NEWSLETTER
A WORD OF COUNSEL

1st Edition 2022 and 13th Issue
Highlights from 2021

FEATURING:
• LATEST LEGAL DIRECTORY RANKINGS
• SIGNIFICANT AND NEWSWORTHY INSOLVENCY UPDATES
• AN EXCITING AND UNIQUE BOOK LAUNCH IN THE HK LANDSCAPE
• ILLUMINATING WEBINARS AND PODCASTS

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Foreword

Wrapping up a chequered 2021, many of us are hopeful that 2022 will deliver on change and an opportunity to seize new opportunities.

Neatly rounded up in this edition of A Word of Counsel, you will find a recap from 2021 of newsworthy Articles, meaty Case Reports, topical Announcements and a multitude of Multimedia updates.

Articles

The days of carrying armfuls of share scripts have been firmly forgotten as the introduction of the new USM regime has implemented the ‘dematerialisation’ of securities: part of a larger visible trend. Find out why John Scott SC, QC, JP and Jonathan Lee say this is “an important new dawn.”

John Scott SC, QC, JP and Jonathan Lee again pair up to consider the unprecedented scale of travel restrictions and quarantine requirements around the world and how they have impacted parties who are facing enormous difficulties in simply executing transaction documents in wet ink and hardcopy: see their overview in “Electronic Signatures and Related Issues”.

Michael Lok reminds us that careful consideration and analysis is required before launching a Norwich Pharmacal application - however straightforward this may appear at first blush.

Brian Fan examines Exclusive Jurisdiction Clauses and Arbitration Clauses - and queries whether Lasmos remains good law, in a Tale of Two Clauses.

Case Reports

Next, José-Antonio Maurellet SC and Michael Lok collaborate with John Carrington QC of Sabal’s Law (BVI) to provide insights and explore the interplay between the common law power of recognition and assistance and the relevant statutory provisions as they pertain to recognition and assistance in cross-border insolvency following the BVI case of Net International Property Ltd v Adv. Eitan Erez.

In a significant step towards insolvency co-operation between Hong Kong and the Mainland, the case of Samson Paper Co Ltd [2021] HKCFI 2151 marks an important
watershed. Here’s why.

Find out why this decision is a “first” for post-creditors’ scheme meetings. John Hui and Terrence Tai consider how this case lit the touch Paper for creditors in Samson Paper Holdings [2021] HKCFI 3288.

A trio of members including José-Antonio Maurellet SC, John Hui and Howard Wong collaborate to analyse the question: how real has the real risk of dissipation been: framing their examination with recent case law.

DVC’s Yang-Wahn Hew, Sharon Yuen and Howse Williams’ Patricia Yeung clear the air on NDA’s, non-compete clauses and solicitors’ undertakings and leave you with their key takeaways following an analysis of Harcus Sinclair LLP and Anor v Your Lawyers Ltd [2021] UKSC 32.

Find out why the minority view in Broad Idea might prove prescient in warning that the majority’s approach has “unpredicted and unknown consequences,” and that this might be sought in seeking to develop the common law in this way as scrutinised by José-Antonio Maurellet SC, John Hui and Cyrus Chua in Frozen in Time.

Benny Lo advises auctioneers to Watch out in this cautionary tale as illustrated in the case of Horometrie SA and Another v Bonhams(HK) Limited and another [2021] HKCFI 458.

Modern School of Thought... Tommy Cheung analyses and explains why the recent Court of Appeal decision in relation to penalty clauses in connection with a teacher is most welcome.

Connie Lee asks whether the Turtle always wins the race in the Turtle Jelly Saga and answers the question: can a whistle-blower be held liable for publication of libel news coverage.

DVC’s William Wong, SC, JP, Alan Kwong and Stephanie Wong clarify the principles relating to proprietary estoppel and delve into the issues in detail against the backdrop of the Court of Appeal case in Cheung Lai Mui v Cheung Wai Shing & Ords [2021] HK CFI 1842.

Switching gears, John Litton QC serves up a quartet offering as he appraises recent case law that has emerged in the UK in the land and planning space.

Turning to intellectual property, Winnie Tam SBS, SC, JP helmed a case which led to the dismissal of a default judgement application resulting in Alibaba’s e-commerce platform being cleared of infringement. Read more about this interesting overview and insightful judgement here.

On the same topic of infringement, Winnie Tam SBS, SC, JP unveils findings from a landmark judgement targeting the manufacturer of imitative pharmaceutical products.

Elsewhere in this issue, Patrick Fung BBS, SC, QC, FCI Arb and Justin Lam uncover the issues surrounding a tenant’s questionable obligation to reinstate the premises after the termination of a lease in a case involving Abercrombie & Fitch.

Pivoting back to insolvency, and viewing developments through the prism of three recent cases, Michael Lok, Tom Ng and Sharon Yuen foreshadow a new and commendable cross-border insolvency era in Hong Kong, which will serve to carve out a more definitive pathway towards modified universalism.

Michael Lok and Sharon Yuen discuss the interplay between offshore soft-touch provisional liquidation and a lack of winding up proceedings in the milestone case of Re Lamtex Holdings Ltd [2021] HKCFI 622.

Will Adding Oil get you there? Look-Chan Ho expounds upon three recent decisions that will shape and mould a changing landscape as depicted in China Oil Gangran Energy Group Holdings Ltd [2020] HKCFI 1592, Re Burwill Holdings Ltd [2021] HKCFI 1 1318 and Grand Peace Group Holdings Ltd [2021] HKCFI 1563 especially as previous offshore parallel schemes are now considered "outmoded and unjustified."

How did the Court ensure the creditors were not exploited when soft-touch provisional liquidation
was being invoked in *Re China Bozza Development Holdings Ltd [2021] HKCFI 1235*. Look-Chan Ho and Terrence Tai shed light on this with a comprehensive narrative of the case.

All Access pass? Find out what the Court decided in *Re China All Access Holdings Ltd [2020] HKCFI 2940* in the context of whether or not Hong Kong appointed liquidators would be recognised in the Mainland. Rosa Lee explains how the issue was resolved.

Heightened levels of uncertainty brought about by COVID-19 have led to a re-formulation in some instances as to how physical meetings can be convened – José-Antonio Maurellet SC and Jasmine Cheung reflect upon three things to look out for in privatisation schemes.

Determine why Anson Wong SC and Look-Chan Ho view *Re HNA Group Company Ltd [2021] HKCFI 2897* as a milestone decision in providing a crosscut to the mainland courts’ recognition of Hong Kong schemes of arrangement under the momentous ‘Pilot Measure.’

Wrapping up the Case Reports section, find out why authors Patrick Fung BBS, SC, QC, FCIarb, José-Antonio Maurellet SC, Tom Ng and Look-Chan Ho consider the *Keepwell* judgment a groundbreaking cross-border insolvency decision where the principle of “one country two systems” is enshrined.

Announcements

Continuing a robust track record, the last quarter of 2021 saw 6 new tenants join DVC – find out who they are [here](#).

Ian Pennicott QC, SC and Calvin Cheuk collaborated to launch a unique book in the Hong Kong landscape in December 2021: *Commissions of Inquiry in Hong Kong*. This is the first text that tells you “all you want to know” about COIs in Hong Kong.

A staunch representation of silks and juniors from DVC were accredited in the latest Chambers and Partners rankings for 2022. Find out who they were [here](#).

For the second year in a row, and since the Legal 500 was first launched for the HK Bar, a substantial cohort of DVC’s members were recognised by the Legal 500 2022.

Find out also who featured in the latest rankings for Who’s Who Legal 2022.

Uncover who was acclaimed in various sectors by the Doyles Guide for 2021.

8 members of DVC were appointed to the panel of arbitrators of the Shanghai International Arbitration Centre. Find out who was empanelled [here](#).

Dr William Wong SC, JP was appointed as a Committee Member of the Shanghai International Economic and Trade Arbitration Commission. Those details are unmasked [here](#).

DVC’s John Scott SC, QC, JP commented on government proposals slated in relation to doxxing in a CNN article. Find out more about what these proposals entailed [here](#).

Multimedia

A constellation of IP professionals and experts from around the world came together to examine IP opportunities and advances in this domain in the recent BIP Asia Forum. A recap from Winnie Tam SBS, SC, JP’s elucidating talk appears [here](#).

DVC’s Head, Winnie Tam SBS, SC, JP spoke at the Joint Opening Ceremony of the International Arbitration Centre of China’s Greater Bay Area and China Shenzhen Intellectual Property Arbitration Centre. This was an engaging presentation which highlighted some key future developments to look out for in a rapidly evolving panorama.
Winnie Tam SBS, SC, JP was featured as a guest speaker in a revealing and fascinating podcast hosted by Boase Cohen & Collins.

Demystifying “Construction 2.0” Kaiser Leung unlocked the measures that have been put in place to redress recent issues transpiring as a result of commissioning delays, site safety and construction delivery quality in his edifying talk at the Society of Construction Law Hong Kong International Conference 2021.

How can Hong Kong and foreign parties participate in recovery and insolvency proceedings in the PRC? Connie Lee outlined some best practices associated with asset recovery involving PRC counterparties and assets in an illuminating virtual conference entitled: Asset Recovery Asia.

DVC’s Look–Chan Ho and Robert Rhoda of Dentons served as the Rapporteurs of the newly published IBA Toolkit on Insolvency and Arbitration for Hong Kong.

Shedding light on a number of key elements that have arisen from recent insolvency case law, Look–Chan Ho crystallised these in a BlackOak LLC’s video blog series.

Highlighting pivotal advantages and the prime benefits associated with using Hong Kong law, William Wong SC, JP and Look–Chan Ho neatly framed these issues in an engaging webinar in the final quarter of 2021.

You can read more about the milestone Cross-border Insolvency Cooperation Forum between Hong Kong and the Mainland where Look–Chan Ho joined a panel of esteemed specialists for a keynote speech delivered by Mr Justice Harris.

DVC hosted an illuminating two part Webinar on Confidentiality & Privilege in Arbitration and Mediation in conjunction with the HKIAC in the final quarter of 2021. This featured a trio of DVC members in concert with eminent external speakers in the field.

Capping off this edition, Patrick Fung BBS, SC, QC, FCIArb and Ellen Pang home in on various aspects of arbitration agreements for an audience from Peking University framing the key takeaways in a clear-eyed brief.

We hope you enjoy this bumper edition of A Word of Counsel, our first edition for the year. We will continue to keep you updated with developments as they unfold in the landscape. And if there is anything you would like to see covered in upcoming issues, please let us know.

Click here to review 2021’s edition.
A Word of Counsel

Inside this issue

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DVC’s Connie Lee Participated in The Panel Discussion “Outside the realms of UNCITRAL – asset recovery involving insolvent PRC parties”

DVC’s Head of Chambers, Winnie Tam SBS, SC, JP recently spoke at the BIP Asia Forum

DVC’s Ian Pennicott QC, SC and Calvin Cheuk launch “Commissions of Inquiry in Hong Kong” a unique book in the HK landscape

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DVC’s Ian Pennicott QC, SC and Calvin Cheuk launch “Commissions of Inquiry in Hong Kong” a unique book in the HK landscape

Chambers and Partners Greater China – HK Bar 2022 Accolades

Legal 500 Asia-Pacific 2021–2022 Inaugural Accolades for the Hong Kong Bar

DVC is delighted to announce 96 that 7 Silks and 3 Juniors have been accredited in the latest Who’s Who Legal 2021–2022 rankings
A number of DVC’s members were recognised by the Doyles Guide 2021 for Leading Construction & Infrastructure Litigation Barristers - Hong Kong.

Members were recognised in the Doyles Guide 2021 for Maritime & Shipping Law.

Recognition of DVC’s members’ strengths in Family & Divorce Law in the latest Doyles Guide 2021.

Kerby Lau and Frances Lok were accredited for Estates & Probate Litigation in the Doyles Guide 2021.


8 members of DVC were appointed to ShIAC.

Dr William Wong SC, JP was appointed as a Committee Member of the Shanghai International Economic and Trade Arbitration Commission.

DVC members passed the first ever Guangdong-Hong Kong-Macao Greater Bay Area Legal Professional Examination.

DVC’s John Scott SC, QC, JP is quoted in a CNN article on new proposals slated to come under the Hong Kong Companies Registry.

Find out about the newly published IBA Toolkit on Insolvency and Arbitration for Hong Kong.

Look-Chan Ho explains the new Hong Kong/Mainland China cross-border insolvency arrangement in BlackOak LLC’s video blog series.

Read more about the “Why Hong Kong Law?” webinar featuring two of DVC’s members.

A recap from “The Cross-border Insolvency Cooperation Forum between the Mainland China and Hong Kong SAR”.

A two-part webinar on Confidentiality & Privilege in Arbitration and Mediation.

DVC’s Patrick Fung BBS, SC, QC, FCIArb and Ellen Pang delivered a lecture on international arbitration at Peking University.

International Women’s Day 2022 and DVC’s collaboration with Inspiring Girls.
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INTRODUCTION

1. On 16th March 2021 the Chief Executive ordered that a Bill be introduced into Legco to enable the implementation of a New Uncertified Securities Market Regime (“New USM Regime”).

2. This is a welcome and long overdue step towards greater shareholder participation in Hong Kong listed securities. It introduces significant changes to the much-criticised central clearing and settlement systems (“CCASS”) which has held back shareholder participation in Hong Kong listed companies.

3. The introduction of this New USM Regime can also be seen as part of a larger trend in the “dematerialization” of securities. One of the authors of this article recalls the distant past of Hong Kong where countless messengers on trading days were to be observed clogging up the Central District carrying armfuls of share scripts. Thankfully, those days are long past, and the latest proposals will finally bring the system of digitalised share trading up to date.

THE USM LEGISLATIVE PROPOSALS

4. The implementation of a New USM Regime requires amendments to both the Securities and Futures Ordinance Cap. 571 ("SFO") and the Companies Ordinance Cap. 622 ("CO") as set out in the draft Bill attached to Legco Paper CO/2/10C (2021).

5. As this legislation has not yet been enacted, still less come into force, the precise details of these amendments will not be considered here, save to note their broad outlines as follows:

(1) SFO Part IIIAA:

Division 1: Amendments provide for the establishment of an Uncertified Securities Registration and Transfer system (“USRT”), being a computer-based system that requires that title to the securities be evidenced and transferred without a physical instrument.

Division 2: Sets out principles governing the evidence and transfer of titles.

Division 3: Provides for the setting out of securities registrars to be approved by the SFC. SFC must determine such a registrar is a fit and proper person whether it can be regulated by the SFC.

(2) The CO will be amended so as to provide for the allotment of transfers of shares in uncertified form, without the need for physical instruments of transfer to effect a transfer of shares.
Listed companies will no longer be under an obligation to issue physical shares certificates in place of lost share certificates.

Section 516 CO, which currently permits shareholders to appoint unlimited numbers of proxies, will be replaced by a limit on the number of proxies that can be appointed by individual shareholders.

Listed companies may no longer close their registry of members for a period longer than that specified by the SFC.

Corporate news and actions (including those of holders of listed shares) can be announced electronically only, without the need for physical publication in hard copy format.

TOWARDS GREATER SHAREHOLDER PARTICIPATION

“It is not too much to suggest that participation in the above Court meetings would have been greater (and possibly the outcome different) if the burden of taking shares out of CCASS had not been placed on beneficial owners in this way.”

