In a newsletter dominated by landscape changing developments in the insolvency and company law domain, DVC’s contributors share with you key takeaways to keep you up to date as to what to expect going forward.

Articles

First out of the gate in this edition is Head of Chambers, John Scott SC, QC, JP’s article on Party Non-Participation and Awards in Default of appearance in the context of arbitration. What happens when one party declines to participate? He takes us through this surprisingly common scenario. Find out what parties do when presented with an empty-chair hearing.

In A Conversation with Michael Lok and Look-Chan Ho, they take us through the origins of COINS, the association they founded in 2016. In a Q&A interview, they highlight the association’s objectives, and spotlight upcoming events including the recurring GRR Live and The Greater China Restructuring Forum which is slated for January 2019.

In our next article, Look-Chan Ho reflects on the decade that has elapsed since the GFC in 2008 and contemplates what the future might hold on the financial and insolvency front.

Case Reports

Headlining our Case Reports section is the case of Mongolian Mining Corporation, a landmark judgment which entailed cross-border schemes of arrangement and the restructuring of foreign companies foreign law governed debts. José-Antonio Maurellet SC, Yang-Wahn Hew and Jason Yu bring you up to speed as to whether sufficient connection was established.

Elsewhere in the insolvency domain, since the China Solar decision was handed down, we see how the needle has moved in other cases such as China Taifeng Beddings Holdings Limited which involved Kevin Lau. Read on as Kevin explores the implications arising from this recent case.

William Wong SC, Michael Lok and Terrence Tai acted in a unique single member scheme of arrangement. What did the court decide and what can you take away from Re Enice Holding Company Limited?

On the heels of third party funding being used in the intellectual property context, how is it being viewed by the courts in relation to funding civil actions? Do third party funding agreements in a civil action offend against champerty and maintenance? Clifford Smith SC, Sabrina Ho and Tommy Cheung definitively answer these questions in the recent milestone case of Raafat Imam v. Life China Company Limited and Others.

In Getting Ahead of the Competition (Conduct Rules) John Hui and Jonathan Chan reveal key findings from Taching Petroleum Co Ltd v. Meyer Aluminium - a decision which is at the vanguard of raising contravention of conduct rules as a defence in civil proceedings.

Are there any exceptions to the usual costs follow the event rule? Johnny Mok SC and Jenkin Suen consider this in Cents and Sensibility. In this case report, they review a recent landmark judgement for Protective Costs Orders in Designing Hong Kong Limited v. The Town Planning Board.

Do payments constitute dispositions of property of the company? Janine Cheung and David Chen examine this point and more in James Wardell and Jackson Ip v. Cheng Shing Ki: Overdrafts in Overdrive authored by newly minted tenant Rosa Lee.
Announcements

Who clinched the Asia Barrister of the Year Award for 2018?

Who was the first ever recipient of the John Griffiths QC SC, CMG prize? Read on to find out. In addition, each of DVC’s Harry Liu Scholars achieved distinction this year. Read on to learn more about their standout results.

Who netted Awards at the annual Middle Temple Amity visit on 21st and 22nd September? The beaming faces that give it away can be found here.

Events

A bevy of wide-ranging events took place this quarter. Richard Leung JP and Tommy Cheung spoke to audiences consisting of in-house counsel and solicitors, and provided their insights as to how the insolvency and competition panoramas are evolving.


In the first of a double feature presentation held in September, Jason Yu and Michael Lok were invited by Reed Smith Richards Butler to speak about the latest developments in the cross-border insolvency and restructuring sphere. Later that evening, on 13th September Winnie Tam SC, William Wong SC and Look-Chan Ho entertained in-house and general counsel with War Stories Taken from the Trade Mark and Restructuring Frontlines: Pick your Battles at a networking event held in concert with the HKCCA.

In the second double feature held on 20th September, Tommy Cheung and Look-Chan Ho spoke in tandem at an in-house CPD accredited seminar entitled “Controlling Costs” where they uncovered action plans designed to boost your bottom line without compromising on quality. The same evening, DVC collaborated with Hong Kong University to roll out the first DVC-HKU-Cambridge Fellowship entitled “Some Short Observations on Short Selling Regulations” featuring Dr Elizabeth Howell. Anson Wong SC chaired the public lecture with opening remarks delivered by new tenant, Jasmine Cheung before an audience made up of students, academics and practitioners.

The annual Middle Temple Amity Visit saw a raft of Benchers, Silks and Judges from the UK converge in Hong Kong on 21st and 22nd September. Exciting new appointments ensued and we have singled these out: you will find these in our Announcements section and our event write up.

Review the highlights from the Asian International Arbitration Centre’s recent Sports month in Kuala Lumpur as Yang-Wahn Hew discusses his role in moderating a panel on esports and esports law.

Crossing continents, we take you centre-stage to the highlights of the IBA Conference which took place between 7th and 12th October in Rome, where Winnie Tam SC, JP delivered an illuminating presentation on the role of the media in the Hong Kong courtroom before a full-house.

Finally, after welcoming 6 new tenants to our Chambers earlier this year, we hear from two of them as they share a day in the life of a pupil at DVC in our latest video.

We hope you find the practical issues raised and the key takeaways helpful in this edition of A Word of Counsel.

Please click here to view the previous edition of A Word of Counsel.
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A Word of Counsel

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A Cross-border insolvency and Restructuring CPD seminar presented by Jason Yu and Michael Lok

DVC’s War Stories Taken from the Trade Mark & Restructuring Front Lines: Pick your Battles

A compass for the conversation on Controlling Costs – an in-house presentation delivered by Look-Chan Ho and Tommy Cheung

Inaugural DVC-Cambridge-HKU Visiting Fellowship 2018 “Some Short Observations on Short Selling Regulations” presented by Dr. Elizabeth Howell

Annual Middle Temple Amity Visit to Hong Kong

Asian International Arbitration Centre’s recent Sports Month in Kuala Lumpur featuring DVC’s Yang-Wahn Hew

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**Video**

Pupillage video: A day in the life of two DVC pupils
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Stephanie Wong
Lai Chun Ho
Jasmine Cheung
Look-Chan Ho

Door Tenants

John Griffiths SC, QC, CMG

Jeffrey P. Elkinson
Jonathan Shaw
Kelvin Kwok
The Chartered Institute of Arbitrators’ Practice Guidance on Party Non-Participation and Awards in Default of Appearance: A Practitioner’s Viewpoint

By John Scott SC, QC, JP

This article first appeared in the October 2018 edition of Asian Dispute Review and can be downloaded here: https://tinyurl.com/y9knj8pj.

This article discusses the types of non-participation that may arise in arbitrations and thus necessitate the exercise by arbitral tribunals of default powers to continue with references and make awards. It then discusses how default powers under arbitration rules should be exercised in accordance with the Chartered Institute of Arbitrators (CIArb) 2016 International Arbitration Practice Guideline, Party Non-Participation. The article is an edited version of a paper delivered at HKIAC on 31 May 2018 as part of the CIArb (East Asia Branch) CPD Seminar Series 2017-2018, ‘CIArb’s International Arbitration Practice Guidelines’.

Introduction: default powers

Most practitioners have in their mind’s eye a vision of a ‘normal’ arbitration hearing. We envisage two eager parties, both sure of the righteousness of their claim, locked in a contest in which each party participates with a clearly focused view of the issues between them and addresses the tribunal on the relevant points of fact and law so as to enable it to analyse the competing submissions and arrive at a coherent reasoned award. Wonderful. How we all wish to participate in such a hearing! This article, however, is not concerned with this type of ‘normal’ arbitration.

What I am going to consider is the antonym to this type of arbitration. Arbitration proceedings that call for the exercise of default powers by the arbitrator can be thought to be asymmetric, in the sense that one party (usually, but not always the respondent), declines to participate. The tribunal, as a result, is confronted with an empty chair at the hearing.

This type of default, non-attendance or ex parte proceedings (call it what you will) is surprisingly common in arbitrations. For instance, in the last 18 months the ICC regional centre in Hong Kong has published four final awards and one partial award where there was a default of appearance by a party. So far as the HKIAC is concerned, the respondent failed to participate in 10% of the cases it administered. The SIAC has informed me that roughly one in five or 20% of the cases it handled in the recent past have been determined in default of appearance. These types of arbitration present some testing problems for the arbitrator, whether a sole arbitrator or a member of a three-person tribunal. It need hardly be added that these types of empty-chair hearing present difficulties to Counsel for the appearing party as well.
I will begin by considering the types of scenario that might occur and which may already be familiar. Then, with the assistance of the guidance of the Chartered Institute of Arbitrators (CIArb) on the subject, I will consider the default powers under the various arbitration rules. After that I will touch on the question of dismissal for delay, typically delay on the part of the claimant, which is in a sense the opposite of the type of empty-chair problem I have just mentioned: ie, one where a claimant fails to progress its own claim.

Types of default

Default by a party in arbitration proceedings can occur at any and sometimes multiple stages in the process. The respondent confronted with a Notice of Arbitration may decline to serve its answer, fail to participate in the appointment of an arbitrator or fail to pay its share of the deposit to the relevant arbitral institution. In the case of an ICC reference, the party in default may fail to participate in preparing the Terms of Reference.

Then, when proceedings are under way, the recalcitrant party may fail to comply with directions to serve pleadings, witness statements, etc. When the evidentiary hearing takes place, the tribunal may be confronted with the vision of an empty chair when the parties are supposed to attend for the main hearing of evidence and submissions. Thereafter, the absent party may fail to serve any submissions and fail otherwise to take up the award.

The overriding reason why the arbitrator and Counsel for the appearing party must tread carefully in all of these circumstances is that the party in default may, despite its non-attendance, nevertheless attempt to argue at the enforcement stage that it has not been given a fair opportunity to present its case or that the arbitrator has overlooked an aspect of its defence of the evidence so as to prevent enforcement of the award under art V of the New York Convention (or, where applicable, art 36 of the UNCITRAL Model Law).

Solutions and sources of practitioner assistance

Fortunately, the CIArb has considered this possible range of problems and has issued an International Arbitration Practice Guideline, Party Non-Participation1 (the Guideline). This latest guidance on default powers prepared by the CIArb’s Practice and Standards Committee was published in November 2016 and can therefore be considered up-to-date. I do not intend to go through it on a point by point basis but will instead draw out some of the most important features of these guidelines, illustrated by my experience of a number of empty-chair arbitration references. Before I do, it is worthwhile considering some relevant default powers provisions that are frequently incorporated in various arbitration bodies’ rules.

Default powers: relevant provisions

1. UNCITRAL Model Law

   Article 25 (incorporated via s 53 of the Hong Kong Arbitration Ordinance (Cap 609)):

   “Unless otherwise agreed by the parties, if, without showing sufficient cause,

   (a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.”


Article 26:

“Hearings

(1) When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.

(2) If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.”

3. SIAC Rules (2016)

Rule 27:

“Additional Powers of the Tribunal

Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:

... ...

1. proceed with the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with the Tribunal’s orders or directions or any partial Award or to attend any meeting or hearing, and to impose such sanctions as the Tribunal deems appropriate in relation to such failure or refusal; ...”


Article 26:

“Hearings

26.1 When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.

26.2 If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have power to proceed with the hearing. ...”
It can be seen that all of these provisions have common features:

1. notification of hearing;
2. failure or refusal by a party to comply;
3. no valid excuse proffered; and
4. the arbitral tribunal can proceed to make an award.

Duties of the arbitrator at common law

Introduction

At common law, an arbitrator has a duty as a matter of natural justice to ensure that the parties have been provided with an opportunity to put their case before him or her. As Megaw J stated in *Montrose Canned Foods Ltd v. Eric Wells (Merchants) Ltd*:

“In my judgment, it is incumbent upon arbitrators to take steps to ensure, so far as is reasonably possible, before they make an award, that each of the parties to the dispute before them know the case which has been put against them, and has had the opportunity to put forward that party’s own case. ... [I]t was the duty of the arbitrators as a matter of natural justice, before they proceeded to make an award on the basis of the arguments and submissions of one side only, to make sure that the buyers did not wish to put their case before the arbitrators.”

Donaldson J (as he then was), in *Owners of the MV Myron v. Tradax Export SA*, highlights two distinct (though related) matters:

“... [F]irst, the duty of the arbitrators to ensure that each party knows the case which is being put against him and has an opportunity of dealing with it, and, second, their duty to make sure that a party does not wish to put his case before them if they are to proceed in default of defence.”

In an earlier decision, *Government of Ceylon v. Chandris*, Megaw J said that:

“It is, I apprehend, a basic principle, in arbitrations as much as in litigation in the courts (other, of course, than ex-parte proceedings), that no one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it or make submissions on it. No custom or practice may override that basic principle.”

