ForeWord

Bringing you a high level of detail and immediacy, this 3rd edition of A Word of Counsel for 2020 (and momentously, our 10th issue) delivers analyses of a significant body of new case law.

You will find numerous recaps and valuable takeaways drawn from recent decisions from the company and insolvency, commercial, arbitration, IP and competition domains housed in the Articles and Case Reports segments.

As always, notable announcements are showcased and a chance to watch illuminating webinars hosted by DVC.

Articles

Find out about the very recent case of Re Ando Credit Limited [2020] HKCFI 2775, handled by DVC's Michael Lok and Jasmine Cheung, which is the first case of its kind in terms of potentially seeking Mainland recognition in a HK insolvency.

Representing Part 2 in a series authored by Adrian Lai, you will find the sequel to Part 1 which was published in DVC’s last edition, 2nd edition 2020 (9th issue) in a series entitled The Appointment of Arbitrators and Related Issues.

Next, Adrian Lai joins forces with Jose-Antonio Maurellet SC in an analysis of the no reflective loss principle as revisited in the recent UK Supreme Court case: Sevilleja v Marex Financial Ltd [2020] UKSC 31.

Read on for some key takeaways for contributories wishing to oppose a winding up petition drawn from the recent case of Re China Cultural City Ltd [2020] HKCFI 1947 as examined by DVC’s John Hui, Christopher Chain, Jasmine Cheung and Howard Wong.

Jose-Antonio Maurellet SC and Tom Ng apprise you on how to ascertain the proper law of an arbitration agreement: the UK Supreme Court weighs in in Enka Insaat Ve Sanayi As v ooo Insurance Company Chubb [2020] UKSC 38.

Case Reports

Rich examinations of contrasting positions from different jurisdictions are scrutinized to demonstrate what might lie ahead from the (HK) court's point of view.

Read on for a milestone judgment which examines and clarifies the divergences between the Old HK Companies Ordinance and the new Companies Ordinance in this Part 1 of a series following the recent Court of Appeal case of Ge Qingfu & Ors v L&A International Holdings Ltd & Ors [2020] HKCA 687 helmed and authored by DVC’s Justin Lam and Jonathan Chan also involving DVC’s Barrie Barlow SC and Eva Leung.

Next, Jose-Antonio Maurellet SC and Michael Lok shine a light on specific issues emanating from the same judgment in relation to whether minority shareholders can seek direct relief for wrongful allotment in Part 2 of this series.

Separately, you will recall Parts 1 and 2 of a different discussion in DVC’s last edition of A Word of Counsel where Jose-Antonio Maurellet SC, Terrence Tai and Look-Chan Ho excavated the answers to the long-standing debate as to whether a creditor could wind-up if there was an arbitration clause
as decided in the case of *Asia Master* and the *ApAn Group (Singapore) Pte Limited v VTB Bank (Public Joint Stock Company)* cases.

The saga continues as *Jose–Antonio Maurellet SC* and *Terrence Tai* analyse Part 3 of this narrative on interim anti-suit injunctions in [*C v D*] [2020] HKCFI 1596.

Following a comprehensive discussion on the 3 prevailing responses to the question of when a creditor can wind up a company based on a debt which is subject to an arbitration clause, Part 4 unpicks the recent case of *Re Telnic Ltd* [2020] EWHC 2075 (Ch) - the English Rejoinder to this multilayered question authored by DVC’s *Jose–Antonio Maurellet SC*, *Terrence Tai* and *Cyrus Chua*.

When entertaining a jurisdictional challenge to wind-up a foreign company with no place of business in HK, is it a material concern that alternative remedies for unfair prejudice are available at the company’s place of incorporation but not in Hong Kong? Find out here as DVC’s *Jose–Antonio Maurellet SC*, *Terrence Tai* and *Jason Yu* analyse this issue in conjunction with Conyers’ *Norman Hau*, with expert opinion provided by *Nigel Meeson QC FCIArb* in the recent case of *Scanty Investment Company v Brilliant Functions Limited* [2020] HKCFI 498 with assistance from *Cyrus Chua*.

Highlighting the importance of full and frank disclosure in the context of a Convention award: find out its critical significance as analysed by *Jose–Antonio Maurellet SC*, *Adrian Lai* and *Connie Lee* in the recent case of *1955 Capital Fund I GP LLC v Global Industrial Investment Ltd.* [2020] HKCFI 956.

And for a wide-angle view, take a look at *Vincent Chiu* and *Brian Fan*’s write up on the same case.

Continuing with the theme but in the context of a foreign court, what is the Court’s approach in determining whether to grant assistance to a foreign Court in the absence of any evidence as to the foreign Court’s “settled practice”? *Terrence Tai* reviews the decision in *Re Rennie Produce (Aust) Pty Ltd (In Liquidation in Australia)* [2020] HKCFI 1500 and leaves you with some insightful takeaways.

On the commercial front, *Vincent Chiu* weighs in again but this time on how an interim payment can be strategically useful. He explores this point against the backdrop of the recent case of *Rich Profit Creation Ltd v Ko Chung Lun and others* [2020] HKCFI 1459.

What are some of the cost and time efficient remedies available to victims of fraud other than garnishee proceedings? DVC’s *Michael Lok*, *Jasmine Cheung* and *Euchine Ng* provide a useful overview in the context of *TOKIĆ, D.O.O. v Hongkong Shui Fat Trading Limited* [2020] HKCFI 1822 where an innovative solution was suggested by the Court.

Does a question of low commercial morality tip the scales when it comes to a real risk of dissipation of assets? Find out here as DVC’s *Jose–Antonio Maurellet SC*, *John Hui* and *Howard Wong* review this issue in the context of the recent case of *Convoy Collateral Limited v Cho Kwai Chee & Ors.* [2020] HKCA 537.

Next, *Michael Lok* reviews the issue of whether third party security can be taken into account as part of the Court’s discretionary exercise in deciding whether to set aside a statutory demand in “A dollar for a dollar” as considered in the *X v Y* case.

To vest or not to vest - that was the question in a case on 'email fraud' and 'cyber fraud.' *Michael Lok*, *Jasmine Cheung* and *Euchine Ng* author a helpful summary on this issue in the context of two recent cases, namely *800 Columbia Project Company LLC v Chengfang Trade Ltd and others* [2020] HKCFI 1293 and *Wismettac Asian Foods, Inc. v United Top Properties Ltd and others* [2020] HKCFI 1504.

Find out what the appropriate response is for a company when served with a statutory demand as decided in *Re Madison Lab Limited*, a case piloted by DVC’s *Michael Lok* and *Jasmine Cheung*. 
Discover here how the recent case of *Daesung Industrial Gases Co Ltd v Praxair (China) Investment Co Ltd* (2020) Shanghai 01 Special Civil Procedure No. 83, the Shanghai No.1 Intermediate People’s Court carved out a number of firsts including significantly, the fact that it confirmed the validity of an arbitration clause which provided for Singapore International Arbitration Centre (SIAC) arbitration in Shanghai. Read on for a comprehensive exposition authored by DVC’s Jose-Antonio Maurellet SC and Ellen Pang.

Switching gears to IP law, CW Ling clarifies the position in a recent decision by the Trade Marks Registry in a case report entitled “Bad faith in trademark opposition... ad infinitum?” Could this be a cautionary tale for opponents? And on that cautionary note, Alan Kwong, Alexander Tang and Howard Wong warn you to tread lightly per the recent case of *Essilor Manufacturing (Thailand) Co., Ltd v Wong Kam Wai & Ors* [2020] HKCA 351; (Unreported, CACV 71/2020, 17 April 2020). In it is a stark reminder to always carefully read the specific wording used in a court order.

And wrapping up for the Case Reports segment for this edition, for a look at evolving developments in the competition law sphere, Michael Lok and Sharon Yuen spotlight how the Carecraft procedure works in the context of competition law in the recent case of *Competition Commission v Kam Kwong* [2020] HKCT 3 where they acted for the 2nd respondent.

**Announcements**

DVC welcomes all of its 9 month pupils as tenants for the 7th consecutive year. Meet them here.

Who was recently awarded the SBS? Find out here who was appointed the new Chairman of the Society of Construction Law in Hong Kong.

As part of a meaningful D&I drive, find out who is Co-Chairing the new Committee of the Women In Arbitration (WIA) initiative under the auspices of the Hong Kong international Arbitration Centre (HKIAC) and who has joined their Executive Committee from DVC.

DVC was the only Hong Kong set to be accredited in the Lawdragon 500. Find out here which three DVC members were recognised.

Find out who was honoured as a Distinguished Friend of Oxford here.

DVC’s Practice Development Department has been singled out for being the only Chambers to be featured in “30 people to watch in the Business of Law in Asia” Read more about this here.

Read more about the new Hong Kong Company Law Cases (HKCLC), a joint inaugural publication between DVC and Kluwer.

**Multimedia**

For a critical analysis of the recent US Supreme Court decision of Booking.com, you will find an edifying webinar entitled “Generic.com– the shifting boundaries of trade mark territory” featuring CW Ling, Benny Lo and Stephanie Wong.

Read more about a topical cross-border insolvency and restructuring webinar co-presented by Look-Chan Ho and Daniel Chow of FTI Consulting to members of The Small and Medium Law Firms Association of Hong Kong (SAMLAW).

CW Ling, Catrina Lam and Kelvin Kwok peel back the layers of the recent UK Supreme Court decision in *Unwired Planet* in an erudite webinar exploring the ramifications on the intellectual property, competition law sphere and telecoms industries.

And to conclude this edition, while we are still in a liminal state in the Covid–19 era, DVC’s Daniel Fung SC, JP and Dr. Cornelia Man discuss “Prophylactic Measures and promising potential treatment for Covid–19” in an enlightening webinar.

Have a go at completing DVC’s interactive crossword puzzle found on page 82 of this newsletter.
He is lauded for being “persuasive both on his feet and on paper, his written work in particular being “succinct, cogent and very punchy.”

Chambers & Partners Asia-Pacific 2020
Has the landscape of trademark law changed after this ruling?  

Shedding light on a 'Cytokine Storm'

Unpacking Unwired Planet

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“Generic.com – the shifting boundaries of trade mark territory”: an IP webinar  
A Cross-border insolvency and restructuring webinar  
“Prophylactic Measures and promising potential treatment for Covid-19”: a dedicated webinar on recent advancements in treatments for the pandemic  
Making FRANDs or Foes: The UK Supreme Court decision in Unwired Planet

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“Bad faith in trade mark opposition... *ad infinitum*?”

*Re Madison Lab Limited*  
*Daesung Industrial Gases Co Ltd v Praxair (China) Investment Co Ltd* (2020) Shanghai 01 Special Civil Procedure No. 83, the Shanghai No.1 Intermediate People’s Court

*Essilor Manufacturing (Thailand) Co., Ltd v Wong Kam Wai & Ors*

*Competition Commission v Kam Kwong Engineering Company Ltd and Others*
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Michael Ng  Jasmine Cheung  Rosa Lee  Tiffany Chan
Howard Wong  Look–Chan Ho  Euchine Ng  Tinny Chan
Sakinah Sat  Martin Lau

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Avery Chan*  Brian Fan  Cyrus Chua  Jonathan Lee

Door Tenants

John Griffiths SC CMG QC  Jeffrey P. Elkinson  Jonathan Shaw  Kelvin Kwok

* Joining in 2021 (Called to the Bar in 2016)
Without Further Ando, Time for Recognition and Reciprocity in Cross-Border Insolvency: *Re Ando Credit Limited* [2020] HKCFI 2775

This article was authored by Michael Lok and Jasmine Cheung.

In *Re Ando Credit Limited* [2020] HKCFI 2775, the Honourable Mr Justice Harris appointed provisional liquidators over a Hong Kong-incorporated company, in an application that broke ground as the first of its kind, made with the express purpose of seeking recognition in the Mainland. Specifically, the appointment was primarily sought with a view to enabling Hong Kong Court-appointed officers to recover the very substantial receivables believed to be owed to the Company by its debtors in the Mainland.

In recent decisions, the Hong Kong Companies Court (presided over by Harris J) has considered the latest position under the Bankruptcy Law of the Mainland. Specifically, the learned Judge has explored the jurisdictional basis for the Mainland courts to formally recognise foreign insolvency proceedings.

In *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676, the learned Judge referred to the relevant law, including Article 5 of the Enterprise Bankruptcy Law (“EBL”). After analysing a number of recent Mainland decisions, it was held at para. 32 that these decisions provided little guidance as to the way in which the Mainland courts would respond to an application for recognition under Article 5 of the EBL. However, the learned Judge accepted that it was (at least) clear that Article 5 of the EBL envisaged that there would be recognition of foreign liquidators as one would expect to be the case given the transnational business conducted by many Mainland businesses.

Similarly, in *Re Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965, pursuant to a letter of request issued by the Bankruptcy Court of the Shenzhen Intermediate People’s Court of Guangdong Province (广东省深圳市中级人民法院) (“Shenzhen Court”), Harris J made an order to recognise the liquidation process as ordered by the Shenzhen Court.

For a helpful discussion on the *CEFC* and *Shenzhen Everich* decisions, readers are directed to the recent articles by our colleagues entitled ‘Hong Kong’s Inaugural Recognition of Mainland Liquidators in *Re CEFC Shanghai International Group*’ (14 January 2020) and ‘Hong Kong’s 2nd Recognition of Mainland Liquidator: *Re Shenzhen Everich Supply Chain Co Ltd*’ (4 June 2020).

In Ando, after citing CEFC, the learned Judge referred to an article originally published in ‘The People’s Judicature‘ (人民司法), entitled ‘Exploring the Practice of Cross-border Insolvency between Mainland China and Hong Kong’ (内地与香港跨境破产的实践探索). The insightful article is co-authored by three esteemed judges of the Shenzhen Court (one of whom, Judge Tang Shan, was the presiding judge in *CEFC*).

1. https://wemp.app/posts/c4ee81da-dfc9-45e3-b440-fcf9d88d47c1
The article focuses on the recent Hong Kong authorities which recognise and assist Mainland insolvency proceedings. In the meantime, however, the article (including in particular the following concluding remarks) also provided useful insight into the latest position in the Mainland:

“Since the implementation of the Enterprise Bankruptcy Law in China, there has yet to be any case on recognition of insolvency procedures in accordance with Article 5 of the Enterprise Bankruptcy Law. Hence, the Hong Kong Court’s application of the legal and factual requirements for deciding an application for recognition of extraterritorial procedures and the approach of granting “general powers + special powers” on the basis of the circumstances of the case as illustrated in the Nianfu Case are worthy of reference when the Mainland courts hear cross-border insolvency cases in the future.

The Hong Kong Courts in the Nianfu Case, and previously in the Guangxin Case and Huaxin Case have shown an open attitude towards recognition and assistance to Mainland insolvency proceedings. This provides a basis for the Mainland courts to hear applications for recognition and assistance from Hong Kong liquidators in the future on the principle of reciprocity. The exploration and accumulation of mutual recognition and assistance by the courts of the two places will inevitably promote future promulgation of cross-border judicial cooperation arrangements for insolvency matters across the border.”

(original text:
「我国企业破产法实施以来，内地法院尚未有依据该法第五条承认破产程序的实践案例。而香港高等法院在年富公司案中，对于承认域外程序的法律要件和事实要件的适用，以及根据申请事项进行“一般授权 + 特别授权”的方式，值得内地法院在未来审理跨境破产案件时予以充分借鉴。

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Postscript

Overall, it is anticipated that more cross-border insolvency cases will come before the Hong Kong Court. This could take the form of either Mainland office-holders seeking recognition and assistance from the Hong Kong Court (as in *CEFC* and *Shenzhen Everich*) or, alternatively, for Hong Kong office-holders to seek (with the Hong Kong Court’s assistance) similar treatment from the Mainland court (as in *Ando*).

In *Ando*, Harris J specifically requested that there be an express provision in the appointment order permitting the provisional liquidators to make an application for recognition by the Shenzhen Court subject to the learned Judge’s approval of the various stages of the application. Accordingly, it remains to be seen how this area of the law will develop, both domestically and in the Mainland.

Michael Lok and Jasmine Cheung, who acted for the Petitioner in *Ando*, co-authored this article.
Apptointment of Arbitrators and Related Issues

This article was authored by Adrian Lai and represents Part 2, and a sequel to Part 1 that was published in DVC’s last edition of A Word of Counsel, that is the 2nd edition 2020 (9th issue) and appears on pages 25–30 and here for your reference.

B. Authority-appointment system

35. Most institutional rules foresee the intervention of an appointing authority to assist the parties in the appointment process. It has been suggested that the direct appointing authority role in selecting arbitrators has increased in recent years in the increasingly polarised ISDS field.

36. The main concern relates to appointments by appointing authorities is the lack of transparency in the appointment process. Transparency is required in two stages: (1) the shortlisting and selection process; and (2) disclosure of appointments. Some authorities, like ICSID, has regularly disclosed information like the names of arbitrators, their nationality, the method of their appointments, who made the appointments and the date of appointment.

26 E.g. Article 38 of the ICSID Convention, Articles 8-9 of the UNCITRAL Arbitration Rules.

27 Footnote 25 (supra), §17.

C. Abolition of the party-appointment system?

37. Given the lack of transparency on the parties’ appointment of arbitrators and the inherent risk (or perception) of bias of party-appointed arbitrators, it has been suggested that the party-appointment system should be abolished and replaced by (a) joint appointment of all arbitrators by the disputing parties; (b) appointment of arbitrators by a neutral body, e.g. the administering institution; or (c) permanent judges (which is discussed separately below).

38. Putting aside cases in which the parties are able to come to mutual agreement on the choices of arbitrators without intervention of the appointing authority, currently there are two commonly used methods through which arbitrators are selected in the case of parties’ failure to reach agreement on the appointment of the sole or presiding arbitrator: namely the “ballot” procedure and the “list” procedure.

28 The Permanent Court of Arbitration do not publish information related to the arbitrator’s identity or qualification except with parties’ consent.
39. Under the “ballot” procedure, the appointing authority proposes potential appointees to the parties, each of them then indicates (without sharing its selection to the other party) which, if any, of the candidates they would accept. The appointing authority will then appoint one of the mutually agreed candidate(s) (subject to clearance of conflict and disclosure requirements) as the arbitrator(s).

40. Under the “list” procedure, the appointing authority similarly proposes potential appointees to the parties, each of them can strike a certain number of proposed appointees and rank the remaining appointees. The appointee who gets the best ranking will be appointed.

41. Under both procedures, if appointment cannot be made under the said procedures, the appointing authority will appoint the arbitrator(s) to fill the place(s).

42. It can readily be seen under the “ballot” and “list” procedures, the appointing authorities play the leading and significant role in (1) shortlisting the candidates for consideration by the parties; and (2) appointing the arbitrators as the last resort in cases where the parties have failed to appoint the arbitrators under the said procedures.

43. The significant role that the appointing authorities are to play highlights the importance of transparency in the appointing process by the appointing authorities. Appointing authorities are expected to be transparent in the shortlisting process (which limits the choices of parties to the candidates put forward by the appointing authorities) and the last-resort appointing process (which imposes the arbitrator(s) on the parties in absence of agreement).

44. In addition to the “list” and “ballot” procedures, views have been expressed that a pre-established “roster” should be agreed by the contracting States to the investment treaties (not by the parties to the dispute) in advance, and that arbitrators, if they cannot be agreed by the parties to the dispute, are to be appointed by the appointing authority from the roster.

45. The China–Australia Free Trade Agreement 2015 is one of very few BITs which provides for the roster system in detail. It provides that a list of arbitrators of not less than 20 individuals shall be established by the Committee on Investment (established by the Contracting States), from which the Secretary-General (being the appointing authority) is to appoint to fill any vacancies if such vacancies cannot be filled by agreement of the parties to the dispute.29

46. Supporters of this option argue that the roster system enhances transparency, expedites appointments and promotes greater quality and consistency of decisions. It is also argued that it is a halfway house between a fully-fledged investment court and the ad hoc arbitration system.

47. The party-appointment system is a facet enshrining the principle of party autonomy, which is the fundamental tenet of arbitration. The abolition of the party-appointment system, some argue, is a draconian and disproportionate response to the concerns raised about party-appointed arbitrators, in particular when there is a lack of empirical evidence to substantiate the perception that the public may have held against party-appointed arbitrators. For instance, the roster system goes as far as excluding the investors from the participation in appointing the presiding (or sole) arbitrator for they have no role to play in setting up the “roster” in the first place.

48. It is argued that on balance the party-appointment system works well in that the alleged polarisation has been exaggerated (evidenced by the fact that majority of the ISDS cases are decided unanimously) and that the disputing parties (and their appointed arbitrators) tend to act sensibly in selecting the presiding arbitrator (evidenced by the relatively moderate level of intervention by the appointing authorities).

49. It is also doubtful whether parties are prepared to give up their right to appoint their own preferred arbitrators. In the 36th session of the Working Group, strong views have been expressed by States’ representatives against the removal of the States’ right to appoint their own preferred arbitrators on grounds that it is a fundamental feature of party’s autonomy in arbitral process and that it is against the national interest to give up such a right. On this, developing States have in different degrees expressed their concerns about the lack of diversity in arbitrators and the lack of sufficient control over ISDS proceedings, caution must be exercised before further taking away the States’ (limited) control over the arbitral process.