6. One of the most forthright criticisms of the role of CCASS under the current arrangements is to be found in the Judgment of Rogers VP in in Re PCCW. Noting the difficulty experienced by a shareholder in extracting his shares from CCASS, at §68, Rogers VP observed that the shares which remain registered in CCASS can be counted, on the basis of proxy votes, towards the number of shares but cannot be counted on a head-count. The problem he identified was that the court simply did not know how the individual shareholders whose shares remain in CCASS would have voted. Whilst he acknowledged that it remained possible for shareholders to arrange for their shares which were held in CCASS to be transferred into their own names, the practical problem was caused by shareholder inertia.

7. A measure of the relatively low level of shareholder participation in voting in schemes of arrangement can be discerned from the following reported cases–

(a) In Re CLP Holdings [1998] 1 HKLRD 158, of a total of 234 members present in person or by proxy representing 1,364,232,049 shares (i.e. 54.82% of the issued share capital).

(b) In Re Cheung Kong Holdings (Ltd) [2015] 2 HKLRD 512, of a total of 329 members present in person or by proxy representing 1,758,761,997 shares (i.e. 75.93% of the issued share capital).
(c) For Hopewell Holdings Limited, based on their announcement dated 21 March 2019 on HKEX, of the members present in person or by proxy (the number of which is not specified) representing 325,451,257 shares (i.e. 59.42% of the issued share capital).

(d) In *Re Enice Holdings Co Ltd* [2018] 4 HKLRD 736, of the members present in person or by proxy (the number of which is not specified in the judgment) representing 39,600,000 shares (i.e. 15.27% of the issued share capital).

(e) Finally, in the recent case of *Re Allied Properties (HK) Ltd* [2020] 5 HKLRD, of the 67 members present in person or by proxy, representing 1,189,718,725 scheme shares (i.e. 69.85% of the scheme shares, or 25.004% of the issued share capital).

8. It is not too much to suggest that participation in the above Court meetings would have been greater (and possibly the outcome different) if the burden of taking shares out of CCASS had not been placed on beneficial owners in this way.

9. In practice, at present CCASS will vote only one share in favour and one against any given resolution. CCASS never made any attempt to gauge the mood of the beneficial holders and this apparently “neutral” stance worked as a cloak for injustice in certain cases. The new approach permits USM registered holders to vote without the existing impediments.

10. What is the likely effect of all this on the new USM regime? We suggest some possible effects:

(i) more shareholder activism (ii) bigger meetings (iii) greater proxy battles (iv) greater use of Proxy advisers in contested cases. (v) greater legal protection for investors (in that they would be holding securities in their own name) and (vii) greater convenience in that investors would be able to hold securities in uncertificated form without paper.

**CONCLUSION**

The new USM Regime is an important new dawn allowing greater shareholder participation in Hong Kong Listed companies and is very much to be welcomed.

This article was authored by John Scott SC, QC, JP and Jonathan Lee
Electronic Signatures and Related Issues

It is no exaggeration to state that the COVID-19 pandemic has been one of the most trying tests of existing institutions in modern times, and the legal sector in Hong Kong has by no means escaped its effects. As a result of the unprecedented scale of travel restrictions and quarantine requirements around the world, parties have faced enormous difficulties in simply executing transaction documents in wet ink and in hard copy. As a result, the Electronic Transactions Ordinance Cap. 553 (“ETO”) has become a subject of newfound interest.

As a result of the unprecedented scale of travel restrictions and quarantine requirements around the world, parties have faced enormous difficulties in simply executing transaction documents in wet ink and in hard copy.

It is not possible to consider each and every provision of the ETO within the scope of this article. Instead, we propose to examine the scope and effect of some of the more common and contentious provisions, namely (i) the definition of “electronic signature” under s.2(1) (ii) s.6(1) concerned with the test for a valid and effective electronic signature and (iii) the exclusions to the use of electronic signatures set out in Schedule 1.

A. GENERAL PRINCIPLES ON CONSTRUING THE ETO

As the scope and interpretation of these provisions are questions of statutory interpretation, it is necessary to start with the principles governing statutory interpretation in Hong Kong, which are now well-established.

A helpful starting point is the CFA’s decision in Town Planning Board v Town Planning Appeal Board (2017) HKCFAR 196, where it was stressed that in construing statutory provisions, the Court does not merely look at the relevant words in isolation but construes them having regard to their context and purpose. In ascertaining the purpose of a statutory provision, the
court adopts a flexible and open-minded approach. The purpose may be clear from the provision itself or it may be necessary to look at the Explanatory Memorandum to the bill introducing the provision or a ministerial or official statement may be utilized for this purpose.\[1\]

In addition, the maxim *expressio unius est exclusion alterius* is relevant here, particularly in respect of the Schedule 1 exclusions. In a nutshell, this provides that when a legislative provision sets out who or what is within the meaning of an expression, it ordinarily means that no-one else or nothing else is.\[2\]

Apart from these general principles, it is of note that the provisions of the ETO were described as being “modelled on” the UNCITRAL Model Law on Electronic Commerce (1996) (the “Model Law”).\[3\] However, the ETO does not expressly permit courts to have regard to commentaries or reports accompanying or in respect of the Model Law.\[4\] That said, it has generally been recognised that when construing legislation that seeks to implement or incorporate international treaties into domestic law, there is a presumption that where a statute is passed in order to give effect to international obligations arising from such treaties, the statute should if possible be given a meaning that conforms to that of the treaty. It is also well-established that the court is entitled, at least in cases of ambiguity, to make reference to the travaux préparatoires or preparatory work of the treaty, where the material is both public and accessible.\[5\]

In addition, subsequent commentaries on a convention or treaty may have persuasive value, depending on the cogency of their reasoning.\[6\] Whilst the Model Law is not a “treaty” in strict international law terms, and the ETO is not strictly speaking enacted to “give effect” to international obligations, Hong Kong has nevertheless endeavoured to implement or incorporate the Model Law into domestic law via the ETO.

Bearing in mind the fundamental principles of statutory interpretation mentioned above, particularly the need to give effect to the purpose and intent of the statute in question, there appears to be no obvious reason why courts should be prevented from referring to the Model Law and its commentaries as an aid to interpreting the

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\[1\] (2017) HKCFAR 196 at §29.

\[2\] Salisbury Independent Living Ltd v Wirral Metropolitan Borough Council [2012] EWCA Civ 84 at §23.

\[3\] Elsie Leung, Internet Law Symposium, 26th September 2003.

\[4\] Cf s.2(3) of the Arbitration Ordinance (which also gives legislative effect to a UNCITRAL Model law).

\[5\] Bennion on Statutory Interpretation (7th ed), Section 24.16.
ETO, especially in the absence of any existing judicial domestic guidance. In 2007, the UN ratified the United Nations Convention on the Use of Electronic Communications in International Contracts (2007) ("2007 Convention"), which Hong Kong is yet to ratify or adopt, but which contains some helpful additional guidance on the provisions contained in the Model Law, and hence the ETO. There is again no obvious reason why courts should be precluded from referring to the commentaries to the 2007 Convention.

B. ISSUES RELATING TO SECTION 2(1) – “ELECTRONIC SIGNATURE”

An electronic signature is defined under s.2(1) to mean “any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted for the purpose of authenticating or approving the electronic record.”

The open-endedness of the definition reflects and is consistent with the underlying rationale of the Model Law as well as the 2007 Convention, namely that the criteria for the legal recognition of electronic signatures should be “technologically neutral”. In other words, the definition itself does not make reference to any particular form of technology so as to maintain a degree of flexibility in view of potential future technological developments. Rather, the section adopts the tests of appropriateness and reliability of the method of attaching to or logically associating the electronic signature with the electronic record under s.6(1).

The ETO differentiates between two kinds of transactions, i.e. those that pertain to a requirement under a rule of law and those that pertain to a case of contract. The ETO is silent on the technology to be used to generate the electronic signature in the case of contract. This reflects the common law position, which is that this is “a matter to be determined by the parties concerned and implicitly, a technology-neutral approach is adopted.”

The commentary to the 2007 Convention provides additional guidance. It suggests that signatures may take the form of “digital signatures” based on public-key cryptography, which are often generated within a “public-key-infrastructure” where the functions of creating and verifying the digital signature are supported by certificates issued by a trusted third party. However, they could also cover authentication through a biometric device based on handwritten signatures, the use of personal identification numbers (PINs), digitized versions of handwritten signatures and other methods, such as clicking an “OK box.”

The English courts have, for instance, held that clicking an “I accept” tick box on a website or header of a SWIFT message amounts to a valid signature.

Similarly, the Singaporean High Court has held that “no real distinction can be drawn between a typewritten form and a signature that has been typed onto an e-mail and forwarded with the e-mail to the intended recipient of that message.”

In the light of these rulings, a possible approach is to start with the principal function of a signature, namely to demonstrate an intention of the party to authenticate the document and then ask whether the method of signature adopted demonstrates an authenticating...

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[8] §150 of the commentary.
intention, adopting an objective approach and considering all of the surrounding circumstances.

C. ISSUES RELATING TO SECTION 6(1)

C1. Signature requirement under a “rule of law”

One of the key operational provisions of the ETO is s.6(1) which seeks to govern how electronic signatures can fit into existing requirements for signature under a “rule of law”.

s.6(1) provides the following

“(1) Where—

(a) a rule of law requires the signature of a person (the first-mentioned person) on a document or provides for certain consequences if the document is not signed by the first-mentioned person; and

(b) neither the first-mentioned person nor the person to whom the signature is to be given (the second-mentioned person) is or is acting on behalf of a government entity,

an electronic signature of the first-mentioned person satisfies the requirement if—

(c) the first-mentioned person uses a method to attach the electronic signature to or logically associate the electronic signature with an electronic record for the purpose of identifying himself and indicating his authentication or approval of the information contained in the document in the form of the electronic record;

(d) having regard to all the relevant circumstances, the method used is reliable, and is appropriate, for the purpose for which the information contained in the document is communicated; and

(e) the second-mentioned person consents to the use of the method by the first-mentioned person.”

As is evident from its format, the section is divided into two main parts – the first part spells out the requirement for signature under a rule of law, and the second part defines the conditions for which an electronic signature would satisfy that first requirement for signature.

Starting with the expression “rule of law”, this is defined in s.2(1) to mean (a) an Ordinance (b) a rule of common law or a rule of equity or (c) customary law.

The reference to “an Ordinance” is clear. The reference to “customary law” is also tolerably clear and is likely to be intended to cover requirements under Chinese or other customary laws, although the Court of Final Appeal (“CFA”) in Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC (2011) 14 HKCFAR 95 observed obiter that “customary law” under Article 8 of the Basic Law “obviously” means “the laws and customs of traditional China”.[13] Nevertheless, it would appear that the expression is not intended to cover areas of law that have not become part of the law of a state. [14] This suggests that, notwithstanding the CFA’s observation, customs that have not been statutorily or judicially recognised should be taken to fall outside of the ambit of “customary law” under s.2(1) of ETO.

The controversial part of s.6(1) ETO relates to subsection (b). Indeed, subsection (b) may appear somewhat out of place in a common law jurisdiction, given that legally binding contracts can be and are routinely created orally and in any event without signatures, and are routinely enforced. This may suggest that there is no “rule of common law” or “rule of equity” which requires the signature of a


person for the purposes of creating a binding contract, as the word “requires” is mandatory in nature.

The immediate problem with this interpretation is that it takes away substantially the efficacy of the provision. Given that the purpose of ETO is to “provide a clear legal framework for the conduct of electronic transactions by giving electronic record and digital signature the same legal recognition as that of their paper-based counterparts”,\(^{[15]}\) the expression should be given an expansive interpretation so as to further the legislative purpose of elevating the legal status of electronic records and digital signatures. In other words, one should not place undue weight on the mandatory nature of the word “requires”.

Related to the word “requires” is the elusive phrase “provides for certain consequences”. If one takes a literal approach to the words “certain consequences”, this could cover just about anything. However, the legislature is unlikely to have intended such a broad reading. In light of this ambiguity, the legislative materials of the ETO may shed some light.

First, the Office of the Government Chief Information Officer (“OOGCIO”) stated, in its “Introduction” to the ETO, that “section 6(1) of the ETO provides that if a rule of law requires a signature of a person on a document and neither the person whose signature is required nor the person to whom the signature is to be given is or is acting on behalf of a government entity, an electronic signature satisfies the requirement”, which tends to suggest that the emphasis is on whether a signature is “required”.

Reference may also be made as to how the expression has been used by courts, although they are at most able to provide limited assistance to how the phrase should be interpreted when deployed in statute. In short, it appears that the expression “provides for certain consequences” is almost invariably used as a shorthand to describe consequences expressly defined and specified by statute. For instance, in Shun Hing Holdings Co Ltd v Li Kowk Po David [2020] HKCA 309, the Court of Appeal at §67 referred to the fact that section 1571 of the old Companies Ordinance “provides for certain consequences for a loan advanced in breach of section 157H”, namely he “shall be liable to repay that sum to the company forthwith”.

It is also important to note that the provision is phrased in the negative – it is concerned with whether certain consequences would follow if the document is not signed. Taking this into account, s.6(1)(b) may be read as requiring some sort of causal connection between the consequence and the absence of signature, that is the absence of a signature needs to play a material role in the consequence to follow. However, if this approach were adopted, it is likely to substantially undermine the purpose of ETO, which is to normalise and promote the legal status of electronic signatures.

In our opinion, the phrase “provides for certain consequences” should be given a wide and liberal interpretation and should cover situations where negative consequences will flow from non-signatures, e.g. when the absence of a signature amounts to a factor that compromises or otherwise casts doubt as to the validity, enforceability or effectiveness of the underlying document.

Applying this liberal interpretation, an intention to create legal relations to form a legally binding contract is likely to be sufficient to meet the “consequences” element so as to allow an e-signature to be attached to a document for the purposes of this section. Put another way, since the absence of a signature is likely to compromise or cast doubts as to the validity, enforceability or effectiveness of the underlying document, notwithstanding that its absence per se

\(^{[15]}\) Legco Brief to Electronic Transactions (Amendment) Bill 2003 dated 11th June 2003 (the “Brief”) at §1.
does not render the document invalid or ineffective, it does provide for “certain consequences”.

C2. To “logically associate” the electronic signature with an electronic record

Having established whether a relevant rule of law is engaged, the next question is what “logically associate the electronic signature with an electronic record” is intended to mean.

The natural and ordinary meaning of the word “associated” is “connected with”. As such, “logically associated” simply means logically or rationally connected. Attaching a document signed electronically to an email is likely to be regarded as logically associating the electronic signature with two electronic records, the Word or PDF document on which the electronic signature appears, and the email to which the document is attached.

However, it is of course not sufficient to simply consider the natural and ordinary meaning of statutory wording. Regard must also be had to the statutory purpose and context. With some relief, we note that this interpretation appears consistent with the underlying rationale of Article 7 of the Model Law, on which s.6(1) is partly based, namely that the criteria for the legal recognition of electronic signatures should be technologically neutral. There is therefore no reason to prescribe any particular form or method of logical association under s.6(1), provided it satisfies the remaining conditions.

The final question is whether the method used is “reliable and appropriate”. The expression finds its origins in Article 7 of the Model Law. It may therefore be useful to refer to the commentary to the Model Law. Two points emerge from the relevant commentary.