What an arbitrator should do if he or she decides to proceed in the absence of one party

Where an arbitration hearing proceeds in the absence of one of the parties, the tribunal should consider the evidence and submissions before it in order to determine whether they are sufficient to establish the claim. The tribunal is not bound to accept the evidence of the party attending and may find, even if it is uncontroverted, that it falls short of establishing the case to be proved. In other words, “the party who is taking part must prove its case to the satisfaction of the arbitral tribunal.”

Indeed, it has been said that:
“[t]he task of an arbitral tribunal is not to ‘rubber stamp’ claims that are presented to it; rather, it must make a determination of these claims, so the tribunal must take upon itself the burden of testing the assertions made by the active party, and it must call for such evidence and legal argument as it may require for this purpose.”

**Practical steps**

The rules (both institutional and those derived from court decisions) considered above are clear and are the primary source of the arbitrator’s jurisdiction to proceed in the absence of a party. But, in practical terms, what does this entail? In short, what practical steps must one take? This is where the CIArb’s Guideline is helpful.

**Article 1: General principles**

“... Arbitrators should satisfy themselves, to the extent that they are able to do so, on the limited information available, that the claimant has a prima facie case and that all parties were properly notified of the proceedings. Arbitrators should also satisfy themselves that the non-participating party has no acceptable excuse for its non-participation.”

**Author’s commentary**

(1) This general principle is all about communication. Practically, if there are early signs of reluctance to participate, the parties and the tribunal should use delivery methods that provide for evidence of receipt, eg, registered post, e-mail receipts or local process servers. Up-to-date company searches of the respondent (if a company) may identify individuals on whom copies of notifications can be served.

(2) Apart from outright refusal to reply, bogus or far-fetched excuses can sometimes be proffered. These must be investigated. Claims to illness should be examined by demanding, for example, an independent medical certificate. An allegation of a failure to get instructions from the client should be explained and realistic deadlines applied.

(3) Arbitrators must be even-handed and not blindly accept a claimant’s assertion of default by the non-attending party. Arbitrators (even where one party persistently fails to respond) should still avoid ex parte communications with the participating party. All communications by, for example, letters and e-mails should be sent to the non-participating party’s most up-to-date address(es) and evidence of receipt obtained.

**Article 2: Failure of the claimant to proceed with its case**

“If a claimant, without providing an acceptable excuse, fails to proceed with its case within the period provided for in the arbitration rules or set by the arbitrators, and no counterclaim is led, arbitrators may, and depending on the applicable law or rules may be required to, make an order for the termination of the arbitral proceedings.”

**Author’s commentary**

This is rare. Arbitral institution rules commonly permit arbitrators to proceed to determine the claim or terminate the proceedings. Best practice is to write to the claimant asking it if it intends to proceed, and then, if no response is
received, notify the parties again of the tribunal’s intention to terminate before issuing a final award. Note the similar position of a counterclaiming respondent.

**Article 3: Failure to submit a statement of defence or to participate**

“If a respondent, without providing an acceptable excuse, fails to submit a statement of defence within the period provided for in the arbitration rules or set by the arbitrators, or fails to participate in the proceedings, arbitrators may, and depending on the applicable law or rules may be required to, continue the proceedings, subject to the General principles in Article 1 above.”

**Author’s commentary**

Likewise, clear notification of time, place and date are crucial. Registered letters, receipted e-mails and notification to a company’s officers or agents as revealed by a recent company search are all useful forensic methods of (i) ensuring adequate notification and (ii) demonstrating effective service at the enforcement stage.

**Article 4: Non-participation at a scheduled hearing**

“If a party fails to appear at a scheduled hearing, the arbitrators may decide to continue with the hearing in its absence or call a temporary adjournment while enquiries are made regarding the non-attendance.”

**CIArb’s commentary**

(1) “When a party, which has been duly notified of the date, time and place of a hearing, fails to attend, arbitrators should decide whether it is appropriate to continue with the hearing on an ex parte basis or to reschedule the hearing if, for example, the excuse proffered for the failure is acceptable. Subject to the provisions of the arbitration agreement[,] including any arbitration rules and/or the lex arbitri, arbitrators may issue a peremptory order against the party who failed to attend the hearing and require it to provide an explanation for its non-attendance within a specified time and/or appear at a rescheduled hearing with an adjourned date.

(2) “If both parties fail to attend a hearing, arbitrators should in most circumstances reschedule the hearing. If the parties fail to attend again, arbitrators may consider terminating the proceedings.

(3) “Multi-party arbitrations
“In multi-party arbitrations, if one or several claimants, or one or several respondents, do not attend at the hearing, arbitrators may continue with the hearing in the absence of a party or parties or alternatively reschedule it[,] depending on whether any excuses proffered for the non-attendance are acceptable.”

To give a practical example reported to the author, the respondent had engaged all the way through until, literally just before the hearing (and even having made skeleton submissions), it then failed to appear. After examining whether all steps had been taken to make sure notice had been given, the arbitrator continued with the hearing. During the hearing, the arbitrator applied no weight to the respondent’s witness evidence, but did examine the claimant’s witnesses in a manner that would be expected if the other party had engaged. Also, during the hearing the claimant’s legal team was required to produce evidence that the daily transcript had been delivered to the non-participating party (which would happen if the latter had engaged). This seems to me the right approach, demonstrating that the tribunal should endeavour to run a hearing in a way that is as close to ‘normal’ as one can expect in the circumstances.
In a relatively recent Hong Kong decision, **Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd.**, a respondent in an arbitration was held *incommunicado* by provincial authorities in Jilin, PRC. While he was in detention, he was deprived of contact with the outside world. The claimant, in the meantime, commenced an arbitration, serving the Notice of Arbitration at (*inter alia*) the address for service specified in the agreement containing the arbitration clause.

The arbitrator having convened a hearing and issued an award in default of the respondent’s appearance, the respondent challenged enforcement of the award under art 34(2)(a)(ii) of the Model Law, on the ground that he had not been given sufficient notice of the hearing and had been deprived of an opportunity to present his case.

The Hong Kong court refused to enforce the award and set it aside. The court held that, although the claimant had done all that was expected of him contractually to effect service, this was not sufficient to constitute adequate service, as the address in question did not exist. It may be commented that more complete adherence to the guidance set out in article 1 of the Guideline and author’s commentary (1) above might have avoided the difficulties which the arbitrator, the parties and the court faced in this case.

**Conclusion**

When confronted with party non-participation, however this may arise, clear communication by the arbitrator along the lines suggested above would help avoid some of the pitfalls that an arbitrator faces in this situation.

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5. Russell on Arbitration (24th Edn), at §4-094 (p 164).
8. Editorial note: The commentaries on this article and on articles 2 and 3 of the Guideline should not be confused with the official CIArb commentaries on those provisions. The commentary on article 4 is, however, that of the CIArb.
9. See, for example, HKIAC Administered Arbitration Rules, arts 26.1 and 26.3; SIAC Rules, rules 24.3 and 27(l).
10. [2016] 5 HKLRD 221.
A Conversation with DVC’s Look-Chan Ho and Michael Lok, Secretariat and Co-Founders of COINS

In a short interview, DVC asked Look-Chan Ho and Michael Lok to expand upon COINS.

Q: **What is COINS?**

A: COINS stands for the Company and Insolvency Law Society. COINS is a non-profit organisation based in Hong Kong and aims to provide a forum which facilitates the exchange of views on the advancement and changing practices in the company and insolvency sphere. It was in fact The Hon. Mr Justice Jonathan Harris (the incumbent Companies Judge) who gave us the idea which led to COINS, as his Lordship considered that such a group would help promote and improve Hong Kong’s company, restructuring and insolvency practices. COINS members consist of leading restructuring, insolvency and company law professionals in the jurisdiction (including offshore practitioners).

Q: **When was COINS established and what brought about its inception?**

A: COINS was established in 2016 and is a unique platform in the Hong Kong company and insolvency space. It was conceived to give members an opportunity to meet regularly to discuss practice issues that are faced by those practising in this field, as well as pending legislative updates and reforms.

Q: **What objectives has COINS served?**

A: COINS facilitates a sustained and continuous dialogue on current issues in the company, insolvency and restructuring law arena, and enables members to discuss practice points (including recent case-law developments) and raise awareness on how practices are evolving in Hong Kong (and abroad). COINS has also been responding to the Hong Kong Government’s consultations on insolvency law reform.

Q: **Please share with us a little about its upcoming events. What will your audience get out of these events?**

A: There are two major events on the horizon, organised or supported by COINS. The first is the GRR Live event which will be held on 6 November and the second is The Greater China Restructuring Forum which will take place on 16 January 2019.

At the GRR Live event next month, the speakers, made up of Hong Kong and PRC judges, and international practitioners, among others, will discuss topical issues and legal reforms in PRC-related restructuring and insolvency practices, the challenges faced by practitioners and the judiciary alike.
They will also provide a steer as to how to get ahead of the curve in the context of restructuring and insolvency matters in the PRC.

Gathering together pre-eminent speakers from the distressed investment community globally, the Hong Kong Government, and members of the international insolvency judiciary, the second large-scale symposium will be held in the first quarter of next year (16 January 2019). The symposium provides an opportunity to discuss and debate Hong Kong’s role in international debt restructuring for businesses in the Greater China region; and how Hong Kong should better facilitate international distressed investors in order to access PRC debt.

In terms of actionable takeaways for our guests, live issues affecting practitioners will be explored and addressed, investors’ war stories will be shared, and vital questions will be answered. Networking cocktails will also follow giving our guests an opportunity to mingle with like-minded experts in the field.

Click here to register for The Greater China Restructuring Forum on 19 January 2019.

Want to know more about COINS? Click here to take you to the website. https://www.coins.hk/

In addition to Michael and Look, DVC’s Head of Chambers, John Scott SC, QC, JP, William Wong SC and José-Antonio Maurellet SC are also members of COINS.
Lehman’s 10-Year Anniversary: A Hong Kong Insolvency Law Perspective

By Look-Chan Ho

Lehman failed ten years ago. Marking the anniversary, central banks, economists, and pundits alike have churned out countless ponderous opinion pieces reflecting on the 2008 global financial crisis, its causes, and what the future holds. But so far as I am aware, although Lehman also collapsed in Hong Kong and London, no one has written about the contrast in post-Lehman insolvency law developments between Hong Kong and the United Kingdom.

The contrast is a tale of two economies.

As an insolvency lawyer based in London’s Fleet Street at the time, I witnessed at the coalface all the Lehman-generated English insolvency law developments – such as the anti-deprivation principle, the enforceability of market-standard documentation for financial products, insolvency set-off, the calculation of post-insolvency interest, and court-to-court communication, just to name a few. Just like the post-BCCI era, the English courts were busy handing down landmark insolvency cases after landmark insolvency cases.

In contrast, while English insolvency law developed rapidly in the immediate aftermath of Lehman, the Hong Kong insolvency law’s development was relatively muted during that period. For example, in 2009, the most high-profile case in the Hong Kong Companies Court’s portfolio was probably the PCCW privatisation scheme, which of course had nothing to do with insolvency. The Court of Appeal decision in Legend in 2006 had also just crippled the development of provisional liquidation.

Ten years on from Lehman, the English insolvency law developments arising from Lehman are coming to an end, with the remnant ‘waterfall’ disputes being resolved through schemes of arrangement.

But Hong Kong insolvency law has been developing very rapidly recently, especially in 2018. For instance, in 2018 we have seen Legend being properly re-interpreted in China Solar, cases demonstrating the flexible uses of schemes of arrangement, innovative restructuring techniques, and many frontier-pushing cross-border developments.

One has to leave it to the economists as to the reasons for these contrasting developments. One theory is that Asia/Hong Kong was shielded from Lehman’s fallout because of China’s stimulus spending in 2008. But the stimulus package has also brought debt levels to unprecedented heights, with the consequences to be felt and worked out later.

Whatever regulatory or economic lessons learnt or not learnt from Lehman, Lehman has moved insolvency law forward which will better prepare the legal system for the next financial crisis. In the meantime, thanks in large part to the Companies Court’s hard work, Hong Kong’s restructuring and insolvency practice is becoming more efficient, effective and resilient by the day.

Look-Chan Ho authored this Article.

Look-Chan Ho

A Word of Counsel
Cross-Border Scheme of Arrangement for Secured Noteholders: 
Re Mongolian Mining Corporation [2018] HKCFI 2035

By Look-Chan Ho

In Re Mongolian Mining Corporation [2018] HKCFI 2035, the court sanctioned a scheme of arrangement which was part of a larger restructuring exercise involving a Cayman scheme of arrangement and scheme recognition in the US under Chapter 15 of the US Bankruptcy Code.