50. Further, it is not the case that there is complete lack of standards governing the conducts of arbitrators in the ISDS context. For example, the IBA Guidelines, though not legally binding, have been taken into account in various challenge proceedings. It has been argued that the concern about arbitrators’ independence or impartiality can be addressed by strengthening the existing controls over arbitrators, developing a new code of conduct at multilateral level with effective enforcement mechanisms, giving clearer guidelines on the interpretation and application of the code; and imposing sanctions on non-complying arbitrators. It is noted that ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators. Also, suggestions have been made to increase the transparency of the challenge decisions in order to shed light on how arbitral tribunals could apply the codes of conduct.

IV. CONCERN 2: Concern about *ad hoc* arbitrators

51. Under the current ISDS system, arbitrator appointments are necessarily *ad hoc* in nature and appointments are made only when disputes are submitted to arbitration.

52. The *ad hoc* nature of the appointments gives rise to certain issues that arguably affect the independence and impartiality of arbitrators: e.g. double hatting, issue conflicts, lack of diversity in arbitrators and the challenge procedures.

A. Double hatting

53. It has been suggested that international investment arbitration is marked by a “revolving door”, in that single individual actors play multiple roles as arbitrators, counsel, expert witnesses, and tribunal secretaries within the *ad hoc* arbitration system. The movement between roles may be sequential or even simultaneous. Double hatting refers to the practice when a single individual plays different roles in different arbitration proceedings simultaneously.

54. According to the recent empirical study, the practice of double hatting continues to exist. The practice, however, is not a common or widespread practice but within a small group of highly influential and well-known actors in the ISDS system.

55. It is generally noted that the practice has posed a number of issues including potential and actual conflict of interest. It is argued that even the appearance of impropriety (e.g. suspicion that an arbitrator would decide in a manner so as to benefit a party he represents in another dispute) has a negative impact on the perception of the legitimacy of the ISDS regime.

56. The problems arising from double hatting has been vividly put by Philippe Sands:

It is possible to recognize the difficulty that may arise if a lawyer spends a morning drafting an arbitral

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30 E.g. ICS Inspection and Control Services Ltd. v The Republic of Argentina, PCA Case No.2010–9, 17 December 2009 (in which it was held the IBA Guidelines, although not binding, “reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator’s impartiality or independence”); Perenco Ecuador Ltd. v The Republic of Ecuador, PCA Case No.IR–2009/1, 8 December 2009 (challenge against a co-arbitrator; IBA Guidelines applied by parties’ agreement); Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia, ICSID Case No. ARB/05/24 (challenge against Counsel’s participation in the proceedings on grounds that the Counsel concerned and the presiding arbitrator were members of the same set of chambers; IBA Guidelines referred to).

31 Footnote 8 (supra), 326–327.
award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously. 

57. Likewise, Judge Thomas Buergenthal has expressed a similar view:

I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments (the bilateral investment treaties, for example) are regularly at issue in different cases before it. 

58. Telekom Malaysia v Ghana is apparently the first decision that a respondent host State challenged one of the tribunal’s arbitrators for double hatting. There, Ghana applied to the Dutch courts (exercising supervisory jurisdiction) to challenge the arbitrator’s appointment after it had learned that the arbitrator was concurrently acting as counsel on behalf of the investor in an application for an annulment of the reward in Consortium RFCC v Morocco for Ghana intended to rely on the award in RFCC v Morocco to advance its defence. The Hague District Court held that the arbitrator’s duty to advance his client’s position in the RFCC annulment proceedings was incompatible with his duty as arbitrator in the Telekom Malaysia case:

[A]ccount should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Morocco award. This attitude is incompatible with the stance Professor Gaillard has to take as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the RFCC/Morocco award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the annulment proceedings against the RFCC/Morocco award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid giving the appearance of not being able to keep these two parts strictly separated.

59. The Dutch court ordered the arbitrator concerned to resign as counsel in the RFCC case if he still wanted to remain as arbitrator in the Telekom Malaysia case, which he duly did. Ghada was not satisfied with the Dutch court giving the arbitrator a choice and filed a second challenge to the Dutch court seeking to remove the arbitrator from the panel of the Telekom Malaysia case. The challenge was, however, dismissed. The court held:

... After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore it could easily happen in arbitrations that an


arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration ...

60. Whilst there are concerns about arbitrators wearing double, or even multiple hats, the case against double hatting is not one sided. The following arguments have been raised against the total ban of double hatting:  

1. There is only a small pool of investment arbitrators and double hatting is an inevitable phenomenon. Limiting qualified legal counsel from sitting as arbitrators would undermine the quality of the arbitral process.

2. The arbitrators’ community in ISDS should be allowed to grow in diversity to move away from the existing pool being “pale, male and stale”. Some tolerance has to be afforded to younger counsel transitioning into arbitrators.

61. The first argument might have been true years ago when the pool of qualified arbitrators available for ISDS cases remained very small. The argument is weakening when the pool has kept growing since 1990s. Yet, despite the growing pool of arbitrators, the practice of double hatting continues to exist. This explains that States and investors, who have been the major players in appointments, have to some extent, contributed to the practice.

62. In respect of the second argument, the general consensus seems to be that tolerance is to be afforded to young practitioners to move from counsel to arbitrators. However, the transitioning period should be brief and a practitioner should cease taking up cases as counsel after taking up his first few appointments.

63. The issue of double hatting, however, should not be overstated. After all, in a three-member tribunal, an arbitrator needs to persuade at least one of the remaining two arbitrators to accept his argument in order to benefit his client in another case. Besides, the fact that the majority of the ISDS cases are decided unanimously suggests that the concern of double hatting may be more apparent than real.

64. The statistics suggests that the situation of double hatting, though continues to exist, is improving. The findings suggest that (1) the practice of double hatting is prevalent among a small but highly-influential group of arbitrators (25 individuals and particularly so for a sub-group of 5 individuals within that group); (2) double hatting for the “top 25” individuals has been relatively stable in the recent years; (3) there has been a declining trend of double hatting due to many reasons such as retirement of those prominent arbitrators or those having sufficient caseload as arbitrators (and thereby precluding them from acting as counsel); and (4) last but not least some arbitrators have declared that they will not engage in practice as counsel.

65. It is expected that the practice of double hatting should become less and less prevalent, though the removal of it is unrealistic (and may deter young counsel from transitioning to arbitrators).

B. Issue conflicts

66. Issue conflict arises where an arbitrator is said to have “pre-judged” issues based on their prior awards or decisions, publications and statements indicating their views on particular issues in dispute.

67. Judge Peter Tomka (the then-President of the International Court of Justice) in CC/Devas (Mauritius)
... The basis for the alleged conflict of interest in a challenge invoking an ‘issue conflict’ is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view. In this respect ... some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not per se sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.40

a. Challenges based on previous scholarly and professional writings

68. Past scholarly and professional writings and speeches expressing general views on substantive legal issues are not sufficient to sustain a challenge on grounds of issue conflict.

69. In Urbaser S.A. v The Argentine Republic, the arbitrator was challenged on the basis of his previous academic writings. The unchallenged arbitrators rejected the challenge and held:

What matters is whether the opinions expressed by [the challenged arbitrator] on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in these proceedings. Claimant’s view is, as stated, broader. They do not include in their position the latter qualification and they contend that the opinions expressed by [the challenged arbitrator] are to be taken as such and that it appears ‘unquestionable’ that he shares the same opinion today, absent any evidence that he has changed his opinion in the meantime (such change not being noticed in [the challenged arbitrator’s] statement ... The Two Members seized with the challenge submitted by Claimants are of the view that the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator.42

70. On the other hand, an arbitrator may be seen to have crossed the line if his academic writing suggests that he is unlikely to keep an open mind. In the CC/Devas (Mauritius) Ltd. case,43 the respondent challenged the co-arbitrator appointed by the investor on the ground that the challenged arbitrator had sat together with the presiding arbitrator in two other cases together decided the legal interpretation of a similar provision arose (the decisions of those two cases were subsequently annulled). In addition, the challenged arbitrator in an academic writing defended his position in those two other cases despite the annulment. The challenge was upheld:

39 CC/Devas (Mauritius) Ltd. v The Republic of India (Decision on the Respondent’s Challenge to the Hon Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego as Co-Arbitrator), PCA Case No.2013-09, 30 September 2013.
40 Ibid, §858.
41 Urbaser S.A. v The Argentine Republic (Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator) ICSID Case No. ARB/07/26, 12 August 2010. See also Repsol v The Argentine Republic (Decision on the Request for Disqualification of the Majority of the Tribunal), ICSID Case No. ARB/12/38, 13 December 2013.
42 Ibid., §§44-45.
43 Footnote 39 (supra).
The standard to be applied here evaluates the objective reasonableness of the challenging party’s concern. In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to [the co-arbitrator’s] ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? [The co-arbitrator] is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail. For this reason, I agree with the Respondent that [the co-arbitrator] should withdraw from this arbitration.44

71. It is considered that unless the opinions expressed are “specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the [p]arties in [the] proceedings,” there is no lack of independence and impartiality.45

72. The aforesaid conclusion is echoed by the ASIL-ICCA Task Force:

... Members of the Task Force from all perspectives urged that international arbitration benefits significantly from vigorous and open discussion of contemporary legal issues by knowledgeable persons. In the Task Force’s view, scholarly or professional publications addressing issues at a general level (but not discussing details of a particular dispute in which they have been named) should not be seen as impairing impartiality. It would be a significant loss for such informed commentary to be chilled by fear of a possible future challenge to the author on account of the views expressed. Opinion in the Task Force thus mirrored the approach of the 2014 IBA Guidelines on Conflicts of Interest, which consider that no disclosure is required where the arbitrator ‘has previously published a legal opinion (such as a law review article or public lecture) concerning an issue that also arises in the arbitration ...’ In this sense, the challenge in the CC/Devas case could be understood as illustrating –

44 Footnote 39 (supra) §64. 45 Footnote 11 (supra) §§36–39.
and not departing from – the general recognition that doctrinal views are not problematic based on the assumption that the arbitrator can be convinced to take a different view.46

b. Challenges based on past service as counsel/advocate or arbitrator

73. The general view is that prior professional advocacy per se is not an indication of bias. In St Gobain Performance Plastics Europe v The Bolivarian Republic of Venezuela,47 the Claimant challenged the Respondent-appointed arbitrator on the ground that “there is a danger that [the challenged arbitrator] will decide a certain issue in favor of Venezuela because he has argued the same, or similar, issues in favor of Argentina in the past and potentially in the future”. The challenge was vigorously rejected:

The Arbitral Tribunal does not find that Claimant’s arguments support a case of a ‘manifest’ danger in this regard. Claimant has presented no facts which cast ‘reasonable doubt’ on [the challenged arbitrator’s] impartiality and independence, let alone facts which ‘make it obvious and highly probable’ that [the challenged arbitrator] lacks these qualities.

... Even if one assumes arguendo that [the challenged arbitrator] did in fact vigorously advocate Argentina’s positions in other investment treaty arbitrations, the Arbitral Tribunal cannot see why [he] would be locked in to the views he presented at the time. It is at the core of the job description of legal counsel – whether acting in private practice, in-house for a company, or in government – that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor’s case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case.48

See also the Telekom Malaysia case (the 2nd challenge) at §59 above.

74. Similarly, the arbitrator’s previous decisions do not per se suggest that his independence or impartiality has been affected. In the CC/Devas case49 the respondent also challenged the presiding arbitrator on the ground that he and the other co-arbitrator (also under challenge) had in two other cases together decided the legal interpretation of a similar provision arose (the decisions of those two cases were subsequently annulled). The fact that the presiding arbitrator had twice decided the issue per se was held to be not sufficient to sustain the challenge:

The circumstances presented by the Respondent as giving rise to justifiable doubts about the Presiding Arbitrator’s impartiality are more limited. The Respondent argues that [the presiding arbitrator’s] participation on the two panels with [the co-arbitrator], both of which discussed the ‘essential security interests’ provision in their decisions, is sufficient to disqualify him from participating on this Tribunal. I, however, find that [the presiding arbitrator’s] more limited pronouncements on the relevant text are not sufficient to give rise to justifiable doubts regarding his impartiality. [The presiding arbitrator] has not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees and thus I can accept his statement that ‘[his] intention is to approach the matter with an open mind and to give it full consideration’ and that '[he] would certainly not feel bound by the CMS or the Sempra awards'. In my view, there is no appearance of his prejudgment on the issue of ‘essential security interests’ which will have to be considered by the Tribunal in the ongoing arbitration.50

47 St Gobain Performance Plastics Europe v The Bolivarian Republic of Venezuela (Decision on Claimant’s Proposal to Disqualify Mr Gabriel Bottini from the Tribunal), ICSID Case No. ARB/12/13, 27 February 2013.
48 Ibid., §§78, 80.
49 Footnote 39 (supra).
50 Footnote 39 (supra) §66.
c. Challenges based on the arbitrator’s prior exposure to similar facts

75. The fact that an arbitrator’s knowledge of significant facts from involvement in previous cases may give rise to a ground of challenge.

76. In the Caratube case\footnote{Footnote 24 (supra).} the claimant investor challenged the respondent-appointed arbitrator on the ground that he had also sat as an arbitrator in the Ruby Roz case. The claimant contended, amongst others, that there were “obvious similarities between the Ruby Roz case and the present arbitration” and such involvement manifestly affected the challenged arbitrator’s ability to exercise independent and impartial judgment. The unchallenged arbitrators found that there was “significant overlap in the underlying facts between the Ruby Roz case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration”. Accordingly, they held:

... In the light of the significant overlap in the underlying facts between the Ruby Roz case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that – independently of [the challenged arbitrator’s] intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, [the challenged arbitrator’s] objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that [the challenged arbitrator] would pre-judge legal issues in the present arbitration based on the facts underlying the Ruby Roz case.\footnote{Footnote 24 (supra), §90.}

77. In EnCana Corporation v Republic of Ecuador\footnote{EnCana Corporation v Republic of Ecuador, LCIA/UNCITRAL, Partial Award on Jurisdiction, 27 February 2004.}, the respondent appointed the same arbitrator in two parallel arbitrations involving similar claims under the same bilateral investment treaty. Accordingly, that arbitrator would receive all materials of the two arbitrations whilst his two fellow arbitrators would not. The tribunal expressed the following concern:

... Pleadings or information provided by Ecuador to [the respondent-appointed arbitrator] in his capacity as a member of the other Tribunal are not thereby provided to this Tribunal. Moreover, this Tribunal has no authority over the documents and information tendered to another Tribunal; it can only decide the present case in the light of the information tendered to it.

On the other hand, as soon as [the respondent-appointed arbitrator] uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties. Furthermore, [the respondent-appointed arbitrator] cannot reasonably be asked to maintain a ‘Chinese wall’ in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration. The most he can be asked to do is to disclose facts so derived whenever they appear to be relevant to any issue before this Tribunal.\footnote{Ibid., §§44–45.}

78. The ASIL-ICCA Task Force in their Report drew the following conclusions from the practices of international courts and tribunals:

... The cases thus suggest that prior opinions about similar legal issues, without more, are generally not disqualifying.

On the other hand, views about factual matters specific to the case at hand have been found to be of concern. Decision makers have upheld challenges where an arbitrator has had previous exposure to
C. Lack of diversity of arbitrators

79. Lack of diversity of arbitrators in terms of gender, age, ethnicity and geographical distribution has been a concern in the ISDS regime for a long period of time. “Pale, male and stale” is a term (not politically correct but succinct) that describes the proclivity for choice of arbitrators.

80. There is not only over-concentration of appointments to a small pool of arbitrators, but also uneven distribution of appointments. Amongst the top 25 arbitrators who collectively have taken up one third of all arbitral appointments, with four exceptions, all are listed as nationals of Western States. For the four exceptions, one is from Eastern Europe but has been residing in the US for decades and the other three coming from Latin American States but maintaining their professional practices in the US or Western Europe. None of them are from Asian or African countries or jurisdictions.56

81. The uneven distribution of appointments (in terms of nationality) remains to be the case in recent years. According to the statistics, arbitrators from France, US and UK have consistently been the three largest groups of appointees and they have taken up almost 30% of the appointments. If one is to expand the analysis to “top 10 nationalities”, the “top 10s” have taken up over 50% of the appointments, and none of them are of Asian or African nationalities.57

82. Parties to ISDS cases have certainly contributed to the aforesaid disparity. In terms of appointments made directly by parties in ICSID cases in 2016, 67% originated from Western Europe or North America. Comparing the national origins of disputing parties with that of the appointment arbitrators, the disparity grows even wider. While 22% of parties came from Eastern Europe and Central Asia, only around 2.5% of ICSID arbitrators originated from there. Similarly, 13% of ICSID parties came from the Middle East and North Africa, but only 4% of ICSID arbitrators came from those regions. 11% of ICSID parties came from Sub-Saharan Africa, but only 1.5% of ICSID arbitrators came from that region.58

83. The over-concentration and uneven distribution of arbitrator appointments also make the ISDS arbitrator community effectively a “closed shop”, which makes it difficult, if not impossible for young practitioners to enter the market.

84. Another concern is the lack of gender diversity. According to the published surveys, in broad terms, women’s participation in ISDS cases as arbitrators has been disturbingly minimal (around 5%-6%).59

85. Diversity in age is also a concern warranting consideration, for it is essential for the sustainability of the ISDS system. This view, however, is not necessarily unanimous. The following observation was made in the recent survey:

“Pale, male and stale” is a term (not politically correct but succinct) that describes the proclivity for choice of arbitrators.

55 Footnote 45 (supra) §174. 56 Footnote 8 (supra).
56 TBC
57 The “Top 10s” are France, USA, UK, Canada, Switzerland, Spain, Australia, Germany, Italy and Mexico.
59 Footnote 13 (supra) §24. This figure takes into account of all ICSID appointments in the past.
Another example of the nuanced and disparate perspectives adopted by respondents was highlighted by a number of interviewees through the lens of age diversity. While most interviewees agreed that gender diversity, for example, is invariably desirable and therefore of less relevance to this enquiry, some advanced the idea that age diversity does not always improve the quality of a tribunal’s decision-making. Some interviewees, both counsel and arbitrators, stressed the fact that the nature of some disputes, particularly in investment treaty arbitration, calls for arbitrators with a sufficient breadth of relevant experience that cannot easily be found among the younger generations of arbitrators. The issue, they argue, is therefore not age itself, but rather the relevant previous experience that can only be acquired through continued practice over a long period of time. Moreover, interviews revealed no general consensus as to who would qualify as a ‘young’ arbitrator in this context. While most interviewees think that an arbitrator under 40 years of age is commonly considered as ‘young’, a small number of interviewed respondents expressed that they would also consider ‘young’ an arbitrator under 50 years of age, particularly in light of their perception that the average arbitrator is likely to be well in his or her sixties.60

D. Adequacy of the challenge mechanism

86. An effective challenge mechanism is seen to be a critical safeguard to ensure arbitrators’ independence and impartiality. It is said that an effective challenge mechanism must fulfil two functions: (1) to provide teeth to the requirements for independence and impartiality (i.e. partisan arbitrators must be disqualified) and (2) it must be sufficiently robust to allow for cases to proceed.61

87. Almost all arbitration laws and rules contain provisions on procedures for challenging arbitrators for non-compliance with ethical requirements.

88. Generally speaking, the burden rests on the
challenging party to make out the case that there are matters that give rise to sufficient doubts as to the challenged arbitrator’s independence or impartiality. Whilst it is generally agreed that proof of actual bias is not required, the practice varies from one case to another as to what precise standard of proof the challenging party has to meet. For example, some arbitral tribunals have adopted the “reasonable doubts” test when applying Article 57 of the ICSID Convention (which requires the challenging party to demonstrate a “manifest lack” of “reliability to exercise judgment”); whilst other indicated that “manifest” involved a higher standard, so that the conflict has to be evident or apparent.

89. In terms of the decision-makers of challenge applications are concerned, the current ICSID Arbitration Rules provides where there is a challenge to a single arbitrator on a three-member panel, the challenge is to be decided by the unchallenged arbitrators, unless they are equally divided, in which case the Chairman will decide. Challenges to sole arbitrators and to two or three members of a three-member panel are decided by the Chairman.62 The UNCITRAL Arbitration Rules, on the other hand, vests the decision-making power in the appointing authority.63

90. One of the concerns raised about the current challenge mechanism is that there is lack of transparency in how challenge applications are decided, largely attributed to the facts (1) that challenge decisions are not routinely published in all fora, and (2) that the published decisions themselves indicate that the application of the standards of independence and impartiality is difficult to predict. The unpredictability of the challenge outcome, coupled with the fear of negative consequences that the challenging party may face if the challenge is unsuccessful, may have contributed to the system not being effectively utilised. On the other hand, it is observed that there is a general increase in the number of tactical, vexatious or frivolous challenges. In one ISDS case, there were five separate challenges to one arbitrator stretching from October 2011 to February 2016, all of which were dismissed.64 Either of these undermines the integrity and legitimacy of the ISDS system.