First, the expression is intended to establish a flexible approach to the level of security to be achieved by the method of identification. It should be as reliable as is appropriate for the purpose for which the data message is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

Secondly, in determining whether the method used under paragraph (1) is “appropriate”, it is said that a wide range of legal, technical and commercial factors may be taken into account. These include ones that relate to the technology in play, such as the capability of communication systems and the range of authentication procedures made available by any intermediary. At the same time, they also cover some relatively subjective factors such as the sophistication
of the equipment used by each of the parties, the kind and size of the transaction and the nature of their trade activity, amongst others.[16] In other words, the stringency of the test may vary depending upon whether the transaction is entered into with, say a high street tailor or an international technology company.

As to the meaning of “reliable”, its explanation may be found in the commentary to the 2007 Convention, which states that the “reliability” test was adopted so as to ensure the correct interpretation of the principle of functional equivalence in respect of electronic signatures. It reminds courts of the need to take into account factors other than technology, such as the purpose for which the electronic communication was generated or communicated, or a relevant agreement of the parties, in ascertaining whether the electronic signature used was sufficient to identify the signatory.[17] However, this is subject to the qualification that it is not intended for parties to invoke the “reliability test” to repudiate its signature in cases where the actual identity of the party and its actual intention could be proved i.e. where the authenticity of the electronic signature is not called into question.[18]

Whilst there is at present no way of predicting how Hong Kong courts are likely to interpret s.6(1), we believe that these commentaries ought to be accorded persuasive value before the Hong Kong courts. It can therefore be reasonably expected that Hong Kong courts will follow or at least adapt these approaches when construing the ETO.

D. ISSUES RELATING TO SCHEDULE 1 EXCLUSIONS

The final provisions to be examined in this article are the exclusions contained in Schedule 1. The relevance of Schedule 1 is spelt out in s.3, namely that ss.5, 5A, 6, 7, 8 and 17 do not apply to, inter alia, any requirement for the signature of a person under a rule of law in a matter or for an act set out in Schedule 1, unless that rule of law expressly provides otherwise.

Schedule 1 then provides a number of instances where e-signatures cannot be used. It is apparent that the matters set out in Schedule 1 are meant to be exhaustive. These include what can be generally described as instruments with strict legal consequences, such as wills, codicils or any other testamentary documents, oaths and affidavits, and judgments amongst others. The focus here is on §6, namely “[a]ny deed, conveyance or other document or instrument in writing, judgments, and lis pendens referred to in the Land Registration Ordinance (Cap. 128) by which any parcels of ground tenements or premises in Hong Kong may be affected.”

Whilst the words “in a matter or for an act set out in Schedule 1” are drafted in broad terms, they tend to suggest that requirements set out in s.3 must relate to or be in furtherance of the stated matters in Schedule 1. This would give rise to the curious result that a deed that is not executed in a matter or for any of the acts set out in Schedule 1 are not caught by the exclusions.

In addition, this interpretation is consistent with the principle expressio unius mentioned above. Since the legislation has deliberately set out what is within the meaning of an expression, namely the Schedule 1 exclusions, it ordinarily means that nothing else is caught by the exclusion. It follows then that deeds as a general class of documents are unlikely to be excluded and s.6(1) ought to apply to such deeds accordingly.

Indeed, deeds not falling within the specified categories in Schedule 1 would appear to be what the “provides for certain consequences” test is primarily intended to cover. This is because at common law, a deed is only effective if it has been signed, sealed and delivered.[19] In other words, the absence of a signature would render the deed invalid, thereby leading to “certain consequences”.

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The obvious question which follows is whether deeds can be executed “electronically”. In this regard, the UK Law Commission’s 2019 report on “Electronic execution of documents” (the “Report”) suggests that an electronic signature is capable in law of being used to execute a document (including a deed), provided any formalities relating to execution of that document as required by law are satisfied.\footnote{\textsuperscript{[20]}}

Indeed, on 3rd March 2020, the UK Lord Chancellor and Secretary of State for Justice issued a written ministerial statement (the “Statement”) in response to the Report, which confirmed that, in most cases, electronic signatures are legally capable of executing a document (including a deed) provided that intention to enter into a contract and certain execution formalities are satisfied.

It is therefore essential to first identify what these execution formalities are. In the context of electronic transactions, three of these formalities are of particular interest (i) where a deed is required to be sealed (the “Sealing Requirement”)\footnote{\textsuperscript{[21]}} (ii) where a deed is required to be witnessed (the “Witnessing Requirement”)\footnote{\textsuperscript{[22]}} and (iii) the common law requirement that a deed must be executed on certain prescribed substance (the “Substance Requirement”).\footnote{\textsuperscript{[23]}}

With regard to the Sealing Requirement, there is no provision for electronic seals in the ETO. If that were all, it might appear that the Sealing Requirement can only be met by a physical seal, which requires a physical copy of the relevant document.

However, if the above interpretation of s.6(1) is correct, s.6(1)(c) does not prescribe what happens subsequently to the electronic record. In other words, it may be possible for a signatory to sign a document electronically within the meaning of s.6(1), have it printed out and sealed physically.

Moreover, courts seem to have taken a liberal approach to seals. Sealing no longer requires the addition of a wax or wafer seal. Where there is no common seal, courts have said the requirement of a seal can be satisfied by symbols written or printed on the page, such as a circle containing “LS” or the word “seal” in parentheses.\footnote{\textsuperscript{[24]}} An argument may be made to the effect that such symbols should also be able to be inserted electronically.

As for the Witnessing Requirement, it was stated in the Report that although a witness may not be able to see the digital information, what they can see is the signatory purporting to add their signature to a document on the screen. There is therefore no impediment per se to the witnessing of an electronic signature.

The issue of how witnessing may be carried out practically was addressed in \textit{Shah v Shah [2001] EWCA Civ 527}, where Pill LJ said that he could “detect no social policy which requires the person attesting the signature to be present when the document is signed”.\footnote{\textsuperscript{[25]}} Moreover, most of the cases which insist on physical presence of a witness were decided in the 19th century, when a presence other than physical presence would not have been in the contemplation of the court or the parties.

Nevertheless, the drafters of the Report are not persuaded that parties can be confident that the current law would allow for a witness viewing the signing on a screen or through an electronic signature platform, \textit{without} being physically present. This conclusion is based on the combination of the restrictive wording of the statutory provisions and the serious policy

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\textsuperscript{[19]} See e.g. Scouk v Premier Building Solutions Pty Ltd [2003] WASCA 263 at ¶22.
\textsuperscript{[20]} Electronic execution of documents at ¶3.32.
\textsuperscript{[21]} E.g. s.19(2)(c) and 20(1) of the Conveyancing and Property Ordinance (Cap 219) (“CPO”).
\textsuperscript{[22]} E.g. s.20(1) of the CPO.
\textsuperscript{[23]} See p.18 below.
\textsuperscript{[24]} E.g. First National Securities v Jones (1978) Ch 109 at 111; Santander UK plc v Parker (No 2) (2012) NI Ch 20 at ¶14. Whilst these cases have not been followed in Hong Kong, they are indicative of an increasingly expansive and pragmatic approach towards the Sealing Requirement.
\end{flushleft}
questions underlying any extension to accommodate technological developments.\(^{26}\) Hong Kong courts are likely to take a similarly conservative approach in the light of potential evidentiary risks and other risks of abuse.

This leaves the Substance Requirement, which is perhaps the most controversial. The requirement has been abolished in the UK but has been retained in Australia, which may provide some insight as to how its scope should be interpreted. The Substance Requirement has been summarised helpfully by Steytler J in *Sook v Premier Building Solutions Pty Ltd* [2003] WASCA 263 – “[a]t common law, there are three, somewhat antiquated, formalities which must be complied with in order for an instrument to amount to a deed. The first is that it must be written on parchment, vellum or paper”.\(^{27}\) In Hong Kong, however, the Court of Appeal in *AG v Wang Chong Construction* (Unreported, CACV 172/1990, 28th June 1991) referred to a section in Halsbury’s Laws of England which only mentions parchment and paper, which is presumably reflective of the relatively more metropolitan and forward-looking nature of Hong Kong as a city.

*Seddon on Deeds* (2015) took the view that in Australia, “until there is legislative change, it would seem that an original version of a deed must be a signed and attested paper document”. This is because whilst it is open to argument that a statutory requirement of writing can be satisfied by an electronic document, in the case of deeds, the common law requires not just writing but writing on parchment, paper or vellum.\(^{28}\)

However, one can detect a degree of circumspection on Dr Seddon’s part from his use of the words “it would seem”. There was also no analysis of the rationale or historical origins of the requirement that a deed must be written on paper, specifically whether the requirement can be satisfied provided the deed can ultimately be printed out on paper. To draw a distinction between a document that is capable of being printed on paper and one which has actually been printed on paper seems inconsistent with the underlying legislative purpose of the ETO of promoting legal recognition of electronic records, especially in light of the fact that the legislature has chosen not to exclude deeds as a general category of documents in Schedule 1.

Moreover, as Mr. Diccon Loxton has pointed out,\(^{29}\) Dr Seddon’s conclusion was apparently reached without consideration of *Manton v Parabolic* (1985) 2 NSWLR 361, a decision which suggested the contrary in relation to the Western Australian, Southern Australian and Tasmanian statutory provisions. Further, Mr. Loxton takes the view that the introduction of the “no-invalidity provisions” and s.11 of the Commonwealth Electronic Transactions Act 1999 enables the execution of electronic deeds.\(^{30}\)

Reverting to the position in Hong Kong, the Substance Requirement requires a deed to be “written on” parchment or paper. It is possible to interpret the word “written” as referring to the consequence or effect, rather than the process. In other words, it does not technically prevent a deed from being signed and sealed electronically, and then printed out on parchment or paper.

Based on our interpretation of the ETO set out above, it appears to us that deeds, in general, are intended to be covered by s.6(1). In principle, therefore, we suggest that a deed that is executed wholly electronically ought to satisfy the Substance Requirement, provided that the document is capable of being printed or otherwise reproduced on paper. This is largely due to the ambiguity as to whether the Common Law Substance Requirement is one that relates to the end-product or the process of execution.

\(^{26}\) Report at §§5.34–5.35.

\(^{27}\) [2003] WASCA 263 at §22.

\(^{28}\) *Seddon on Deeds* (2015), section 2.28 at p.98.


\(^{30}\) Ibid, at 220–222.
Against this, however, we recognise the well-established principle of statutory interpretation that fundamental changes to the common law “should not be effected by a sideward but only by measured and considered provisions”.[31] This may suggest that the Substance Requirement can only be satisfied when the document is in fact printed out as a hard copy. In the ultimate analysis, there remains an unfortunate element of ambiguity, proper resolution of which will require a judicial decision. In the meantime, parties should generally err on the side of caution by adhering to the Substance Requirement in order to avoid unnecessary arguments as to the validity of deeds.

This article was authored by John Scott SC, QC, JP and Jonathan Lee.

Useful Lessons on approaching Norwich Pharmacal applications: *A1 and A2 v. R1, R2 and R3* [2021] HKCFI 650

This article was authored by Michael Lok

Introduction

Norwich Pharmacal relief is granted where “innocent parties are caught up or have become involved in the tortious or wrongful activities of others and thus facilitating the perpetration (or continuation) of such activities”: *A Co. v. B Co.* [2002] 2 HKC 497 at para. 10 per Ma J (as his Lordship then was).

While the substantive principles are trite and need not be revisited in this article, the ‘practical side’ of the applications has always required some careful consideration.

In Mr. Justice Coleman’s recent decision (which has been anonymized given the nature of the proceedings), a number of “points of wider interest” arose, relating to (1) the making of the application ‘ex parte on notice’; (2) how properly to make full and frank disclosure; and (3) orders relating to bank accounts not held in Hong Kong.

This article shall consider each of the above in turn.

With or without notice?

It goes without saying that based on principles of natural justice, applications should generally proceed on an *inter partes* basis. Briefly stated, all parties are to be heard, save in the most exceptional circumstances where extreme urgency or secrecy so requires. This is common sense.

In this instance, the Applicants sought relief against three respondent banks (“Banks”) in respect of disclosure relating to four bank accounts. It proceeded on an ex parte basis.

In the lead-up to the ex parte application, the Applicants took the “slightly unusual approach” (para. 15) of writing to the Banks 5 days before the application papers were delivered to court informing the Banks of their intention to make the subject application, and providing relevant documents including the draft affidavit material (without exhibits).

In the words of Coleman J, the “unusual aspect” is that the Banks were told about a potential ‘gagging order’ such that the Banks were asked to treat the documents received as “strictly private and confidential, and to refrain from taking any steps which would be contrary to the gagging order including notifying any third party (as well as the relevant account holder or connected persons)” of the contents (para. 15).

This was considered to place the Banks “in a difficult position vis-à-vis their own customer, to whom they owe
certain obligations or duties arising from the banker/customer relationship” (para. 16).

Coupled with the fact that the Banks were actually given “significant advanced notice of the intended application” (para. 18), Coleman J came to the view that there was no need to proceed on an ex parte basis in this case.

The “correct, or better, practice”, according to Coleman J, is found in the decision of DHCJ Maurellet SC in *Asiya Asset Management (Cayman) Ltd v. Dipper Trading Co Ltd* [2019] HKCFI 1090 (para. 19). In particular, the learned Judge agreed that the correct procedure which “should be followed in all save the most exceptional of cases” is that as stated by DHCJ Maurellet SC, namely:–

1. First, the plaintiff seeks on an ex parte without notice basis a gagging order against the bank pending the hearing of the Norwich Pharmacal discovery against the bank either on an *inter partes* basis or at the very least on an ex parte basis but with notice. Whatever notice period is given should normally be sufficiently long so that the bank can meaningfully make submissions, if it thinks it appropriate to do so.

2. Second, at the hearing of the Norwich Pharmacal discovery application against the bank, the court will then have the benefit of the submissions of the bank, if any, while the plaintiff will on the other hand be protected by the gagging order until the conclusion of the application.

3. Third, the court can in an appropriate case grant a further brief period for the gagging order to continue, to allow the plaintiff to make such applications as it sees fit to protect its interests.

At para. 26, the learned Judge explained that it was considered important to highlight the above to practitioners, which casts the proper balance of interest between (a) the party seeking the information from the bank and (b) the bank’s customer. Indeed, given the “unusual approach” taken by the Applicants, it was considered that the proper procedure identified above would not have been to the Applicants’ detriment.

**Key Takeaway:**

- Do follow the procedure laid down by DHCJ Maurellet SC (i.e. a two-stage process) save in exceptional circumstances. Where the procedure is not followed, the exceptional circumstances said to warrant the departure should be identified and explained to the ex parte Judge.

**Making Full and Frank Disclosure**

Coleman J next went on to highlight that voluminous materials had been placed before the Court for the purposes of the ex parte application.

Thus, the learned Judge reiterated that it would not suffice to simply place the materials before the ex parte Judge, without explaining their significance. Indeed, “the greater the amount of material placed before the court, the more likely the court will need – and is entitled to – clear sign-posting to the various aspects of that material (which, hopefully, also has been organised in a logical way, making it easier to find, follow and understand)” (para. 34). This, in the ex parte context, means “specifically drawing the attention of the court to those matters, and doing so fully as well as frankly” (para. 35).

