied. The Judgment Debtor (a medical doctor by profession) transferred to his wife (an accountant by profession) all his shareholding in a clinic he was allegedly operating some time after his appeal to the Court of Appeal was dismissed with costs. It was found that the Judgment Debtor disposed of his assets with a view to avoiding satisfaction.

It was also found that the Judgment Debtor failed to comply with Master J. Wong’s directions for endorsing the authorisation letters for the Judgment Creditors’ solicitors to obtain the relevant documents (i.e. the bank statements, tax returns and salary records) from the various institutions.

Significantly, it was an amalgam of these findings that led the court to sentence the Judgment Debtor to 1 month imprisonment.

**What redress is appropriate in the circumstances?**

When considering enforcement options - what recourse is best? Where it is known that the Judgment Debtor has valuable assets, conventional and more popular means (including charging orders, garnishee orders, etc.) can be deployed for enforcement against identifiable assets.
However, if the Judgment Creditor knows little about the whereabouts of the judgment debtor’s assets, an examination order from the court is the usual redress sought. If such an order is made, the judgment debtor is required to disclose his state of financial affairs and attend an examination by the Judgment Creditor as to the whereabouts of his assets.

How might the climate change?

As stated earlier, applications under O.49B r.2 are by no means common. The standard of proof required is a criminal one, and indeed the objective of the examination proceedings is to obtain disclosure about the Judgment Debtor’s means to satisfy the judgment rather than securing the imprisonment of the Judgment Debtor.

However, this case demonstrates that the court was not timorous in invoking the machinery of O.49B rule 2 (holding that 1 month imprisonment was justified in the circumstances as opposed to the 3 month maximum) given that the Judgment Debtor had failed to comply with an order of discovery and had deliberately disposed of his assets so as to avoid paying a debt. It is appropriate to invoke the sanction when the Judgment Debtor adopts a defiant attitude towards disclosure.

Vincent Chiu acted on behalf of the Plaintiffs.
Will ownership alone eventually trump the landlord’s right to distraint?

A third party distress signal

Pro Landlord?

*Goldcrest Management Holdings Limited* v. *Great Wish Corporation Limited* [2018] HKDC 416 is a typical case concerning distraint for rent. After the landlord seized goods from the leased premises, a third party intervened; claiming ownership of the seized goods and seeking possession based on the same.

At issue was an apparently simple question: what exactly would the third party need to show to have the Court’s discretion to return the seized goods (under section 96(2) of the Landlords and Tenant (Consolidation) Ordinance (Cap.7)) exercised in its favour? The answer, however, proved remarkably elusive.

The legal position in Hong Kong is quite pro-landlord. In *Fuleekoo Co Ltd* v. *Spiral Tubes International Ltd* [1986] HKC 269, the Court of Appeal considered that even if the third party can adduce proof of ownership, this alone “would not cause the discretion to be exercised in favour of a claimant” but is only a relevant factor “to be weighed against the rights of the landlord”.

In practice, ownership alone usually loses out to the rights of the landlord in this weighing exercise (see e.g. *Wing Sau Industrial Company Limited* v. *Tang Shing Fai* [2009] 1 HKLRD 291; *Jet Force Investment Limited* v. *Ocean First (Asia) Limited* (unrep., DCDT 1769/2009, 8.5.2009)). A review of case law shows that the court’s position is to generally hold that the third party’s redress (if any) lies against the tenant.

Are the scales tilted?

Of more practical concern is the dearth of authorities discussing when the discretion would be exercised in favour of the third party. Foreign case law does not assist – section 96(2) is a unique domestic provision (*Fuleekoo*). However, there appear to be only a few local cases where the decision is against the landlord, and these concern rather extreme scenarios.

1 Not recorded in detail in the judgment
For example, in *Copthorne Holdings Corporation v. Wealth Fair Technologies Limited* (unrep., DCDT 3144/2009, 22.7.2009), the landlord intentionally misled the Bailiff and deliberately obstructed the third party’s attempts to take possession. Or consider *Lu Shang Chang v. Kingroup Ltd* [1995] 3 HKC 709, where the Court of Appeal held that the judge below wrongly exercised her discretion in favour of the landlord as she had ignored relevant evidence and arrived at unsustainable conclusions of fact.

The lack of authority providing useful and practical guidance on the exercise of the discretion under section 96(2) troubled the Court in *Goldcrest*. Despite submissions specifically on the point⁴, the Court eventually dismissed the third party’s claim not on the basis of legal principle but rather by way of a factual approach (i.e. that the evidence did not support its claim of ownership).