91. Another concern is whether it is suitable for the unchallenged arbitrators to decide a challenge application against their fellow arbitrator. It is said that having an external party decide on the delicate matter of removal of an arbitrator is preferable to a decision by the remaining members of the arbitral tribunal, because this ensures that an independent entity, not vested in the specific case, decides this fundamental matter. After all, the practice of double hatting and over-concentration of arbitrator appointments arguably gives rise to an impression that arbitrators tend to be more generous to their fellow arbitrator subject to challenge.

E. Possible reforms?

92. It is noted that efforts have been made to diversify the pool of arbitrators. For instance, in the case of ICSID, the Secretariat has made effort in promoting a diverse and highly qualified pool of arbitrators. The effort has borne fruit: in 2018, 22 ICSID member States,65 most of them are non-Western States, designated 102 individuals to the ICSID Panels. Improvement has been made to actual appointments as well. In the case of ICSID, there has been constant improvement on gender diversity: from 12.3% of total female appointments in 2015 to 24% in 2018. Similar commitment has been expressed by PCA.66

93. While the numbers with respect to gender and geographic diversity have gradually improved, the extent of disparity in representation is still vast. In particular, when one considers diversity in nationality, even the recent figures remain to show

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62 Rule 9 of the ICSID Arbitration Rules.
63 Article 13(4) of the UNCITRAL Arbitration Rules.
64 ConocoPhillips Company & Ors v Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30.
66 See “PCA Responds to Queries on Arbitral Legitimacy” (20 May 2014).
that the appointments are still Western Europe- and North America-dominated and developing countries remain significantly under-represented.

94. Some suggest that the cause of lack of diversity in appointments is that disputing parties are not familiar with the potential arbitrator candidates, rather than any real basis or prejudice against appointing diverse candidates. The lack of familiarity gives rise to a sense of insecurity and fear of making the wrong choice etc. 67

95. It is said that tight controls can be imposed on candidates to reduce double hatting or repeated appointments in order to promote diversity in appointments. For instance, an arbitrator may be required to confirm under the declarations the days or weeks that he has already committed to other undertakings over the next couple of years and/or require the arbitral tribunal to provide the parties and the administering institutions with regular progress reports. These measures, to some extent, may (indirectly) force the disputing parties to expand their search for suitable candidates for appointment.

96. Although there is a growing representation in arbitrators from non-Western States, continued effort should be made to expand their representation. Many developing States have not nominated a sufficient number of arbitrators that they are entitled to nominate under the ICSID or PCA systems. In doing so, there is a pressing need for States, in particular developing States, to build up capacity for counsel and potential arbitrators.

97. Insofar as the challenge procedure is concerned, as submitted above, the transparency in the challenge decisions should be increased. On this, administering institution should compile summaries of the challenge decisions or best practices to promote a uniform and consistent application of principles in dealing with challenge applications.

98. On the other hand, firm measures should be taken against tactical, vexatious and frivolous challenges, which serve no purposes other than delaying the arbitral process. It is noted that in the proposed reform of the ICSID Rules, measures such as a tighter challenge procedure timeframe and removal of “automatic suspension” upon filing a challenge etc. are proposed to address the issue. Also, the proposed reform also allows the unchallenged arbitrators to refer the challenge to the Chairman for decision if they see fit not to decide the challenge application themselves.

**V. CONCERN 3: Replacing ad hoc arbitrators with full-time judges?**

99. There is a resurgence of debate over the dichotomy between the advantages of courts system over ad hoc arbitral tribunals. The debate is in two-fold: (1) whether there should be an appellate body (this is to be covered by another discussion paper); and (2) whether there should be an investment court (consisting of the first instance level and the appellate level) replacing the ad hoc arbitral tribunal system.

100. Creating a standing international investment court system (ICS) implies the replacement of the current system of ad hoc arbitral tribunals with a new institutional structure, namely a standing international court. The latter would consist of judges appointed or elected by States on a permanent basis, for example, for a fixed term. It could also have an appeals chamber.

101. The intensity of the debate is neatly summarised by Lucy Reed:

Speaking with more perspective, but still with drama, Philippe Pinsolle has taken the view that defending investment arbitration is a ‘lost battle’ because no ‘rational discussion is possible’ where the criticisms are ‘largely ideological, if not emotional’ and ‘[t]he perception is that private arbitration no longer passes the legitimacy threshold.’ The only answer, says Maitre Pinsolle, is an investment court system.

Others disagree, with equally dramatic language. Judge Stephen Schwebel has written that the investment court proposals ‘smack of appeasement of uninformed criticism of ISDS rather than sound judgment.’ His fundamental objection is that the EU investment court regime would replace ‘a system [i.e. arbitration] that on any objective analysis works reasonably well’ with ‘a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing.’

102. Scholars and practitioners have advanced different arguments in favour of, or against, the ICS for various reasons, such as costs, enforceability of judgments, and jurisdictional limitation etc. Those arguments, no doubt, warrant consideration and debate in the ISDS reform discussion. However, for the purpose of this paper, the discussion is confined to “appointment of arbitrators and related issues”.

103. An important argument in favour of ICS is that judges, as opposed to arbitraors, will be free from (perceived) inherent flaws in the party-appointed system and problems like double hatting or actual or apparent bias arising from repeated appointments by the same law firm or party. Judges, as the argument goes, will be truly independent and impartial in handling ISDS cases. The argument has been succinctly captured by UNCTAD:

This approach rests on the theory that investment treaty arbitration is analogous to domestic judicial review in public law because ‘it involves an adjudicative body having the competence to determine, in response to a claim by an individual, the legality of the use of sovereign authority, and to award a remedy for unlawful State conduct.’ Under this view, a private model of adjudication (arbitration) is inappropriate for matters that deal with public law. The latter requires objective guarantees of independence and impartiality of judges which can be provided only by


a security of tenure – to insulate the judge from outside interests such as an interest in repeat appointments and in maintaining the arbitration industry. Only a court with tenured judges, the argument goes, would establish a fair system widely regarded to be free of perceived bias.

A standing investment court would be an institutional public good serving the interests of investors, States and other stakeholders. The court would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and accuracy of decisions and ensure independence and impartiality of adjudicators.

104. Another argument in favour of ICS, by rules, it can better achieve a fairer distribution of judicial appointments. For instance, Article 9 of the Statute of the International Court of Justice provides that States in electing judges shall bear in mind “not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”

Taking Canada–EU Trade Agreement (CETA) as an example, it is provided that the 15-member tribunal is to be comprised of (a) 5 nationals of EU member States; (b) 5 nationals of Canada; and (c) 5 nationals of third-countries.

105. There are, however, counter-arguments against the proposal of replacing arbitrators with judges.

106. Firstly, the argument against party-appointment system is that the arbitrators so appointed are likely to be biased in favour of the appointing party. It is unclear why this “inherent flaw” does not apply to ICS, under which judges are appointed by States.

107. Judge Schwebel made the following observation when he discussed CETA:

The inference to be drawn from the foregoing EU state-ments is that the system of arbitrators chosen by the parties to the dispute found in bilateral investment treaties and the ICSID Convention is not insulated from any real or perceived risk of bias. Yet the parties to cases before the Investment Tribunal will be investors and States. The question arises, if there is a risk, real or perceived, of bias of ad hoc arbitral tribunals, as the EU appears to insinuate, is there not a risk, real or perceived, of bias – in favor of States and against investors – in the EU Commission’s proposals?

If the fact of appointment by a party of an arbitrator is taken to import bias, is not the appointment of judges solely by States a formula for the establishment of courts biased against investors?

I do not believe that it is the intention of the EU to entrench such bias in the courts proposed by the EU Commission. But if it is to be presumed that an arbitrator appointed by an investor is biased in favor of the investor – a presumption that the record of investor/State arbitration does not sustain – is there reason to presume that judges appointed only by States will not be biased in favor of States? 70

108. The existence of perceived bias on international judges is reinforced by statistics. In the empirical study conducted in 2004 over the cases decided by the International Court of Justice, it is suggested (1) that judges usually voted in favour of their home States; and (2) that judges are more likely to vote in favour of States that belong to a geopolitical bloc shared by their own State(s). 71

109. Secondly, investors are excluded from the judges’ election process. Under the current system, an investor appoints its own preferred arbitrator, and has some involvement in the appointment of the presiding arbitrator (by the “ballot” or “list” procedures or through the agreement of the parties’ respective trusted co- arbitrators). However, under ICS, investors are unlikely to have any, or any

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substantive role, to play in the election of judges who are to hear their cases.

110. The impact of depriving investors of participation in the selection process of judges cannot be underestimated: the whole purpose of the ISDS system is to allow investors to seek reliefs directly against the host States for any non-compliance of substantive protection afforded by the relevant investment treaties. It is counter-intuitive to say that investors should have faith in the judges’ election process dominated by States. It is important to maintain the system to be inclusive to allow investors' participation in the selection process.

111. Thirdly, host States do not necessarily find favour of ICS even investors are to be excluded from the judges’ election process. Under ICS, host States, if sued, will also be deprived of the right to appoint its own preferred judge. As submitted above, resistance has been strong against any attempt to deprive the parties of their right to appoint their own preferred arbitrators in accordance with their own weighted criteria.

112. Fourthly, the election process of judges in permanent international tribunals is often highly politicised, and there is no reason why ICS would be immune from this problem. Judge Buergenthal recalled what happened to him when he went through the re-election process to the ICJ:

... Having just gone through a re-election process, I am particularly conscious of the variety of problems the current system poses for judges seeking election or re-election to certain courts and tribunals, particularly within the United Nations system. What struck me in my re-election campaign is how highly politicised the election process is for the various judicial positions that the UN membership has to vote for and how little judicial qualifications of the individual candidates or their judicial record seem to matter. In my case, for example, one state very formally proposed to vote for me, provided the USA agreed to support that state's candidacy for a seat on the Security Council. ...

Another problem that will have to be addressed at some point, I believe, has to do with the pressure that judicial candidates wishing to be renominated are likely to experience when they have to vote in a case in which their state of nationality is a party. That is another reason why, as I indicated a minute ago, I would prefer for national judges not to participate in cases involving their own country. The problem might also be dealt with by limiting judges to one term only, possibly one longer single term.72

113. Fifthly, the ICS does not address the lack of diversity in arbitrators. Whilst the rules may provide for geographical/ nationality distribution of judicial appointments (like CETA), it is unclear how the age, gender, or even language diversity is to be addressed. In fact, it is suggested that depriving the investors of their right to appoint arbitrators, there is a risk that the individuals appointed to the ICS are likely to come from similar background (e.g. government counsel or career judges instead of practitioners) and it may result in tribunals of monochromatic experience and uniform views. Besides, the over-emphasis of the expertise in public international law (as a mandatory requirement for appointments as judges under the ICS) unnecessarily excludes arbitrators with expertise in different legal areas and risks marginalising valuable ideas from other areas of law.73

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**Sevilleja v. Marex Financial Ltd**: UK Supreme Court revisited the “no reflective loss” principle

This article was authored by José-Antonio Maurellet SC and Adrian Lai

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**Facts and Procedural History**

The facts in *Sevilleja* were straightforward: the claimant, who was a judgment creditor of the two BVI companies, sued the BVI companies’ director for siphoning off the said companies’ assets with a view to evading the judgment debt. The director, in seeking to set aside the order for service of proceedings out of jurisdiction, argued that it was the BVI companies, to whom the defendant director owed fiduciary duties, who were the proper claimants for the loss, and thus the claim offended the “no reflective loss” principle. Knowles J rejected the director’s argument but the Court of Appeal (Lewison, Lindblom and Flaux LJJ) allowed the appeal. The Supreme Court (convened as an enlarged panel) unanimously reversed the judgment of the Court of Appeal. While the outcome was unanimous, Lord Reed (with whom Lady Black and Lord Lloyd-Jones concurred), Lord Hodge and Lord Sales (with whom Lady Hale and Lord Kitchin concurred) gave their own judgments explaining the legal basis and scope of application of the “no reflective loss” principle.

**Lord Reed’s judgment (with whom Lady Black and Lord Lloyd-Jones concurred)**

Lord Reed generally endorsed the reasoning in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd* (No.2) and considered that Lord Bingham’s dicta in *Johnson v. Gore Wood* was consistent with Prudential Assurance. However, he considered other judgments in *Johnson*, in particular that of Lord Millett, had departed from *Prudential Assurance* and should not be followed.

It is interesting to analyse how Lord Reed arrived at his conclusion: he accepted diminution in value of shares was a personal loss to the shareholder as a matter of fact, and that there might not be a close correlation between the company’s loss and any fall in share value (particularly in the case of a listed company). That said, Lord Reed accepted the rationale behind the “cash box” example given in *Prudential Assurance* and held that a fall in share value (or in distributions to shareholders) as a result of a wrong committed against the company “[was] not a loss which the law recognises as being separate and distinct from the loss sustained by the company.” In that light, Lord Reed considered that Lord Millett’s concern about double recovery in *Johnson* could not be a valid justification for the “no reflective loss” principle for such a concern was premised on the recognition of that loss as a matter of law. Instead, Lord Millett (mistakenly) paved the way for the expansion of the “no reflective loss” principle beyond the narrow ambit in *Prudential Assurance*. He also considered the two policy considerations given by Lord Millett in *Johnson* were not sufficient to justify the “no reflective loss” principle.

His Lordship also considered scenarios where a company did not pursue the claim or settled it for a lesser sum. He referred to the fundamental company law principles that a shareholder had entrusted the management of

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1. [2020] UKSC 31, 15 July 2020
2. [1982] Ch 204. There, the directors by fraudulent misrepresentation induced the members of the company to approve the transaction under which the company acquired assets of another company (to which the directors were related) at an overvalue. The claimant, being a shareholder of the victim company, pursued (primarily) a derivative claim on behalf of the company as well as a personal claim. There was no evidence that the market value of the victim company had been in any way affected by the impugned transaction (and in fact the market value of the victim company increased after the transaction).
3. [2002] 2 AC 1
4. See Lord Reed ¶67
5. See Lord Reed ¶28
6. See Lord Reed ¶¶32–33, 42
7. See Lord Reed ¶¶28–30 and 83
8. See Lord Reed ¶53. His Lordship further held that where a loss is recognized as a legally recoverable loss, there were procedural tools which the court could adopt to avoid double recovery, and accordingly avoidance of double recovery could not by itself justify exclusion of a legally valid claim. ¶¶4–7, 31, 51 and 55
the company’s affairs to the company’s decision-making organ, and it would be for that organ to decide whether, and how, the company’s potential claim should be pursued. The affected shareholders would have a range of options such as derivative actions and/or unfair prejudice proceedings if there is an abuse of power. His Lordship further held that the “no reflective loss” principle had practical advantages of clarity in sparing the court from the difficult exercise of ascertaining the extent, if any, to which a fall in the value of a company’s shares was attributable to a loss that the shareholder had suffered as a consequence of the defendant’s wrongdoing, and from addressing the issue of double recovery.

Having clarified that the “no reflective loss” principle is not founded on avoidance of double recovery but on principles of company law, Lord Reed emphasized that it operated within a narrow ambit and had no application to (a) claims brought by persons in a non-shareholder capacity; and (b) claims outside the company law context.

**Lord Hodge’s judgment (concurring with Lord Reed)**

Lord Hodge agreed with Lord Reed. In particular, he read the judgment of Prudential Assurance as barring the shareholder’s claim on the ground that the shareholder’s loss “[was] not a loss which the law recognises as being separate and distinct from the loss sustained by the company” and Prudential Assurance was “a principled development of company law which should be maintained”. He also held that the “no reflective loss” principle was a rule of company law arising from the nature of the shareholder’s investment and participation in a limited company, and it had no application in other contexts.

**Lord Sales (with whom Lady Hale and Lord Kitchin concurred)**

Lord Sales, whilst agreeing that the appeal should be allowed, disagreed with the reasoning of Lord Reed and Lord Hodge. Importantly, Lord Sales did not consider that Prudential Assurance supported a sweeping proposition that a shareholder was deemed to have suffered no loss merely because the loss concerned was reflective in nature. He was critical of the judgment in Prudential Assurance in that he considered the Court of Appeal “[had] conflated the rationale for the rule in *Foss v Harbottle* with the rationale for the reflective loss principle ...” and erroneously deemed the shareholder having suffered no personal loss. He also considered the “cash box” example to be flawed and considered that one could not assume as a matter of course that the shareholder’s loss would be fully replenished through the company’s action against the wrongdoer. In that light, where the shareholder has suffered personal loss, Lord Sales considered nothing as a matter of company law or the articles prevented the shareholder from pursuing his claim, and the court could not exclude such claims as a matter of judicial fiat.

Insofar as the risk of double recovery is concerned, His Lordship considered that credit could be given with respect to the company’s recovery and in any event the risk could be addressed through procedural means. Finally, with respect to the decisions of Lord Reed and Lord Hodge, Lord Sales considered that such a “bright line” approach preferred “… simplicity at the cost of working serious injustice in relation to a shareholder … who has a good cause of action …”.20

**Takeaway points from Sevilleja**

Influenced by the “cash box” example in Prudential Assurance and Lord Millett’s judgment in Johnson, double recovery and prejudice to company’s creditors and other shareholders for a very long period of time and in many jurisdictions have been considered to be the mischief addressed by the “no reflective loss” principle: *Garden v. Parker*, *Hotung v. Hillhead Ltd.*, *Landune International Ltd. v. Cheung Chung Leung Richard*. The Supreme Court, after almost 40 years of the principle, has now revisited

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9. See Lord Reed ¶¶33–37, 79–83
10. See Lord Reed ¶38
11. See Lord Hodgson ¶99
12. See Lord Hodgson ¶¶102 and 108
13. See Lord Hodge ¶100
14. See Lord Sales ¶118
15. See Lord Sales ¶¶142–143
16. See Lord Sales ¶¶122, 130–132, 145–146
17. See Lord Sales ¶¶125–127, 165–166
18. See Lord Sales ¶118
19. See Lord Sales ¶¶154–156, 162–164
20. See Lord Sales ¶167
and reshaped the basis as well as the applicability of the principle.

First, the Supreme Court has unanimously rejected avoidance of double recovery as the legal basis of the “no reflective loss” principle. Instead, the majority held that the principle operated as a substantive, as opposed to procedural, bar against a shareholder’s claim, for the principle does not admit a loss factually and personally suffered by the shareholder as a legally recoverable loss. This holding casts doubt on previous decisions holding that the principle did not operate to bar a cause of action: e.g. Gardner v. Parker.24

Secondly, the Supreme Court has unanimously held that the principle had no application with respect to claims brought by persons acting in a capacity other than as shareholders, or any claims outside the company law context. This has helpfully settled the long debate whether the principle has application in, say, the trust context.25

Impact of Sevilleja on Hong Kong law

In Hong Kong, the leading authority in this area is Waddington v. Chan Chun Hoo Thomas, in which Lord Millett NPJ, having accepted that the reflective loss suffered by a shareholder was a recognized loss, reaffirmed the “no reflective loss” principle was rooted on the ground of avoidance of double recovery and prejudice to company’s creditors and other shareholders.26 Whilst Waddington remains a binding authority, the Supreme Court’s decision has perhaps opened up the possibility of re-examining the proper legal basis of the principle.

One may consider that the potential re-examination is academic for the shareholder’s claim is barred in any event either substantively (by reason of the majority in Sevilleja) or as a matter of legal policy (by reason of Lord Millett’s judgment in Waddington). However this is not necessarily the case, particularly in cross-border claims – e.g. suppose a wrongdoer residing in a foreign jurisdiction has committed a tortious act against a Hong Kong company and such a tortious act gives rise to a cause of action to the shareholder who has suffered reflective loss as a result. The shareholder may want to sue the wrongdoer in that foreign jurisdiction and his claim will be subject to the procedural rules of the forum court, which may or may not bar reflective loss claims. On the other hand, if the majority judgment of Sevilleja were to apply, it would be arguable that the shareholder would have no cause of action to start with for his reflective loss is not to be regarded as legally recoverable under lex incorporationis.27

Another important potential impact of Sevilleja on Hong Kong is its applicability to claims brought by persons in other capacities. The courts in Hong Kong followed Johnson that the principle applied not only to a shareholder’s claim but also a claim brought by a person in other capacities (e.g. employees or creditors): see Landune International Ltd. It remains to be seen whether the higher courts in Hong Kong will change their view in light of Sevilleja.

Finally, it is worth noting that despite the skepticism exercised in other jurisdictions, Reyes J. in Hotung v. Hillhead Ltd.28 applied the “no reflective loss” principle in the trust context. The decision, with respect, needs to be revisited on an appropriate occasion in light of Sevilleja.

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21. [2004] 2 BCLC 554 per Neuberger LJ ¶49
22. [2008] 3 HKLRD 200 ¶122–23
24. [2004] 2 BCLC 554 ¶49
27. It is premised upon the assumption that the lex incorporationis is determined to be the substantive law in accordance with the conflict of law rules of the forum court governing the right of the shareholder.
28. [2008] 3 HKLRD 200
Does a beneficiary of a debt under a trust have standing to bring a winding up petition against a company?