This decision is a useful reminder of a number of scheme practice points, some of which have no previous Hong Kong authority:

(a) a scheme of arrangement may be used to restructure purely secured debts governed by non-Hong Kong law;

(b) foreign expert evidence about the scheme’s effect abroad may be needed to satisfy the court that the scheme will achieve its practical objectives; and

(c) where the bonds are issued in the form of a global note, the underlying beneficial holders may participate directly in the scheme as creditors.

The facts and decision

The scheme of arrangement in this case concerned the debt restructuring of Mongolian Mining Corporation (“Company”), a Cayman-incorporated and Hong Kong-listed company. It was an investment holding company with operating subsidiaries in Mongolia carrying on the business of producing and exporting high quality coking coal.

Due to financial distress, the Company went into Cayman provisional liquidation in July 2016. The Company’s financial indebtedness comprised:

(a) US$600,000,000 senior secured notes, governed by New York law, listed in Singapore, and secured by charges over shares in the Company’s subsidiaries in Hong Kong and Luxembourg (“Old Notes”);

(b) a secured loan facility of US$150,000,000; and

(c) two promissory notes in the aggregate original principal amount of US$52,500,000.
The secured loan facility and promissory notes were restructured bilaterally and consensually. The Old Notes were to be restructured through inter-conditional parallel schemes of arrangement in Hong Kong and the Cayman Islands. The effect of the schemes was that debts owed to the Scheme Creditors would be released and discharged; in return, the Scheme Creditors would obtain new notes and shares in the Company. The effectiveness of the Hong Kong scheme was conditional on the Cayman scheme being sanctioned by the Cayman court and recognised in the US under Chapter 15 of the Bankruptcy Code.

As the Old Notes were held in a global form or global restricted form through the clearing systems, the Scheme Creditors were defined in the scheme as the beneficial holders of the Old Notes who had a right, upon satisfaction of certain conditions, to be issued with definitive notes in accordance with the terms of the Old Notes.

The court was satisfied that the court had scheme jurisdiction over the Scheme Creditors because, while there was statutory definition of ‘creditor’ for scheme purposes, the scheme jurisdiction would extend to contingent and secured creditors, consistent with English case law. Here because the Scheme Creditors were entitled, upon satisfaction of certain conditions, to be issued with definitive notes in accordance with the terms of the Old Notes, they were contingent creditors for the purposes of the scheme jurisdiction. The court was also satisfied that the Scheme Creditors were properly put in a single class.

As the Company was a foreign company, the court had to be satisfied that there was sufficient connection between the scheme and Hong Kong. Sufficient connection was established because of a number of factors, including the Company being registered as an overseas company in Hong Kong and listed in Hong Kong; one key security agreement securing the Old Notes being governed by Hong Kong law; and approximately 30% of the Scheme Creditors being based in Hong Kong.

The Company produced expert evidence that the Cayman parallel scheme would be granted recognition in the US and thus the Hong Kong scheme would achieve its practical purpose.

The court sanctioned the scheme accordingly.

Comments

This decision is a welcome addition to the scheme authorities in Hong Kong. It serves as a useful reminder of how schemes in Hong Kong can be used to restructure foreign companies’ foreign law-governed debts, including notes issued in the form of a single global note.

José-Antonio Maurellet SC and Jason Yu acted for the Company.
Yang-Wahn Hew acted on behalf of the Company and obtained leave for a court sanctioned scheme of arrangement.
Look-Chan Ho authored this Case Report.
**Case Reports**

**Re China Taifeng Beddings Holding Limited** [2018] HKCFI 1755 is one of the latest cases by Harris J (the Companies Judge) concerning the issue of provisional liquidators being appointed to conduct restructuring and corporate rescue, a topic which has come squarely into focus recently following the recent **China Solar** litigation (see [2018] 2 HKLRD 338).

In **China Taifeng**, the Cayman Islands-incorporated company applied for the appointment of provisional liquidators on *inter alia* the basis that provisional liquidators were needed to investigate the company’s affairs and to further an ongoing restructuring exercise which had run into difficulties. The application was taken out by the company under a winding-up petition presented by the company against itself.

Harris J adjourned the application, despite finding that a meritorious case had been made out for appointing provisional liquidators (at paragraph 8). His Lordship’s primary concern was one of jurisdiction: he felt unable to decide (on the available evidence) that the board of directors had the power to wind up the company on their own accord, without first seeking shareholder approval. Whilst accepting that this issue involved primarily the construction of the company’s Articles of Association, Harris J observed that: (1) recent Cayman Islands authority had applied a restrictive interpretation, and (2) there was an absence of Hong Kong authority directly on point (at paragraphs 3, 6).

In light of this difficulty, the learned Judge adjourned the application, noting that this jurisdictional issue could be resolved by finding a “friendly creditor” to present the winding up petition, and then for the company to issue a fresh application for appointing provisional liquidators thereunder (at paragraph 7).

Finally, Harris J also observed that this was a case in which, due to the fact that restructuring efforts had been ongoing even well before the application, it would be appropriate to grant restructuring powers to the provisional liquidators at the first instance. This was an exception to the current Companies Court practice that restructuring powers would be introduced only after provisional liquidators have familiarized themselves with the affairs of the company and apply to carry out restructuring to further the aims for which they were appointed (paragraph 8).

**Two Key Takeaways**

**China Taifeng** has two main implications for practitioners.

1. Unless the Articles of Association of any company clearly provides for the power of its directors to do so, practitioners would be well-advised not to have the company seek its own winding-up so as to avoid prolonged argument on the issue of jurisdiction (which may well require substantial foreign law evidence).

2. Practitioners who require provisional liquidators to take over an ongoing and potentially time-sensitive restructuring exercise will take comfort in the Court’s robust and common sense approach. The immediate grant of restructuring powers ensures that the appointment of provisional liquidators will not cause a *de facto* stay of an ongoing restructuring exercise.

**John Hui** and **Kevin Lau** acted for the Company. Provisional liquidators were successfully appointed shortly thereafter: see [2018] HKCFI 1828.
Novel Single-Member Scheme of Arrangement: *Re Enice Holding Co Ltd*

By Look-Chan Ho

In *Re Enice Holding Co Ltd* [2018] HKCFI 1736, the Court sanctioned a novel privatisation scheme of arrangement and explains:

(a) the Court’s jurisdiction over a scheme of arrangement involving just one member;

(b) the possibility of split voting; and

(c) the management of the Court’s timetable especially in the case of an urgent application.

**The facts and decision**

The scheme of arrangement in this case concerned the privatisation of Enice Holding Company Limited (*Company*) which, though incorporated in Hong Kong, was listed on the Australian Securities Exchange (*ASX*).

While privatisation schemes are commonplace, this scheme contained some novel features because the Company had only one shareholder which held all the issued shares on trust for the underlying investors.

The reason for the Company having only one shareholder was that, being a Hong Kong incorporated company, its shares could not be directly traded on Australia’s financial markets. Thus, in order to facilitate electronic trading on ASX, the Company’s shareholding structure had to be altered as follows: All the Company’s issued shares were transferred to CHESS Depositary Nominees Pty Ltd (“CHESS”). CHESS then issued Chess Depositary Interests (“CDIs”) to the holders of CDIs. CDIs were developed by ASX to facilitate the clearing and settlement of transactions in securities through CHESS where the listed entity is incorporated outside of Australia.

The legal effect of these changes to the Company’s shareholding structure was as follows:

(a) CHESS became the only shareholder of the Company.

(b) CHESS held all the issued shares on trust for the CDI holders, with one CDI unit representing the beneficial ownership of one share.
CDIs (as opposed to the issued shares) would be listed and traded through the ASX trading platform.

The CDI holders would enjoy all the economic benefits of the issued shares. Although the CDI holders, not being the legal owners, could not vote at the Company’s general meeting, they could direct CHESS on how to vote.

The scheme contained the following key steps:

(a) The Company’s issued share capital would be reduced by cancelling and extinguishing ordinary shares (“Scheme Shares”) beneficially held by the CDI holders who were not connected with Tech World Limited (“Offeror”).

(b) In consideration of the cancellation and extinguishment of the Scheme Shares, the Offeror would pay CHESS a cancellation price which CHESS would hold on trust for the CDI holders.

(c) Subject to and immediately upon such reduction of capital taking effect, the Company’s share capital would be increased to its former amount by the creation of such number of new shares as was equal to the number of the Scheme Shares cancelled.

(d) The Company would apply the credit arising in its books of account as a result of the capital reduction in paying up the newly created shares, which would be allotted and issued, credited as fully paid, to the Offeror.

On completion of the scheme, the entire issued share capital of the Company would be held by the Offeror and parties associated with it. The Company’s listing on ASX would be withdrawn accordingly.

The Court undertook some research, provided guidance to the Company on the scheme structure, and was satisfied that the scheme should be sanctioned. The Court reasoned as follows:

(a) The Court had jurisdiction over a single-member scheme, supported by precedents of such scheme in England and Australia.

(b) Where the single member was a trustee (such as CHESS in the present case), the trustee’s vote could be split for the purposes of determining the value of votes for and against the scheme, according to the beneficial owners’ wishes.

(c) As the scheme was a “takeover offer” within the meaning of section 674(2) of the Companies Ordinance, the headcount test was inapplicable.

(d) As the scheme would operate to bind CHESS (as the sole shareholder) and the ASX rules would operate to give reflexive effect to the scheme vis-à-vis the CDI holders such that the scheme in practice would become binding on the CDI holders, this would be a proper scheme to sanction.

In explaining the operation of a single-member scheme, the Court also explained how the single member-cum-trustee’s vote would be counted for headcount purposes. In brief, depending on the beneficiaries’ wishes, the trustee’s vote could be counted as (i) one vote for, (ii) one vote against, or (iii) zero, for headcount purposes.
Finally, the Court provided practical timetable guidance for practitioners seeking to launch an urgent scheme of arrangement:

“[T]he Companies Court expects solicitors to proceed as follows when acting for parties introducing schemes or capital reductions. As soon as they are instructed to proceed with a scheme or capital reduction they should approach the Companies Judge’s clerk to obtain dates, which it is reasonable to expect the company to meet. Counsel should be instructed who are available on the allocated dates and the Company should work towards those dates. The Companies Court should not be expected to fit in with the convenience of companies and solicitors should make this clear to those instructing them.”

**Actionable takeaways**

Although this is a solvent privatisation scheme, most of the Court’s reasoning and remarks apply equally to a debt restructuring scheme.

The decision stands for the following scheme practice points:

- the Court has jurisdiction over a scheme of arrangement involving just one shareholder or creditor;
- where the single shareholder or creditor is a trustee, his vote could be split for the purposes of determining the value of votes for and against the scheme, according to the beneficial owners’ wishes;
- depending on the beneficial owners’ wishes, a trustee’s vote could be counted as (i) one vote for, (ii) one vote against, or (iii) zero, for headcount purposes; and
- if a scheme needs to be sanctioned urgently, advance planning and timely communication with the Court is crucial.

**William Wong SC** and **Michael Lok** acted for the Company.

**Terrence Tai** acted for the Offeror.

**Look-Chan Ho** authored this Case Report.
Litigation Funding Agreements - do the Courts approve?

Find out in **Raafat Imam v. Life (China) Company Limited and Others** [2018] HKCFI 1852

By Clifford Smith SC, Sabrina Ho and Tommy Cheung

Litigating in Hong Kong to enforce one’s rights and entitlements can be expensive. Against this backdrop, can a plaintiff of limited financial means enter into a third party civil action funding agreement to fund his civil case? The answer is highly fact sensitive, and therefore uncertain. Faced with such uncertainty, can that plaintiff ask the Court to grant a declaration that a proposed funding agreement does not offend the law prohibiting maintenance and champerty, and have that agreement approved beforehand? This is what happened in the recent case **Raafat Imam v. Life (China) Company Limited and Others** [2018] HKCFI 1852. Deputy High Court Judge Fee, sitting at the Court of First Instance, accepted the persuasive arguments advanced by Clifford Smith SC, leading Sabrina Ho and Tommy Cheung, and held that, on the facts of the case and perhaps generally, the answer is in the negative.

**Background**

The Plaintiff and the 3rd Defendant were once business partners in the fashion retail industry, and the 1st and 2nd Defendants were the corporate vehicles set up by the 3rd Defendant. The Plaintiff claimed against the 1st and 2nd Defendants for, amongst others, damages for breach of a consultancy agreement dated 6 January 2004, and against the 3rd Defendant for, amongst others, payment of all sums due under the said consultancy agreement pursuant to a guarantee also dated 6 January 2004.