**How will the climate change?**

The lacuna exposed in *Goldcrest* will eventually have to be addressed. It is respectfully submitted that this may entail a wholesale re-examination of the law under section 96(2). It may be more defensible in principle to hold that ownership alone can trump the landlord’s right to distraint, subject to the landlord showing further factors against the third party (most commonly the existence of connections between it and the tenant, such as a parent-subsidiary relationship or common directorship.) After all, the fact that ownership *per se* loses out may be a surprising conclusion, given Hong Kong law’s traditional respect for property rights. Indeed, it may be of note that the leading cases are based on the common law and pre-date the coming into force of the Basic Law, with its constitutional guarantee of the right to property.

Kevin Lau authored this Case Report.

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DVC wins GRR Award
03 July 2018

DVC is delighted to announce that it won the GRR award for Most Significant Insolvency or Restructuring Related Litigation for work on the China Solar Energy Holdings [2018] HKCFI 555 restructuring case at the 2nd Annual GRR Ceremony held in London on 26 June.

7 of DVC's members were involved in this landmark case including:

José-Antonio Maurellet SC, John Hui and Jonathan Chan for the petitioner.

John Scott SC, JP for the company.

Clifford Smith SC and Alexander Tang for the provisional liquidators.

Patrick Chong for an investor.

In this case, essentially Harris J has clarified that provisional liquidators need to be appointed on such conventional grounds as asset preservation. But where the circumstances warrant it, the provisional liquidators may be given restructuring powers and may pursue the company's restructuring exercise to fruition.
3 DVC members appointed JPs
03 July 2018

DVC is pleased to announce that John Scott SC, Winnie Tam SC and Richard Leung have been appointed Justices of the Peace effective 1 July 2018.
Winnie Tam SC, JP appointed as Deputy Head of DVC

10 July 2018

Adding to a series of significant announcements, DVC is delighted to announce that Winnie Tam SC, JP has been elected Deputy Head of DVC effective 4 July 2018.
Insolvency specialist, Look-Chan Ho to join DVC

Formerly Freshfields Bruckhaus Deringer’s Asia head of restructuring and insolvency, Look is transitioning to the Hong Kong Bar (and is to be called to the Bar very soon). During his 15-year practice as a solicitor in London and Hong Kong, Look specialised in corporate insolvency and restructuring, with a particular emphasis on cross-border matters. He is particularly well known for his high level of legal expertise and frequently advises on transactions involving novel and complex legal issues.

Look’s experience includes advising on:

- the global restructuring of Korea’s Hanjin Shipping
- the provisional liquidation application of Hong Kong-listed China Shanshui Cement
- the implementation of the scheme of arrangement of ATV
- the administration of the Icelandic banking group, Kaupthing
- various Lehman Brothers litigations, including the waterfall applications determining the priority of rankings for surplus assets

Look graduated from the University of Oxford, University of Cambridge, and New York University School of Law. Look was admitted as a solicitor-advocate in England, a solicitor in Hong Kong, and an attorney in the State of New York. He has also published extensively on insolvency matters and his publications are widely cited internationally.

Look’s representative publications include:

- Cross-Border Insolvency: Principles and Practice (Sweet & Maxwell, 2016) (author)
- Principles of Corporate Finance Law (2nd edn. OUP, 2014) (co-author)
- Key Authorities in Corporate Insolvency (Nova Law and Finance, 2012) (author)
DVC welcomes new Tenants

05 July 2018

For five years running, all of our 9 month pupils have been offered tenancy at Des Voeux Chambers, effective in September of this year. DVC is delighted to welcome:

**Michael Ng** - Michael graduated with First Class Honours in his LLB from King’s College London and First Class Honours in his LLM from the University of Cambridge. Michael was also awarded the Society of Construction Law Bar Scholarship.

**Rosa Lee** - Rosa graduated with a Distinction in the BCL from the University of Oxford ranking first in her class in Advanced Property & Trusts and Comparative Public Law. Rosa undertook her BBA (Law) and LLB at the University of Hong Kong ranking 2nd in her year. Rosa was also a visiting student in Law, Political Science and Philosophy at Yale University under a full HKU Worldwide Scholarship. Rosa was additionally awarded the Bar Scholarship.

**Jasmine Cheung** - Jasmine undertook her BCL from the University of Oxford and obtained a Triple First for her BA in Law from the University of Cambridge. In 2018, she was awarded the Middle Temple Advocacy Scholarship and attended the Middle Temple Advocacy Training Course in London in February 2018.