As a general rule, a beneficiary under a trust does not have standing to bring an action in his own name in respect of the trust property. An important exception is the Vandepitte procedure, named after the Privy Council decision in *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] 1 AC 70 (PC), by which the beneficiary may bring an action in special circumstances such as breach of trust or conflict of interest on the part of the trustee, but only if the trustee is joined or before the court.

The question therefore arises as to whether the same principles apply to a beneficiary of a debt under a trust who intends to present a winding up petition against the corporate debtor. In *Re China Cultural City Limited* [2020] HKCFI 1598 (22 June 2020), the Court of First Instance reviewed the relevant authorities and held that joinder of the trustee is not a necessary precondition to the beneficiary’s right to present a winding up petition.

### The factual context

Shun Wo Yuen Limited (the “Petitioner”) issued a winding up petition (the “Petition”) against the subject company, China Cultural City Limited (the “Company”), on the grounds of insolvency relying on non-payment of a statutory demand for HK$113,208,628 (the “Debt”). The Debt had been assigned to the Petitioner by its parent company Xin Wenhua (Hong Kong) Development Company Limited (“Xin Wenhua”). The Petition was opposed by one of the two shareholders of the Company, Chinluck Performance Limited (“Chinluck”).

The Company was set up in 1993 by the Government of the People’s Republic of China (“Government”) through its then Liaison Office in Hong Kong, in collaboration with the owner of Chinluck in order to promote Chinese culture. Chinluck owned 50% of the Company; the other 50% was held by nominees on behalf of the Government.

The two camps had fallen out and the Company entered a state of deadlock. Xin Wenhua decided that the way to resolve the impasse was for it to initiate a winding-up through the Petitioner.

It was the Petitioner’s case that Xin Wenhua represented the Government’s interest in the Company through a number of nominees who worked for it from time to time, including Mr. Pang, Mr. Zeng and Mr. Wang. The Debt consisted of advances to the Company which were made on behalf of the Government, and recorded as loans from the nominees representing Xin Wenhua’s interest.

Over the years, the loans were transferred by equitable assignment from Mr. Pang to Mr. Zeng to Mr. Wang. Then, Mr. Wang executed a declaration of trust in respect of his interest in the Debt in favour of Xin Wenhua, and Xin Wenhua effected a legal assignment of its interest in the Debt to the Petitioner.

This article was authored by John Hui, Christopher Chain, Jasmine Cheung and Howard Wong
Does a beneficiary of a debt under a trust have standing to present a winding up petition?

Chinluck attempted to dispute the Debt on a number of grounds. Of particular interest was Chinluck’s submission that the Petitioner did not have standing to present the Petition against the Company because it was only a beneficiary (and not the legal title holder) of the Debt under a trust, and the trustee had not been joined to the winding up proceedings.

In this regard, it is well settled that a beneficiary under a trust does not have standing to bring an action in respect of the trust property in his own name. An exception to this rule is the Vandepitte procedure, by which the beneficiary may bring an action in special circumstances such as breach of trust or conflict of interest on the part of the trustee, but only if the trustee is joined or before the court. The effect of the Vandepitte procedure is explained by Lord Templeman in Hayim v. Citibank NA [1987] 1 AC 730 (PC) at 747C-D & 748F-G:

“… when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner…

… a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate”.

As for the rationale behind the requirement of joinder of the trustee, the learned authors in Lewin on Trusts (20th Ed., Vol. 2) at §47-012 explain:

“Where a beneficiary brings a derivative action in his own name, then the trustees must be joined as defendants. The need for joinder of the trustees is not merely a procedural matter, nor merely to ensure that the trustees are bound by the judgment or to avoid multiplicity of actions. The need for joinder has a substantive basis since the beneficiary has a personal right to sue and is suing on behalf of the estate, or more accurately the trustee”.

Chinluck sought to argue that the aforesaid principles also applied to a winding up petition presented by the beneficiary of a debt under a trust. On the facts, Mr. Wang executed a declaration of trust of his interest in the Debt in favour of Xin Wenhua. This made Mr. Wang the trustee or legal title holder and Xin Wenhua the beneficiary of the Debt. Although Xin Wenhua then executed a legal assignment of the Debt to the Petitioner, Chinluck argued that necessarily all that could have been assigned to the Petitioner was the interest that Xin Wenhua itself held, which was an equitable interest in the Debt that Mr. Wang held on trust for it. That being the case, Chinluck contended that the Petitioner did not have standing to present the Petition because the trustee had not been joined to the winding up proceedings.

The main obstacle to Chinluck’s argument was the decision in re Steel Wing Company Limited [1921] 1 Ch 349, which established that an equitable assignee of a debt need not join the assignor or legal title holder in order to have standing to present a winding-up petition. P O Lawrence J explained that the reason why an assignee of part of a debt is required to join all parties interested in the debt in an action to recover the part assigned to him is because the court cannot adjudicate completely and finally without having such parties before it. The absence of such parties may result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning the same debt. However, as P O Lawrence J went on to explain, this reasoning does not apply to a winding up petition. After a winding up order has been made,
the liquidator will investigate, adjudicate upon and settle the petitioner’s debt as well as the debts of other creditors. In other words, the winding up order does not prevent the debt from being settled completely once and for all. There is therefore no policy reason for requiring the petitioner or equitable assignee to join the assignor to the winding up proceedings.

Re Steel Wing has been cited with approval by the Privy Council in Parmalat Capital Finance Ltd v. Food Holdings Ltd [2009] 1 BCLC 274 at §§6–8 per Lord Hoffmann.

To counter the above, Chinluck sought to rely on the decision in Re Chung Kong Materials (JV) Limited [2019] HKCA 788 (15 July 2019), where the Court of Appeal upheld the decision of the Court of First Instance to dismiss a winding up petition on the basis that, on the evidence, it was triable as to whether the petitioner was the equitable assignee of the debt; and that, even if the petitioner was an equitable assignee of the debt, it should in any event have joined the assignor to the proceedings. Harris J found that Re Chung Kong Materials was of no assistance to Chinluck because: (1) the Court of Appeal did not have the benefit of being referred to the English decisions dealing specifically with the necessity of a beneficiary joining a trustee when presenting a winding up petition; and (2) the Court of Appeal was influenced by the fact that the assignee’s title was questionable.

Applying the reasoning in re Steel Wing, Harris J found that it was not necessary for the Petitioner to join the trustee, and so Chinluck’s defence failed and a winding up order should be made.

**Takeaway points**

Re China Cultural City Limited is authority for the fact that a beneficiary of a debt under a trust has standing to present a winding up petition against a company without joining the trustee, and that the policy concerns underpinning the general rule prohibiting a beneficiary to bring an action in his own name without the participation of the trustee, do not apply to winding up petitions. In this respect, the Court apparently took the view that no meaningful distinction could be drawn between an equitable assignee of a debt and a beneficiary of a debt under a trust. In both cases, all the claims of the company’s creditors could be dealt with conclusively in the liquidation process.

Christopher Chain and Jasmine Cheung acted for the Petitioner.

John Hui and Howard Wong acted for the Opposing Contributory.
Opposing Contributories in Winding Up Petitions: When and how to oppose

Often in winding-up petitions, contributories of the company, for one reason or another, may wish to oppose the winding-up petition in their own right, including by filing evidence and making submissions at hearings. One major concern a contributory may have in deciding whether to take this course of action is of course the potential costs consequences, especially in the scenario where the opposition is ultimately unsuccessful and the company is wound up.

This issue recently arose in Re China Cultural City Ltd [2020] HKCFI 1947, a decision concerning costs of a creditors’ winding-up petition (which itself concerned an interesting issue on locus standi: see our earlier article), where the Court ultimately ordered the opposing contributory Chinluck to bear 70% of the Petitioner’s costs of the Petition save the Petitioner’s costs of presenting and advertising the Petition. In so doing, Harris J clarified the judgment of Le Pichon J (as she then was) in Re Datacom Wire & Cable Co Ltd [2000] 1 HKLRD 526, where she explained the conventional costs order at 529E-I as follows:

(1) One set of costs is generally given to the petitioner, another among all the creditors supporting him and a third among the contributories supporting him;

(2) Where the petitioner has been substituted, the original petitioner’s costs of presenting and advertising the petition will be ordered to be paid as an expense of the liquidation: see Re Bostels Ltd [1968] Ch 346;

(3) Costs under (1) and (2) are normally ordered to be paid out of the assets of the company as an expense of the liquidation;

(4) Creditors or contributories appearing to oppose a successful petition are not entitled to costs. See Re Bathampton Properties Ltd [1976] 1 WLR 168 at p.171H and French, Applications to Wind-up Companies at para.4.5.5.1.” (emphasis added)

Le Pichon J then added at 530C–E that “the underlying rationale remains that a party who unreasonably opposes a winding-up petition should be ordered to bear the costs.” (emphasis added)

On the face of it, this would seem to suggest that the
normal costs order is that opposing contributories do not need to pay the costs of the Petitioner, unless the opposing contributories acted unreasonably in opposing the Petition. Indeed, this was subsequently applied in **Re HKSTC Warrington Fire Research** (unrep., HCCW 684/2001, 21 May 2002) per Yuen JA at §§4–9 and more recently in **Re Sky River International Trading (HK) Limited** [2019] HKCFI 2561 per DHCJ Le Pichon at §§33–34.

However, Harris J clarified at §5 of the said judgment that the test was that generally active opposition by an opposing contributory will attract an adverse costs order, in contrast to the approach of there being a presumption that costs are paid out of the assets of the company unless it is demonstrated by a petitioner that opposition was unreasonable. With respect, this approach has much to commend and is also in line with the general rule that “costs follow the event.” It remains to be seen whether this clarification would deter active but unmeritorious opposition by opposing contributories.

**Key Takeaway**

Contributories who intend to oppose a winding-up petition should bear this decision in mind in deciding whether to take an active stance, given that it has now been made clear that the general rule is that an adverse costs order would be made should their opposition be unsuccessful.

What then are the exceptions to this general rule? Examples given by Harris J include “if an opposing contributory is simply bringing to the court’s attention relevant matters to which the court should have regard and of which the court might not otherwise have been apprised or if the opposition is being advanced because the company cannot, for example, because of a deadlock at board level, oppose the petition”.

Further, as the cost order in this case (i.e. that Chinluck should bear 70% of the Petitioner’s costs save the Petitioner’s costs of presenting and advertising the Petition) demonstrates, this is not necessarily an all-or-nothing question, and the extent of an opposing contributory’s assistance to the Court has to be assessed on a case-by-case basis.

This article is co-authored by John Hui, Christopher Chain, Jasmine Cheung and Howard Wong
1. In *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38, the UK Supreme Court (“UKSC”) had occasion to consider the correct approach to determining the proper law of an arbitration agreement.

2. In a well-drafted contract, there are 2 primary possible candidates: the law of the seat, or the law designated by the choice of law clause in the underlying contract.

3. The exact legal position is unclear. On the one hand, there are authorities supporting the notion that the proper law is the law designated by the choice of law clause:

   (a) In *Sulamerica v Enesa Engenharia* [2013] 1 W.L.R. 102,[1] the English Court of Appeal held that (at §§11, 26):

   “It has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.”

   “In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties’ intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion.”

   (b) A similar approach has been adopted in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 1 C.L.C. 1040.

   (c) The position has been neatly summarized by *Habas Sinai* [2014] 1 Lloyd’s Rep 479, at §101 (See also *Russell on Arbitration* (24th edn., 2015), at §2–120):

   “(1) Even if an arbitration agreement forms part of a matrix contract (as is commonly the case), its proper law may not be the same as that of the matrix contract.

   (2) The proper law is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) the system of law with which the arbitration agreement has the closest and most real connection.

   (3) Where the matrix contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be “overwhelming”. That is because the system of law of the country seat will usually be that with which the arbitration agreement has its closest and most real connection.

   (4) Where the matrix contract contains an express choice of law, this is a strong indication or pointer in relation to the parties’ intention as to the governing law of the agreement to arbitrate, in the absence of any indication to the contrary.
(5) The choice of a different country for the seat of the arbitration is a factor pointing the other way. However, it may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract.

(6) Where there are sufficient factors pointing the other way to negate the implied choice derived from the express choice of law in the matrix contract the arbitration agreement will be governed by the law with which it has the closest and most real connection. That is likely to be the law of the country of seat, being the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.”

4. On the other hand:–

(a) There is academic support in Hong Kong which supports the proposition that if an agreement contains a choice of law clause and identifies a seat of arbitration, the Hong Kong court should conclude that the arbitration agreement is governed by the law of the seat of arbitration: See Graeme Johnston and Paul Harris SC, *The Conflict of Laws in Hong Kong* (3rd Edition), page 676, §10.007.

(b) Thus, in the UK Supreme Court decision of *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 W.L.R. 1889, it was common ground between the parties, for the purpose of the hearing before the Supreme Court, that the London arbitration was governed by English law, even though the underlying contract was expressed to be governed by Kazakh law (at §6; Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn., 2015), at §6.35).

5. The Supreme Court unanimously held that if the parties have expressly or impliedly chosen the law of the contract, then the chosen law applies to the arbitration clause therein.

6. The five Justices of the Supreme Court were however unable to agree on what the default position should be in the absence of such an express or implied choice.

7. The majority (Lords Hamblen, Leggatt and Kerr) took the view that the court must determine the law with which the arbitration agreement is most closely connected; in contrast, the minority took the view that the court has to determine the law with which the contract itself is most closely connected.

8. The UK Supreme Court’s decision is consistent with the earlier HK decisions in *Klöckner Pentaplast GMBH & Co. KG v Advance Technology (HK) Co. Ltd* –

(a) See *Klöckner Pentaplast GMBH & Co. KG v Advance Technology (HK) Co. Ltd* [2011] 4 HKLRD 262 (holding that the wording of the contract containing the arbitration agreement indicated that the agreement was governed by the governing law of the contract (German law), not the law of the seat of the arbitration (PRC law)).

(b) In *Klöckner Pentaplast*, the first instance judge relied on the proposition that “If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat” (at §24).

(c) Tang V-P (as Tang N.P.J then was), in refusing leave to appeal, expressly agreed with this approach (*Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* (HCMP 1836/2011, 19 October 2011), at §8).

9. Of course, one still has to consider if the Tribunal would apply the English or Hong Kong choice of law principles in the first place. Nonetheless, The UK Supreme Court has provided welcome clarity to the state of the law.

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[1] On the facts, the Court of Appeal preferred to apply English law (the law of the seat), rather than Brazilian law (the law governing the contract), because (inter alia) Brazilian law might affect the validity of the arbitration agreement (at §30).
In its recent landmark decision *Ge Qingfu & Ors v L&A International Holdings Ltd & Ors* [2020] HKCA 687 (11 August 2020), the Court of Appeal clarified the scope and application of sections 728–730 of the *Companies Ordinance* (Cap. 622) (the “CO”). This decision is important in at least two aspects: (1) it has clarified the boundaries between the various remedies available to shareholders under Part 14 of the CO; and (2) it demonstrates the court’s approach in interpreting the new provisions in the CO which are worded differently from their antecedent provisions in the predecessor *Companies Ordinance* (Cap. 32) (the “Old CO”).

In this case, the Plaintiffs (who were shareholders of L&A International Holdings Ltd) relied on sections 728–729 of the CO to claim damages against the company’s directors (i.e. the Defendants), on the grounds that they had breached their fiduciary duties by causing the Company to grant share options and allot shares for improper purposes.

The wording of sections 728–729 on its face appears to be very wide. Section 728(1)(a) states that section 729 applies if a person “has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute” certain conduct, which includes, *inter alia*, “a breach of the person’s fiduciary or other duties as a director of the company owed to the company” (section 728(4)). Section 729(1) provides that “The Court may, on application by a member or creditor of the company whose interests have been, are or would be affected by the conduct or by the refusal or failure, do any or all of the following – (a) grant an injunction… (b) order the person to pay damages to any other person; (c) declare any contract to be void or voidable to the extent specified in the order” (emphasis added). The Plaintiffs relied on such apparently wide wording and contended that the Court could order the Defendants to pay damages to them directly under these provisions.

Such a wide construction of sections 728–729 is problematic as a matter of legal principle.

*Firstly,* under such a construction, section 729 (“New CO s.729”) would have a much wider scope than its predecessor, section 350B of the Old CO (“Old CO s.350B”), which provided that the court may grant an injunction to restrain wrongful conduct and may, “either in addition to or in substitution for the grant of the injunction”, order damages. Old CO s.350B had created only a limited statutory exception to the rule in *Foss v Harbottle*, giving *locus* to a shareholder/creditor to seek only injunctive relief or damages in lieu in respect of breaches of the CO or the law in respect of a company’s affairs. Its purpose being to facilitate the prevention of wrongdoing, Old CO s.350B did not allow a shareholder/creditor to, irrespective of whether there was any basis for injunctive relief, advance any free-standing...
damages claim for personal loss caused by any wrongful conduct / breach of duty owed by directors to the company.

Secondly, if New CO s.729 were to be construed as allowing shareholders and creditors to bring free-standing damages claims against directors for breach of duties (even though the duties are owed to the company), New CO s.729 would have the effect of recognising a duty owed in parallel by directors to shareholders and creditors generally. This is contrary to the well-established principle that directors do not, by virtue of office, owe duties to members/creditors.

Thirdly, such a wide application of New CO s.729 would result in incoherence/discordance within the New CO. If New CO s.729(1)(b) authorises the Court to award damages to “any other person” including the Company, then in principle an applicant may bring a derivative claim under New CO s.729(1) (b) for damages to be paid to the Company, without going through any of the requirements to obtain leave for a statutory derivative action. If such an approach were correct, there would be no incentive for members to seek leave from the Court to commence a statutory derivative action. They could simply proceed under New CO s.729. This would render the provisions on statutory derivative actions entirely nugatory.

In light of the above, the consequence of such a wide construction of New CO s.729 is to introduce a fundamental sea change and drastic disruption to established company law principles. However, the legislative materials (including the consultation papers and the Bills Committee paper) in relation to sections 728–730 do not in any way indicate any major policy objectives or major changes from Old CO s.350B. Rather, the relevant provisions in the Bill were presented as representing “existing law” with improvements made to the drafting language and style.

The Defendants highlighted the above to the judge in the court below and argued that New CO s.729 should be interpreted in a manner similar to the Old CO s.350B and the equivalent Australian provision. In the present case, since the relevant shares were sold in the open market by the time the Plaintiffs commenced the proceedings, there was no basis for the Plaintiffs to have obtained any injunctive relief and therefore no damages should be awarded under the section.

However, the judge considered that as New CO s.729 is worded differently from Old CO s.350B “the change of legislative framework and the removal of these words unmistakably show that section 729 is a new piece of legislation not to be shackled by its predecessor or forerunners”. He concluded that damages can be awarded to any person who has suffered a pecuniary loss as a result of the conduct in question, whenever the court finds it “just and proper” to do so.

On appeal, the Court of Appeal overturned the judge’s interpretation of New CO s.729 and accepted the Defendants’ interpretation. First, applying the modern approach of statutory interpretation (§§61–63), the Court of Appeal considered that New CO s.729 should be construed in its proper context, which includes the “whole corpus of company law including both statute law and common law” (§64). The Court of Appeal also undertook a detailed review of the legislative history and purpose as set out in the consultation papers and Bills Committee paper, holding that they were admissible in order to identify the purpose of the legislation.

Having considered the difficulties and problems in terms of legal principle(s) as identified above, the Court of Appeal agreed with the Defendants that the judge’s construction would represent a fundamental change in the law (§§65–67). By New CO s.729, the legislature could not have intended to create a free-standing, independent cause of action which would have the effect of recognising a duty owed by directors in parallel to shareholders and creditors generally (which is contrary to the well-established company law principle); and in addition, would abolish the rule in *Foss v Harbottle* and render the derivative action wholly otiose (§67).

With such broader context in mind, the Court of Appeal took the view that while “may” and “any or all” in New
CO s.729 are on their face words of wide import, the scope of the power to order damages is “highly unclear” (§69). Such uncertainties are further heightened when one has regard to the legislative history, which did not identify any mischief that caused the legislature to make the relevant change (except that the language of Old CO s.350B was thought not “modern” enough) (§70).

Given such obscurities, the Court of Appeal agreed with the Defendants and found it legitimate to find guidance in the predecessor provision which New CO s.729 was merely intended to restate in different language and style. In this respect, the Court of Appeal referred to the UKSC’s decision on interpretation of consolidation statutes, *R (Derry) v Revenue and Customers Commissioners* [2019] UKSC 19, where Lady Arden said at §86 that consolidation statutes receive less Parliamentary scrutiny than other primary legislation, and there is a presumption, in relation to consolidating statutes, that Parliament did not intend to change the law. The Court of Appeal held that this applies a fortiori here, where it was represented to the Legislative Council that the provisions merely restated existing law in different language and drafting style without a change in substance (§75).