The interesting element of this case is that the Plaintiff claimed that he does not have sufficient financial means to pursue the civil action in Hong Kong without the benefit of a third party litigation funding agreement. The Plaintiff therefore applied for the Court’s approval of a funding agreement into which he proposed entering with a third party funding subject to such approval being given. Legally, the Plaintiff, by way of a summons, applied for the following reliefs from the Court:

(i) A declaration that the proposed litigation funding agreement for the Plaintiff to carry on the said civil action (the **Funding Agreement**™) would not offend the law prohibiting maintenance and champerty and/or would fall within the recognised exception relating to access to justice; and

(ii) The Funding Agreement be approved.
The Defendants opposed the Plaintiff’s application on the grounds that:

1. The declaration sought by the Plaintiff is effectively a declaration of non-criminality from a civil Court, where the civil Court would not grant one except in exceptional circumstances as demonstrated by Imperial Tobacco Ltd v. Attorney General [1981] AC 718 and R (Rusbridger) v. Attorney General [2004] 1 AC 357. This is so particularly because the Funding Agreement does not form part of any issue in the dispute between the Plaintiff and the Defendants; further, maintenance or champerty is not a defence or a ground for a stay unless a plaintiff is obliged to found his cause of action on the illegal agreement;

2. The Plaintiff failed to join the Director of Public Prosecutions (“DPP”) or the Secretary for Justice (“SJ”) as a proper contradictor in the application;

3. The third party funding cases in the insolvency context would not assist the application;

4. The application is procedurally defective as declaratory relief has to be sought by originating process and not by a summons; and

5. The Funding Agreement is per se champertous and it does not fall within the access to justice exception.

Falling foul?

The issues which the Court had to decide were:

1. Whether the Court should exercise its discretion to grant the declaration sought (“Issue 1”);

2. If the answer to Issue 1 is yes, whether the Funding Agreement per se falls foul of the prohibitions of maintenance and champerty (“Issue 2”); and

3. If the answer to Issue 2 is yes, whether the Funding Agreement falls within the access to justice exception (“Issue 3”).

A clear framework going forward

In short, the learned Judge accepted the Defendants’ submissions and held in favour of the Defendants on Issue 1, rendering Issues 2 and 3 academic. The learned Judge’s reasoning in relation to Issue 1 is as follows:

1. The common law rules making maintenance and champerty criminal offences, torts and a ground of public policy for invalidating tainted contracts were part of Hong Kong law prior to 1997 and remain applicable by virtue of article 8 of the Basic Law.

2. Contrary to the Plaintiff’s submissions, there is no lack of modern jurisprudence on maintenance and champerty in Hong Kong, such as Winnie Lo v. HKSAR (2002) 15 HKCFAR 16, Unruh v. Seeberger (2007) 10 HKCFAR 31 and HKSAR v. Mui Kwok Keung [2014] 1 HKLRD 116. In this regard, Hong Kong is still moving in a very cautious and prudent manner in abolishing maintenance and champerty as criminal offences. Further, the recent Irish Supreme Court case Persona Digital Telephony Ltd & Another v. The Minister for Public Enterprise, Ireland & Others [2017] IESC 27 showed that, contrary to the Plaintiff’s submissions, the erosion of the ancient prohibition against maintenance and champerty may not have a universal application.

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The Plaintiff’s application is for a declaration of non-criminality, which should not be granted save in exceptional circumstances:

(a) The Plaintiff’s reliance on Securities and Futures Commission v. Tiger Asia Management LLC (2013) 16 HKCFAR 324 is misplaced. Even though section 219(5) of the Securities and Futures Ordinance (Cap 571) (“SFO”) concerns the criminal offence of insider dealing, that does not make Tiger Asia the authority for the proposition that the Court would be ready to grant declarations of non-criminality. In Tiger Asia, the Court’s jurisdiction under section 213(1) of the SFO turns on its proper construction, no more no less. Put simply, section 213(1) of the SFO confers statutory jurisdiction on the Court to determine whether or not a person has contravened any of the relevant provisions, including section 291(5) of the SFO.

(b) By contrast, in the present case, like Imperial Tobacco, the Plaintiff is in essence seeking a declaration that a proposed act is lawful. The dispute between the Plaintiff and the Defendants may be a private law dispute; however the effect of the application is to declare whether or not the Plaintiff’s and/or the funder’s conduct in entering into the Funding Agreement is criminal.

(c) The fact that there is no criminal prosecution against the Plaintiff or the funder is of no significance. Once there is a possibility of criminal proceedings, a declaration of innocence vis-à-vis conduct which is the subject matter of the potential criminal proceedings should not be made, save in exceptional circumstances.

(4) The Court went on to find that the present case does not fall within the two established categories of exceptions, namely (a) cases where the integrity of the relevant criminal proceedings is questionable, and (b) cases where a matter of life and death is at stake.

(5) Further, the Plaintiff must be able to secure a proper contradictor, namely someone presently existing who has a true interest in opposing the declaration sought. There is no real issue between the Plaintiff and the Defendants in the Plaintiff’s application and hence the DPP or the SJ must be joined. In this connection, the Plaintiff missed the point by relying on Remedy Asia Ltd v. Yick Shing Contractor Ltd HCCT 4/2012 (unreported, 26 June 2014) and Beijing Tong Gang Da Sheng Trading Ltd v. Allen & Overy [2015] 3 HKLRD 247 to argue that the DPP or the SJ does not have to be joined, since there are two material differences between these striking out cases and the present case:

(a) First, in terms of jurisdiction, a striking-out application is based on Order 18, rule 19 of the Rules of the High Court (Cap 4A) on the ground of an abuse of process, which provided the Court with a statutory jurisdictional basis.

(b) Second, such an application is taken out based on the fact that the relevant action is tainted with maintenance and champerty. There is clearly a live issue between the parties to be resolved by the Court in the sense that the real fight is between the parties.

(6) The third party funding cases in the insolvency context do not assist the Plaintiff’s application because in the bankruptcy or winding-up context, the trustee in bankruptcy or liquidator can rely on express statutory powers which enable them to apply to the Court for approval of any transactions which might involve funding arrangements or assignment of causes of action that would result in the proceeds of litigation being shared with a funder. In any event, insolvency proceedings are expressly treated by the Court of Final Appeal in Unruh as a special category of proceedings that do not fall foul of the prohibition against maintenance and champerty.
Finally, if the Court accedes to the application by the Plaintiff, it will open up a floodgate for litigants and potential funders to seek the Court’s “legal advice” in relation to other funding arrangements in the light of the particular circumstances of each individual litigant.

As discussed above, since the learned Judge accepted the Defendants’ submissions and held in favour of the Defendants on Issue 1, Issues 2 and 3 have become academic. That said, for completeness, the following points remarked upon by the learned Judge are noteworthy:

1. On Issue 2, the learned Judge expressed the view that in deciding whether the Funding Agreement would attract criminal liability for champerty, the Court would have to consider a number of facts on top of its terms – and it is impossible to determine such matters in an interlocutory application.

2. On Issue 3, his Lordship considered that the Plaintiff’s alleged impecuniosity appears artificial, and the purpose of the access to justice exception is to ensure that a litigant can gain access to justice, not to facilitate access to his ideal or preferred legal representation, however that was something the Plaintiff was hoping to achieve. It is after all not the Court’s function to balance litigation power between the Plaintiff and the Defendants.

What this means for you

This decision is significant to both potential plaintiffs, funders, and indeed all Court users. The Court considered that it is generally inappropriate for potential plaintiffs and/or funders to seek the Court’s approval (in effect “legal advice”) on whether or not a proposed funding agreement would offend the law prohibiting maintenance and champerty and/or fall within the recognised exception relating to access to justice. This means that if any plaintiffs and/or funders wish to enter into a litigation funding agreement, they would have to do it at their own risks. It is advisable that these risks are factored into the commercial terms of the funding agreement itself. If in doubt, legal advice should be sought before executing any funding agreements.

Clifford Smith SC, leading Sabrina Ho and Tommy Cheung, appeared on behalf of the Defendants. Tommy Cheung expanded on this case further in “Controlling Costs”, click here to read the event write up.
Getting ahead of the Competition (Conduct Rules):
7 landscape changing findings from Taching Petroleum Co Ltd v. Meyer Aluminium Ltd [2018] 2 HKLRD 1284

By Richard Leung JP, John Hui and Jonathan Chan

➢ The recent case of Taching Petroleum Co Ltd v. Meyer Aluminium Ltd creates new precedent.
➢ This decision is at the vanguard of raising contravention of conduct rules as a defence in civil proceedings.

A shield not a sword

It is well-known that “stand-alone” private actions are currently not available under the Competition Ordinance (Cap. 619) (the “CO”), meaning that private parties (as opposed to the Competition Commission) are prohibited from bringing any action based on allegations of contraventions of the conduct rules.

However, as the decision of Taching Petroleum Co Ltd v. Meyer Aluminium Ltd [2018] 2 HKLRD 1284 has demonstrated, the CO does not prevent private litigants from raising allegations of contraventions of the conduct rules as a defence in civil proceedings brought against him/her.

Significantly, this is the first decision of the Hong Kong Court dealing with contravention of a competition conduct rule being raised as a defence to a civil claim, and the Honourable Mr. Justice Godfrey Lam explored and clarified a number of important issues in this respect.

Background

From 1999 onwards, Meyer Aluminium Limited (“Meyer”), a manufacturer of aluminium products, entered into a number of industrial diesel oil supply agreements with Taching Petroleum Company Limited (“Taching”), an authorised dealer for Sinopec (a major fuel oil supplier). This arrangement continued for years. In 2017, however, Meyer refused to settle the price of industrial diesel oil sold and delivered in the period between April to June 2017. Taching then brought proceedings against Meyer for such price, and applied for summary judgment.
There was no dispute that the diesel was sold and delivered and that the invoices were issued in accordance with the agreements between the parties. The defence raised by Meyer was based on an allegation that Taching had been colluding with Shell Hong Kong Limited (“Shell”), Meyer’s other supplier of diesel, to move their prices together, as a result of which Taching had overcharged Meyer for years. Meyer contended that for this reason, Taching acted in breach of the first conduct rule under section 6 of the CO, and Meyer had a valid defence based on illegality. Further, if there was such a contravention, Meyer said it would be entitled to damages for the loss and damage it suffered as a result, which could be set off against the price claimed by Taching.

After the hearing of the summary judgment application, the learned Judge gave conditional leave for Meyer to defend the action.

6 significant clarifications that will shed light

A number of important issues in respect of raising competition law as a defence have been clarified in this decision:

I. **JURISDICTION:** First and foremost, the learned Judge confirmed that pursuant to section 142(1)(d) of the CO, the Competition Tribunal (the “Tribunal”) has jurisdiction to hear and determine “allegations of contraventions, or involvements in contraventions, of the conduct rules raised as a defence”.

II. **TRANSFERS:** The learned Judge laid down the Court’s approach in dealing with a competition law defence raised in a civil action before the Court of First Instance (the “CFI”):

(1) Section 113(3) of the CO provides that “if, in any proceedings before the Court of First Instance, a contravention, or involvement in a contravention, of a conduct rule is alleged as a defence, the Court must, in respect of the allegation, transfer to the Tribunal so much of those proceedings that are within the jurisdiction of the Tribunal”. Section 113(3) should be read with section 142(1)(d).

(2) Although section 113(3) of the CO mandated a transfer by the CFI to the Tribunal, it may be that there is scope for suggesting that the CFI can examine the quality of the defence so that if it can be summarily seen to be of no substance with the result that it can be struck out or summary judgment can be entered, then no defence remains that calls for a transfer.

(3) Even if a transfer is mandatory irrespective of the quality of the defence alleged, the same result may be reached via the alternative route of section 114(3) of the CO, which provides that the Tribunal may transfer back to the CFI so much of those proceedings that the Tribunal considers should, in the interest of justice, be transferred back to the CFI. It is open to the Tribunal to exercise this power where the defence raised is so lacking in substance that it would be liable to be struck out or would not survive an application made by the plaintiff for summary judgment.

(4) The above “transfer and transfer back” mechanism would be “very cumbersome”. However, as all judges of the CFI appointed under section 6 of the High Court Ordinance (Cap. 4) are *ex officio* members of the Tribunal, there seems to be nothing to prevent the same judge, after transferring (mandatorily) part of the proceedings to the Tribunal, from himself constituting the Tribunal (at any rate with the consent of the President of the Tribunal under section 145(1) of the CO) and immediately exercising the discretion to transfer that part back to the CFI.
(5) For this reason, it would be conducive to list any application to strike out a competition law defence or for summary judgment or for transfer to the Tribunal before the President of the Tribunal (as a CFI judge) or with any other judge in the CFI in consultation with the President.

III. SCRUTINY: The threshold for raising a competition law defence in an application for summary judgment was clarified. In line with English jurisprudence, it was held that competition law defences are not in a special category with a different set of rules. The usual principles apply, save that given the ease with which a defence may be generated on the basis of vague or imprecise allegations, there is a need for careful scrutiny of competition law defences.