**Key Takeaway:**

- Needless to say, the parties and their representatives should specifically “bring to the attention of the court those matters which the court must, or likely will wish, to take into account in the context of the particular application” (para. 34).
This means, amongst other things, at least summarising “in the body of the affidavit (and/or in the skeleton argument) what particular position had been set out in respect of what specific allegation of wrongdoing – as well as any suggested response given by the Applicants to that position” (para. 36).

**Bank Accounts Outside Hong Kong**

The Banks operate in Hong Kong but two of the four accounts in question are with the Macau branches of two of the Banks. All of the Banks are incorporated in Hong Kong, and neither of the respective Macau branches of the two banks is a separate legal entity. Instead, each is an overseas branch and part of the same Hong Kong entity.

This opens up the question as to whether the Hong Kong Court may grant *Norwich Pharmacal* relief in respect of the accounts maintained outside Hong Kong.

In the absence of any relevant Hong Kong authority hitherto, Coleman J cited the English High Court decision in *Credit Suisse Trust v Intesa San Paulo SPA & Banca Monte Dei Pasche Di Siena* [2014] EWHC 1447 (Ch) (see para. 47).

The learned Judge went on to hold that, first, there is no authority in Hong Kong or other reason which stands in the way of the relief sought. In particular, Coleman J was of the view that “it might be thought straightforward that one legal entity has possession, custody or power over the documents held by any part of that entity, including in its branches overseas. Indeed, this would perhaps be thought a stronger position than where the branch is local and the main bank overseas” (para. 52).

Further, at para. 53, it was held that “on the materials in particular relating to the regulation by the HKMA, it seems to me that there is the likelihood that each of Bank A and Bank B can have access to – in other words, they have control or power over, and can obtain possession of – the documents”.

**Key Takeaway:**

Relief is potentially available even in the case of a bank account located outside Hong Kong. However, the detailed circumstances surrounding e.g. the location of the account and its precise relationship with the bank in question should be fully explained, as in the present case.

Further, it would be useful to confine the order to “requiring disclosure of documents and information in the Banks’ respective possession, custody or power” (para. 54) because, in the words of Coleman J, “to the extent that the inference invited – that the Hong Kong operations likely have access to documents and information contained in their branches in Macau – turns out to be incorrect, then that simply means that Bank A and/or Bank B would not be required to disclose documents pursuant to the order”.

**Postscript**

As his Lordship's analysis went on to demonstrate, the principles surrounding the orders being made are rather well-established. Likewise, the facts are usually relatively straightforward which, at least for the present purposes, ought not create too many difficulties. That said, Coleman J’s recent decision should serve as a helpful reminder that careful consideration and analysis is required before launching the application, however straightforward it may seem at first blush.
Insolvency Petitions: Exclusive Jurisdiction Clauses and Arbitration Clauses – A tale of two clauses

This Article was authored by Brian Fan

The interplay between an arbitration clause and a creditor’s winding up petition is a vexed question which has given rise to a string of cases, including *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449, *Re Asia Master Logistics Ltd* [2020] 2 HKLRD 423 and *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 873. While the latter two cases doubted the ratio of *Lasmos* that an arbitration clause governing the petition debt should generally lead to a dismissal of the petition, the *Lasmos* case remains the law of Hong Kong at the time of this Article.

However, the debtor argued that in order to respect freedom of contract between the parties, even where the debtor has no arguable defence to the creditor’s claim, the creditor must establish liability in the jurisdiction stipulated by the EJC before petitioning for bankruptcy.

The Court rejected the debtor’s argument. In particular four matters are noteworthy.

1. Linda Chan J accepted the creditor’s submission (at §47) that there is a fairly settled view in the Commonwealth authorities (including English, New South Wales and BVI cases) that an EJC does not *per se* prevent a winding up petition from being presented in an appropriate jurisdiction.

2. Her Ladyship explained that the reason why the
EJC does not have this effect is because the Court is concerned with the locus of the creditor when determining whether there is a bona fide dispute in respect of the debt founding the petition (at §48). Her Ladyship held (citing Re Peveril Gold Mines [1898] 1 Ch 122) that the jurisdiction to wind up a company is conferred by statute as a statutory condition annexed to the incorporation of the company, and hence cannot be fettered by an EJC (at §47). The Court further noted that unless the debtor is able to demonstrate a bona fide dispute on substantial grounds, there is no proper basis for the debtor to contend that there is a dispute which must be litigated in accordance with the contractually agreed forum (at §49).

3. whilst setting out counsel’s arguments that the Lasmos approach should not be extended to EJCs (referred to as “the 2nd point”) and that the Lasmos case is unsound on its own terms (referred to as “the 3rd point”), it was not necessary for the Court to deal with these submissions and the cases that doubted Lasmos. The Court appeared to have distinguished EJCs from arbitration clauses and refrained from resolving the issue of whether the Lasmos approach is correctly decided.

Finally and significantly, although the Court was only faced with an EJC rather than an arbitration, her Ladyship’s reasoning could arguably be said to apply to an arbitration clause. The reasoning would be in line with the Court of Appeal’s analysis in But Ka Chon that the winding up jurisdiction cannot be fettered by contract.

In the course of the analysis, her Ladyship also referred to arbitration clauses where she said that “the fact that the parties have agreed to an arbitration clause or an EJC is only a factor which would be taken into account by the Court when considering a winding up/bankruptcy petition” (at §49). However, unlike Re Asia Master and But Ka Chon where the point did not arise for determination, her Ladyship’s determination forms the ratio of Re Guy Kwok-Hung Lam in relation to EJCs. The upshot is that the law as it currently stands would potentially apply different approaches to arbitration clauses and EJCs - the issue of whether Lasmos is good law remains a live issue to be resolved on another occasion.

Brian Fan authored this article.

José-Antonio Maurellet SC (leading Mr Nick Luxton) and Tommy Cheung appeared.
The Court of Appeal of the Eastern Caribbean Supreme Court, on an appeal from the BVI Commercial Court, recently discussed the present state of the law on recognition and assistance, in the context of a cross-border bankruptcy: *Net International Property Limited v. Adv. Eitan Erez* (BVIHCMAP2020/0010, 22 February 2021) per Webster JA [Ag.] (with whom Chief Justice Pereira DBE and Ellis JA [Ag.] agreed).

In broad summary, the respondent had been appointed as the trustee of the bankrupt’s estate by the District Court in Israel and his appointment was confirmed on appeal to the Supreme Court. On the respondent trustee’s application for recognition at common law and assistance in the form of Orders that would enable him to take control of the bankrupt’s estate in the BVI which the Israeli courts had found to comprise bearer shares in the appellant company, the trial judge in the BVI recognised his appointment and made various orders to assist him, including the registration of the respondent trustee as shareholder of a company incorporated in the BVI (i.e. the appellant company). The appellant company appealed against these orders.

While a number of questions arose in the ECSC Court of Appeal’s judgment, we would focus on the question of recognition and assistance, notwithstanding the insightful discussion elsewhere in the judgment on, *inter alia*, the *res judicata* doctrine.

**Recognition vs. Assistance**

The first relevant aspect of the ECSC Court of Appeal’s judgment is the distinction between recognition and assistance.

At paras. 19–20, the Court emphasised that there exists at least a theoretical distinction. Specifically, while “[R]ecognition is the formal act of the local court recognizing or treating the foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court...[A]ssistance goes further”. Assistance therefore accords the recognised foreign office holder with rights and powers to deal with the assets of the bankrupt/insolvent estate in the recognising court’s jurisdiction.

That said, there might be some tension as to the precise demarcation between the two concepts. However, it may well be unnecessary to grapple with this, as it suffices to “bear in mind that recognition does not necessarily include assistance” (para. 21). Indeed, as we shall see, while the ECSC Court of Appeal was prepared to uphold the trial judge’s orders recognising the respondent trustee, the Court was not prepared to grant the additional orders seeking to provide the assistance sought.
What of the common law power of recognition in the BVI?

At para. 27, Webster JA [Ag.] recounted the well-established principles on the interplay between common law rights and statutes. Specifically the learned Judge explained that an “established common law right such as the principle of recognition cannot be abrogated by statute unless the intention is clear from the wording of the statute, or by necessary implication of the words used in the statute”.

Insofar as the common law power to recognise is concerned, the Court (at para. 28) was satisfied that Part XVIII of the BVI Insolvency Act 2003 provided a comprehensive statutory scheme for the recognition of office holders. However, this part of the Insolvency Act has not come into effect and in the absence of an effective Part XVIII, the common law right of recognition has not (yet) been abrogated. It therefore “survives in the BVI” (para. 28).

On the facts of the case, having been satisfied that the bankrupt had submitted to the jurisdiction in Israel, the Court accepted that it was a proper case for recognition, “but only in the narrow sense of giving him the status of recognition in the BVI” (para. 32).

Is the common law power to assist abrogated/limited by the Insolvency Act 2003?

The logical next question then becomes whether the power to grant assistance survives under the common law, or whether it has been abrogated and replaced by the relevant statutory scheme found in Part XIX of the Insolvency Act. The significance of this question is as follows.

Part XIX, which provides a procedure by which a foreign office holder can apply for assistance, defines the proper applicant as “a person or body...authorized in a foreign proceeding to administer the re-organisation or the liquidation of the debtor’s property or affairs or to act as a representative of the foreign proceeding”.

A “relevant foreign country” is, in turn, defined as “country, territory or jurisdiction designated by the Commission as a relevant foreign country for the purposes of this Part” (the shorthand is somewhat unfortunate given, for instance, the designation of Hong Kong which of course is part of the People’s Republic of China; see para. 43).

Having regard to the principles on the statutory abrogation of common law powers as discussed above, the Court was satisfied that Part XIX was intended to “provide a complete code for foreign representatives to apply to the BVI courts for assistance in cross-border insolvency matters such that foreign representatives from non-scheduled countries are unable to obtain assistance” (para. 41).

Hence, given that Israel is not one of the countries that has been designated under Part XIX, the respondent trustee is simply not entitled to apply for assistance under BVI’s regime (see paras. 42, 49-50). Webster JA [Ag.] found the result to be regrettable, as it “does not further the principle of modified universalism and the movement of the courts towards greater co-operation in cross border insolvency matters” (para. 50). But the learned Judge accepted that this was a matter which the Legislature had addressed as a matter of public policy. As such, it was not open to the Court to make the orders sought which would undermine this policy.

Accordingly, the appeal was capable of being determined on this basis alone (see para. 51).

Commentary

The subject of recognition and assistance has received significant attention in recent years. This follows from, in particular, the Privy Council’s seminal decision in Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 597 discussing the common law power to recognise and assist foreign office holders in cross-border insolvencies. In Hong Kong, the Court has developed an insightful practice of recognition and assistance. See, for instance, the recent decisions in...

However, as explained by the learned Companies Judge in Joint Official Liquidators of A Co v. B [2014] 4 HKRLD 374 at §11, “Hong Kong is not a party to the UNCITRAL Model Law on cross-border insolvency and at the time of writing there is no prospect of it becoming so in the near future. Hong Kong’s insolvency legislation contains no provisions dealing with cross-border insolvency. However, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings”.

It would therefore appear that the predicament faced by the respondent trustee in Net International is unlikely to arise in Hong Kong in the near future. However, the decision does provide an insightful discussion on the interplay between the common law power of recognition/assistance and the relevant statutory provisions. This no doubt provides a helpful vision as to how things might transpire, if and when Hong Kong does introduce a statutory regime of recognition/assistance.

This update is co-authored by José-Antonio Maurellet SC and Michael Lok, together with John Carrington QC (of Sabals Law, BVI) who acted for the appellant company.
In *Re Samson Paper Co Ltd* [2021] HKCFI 2151, the Hong Kong Court issued for the first time a letter of request to the Shenzhen Bankruptcy Court requesting that the latter recognise and assist Hong Kong liquidators.

This decision marks the first practical step towards implementing *The Supreme People’s Court’s Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region (“Pilot Measure”)*.

**The facts and decision in brief**

Samson Paper Company Limited (“Company”) was incorporated in Hong Kong and went into Hong Kong creditors’ voluntary liquidation in August 2021.

The Company had assets in the Mainland, including a wholly-owned subsidiary in Shenzhen, a wholly-owned subsidiary in Shanghai, receivables due from affiliated companies incorporated in the Mainland, and an apartment in Beijing.

As the Company’s liquidators had to take possession of the Company’s Mainland assets in order to perform the duties, they sought to rely on the Pilot Measure and applied for a letter of request to be issued to the Shenzhen Bankruptcy Court so that the liquidators could be given the relevant judicial assistance in the Mainland.

Mr Justice Harris approved the liquidators’ application and duly issued a letter of request. His Lordship found that the Company’s centre of main interests was in Hong Kong and the circumstances warranted assistance to be considered by the Shenzhen Bankruptcy Court under the Pilot Measure.

**Commentary**

This decision marks another welcome and important development in cross-border insolvency cooperation between Hong Kong and the Mainland.

Just less than two years ago, Mr Justice Harris recognised and assisted Mainland liquidators for the first time: *Re CEFC Shanghai International Group Ltd* [2020] HKCFI 167; [2020] HKCLC 1.

In May 2021, the Pilot Measure came into effect.

Now, hot on the heels of the Pilot Measure, Mr Justice Harris used the Pilot Measure to request that the Mainland court recognise and assist Hong Kong liquidators.

The success of the Pilot Measure will need further judicial pragmatism in Hong Kong and the Mainland, which will in turn spur further cross-border insolvency cooperation between Hong Kong and the Mainland.

Look-Chan Ho acted for the liquidators in this case.

Click [here](#) for the Chinese translation.
Lighting The Blue Touch Paper For Post-Creditors' Scheme Meetings in: 
Re Samson Paper Holdings

This Case Report was authored by John Hui and Terrence Tai

In Re Samson Paper Holdings Ltd [2021] HKCFI 3288, the Honourable Mr. Justice Harris sanctioned a scheme of arrangement notwithstanding that there were proposed modifications after the relevant scheme meeting. His Lordship further put a gloss on Re Burwill Holding Limited [2021] HKCFI 1318 and clarified the relevance of a company’s listing status in scheme practice.

The Material Facts

Samson Paper Holdings Ltd (“Company”) is listed on the Main Board of the Stock Exchange of Hong Kong (“HKEX”). Because of balance sheet insolvency and failure to comply with financial covenants, its trading was halted. The Company and its provisional liquidators later entered into a restructuring agreement with certain investors (“Investors”) and proposed a scheme, which was approved in a scheme meeting (“Scheme”).

Under the proposed restructuring, the Investors would subscribe for 70% of the enlarged share capital of the Company. There would be an open offer to certain qualifying shareholders (“Open Offer”), and this would be underwritten by the Investors. For the scheme creditors, they would also receive newly issued shares (“Creditor Shares”). Alternatively, they may opt for cash, in which case the scheme administrators may sell the Creditor Shares back to the Investors under a put option to raise funds.

The original terms of the Scheme were approved by the requisite majority of creditors at a meeting previously approved to be convened by the Court.