In the event, the Court of Appeal accepted the Defendants’ submissions that sections 728–730 of the CO should be interpreted in a similar manner to Old CO s.350B, and there should be jurisdiction limitations in the Court’s exercise of its power under New CO s.729 as to when an applicant (being a shareholder or a creditor of the company) would be entitled to relief by way of damages payable to himself personally. Injunction remains the primary remedy, to which damages is “an adjunct which may be granted in addition to or in substitution for an injunction” (§79). The Court of Appeal stressed that this did not involve reading words into a statute (§76) or denying the entitlement of the legislature to abrogate or reduce any fundamental principle of common law. Rather, this was to assume that the legislature would not alter fundamental principles except on a considered basis (of which there was none in the present case) (§78).

**Key Takeaways**

Following the re-write of the Companies Ordinance, many provisions have been revised and re-drafted, which has often resulted in different wording. This Judgment has demonstrated that in interpreting such provisions, the Court is ready and willing to consider the “whole corpus” of company law including both statute law and common law, and in appropriate cases, the Court will have regard to the legislative history, and give effect to a presumption that in rewriting the Ordinance the legislature did not intend to change the law. It also shows that in the absence of a clear indication, the Court would be slow to ascribe an intention to the legislature to make fundamental changes to the law in one fell swoop, even if the wordings are on their face apparently of wide import.

Specifically in relation to sections 728–730 of the CO, the Court of Appeal has clarified that under these provisions an injunction is the primary remedy, to which damages is “an adjunct which may be granted in addition to or in substitution for an injunction”. These provisions therefore provide for different remedies as distinct from sections 731–738 of the CO which govern the statutory derivative action. Legal practitioners should pay attention to these different provisions when advising clients as to what remedies are available and which course should be taken.

Justin Lam and Jonathan Chan acted for the Defendants and co-authored this Case Report.
A number of significant legal issues arise out of the recent Court of Appeal decision in *Ge Qingfu & Ors v L&A International Holdings Ltd and Others* [2020] HKCA 687 (11 August 2020) (some of which have been discussed in another article which appears at pages 37-39 of this edition, as part of the present series, which is certainly recommended for readers interested in this area of the law).

In this article, we will look at only one of those, namely the standing of minority shareholders to directly seek redress for any wrongful allotment of shares. We will also consider the recent decision of Mr Justice Segal in *Tianrui (International) Holdings Company Limited v China Shanshui Cement Group Limited* FSD 161 of 2018 (6 April 2020, Grand Court of the Cayman Islands), which departed from an earlier decision of the same Court (Mr Justice Kawaley) in *Gao v China Biologic Products Holdings*, Inc. FSD 157 of 2018 (10 December 2018, Grand Court of the Cayman Islands).

The scope and limits of one of the most well-established principles of company law, the irrevocability of reflective loss, was recently the subject of a comprehensive review by the UK Supreme Court in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31. However, while an extensive examination of that principle will be the subject of discussion for another day, a particularly interesting aspect, which is spotlighted in this article, is whether minority shareholders can seek direct relief for wrongful allotment.

As things presently stand, as a matter of Hong Kong law, the answer appears to be in the affirmative. In *Re L&A International Holdings Limited*, after a thorough examination of the Court’s power to grant damages in addition to or in substitution for injunctive relief under the *Companies Ordinance* (Cap. 622), it considered this specific scenario.

At paragraphs 104–106, it was emphasised that where there are complaints about wrongful allotment of shares, the loss caused is not necessarily suffered solely by the company in question. As Hoffmann J (as he then was) said in *Re Sherborne Park Residents Co Ltd* (1986) 2 BCC 99, 528, “[T]he company is not particularly concerned with who its shareholders are. The true basis of the action is an alleged infringement of the petitioner’s individual rights as a shareholder. The allotment is alleged to be an improper and unlawful exercise of the powers granted to the board by the articles of association, which constitute a contract between the company and its members. ... An abuse of these powers is an infringement of a member’s contractual rights under the articles.”

This is also borne out by a number of common law authorities, including a string of Hong Kong decisions which have enabled members (in their own right) to restrain a wrongful allotment. The recognition of the member’s standing in such applications demonstrates that a member is entitled to seek some form of direct remedy in the face of a threatened or actual wrongful allotment, without having to pursue (for instance) a derivative action.

As a matter of reality, the Court went on, at paragraph 108, to illustrate the point by reference to the possibility of “a real loss suffered by a member as a result of a wrongful allotment of shares separate from and independent of any damage that is suffered by the company”, with such
compensation being capable of being “rationalised in terms of an infringement by the company of his contractual rights under the articles which was procured by the improper actions of the directors who managed its affairs.”

Thus, at paragraph 109, the Court of Appeal affirmed the first instance decision that, as a matter of Hong Kong law, under section 729 of the Companies Ordinance (Cap. 622), Hong Kong, damages may be awarded to a member in lieu of a prohibitory injunction at his behest restraining the wrongful conduct.

At this juncture, it is also of interest to refer to the decision of Mr. Justice Segal in Tianrui (International) Holdings Company Limited FSD 161 of 2018 (6 April 2020, Grand Court of the Cayman Islands).

It was held that relief can be granted, on the basis that the company is regarded as being in breach of the articles and liable to be sued once powers have been improperly exercised by its directors (as the improper action necessarily remains attributable to the company, until and unless it is set aside).

In arriving at this view, Segal J specifically departed from a decision of the same Court in Gao in which Kawaley J held that to grant relief to the aggrieved member in such circumstances would be inconsistent with the rule that (absent a special relationship which, according to Kawaley J, did not arise) directors owe their duties to the company and not individual shareholders.

Viewing the matter differently, Segal J reiterated that the key question is not whether and when directors owe duties directly to shareholders, but whether and when a shareholder can bring proceedings against the company for the company’s breach of the statutory contract and the corporate constitution (paragraph 103(c)).

Further, as a matter of principle, Segal J considered that the shareholder’s cause of action (arising out of an improper allotment of shares) is premised on the statutory contract and is to be treated as a personal right. This recognizes the true nature of the dispute, i.e. being one between the shareholders themselves, and it is their rights (and technically not the company’s rights) which have been affected.

Following from the above, Segal J (at paragraph 108) concluded that the most appropriate remedy in such a scenario would be a declaration or injunction against the company. The learned Judge specifically left open the question as to whether “a claim for financial compensation for breach of the articles might be possible”. Noting that this was not argued before him, Segal J observed that this “would face a number of difficulties including the effect of the rule against recovery of merely reflective loss”.

Postscript

As Tianrui was decided several months earlier, Segal J did not have the advantage of being referred to it. It would be interesting to see whether the Cayman Court would likewise come to a similar view. As a matter of Hong Kong law, however, it seems clear that the reflective loss principle is no bar to the award of damages at least where it is considered on the facts to be appropriate as a relief in lieu of an injunction.
The correct approach that should be adopted by the Court to deal with a winding-up petition based on a debt arising out of a contract containing an arbitration clause is a vexed question: see e.g. our earlier commentary on Re Asia Master Logistics Limited [2020] HKCFI 311 (“Asia Master”) and AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) [2020] SGCA 33.

The case of [C] v. [D] [2020] HKCFI 1596 demonstrates that the resolution of this important issue can have broader implications and may have a bearing on whether a Court would be prepared to grant an anti-suit injunction to restrain a party from presenting a winding up petition based on an arbitration clause.

**The Facts**

[C] is a British Virgin Islands company. [D] was a Cayman Islands company. They entered into an agreement whereby [C] would sell and [D] would purchase shares in a company. Under the agreement, [D] also had the right to require [C] to buy back the shares. The agreement also contains an HKIAC arbitration clause.

[D] decided to exercise its right provided under the buyback clause. However, [C] did not take any steps to buy back the shares. As such, [D] instituted proceedings in the BVI on 4 March 2020 seeking an order to wind up [C]. The substantive hearing of the BVI proceedings was adjourned to 13 July 2020.

In the meantime, [C] issued and served a notice of arbitration seeking inter alia declarations that [D] was not entitled to require [C] to purchase any shares from [D] and that [C] was not obliged to purchase any shares from [D]. [C] also applied for an interim anti-suit injunction in Hong Kong in relation to the hearing of the BVI proceedings on 13 July 2020.
The Decision

The sole question for the Court to decide was whether an interim anti-suit injunction should be granted in relation to the hearing of the BVI proceedings on 13 July 2020.

The Court declined to grant the interim anti-suit injunction for a number of reasons including (1) the injunction was highly intrusive, (2) this would bring the BVI proceedings to a halt which would lead to a waste of resources, (3) [D] did not have enough time to respond to the application, and (4) the urgency was self-induced.

What is interesting for present purposes is [D]’s argument that the principles relied upon by [C] for an anti-suit injunction based on a breach of the arbitration agreement are not in fact applicable.

Relying on the decision in Asia Master, [D] argued that in commencing and pursuing an application for winding up in the BVI, [D] was not seeking to have any dispute arising out of or in connection with the Agreement resolved by way of arbitration and was therefore not acting in breach of the arbitration agreement. The Court opined that this may or may not be right at the end of the day, but all of this demonstrated that the matter is not so plainly in [C]’s favour such that an interim injunction ought to be granted.

Commentary

The case of [C] v. [D] again demonstrates the need for a higher court to clarify how one should deal with a winding-up petition based on a debt arising out of a contract containing an arbitration clause. The resolution of this question will determine whether creditors can present a winding-up petition and will also have a bearing on whether companies can apply for an anti-suit injunction in Hong Kong to restrain a creditor from presenting a winding up petition elsewhere.

This Case Report was authored by José-Antonio Maurellet SC and Terrence Tai.
In our previous commentaries, we explored the three prevailing responses to the question of when a creditor can wind up a company based on a debt which is subject to an arbitration clause.

The first approach requires the debtor–company to demonstrate a *bona fide* dispute on substantial grounds and largely ignores the existence of the arbitration clause. The second approach requires the Court to dismiss or stay a winding-up petition if the debtor–company disputes a debt which is subject to an arbitration agreement, save in “wholly exceptional circumstances” (“Salford Approach”). The third approach largely follows the Salford Approach but is subject to the caveat that the dispute is not raised by the debtor–company in abuse of process (“An An Approach”).

The English High Court has handed down its decision in *Re Telnic Ltd* [2020] EWHC 2075 (Ch) which provides the English rejoinder to the question of whether a creditor can wind up a company based on a debt which is subject to an arbitration clause. In short, the English High Court followed the Salford Approach and sheds some light on what constitutes “wholly exceptional circumstances”.

**The Facts**

Knipp Medien (“Knipp”) and Telnic Limited (“Telnic”) entered into a service agreement which contains an arbitration clause stating that “any dispute, controversy or claim arising out of or relating to this [Agreement] … or the breach, termination or validity thereof” shall be referred to arbitration.

Knipp later petitioned to wind up Telnic based on certain unpaid service fees under the service agreement. Telnic does not admit liability and argues that the matter should go to arbitration. Deputy ICC Judge Schaffer, the first instance judge, adopted the Salford Approach and stayed the petition without considering whether a bona fide dispute on substantial grounds exists. Telnic commenced arbitration shortly after the first instance decision was given.

Knipp appealed on grounds that there were “wholly exceptional circumstances”, viz. (1) the debt was admitted by Telnic in correspondence without prejudice, (2) Telnic was balance sheet insolvent, (3) Telnic made an unlawful distribution to its shareholders and had tried to stay the arbitration. Telnic cross-appealed on grounds that the Judge should have dismissed, rather than stayed, the petition.

**The Decision**

The High Court confirmed that the Salford Approach remained the law in England and on the facts the Court held that that none of the circumstances raised by Knipp was “wholly exceptional” which would justify the Court in departing from its usual practice which is to dismiss or stay the petition.

As regards Telnic’s admission in without prejudice correspondence, the Court held that even past admissions (at least if they were retracted at the point of the petition) are not “wholly exceptional” and the
position is a fortiori here as Telnic’s admissions were “hedged around with caveats”. In relation to the balance sheet insolvent point, the Court opined that this was unclear. In any case, this would not give Knipp locus standi unless it can show it was a creditor. The unlawful distribution point could not be resolved in winding-up proceedings. Finally, as for Telnic’s conduct in attempting to stay the arbitration, this was “unfortunate” but could not be described as “wholly exceptional”.

As for Telnic’s cross-appeal, the Court held that the judge below was entitled, in exercising his discretion, to stay the petition given the need to (a) protect Knipp by allowing it to lift the stay if it succeeded in the arbitration and (b) protect creditors by preventing Telnic from disposing of assets and preserving a liquidator’s rights for the period up to presentation of the petition. Further, there was little prejudice to Telnic since it was no longer actively trading.

**Commentary**

*Re Telnic Ltd* is significant in that it not only confirms that that the Salford Approach remains the law in England, but also elaborates on the meaning of “wholly exceptional circumstances”. In so doing, the Court confirmed that there are subtle variations between the Salford Approach and the AnAn Approach.

Under the Salford Approach, past admissions (at least if retracted by the time of the petition) would not constitute wholly exceptional circumstances whereas, under the AnAn Approach, the fact that a debt was previously admitted may constitute “abusive conduct” and justify disapplying the disapplication of the *prima facie* standard of review. There is also a difference in determining when a petition would be stayed. The Salford Approach requires the court to exercise its discretion independently with regard to the interests of creditors and the need to preserve a liquidator’s rights of action; there is no need to engage in the merits of the dispute. By contrast, the AnAn Approach requires the creditor to show “legitimate concerns about the solvency of the company as a going concern, and that no triable issues are raised”.

The varying judicial treatment of arbitration agreements in the winding-up context seems to confirm the concern expressed in *Re Asia Master Logistics Limited* [2020] 2 HKLRD 423 that “an invitation to give greater emphasis to arbitration agreements invariably begs further questions as to how such “greater” emphasis should be given”. It will be interesting to see whether the appellate courts in Hong Kong will follow the Salford Approach and, if so, how they would give “greater emphasis” to arbitration agreements.

José-Antonio Maurellet SC, Terrence Tai and Cyrus Chua authored this Case Report.
When entertaining a jurisdictional challenge to wind-up a foreign company with no place of business in Hong Kong, is it a material concern that alternative remedies for unfair prejudice are available at the company’s place of incorporation but not in Hong Kong (“Question”)? Whilst this Question was raised for the first time in *Kam Leung Sui Kwan and Kam Kwan Lai* (2015) 18 HKCFAR 501 (“Yung Kee”), it was left unresolved by the CFA as the point was considered to have been raised too late in the proceedings; indeed, for the point to be taken, the court held that the respondent had to raise it “at the earliest possible opportunity” (Yung Kee §61).

This was thus done by the respondents in *Scanty Investment Company v Brilliant Functions Limited* [2020] HKCFI 498 (“Scanty”), where they promptly challenged the Hong Kong Court’s jurisdiction to wind-up a BVI company on grounds that it was still open to the petitioners to obtain a buy-out order via unfair prejudice proceedings in the BVI (Scanty §8). Answering the Question in the affirmative, Harris J held that it would “generally be unreasonable” for a shareholder to wind-up a foreign company with no place of business in Hong Kong if it has an alternative remedy for unfair prejudice at the company’s place of incorporation (Scanty §9).

**Facts and decision in Scanty**

The company, ACE International (BVI) Ltd (“ACE”), was incorporated in the BVI, solvent, and had an ongoing business (Scanty §2). The petitioners (“Petitioners”) petitioned to wind-up ACE on just and equitable grounds in Hong Kong (“Petition”). However, no relief for unfair prejudice was sought in the Petition as the Hong Kong Court has no jurisdiction to entertain such proceedings if the foreign company lacks a place of business in Hong Kong, as was the case for ACE (Scanty §6).

The respondents (“Respondents”) applied to strike-out the Petition on grounds that the Hong Kong Court should not exercise jurisdiction to wind-up ACE as “[the Respondents] can obtain a buy-out order” via unfair prejudice proceedings in the BVI (Scanty §2).

At the hearing of the strike-out application, the Petitioners undertook not to seek relief for unfair prejudice in the BVI should the Hong Kong Court refuse to wind-up the Company (“Undertaking”). On this basis, Harris J dismissed the application as the Undertaking had now foreclosed the possibility of any unfair prejudice proceedings in the BVI.

However, in the interest of determining costs, the Court went on to consider whether, but for the Undertaking, the Respondent would have prevailed on its strike-out application (Scanty §3). On this issue, Harris J held that, where the place of incorporation of a foreign company has a similar unfair prejudice regime to Hong Kong and that company does not have a place of business in Hong Kong, the dispute should be litigated in the place of incorporation (Scanty §10).

This is subject to an exception if the petitioner could show a “compelling reason” not to require it to litigate at the place of incorporation; for example, if the...
respondent was “unlikely...to finance the purchase of the petitioner’s shares” (Scanty §9).

The judge opined that this approach is consistent with principle. It is well-established that a contributory winding-up of a company is a remedy of last resort and a petitioner would be acting unreasonably in insisting on winding-up if there was an alternative remedy (Scanty §2, citing Re Wong To Yick Wood Lock Ointment Ltd [2003] 1 HKC 484 at 488A-B). The same principle applies if the shareholder, having “agreed to participate in a business using a foreign incorporated company”, insists on winding-up that company in Hong Kong (Scanty §9). Ultimately, as the strike-out application would have succeeded but for the Undertaking, the Petitioners were ordered to “pay the costs of the Respondents’ summons” (Scanty §11).

Commentary

Following Scanty, a contributory’s petition to wind-up a foreign company would likely be struck out (or stayed) if the respondent can show, at the earliest possible opportunity, that (1) the Hong Kong Court has no jurisdiction to grant relief for unfair prejudice because the company has no place of business in Hong Kong and (2) the place of incorporation has a similar unfair prejudice regime to Hong Kong. However, the petitioner may resist the strike out (or stay) if it shows a compelling reason not to require it to litigate in the place of incorporation.

The Scanty approach has much to commend. When a Hong Kong Court hears a petition to wind-up a foreign company with no place of business in Hong Kong, its options are limited to winding-up and making no order whatsoever. Neither is desirable. If no order was made, this might encourage the petitioner to have a second bite at the cherry by petitioning for unfair prejudice at the place of incorporation. This presents a clear risk of inconsistent judgments from different jurisdictions since unfair prejudice and winding-up proceedings are often premised on the same facts. Equally, a winding-up order would be contrary to comity insofar as it pre-empts possible unfair prejudice proceedings at the place of incorporation and prevents the foreign court from making a less draconian buy-out order.

Section 184I of the BVI Business Companies Act (the “BVI Act”) provides a wide range of available remedies to prejudiced shareholders. In addition to the often sought “buy-out” relief, the statutory regime in the BVI also provides less draconian remedies, including a compensation order; order regulating the future conduct of the company’s affairs; order requiring amendment to the memorandum or articles of the company; appointment of receivers; rectification of records of the company; and setting aside any decision made or action taken by the company or its directors in breach of the Companies Act or the memorandum or articles of the company.

Relevantly, proportionality of relief is the theme of a line of recent BVI Court of Appeal judgments.
In Kwok Kin Kwok v. Yao Juan (“Kwok”), the Court of Appeal reaffirmed the wide discretion of a BVI Court in granting a remedy pursuant to section 184I of the BVI Act. The Court may make any order “as it thinks fit” to dispose of the claim including but not limited to those listed in section 184I. It follows that the Court is not bound by the relief sought by the claimant (Kwok §65). Despite such wide discretion, the Court of Appeal in Kwok reaffirmed and applied the principles set out in Wang Zhongyong et al v. Union Zone Management et al [1] that the relief must be one that is based on conduct alleged to constitute unfair prejudice and contained in the pleaded case (Kwok §63). Following the principles laid out by the Court of Appeal in JF Ming Inc. et al v. Ming Sui Hung, Ronald et al [2], the Court of Appeal considered that the following shall be in the Court’s mind in determining the remedy to be granted:

1. The remedy granted in an unfair prejudice claim was to grant the minimum remedy necessary to correct the misconduct and to prevent such unfair prejudice from happening again in the future

2. The remedy granted should be proportionate to the prejudice suffered by the petitioner;

3. It should not be used as a punishment for bad behaviour.

Scanty navigates a middle-ground between both extremities by effectively requiring the petitioner to exhaust all alternative remedies by way of unfair prejudice proceedings at the place of incorporation or, as in Scanty, to undertake not to pursue those proceedings. In light of the wide range of remedies available under the BVI Act, and the BVI case authorities specifically addressing proportionality of remedy, it would seem as a matter of jurisdiction there is clearly something to be gained but nothing to be lost by commencing minority oppression/unfair prejudice actions in the BVI if the company in question is incorporated there.

The Scanty approach not only addresses concerns of comity, but is also consistent with the “philosophy underlying Hong Kong’s own legislation” that shareholder disputes should be litigated in the forum that can grant either a buy-out or winding-up order (Scanty §10).

DVC’s José-Antonio Maurellet SC and Jason Yu appeared as counsel for the Respondents in Scanty. Expert opinion was provided by Nigel Meeson QC of Conyers as referred to in the judgment.

For a different angle on this case, take a look at Vincent Chiu and Brian Fan’s write up here.

The Hong Kong Court of First Instance recently set aside its own *ex parte* leave to enforce a Convention award for the award creditors’ failure to make full and frank disclosure.