IV. ILLEGALITY AS A DEFENCE: It was confirmed that a breach of the first conduct rule could give rise to an illegality defence to a civil claim. In the present case, there were triable issues raised that Taching was in breach of the first conduct rule, in the light of (i) the *prima facie* evidence of parallel pricing over a prolonged period between Taching and Shell as against Meyer which substantially exceeded the prices charged by the rest of the market, (ii) the uncontradicted evidence that the relevant price information in the sales to Meyer was confidential, and (iii) the absence of any relevant evidence from Taching to show that Meyer’s express or implied assertions of fact are beyond belief or to set out or explain what had happened. It was held that there was a triable issue in relation to the illegality defence. However, the learned Judge also took the view that there was sufficient doubt raised to warrant imposing a condition for leave to defend.

V. CAUSE OF ACTION: For the defence of set-off, the learned Judge doubted whether Meyer had a cause of action for damages under the CO other than that enforceable by a follow-on action conferred by section 110 of the CO. This issue, however, was not determined. The learned Judge only mentioned that it seemed a follow-on action can be issued after a judicial finding of contravention has been made not only in the context of an enforcement action brought by the Competition Commission, but also in the context of a defence in an action raising a contravention of a conduct rule. This may be inferred from section 110(3)(b) of the CO which refers to a decision of the CFI under section 114(3) which in turn refers to section 113(3), which is concerned with a contravention of a conduct rule being raised as a defence.

VI. POWER TO STAY PROCEEDINGS: With regard to the power of the CFI and the Tribunal to refer an alleged contravention or alleged involvement in a contravention of a conduct rule to the Competition Commission for investigation under section 118(1) of the CO and the power to stay the proceedings pending the Commission’s investigation under section 118(2) of the CO, the learned Judge said that such reference is not to be lightly made, and if no reference is made, the power to stay does not arise.

**What you can takeaway from this: 7 key findings**

1. This decision has cleared any previous doubt over whether a private litigant may raise allegations of contraventions of the conduct rules as a defence to a civil claim brought against him/her. The range of defences that can be raised, however, has not been fully explored.

2. This decision has confirmed that a defence of illegality may be raised, but the learned Judge has left open the possibility of a defence of set-off which is based on follow-on damages.

3. It is expected that competition law defences will begin to feature more frequently in private litigations, and that Hong Kong competition law will not only be developed in cases initiated by the Competition Commission, but also in private litigations.
(4) Competition law defences are thus likely to become a more useful option for practitioners defending a civil claim (especially those involving summary judgment applications). However, practitioners will have to pay attention to the procedure laid down in this decision, and equally importantly, bear in mind that the court will carefully scrutinise any competition law defence to see if it is of any substance.

(5) Practitioners should bear in mind that these defences, once raised and accepted by the Court to pass the summary judgment threshold, will be transferred to the Competition Tribunal and will likely be determined before other issues raised in the main action.

(6) It is also likely that the party raising the competition law defence will become the claimant in the transferred action before the Tribunal, thus having the burden of proof.

(7) Given the nature of competition law issues, practitioners should advise their clients to be prepared to dedicate sufficient resources if proceeding with a defence based on breaches of competition law.

John Hui and Jonathan Chan acted for the Defendant.
Richard Leung JP, John Hui and Jonathan Chan co-authored this Case Report.

For more on competition law in Hong Kong, click the icons below to see John Hui and Jonathan Chan’s videos on how the competition landscape is unfolding in Hong Kong.
Cents and Sensibility: Landmark Judgment on Protective Costs Orders

*Designing Hong Kong Limited v. The Town Planning Board & Anor* [2018] HKCFA 16

By Jenkin Suen

This recent Court of Final Appeal (CFA) case is a forerunner and a landmark judgment on the principles and practice in Hong Kong concerning the grant of a protective costs order (PCO.)

This is an order in relation to costs whereby a party seeks at an early stage of public law proceedings to obtain an order to the effect that in the event that that party is unsuccessful, there will be no requirement to pay costs to the successful party (or alternatively there will be a costs cap).

A departure from the usual rule?

The grant of a PCO represents an exception to the usual approach as to costs in an application for judicial review, where the costs of the proceedings will usually be dealt with at the end of the substantive hearing of that application. It is also a departure from the usual rule as to the incidence of costs, i.e. costs follow the event, meaning that in adversarial proceedings, the successful party will generally recover costs from the unsuccessful party.

As affirmed by the CFA, section 52A(1) of the High Court Ordinance provides that subject to the rules of court, the costs of civil proceedings are in the discretion of the court. The general rule that costs should follow the event is also recognised as the starting point in cases involving the public interest, although this is subject to the court’s discretion to take into consideration other relevant matters. The court thus has jurisdiction to grant a PCO by virtue of its wide discretion as to costs under the statutory context.

Public interest litigation (PIL)

The starting point for considering the principles in the grant of a PCO is the court’s established jurisprudence in departing from the general rule of costs following the event where public interest litigation (“PIL”) was involved. Unlike the PCO, this is concerned with the court’s exercise of discretion at the end of public law proceedings to decline to order costs against a party notwithstanding that such party is unsuccessful.

3 criteria

In *Chu Hoi Dick and Another v. Secretary for Home Affairs* (No. 2) [2007] 4 HKC 428, Lam J (now Lam VP) gave useful guidance on the question of costs where PIL was involved. After going through various authorities including the landmark decision of *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600 in the UK, he formulated the three criteria as follows:
(1) A litigant has properly brought proceedings to seek guidance from the court on a point of general public
importance so that the litigation is for the benefit of the community as a whole to warrant the costs of the
litigation being borne by the public purse as costs incidental to good public administration;

(2) The judicial decision has contributed to the proper understanding of the law in question;

(3) The litigant has no private gain in the outcome.

As the CFA emphasised, the public interest element is only one of the factors that is relevant for the exercise of
the discretion as to costs, and the court must also have regard to other relevant factors such as the conduct of the
litigants in the proceedings in coming to a final decision on what is just in the circumstances.

A meritorious case

In particular, in order to justify the grant of a Chu Hoi Dick order, it is necessary for the unsuccessful party to
demonstrate merits in the public law proceedings, the point being that however important the point in issue may be
in a PIL case, a lack of merits will not often (if ever) save a party from an adverse order for costs: see also the decision
of the Court of Appeal (“CA”) in Chan Noi Heung v. Chief Executive in Council [2009] 3 HKLRD 362 at §§30-31 and the
CFA’s decision in Leung Kwok Hung v. President of the Legislative Council (No. 2) (2014) 17 HKCFAR 841 at §§17(10)
and (11).

As emphasized by the CA in Chan Noi Heung, the mere fact that leave to apply for judicial review was granted at an
early stage does not ipso facto mean that the court will conclude at the end of the public law proceedings that there
are sufficient merits to avoid adverse costs consequences. This is particularly the case since the court will only have
all the materials and legal arguments before it at the conclusion of the litigation.

Seen in this light, one can immediately see that the jurisdiction to grant a PCO at an early stage of public law
proceedings represents an even greater departure from the normal incidence of costs than a Chu Hoi Dick order.

A pre-emptive strike?

The issue of PCO came before the CFA for the first time in this case. Having reviewed the authorities in Hong Kong and
abroad, the CFA emphasised three underlying aspects in considering the grant of PCOs.

3 key aspects of a PCO

(1) A PCO is an exceptional order to make. It is made at an early stage of the proceedings and is therefore pre-
emptive. In granting a PCO, the court makes a determination having the effect of denying costs to a potentially
successful party at an early stage irrespective of (i) the future conduct of the case by the parties and (ii) the
merits of the case as the court may ultimately find them. Hence, as observed by the CFA, whilst it is exceptional
to make a Chu Hoi Dick order to deprive a successful party of an order for costs in his favour, a PCO is all the more
so given the early stage at which it arises when the court simply does not have the full picture.

(2) It is important to identify a principled basis and rationale for the exercise of the jurisdiction, namely that a court
should consider granting a PCO in PIL cases involving an issue or issues of great public importance which should
be determined and which would be stifled through lack of financial means to meet the potential costs liability to
the other party or parties in such proceedings in case the applicant is unsuccessful.

32 | A Word of Counsel
As with all exercises of discretion in a procedural context, it is important for the court to bear in mind the overall fairness and justice of the application for a PCO. Whenever flexibility is urged upon the courts in the exercise of discretion, it is fairness and justice that lie at the heart of this.

**Corner House**

The CFA made it clear that one shall have the above essential aspects in mind when examining the principles regarding the grant of PCOs as summarised in *Corner House* at §74:

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

In particular, other than the starting point of PIL, “something more” needs to be shown to justify the making of a PCO at an early stage, and that is reflected in §§74(1)(iv) to (v) of *Corner House* which render it essential to look at the financial ability of the applicant for a PCO in order to determine whether it would be fair and just to make an order at such early stage (at the expense of the respondents and the proper determination of question of costs by the court).

**Financial ability of the applicant for a PCO**

The issue of financial ability of the applicant for a PCO is indeed the main question for determination by the CFA on this occasion. It would be helpful to highlight a few points of importance in the CFA's reasoning.

**Key Findings**

1. Before the court can come to a conclusion as to whether it would be fair and just to grant a PCO or, if an order is not made, whether the applicant will probably discontinue the proceedings and be reasonable in doing so (thus incorporating an objective element in the discretion), it must first be apprised of the financial ability of the applicant.

2. The burden is on an applicant to provide details going to financial ability to bear the likely costs of the other side. An applicant will need to disclose his financial resources. There are no technical rules here; it is an exercise involving common sense.

**What about corporates?**

In the case of corporate applicants, the fundamental question remains, what financial resources does the applicant have at his disposal? The inquiry here undertaken by the court is similar to that undertaken in other proceedings, such as...
as proceedings for ancillary relief in matrimonial proceedings and applications for security for costs. In examining financial ability, it is legitimate, in the case of a corporation, to inquire not only as to assets belonging to the company, but also to other sources of funding to which the company would have access. It is a fact-sensitive question. Some flexibility and realism need to be applied to the position of shareholders, directors, guarantors and other supporters of a company. In some situations it may be entirely appropriate to look closely at the financial ability and resources of such persons, in other situations perhaps not. There is no fixed approach one way or the other. What is clear, however, is that the court should not take an emphatic refutation to to provide financial support by such persons at face value, and should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position; and by reference to all aspects of its relationship with such persons, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms.

Casting a wide net

At the end of the day, whether or not it is appropriate to look at the financial ability or resources of the shareholders, directors or other supporters of a company depends on the circumstances of any given case. This may, for example, involve looking at the history of support given to the company in question by the shareholders, directors or other people. It is also important to look at the underlying realities of the company’s financial position and to adopt a common sense view of the matter.

The CFA emphasises the need for an applicant to be full and frank when dealing with questions of financial ability. It is important for an applicant properly and fully to explain his financial position to justify a claim for exceptional treatment in applying for a special costs order.

The assessment of financial ability is not a purely arithmetical exercise. Sometimes it will be fair and just to make an order even though an applicant’s resources might appear to be adequate to meet a potential adverse costs order. The critical question here is not whether, as a matter of dollars and cents, an applicant may be able to meet a potential costs order liability, but whether it would be fair and just to make a PCO. Much depends on the circumstances.

In the final analysis, the touchstone is fairness and justice. In this regard, some flexibility is inherent in any exercise of discretion. The Corner House principles are to be applied with the necessary flexibility in order to reach a fair and just outcome. Fairness and justice mean that the position of the other party to the proceedings is always taken into account.

Having laid down the relevant principles on the grant of PCO, the CFA went on to conclude that, as a matter of fairness and justice, a PCO should not be granted in the present case.

5 key takeaways

There are several important implications arising from the decision of the CFA.

The CFA recognised that a PCO represents a more exceptional departure from the normal incidence of costs when compared with the Chu Hoi Dick order. As a result, an applicant has to demonstrate “something more” in order to justify the grant of a pre-emptive PCO at an early stage of the public law proceedings, which the CFA identified as the issue of financial ability of the applicant for a PCO under §§74(1)(iv) to (v) of Corner House. This enables the court to proceed on a principled basis and rationale in determining whether it is just and fair to grant a PCO in the circumstances.
(2) It is now clear that the burden is on the applicant for a PCO to provide details on his/her financial ability to bear the potential adverse costs consequences. Specifically, this applies equally to corporate applicants and, depending on the circumstances, it may be entirely appropriate to look closely at the financial ability and resources of shareholders, directors, guarantors and other supporters of a corporate entity.

(3) The assessment of financial ability is not a matter of dollars and cents. In other words, it is not a pure arithmetic question of whether an applicant has adequate financial resources to meet a potential costs order liability. Hence, depending on the facts, there could well be cases where an applicant can afford to meet such potential costs exposure but it would still be fair and just to make a PCO.