After the creditors’ meeting, in response to the HKEX’s enquiries, the Company proposed to have an independent third party acting as the underwriter for the Open Offer. Further, to better comply with the public float requirement, the Company suggested that the put option should be made through a placing agent with independent third parties instead (“Proposed Modifications”).
**The Decision**

Harris J was satisfied that the Scheme should be sanctioned following the general principles. As the Company had not yet entered the delisting stage, his Lordship distinguished *Re Burwill Holding Limited* and held that the Court can properly sanction the Scheme all else justifying it doing so.

On the Proposed Modifications, his Lordship observed that the Scheme contains a conventional modification provision. That provision allows amendments to be made to the terms of the Scheme after the creditors have already approved them at the creditors’ meeting, provided that no material adverse effect would be caused to the interests of the scheme creditors. Citing with approval the English case of *Re Aon Plc [2020] EWHC 1003 (Ch)*, his Lordship allowed the Proposed Modifications.

**Commentary**

This decision is commendably correct and will facilitate schemes of arrangement in Hong Kong.

As can be seen from *Re Burwill Holding Limited*, if a company’s listing status has been cancelled and it has entered into the review process, sanctioning a scheme may influence the HKEX Listing Review’s Committee decision and/or amount to wastage of judicial resources. In contrast, where a company’s shares are only suspended from trading, the same considerations do not apply. Harris J’s decision is therefore right as a matter of principle and consistent with authority.

It is equally important to highlight that the present case is the first decision in Hong Kong dealing with post-creditors’ meeting modifications to the scheme. The Court’s recognition of the conventional modification provision is most welcome. This will strike a good balance between allowing necessary modifications as circumstances change and ensuring scheme creditors’ interests are adequately protected.

*John Hui* and Terrence Tai acted for the Company in this case and co-authored this Case Report.

![John Hui and Terrence Tai]
How real has the real risk of dissipation been?

This article was authored by José–Antonio Maurellet SC, John Hui and Howard Wong

Test for risk of dissipation

1. In Convoy Collateral Limited v. Cho Kwai Chee [2020] HKCA 537 (3 July 2020), the Hong Kong Court of Appeal (“Hong Kong CA”) held that, for the purposes of obtaining a Mareva injunction, the applicant must show objectively a solid basis for concluding that there is a real risk of unjustified dissipation of assets by the defendant (§§53). Since Convoy, the English Court of Appeal (“English CA”) had occasion to revisit and examine the principles for identifying a risk of dissipation in Ambassadeurs Club Ltd v. Yu [2021] EWCA Civ 1310.

2. In that case, the applicant invited the English CA to put a gloss over the test of “real risk of unjustified dissipation” by describing a “real” risk as one that is “more than fanciful”. The English CA rejected this invitation. It held that the test of a “real” risk sets the bar lower than “more likely than not” (§§35-36):

“Whilst I find no difficulty in accepting the proposition that "real" in this context does mean something which is "more than fanciful", and lawyers are used to those concepts being treated as two sides of the same coin in other contexts (such as applications for permission to appeal), there is an obvious danger that putting such a gloss on the well-established test will create an impression that the threshold is lower than it actually is...

The focus should be on whether, on the facts and circumstances of the particular case, the evidence adduced before the court objectively demonstrates a risk of unjustified dissipation which is sufficient in all the circumstances to make it just and convenient to grant a freezing injunction. Plainly a risk which is theoretical, fanciful or insignificant will not meet that threshold, but the judge should be addressing the question whether he or she is satisfied that the alleged risk is real, and that does not require any comparative exercise to be carried out, or the attaching of some other label to a risk which falls short of the threshold. Judges and practitioners have been addressing the test for many years without the need for such a gloss. I would not wish it to be suggested that henceforth, in every case in which a freezing order is sought, in order to avoid being criticized for making an error of law, the Judge must specifically turn his or her mind to the question whether the risk of dissipation is real "rather than fanciful".”
3. It may be that, in practice, the principles adumbrated by the English CA will likely lead to the same results as the Hong Kong CA’s approach in *Convoy*. This is because in *Les Ambassadeurs Club Ltd v. Yu* at §31, the English CA followed and applied the reasoning in *Holyoake v. Candy* ([2017] EWCA Civ 92; [2018] Ch 331 at §34, where the English CA held that:

> “it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what this entails in any given case will necessarily vary according to the individual circumstances.” [Emphasis added]

4. The emphasis on the need for “solid evidence” mirrors the requirement for a “solid basis” in *Convoy*.

5. The English CA stated that the test of a “real risk” is lower than a test of likelihood. The expression that there is a “real risk” that a judgment will go unsatisfied is not to be equated with “likely” or “more likely than not”. It sets a lower standard (§27).

**Refusal to pay is not to be equated with a risk of dissipation**

6. The English CA emphasised that an important distinction needs to be drawn between a defendant who can pay but refuses to pay his debts until he is forced to do so, and a defendant who is so determined not to pay that he would take active steps to frustrate the recovery of sums due to his creditors by transferring or concealing assets or by some other form of unjustified dissipation (§19). In order to avoid the undesirable situation in which the nuclear remedy of a freezing order would become a commonplace threat, there must be cogent evidence from which it can at least be inferred that the defendant falls into the latter category (§19).

7. The English CA reiterated that a freezing injunction is not intended as a safeguard against insolvency, nor as a means of providing security for a claim, however strong that claim may be and however large a sum of money may be involved. Hence, a freezing injunction is not just another standard means of securing enforcement of a judgment in favour of the applicant, like a charging order or third-party debt order (§14).

**Risk of dissipation is not easier to infer in a post-judgment situation**

8. The English CA also rejected the suggestion that, in a post-judgment situation, an adverse judgment against the defendant will make it easier to infer a risk of dissipation. An adverse judgment may provide more of an incentive to the defendant to put his assets beyond the reach of the claimant than a mere claim, but that tells one nothing about whether the evidence establishes a real risk that he may do it (§18).

José-Antonio Maurellet SC, John Hui and Howard Wong acted for the Plaintiff in the Court of Appeal.
Emissions Control: Clearing the air on NDAs, Non–Compete Clauses, and solicitors’ undertakings

This Case Report was authored by Yang-Wahn Hew, Sharon Yuen, and Howse Williams’ Patricia Yeung.

**Harcus Sinclair LLP and Anor v. Your Lawyers Ltd**  
[2021] UKSC 32

**Summary**

The UK Supreme Court has clarified that when assessing the legitimate interests of the beneficiary of the restraint, the Court can take into account both the terms of the contract and the parties' objectives, intentions, or contemplation of their future relationship at the time when the contract was made.

This case also has significant implications for the legal profession as the court authoritatively discussed the nature and enforceability of solicitors' undertakings and set out certain *obiter* observations on issues such as its inherent supervisory jurisdiction over law firms and incorporated bodies (such as LLPs) offering legal services, and on public policy in relation to contracts and solicitor’s undertakings.

**Facts**

The disputes arose from group litigation initiated against the Volkswagen Group ("VW") in relation to the allegation that it had installed “defeat devices” to manipulate the results of tests for emissions standards, referred to by the UKSC as the “Volkswagen emissions scandal”.


In January 2016, the appellant Your Lawyers ("Your Lawyers") issued a claim against VW with the intention to apply for a Group Litigation Order ("GLO"). Your Lawyers, reached out to Harcus Sinclair LLP ("Harcus Sinclair") for collaboration and sent a draft non-disclosure agreement ("NDA") to Mr Parker ("P"), a solicitor at Harcus Sinclair. The NDA contained a non-compete clause stating that Harcus Sinclair undertook "not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action" without the express permission of Your Lawyers. P signed the NDA "for and on behalf" of Harcus Sinclair, and without reading it. Your Lawyers then started sharing confidential information with Harcus Sinclair, but no formal collaboration agreement was ever reached.

Harcus Sinclair later recruited a group of VW emissions claimants without the knowledge of Your Lawyers. It also shared confidential information, and agreed to collaborate, with another law firm. Your Lawyers claimed that Harcus Sinclair had breached the non-compete undertaking, and that such was a solicitor’s undertaking. Subsequently, Your Lawyers sought an injunction against Harcus Sinclair.

At first instance, the High Court found that Harcus Sinclair was in breach of contract and imposed an injunction requiring them to cease acting in the emissions litigation for six years. The Court of Appeal reversed the decision and discharged the injunctions, holding that the non-compete undertaking was unenforceable as an unreasonable restraint of trade. Your Lawyers appealed to the Supreme Court.

The Supreme Court unanimously allowed the appeal. Lord Briggs, Lord Hamblen and Lord Burrows jointly gave the sole judgment, with which Lord Lloyd-Jones and Lady Arden agreed.

Did the non-compete undertaking constitute an unreasonable restraint of trade?

It was clear and undisputed that the non-compete clause engaged the doctrine of restraint of trade. The question was whether the restraint of trade was reasonable. To determine that issue, two legal principles had to be applied:

1) The promisee (Your Lawyers) had to establish that the non-compete undertaking was reasonable as between the parties by showing that (i) the undertaking protected its legitimate interests; (ii) it went no further than was reasonably necessary to protect those interests; and (iii) the restriction was commensurate with the benefits secured to the promisor under the contract.

2) If so, the promisor (Harcus Sinclair) would have to establish that the non-compete undertaking was unreasonable as being contrary to the public interest.

When considering reasonableness, the critical question was whether Your Lawyers' legitimate interest was limited to the NDA provision. The Court, having considered various authorities including the “most important cases” of Allan Janes LLP v. Johal [2006] EWHC 286 (Ch.); [2006] ICR 742 and Egon Zehnder Ltd v. Tillman [2017] EWHC 1278 (Ch.), held that the courts could also take into account the parties' non-contractual intentions, or what they contemplated would occur as a consequence of entering into the contract at the time the contract was made.

In the present case, Your Lawyers had legitimate interests to protect through the non-compete undertaking, which flowed from the intended informal collaboration. Hence, it was logical and necessary for the non-compete undertaking to last for 6 years (which would roughly equate to the limitation period for claims in the emissions litigation), and the restriction was commensurate with the benefits to Harcus Sinclair secured under the contract, and was reasonable between the parties. Their Lordships also recognised the force in Your Lawyers’ submission that
a non-compete undertaking might be needed even if one were just protecting confidential information, since that undertaking might usefully protect confidential information without the need to prove what is confidential information, and the misuse of such, through litigation.

The court hence reversed the Court of Appeal’s decision and concluded that clause was not unreasonable as being contrary to the public interest. In passing, their Lordships also observed that while there is some similarity between the principles governing contracts in restraint of trade and those governing contracts affected by illegality as laid down in *Patel v. Mirza* [2017] AC 467, it is preferable to treat the former as separate from the latter as the former are well-established, mostly self-contained and already reflect the type of flexibility that *Patel v. Mirza* had brought to the law on contracts affected by illegality. However, Hong Kong practitioners will be aware that the question of whether the approach in *Patel v. Mirza* applies in Hong Kong has been said to be a matter for review by the Court of Final Appeal.[1]

**Was the non-compete undertaking a solicitor’s undertaking?**

The mere fact that the undertaking was given by a solicitor did not make it a solicitor’s undertaking, for the test was whether the undertaking was given by the solicitor in his or her "capacity as a solicitor". It was the fact that the undertaking was given professionally that would engage the court’s supervisory jurisdiction.

To determine whether an undertaking was given in the solicitor’s "capacity as a solicitor", relevant factors would include whether it was given in connection with a transaction involving a client, whether it was given to the court or a third-party, whether the solicitor was acting on instructions, and whether the solicitor was acting in a personal or business capacity, rather than in a professional capacity. The court then held, as a matter of further guidance, that in answering the question it would be helpful to consider two questions:

1. the subject matter of the undertaking, and whether what the undertaking required the solicitor to do was something which solicitors regularly carry out (or refrain from doing) as part of their ordinary professional practice; and

2. the reason for the giving of the undertaking, and the extent to which the cause or matter to which it relates involves the sort of work which solicitors regularly carry out as part of their ordinary professional practice.

If both questions were answered affirmatively, then the undertaking would likely be a solicitor’s undertaking.

Their Lordships then held that the non-compete undertaking was not a solicitor’s undertaking. Rather, it was a business arrangement, being an undertaking given by Harcus Sinclair in a business, rather than a professional, capacity, as the subject matter of the undertaking was a promise not to compete with another law firm, which did not involve the sort of work that solicitors undertake not to do as part of their ordinary professional practice (as solicitors are in practice to carry out work, and as it was difficult to conceive of circumstances where a non-compete undertaking could ever be given on behalf of a client). Moreover, the undertaking was given to further the parties’ business interests, rather than those of any client.

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[1] See inter alia *Arrows Ecs Norway AS* [2018] HKCFI 975 [28] per Chow J. (as he then was) and related cases as discussed in the 3rd Edition (2018) of A Word of Counsel in *Back for good? Can it be said that all forms of illegality are sufficient to defeat the Change of Position Defence to Unjust Enrichment Claims?* by Anson Wong S.C and Connie Lee and in the 2nd Edition (2018) of A Word of Counsel in *A change of direction by the Court in favour of filial piety?* by Yang-Wahn Hew, John Hui and Alvin Tsang.
Did the court’s supervisory jurisdiction over solicitors apply to Harcus Sinclair or to Mr Parker, if the non-compete undertaking was a solicitor’s undertaking?

Given their Lordships’ conclusion on the first issue above, it was unnecessary for the court to discuss whether the undertaking could have been enforced against Harcus Sinclair or Mr Parker. However, the court addressed the question as it was one of general public importance given the significant structural role played by solicitors’ undertakings in the smooth and efficient transaction of legal business, particularly litigation and transactions.

The court suggested that the correct question to be asked was not merely whether its inherent supervisory jurisdiction applied, but whether such jurisdiction should be extended to cover all or some of the incorporated bodies (such as LLPs, of which Harcus Sinclair was one) which were authorised to provide solicitor services.

While the court confirmed that its inherent jurisdiction applied to solicitors because of their status as officers of the court (pursuant to Assaubayev v Michael Wilson & Partners Ltd [2014] EWCA Civ 1491; [2015] PNLR 8), it also reluctantly decided that it was not an appropriate occasion to decide whether that jurisdiction should be extended to incorporated law firms given that any views expressed would only have the force of obiter dicta, the lack of submissions from professional or regulatory bodies with a legitimate interest (such as the Law Society and the Solicitors’ Regulation Authority), and as in their view the question was better addressed by legislation.

As matters stood, the Supreme Court agreed that the non-compete undertaking would not have been enforceable against Harcus Sinclair even if it had been in the nature of a solicitor’s undertaking, as Harcus Sinclair was not an officer of the court. Similarly, the non-compete undertaking would not have been enforceable against Mr Parker as he gave it on behalf of Harcus Sinclair, instead of in his own personal capacity. For, unlike an undertaking given by a solicitor expressly on behalf of an ordinary unincorporated partnership, an undertaking given on behalf of a solicitors’ LLP would result in the solicitor dropping “out of the picture” due to the LLP’s separate legal personality, and limited liability.

The Court also made some obiter observations on the operation of public policy in relation to non-compete clauses, whether contained in a contract or in a solicitors’ undertaking.

Key takeaways

Practitioners should be aware that:

- It is possible to enforce a restrictive covenant contained in an NDA. Furthermore, a non-compete undertaking may usefully protect confidential information, with the potential added benefit of avoiding litigation on the need to prove what information is confidential, and whether such has been misused.