In *1955 Capital Fund*, the award creditors, in their *ex parte* application for leave to enforce a USA award, failed to draw the court’s attention to the fact that pursuant to the operative part of the award, the award debtor’s duty to perform the award was conditional upon “absence of the filing of an application to correct or vacate the arbitration award under the applicable law”. The failure was held to be deliberate and the judge accordingly set aside the *ex parte* leave previously granted to enforce the award.

The decision is a timely reminder of an award creditor’s duty to the court if it chooses to enforce an arbitration award through the summary process under Part 10 of the Arbitration Ordinance (Cap. 609). Applications made under that Part may be done *ex parte*. Where *ex parte* leave is granted, the leave is suspended for a period of 14 days (or any other period fixed by the court), within which the award debtor may apply to the court for setting aside the leave.

Although it has been observed, as *obiter*, that an *ex parte* application for leave to enforce an award is not completely the same as an ordinary *ex parte* application,1 recent authorities have consistently confirmed that an award creditor seeking *ex parte* leave to enforce an award, like other *ex parte* applications, owes a duty to make full and frank disclosure in “the highest good faith”: e.g. *Shenzhen Honeycomb System Co Ltd v. HCT Technologies (HK) Co Ltd*,2 *Grant Thornton International Ltd v JPBP & Co (a partnership)*,3 and the *1995 Capital Fund I GP LLC*. The fact that the 14–day suspension window attached to an *ex parte* leave to enforce an award does not in any way reduce the onus of the award creditor’s duty of disclosure: *Grant Thornton International Ltd*; and the *1995 Capital Fund I GP LLC*.

Insofar as the content of the duty is concerned, the award creditor is obliged to disclose all facts which are material to the court’s exercise of its discretion. Such facts include not only facts already known to the award creditor but also additional facts which it would have known upon proper inquiries. The award creditor must also bring to the attention of the court any points which the award debtor may make in relation to the enforcement application. Materiality is to be judged from the court’s perspective, not that of the parties or their legal advisers. The duty is continuing (as long as the application remains *ex parte*), including a duty to correct any misinformation or incomplete information previously given to the court. The duty is not discharged simply by burying the relevant and material information in a pile of exhibits.4 Failure to discharge the duty may result in the leave being set aside (e.g. the *1995 Capital Fund* case) and/or deprivation of award creditor’s costs (e.g. *Leidos Inc v. The Hellenic Republic* [2019] EWHC 2738 (Comm)).

José–Antonio Maurellet SC and Connie Lee acted on behalf of the applicants.

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2. [2018] HKCFI 1877
3. HCCT 13/2012, unreported, 5 April 2013
4. Case law suggests that the duty of disclosure does not, for instance, include disclosure of (i) partial performance of the award: U v. A, HCCT 34/2016, unreported, 23 February 2017 (however, partial performance is relevant and material in enforcing a Mainland award for only the unsatisfied part of the award is capable of being enforced s.93(2) of the Arbitration Ordinance); and (b) the defences which the award debtor might have argued had it attended the arbitral proceedings: Medison Co Ltd v. Victor (Far East) Ltd. [2000] 2 HKC 502.
What is the Court’s approach in determining whether to grant assistance to a foreign Court in the absence of any evidence as to the foreign Court’s “settled practice”?

This Case Report was authored by Terrence Tai

In Re Rennie Produce (Aust) Pty Ltd (In Liquidation in Australia) [2020] HKCFI 1500, the Court examined the approach in determining whether to order the production of documents or examination of parties by way of the Court’s common law powers of recognition and assistance in the absence of any evidence in relation to the “settled practice” of the relevant foreign court.

The facts

Rennie Produce (Aust) Pty Ltd (“the Company”) was incorporated in Australia and was being liquidated in Australia. The liquidators were appointed on 9 August 2010 (“Liquidators”).

By a Deed of Settlement dated 3 October 2012 (“the Deed”), the Company and another company belonging to the same group through their liquidators (being also the same individuals as the Liquidators) settled a dispute between the companies and what is termed the “Rennie Parties”.

As a result of the Deed, assets held offshore by or for the benefit of the Rennie Parties are now the property of the Company. The Liquidators believe that the said overseas assets were not properly repatriated in accordance with the provisions of the Deed and they believe that the said assets were hidden away via various offshore transactions.

Accordingly, the Liquidators wanted an order for the production of documents and the examination of the Respondents in relation to the funds or assets held or previously held outside Australia for the benefit of not only the Company but also the Rennie Parties.

The Respondents opposed the application on the basis that the Liquidators had not produced any expert evidence to demonstrate that the Australian Courts would have made an order like the order that the Liquidators now seek.

The Decision

The present case was different from the more typical case where the respondent was a director, auditor or an entity which provided a service to the relevant company which then led to a chain of enquiry by reason of the respondent’s dealing with the company before liquidation. Instead, the main purpose of the application was to identify whether the Rennie Parties maintained or kept offshore assets.

Whilst the Court was reasonably confident that the Australian Courts would have the jurisdiction to make the order now sought in Hong Kong, it was less certain about the Australian Courts’ settled practice in response to an application of the present kind.
The Court was not prepared to assume that the “settled practice” of the Australian Courts would necessarily result in an order being made.

This is important because, according to the dicta of Lord Sumption JSC in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 (at §25), assistance cannot be granted so as to enable foreign officeholders to do something which they could not do under the law by which they were appointed. Thus, the assisting Court has to be satisfied that it is not going beyond what would have been allowed in the home jurisdiction before granting any assistance.

Whilst in many cases it will be possible and appropriate for the Hong Kong Courts to deal with applications for examination and production of documents without requiring an application being made or an order being obtained in the “home” court, the Court was not prepared to assume that the “settled practice” of the Australian Courts would result in an order being made in the present case.

Ultimately, it was held that it was more appropriate for the Court to wait for the Australian Courts to make such an order before rendering assistance. In such a case, the Hong Kong Courts would have the benefit of the reasoned judgment of the “home” court and could be confident that it was not going beyond what the “home” court would allow. The Hong Kong Courts could then make the order sought, provided that it was satisfied that it also had the power to make a similar order in the circumstances of the present case.

**Commentary**

This case demonstrates the importance of adducing evidence of the “settled practice” of the “home” court before invoking the common law power of the Hong Kong Courts to provide assistance (e.g. by ordering the production of documents and/or examination). In the absence of such evidence, the Hong Kong Courts may choose to wait for the “home” court to make a similar order first before granting assistance.
Interim Payment as an Interim Remedy:  
*Rich Profit Creation Ltd v Ko Chung Lun and others* [2020] HKCFI 1459

This Case Report was authored by Vincent Chiu

In *Rich Profit Creation Ltd v Ko Chung Lun and others* [2020] HKCFI 1459, Deputy High Court Judge Paul Lam SC allowed the plaintiff’s appeal and acceded to the plaintiff’s application for interim payment against some of the defendants for two sums totalling around RMB 33 million.

The Court provided a helpful summary of the relevant principles concerning an interim payment application under Order 29 of the Rules of the High Court (Cap. 4A).

The plaintiff has to show, on the material before the judge at the time of the application and on the balance of probabilities, that he would succeed in his claim, and would obtain a substantial amount of damages at trial. The Court must also be satisfied that the defendant has no arguable defence, if not having sufficient doubts regarding the genuineness of the defence. The test on “merits” of the defendant’s case was similar to that for granting conditional leave to defend in a summary judgment application, i.e. whether the defendant’s defence was shadowy (§15).

In addition, although Order 29, rules 11 and 12 are worded slightly differently and would appear to cater for different situations, the Court should read rules 11 and 12 together and ask the single question whether the application fulfils the requirements of those rules as a whole, rather than considering separately and exclusively the applicant’s entitlement under each rule (§16).

Turning to the facts, in gist, the plaintiff’s case was that it gave two sums of money (“the two sums”) to the defendants as loans to be advanced to a Mainland joint venture in 2011. Subsequently, it was discovered that the defendants purported to lend the two sums to the Mainland joint venture on their own behalves, instead of under the plaintiff’s name, and the defendants refused to return to the plaintiff the two sums after such monies were returned to the defendants. The plaintiff pursues the defendants for repayment of the two sums.

The Court came to the view that the defendants’ defence was shadowy. An order for interim payment was granted, whereby the defendants had to make interim payment of the two sums to the plaintiff.

**Key Takeaways**

An interim payment application is strategically useful for the following reasons:-

- An interim payment application is in many ways similar to a summary judgment application. Hence, very often, the two applications can be brought together. In some ways, interim payment is procedurally advantageous.

- If the court comes to the view that the defence is shadowy, interim payment will usually be ordered for payment to be made to the plaintiff, subject to any objection based on the potential inability of the plaintiff to repay such sums to
the defendant if the plaintiff fails the claim at trial. On the other hand, where the defence is shadowy in a summary judgment application, the court would usually grant conditional leave to defend, with the condition imposed on the defendant to make payment into court (as opposed to making payment to the plaintiff).

In addition, where the plaintiff’s case involves a fraud allegation, the fraud exception under O.14 r.1(2)(b) would be engaged and the court would have no jurisdiction to deal with the summary judgment application (see e.g. A-1 Business v Chau Cham Wong Patrick [2009] 5 HKLRD 579; Zimmer Sweden AB v KPN Hong Kong Ltd [2016] 1 HKLRD 1016). For an interim payment application, there is no similar “fraud exception”.

The downside of an interim payment application is that the need for a trial is not averted. However, the same may be said of a summary judgment application which could ultimately lead to the defendant being granted conditional leave to defend.

For the above reasons, when a litigant has a strong case on the merits, it would seem appropriate in most cases to consider whether to bring a summary judgment application and an interim payment application concurrently.

References:

Order 29, rule 11(1)(c), RHC:

“If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied... that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them, the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross claim or counterclaim on which the respondent may be entitled to rely.” (emphasis added)

Order 29, rule 12(c), RHC:

“If, on the hearing of an application under rule 10, the Court is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs, the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.” (emphasis added)

Vincent Chiu acted for the Plaintiff
‘Email fraud’ or ‘cyber fraud’ has become commonplace in the Court of Hong Kong. Time is always of the essence in order to conduct tracing exercises through what usually involves multiple layers of recipients.

Unsurprisingly, more often than not the relevant fraudsters do not appear in the proceedings. As such, alongside the obtaining of a default judgment, one of the reliefs often sought is to obtain a ‘vesting order’ under section 52 of the Trustee Ordinance (Cap. 29) (“TO”), such that the relevant funds will be transferred directly from the banks (with which the recipient accounts are held) to the victim of the fraud. This is usually considered to be a more expedient alternative to the ‘garnishee’ procedure.

One of the first reported decisions to have adopted such an approach is Guaranty Bank and Trust Company v ZZZIK Inc Limited (Unrep., HCA 1139/2016, 18 July 2016) per Deputy High Court Judge Cooney SC, followed closely by a decision by the same learned Deputy Judge in Halliburton BV Merkezi Hollanda Ankara Merkez Turkiye Subesi v Sheng Yi (HK) Trade Co., Limited (Unrep., HCA 1627/2016, 24 January 2017). Similar orders were made in, inter alia, SBM Bank (Mauritius) Ltd v Warner Trading Ltd and others [2019] HKCFI 2956.

Recently, in 800 Columbia Project Company LLC v Chengfang Trade Ltd and others [2020] HKCFI 1293 and Wismettac Asian Foods, Inc. v United Top Properties Ltd and others [2020] HKCFI 1504, Recorder Eugene Fung SC and Deputy High Court Judge Paul Lam SC conducted a meticulous examination of the relevant juridical basis of a ‘vesting order’.

In Boo Columbia, the learned Recorder analysed the provisions of section 52(1) of the TO, before arriving at the conclusion that the Court’s jurisdiction under section 52(1)(e) of the TO is not engaged upon the making of a declaration that a defendant holds certain sums of money in a bank account on a constructive trust for a plaintiff (see the learned Recorder’s detailed analysis at §16).

In Wismettac Asian Foods, the learned Deputy Judge agreed with the analysis in Boo Columbia, to the extent that section 52(1)(a) cannot be invoked in these circumstances. In particular, the learned Deputy Judge agreed that a declaration that a person has become a constructive trustee does not mean that he or she has been “appointed” by the Court to be a trustee for the purpose of section 52 (see Boo Columbia at §§16(7)–(8)).

The learned Deputy Judge then went on to consider whether the remaining parts of section 52(1) may come into play. Eventually, it was held that section 52(1)(e) could be invoked in the present context. Section 52(1) (e) is applicable “where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the Court to be expedient”. After a thorough discussion, DHCJ Paul Lam SC held that section 52(1)(e) does not exclude a constructive trustee. In particular, it is worth highlighting the following constituents of the learned Deputy Judge’s analysis at §§43–44:–

(a) The word “trustee” in s 52(1)(e) would extend to a constructive trustee unless the context otherwise requires.
(b) In considering whether the context requires the exclusion of constructive trustee, one must note that the statutory provision prescribes the mode of vesting in the following way ie “by way of mortgage or otherwise”. The phrase “or otherwise” is extremely broad. In general, it means “in any other way” (Packwood v Union–Castle Mail Steamship Co Ltd (1920) 20 TLR 59 at 60). This is precisely what the Chinese version (which is equally authentic) says i.e. “其他方式”. There is no reason why, in this context, the word “otherwise” should not be given its natural and ordinary meaning. In particular, it seems that “otherwise”, meaning “any other way”, is capable of including vesting by way of operation of law.

(c) In a constructive trust arising in this sort of case, the trust is imposed by the operation of law as a result of which the legal title of the victim’s money or its traceable proceeds is vested in the fraudster or the subsequent recipient but the victim retains or holds the equitable or beneficial interest therein.

(d) In respect of a constructive trust which is imposed by law, it is permissible to say that the legal title to the property is vested in the constructive trustee. The constructive trust comes into existence the moment the fraudster or the subsequent recipient receives the victim’s money or its traceable proceeds in their bank accounts by operation of law. When the Court grants a declaration in this respect upon the victim’s application for default judgment, it is merely affirming the legal position but is not creating any trust by such order.

Interestingly, DHCJ Paul Lam SC at §48 “decided to withdraw the reservation [he] expressed in International Automotive Components Group SRO. Under s.52(1), the Court may make an order vesting the trust properly directly in the beneficiary, which would have the effect of putting an end to the trust. In the present context, it would mean that, firstly, the Court is entitled to order that the right to claim the remaining balance in the bank account be vested in the victim, who is the equitable or beneficial owner of the money. Secondly, having regard to the wide discretion given to the Court under s.52(5), the Court may then direct the bank to release the balance to the victim immediately. In other words, the victim is enforcing the chose in action immediately once it is vested in it”.

In addition, the learned Deputy Judge noted that “Deputy High Court Judge Leung was plainly right in holding in SBM Bank (supra.), §19 that “[I]t would be for the plaintiff to establish that such current balances are indeed attributable to the plaintiff as the source of money over which it asserts a proprietary claim ...”.

Finally, DHCJ Paul Lam SC helpfully summarised his view on the proper procedure for applying for a vesting order, at §§52–56, which provides a very clear and useful roadmap going forward.

Postscript

The judgments cited above, particularly the illuminating analyses by Recorder Eugene Fung SC and DHCJ Paul Lam SC, merit close reading for any practitioner interested in this area. In the meantime, however, it appears that the debate remains somewhat unsettled.

From a broader perspective, a lot of parties have perceived ‘email fraud’ as a rather straightforward kind of case. That is probably right as far as the rather repetitive factual patterns are concerned. However, as demonstrated by the discussion referred to herein, complex legal questions can often arise which certainly warrant particular attention.

Michael Lok (who appeared for the Plaintiff in Halliburton BV and SBM Bank), Jasmine Cheung (who appeared for the Plaintiff in SBM Bank) and Euchine Ng (who appeared for the Plaintiff in 800 Columbia) co-authored this Case Report.
Real risk of dissipation and Mareva injunctions: Convoy Collateral Limited v. Cho Kwai Chee & Ors. [2020] HKCA 537

This Case Report was authored by José-Antonio Maurellet SC, John Hui and Howard Wong

1. In the context of applications for Mareva relief, it is well established that evidence of low commercial morality may in appropriate circumstances give rise to the inference of a real risk of dissipation of assets. However, it is trite that one should not draw such an inference too readily.

2. In Convoy Collateral Limited v. Cho Kwai Chee & Ors. [2020] HKCA 537 (3 July 2020), the Court of Appeal (Lam V.P. and Barma J.A.) had occasion to review the relevant authorities and has provided much needed clarity on this issue.

3. The Court of Appeal held that:

(1) The applicant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer (§35).

(2) On the onus borne by the applicant, many authorities had referred to the need for a solid evidential basis to establish a real risk of dissipation, the preferable description of the burden is of a “solid basis” for concluding that there is a real risk of dissipation (§37). A solid basis to support an inference of risk of dissipation is to be contrasted with unsupported or bare statements of fear which would carry little weight (§41).

(3) Since the assessment is in respect of the risk of dissipation as opposed to the fact of actual dissipation, the exercise necessarily involves an evaluative and predictive judgment. Thus, the evidential burden can be satisfied by drawing proper inferences from a holistic consideration of all the circumstantial materials that are indicative of risk. Such materials are not confined to acts of actual dissipation of assets (§32(a), §40).

(4) Evidence of dishonest and fraudulent conduct or other serious wrongdoings which form the basis of the claims, and which reflect adversely on the integrity of the defendant could point powerfully towards an inference of such risk (§53). In particular, where the dishonesty alleged is at the heart of the claim against the relevant defendant, the Court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets (§47).

(5) On the other hand, the Court must be vigilant in scrutinizing the allegations in a claim with care before drawing the inference of risk of dissipation (§43).

(6) In the present case, it was not disputed that a good arguable case on the pleaded claims had been demonstrated (§63). The underlying premise of the claims involved the commission of serious and sophisticated wrongdoings which involved
manipulation of the affairs of listed companies in a dishonest manner (§64).

(7) The aforesaid conduct was “a serious form of dishonest deception” as it allowed the perpetrator to evade one’s fiduciary obligations to listed companies and side-step compliance with the rules imposed by regulatory authorities designed for the protection of the general investing public. The Court should have no hesitation in finding a real risk of dissipation (§64).

(8) On the facts, there was ample evidence to support an inference that dissipation of assets was a real option on Roy Cho’s agenda in response to investigations and litigations against him (§58).

Takeaway points

4. The Court of Appeal’s decision makes clear that what is required from the applicant is a “solid basis” for inferring a real risk of dissipation. A solid basis is to be contrasted with unsupported or bare statements of fear which would carry little weight.

5. Further, it is equally clear that the Court must approach the evidence holistically, taking into account all the circumstances. Evidence of fraudulent conduct or lack of integrity can, in appropriate circumstances, amount to powerful indicators of a risk of dissipation, although the Court must scrutinise the evidence with care.

José-Antonio Maurellet SC, John Hui and Howard Wong acted for the Plaintiff in the Court of Appeal
A dollar for a dollar? The value of third party security in the bankruptcy context

This Case Report was authored by Michael Lok

In X v Y [2019] HKCFI 2880, Deputy High Court Judge José-Antonio Maurellet SC considered (albeit on an *obiter* basis) whether third party security could be taken into account as part of the Court’s discretionary exercise in deciding whether to set aside a statutory demand.”

The debtor applicant (“Debtor”) relied on certain shares charged by the Debtor's company (“Company”) in favour of the creditor respondent (“Creditor”) (“Charged Shares”) in respect of the same underlying indebtedness. The Debtor complained about the fact that the Charged Shares held by the Company were not taken into account in the present Statutory Demand (“SD”).

Simply put, it was thus contended on behalf of the Debtor that every dollar realised on the Charged Shares would result in an extra dollar available to the estate of the Debtor.

Hence, the Charged Shares should be taken into account in deciding whether the Debtor should be made bankrupt. The Court was thereby invited to set aside the SD having regard to the value of the Charged Shares.

The Debtor’s application proceeded on the basis of Rule 48(5)(c) (”the 5(c) Limb”) and Rule 48(5)(d) (“the 5(d) Limb”) of the Bankruptcy Rules (Cap. 6A), which provide as follows:-

“(5) The court may grant the application if—

(c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either rule 44(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the court is satisfied, on other grounds, that the demand ought to be set aside.”

**Rule 5(c) Limb**

It is well-established that “a petitioner is not to be regarded as a “secured creditor”, and the petitioning debt is not to be regarded as a “secured debt”, where the petitioner holds securities, whatever their form, furnished by third parties rather than the debtor himself”: *Re Mann, Kevin Patrick* (Unrep., HCB 8023/2013, 24 March 2015) at §16 per Ng J, citing *inter alia* *Re Kwok Chok Yee* [2000] 2 HKC 543 and *Cheng Wai Kei v Commerzbank Aktiengesellschaft* [2002] 2 HKC 340.

As seen in *Kwok Chok Yee* at §4, the above position is based on a construction of “secured creditor” under section 2 of the Bankruptcy Ordinance.

This is also consistent with the clear pronouncement of the law by Chu J (as her Ladyship then was) in *Cheng Wai Kei* at §§16–17 and the detailed analysis by Deputy High Court Judge S Kwan (as the learned Vice President then was) in *Lai Yuk Shau v Dao Heng Bank Ltd* [2001] 4 HKC 299 at §§3–6.