(4) Fairness and justice is the touchstone of the jurisdiction. One facet of this principle is that an applicant must make full and frank disclosure of the financial resources. Accordingly, a failure to do so may well result in the court exercising its discretion against the grant of a PCO.

(5) Since the Corner House principles are to be applied with the necessary flexibility in order to reach a fair and just outcome, the principle in §74(1)(iii) of Corner House that the applicant should have no private interest in the outcome of the case may, in certain circumstances, be relaxed. Although the CFA did not consider it necessary to go into this issue further, it seems clear that such a requirement may be relaxed in future depending on the circumstances of a case.

Jenkin Suen (led by Johnny Mok SC) appeared on behalf of the Town Planning Board in the appeal to the CFA (as well as the appeal to the CA).
Overdraft in overdrive: what happens to post-petition payments?

*James Wardell and Jackson Ip v. Cheng Shing Ki* [2018] HKCFI 2057

By Rosa Lee

The Company in question was wound up. The Petitioner (who are liquidators) subsequently applied for declarations that two payments made out of the bank account of the Company after the commencement of the winding up of the Company are void pursuant to section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) (“Ordinance”).

The first of the two impugned payments was made out of a bank account that was in overdraft. The consequence of the payment was that the overdraft increased.

Whilst the Hong Kong Court of Appeal has previously held that a post-petition payment out of the account of a company that was already in overdraft did not constitute a disposition of the property of the company for the purpose of section 182 of the Ordinance, it left open the question of whether or not the use of an overdraft might give rise to a disposition of a company’s property where the bank held security for future advances.

This question was examined by Harris J in this case. He held that whilst the payment in itself does not constitute a disposition, it might nonetheless cause a negative impact on the equity of redemption of the secured asset and in this sense constitute a disposition of the company’s property. In other words, an increase in the overdraft automatically expands the quantum of the bank’s security interest, and correspondingly reduces the company’s equity in the charged assets, unless these are already charged to their full value at the time of the further drawing on the account.

On the facts of this case, Harris J held that the two payments did not constitute dispositions of the property of the Company, as they were proceeds of sale of a property which were subject to a charge given by the Company over the property. The charge extended to the proceeds of sale, both as a matter of express terms of the charge, and as a matter of common law.

Janine Cheung appeared for the applicant.

David Chen appeared for the 1st respondent.

Rosa Lee authored this Case Report.
Asia Barrister of the Year 2018

It is with delight that DVC announces that John Scott SC, QC, JP, Head of Chambers, secured the Asia Business Law award for Asia Barrister of the Year. The announcement was made at the Asia Law dinner on 20 September 2018.
Exceptional results achieved by DVC Harry Liu Scholars as well as the John Griffiths QC, SC, CMG Prize Awardee

16 July 2018

With pleasure, we announce the exceptional results achieved by our second batch of DVC Harry Liu Scholars and first John Griffiths QC, SC, CMG Prize awardee upon completion of their Masters degrees from the Universities of Oxford and Cambridge this year. They will be commencing 9 month pupillages in Chambers in 2018 and 2019.

Cyrus Chua, our second DVC Harry Liu Scholar, is the recipient of the Vinerian Scholarship Proxime Accessit 2018, a prestigious prize awarded by the University of Oxford to the runner-up in the Bachelor of Civil Law ("BCL") examinations. Cyrus obtained subject prizes for three out of four BCL subjects (conflicts of laws, competition and legal concepts of financial law). Cyrus completed his first degree at the University of Cambridge with a Triple First and won prizes for best performance in EU law, conflicts of laws, land law and tort law. He has been adjudged best speaker and champion of a number of competitive moots.

Brian Fan, our first John Griffiths QC Scholar, achieved a distinction in each of his BCL subjects (corporate insolvency, commercial remedies, restitution of unjust enrichment and private law and fundamental rights) in 2018. Brian graduated with a top first from the University of Hong Kong. He was awarded prizes in various international and domestic mooting competitions including a championship and best oralist award. Brian was awarded the Hong Kong Jockey Club Scholarship and the John Griffiths QC Prize to pursue the BCL.

Euchine Ng, our third DVC Harry Liu Scholar, achieved a distinction in her Master of Laws at the University of Cambridge after she completed her undergraduate degree in the same university with a Double First. Euchine has received a string of prizes and scholarships over the years, including 5 scholarships awarded by Trinity College Cambridge.

Tinny Chan, our fourth DVC Harry Liu Scholar, also obtained a distinction in her BCL studies in 2018. Tinny graduated from the University of Oxford with First Class Honours and a number of awards from Merton College. She represented Oxford in the Philip C Jessup International Law Moot Court Competition and was awarded the 4th best oralist prize for individual performance in the international rounds.
Ian Pennicott SC, QC was called as a Bencher to the Middle Temple

21 September 2018

DVC’s Ian Pennicott SC, QC, was called as a Bencher to the Middle Temple on 21st September when Benchers, Judges, Silks and members of the Bar from the UK and Hong Kong gathered for the annual Amity Visit which was held at the Asia Society in Hong Kong. Additional highlights of the Amity Visit can be found on page 54-55.
DVC’s **Catrina Lam** receives Honorary Award

DVC’s **Catrina Lam** also received an award from The Middle Temple and was made an Honorary Member of the Middle Temple on 22nd September. Additional members who attended from DVC included former Head of DVC, **John Griffiths SC, QC, CMG**, **John Scott SC, QC, JP**, **Winnie Tam SC, JP**, **Teresa Wu**, **Frances Lok**, **Sabrina Ho**, **Connie Lee**, **Michael Lok**, **Stephanie Wong**, **Cherry Xu**, **Tommy Cheung**, **Lai Chun Ho**, **Look-Chan Ho** and door tenant, **Kelvin Kwok**.
How are insolvency and competition laws evolving? Richard Leung JP and Tommy Cheung talk about the changing dynamics

DVC’s Richard Leung JP and Tommy Cheung delivered an enlightening seminar on minority shareholders’ rights. Richard and Tommy examined various weapons minority shareholders could deploy for countering and/or checking against oppression by the majority, including the frequently utilised derivative actions, just and equitable winding-up petitions and unfair prejudice petitions as well as less drastic methods such as requisitions for general meetings and inspection of books and records. The key message delivered was that a minority shareholder should clearly identify his objectives, and select the appropriate method(s) to serve that desired purpose, taking into account the structure of the company and the dynamics between the shareholders. The seminar was an engaging one with many thought-provoking exchanges between the speakers and the audience.

Riding on the success of the CPD seminar on insolvency law, Richard and Tommy held another well-attended CPD seminar on competition law on 10 July 2018. This time, Richard and Tommy provided a succinct and lively introduction to Hong Kong’s competition law as well as an update of the competition law decisions decided since the Competition Ordinance (Cap 619) came into effect. They also critically examined the implementation of the Ordinance, and suggested ways to enhance its effectiveness. The seminar concluded with a very interesting Q&A session as well as tips on how undertakings and their legal advisors could work together to ensure due compliance with the Ordinance.

For a run down of DVC’s competition specialists please click the image below.
Joint Collaboration between DVC and the Beijing International Arbitration Forum: An Autumn seminar on Cross-Examination Skills

On 7 and 8th September, DVC’s Winnie Tam SC, JP, William Wong SC, José-Antonio Maurellet SC, Adrian Lai, Patrick Siu, Alex Tang, Michael Lok and Ellen Pang visited Beijing to jointly host presentations and a series of workshops with the Beijing International Arbitration Forum (BIAF). 200 participants attended the events with another 600 people following online.

The plenary on 7th September commenced with a lively keynote speech delivered by William Wong SC who discussed the mutual synergies that could be brought about given the long-established, high-level advocacy and training skills that DVC was able to offer various Red-Circle firms, and symbiotically the potential arbitration opportunities that the BIAF could facilitate and extend to foster and fuel relationships going forward. Given Hong Kong barristers’ abilities to assist with international arbitration, legal opinions, litigation strategy and advisory work, and importantly the capacity to be directly instructed by PRC law firms, our members shared with the audience their capabilities in terms of collaborating and forming complementary teams with a view to pooling knowledge from both jurisdictions.

William and Patrick then discussed Witness and Evidence Preparation in International Arbitration. William and Patrick also introduced the rules and practices of witness and evidence preparation in international arbitration. And this was followed by an engaging joint presentation by Adrian Lai and Sun Huawei from Zhong Lun, on the principles associated with the practice of investment arbitration.
Ellen Pang unveiled the issues surrounding late submissions in an arbitration. Yao Hongmin, Deputy Secretary-General of the Shanghai International Arbitration Center, shared his views on how to avoid *excès de pouvoir* of arbitrators.

The second module in the afternoon’s session was conducted adopting the Tylney Hall Style, which afforded guests the opportunity to have their questions answered, encouraging interactive exchanges between the speakers and attendees. The module was moderated by Professor Lu Song of China Foreign Affairs University and the founder of BIAF. DVC’s Alex Tang was joined by Dr. Chen Fuyong, Deputy Secretary-General of the BAC, Liu Yuwu, Partner at King & Wood Mallesons, and Jessica Fei, Partner at Herbert Smith Freehills in their talk on vital issues which included: language in international arbitration, translation of evidence; treatment of witnesses statements in the absence of a respondent; the treatment towards non-signatories to an arbitration and the applications associated with pre-trial procedure orders.

In mock arbitrations, José-Antonio Maurellet SC, Winnie Tam SC, JP, and William Wong SC invited the audience to participate in various workshops to showcase specific do’s and don’ts associated with witness and cross-examination skills in the international arbitration context. Two partners from Fangda Partners acted as witness and expert respectively in engaging and informative hypothetical scenarios and a Q & A session rounded off the day in what was regarded as a rewarding and successful two day colloquium.
A Cross-border Insolvency and Restructuring CPD seminar 13th September 2018

What are the options for a creditor seeking to wind up a foreign company?

DVC's Jason Yu and Michael Lok set out the options illuminating all the relevant tests and case law associated with each avenue when they delivered a presentation on the latest developments on cross-border insolvency and restructuring at Reed Smith Richards Butler on 13th September.

Jason and Michael singled out the overarching question and the three core requirements that needed to be satisfied under China Medical Technologies Inc 2018 HKCA 111 and discussed the cardinal case of Re Yung Kee Holdings Limited 2015 18 HK CFAR 501.

They also examined:

(1) Arbitration and Winding-up citing the very recent case of Re South West Pacific Bauxite Hong Kong Ltd 2018 to HKD 449

(2) Recognition and Common Law Power of Assistance where the Privy Council case of Singularis Holdings Ltd v. PricewaterhouseCoopers [2015] was cited. Separately, the need for a recognition order was queried and the general limitations of the power were considered in context in Re African Minerals Limited Ltd [2015] 4 HKC 215.

(3) Recognition of Foreign Corporate Rescue Proceedings and Voluntary Winding-up deliberated on various issues surrounding solvent liquidation and whether foreign corporate rescue and restructuring schemes were covered by the common law power of assistance.

(4) Cross-border Restructuring Regimes and Schemes of Arrangements referenced three very recent schemes from 2018 where the cross-border element was sanctioned by the Court.

The CPD accredited seminar was very warmly received by the attendees.
At a thought leadership event entitled “War Stories Taken from the Trade Mark & Restructuring Front Lines: Pick your Battles” featuring speakers Winnie Tam SC, JP, William Wong SC and Look-Chan Ho, held in concert with the HKCCA, a group of in-house and general counsel from a spectrum of different industries converged at the Bankers Club on the evening of 13th September.

After introductory remarks by Andrew Olsen, CEO of HKCCA, the evening got off to a brisk start when DVC’s Winnie Tam SC, JP began the first part of the talk which focused on the fine line between good and bad trade marks and bilingual trademarks as well as the tension between well-known fashion marks and their Chinese names. In an entertaining review of recent case law including the Hugo Boss and the TWG cases, Winnie emphasised the importance of registration trumping all else in the context of trademarks.

William Wong SC dived into the War of Jurisdictions homing in on recent developments in jurisdictional issues in corporate restructuring which was followed by a talk on Board Fights and Wars of Control over Listed Companies. This topic was also discussed in detail at the Book Launch for the “Company Law: Powers and Accountability- 2nd edition.”

He discussed battles in the boardroom and the rise of shareholder disputes in Hong Kong. And with a slew of new cases emanating from the HK Companies Court, he delved into recent developments on the appointment of provisional liquidators and the ramping up of their...
powers over the course of the last year. This included a significant change in the law following the China Solar case enhancing the powers of provisional liquidators enabling them to carry out restructuring where they had originally been appointed for asset preservation.