**Tiffany Chan** - Tiffany graduated with a First in BA (Jurisprudence) from the University of Oxford. She subsequently obtained the Mansfield College Award for Academic Excellence upon completing her BCL (with Distinction) from the University of Oxford. In 2017 she was awarded the Bar Scholarship and attended a two week Middle Temple Advocacy Training Course in London in February 2018.
DVC welcomes new Tenants (continued)
05 July 2018

**Howard Wong** - Howard graduated with First Class Honours in his LLB from the London School of Economics and obtained his BCL from the University of Oxford in 2016. Howard was awarded the Hong Kong Bar Scholarship in 2018.

**Look-Chan Ho** - During Look’s 15-year practice as a solicitor in London and Hong Kong, Look specialised in corporate insolvency and restructuring. Look graduated from the University of Oxford, University of Cambridge, and New York University School of Law. Look was admitted as a solicitor-advocate in England, a solicitor in Hong Kong, and an attorney in the State of New York. Look has also published extensively on insolvency matters and his publications are widely cited internationally.
At the Inaugural Construction Forum 2018 held by Deacons on 24 April 2018, DVC's Calvin Cheuk discussed with a panel of leading construction experts including KK Cheung, Scott Adams and TT Cheung the current issues and challenges in Hong Kong's construction industry. Over 250 practitioners from both the government and private sectors attended the Forum.

One of the most often encountered and difficult issues in construction disputes is: "What is concurrent delay?" Calvin took the audience through the development of the concept by referring to cases including Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd (1990) 70 Con LR 32, Royal Brompton Hospital NHS v. Hammond (No 7) (2001) 76 Con LR 148 and Adyard Abu Dhabi v. SD Marine Services [2011] BLR 384. He then considered the recent application of these cases in Saga Cruises BDF Ltd v. Fincantieri SPA [2016] EWHC 1875, which demonstrated a more restricted approach towards the issue adopted by the English courts and the difficulties that contractors face in arguing concurrent delays. By contrast, Calvin compared it with the more liberal approach adopted by Scottish courts in City Inn v. Shepherd [2008] BLR 269 and in City Inn v. Shepherd [2010] BLR 473 (on appeal), in which the English courts' restricted approach was doubted.

Calvin went on to explain the application of the prevention principle in construction disputes by reference to Peak Construction (Liverpool) Ltd v. McKinney Foundations Ltd (1970) 1 BLR 111, which led to the need to have extension of time clauses in construction contracts. He also elaborated upon the reason why the causation treatments of extension of time and loss and expense are different.
Scott shared his experience of concurrent delay and stressed that "true concurrency delay" in real life was rare according to the approach of the English courts. He also explained the recent changes in the Society of Construction Law Delay and Disruption Protocol, which brought it more in line with the restrictive approach of the English courts.

The panel then examined the recent Hong Kong case of *Chun Wo Building Construction Ltd v. Metta Resources Ltd* (HCCT 29/2013, 19 August 2016) in which the court suggested that joint expert appointment should be the norm in disposing of construction disputes in the future.

KK and TT shared their experience of instructing and being instructed as a joint expert. TT in particular explained the apparent attraction of saving time and costs may not materialize as parties may still instruct shadow experts to prepare their case and there would be many difficulties associated with the selection of such an expert. In addition, where a joint expert was appointed, the danger was that the case may essentially be determined by the joint expert rather than the court.

Vital exchanges between the panel and the audience followed, and insightful questions were raised and answered simultaneously. Overall, the presentation and discussion were very well received.
Unfair Prejudice and Shareholders’ Winding-Up
– presented by DVC’s Yang-Wahn Hew and Stephanie Wong

When and how can aggrieved shareholders petition the court for relief when affairs are considered unfairly prejudicial? What elements does one need to satisfy to invoke the relevant statutory provision?

On 8th May, Yang Wahn-Hew and Stephanie Wong delivered a compelling in-house presentation on Unfair Prejudice and Shareholders’ Winding-Up. This was a lunchtime CPD accredited seminar held at Des Voeux Chambers before an intimate audience of solicitors made up of partners, associates and trainees from Anthony Siu & Co.

After a brief introduction to both speakers’ backgrounds, Stephanie took the participants through an explanation of the “unfair prejudice” regime, including an explanation of the necessary elements. Noting that the Company law ecosystem was changing for the better in terms of clarity and delineation of provisions, she then filled the audience in on the new requirements under the Companies regime for reporting beneficial and ultimate owners, including how even solicitors might have to disclose information relating to the beneficial ownership of a company. This prompted an interesting question about whether a solicitor could rely on legal professional privilege, which Stephanie deftly dealt with.