* By the time of the substantive hearing, however, the Charged Shares (as defined below) had been sold, therefore this point no longer strictly speaking arose for determination.

** The hearing took place on 31 October 2019, with the judgment delivered on the same day. However, the uploading and publication of the judgment was embargoed until further order. An anonymized version of the Judgment was published and uploaded on 14 July 2020.

*** English equivalent of the 5(c) Limb.
It is therefore clear that “the Debtor’s liability as guarantor is not affected by any third party security that the [Creditor] might have”: Re Kwok Chok Yee at §10 per Le Pichon J (as her Ladyship then was).

The above propositions were accepted by the learned Deputy Judge at §§8–9 of his judgment.

**Rule 5(d) Limb – The Orthodox View**

However, the learned Deputy Judge left open a further question viz. whether “the Debtor would [not] be able to avail himself of rule 48(5)(d)” (§10)?

As a matter of principle, the answer would seem to be ‘no’.

First, there must be some degree of similarity between the circumstances constituting those “other grounds” and the situations already contemplated under the other limbs of Rule 48(5).

In Re Wah Tat Foundation (Unrep., HCSD 5/2003, 7 May 2003) at §11, Deputy High Court Judge Poon (as the learned Chief Judge then was) cited the following remarks of Nicholls LJ (as he then was) in Re a Debtor [1999] 1 WLR 271:

“When therefore the rules provide for the court to have a residual discretion to set aside a statutory demand, the circumstances which normally will be required before a court can be satisfied the statutory demand ought to be set aside are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The court’s intervention is called for to prevent that injustice.”

At first instance, Warner J had held at 421F that:

“It seems to me, reading that provision as a whole, that the “other grounds” which can be invoked under sub-paragraph (d) must be of the same degree of substance as the grounds specified in sub-paragraphs (a), (b) and (c) and that it is not enough for a debtor, under this provision, merely to show that a statutory demand served on him is perplexing.” (emphasis added)

Second, in White v Davenham Trust [2011] Bus LR 1443 at §§40–41, Lloyd LJ (as he then was) explained why it is not unjust to allow a creditor to proceed against a debtor who has given no security of his own in respect of the debt. The rationale lies in the fact that the creditor (holding security belonging to a third party) is entitled to prove 100% of its debt in the debtor’s estate:

“...As against a given debtor, if a creditor has security over that debtor’s assets which is more than sufficient, there is no reason to allow the creditor to pursue bankruptcy proceedings because the existence of the security means that the creditor has no interest in that debtor’s estate. He would not be able to prove his debt, and there is no reason for him to be able to invoke the collective realisation of assets which is the point of insolvency proceedings, unless he is willing to give up his security. By virtue of section 267 of the 1986 Act he is not even entitled to present a bankruptcy petition. It follows that there is every reason why he should not be entitled to take the preliminary step of serving a statutory demand. If, however, the security given to the creditor is over the assets of a different person, then the existence of that security does not constitute any reason why the particular creditor should not proceed against this other debtor, who has given no security over his assets, for an undoubted debt by way of a personal claim or by way of insolvency proceedings. There is no bar to the creditor presenting a bankruptcy petition in relation to such a debtor and there is therefore no reason why the creditor should not serve a statutory demand as a preliminary to the presentation of a petition if the demand is not satisfied.

...Since the fully secured creditor is not entitled to present a bankruptcy petition against a debtor over whose assets he has his full security, it is not merely because of injustice that he should not be able to serve a statutory demand, but because there is no justification at all for allowing such a creditor to take a preliminary step towards insolvency proceedings which the creditor would not be allowed to invoke. If it is to be seen as an example of injustice, the creditors’ lack of any right to present a bankruptcy
petition if the statutory demand is not complied with is what makes it unjust.” (emphasis added)

It thus follows that one should construe a creditor’s right to serve a statutory demand in a way which is consistent with the same creditor’s right to present a bankruptcy petition. At §64, it was concluded that “[F]or those reasons in my judgment the existence of third party security, which on a statutory demand against the debtor who gave the security would bring into application rule 6.5(4)(c)***, is by itself entirely irrelevant under rule 6.5(4)(d)**** to a statutory demand served on a separate debtor even if liable as guarantor for the same debt but who has given no security himself...”.

In the premises, the orthodox view would seem to be that third party security should not at least in the ordinary course of things make any difference to the creditor’s entitlement to bring bankruptcy proceedings against the debtor.

Indeed, the learned Deputy Judge also pertinently observed at §45 of his Judgment that “the court should be careful in not effectively permitting an intrusion on other rules; for example, rule 5(c), whereby a Debtor would be able to rely on third party security as if he had provided it himself or herself. That of course would be incorrect”.

Rule 5(d) Limb – The Extreme Case

Having said the above, one is mindful that, as reiterated in the citation by his Lordship in Re Wah Tat Foundation, the residual discretion under the Rule 5(d) Limb enables the Court to set aside a statutory demand where there are “circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case” and the “court’s intervention is called for to prevent that injustice”.

Bearing the above in mind, as well as having regard to the harsh consequences of a bankruptcy order, it was not surprising for DHCJ Maurellet SC to hold at §46 of his judgment that “in an extreme case where the security, albeit one provided by a third party, would be of such an amount and of such liquidity (say cash or cash equivalent) that it could be said that no reasonable creditor would have proceeded to bankrupt the Debtor rather than realise the security, then perhaps the residual discretion could be relied upon” (§46).

The learned Deputy Judge went on to explain (at §47) that “this should not be considered as an intrusion in the rule in China and South Sea Bank v Tan which provides that the lender clearly has the legal right to sue the guarantor or the borrower as he sees fit. But rather this would be recognising that as the bankruptcy regime engages class remedies, as well as the more draconian consequences which flow from the bankruptcy, the court is entitled to consider the practical realities in any given case.”

Postscript

What is an “extreme case” potentially leads to further debate. However, the Court is of course not unfamiliar with the proper exercise of its discretion where it is so warranted by exceptional circumstances present in any given case. The formulation by the learned Deputy Judge therefore should not pose any real difficulty in its application. In the meantime, such an approach reflects the practical reality of the matter, which is perhaps of particular significance where one is dealing with the potential bankruptcy of a debtor.

Michael Lok appeared for the Creditor in X v Y and authored this Case Report.
To vest or not to vest – Or a new way out?

This Case Report was authored by Michael Lok, Jasmine Cheung and Euchine Ng

In our article which you will find on pages 50–51 of this edition, we referred to recent cases dealing with the Court’s making of a ‘vesting order’ under section 52 of the Trustee Ordinance (Cap. 29) (“TO”). A number of judgments have since emerged, including the decision of Deputy High Court Judge Douglas Lam SC in TOKIĆ, D.O.O. v Hongkong Shui Fat Trading Limited [2020] HKCFI 1822 (4 August 2020).

To recap, vesting orders have been granted in cases involving ‘email fraud’ or ‘cyber fraud’ such that the relevant funds will be transferred directly from the banks (with which the recipient accounts are held) to the victim of the fraud. This is generally considered to be a more expedient alternative to the garnishee procedure.

In our article, we discussed a divergence in approach, as seen in two recent cases, namely 800 Columbia Project Company LLC v. Chengfang Trade Ltd and others [2020] HKCFI 1293 (23 January 2020) and Wismettac Asian Foods, Inc. v. United Top Properties Ltd and others [2020] HKCFI 1504 (10 July 2020).

Since the above decisions, in Jensonn Power Systems Pte Ltd v. Lishan Zhi Trading Co Ltd [2020] HKDC 629 (30 July 2020) and Concrete Waterproofing Manufacturing Pty Ltd v. Changxuan Co., Ltd [2020] HKDC 547 (31 July 2020), His Honour Judge Leung and Her Honour Judge Phoebe Man, having regard to the above divergence, likewise came to the view that ‘vesting orders’ should be granted in a similar context, following the decision of DHCJ Paul Lam SC in Wismettac.

Most recently, in TOKIĆ, D.O.O., DHCJ Douglas Lam SC again had the opportunity to consider the rather interesting debate, and ultimately preferred the reasoning of Recorder Eugene Fung SC in Boo Columbia. The learned Deputy Judge considered leading authorities on the nature of a ‘constructive trust’ imposed in cases of fraudulent receipt of proceeds, before concluding that “the defendants in the present case (as were those in Wismettac) were no more than recipients of proceeds of fraud and not “true” trustees, constructive or otherwise...they are merely required by equity to account as if they were trustees or fiduciaries, although they are not. It is purely remedial. Like the dishonest assister or knowing recipient of trust assets in...”
breach of trust, their sole obligation of any practical significance is to restore the assets immediately to the plaintiff.”

Accordingly, the learned Deputy Judge came to the view that, on its proper construction, the use of the phrase “or otherwise” in section 52(1)(e), despite its wide import, cannot cover persons who are not “true trustees” but have simply been made subject to a Court declaration to account for certain stock or choses in action as if he were a trustee. It follows therefore that the TO has no application to situations like the present, and therefore the Court cannot make the vesting order sought.

Having said the above, the learned Deputy Judge considered that in addition to garnishee proceedings, an available alternative remedy could be found in section 25A of the High Court Ordinance (Cap. 4), which provides at sub-section (1) a right for the Court to order the execution of a conveyance, contract or other document, where the person to whom the Court directs to execute the same has neglected or refused to comply with the order or cannot after reasonable inquiry be found.

In the premises, it was ordered that the relevant defendants do “execute such documents as may reasonably be required to instruct the banks in which the relevant bank accounts are held to transfer to the plaintiff the sums which I have declared to be held by them as constructive trustees, failing which the plaintiff be at liberty to apply for an order under section 25A of the HCO.”

Postscript – a new way out?

The debate remains an intense one, and the authors herein expect there to be more authorities on this topic in the months to come. As DHCJ Douglas Lam SC observes, this may well be an issue which would benefit from appellate guidance.

However, what is particularly noteworthy about the recent decision of DHCJ Douglas Lam SC is the (with respect, innovative) suggestion of an additional alternative remedy, i.e. the use of section 25A of the High Court Ordinance (Cap. 4). This could potentially provide a satisfactory answer to victims of fraud who do not otherwise wish to go through the costs and time involved in garnishee proceedings. It remains to be seen whether this will in itself open up yet further debate: watch this space.

Michael Lok, Jasmine Cheung and Euchine Ng co-authored this Case Report.
Proper response to a statutory demand; timely reminders for practitioners: *Re Madison Lab Limited* [2020] HKCFI 1409

In his judgment dated 12 March 2020 [2020] HKCFI 382, Deputy High Court Judge Abraham Chan, SC, granted a final injunction to restrain the creditors from presenting a winding-up petition based on the debts which were found, on the facts, to be *bona fide* disputed. Costs were ordered to be borne by the creditors on a *nisi* basis. The Company then applied to have their costs assessed on an *indemnity* basis.

By a decision dated 3 July 2020 [2020] HKCFI 1409, the learned Deputy Judge ruled in favour of the Company, and ordered that costs should be borne by the creditors on an indemnity basis.

Several useful lessons can be derived from the latter decision:

1) Do bear in mind that a winding-up procedure, *per se*, entails a "high-risk strategy". In particular, winding-up petitions, by the very fact of their presentation, can cause considerable disruption and potentially irreparable damage to a company especially one with ongoing business.

2) It follows from the above that creditors – and those advising them – have an onus of care to determine whether they can fairly say that on the information available to them any asserted defence is fairly obviously insubstantial and unmeritorious. If the answer is ‘no’, then they should not invoke the winding-up procedure. See *Re Alpha Building Construction Ltd* (20 May 2015) *per* Harris J.

3) At the same time, a company faced with a statutory demand cannot merely sit on their hands and ignore it. It should set out its grounds for disputing the subject indebtedness, so as to enable the creditors to form a proper view as to the merits of the defences. As an illustration, in *Re Madison Lab*, the learned Deputy Judge took into account the various *pre-action correspondence* in which the Company set out its disputes to the indebtedness as well as specifically urging the creditors not to invoke the winding-up procedure and highlighting the possibility of indemnity costs.

4) If the creditors fail to provide any form of assurance, e.g. an effective undertaking not to present the winding-up petition based on the subject statutory demand, then it may be open to the company to take out an urgent injunction application.

5) However, whether urgent relief is reasonable and justified depends on the overall circumstances of the case, including the attitude of the parties. Hence, it is important that the company must, as was the case in *Re Madison Lab*, act "reasonably and conscientiously" so as to ensure that it would not become deprived of any part of its costs in pursuing injunctive relief.

Michael Lok and Jasmine Cheung acted for the Company and authored this Case Report.
In *Daesung Industrial Gases Co Ltd v Praxair (China) Investment Co Ltd* (2020) Shanghai 01 Special Civil Procedure No. 83, the Shanghai No.1 Intermediate People’s Court confirmed the validity of an arbitration clause which provided for Singapore International Arbitration Centre (SIAC) arbitration in Shanghai. This is the first occasion where a PRC Court expressly confirmed that a non-PRC arbitration institution may conduct an arbitration hearing in the PRC, and that this has nothing to do with whether the PRC arbitration market is open to non-PRC arbitration institutions or not. In addition, this case further affirmed the position that the PRC Court's power to review a non-PRC arbitral tribunal’s decision on the validity of the arbitration agreement was not confined to the enforcement stage.

**Background**

The dispute arose in relation to a Takeout Agreement and its addendum ("Agreement") between *Daesung Industrial Gases Co Ltd v Praxair (China)* Investment Co Ltd, a Korean company and its affiliate in Guangzhou ("Claimants"), and Praxair (China) Investment Co Ltd, a PRC company associated with Praxair Inc. in the USA ("Respondent").

The dispute resolution provision of the Agreement reads as follows:

**ARTICLE 14: DISPUTES**

14.1 This Agreement shall be governed by the laws of the People’s Republic of China.

14.2 With respect to any and all disputes arising out of or relating to this Agreement, the [p]arties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both [p]arties.” (emphasis added)

In 2016, the Claimants initiated arbitration proceedings with SIAC. The Respondent objected to the tribunal’s jurisdiction on the basis that, under PRC law, a non-PRC arbitration institution is prohibited from running an arbitration in PRC.

The arbitral tribunal arrived at a split decision on the question of its jurisdiction, with the majority holding that the tribunal had jurisdiction. The majority considered that it would have made no commercial or logical sense for parties to have intentionally selected a law to govern the arbitration agreement which would then invalidate it. Therefore, it took the view that Shanghai was not the seat, but merely the venue of the arbitration.

The dissenting arbitrator took the view that Shanghai was the seat of the arbitration, and thus PRC law was the law of the seat as well as the applicable law of the arbitration agreement. As PRC law did not allow the dispute to be referred to arbitration, the tribunal lacked jurisdiction to hear the dispute.

**The Singapore Court's decision**

The Respondent then applied to the High Court of
Singapore seeking a declaration that the tribunal lacked jurisdiction to hear the dispute. The Judge accepted that the choice of PRC law would serve as the starting point to determine the parties' implied choice of the applicable law. But he considered that Singapore law, as the law of the seat, would displace that implied choice, because it was likely that the parties' arbitration agreement would be invalid if PRC law were the applicable law. On that basis, the Judge dismissed the Respondent's jurisdictional challenge.

The Respondent appealed to the Court of Appeal of Singapore, which reversed the lower court’s decision on the applicable law of the arbitration agreement. The Court of Appeal held that the natural meaning of the phrase "arbitration in Shanghai" was that Shanghai was the seat of the arbitration. Where parties had specified only one geographical location in an arbitration agreement, that ought to be construed as a reference to the parties’ choice of the seat. It followed that the parties' implied choice of applicable law of the arbitration agreement was PRC law. The appeal was therefore allowed to that limited extent, but the Court of Appeal did not express any concluded view as to whether the tribunal did or did not have jurisdiction.

**The Shanghai Court's decision**

Shortly after the Singapore Court of Appeal’s decision was rendered, the Claimants requested the Shanghai No.1 Intermediate People's Court to confirm the validity of the arbitration agreement in question.

The Court in Shanghai found that the arbitration agreement contained all the elements as stated in Article 16 of the PRC Arbitration Law, namely, (1) an expression of the parties' intention to submit the matter to arbitration; (2) the scope of matters being referred to arbitration; and (3) a designated arbitration commission. Therefore, the arbitration agreement was valid.

As to the Respondent's argument that a non-PRC institution is prohibited from conducting arbitration proceedings in PRC, the Court in Shanghai determined that:
First, arbitration is a dispute resolution mechanism which is based on the parties’ consent. The question of whether the PRC arbitration market was 'open' or not was irrelevant. While the State had made reservation to ad hoc arbitrations under the New York Convention, non-Chinese arbitration institutions do not fall within the scope of such reservation.

Second, the Supreme People’s Court (“SPC”) had issued a reply letter in *Anhui Province Long Li De Packaging and Printing Co Ltd v BP Agnati S.R.L.* No. 13 [2013] of the Civil Division IV of the SPC on 25 March 2013 confirming that parties to a contract involving foreign elements may designate a non-PRC arbitration institution to resolve disputes there under by arbitration domestically. The said reply letter is a form of judicial interpretation which is legally binding.

Third, there is no statutory instrument or law which expressly prohibited non-PRC arbitration institutions from conducting arbitration proceedings in the PRC. Such prohibition would go against the developing trend in international commercial arbitration.

Fourth, at the time of the promulgation of the PRC Arbitration Law, the legislators seemingly lacked an international perspective. As a result, the legislation at the time was not fully in line with international practice. The proper interpretation of “arbitration institution” under the PRC Arbitration Law is a matter that needs to be resolved by legislation in the future. However, in the absence of express provisions in the legislation, the Court saw fit to fill in the gap by way of judicial interpretation.

**Key Takeaways**

Daesung Industrial is a milestone decision in many ways. It is the first PRC Court decision which expressly confirms that a non-PRC arbitration institution may conduct an arbitration hearing in the PRC. It is also the first decision which directly addresses the ‘silence’ or perhaps ambiguity in the PRC Arbitration Law over the status of offshore arbitration institutions. This will certainly "open the door" for non-PRC institutions to conduct arbitrations in PRC. Commercial parties who are used to having overseas institutions administer their cases can now choose PRC cities as their seat of arbitration with a greater degree of certainty over its status and effectiveness.

The decision also demonstrates the commitment of the PRC Courts in further aligning its arbitration practices with international standards.

It is thus expected that the PRC Courts will continue to adopt a "pro-arbitration" policy, and that international arbitration practitioners will have a greater role to play in the development of arbitration practice there in.

What is also significant is that the Daesung Industrial was decided before the end of the arbitral proceedings. This further affirms the position that the PRC Court’s power to review a non-PRC arbitral tribunal’s decision on the validity of the arbitration agreement is not confined to the enforcement stage.

This Case Report was authored by José-Antonio Maurellet SC and Ellen Pang.
Bad faith in trade mark opposition ... ad infinitum?

This Case Report was authored by CW Ling

Bad faith as a ground of refusal

In Hong Kong, it is almost routine for opponents in trade mark opposition cases to accuse the applicant of bad faith. Such allegations are sometimes based on nothing more than a perceived similarity between an earlier mark and the sign in question. A recent decision of the Trade Marks Registry, however, underlines the importance of discipline and fairness in this area.

The Trade Marks Ordinance, Cap 559, came into force in 2003. Following the UK legislation (Trade Marks Act 1994), it introduced the concept of bad faith on the part of the applicant as an absolute ground of refusal (section 11(5)(b)). The term “bad faith” is not defined in the Ordinance. According to the case law, it includes dishonesty, and also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined. The subjective element of the test means that the tribunal must ascertain what the defendant knew about the transaction or other matters in question. It must then be decided whether in the light of that knowledge, the applicant’s conduct is dishonest judged by ordinary standards of honest people, the applicant’s own standards of honesty being irrelevant to the determination of the objective element.

See 深圳市德力康電子科技有限公司 v LG Corporation & Anor, HCMP 881/2013, 26 March 2014.

The above interpretation of the expression stems largely from the definition adopted by the courts for “dishonesty” in other areas of the law, such as the criminal law. While judicial interpretation has evolved (and is continuing to evolve) over the last ten or twenty years, a constant theme is that a charge of “bad faith” or “dishonesty” is one of the most serious and damning allegations in law. It is therefore not surprising that strict rules of pleading and evidence have developed in relation to the making and proof of such allegations in civil courts of law.

How “bad faith” is pleaded: theory and practice

On the other hand, undeniably, the Trade Marks Registry is not a court of law. Its procedure is governed by the subsidiary legislation, in particular, the Trade Marks Rules, Cap 559A. Obviously in proceedings before the Registry, the Rules of the High Court have no direct application. The Trade Marks Rules however do not expressly govern how an allegation of bad faith should be pleaded or proved. Those Rules do provide for the filing of mandatory documents such as a notice (grounds) of opposition and a counter-statement. In practice those documents function as pleadings in Registry proceedings. Nevertheless, there is no procedure corresponding to requests for further and better particulars or striking out obviously unsustainable averments such as that available in the Court of First Instance. Furthermore, unlike in court proceedings, cross-examination is an exception rather than the norm in contested Registry proceedings.