- In determining the legitimate interests of the promisee, one can take into account what the parties objectively intended or contemplated, consequent on the contract, at the time the contract was made as well as the contract terms. However, it remains to be seen to what extent the Hong Kong Courts will follow this, given the UKSC’s favourable comparison of the law on restrictive covenants with the flexible approach...
in *Patel v. Mirza* (which has yet to be adopted in Hong Kong).

The considerations in determining whether a non-compete agreement is a solicitor's undertaking include the subject matter of the undertaking, the reason it was given, and its relation and requirements when compared to a solicitors' ordinary professional practice.

As the court's inherent supervisory jurisdiction (see s. 3 *Legal Practitioners Ordinance*) does not extend to cover incorporated bodies authorised to provide legal services (such as LLPs), practitioners should (at least until the legislature is updated) consider seeking personal undertakings from individual solicitors, as well as, or in the alternative to, the LLP for which he or she acts.

There is *obiter* which suggests that solicitors' undertakings, although not contractually binding, are generally subject to the rules of public policy in relation to contract law.

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[1] This approach is consistent with the decision in *Egon Zehnder Ltd v. Tillman*, in which Mann J said "one has to go further and look at what was in the contemplation of both parties". Our Case Report on the subsequent appeal to the UKSC was published in the 3rd Edition (2019) 7th Issue of *A Word of Counsel* in *When will severance pay? Exploring the limits of the blue-pencil doctrine*.
Frozen in Time: The Common Law and Freezing Orders

This Case Report was authored by John Hui and Cyrus Chua

Broad Idea v Convoy Collateral [2021] UKPC 24

Overview

1. It has traditionally been assumed in Hong Kong that to qualify for interim relief under s.21L of the High Court Ordinance ("HCO"), an applicant had to show a cause of action justiciable within the jurisdiction. This assumption might perhaps be traced to a dictum in The “Siskina” [1979] 2 AC 210, where Lord Diplock said (256):

   “…the High Court has no power [at common law] to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment…” (emphasis added)

2. Because of this assumption, there was a belief that s.21L did not permit the courts to grant freezing orders in the absence of substantive proceedings in Hong Kong. In their Final Report, the Chief Justice’s Working Party on Civil Justice Reform recommended that (§347):

   “[Section 21L of the HCO] clearly classifies [freezing] injunctions as ‘interlocutory’. In the light of The Siskina and the Leiduck decisions which unequivocally lay it down that as an interlocutory injunction, [freezing] injunctions require to be incidental to a substantive action… the Working Party’s view is that s.21L should be amended, making it clear that [freezing] injunctions...are capable of being sought independently in aid of foreign proceedings…” (emphasis added)

3. To implement these recommendations, the legislature enacted s.21M of the HCO to authorise a standalone freezing order to aid foreign substantive proceedings.

4. Yet, the correctness of these assumptions was recently challenged before the Judicial Committee of the Privy Council ("JCPC" or "Board") in Broad Idea
Case Reports

**v Convoy Collateral** [2021] UKPC 24. By a majority, the Board held that the BVI High Court has the power at common law and under s.24(1) of the Eastern Caribbean Supreme Court Act (“BVI Act”) (in pari materia with s.21L of the HCO) to grant freezing orders, despite the absence of substantive proceedings before it. In doing so, the majority rejected Lord Diplock’s *dictum* and held that an existing cause of action is no longer a condition for an interlocutory injunction.

5. It is unclear whether the Hong Kong courts might extend the common law in the same manner. By enacting s.21M of the HCO in response to a perceived lacuna in the common law, the legislature might have made it impossible, or at least undesirable, for s.21L to be read in the same way as s.24(1) of the BVI Act. This concern is fortified by a well-established line of cases that treated *The “Siskina”* as laying down a hard requirement for an existing cause of action. These decisions might have to be overruled or otherwise distinguished if the majority’s approach was adopted. To that extent, it is arguable that the enactment of s.21M had frozen the common law’s development in this area.

**Decision**

6. Dr Cho is a shareholder of *Broad Idea*, a BVI company. The injunction applicant, CCL, sought a freezing order against *Broad Idea* to aid substantive proceedings against Dr Cho in Hong Kong. No substantive proceedings were on foot in the BVI. There being no dispute that the BVI High Court had jurisdiction over *Broad Idea*, the key issue was whether the Court had the power to grant an order freezing *Broad Idea*’s assets under s.24(1) of the BVI Act.

7. At first instance, Adderley J granted the freezing order against *Broad Idea*. But his decision was reversed by the Eastern Caribbean Court of Appeal (“ECCA”). Citing Lord Diplock’s *dictum*, the ECCA held that the High Court had no power to grant a freezing order in the absence of substantive proceedings in the BVI.

8. By a majority (Lords Leggatt, Briggs, Sales and Hamblen), the Board disagreed with the ECCA. It held that the High Court had the power under s.24(1) of the BVI Act and common law to grant a freezing order even without substantive proceedings in the BVI. Contrary suggestions in *The “Siskina”* should “be laid to rest” (§§120–121). They reasoned:

- Section 24(1) refers to an “interlocutory order...in all cases”. Was there a reason to read “in all cases” as excluding cases “where an injunction is sought in aid of foreign proceedings” (§76)? The Board decided otherwise. “Interlocutory order” meant “any order other than a final judgment in an action”. There is no basis to read in a requirement of a “final judgment” in “the action in which the order is made” (§77).

- Further, s.24(1) of the BVI Act did not reduce the courts’ common law powers to grant injunctions. The only limits were those arising from an “established practice” (§§78–79). But there is “no settled practice or principle” at common law preventing the grant of an injunction “against a defendant” if substantive proceedings are abroad (§80).

- The requirement of substantive proceedings in the BVI is unprincipled. There is “no connection between a freezing injunction and a cause of action for substantive relief” (§91). The freezing order aims to “prevent the right of enforcement [of a judgment] from being rendered ineffective” by dissipation of assets (§89). There is no reason to link this with a cause of action (§90).

9. The minority (Sir Geoffrey Vos, Lords Reed and Hodge) refused to endorse this sea change in the law. It was unnecessary to do so as the Board had unanimously agreed that, since there was no risk of dissipation, no injunctive relief lay against *Broad Idea* (§215). In those circumstances, the majority’s “exposition” will be no more than “powerful obiter
dicta” and “an unsatisfactory way to change the law in such an important area” (§221).

Implications

10. The majority’s approach in Broad Idea creates two layers of uncertainty. **First**, it is unclear whether the Hong Kong courts will construe s.21L of the HCO in the same way as s.24(1) of the BVI Act, despite both being in pari materia.

11. Unlike the BVI, s.21M of the HCO has been on Hong Kong’s statute books for over a decade. As Lord Phillips explained in Compania v Hin–Pro (2016) 19 HKCFAR 586, this section was intended to “reverse” the “effect of the Siskina” and to make freezing orders “available” for “proceedings...outside the jurisdiction” (§44).

12. Since s.21M of the HCO was enacted to fill the lacuna created by the common law, further development of the latter might no longer be possible or desirable. A similar point was made, albeit in another context, in Johnson v Unisys [2003] 1 AC 518. Lord Millett said (§80):

“But the creation of the statutory right has made any such development of the common law both unnecessary and undesirable. In the great majority of cases the new common law right would merely replicate the statutory right...In other cases, where the common law would be giving a remedy in excess of the statutory limits...it would be inconsistent with the declared policy of [the legislature]...” (emphasis added)

13. The same concern rears its head here. If s.21L were given the same effect as s.21M, this would give the latter little work to do. And since s.21M expressly relates to freezing orders in respect of proceedings “outside Hong Kong”, the “new common law right” would “merely replicate the statutory right”. But that would be “unnecessary and undesirable”. On the other hand, if s.21L were given an effect “in excess of” s.21M, this might be “inconsistent with the declared policy of” the legislature.

14. However, this conundrum was not addressed in Broad Idea, where the majority only noted that statute and common law could operate “in harmony” (§118). This begs the question – do the principles governing the exercise of discretion under s.21M also apply to s.21L by analogy? If both provisions are “in harmony”, s.21L should not be used as a backdoor to sneak in applications that might otherwise fail to get past s.21M. But this will then run into the obvious complaint that s.21M would be perfunctory if s.21L were duplicative. Arguably, the fact that there is no easy solution might indicate that the enactment of s.21M had rendered further development of the common law unnecessary or undesirable.

15. Second, it is unclear whether the Hong Kong courts would follow Broad Idea in disclaiming the “connection between a freezing injunction and a cause of action for substantive relief” (§91). The issue is fundamental. If we are to adopt the majority’s approach, the Court’s power to grant freezing orders might be significantly expanded to include cases where:

- An applicant anticipated that the respondent would owe it a debt, but the latter might unjustifiably dissipate its assets before the debt becomes due.
- An applicant anticipated that the respondent would commit a breach of contract, but the latter might unjustifiably dissipate its assets before the breach occurred.
- An applicant anticipated a potential cost-order against the respondent, but the latter might unjustifiably dissipate its assets before the cost-order was made.

16. But this expansion of powers might be too much of a good thing. In Grand Trade v Bonance (unrep., CACV 776/2000, 3.11.2000), Rogers VP cautioned
that freezing orders “are extremely serious”, “very damaging”, and akin to “nuclear weapons” (§17). Due to the undoubted potency of a freezing order, any attempt to expand the courts’ powers will be treated with circumspection.

17. These difficulties are further compounded by the existence of a line of cases that consistently affirmed the need for an existing cause of action as a precondition to freezing orders: see, for example, (1) *Intercontinental v Quek* [1986] HKLR 1153 at 1163H–1164 D (Fuad JA); (2) *Gainluxe v Superstand* [1994] 3 HKC 641 at 665G (Yam J); (3) *Pacas v China Health* (unrep., HCA 2961/2015, 3.5.2016) at §§88; 20 (Au-Yeung J), and (4) *Americhip v Zhu* [2021] HKCFI 2073 at §§28–30 (Recorder Manzoni SC).

18. On the other hand, a different view was taken in *Tang v Sinopac* [2019] HKCFI 2087. At issue was whether a co-defendant could apply for a freezing order in aid of a contribution notice, notwithstanding that it had no cause of action. The Deputy Judge held that the absence of a cause of action did not foreclose the grant of a freezing order. Analogies were drawn with *quia timet* injunctions, which are granted even without an accrued cause of action (§§82–85).

19. Although *Tang* was clearly ahead of its time by foreshadowing *Broad Idea*, certain aspects of its reasoning might be open to challenge. For instance, the analogy between freezing orders and *quia timet* injunctions is hard to square with *Mercedes v Leiduck* [1997] AC 284, a JCPC decision on appeal from Hong Kong, where Lord Mustill repudiated the same attempt to draw “an analogy” between freezing orders and “quia timet injunction” (303E). Nor did it consider the long line of cases beginning with *The “Siskina”*. In such circumstances, the precedential value of *Tang* as a springboard to abolish the requirement for an existing cause of action might be somewhat limited.

20. Given the conflicting decisions and the intervention of s.21M of the HCO, the Hong Kong courts will have to be very cautious before developing the common law on freezing orders. In the end, the minority in *Broad Idea* might prove prescient in warning that the majority’s approach has “unpredicted and unknown circumstances” and that it will be “danger[ous] in seeking to develop the common law in this way” (§§222–223).

José-Antonio Maurellet SC was part of the counsel team acting for the Appellant (CCL) before the JCPC in Broad Idea.

John Hui and Cyrus Chua co-authored this Case Report.
Auctioneers Watch Out! The Cost of Overcaution – How a “Neutral” Auctioneer paid the price for its Dawdling

This Case Report was authored by Benny Lo

Introduction

When two or more parties assert claims to an item, e.g., a stolen item, in the possession of a neutral party (such as an auctioneer), the neutral party, upon being sued, may apply to the court for interpleader relief. When this happens, those who assert ownership of the item shall litigate over entitlement to the item in court, and the neutral party will observe the court’s final order accordingly (see Rules of the High Court (Cap 4A) O.17 r.1).

Normally, if interpleader relief is granted, the neutral party’s costs shall be borne by the losing party of the action. However, the Hong Kong High Court decision of Horometrie S.A and another v Bonhams (Hong Kong) Ltd and another [2021] HKCFI 458 shows that this is not always the case.

In the decision, the plaintiffs had repeatedly requested and sought undertakings from an auctioneer to preserve an allegedly stolen item 6 months before commencing proceedings. These requests were persistently rejected by the auctioneer. The plaintiffs then made an application to the Court requesting for the same. Ultimately, the High Court deemed the auctioneer’s refusal of the undertakings as unreasonable and ordered costs against it.

Material Facts of the Case

The underlying action concerns a Richard Mille prototype watch (the “Watch”). The Watch was consigned to the 1st defendant (an auctioneer) by the 2nd defendant for sale through public auction. The plaintiffs’ case was that the Watch rightfully belonged to the 1st plaintiff (a world-renowned watch manufacturer) but was stolen from the 2nd plaintiff (its general manager) in Paris.

Seeking to recover the Watch by way of a writ, the plaintiffs’ solicitors wrote to the 1st defendant numerous times. The first of which requesting it to undertake not to dispose of or return the Watch to the 2nd defendant. However, the 1st defendant failed to reply to the initial request.

More letters were written by the plaintiffs’ solicitors to the 1st defendant, noting that the police had directed them to refrain from dealing with the watch, and repeated the initial request for the undertakings. The 1st defendant replied that, while it would cooperate with the police, it would not accede to the plaintiffs' requests before the police investigation had led anywhere. However, even upon the closure of the police investigation, the 1st defendant in refusing to provide the undertakings, instead suggesting that the plaintiffs resolve the matter with the 2nd defendant themselves.
In response to the 1st defendant’s conduct, the plaintiffs took out a summons, *inter alia*, seeking the 1st defendant’s delivery-up of the Watch to the plaintiffs’ solicitors for safekeeping (the “Application”). Belatedly, it was less than 2 days before the return date of the plaintiffs’ summons that the 1st defendant verbally agreed to provide the undertakings. The plaintiffs had also successfully obtained an injunction restraining the 1st defendant from dealing with or disposing of the Watch pending the resolution of the action.

Consequently, the plaintiffs agreed that the Watch remain in the custody of the 1st defendant until trial and asked the court that no order be made in respect of the Application.

**Decision**

Deputy High Court Judge Dawes SC rejected the 1st defendant’s argument which asserted that it should be entitled to costs by arguing that the plaintiffs had abandoned their Application, and that the Application would inevitably fail because, in interpleader cases, a neutral party should retain the subject property pending trial.

The Court found that the plaintiffs’ discontinuance of the Application was “for reasons other than an acknowledgment of defeat or likely defeat” (citing *Uni-Creation Investments Ltd v Secretary for Justice* (unreported, HCMP2166/2015, 30.06.2017) at §10). The Court looked into the conduct of the parties, as explained at §§18 & 21 of the decision:

> “18. ... the Delivery Up Application was necessitated by D1’s failure to provide an undertaking to preserve the Prototype Watch. This is clear when one considers the communications exchanged between Ps and D1 in the period leading up to these proceedings.

> ...

> 21. ... in the absence of legal proceedings [D1] was unwilling to grant an undertaking to preserve
the Prototype Watch. In light of these matters, I consider that the Delivery Up Application was necessitated by D1’s refusal to undertake to preserve the Prototype Watch.”