Look-Chan Ho wrapped up the session by taking the audience through 3 key topics which included how a restructuring is normally carried out, the use of provisional liquidators in HK, and the international issues that are affecting the Hong Kong panorama. He noted that Hong Kong has no corporate rescue legislation unlike Singapore, and the US which makes use of Chapter 11 proceedings. He additionally observed that in Hong Kong we have the Companies Ordinance scheme of arrangement based on English law which is beneficial because it is a flexible tool that can cater to all forms of restructuring.

The evening was capped off by a casual networking cocktail where DVC’s members were able to mingle with in-house and general counsel.

For a highlight reel of recent cases in the insolvency sphere please click the image below:
A compass for the conversation on Controlling Costs - an in-house presentation delivered by Look-Chan Ho and Tommy Cheung

The holy grail for most lawyers in today's panorama is to maximise efficiencies and deliver exceptional work product with fewer resources. At an in-house CPD accredited event entitled *Controlling Costs* that pulled together intimate contingents of litigators and in-house counsel, DVC’s Look-Chan Ho and Tommy Cheung put forward possible solutions to achieve this.

On 20th September, Tommy and insolvency specialist turned newly minted barrister Look-Chan Ho addressed the ubiquitous more for less challenge by looking at best practices for cost-efficiency through the lens of solicitors and the in-house community, suggesting how barristers might assist. Look and Tommy also provided a compass for the conversation on Controlling Costs in the commercial insolvency litigation and third party funding context.

Collectively, they tackled the issues of client dissatisfaction in a fiercely competitive environment, pointing out judges’ chief complaints in the commercial court and suggested how tactical and strategic decision making might be used to shape short-term and long term budgetary objectives. Look also considered the cost benefits of niche expertise. He additionally raised the possibility of fee caps being introduced in phases and getting the ratio right when it came to partners and more junior staff that could assist.

Experience tells us that economic and political volatility often generate more disputes, and with geopolitical shifts, we have seen this already. That said, Look pointed out that we are also seeing more clarity in the form of very recent case law that has emerged in the context of insolvency, commercial and third party funding. This included references to the cases of *Mongolian Mining* (see page 17 of this newsletter) and *China Solar* (for which DVC netted the GRR Insolvency or Restructuring Deal of the Year Award in June this year featuring John Scott SC, QC, JP, Clifford Smith SC, William Wong SC, Jose-Antonio Maurellet SC, John Hui, Alexander Tang and Jonathan Chan).

Tommy relayed his experience of how the courts regard litigation funding agreements, drawing from the very recent case of *Raafat Imam v Life (China) Company Limited and Others* [2018] HKCFI 1852 which definitively laid to rest the issue as to whether a plaintiff is entitled to ask the Court to grant a declaration that a proposed funding agreement does not offend against maintenance and champerty. Click here to read the full Case Report featuring DVC’s Clifford Smith SC, Sabrina Ho and Tommy Cheung.

A rousing question and answer session followed with Look-Chan Ho and Tommy jockeying with the attendees on issues involving criminality in the context of champerty, access to justice exceptions and more on third party funding related matters.
Opting not to hedge their bets on the risks associated with short selling regulations, over 50 academics and practitioners assembled at the DVC-Cambridge-HKU Fellowship on 20th September 2018 for a seminar entitled “Some Short Observations on Short Selling Regulations”. The Public Lecture was delivered by Fellowship recipient Dr Elizabeth Howell* and chaired by DVC’s Anson Wong SC.

DVC’s Jasmine Cheung delivered a brief introduction to the Fellowship, the first of its kind, before giving the floor to Anson Wong SC who chaired the discussion on Short Selling and whether it should be the subject of regulation.

Dr. Howell took the audience through the territorial scope and nature of financial instruments traded and this was followed by a discussion on sovereign debt and sovereign credit default swaps. Set against a climate marked by global inflection points that included the 2008 GFC and the Eurozone sovereign debt crisis, Dr Howell evaluated the evolving role of the European Securities and Markets Authority (‘ESMA’) under the Short Selling Regulations. She wrapped up with predictions as to what the future might hold given a looming Brexit.

See below for a full transcript of Dr Elizabeth Howell’s talk.

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This evening’s presentation is in five parts:

**Part I:** Should Short Selling Be Regulated? **Part II:** Divergent Responses - USA; Hong Kong; EU jurisdictions (pre-SSR) **Part III:** Regional Response: EU Short Selling Regulation (‘SSR’) **Part IV:** ‘Brexit’ and the Future **Part V:** Conclusion — the Global View

The presentation’s key take-aways are as follows: the justifications for permanent short selling constraints largely fail to stand up to scrutiny. From a legal and economic perspective – the practice makes markets more efficient. But regulators often need to be ‘seen to be acting’, especially following a crisis (it is a politicised topic). This results in divergent national (or regional) responses. It generates additional costs for participants and leads to regulatory arbitrage. If short selling is to be regulated, it needs a global stance – but this is unrealistic. International standards are framed at a high level of generality; can only recommend approaches to problems.

**Part I: Should Short Selling Be Regulated?**

What is short selling? It is the sale of securities the seller does not own. Generally shares are borrowed from a third party with the intention of buying back identical assets at a later date to return to the lender. The short seller hopes to profit from a decline in price between sale and repurchase.
It is a sensitive topic. Short sellers are convenient targets for criticism; they are seen as ‘betting against the team’ as they profit when the share price falls.

There are two main types. There is covered or conventional short selling where shares are borrowed (or arrangements are made for them to be borrowed) in advance. There is also naked short selling, where no shares are borrowed in advance. This is possible because there is a gap in time between the agreement to transfer shares to the buyer for a particular price and the requirement to actually do so. The gap in time enables the short seller to go into the market and buy the shares to deliver them to the buyer.

How does short selling compare with taking a long position.

A long position or ‘going long’: involves the more conventional method of buying shares and selling them in the future for a profit; there is a fixed downside. In contrast, with short selling, you profit if the price falls. There is a fixed upside as the price can only fall to zero but the downside could be unlimited. For example, the German carmaker Volkswagen briefly became the world’s most valuable company in 2008 after disclosure of stakebuilding by Porsche sent the share price skyward and squeezed hedge funds into a scramble for stock.

Why does short selling justify a different regulatory response to taking a long position? This can be best explained by the fact that short selling is considered to be a morally dubious activity. Descriptions abound from short sellers as pecuniary vampires, and villains, and the fact that many short sellers are hedge funds compounds the perception that they are embracing unscrupulous strategies to profit on price falls.

What concerns does the practice raise?
Three key concerns are raised.

(1) It can destabilise orderly markets and increase market volatility, especially in falling markets.

(2) There can be market manipulation concerns.

(3) There are settlement risks.

Does Short Selling Destabilise Markets?

There is substantial evidence that it has beneficial impact on markets. It facilitates price corrections in overvalued stocks. Some studies suggest contribution is greater than that of analysts. It also enhances liquidity and trading opportunities. Further, empirical studies of the conditions during the financial crisis found that temporary bans slowed down price discovery; affected liquidity; and that the bans failed to support prices.

On the second regulatory concern, of market abuse (in essence that it can manipulate the market in a stock), this is a risk, but it can be dealt with via a jurisdiction’s market abuse regime. If such provisions are unsatisfactory, this merits a re-consideration of these rules and their enforcement. It is not immediately clear that additional ex ante short selling constraints are the answer, particularly as this would limit valuable shorting activity. The final concern of settlement failure is especially highlighted with naked short selling where the shares are not borrowed in advance. Yet, strict settlement regimes and penalties for default can incentivise traders to settle their trades.

Taken together, the practice of short selling does not create insurmountable problems for markets; moreover the imposition of short sale restrictions may be ineffective and impede market efficiency.

If the decision is made to regulate—which tools exist? There can be a disclosure regime (e.g. notification to regulators (private); disclosure to market (public) (e.g. EU regime).
Circuit breakers can be used, and there can be a tick rule (e.g. only allowing short sales when the share price is rising) (e.g. US, Hong Kong regimes). Settlement rules can be imposed (e.g. T+3; penalties; buy-in procedures) (e.g. EU). There can be short selling bans: naked or covered; temporary or permanent.

The 2008 crisis has been described as a ‘watershed moment’ for short selling regulation (Avgouleas). Temporary short selling bans were imposed (although Hong Kong did not introduce any additional restrictions). There was a political push to protect certain (i.e. financial) stocks (this also played out in the Eurozone crisis). Subsequently, the EU introduced the Short Selling Regulation (‘SSR’) and the US introduced additional short sale constraints (alternative uptick rule).

It is easy to characterise the regulatory reactions to short selling as a political response to the crisis. Short sellers are seen as villains; and the public does not fully understand the practice. Politicisation is often evident in the regulation of short selling (e.g. the crisis temporary bans; the EU regulation of sovereign debt and sovereign CDSs).

Is there merit in its regulation?
Depending on one’s viewpoint, temporary restrictions on major banks may be justified during periods of volatility (Armour et al, 2016) Regulators will (understandably) prioritise financial stability during a crisis. But, given that restrictions may not necessarily achieve their aim, what is actually achieved? Plus, there remains the ability to circumvent restrictions e.g. via derivatives.

Part II: Divergent Responses

At the international level, the IOSCO High-Level Principles on short selling regulation (2009), seek to limit political pressure to ban short selling or impose an uptick rule. The principles recommend restrictions on failed trades (strict settlement discipline – in effect banning naked short sales); an appropriate disclosure regime; effective compliance and enforcement; and exceptions (e.g. for hedging, market making activity). The principles are light touch; they are the product of compromise. There was much disagreement between states as to the need for regulation, and if so, with which tools. Accordingly these are not sufficiently granular for international harmonisation.

The US has regulated short selling since the 1930s. A wide range of provisions exist including constraints on all short sales before secondary share offerings; a ‘locate’ rule (i.e. a broker-dealer has reasonable grounds to believe security can be borrowed); settlement rules to prevent fails-to-deliver. Taken together, these equate to a de facto ban on naked short selling. There is also now an ‘alternative uptick rule’ (a variant on its earlier uptick rule). In essence if the price drops by 10%+ then a circuit breaker kicks in to prevent short sales from driving down the price. A restriction period applies for the remainder of that day plus the next day and if the price continues to fall – it can be re-triggered). There are also some general reporting requirements including marking (‘flagging’) requirements; plus SROs (FINRA etc) publish some aggregated data on a delayed basis.

The US regime is fairly onerous and can be explained by the fact the SEC is an agency ‘at once independent and beholden’ (Sirri, 2010). It has to go cap in hand to Congress for its funding, and it was weakened as a regulator after the GFC. Political pressures were also placed on the SEC and it did not want to lose part of its authority over a matter such as short selling. Accordingly, it sought to please Congressional critics with the direction of its short selling policy.

Hong Kong is a type of ‘New York for China’. It is tied to China politically and economically, yet separate and primarily outward looking (Donald, 2014). A variety of regulatory approaches are in operation and it has been described as ‘robust’, but also perhaps ‘archaic’? (Webb, 2010)) The practice was prohibited until the 1990s; a pilot scheme in 1994 permitted covered short selling for some stocks (plus a tick rule). The practice was then allowed (to an extent) since 1996 (and the tick rule was repealed). A tighter regime has then been in place since the Asia crisis in 1997 (i.e. due to short selling on the HK dollar) and a tick test was reinstated. Hong Kong did not impose additional constraints during the crisis.

Short selling is only permitted for ‘designated stocks’ on the public list (this is revised quarterly and responds to market conditions). There are tight settlement rules; and no naked short selling is permitted (criminal liability). There is a permanent tick rule in operation. Since 2012, disclosure to the regulator is required of net short positions (0.02%/

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HK$30 million in the main). Aggregated anonymous data on short positions is published (c. 3 days later). Economic analysis on HK market in line with general literature: shorting constraints lead to overvaluations (Chang, 2007).

Politics may influence which shares are shortable? (Choi and Huszar, 2016). There are also analogies with the US/EU jurisdictions during a crisis: regulators need to respond to political or national sentiment and protect certain stocks. The Hong Kong regime is certainly robust, but not all shares can be sold short?

In the EU, before the SSR, a wide range of national approaches existed. The UK principally used disclosure (plus temporary bans during crisis). Germany imposed temporary measures during the crisis and adopted permanent regime after the crisis (bans on some forms of short selling; plus disclosure). In France, there was a disclosure regime plus a locate rule (Payne, 2012).

There are discrepancies between the IOSCO recommendations and the different regulatory approaches worldwide. When national regulators perceive a strong national interest in reaction to a problem, they ‘go their own ways’ (Karmel, 2012). This leads to a failure of international regulation. Go-it-alone strategies are distortive and ineffective in highly integrated markets (Payne, 2012). This results in regulatory arbitrage; invention of synthetic equivalents; and extra costs for participants.