Drawing on her experience of cases by way of reference points, Stephanie then went on to distinguish between shareholders’ private acts and shareholders’ private dealings with their shares, summarised the various remedies available under section 725 of the Companies Ordinance, and discussed the interplay between unfair prejudice petitions and derivative actions.

Yang took the audience through the factors that a Court will consider when deciding whether to wind up a company on the ground that it is just and equitable to do so. Apart from citing various examples, Yang also highlighted the facets that needed to be adduced or addressed, and discussed the relevant factors to be considered when seeking a winding-up order, or conversely applying to dismiss or strike out a winding-up petition.

He then went on to explain what other remedies a shareholder might consider before seeking to winding-up a company in comparing and contrasting the advantages of winding-up petitions versus unfair prejudice petitions. In doing so, he analysed the benefits of being able to appoint liquidators, and other factors that might be relevant depending on the petitioner’s motives and goals.

Yang and Stephanie concluded with some helpful takeaways which inspired some practical questions from the audience.
Chinese Women and Arbitration - How can initiatives be improved?

On Friday 8th June, the HKIAC’s WIA (Women in Arbitration) hosted an engaging forum in Beijing on Chinese Women and Arbitration and how initiatives should be improved. DVC was one of the sponsors of the event which brought together female professionals from diverse backgrounds committed to promoting the success of female practitioners in international arbitration and related practice areas in China.

DVC’s Winnie Tam SC, JP led a delegation of 4 other female barristers from DVC including, Catrina Lam, Teresa Wu, Sabrina Ho and Connie Lee and they joined forces with 12 other female key players to deliver their insights on the professional development of women in arbitration.

Winnie shared her advice on how young female practitioners could participate in and excel in the field of arbitration drawing from her extensive experience as a barrister, judge and arbitrator. The event was a success with beneficial exchanges between the speakers and the audience and the day concluded with essential tips on how leading female practitioners could achieve the brass ring. In other words, how women could optimise their work life balance; by mastering their careers without compromising the interests of their family and children.
In an event that was teeming with trainees, associates and partners from international and local law firms, many of DVC’s Juniors under 10 years’ call welcomed close to 100 guests at the inaugural DVC Juniors’ Cocktail on 27 June held at China Tang.

José-Antonio Maurellet SC headlined the event with a brief but powerful summary which focused on the art of advocacy. Drawing from his extensive arc of experience on the frontlines, José put together an advocacy toolkit based on the responsibilities of the advocate and duties owed to court. He emphasised the importance of not over-pitching, picking points carefully and the value of brevity and conciseness over a spray and pray approach by referencing a popular Chinese film "Let the Bullets Fly." He wrapped up by underscoring the importance of preparing carefully crafted written submissions.
The cocktail facilitated a happy confluence of meaningful ideas and new introductions; it gave DVC's Juniors a chance to dial into the discussions that our guests were having and to discover what their bugbears were. It also enabled our members to showcase their experience and to renew ties with former peers from Law School as well as their University cohorts from their Undergraduate days.

All in, the atmosphere was irrepressibly lively and the event very well received.

The following members from DVC attended:

- José-Antonio Maurellet SC
- John Hui
- Benny Lo
- Christopher Chain
- Connie Lee
- Patrick Siu
- David Chen
- Alexander Tang
- Jason Yu
- Kerby Lau
- Justin Lam
- Michael Lok
- Eva Leung
- Jonathan Chan
- Kaiser Leung
- Ross Li
- Ellen Pang
- Vincent Chiu
- Cherry Xu
- Terrence Tai
- Tommy Cheung
- Lai Chun Ho
- Sharon Yuen
- Kevin Lau
- Michael Ng
- Jasmine Cheung
- Rosa Lee
- Tiffany Chan
- Howard Wong
- Look-Chan Ho
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@dvchk) or Practice Development Director, Aparna Bundro (aparnabundro@dvchk)

Stay tuned for future newsletters

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- Patrick Fung BBS, SC, QC, FCIArb
- Simon Westbrook SC
- Winnie Tam SC, JP
- Anthony Houghton SC
- Anson Wong SC
- John Litton QC (England & Wales)
- John Scott SC, QC, JP
- Clifford Smith SC
- Johnny Mok SC
- Ian Pennicott SC, QC
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- Frances Lok
- Benny Lo
- Sabrina Ho
- Alexander Tang
- Justin Lam
- Eva Leung
- Ross Li
- Stephanie Wong
- Lai Chun Ho

#### Door Tenants
- John Griffiths SC, QC, CMG
- Jeffrey P. Elkinson
- Jonathan Shaw
- Kelvin Kwok

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