Additionally, the Court did not agree that by withdrawing the Watch from the auction, the 1st defendant had undertaken not to deal with the Watch. §19 of the decision further stated that:

“19. ... even if one can derive such an implied undertaking to this effect from its statement that “we will of course fully cooperate with the Police” (as D1 contends), such an undertaking would have lapsed when the Police decided to end their investigation in February 2019.” (emphasis added)

Indeed, the Watch was retained in the custody of the 1st defendant rather than delivered to the plaintiffs’ solicitors. However, the result was effectively equivalent to what was sought under the Application: that the Watch be held “for safekeeping until trial”.

Thus, the plaintiffs had not “withdrawn” or “abandoned” their Application, and accordingly, their Application was not bound to fail. Hence, the Court ordered the 1st defendant to pay the plaintiffs’ costs.

Commentary

This decision is significant for auctioneers and those who frequently deal with consigned items.

First, it sets an example for the neutral party in respect of interpleader issues. It is not a given that neutral parties are automatically entitled to costs in interlocutory applications. In situations like the present one, when determining costs of interlocutory applications, the Court is entitled to examine whether the plaintiffs’ application was necessitated by the auction house’s unreasonable conduct such as refusing to give undertakings not to deal with the item in dispute.

Second, it imposes an obligation on neutral parties that they should reasonably agree to the ‘true’ owner’s request to preserve the disputed item. In this regard, the Court has set a high standard. As shown in the present decision, merely cooperating, or expressing its willingness to cooperate with the police is insufficient to discharge such an obligation. Neutral parties should have the obligation of being reasonable and neutral even in the absence/conclusion of a police investigation or legal proceedings.

Third, this obligation may arise way before the underlying proceeding has been commenced as the Court can consider the conduct of the parties since the first request was made.

Thus, practitioners and auctioneers alike should be reasonable when determining whether to provide undertakings to preserve a disputed item upon receipt of such a request.

DVC’s Benny Lo authored this Case Report and represented the successful plaintiffs.
Modern School of Thought... a Milestone Decision by the Court of Appeal in relation to Penalty Clauses as they pertain to a teacher

Overview and two important takeaways

The Court of Appeal (“CA”) recently handed down a milestone decision on Hong Kong commercial and employment law in Law Ting Pong Secondary School v Chen Wai Wah [2021] HKCA 873 (the “CA Decision”). This case concerned the remedies available to a secondary school (the appellant) after one of its teachers (the respondent) wrongfully revoked his employment contract just a few days before the formal opening of the academic year. One of the arguments advanced by the teacher was that the payment in lieu of the notice clause in the employment contract was an unenforceable penalty clause. The CA rejected the teacher’s arguments and allowed the school’s appeal. Among other points, there are two important takeaways:

(1) First, the CA Decision confirmed that Hong Kong Courts welcome and would adopt the modern approach to control penalty clauses as laid down by the Supreme Court of the United Kingdom in Cavendish Square Holdings BV v Talal El Makdessi [2016] AC 1172 (the “UKSC Judgment”).

In gist, instead of asking whether the clause represents a genuine pre-estimate of loss and/or is in terrorem, the modern test requires the Court to “first identify the legitimate interest of the innocent party that is being protected by the clause, and then assess whether the clause is out of all proportion to the legitimate interest by considering the circumstances in which the contract was made” (see, e.g., paragraphs 69-70 of the CA Decision).

The CA Decision has therefore authoritatively resolved the uncertainty as to whether Hong Kong law on penalty clauses should be fine-tuned and/or modernised after the UKSC Judgment, which has sparked debates among practitioners and academics in the common law world since 2015: see, e.g., Remedies for Torts, Breach of Contract, and Equitable Wrongs (2019, Oxford University Press) by Professor Andrew Burrows QC (Hon) (as Lord Burrows JSC then was).

(2) Second, with the insightful comments by the
learned Lam VP in the CA Decision, the law against penalty clauses may not apply to payment in lieu of notice clauses in the employment context, although that will still depend on how the clause is being drafted and agreed.

As pinpointed by the learned Lam VP at paragraph 7 of the CA Decision, “termination by advance notice or payment in lieu of such notice is quite common” and His Lordship did not think “it is in the interest of the development of employment law to complicate the matter by bringing the concept of penalty to such a common practice.”

Such inspiring comments would surely have material and important implications on the drafting of employment contracts and the resolution of employment disputes in the future.

**Commentary**

The CA Decision is most welcome. The modern approach to penalty clauses, now confirmed to be part of Hong Kong laws, essentially (1) dissuades a simplistic evaluation of merely checking whether the agreed payment is a genuine pre-estimate of loss and/or is in *terrorem* and (2) places emphasis on the qualitative aspect of the contracting parties’ legitimate interests.

Such an approach makes good commercial and common sense. For instance, when parties entered into the contract on a commercial basis, and there was no compelling evidence of an abuse of bargaining power, it was logically sensible and reasonable for the Court to uphold the legitimate interests of the contracting parties and to be slow in striking down a clause on the basis that it was penal. After all, certainty (including certainty of agreed contract terms) is important to the operation of commercial activities.

For the above reasons, the CA Decision has provided important guidance on the laws governing both (1) penalty clauses and (2) payment in lieu of notice clauses. Readers are invited to study the same if and when a related issue arises.

Tommy Cheung acted for Law Ting Pong Secondary School, the appellant in the appeal.
Does the *Turtle* always win the race? And Can A Whistle-Blower Be Held Liable For Publication of Libel News Coverage? Find out in The Turtle Jelly Saga.

After an entangled lawsuit spanning 8 years, the High Court of Hong Kong on 27 September 2021 gave judgment in *Hoi Tin Tong v. Choy Kwok Keung* [2021] HKCFI 2888, dismissing a libel and conspiracy claim to injure the reputation of the well-known herbal products chain – Hoi Tin Tong – in the amount of over HK$131 million.

In September 2013, damning news reports and videos published by the then Apple Daily newspaper showing a Hoi Tin Tong’s shop-keeper washing mould off turtle jelly (龜苓膏) went viral. Hoi Tin Tong then commenced the claim against a former shareholder in the chain’s PRC outlets for libel, malicious falsehood and conspiracy (i.e. colluding with the Apple Daily reporter and the shop-keeper) in staging the demonstrations to be video-recorded.

After a 11-day trial, the Court held that the defence of justification was made out – Hoi Tin Tong had instructed, encouraged or condoned its staff to adopt the malpractices of cleaning and processing mouldy turtle jellies and transferring the same from plastic to pottery cups before serving customers.

Whilst the ruling on justification would have disposed of the claim, the Judgment also shed light on the important question of whether a mere whistle-blower would be ultimately responsible for the contents of a report of a piece of investigative journalism made based on the information provided by him – the first time that a Hong Kong court was asked to rule on the same.
Applying the Australian decisions of *Dank v. Whittaker (No. 1)* [1] and *Thiess v. TCN Channel Nine Pty*, Lok J held that to hold the Defendant liable for the contents in the publication of the videos and the newspaper articles, it is not sufficient that the Defendant had provided materials proactively to the press which had contributed (even substantially) to the publication of the videos or news articles.

Lok J concluded that to hold the Defendant liable for the defamatory statements made in the videos and articles as the original publications and not republications, the Plaintiff must establish that either (1) the Defendant had control over the publication of process or (2) he had assented to the final form of the publication; or (3) the press was the agent of the Defendant in publishing the defamatory statements.

On the facts of this case, Lok J held that:

The Defendant should not be liable for the publication of the defamatory statements in the video and newspaper articles published by Apple Daily. The same were published by the reporter and Apple Daily as a result of the journalistic investigation carried out by them with the Defendant merely supplying the materials for investigation and arranging the reporter to visit the shop for the demonstrations having no control as to how the story was to be reported.

However, the press could be considered agents of the Defendant in publishing the statements made by him in the press conference. The maker of any statements in a press conference would have known that their statements would have been reported in the press. The Defendant should be held responsible for the publication in the newspaper articles provided that they accurately contained the statements made by him in the press conference.

Although the above discussions in this Judgment are *obiter* only, this case nevertheless highlights the complications that may arise from different formulations of a defamation claim depending on which are the original publications to be used. The have provided a welcoming reminder on the issues that claimants should focus on when formulating their claims in a world where information passes through social media without borders.

It remains to be seen whether the Hong Kong Court may in another case take the above discussions further.

*Connie Lee* (led by Mr. Paul Lam S.C) appeared for the Defendant.
Hong Kong Court of Final Appeal Ordered Land to be Transferred and Clarified Principles on Proprietary Estoppel

This Case Report was authored by William Wong, SC, JP, Alan Kwong and Stephanie Wong

1. In the recent judgment of Cheung Lai Mui v Cheung Wai Shing & Ors. [2021] HKCFA 19 given by the Hong Kong Court of Final Appeal (the “CFA”) over a land dispute, Counsel William Wong, SC, JP, Alan Kwong, and Stephanie Wong successfully established beneficial interest over the disputed land for their client, namely the 3rd Defendant (“D3”).

2. In this case, the CFA resolved two legal issues of general public importance, namely:-

   (1) Whether a proprietary estoppel can arise if the promisee only suffers reasonable detrimental reliance after the death of the promisor; (the “PE Question”); and

   (2) Whether a court of equity will order a co-owner in sole occupation of land to account to the other co-owners for occupation rent even if there is no ouster when it is necessary to do so to achieve equity between the parties: Re Pavlou (A Bankrupt) [1993] 1 WLR 1046 at 1050D (the “Rent Issue”)

A. The PE Question

3. On the PE Question, the CFA held that equity requires that a flexible approach be adopted:-

   (a) Where no detrimental reliance was suffered prior to the death of the promisor, the promise will be taken to have lapsed;

   (b) Where the subject land is co-owned, the “cut-off” date is that of the last survivor’s death;

   (c) In considering whether sufficient reliance has been established prior to the “cut-off” date, the Court would look at all relevant circumstances, the context surrounding the promise, and the relationship between the parties;

   (d) Where some reasonable detriments were suffered before the promisor’s death (such that the requirement of detrimental reliance is satisfied), the state of affairs subsequent to the “cut-off” point (i.e. the date of death) are relevant to the question of reliefs.

4. Applying the above principles to the facts, the CFA considered that in the context of this case concerning a traditional Chinese family living in the New Territories, the steps taken by D3, such as carrying out works to build stone walls to surround the disputed land, applying substantial physical effort to heighten the stone walls and installing underground electricity cables connected to the lights at the entrance gate etc., constituted sufficient detriments. Indeed, these were the acts of a young man preparing for an adult life in occupation of the improved disputed land. Since these acts were performed before the death of the promisors, the requisite requirement of detrimental reliance was satisfied.

5. On the question of relief, the CFA took into account that after the death of the promisors, D3 carried out very extensive works to build 2 houses (i.e. his home) on the disputed land. Even though these works took place after the “cut-off” date, they should be taken...
into account in considering what relief to grant. Pertinently, the Court also took into account D3’s emotional and sentimental attachment to the disputed land throughout the years.

6. Accordingly, the CFA declared that P was estopped from denying that D3 was beneficially entitled to the disputed land, and it would be appropriate to grant D3 beneficial interest over the disputed land.

B. The Rent Issue

7. On the Rent Issue, the Court of Final Appeal considered that on proper understanding, the authorities (including Re Pavlou (A Bankrupt) (supra)) reviewed did not support a free-standing “modern approach” on occupation rent.

8. The notion of “unity of possession” prevailed. Therefore, in order for a claim by one co-owner against another co-owner in occupation for payment of occupation rent or for an account of rent to be successful, ouster (including “constructive exclusion” as in domestic violence cases) or an operative agreement rendering the co-owner in occupation an agent or bailiff had to be established.

William Wong, SC, JP, Alan Kwong and Stephanie Wong for the 1st to 3rd Defendants (Respondents)

Ms Audrey Eu, SC, Mr Anson Wong Yu Yat and Mr Jason Kung for the Plaintiff (Appellant)
The Court of Appeal, yet again, was asked to consider the interpretation of para. 11d) of the NPPF in a case where an Inspector dismissed an appeal for residential development in the countryside. It was also asked to interpret a policy in the Aylesbury Vale District Local Plan and whether it was “relevant” to the determination of the appeal. The High Court held that the Inspector’s interpretation was correct and the Court of Appeal upheld his judgment.

In dismissing the s.78 appeal against the Council’s failure to determine an application for outline permission to build 50 homes in the countryside the Inspector concluded that Policy GP.35 was a relevant policy to her decision and consistent with the aims of the NPPF such that it was up-to-date and should be given full weight. She found that the development would unnaturally extend the settlement and encroach into the countryside causing harm to its character and appearance. She further found that Council had a 5-year supply of housing land and that the tilted balance under para. 11d) did not apply. She concluded that the benefits did not outweigh the harm and dismissed the appeal. The High Court held that the Inspector had correctly found Policy GP.35 to be relevant to a decision on an outline planning application and was entitled to conclude that the development was contrary to the development plan. He further held that the Inspector’s approach to what were the most important development plan policies for determining the application was correct. On appeal, the Court of Appeal had to consider
(1) whether Policy GP.35 was intended to guide decision-making at the outline application stage; and (2) whether the Judge had erred in construing para. 11d) of the NPPF.

On the first issue the Court applied the decision in *Canterbury City Council v Secretary of State [2019] EWCA Civ 669* and held that if the duty in section 38(6) of the Planning and Compulsory Purchase Act 2004 is to be performed properly, the decision-maker must identify and properly understand the relevant policies. Further, that the language of para. 11d) of the NPPF requires a judgment by the decision-maker as to whether a policy was relevant to the determination of the application and its importance. Noting that the distinction between the interpretation of a particular policy and its application may sometimes be fine, the Court held that the Inspector had explained clearly why Policy GP.35 was relevant. It rejected the appellant’s submission that Policy GP.35 could not be relevant at the outline application stage. Notwithstanding that Policy GB.35 had elements which were more relevant to the reserved matters stage, there were aspects of the policy that were fundamental to the principle of the development; and that there is no hard and fast line between what is acceptable in principle and what the impact of a particular development may be.

On the second issue, the Court held that it was unhelpful to consider the language of the earlier 2012 NPPF and its reference to “absent” and “silent” and the earlier cases construing it as the NPPF 2018 (which as regards para 11d) was not materially different to the 2019 version) replaced the 2012 version and used different language. It said that the first “trigger” for the application of the tilted balance was where there were no relevant development plan policies which was wide enough to embrace where there was no development plan at all, or where the plan pre-dated the Planning and Compulsory Purchase Act 2004 and none of the relevant policies had been saved. Agreeing with the Judge, the Court of Appeal held that “relevance” means that the policy has a real role to play in the determination of the application but need not be determinative of the application. As to the second “trigger” (i.e. where the policies which are most important for determining the application are out-of-date), this involved an evaluation by the decision maker of which of the relevant policies in the local plan were the most important and whether they accorded with current national policy. The fact that one of the policies amongst the most important may be out-of-date did not mean that the tilted balance automatically applied.

The decision is the matter of some debate as to its correctness and in particular the relationship between paras. 11c) and d).

“This Case Report was produced by John Litton QC.”
When do construction works in a conservation area comprise demolition?:

Jean-Francois Clin v Walter Lilly & Co. Ltd.