As is commonly observed, this state of affairs has sadly led to a relatively lax and undisciplined attitude
towards pleadings in Registry proceedings. Another reason for this might be the fact that the time for filing a notice of opposition is fairly limited (three months after publication), whereas the evidence is filed by the parties over a much longer period of time, typically the subsequent 21 months. In most cases, trade mark agents are not able or ready to craft a well-considered or detailed notice of opposition (or counter-statement) before they possess all the evidence. This has led to the common practice mentioned at the outset, namely, the widespread use of more or less a boiler-plate pleading when the time comes to file a notice of opposition. Among other things, the boiler-plate almost always includes an allegation of bad faith, often without particulars or any meaningful attempt at elaboration.

Such laxity may not be a big problem when the tribunal is faced with run-of-the-mill objections such as risk of confusion with an earlier mark, registered or unregistered, provided that the prior mark (and the relevant goods and services) is identified with accuracy. However when one is dealing with an accusation of bad faith, the respondent (i.e. applicant) is clearly entitled to know the charge he has to meet, and the precise factual basis for asserting such a sinister state of mind. Such a fundamental requirement or safeguard of procedural fairness should apply, regardless of whether one is in a court of law or other legal tribunal.

The case of Infinitus ™

Coming to the decision under discussion, at the hearing of the opposition, counsel for the opponent invoked a loosely pleaded allegation of bad faith. He submitted, first of all, that because the opponent had an earlier mark which bore some resemblance with the mark in issue, there must have been an attempt by the applicant to confuse or mislead the public. He further argued that the Chairman of the applicant was a businessman in Malaysia, where the opponent was also active. Finally, he urged that the applicant had intended to block the opponent from marketing a new line of product or service in Hong Kong. None of these arguments was spelt out in the notice of opposition.

As the hearing officer (Ms Winnie WH Ng) observed, “An allegation of bad faith is a serious allegation which must be distinctly alleged and which should not be made unless it can be properly pleaded.” Furthermore, she rightly held that such an allegation must be “distinctly proved and cogent evidence is required”. At the invitation of the applicant (represented by DVC's CW Ling), she declined to entertain the three arguments raised in the opponent’s submission. Consequently she dismissed the objection of bad faith entirely.

Key takeaways

As the Registrar correctly reminded us, an allegation of bad faith should never be lightly made. Practitioners should think twice before throwing in such a plea as a matter of course, even under the pressure of time. Even if this had to be done for whatever reason, there would come a time when the opponent or its adviser should pause and review the allegation in light of all the evidence filed, and critically assess whether it could properly be maintained. They should also consider, at the earliest available opportunity, whether any particulars should be given or supplemented. As we have seen, a failure to heed this fundamental advice may lead to the objection being thrown out before it is even entertained by the tribunal. Such an omission would also substantially increase the time and costs of opposition proceedings.
1. In *Essilor Manufacturing (Thailand) Co., Ltd v. Wong Kam Wai & Ors* [2020] HKCA 351; (Unreported, CACV 71/2020, 17 April 2020), the Court of Appeal considered the proper approach to construing injunction orders. This case is a useful reminder that it is always important to carefully read the specific wording used in a court order, and that one should not lightly make assumptions about an order’s precise effect.

**Factual context**

2. In *Essilor*, the plaintiff is a Thai manufacturer of spectacle lenses which fell victim to a fraudulent scheme perpetrated by one of its employees. As a result of the fraud, a total sum of approximately US$39.3 million was transferred without authorization from its bank account to unrelated third parties.

3. On 24 January 2020, the plaintiff made an *ex parte* injunction application before Mrs. Justice Campbell-Moffat (the “*Ex Parte Judge*”) and obtained proprietary and Mareva injunctions against all 45 defendants (the “*Injunction Orders*”).

4. Each of the Injunction Orders contained a provision regarding its duration taken from the standard form in Practice Direction 11.2:

   “This Order will remain in force up to and including 7 February 2020 (“the return date”), unless before then it is varied or discharged by a further order of the court”.

5. Each of the Injunction Orders also contained a number of usual undertakings given by the plaintiff, including the one that it would as soon as practicable serve on each defendant a summons to be heard on the return date (the “*Undertakings*”).

**General adjourned period**

6. Due to the general adjourned period (“*GAP*”), from 29 January 2020 onwards, all court hearings were adjourned and court registries were also closed. On 1 February 2020, the Judiciary issued an announcement stating that the courts would handle “urgent and essential” applications during GAP in accordance with the established mechanisms, such as the Duty Judge system.

**Failure to take out *inter partes* summons**

7. Despite the Undertakings, the plaintiff did not take out an *inter partes* summons to be heard on 7 February 2020, the return date as stated in the Injunction Orders. Instead, the plaintiff proceeded on the assumption that the Injunction Orders would remain in place until the actual return date hearing, and that the plaintiff should wait until the reopening of the Court Registry to issue an *inter partes* summons for securing such a hearing.

8. Between 6 and 11 March 2020, the plaintiff’s solicitors made enquiries with the clerk to Ng J, the Summons Judge designated for 7 February 2020. By a letter of 13 March 2020, Ng J pointed out that if the
plaintiff wished to continue the Injunction Orders, it was their duty to honour the Undertakings, including the issue of a summons in the usual way and to re-fix the hearing date of the summons.

9. Acting on Ng J’s indication, the plaintiff’s solicitors issued a summons on 13 March 2020 (the “Summons”) seeking, amongst others, an order that the Injunction Orders be continued until trial or further order. The Summons did not ask for a fresh injunction.

The decision of the Judge

10. The Summons came before DHCJ MK Liu (the “Judge”) on 20 March 2020. The Judge refused to continue the Injunction Orders because they had “expired immediately after 7 February 2020” and therefore “there is nothing which can be continued now”. He also refused to grant any new injunctions on the same terms as the Injunction Orders because (i) the plaintiff did not apply for any new injunction in the Summons but only sought to continue the Injunction Orders; and (ii) there was neither urgency (since the Injunction Orders had already lapsed for 1.5 months) nor secrecy (since all the defendants had already been notified of the action) to justify granting any new injunction on an ex parte basis.

The decision of the Court of Appeal

11. The plaintiff made an urgent appeal against the decision.

12. On the construction of the Injunction Orders, the plaintiff submitted that they did not expire on 7 February 2020 but continued until 20 March 2020. On the plaintiff’s approach/construction, the starting point in construing a court order is the context and purpose, rather than the natural and ordinary meaning of the words used. Reading the Injunction Orders in context, the plaintiff contended that in granting the Orders, the Ex Parte Judge presumed and intended that the matter would come back for a return date and the Injunction Orders should continue in the meantime. The Ex Parte Judge could not possibly have meant that the Injunction Orders should lapse on 7 February 2020 regardless of whether any return date hearing took place.

13. The Court of Appeal rejected these arguments. It held that in interpreting a court order, the starting point is the natural and ordinary meaning of the words in light of the syntax, context and background in which they were used. Further, because of the penal consequences of breaching a freezing order and the need for the defendant to know where he stands, such orders should be clear and unequivocal, and should be
strictly construed. Having regard to the plain wording of the Injunction Orders and the serious consequences of breaching those Orders, the Court of Appeal held that it was clear beyond doubt that the Injunction Orders lapsed on 7 February 2020. The Court also noted that the plaintiff’s construction would lead to absurdity – it would entitle the plaintiff to unilaterally extend the duration of the Injunction Orders by refusing to take out an inter partes summons for a return date hearing.

14. The Court of Appeal also considered the plaintiff’s argument that the Injunction Orders were automatically extended due to the common law rule in *Pritam Kaur v. S Russell & Sons Ltd* [1973] 1 QB 336. According to this rule, when a time is prescribed for doing any act, and that act can only be done if the court office is open, then, if it turns out that the deadline for doing the act in question is a day on which the court office is not open, the time shall be extended until the next day on which the court office is open. The Court of Appeal held that the rule in *Pritam* did not assist the plaintiff. Central to the rule is the notion of “impossibility” – for the rule to apply, it must be impossible for the relevant party to carry out the required act on the prescribed deadline. Here, it was not impossible for the plaintiff to take out an inter partes summons returnable on 7 February 2020, as such a summons would clearly fall within the scope of urgent business which could be conducted during GAP. It was also not impossible for the plaintiff to seek a continuation of the Injunction Orders before 7 February 2020 through the Duty Judge system. The only logical conclusion, therefore, was that the Injunction Orders lapsed on 7 February 2020.

15. Nonetheless, the Court of Appeal held that the Judge had erred in failing to properly consider the plaintiff’s application for a new injunction on the merits. In particular, it was wrong for the Judge to take the view that the plaintiff was only seeking to “continue” the Injunction Orders rather than the grant of new injunctions. In the view of the Court of Appeal, the Summons must be approached by looking at its substance and not its form. As a matter of substance, it was plain that the plaintiff was also seeking injunctions on the same terms as the Injunction Orders from 20 March 2020 until trial or further order.

**Conclusion**

The Court of Appeal’s decision in *Essilor* illustrates the importance of construing a court order, especially ones which have potential penal consequences, strictly, and to err on the side of caution in the event of any ambiguity. Just because a particular construction is thought to be reasonable or consistent with practice does not mean that it is the correct interpretation of the order – given the draconian consequences the Court would generally construe any ambiguities in favour of the defendant. If in doubt, further directions should be sought from the Court, if necessary, on an urgent basis.

Alan Kwong, Alexander Tang and Howard Wong represented the 10th Defendant in this case.
Latest from the Competition Tribunal: Adoption of the Carecraft Procedure

This Case Report was authored by Michael Lok and Sharon Yuen

The Hong Kong Competition Tribunal ("Tribunal") was set up under the Competition Ordinance (Cap. 619) ("Ordinance").

In *Competition Commission v Kam Kwong Engineering Company Ltd and Others* [2020] HKCT 3, the Honourable Mr Justice Harris (sitting as a Member of the Tribunal) dealt with the first application in the Tribunal for the disposal of proceedings against respondents by consent.

Relevantly for present purposes, and for the purposes of ‘setting the scene’:-

Rule 39(1) of the Competition Tribunal Rules (Cap. 619D) provides that “[I]f the parties have agreed on the terms of an order to be made by the Tribunal in any proceedings under Part 3 or 4, the agreed terms, signed by or on behalf of the parties, must be sent to the Tribunal for approval.”

Rule 39(4), subject to this rule, adopts Order 42 of the Rules of the High Court (Cap. 4A), but expressly excluding O 42 rule 5A (‘consent judgment and orders’); §72 of Practice Direction No 1 of the Tribunal, titled ‘Orders by consent’, provides that, “[O]ne of the underlying objectives of the procedures of the Tribunal is to facilitate the settlement of disputes. In particular, in respect of proceedings under Parts 3 and 4 of the Rules, rule 39 of the Rules provides power for the Tribunal to make orders by consent, including any findings, determinations or decisions and orders that are within the power of the Tribunal. Where the Ordinance provides the Tribunal may, upon being satisfied of certain facts, exercise a power, such as the imposition of a pecuniary penalty under s. 93 or other orders under s. 94, an application for such an order by consent should be accompanied by a statement of agreed facts on the basis of which the Tribunal is asked to make the order in question. In respect of proceedings under Part 5 (follow-on actions) and Part 6 (transferred proceedings) of the Rules, RHC Order 42 including rule 5A applies.” (emphasis added).
Thus, in the instant case, an interesting question arose as to the proper procedure to be adopted where parties wished to have the matter disposed of by consent.

At §§9-19 of the Reasons for Decision, Harris J confirms that the procedure derived from the seminal decision of *Re Carecraft Construction Co Ltd* [1994] 1 WLR 172 ought to be adopted in the Tribunal. What is generally referred to as the Carecraft procedure has been routinely applied in Hong Kong, in the context of disqualification proceedings under the Companies Ordinance (Cap. 622) and the Securities and Futures Ordinance (Cap. 576). For recent examples, see for instance *SFC v Chin Jong Hwa* [2019] HKCFI 2735; *SFC v Wong Kam Leong* [2020] HKCFI 606.

The nature of the Carecraft procedure is succinctly explained by Harris J at §11 of the Reasons for Decision. In short, the procedure allows the limiting of facts (by way of a statement of agreed facts) on which the Judge will be asked to base his judgment as to the appropriate order to be made. The Judge will, on that basis, decide whether the relevant disqualification sought should be made, and if so for what period.

In the words of the learned Judge, the Carecraft procedure in practice “enables the expeditious disposal of proceedings and avoids the substantial costs that would otherwise be incurred if there is a trial” (§11).

Against the above backdrop, the learned Judge (perhaps unsurprisingly) concluded at §13 that “the justifications for the adoption of the Carecraft procedure in the context of director’s disqualification apply equally in proceedings under the Ordinance”.

At §17, the learned Judge went on to hold that “in my view the benefits of providing a mechanism, which facilitates agreements between the Commission and respondents, who concede that they have contravened the Ordinance are overwhelming. The authorities to which I have referred demonstrate that this is the view of courts in other jurisdictions with substantive and procedural legal systems similar to Hong Kong, including specifically in the area of competition law. The Carecraft procedure provides a mechanism developed in comparable contexts to competition law. In my view it provides a readymade blueprint for disposing of proceedings under the Ordinance, which I agree with the parties can be adopted to dispose of the proceedings against the 1st, 2nd and 4th Respondents.” (emphasis added)

**Postscript**

The decision of Harris J is certainly to be welcomed. The learned Judge has emphasized the desirability of an early settlement, which is underscored by the legislative intent behind the Ordinance as well as experiences shared by other jurisdictions. In the meantime, the availability of a relatively expeditious and cost-effective “readymade” procedure certainly provides added comfort to litigants who simply wish to bring an end to the proceedings, in full cooperation with the Commission. One expects this procedure to be frequently resorted to, just as it has been in the disqualification context as cited above.

Michael Lok and Sharon Yuen acted for the 2nd Respondent and co-authored this Case Report.
DVC welcomes new tenants

DVC is pleased to announce that for the 7th consecutive year, all of DVC’s 9 month pupils have been offered tenancy. Introducing DVC’s new tenants:

**Avery Chan**
Avery is developing a broad civil practice with an emphasis on commercial, company, and probate cases. He has appeared as trial and appellate counsel in practice areas including probate, commercial, company, construction, and property disputes both as sole advocate and led junior. Avery also has experience in a multitude of interlocutory applications, including summary judgment, specific discovery, striking out, and expert evidence.

**Brian Fan**
Brian graduated first in class from the University of Hong Kong with an LLB, and further obtained his BCL with distinctions in all subjects from the University of Oxford as a Jockey Club Scholar. He is also a Bar Scholar and the recipient of the inaugural John Griffiths QC Prize.

**Cyrus Chua**
Cyrus graduated with a Distinction in the BCL from Oxford, where he won the Vinerian Scholarship Proxime Accessit and university prizes in Conflict of Laws, Competition Law, and Legal Concepts of Financial Law. He obtained his BA in Law at Cambridge, where he took a Triple First and was ranked top of his class in Land Law, Tort Law, Conflict of Laws, and European Union Law.

**Jonathan Lee**
Jonathan graduated from the University of Cambridge with a BA in Law with Double First Class Honours. He went on to obtain the BCL with Distinction from the University of Oxford. He was also awarded the Bar Scholarship in 2019.

*Joining in 2021 (Called to the Bar in 2016)*
DVC’s Head awarded the SBS

DVC is delighted to announce that Winnie Tam SBS, SC, JP has been awarded the Silver Bauhinia Star (SBS), an honour that is awarded to people who have taken a leading part in public affairs or voluntary work over a long period.

Specific mention was made in relation to her dedicated public service over the years, in particular her significant contribution to the development of the communications sector, enhancing Hong Kong’s position as a telecommunications hub in the region, and steering the work of the Communications Authority. Winnie has also rendered wise counsel in promoting Hong Kong’s tourism industry and arts development through her participation in the Hong Kong Tourism Board and the Board of the West Kowloon Cultural District Authority.

Click here for the full Honours List

Who is the new Chairman of the Society of Construction Law Hong Kong?

DVC’s Calvin Cheuk has been appointed the Chairman of the Society of Construction Law Hong Kong, which has about 250 members from all sectors of the construction industry and aims to promote the education, study and research in the field of construction law.
DVC’s Head, Winnie Tam SBS, SC, JP Co-Chairs the Women in Arbitration Committee, one of two newly minted Committees established under the auspices of the HKIAC’s Women in Arbitration initiative (WIA)

The HKIAC’s Women in Arbitration initiative (WIA) has established the first WIA Committee and WIA Executive Committee.

Winnie Tam SBS, SC, JP will co-chair the WIA Committee for a period of 2 years (from 2020–2022) and DVC’s Connie Lee has been appointed as a member of the Executive Committee also for a period of 2 years.

In line with DVC’s growing commitment to strengthening gender equality and Diversity & Inclusion, the WIA Committee will be responsible for shaping the policies and activities of the WIA for the purpose of promoting gender diversity in arbitration and related areas in China. The aim of WIA is to provide a forum to consider and discuss current topics, grow networks and business relationships, and develop the next generation of leading female practitioners.

The WIA Committee members are based in a variety of locations to extend the reach of WIA’s work.

The WIA Executive Committee will work with the WIA Committee Members to implement policies and activities.

For more about the WIA’s origins and a full list of the incoming WIA Committee members for the 2020 – 2022 term, click here.
3 of DVC’s members were singled out by Lawdragon 500. Find out who featured in this year’s Guide...

DVC’s William Wong SC, JP, José-Antonio Maurellet SC and Look-Chan Ho were identified as legal experts in the field of Leading Global Restructuring & Insolvency Lawyers in the Lawdragon 500 Guide for 2020.

Des Voeux Chambers was also the only Hong Kong set to be accredited in the Guide.
DVC’s William Wong SC honoured as a Distinguished Friend of Oxford

Recognising alumni and friends of Oxford who have gone above and beyond in terms of support, DVC’s William Wong SC, JP was honoured on 21st September as a Distinguished Friend of Oxford University (DFO.)

Singled out for fostering academic excellence and intellectual exchange, the award acknowledges the sustained generosity and collaboration enabled by William as well as the myriad scholarships that he has founded for talented Wadham College alumni.

To read more about the DFO and William’s contributions, click here.

Recognition for DVC’s Practice Development

DVC’s Practice Development has been singled out for being the only Chambers featured for the accolade in Asia Law Portal’s recent publication. The list references 1 in 30 people to watch in the Business of Law in Asia in 2020.

Click here for the write up.
The New Hong Kong Company Law Cases - a joint inaugural publication between DVC and Kluwer

Pioneering a new path in the dedicated Hong Kong Company Law space, DVC is delighted to announce its inaugural publication of the Hong Kong Company Law Cases in a joint publication with Kluwer. These cases, which feature head notes produced by DVC’s members, span the period between 2008 - 2019, inclusive.

The Hon. Mr. Justice Harris is the Honorary Chief Editor and DVC's William Wong SC, JP and Look-Chan Ho are the co-editors.

With contributors hailing exclusively from Des Voeux Chambers, DVC is the first mover in this space and the only Chambers globally to have authored a compendium of this kind.

DVC’s Contributing Editors appear below:
If you missed DVC's IP webinar entitled: “Generic.com – The shifting boundaries of trade mark territory” you can find the video link here

How has a recent US Supreme Court ruling changed the landscape of trade mark law? Find out more from a recent ZOOM webinar presented by DVC’s CW Ling, Benny Lo and Stephanie Wong.

Click [here](#) for the webinar

Look–Chan Ho and Daniel Chow of FTI Consulting co-presented via Zoom to members of The Small and Medium Law Firms Association of Hong Kong (SAMLAW)

On 22 September 2020, Look–Chan Ho and Daniel Chow of FTI Consulting co-presented via Zoom to members of The Small and Medium Law Firms Association of Hong Kong (SAMLAW) on recent restructuring and insolvency practices in Hong Kong. Look focused on cross-border restructuring/insolvency and the interaction between arbitration and insolvency, while Daniel focused on the practical steps in debt restructuring and resumption of trading. Many thanks to Ms Maggie Chan (Founding President of SAMLAW) and Ms Loretta Lo (President of SAMLAW) for their kind invitation and for hosting.
DVC’s Daniel Fung SC, JP and Dr. Cornelia Man discuss “Prophylactic Measures and promising potential treatment for Covid-19”

What is a Cytokine Storm? Can MS cells be effectively used to combat Covid-19? Listen to an enlightening presentation by Dr. Cornelia Man followed by an informative Q&A exchange with DVC’s Daniel Fung SBS, SC, QC, JP, FCIArb.

Click the play button to watch the full webinar:

How did the UK Supreme Court break new ground in Unwired Planet v Huawei?

How can a patent owner avoid abusing its dominant position under a FRAND licensing scheme?

Will the decision be welcomed in other jurisdictions?

Click the here to watch the video following the webinar
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.
Look out for DVC's Brochure (Vol. 4) 2020 and an upcoming video featuring highlights from this year.

Merry Christmas & Happy New Year from everyone at DVC

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)

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If you would like to see any of the topics considered in this issue covered by way of a seminar or webinar, please contact DVC's Aparna Bundro, Practice Development Director, at aparnabundro@dvc.hk or 3413 0600.

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