Part III: Regional Response: the EU

The SSR has a wide ambit. It has extra-territorial scope (its perimeter is set by instruments subject to the rules, not by e.g. location of market participants holding short positions). Its regulatory techniques include restrictions; reporting rules; and settlement discipline. The restrictions focus on shares, sovereign debt and sovereign credit default swaps (‘CDSs’). There is a fundamental distinction between naked vs covered short selling. Permanent restrictions exist on the naked short selling of all shares and sovereign debt; plus a prohibition on entering uncovered sovereign CDSs (an equivalent method of short selling the debt). Temporary bans can be imposed, and there is a two-tier approach for reporting net short positions in shares. Tight settlement rules are in place (and this is now governed by separate legislation).

National competent authorities (‘NCA’) have temporary powers for emergency situations (e.g. they can impose bans; circuit breakers etc). The European Securities and Markets Authority (‘ESMA’) has wide powers. These range from soft powers including a facilitation and coordination role regarding any NCA emergency action plus direct intervention powers (as a last resort). It can prohibit or impose conditions on entry into short sales (NB sovereign debt excluded).

The conferral of direct intervention powers on ESMA is a significant step forward regarding EU intervention in markets. This was a controversial development- why? There are constitutional and political sensitivities with this transfer of competence from Member States to an unelected EU agency such as ESMA. The UK challenged ESMA’s powers on a number of grounds (including Meroni) but the European Court of Justice affirmed ESMA’s powers (Case C-270/12 UK v. Council and Parliament). The case places ESMA on a firmer constitutional footing (a type of ‘mellowing’ of Meroni? (Pelkmans & Simoncini, 2014).

ESMA has not yet made use of its direct powers. Due to the sensitivities surrounding its direct powers of intervention, ESMA is likely to be relatively circumspect before utilising them. In relation to the UK’s ‘Brexit’ vote, ESMA and NCAs coordinated in advance and decided there was no need to use their powers on the day of the result (including with respect to imposing short selling bans).
The table below sets out ESMA’s opinions issued to date in relation to national temporary bans.

### ESMA Opinion: NCA Temporary Bans

#### Country Number (inc renewals)

ESMA’s early opinions were brief and mapped the legislative wording. For instance its opinion on the Spanish ban in 2012 (2012/715) gave a brief factual background before endorsing the national stance. Over time ESMA has issued more detailed and comprehensive opinions. For instance its opinion on Italy’s 3-month ban (2016/1078) took into account the market uncertainty surrounding Brexit; and related pressure from the ECB etc. In 2016 there was one negative opinion on a proposed extension of a Greek ban relating to the shares of Attica Bank. Its detailed opinion included quantitative analysis of Attica’s share price, and it identified other tools (e.g. the more short term circuit breaker measure) that could be more appropriate in event of price spiral.

The Greek regulator implemented the ban regardless. Again, it is likely that the wider political backdrop/fragility of its relations with the EU played a part. It shows it is strengthening its capacity as an EU supervisor in its willingness to adopt a stance that directly contradicts a NCA (Moloney, 2016). This may not be the only occasion when NCA and ESMA disagree. In this regard the question remains open about whether ESMA may embrace its direct powers of intervention especially in absence of NCA cooperation. Brexit will also remove the UK’s ‘often sceptical posture’ towards ESMA (Moloney, 2017). More broadly, we could witness the incremental strengthening of ESMA’s role? (Howell, 2017)

### Date ESMA’s Opinion

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of Temporary Bans</th>
<th>Date of Opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spain</td>
<td>2 x Temporary Ban</td>
<td>Nov 2012, June 2017</td>
</tr>
<tr>
<td>Italy</td>
<td>4 x Temporary Bans (includes 2 renewals)</td>
<td>Oct/Nov 2014, July/Oct 2016</td>
</tr>
<tr>
<td>Greece</td>
<td>13 x Temporary Bans (includes 9 renewals)</td>
<td>Nov/Jan/April 2012-13, June-Dec 2015</td>
</tr>
<tr>
<td>Greece</td>
<td>1 x Temporary Ban</td>
<td>Jan 2016</td>
</tr>
</tbody>
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Why did stocks plummet? This was due to the political surprise – the financial markets were expecting a ‘remain’ vote. Downward movements in markets made shorting profitable. A large number of short positions were reported after Brexit (the numbers almost doubled from 4 trading days pre-Brexit to the 4 after Brexit) (Koehl, 2016). Industries particularly impacted included travel and construction. Such sectors were affected by the loss of value of the British pound, and were vulnerable to an economic downturn.

Will the UK retain the SSR post-Brexit? To recap, the SSR has extra-territorial application. The perimeter is set by the instruments subject to the SSR; domicile or establishment is irrelevant. Hence in one sense, there is no change: it continues to apply to actions in the UK post-Brexit where they relate to shares on trading venues in EU (although if the principal venue is third country then this is exempt from the SSR). Further, as a matter of UK law, the EU Withdrawal Act generally converts EU law into UK law on ‘Brexit day’. But will the UK retain the SSR long-term?

In terms of possible UK policy responses over the longer term, arguably there are three broad categories of EU legislation to consider. Those the UK views as necessary and seeks to maintain (e.g. EU market abuse regulation – ensure public confidence and integrity of financial
markets); those the UK may view as unnecessary, but choose to maintain to try and ensure equivalence to facilitate continued access to EU for UK-based firms (e.g. AIFMD?); and those the UK views as unnecessary and allows to lapse (SSR?).

Is the SSR unnecessary? The SSR is unpopular with industry (especially naked short selling restrictions and reporting rules). The industry view is that the constraints do not halt price declines in times of market stress. The UK regulator also considers that specific elements of SSR could have unintended consequences and potentially negative effects on market liquidity (2016). It remains a matter of debate whether the UK will retain the SSR or allow it (or parts of it) to lapse? Should it be retained, given the regulatory concerns?

**Part V: Conclusion – the Global View**

Short selling regulation will only be effective if there is a uniform cross-border response. Divergent rules lead to uncertainties and produce regulatory arbitrage. Although this could be seen to be a welcome outcome given short selling’s benefits, such activity is not necessarily straightforward or cost-free.

What about a global regime? This would simplify compliance and produce clarity. But we only have high level principles. Global harmonisation is difficult! (IOSCO has over 115 members – varying legal and market structures). National (or regional) interests often trump harmonisation in practice. Plus, IOSCO has an absence of firm enforcement mechanisms. Finally, from a policy perspective, whether the practice merits regulation, depends on the view ultimately taken as to the benefits and harms that result from it.
Bringing together Middle Temple members, guest Judges from all levels of the Judiciary and Magistracy, members of the HK Bar and junior members and pupils, the annual Middle Temple Amity Visit was held in Hong Kong on Friday 21st and Saturday 22nd September to discuss and share views on a variety of current legal themes affecting the UK and Hong Kong landscapes. A number of Benchers assembled at the event (led by Sir Christopher Clarke, Treasurer in 2016.) Members from DVC included John Scott SC, QC, JP, Winnie Tam SC, JP, Ian Pennicott SC, QC, Catrina Lam-Secretary of The Middle Temple Society of Hong Kong, Teresa Wu, Frances Lok, Ling Chun Wai, Sabrina Ho, Connie Lee, Michael Lok, Stephanie Wong, Cherry Xu, Tommy Cheung, Lai Chun Ho, Look-Chan Ho and Door Tenant Kelvin Kwok. DVC’s previous Head of Chambers, John Griffiths QC SC CMG (pictured below) also visited Hong Kong for the Middle Temple event.

An engaging and interactive Advocacy Demonstration and Moot on Criminal Joint Enterprise was held on the first day and a host of thought-provoking topics were ventilated on the second day with a focus on Competition Law and the Belt & Road Initiative.
The symposium included a presentation on the Resolution of Disputes from Belt and Road Initiative by DVC’s John Scott SC, QC, JP, which was moderated by Sir Vivian Ramsey, and prefaced by a talk delivered by Rimsky Yuen GBM, SC, JP, Judge of the Court of First Instance of the High Court and President of the Competition Tribunal (HK) who considered the use of English law and Hong Kong law in dispute resolution, and the impact of additional maritime cases. An examination of the Competition Law in the 21st Century was shared by DVC’s Kelvin Kwok. He compared and contrasted the Hong Kong and UK regimes stating that stand-alone private actions were not permitted under the Hong Kong Competition Ordinance making it narrower than the UK regime.

Other speakers included The Hon Mr Justice Godfrey Lam, The Hon Mr Justice Joseph Fok, Judge of the Hong Kong Court of Final Appeal (HK), Mr Justice Kevin Zervos, Justice of Appeal of the Court of Appeal of the High Court (HK.) The Hon Mrs Justice McGowan, High Court Judge (UK), The Rt Hon Lord Justice Holroyde, Lord Justice of Appeal (UK) Sir Vivian Ramsey (UK) Dr Gerard McCoy QC SC, Gilt Chambers (HK) Jeremy Nicholson QC, 4 Pump Court (UK) James Flynn QC, Brick Court Chambers (UK), and Michael Bowsher QC, Monckton Chambers (UK) Bruce Harris, Quadrant Chambers (UK) and Steven Parker, Executive Director (Legal Services), Competition Commission (HK) also attended.
Asian International Arbitration Centre’s recent Sports Month in Kuala Lumpur featuring DVC’s Yang-Wahn Hew

DVC’s Yang-Wahn Hew recently partook in the Asian International Arbitration Centre’s (AIAC’s) Sports Month by studying for the AIAC’s Certificate in Sports Arbitration and moderating an engaging and informed panel on esports as part of the AIAC’s Sport Law and Arbitration Conference (SLAC) held in Kuala Lumpur.

The AIAC’s course was orchestrated and taught by Datuk Professor Sundra Rajoo (Director of the AIAC), Paul Hayes QC, Professor Richard McLaren OC, Malcolm Holmes QC, and Kok-Keng Lau, and culminated in a moot involving Yang, Datin Savithiri Ganesan as the arbitrator, and Stephanie David from 39 Essex as his opponent.

As part of the SLAC on 28 September, Yang moderated a panel comprised of specialists and leading experts on esports and esports law. The SLAC was graced with the attendance of and input from YAB Tunku Tan Sri Imran (Hon Life President of the Olympic Council of Malaysia), YB Syed Saddiq Syed Abdul Rahman (Minister of Youth & Sports), Mohamed Hanipa Maidin (Deputy Minister in the Prime Minister’s Department), and Datuk Professor Sundra Rajoo. Its other panels addressed other weighty and topical matters such as pathways to sports dispute resolution in the region, the war on doping, and the rights of athletes.

Yang summarises his experience of the Conference by way of a LinkedIn update.
Prominent speakers, global experts and general counsel from the full spectrum of practice areas came together for the annual IBA Convention in Rome to promote human rights, exchange innovative ideas, discuss geopolitical concerns, learn about the future of law, consider frontier-pushing developments in AI and to discover more about international arbitration, cyber-security, intellectual property and more.

As part of a focus on the role of the media in Hong Kong court proceedings and in her position as Senior and Co-Chair, Forum for Barristers and Advocates, and Head of the Hong Kong Communications Authority, DVC’s Winnie Tam SC, JP, weighed in on the restrictions against photography and video recordings in the courtroom. She explained that Hong Kong has a zero-tolerance policy when it comes to taking photos while Court is in session. Winnie also asserted that unlike other countries where broadcasting and webcasting have become the norm, public debate in Hong Kong has yet to be generated surrounding the virtues of webcasting court proceedings as a way of improving transparency. It was an erudite and fascinating presentation that also expanded upon the elements of free speech with certain limitations. The presentation was warmly received and was delivered before a full-house.

For a full line-up of all the speakers on the Judges or Arbitrators Panel please see the adjacent extract taken from the Programme.

On the first day of the Conference, the keynote speech was delivered by Romano Prodi, the former Prime Minister of Italy and former President of the European Commission. A thought-provoking conversation between Mark Ellis, the...
Executive Director of the IBA and the former Prime Minister ensued as they homed in on economic themes set against a backdrop of Europe’s faltering prominence, increased tension between China and the US and question marks raised over a looming Brexit. Mr Prodi lamented changing alliances and populist attitudes however, he asserted that Europe still had a heritage of intellectual influence. He posed possible solutions to a host of formidable issues in the form of a series of focussed conferences dedicated to tackling migration and upholding the rule of law in addition to other critical issues.

For those in the marketing and business development domain, a series of workshops spotlighting crisis management, agile workforces and the future of law firms enabled meaningful conversations around a constantly evolving workplace.

A powerful video underscored numerous vital themes at the Opening Ceremony in Rome.
GET IN TOUCH

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

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Door Tenants
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