[2021] EWHC Civ 136

In this claim, and in the context of a contractual construction dispute, the Court of Appeal considered the approach to be taken in determining whether construction works are to be treated as amounting to demolition for the purposes of s.74 of the Planning (Listed Building and Conservation Areas) Act 1990 and thereby require conservation area consent.

Mr Clin wished to convert two adjacent residential terraced properties in a conservation area in Kensington & Chelsea into a single dwelling and contracted with Walter Lilly to undertake the works. The works included the demolition of the internal walls and floors in their entirety, extensive demolition of the rear elevations and the removal of the chimney breasts and roofs. The works commenced in March 2013 but were suspended in August 2013, after the local planning authority said that conservation area consent was required but had not been obtained. The works started again in August 2014, after the relevant consents had been obtained and a dispute arose between Mr Clin and Walter Lilly as to where the contractual responsibility fell for the year’s delay.

In April 2019, Walter Lilly obtained a declaration from the Court that the works amounted to demolition and that (1) Mr Clin had breached his implied contractual obligation to use due diligence to obtain the necessary conservation area consent; and (2) Walter Lilly was entitled to an extension of time for completing the
works and did not owe Mr Clin any liquidated damages for the delay. Crucial to those findings was that the works comprised demolition which required conservation area consent.

"The Court of Appeal applied the conventional approach to statutory interpretation most recently restated in Zuberi v Lexlaw Ltd [2021] EWCA Civ 6 at [30] and upheld the first instance Judge’s conclusion that the works comprised demolition..."

On appeal, Mr Clin argued that the Judge had failed to take into account the effect the works would have on the character and appearance of the conservation area in determining whether those works comprised demolition as required by s.72 and s.74 read together.

The Court of Appeal applied the conventional approach to statutory interpretation most recently restated in Zuberi v Lexlaw Ltd [2021] EWCA Civ 6 at [30] and upheld the first instance Judge’s conclusion that the works comprised demolition, for which conservation area consent was required, for two reasons. First, on the proper construction of s.72 and s.74 of the Planning (Listed Building and Conservation Areas) Act 1990 in deciding whether works comprise demolition the local planning authority is not required to carry out a qualitative exercise by reference to considerations of character and appearance of the conservation area in question [71]. In doing so it accepted that those considerations were relevant to whether conservation area consent should be granted. Secondly, the decision in Shimizu (UK) Limited v Westminster City Council [1997] 1 WLR 168, which was concerned with whether certain works to a listed building comprised demolition, confirms that the question of whether or not demolition of a building is involved is a question of fact and degree to be assessed on a quantitative basis and applies to the conservation area regime in Part II of the Planning (Listed Building and Conservation Areas) Act 1990 just as it does to the listed building regime in Part I of the Act [76]. However, the Court of Appeal questioned (but left open) whether Lord Hope’s decision in Shimizu, that the definition of a “building” excluded any “part of a building” for the purposes of the listed building regime, applied to an unlisted building in a conservation area.

This Case Report was produced by John Litton QC.
This case concerned the correct interpretation of a planning permission granted in 2013, and in particular the site plan, in the context of a long-running dispute with the owner/operator of a caravan park and an application for an injunction by the local planning authority under section 187B of the Town and Country Planning Act 1990.

The dispute arose because the local planning authority sought an injunction to prevent further development of an existing caravan park in the Green Belt which it alleged fell outside of the scope of a planning permission granted in 2013. The caravan park owner claimed that the development fell within the scope of the permission. The Supreme Court has now twice considered how planning permissions should be interpreted in Trump International Golf Club Scotland Ltd v Scottish Ministers [2016] 1 WLR 85 and Lambeth LBC v Secretary of State for Housing, Communities and Local Government [2019] 1 WLR 4317 and their endorsement of the factors concerning the interpretation of permissions set out by Keene J in Ashford Borough Council, Ex parte Shepway District Council [1999] PLCR 12.

However, the factors in this case had to be applied not to the text of the permission or the conditions but to the interpretation of the site plan where the parties agreed that there was an inaccuracy in the red line delineating the extent of the planning permission.

The primary issue between the parties was where exactly the boundary, as shown by the red line on the site plan attached to the 2013 permission, lay when the parties agreed that a section of that red line (Boundary B) had been drawn in error because, when superimposed on an OS map base, it extended over a railway line. The local planning authority argued that the Court should disregard Boundary B whilst the caravan park owner argued that the ambiguity in relation to Boundary B allowed the Court to look at the material submitted with the application in interpreting the permission.

On the question of interpretation, the Court also referred to the recent decision of Lieven J in UBB Waste Essex Ltd v Essex County Council [2019] EWHC 1924 and the four principles she set out governing the approach to the interpretation of planning permissions, including that they should be interpreted as a whole by the reasonable reader with common sense taking into account the planning purpose or intention of the permission and excluding...
extrinsic documents unless they are expressly incorporated into the permission. Applying Keen J’s principles in Ashford, the Court rejected looking at the application materials and, looking at the site plan itself, held that Boundary B was ambiguous but that the rest of the red line (Boundary A) was not and the development was outwith Boundary A.

The owner further argued that the works were entitled to be undertaken as they fell within the scope of the caravan site licence, even if they fell outside of the red line on the site plan as properly construed.

As to whether the development was authorised by the caravan site licence (whose boundaries included the land on which the works were taking place), the Court held that the development was only permitted under the Town and Country Planning (General Permitted Development) Order 2015 if it was required by the conditions of the site licence and there was nothing in the conditions on the site licence which required the owner to carry out the works enforced against.

Further, the owner argued that if the works were unauthorised the Court should not in the exercise of its discretion grant an injunction. However, the Court held that it was appropriate to grant the injunction taking account of the unlawfulness of the works, that the owner had ignored the local planning authority’s warnings and that it would bring clarity given the history of disputes between the parties.

This Case Report was produced by John Litton QC.
The case concerns the interpretation of the NPPF and the discouragement of building isolated homes in the countryside together with the approach to sustainability and the duty in section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 in the context of the proposed conversion of listed buildings and substantial development in the countryside. It is important to developers and planning practitioners alike as it provides an endorsement of the Court of Appeal’s decision in *Braintree District Council v Secretary of State for Communities and Local Government [2018] EWCA Civ 610*, which interpreted similar words in the NPPF (2012), now found in paragraph 79 of the NPPF (2018) and reproduced in the NPPF 2019, on the meaning of “development of isolated homes in the countryside”. It also considered the approach to sustainability where there is a “fall-back” use of a site together with the duty under section 66 of the Listed Buildings Act 1990 and the policy in paragraphs 193 – 196 of the NPPF relating to the protection of historic assets. In doing so it rejected the argument that the Court of Appeal in *R. (on the application of Palmer) v Herefordshire Council [2016] EWCA Civ 1061* had set out a principle requiring the decision-taker to carry out a “net” or “internal” heritage balance, weighing heritage harms against heritage benefits before weighing any other public benefits against any overall harm.

The development involved a large number of discrete applications to convert listed buildings for residential use and to build a substantial number of new dwellings on a 106 ha site in the countryside between two villages. Following a long inquiry into appeals against the refusal of those applications the Inspector allowed some of the appeals but dismissed others. In the High Court, the developer challenged the Inspector's decision to dismiss some of the appeals but was unsuccessful.

In the Court of Appeal, there were four principal issues. First, whether the Inspector erred in law in her interpretation and application of the policy against “isolated homes in the countryside”. Secondly, whether the Inspector erred in her approach to “sustainability”. Thirdly, whether in performing the duty in section 66 of the Listed Buildings Act 1990 and applying the corresponding policies in the NPPF, the Inspector had failed to comply with a “principle” identified in *R. (on the application of Palmer) v Herefordshire Council [2016]*.
Fourthly, whether the Inspector erred in her approach to applying development plan policies for the protection of the historic environment.

**Issue 1**

On the first issue the Court fully endorsed the decision in *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610 and that “isolated” in the phrase “isolated homes in the countryside” connotes a dwelling that is physically separate or remote from a settlement and is a concept of national planning policy that does not lend itself to judicial analysis. Thus, the decision-maker must consider whether the development would be physically isolated, in the sense of being isolated from a settlement, what is a “settlement” and whether the development would be “isolated” from a settlement which are matters of planning judgment for the decision-maker on the facts of the particular case.

**Issue 2**

On the second issue, the Court rejected the argument that the Inspector had failed to take account of an accepted “fall-back” use in considering whether the proposed development was sustainable. It was clear the Inspector had this in mind when assessing the locational sustainability of the proposed development.

**Issue 3**

On the third issue, the Court endorsed the approach to the section 66 duty set out in *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council* [2014] EWCA Civ 137 and *Jones v Mordue* [2015] EWCA Civ 1243 but rejected an argument that the decision in *R. (on the application of Palmer) v Herefordshire Council* required the decision-taker to carry out a “net” or “internal” heritage balance (i.e. that only if “overall harm” emerges from the weighing of “heritage harms” against “heritage benefits” must the “other public benefits” of the development be weighed against that “overall harm” under paragraph 196 of the NPPF).

The Court said that section 66(1) did not require a decision-maker to undertake a “net” or “internal” balance of heritage-related benefits and harm as a self-contained exercise preceding a wider assessment of the kind envisaged in paragraph 196 of the NPPF. Nor, it said, was there any such a requirement in NPPF policy. The “net balance” exercise was one which the Inspector could have chosen to undertake when performing the section 66(1) duty and complying with the corresponding policies of the NPPF, but it was not required as a matter of law.

**Issue 4**

On issue 4, the Court held that the specific development plan policies in that case were consistent with the section 66 duty and national policy. And, in applying those policies, the Inspector was entitled to give them such weight as she reasonably judged to be appropriate. The Inspector’s conclusion that they should be given significant weight was one she was entitled to reach as a matter of planning judgment notwithstanding that none of the parties had suggested that they should be given such weight.

The appeal was dismissed.

This Case Report was produced by John Litton QC.
Alibaba’s eCommerce Platforms Cleared of Infringement

Spurious allegations of trade marks infringement and passing-off made by US direct sales giant Mary Kay were met with strong resistance from a team led by Winnie Tam SBS, SC, JP (with Philips Wong, instructed by Deacons), resulting in the setting aside of service on T-Mall and Taobao out of the jurisdiction, with indemnity costs awarded against Mary Kay, the dismissal of the default judgment application against the non-responsive mainland direct sales agents upon the Court allowing T-Mall and Taobao to intervene to resist default judgment application against the absent defendants. The products were sold by the two traders on the mainland-targeted platforms for the mainland market, but were requested to be shipped to Hong Kong pursuant to trap orders placed by agents for Mary Kay. They were genuine products, but were alleged to have been "tampered with" by the removal from the packaging of the production lot codes to prevent tracing of their distribution channel.

The interesting judgment of Lok J covers important principles of trade mark law and civil procedure and can be found by clicking here.
Landmark Judgment targeting the Manufacturer of Imitative Pharmaceutical Products

The manufacturer of the popular medicated oil brand “Wong To Yick Wood Lock Oil 黃道益活絡油” received a positive result in favour of protection of the famous product against imitative copycats, all using product names similar to “黃道益” such as “黃道人”, “黃道老人” and “正宗老人” with packagings designed to be easily confused with packagings used for the genuine product.

In Wong To Yick Wood Lock Ointment Limited v. Singapore Medicine Co. & Ors [2021] HKCFI 920, Winnie Tam SBS, SC, JP led the trial team in an action in passing-off and trade mark infringement under s.18(3) and (4) of the Trade Marks Ordinance (“TMO”) against a group of well-established local medicinal oil manufacturers who advertised themselves as “藥油王國 (Medicinal Oil Empire)”. They were known to own hundreds of own-brand products, but still made and distributed a number of products imitative of the most popular products including “黃道益活絡油” lookalikes. The trial is the first contested trial against a major manufacturer of multiple imitating products of “黃道益活絡油”.

In addition to the product name “黃道益”, the plaintiff relied on a combination of a number of visually significant features distinguishing generations of its evolving packaging to establish a case on get-up passing-off. Defences on the basis that the features identified on the plaintiff’s packagings were common features, and that the contested packagings were independently designed were all rejected. The defendant further asserted that they commenced use of the contested packagings since before the 1990’s, the evidence in support of which was found to be spurious. The plea of estoppel or acquiescence failed.

Similar factual evidence was admitted by the court, in the form of judgments in other cases, to demonstrate the defendants had a propensity to sell imitative herbal ointments.

In respect of infringement of trade marks, ie a word mark and a packaging mark, the Court concluded that there existed visual, oral and conceptual similarities between the defendants’ various packagings and the plaintiffs registered trade marks, applying the CFA judgment in Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd (No.2) (2016) 19 HKCFAR 20. The Court applied the global appreciation test and the imperfect recollection test and concluded that the defendants’ various packagings were confusingly similar to the plaintiff’s trade marks. Additionally, the plaintiffs’ marks were held to qualify as “well-known trade marks” under the Trade Marks Ordinance, and were found to have been infringed.
Construction of Reinstatement Obligations and Notices in Commercial Leases

This Case Report was authored by Patrick Fung BBS, SC, QC, FCIArb and Justin Lam.

In AFH Hong Kong Stores Limited v Fulton Corporation Limited [2021] HKCFI 873, the Hon K Yeung J determined questions of construction of a lease and reinstatement notices issued thereunder pursuant to Order 14A of the Rules of the High Court. Under the lease, the tenant (an Abercrombie & Fitch company) rented several floors of Pedder Building for its fashion retail business. The dispute concerned the tenant’s obligation to reinstate the premises after moving out. The judge held in favour of the tenant and ordered the landlord to repay the deposit and overpaid rent in the total sum of nearly HK$40 million, which the landlord had retained after the termination of the lease.

Brief Facts

Various terms of the lease were relevant for the judge’s determination, but the crucial clauses were Clauses 3.27 and Clause 13 of the Third Schedule (which were similarly worded). Clause 3.27 provided that the tenant’s obligation was:

“To yield up the Premises in a ‘bare shell’ good clean state of repair and condition (fair wear and tear latent inherent structural defects not caused by the act or default of the Tenant excepted) at the expiration or sooner determination of this Agreement in accordance with the stipulations herein contained.”
Provided That the Landlord reserves the right subject to not less than 9 months’ prior written notice being given by the Landlord to the Tenant

(i) EITHER to require the Tenant to leave all fixtures and fittings or any part thereof which have been affixed to the Premises by or on behalf of the Tenant and which have become part of the Premises (except trade fixtures and fittings which the Tenant may remove subject to making good all damages caused by the removal thereof at the Tenant’s own cost) and yield up the Premises together with such alterations fixtures and additions thereto and all additions ections alterations and improvements or any part thereof which the Tenant may have made to the Premises with or without the consent of the Landlord

(ii) OR at the discretion of the Landlord, to require the Tenant to reinstate remove or do away with any additions, alterations or improvements to the Premises, including the Staircase, elevators, air-conditioning system and the signages (both inside or outside of the Premises) and make good all damages caused thereby in a proper and workmanlike manner at the Tenant’s sole costs and expense before delivering up the Premises to the Landlord."

Upon the commencement of the lease, substantial structural and fit-out works were carried out at the premises. At the end of the tenancy, the tenant returned the premises to the landlord in a bare shell state.

The landlord argued that the tenant was required to reinstate the premises to its original layout to the extent permitted by the general building plans as approved by the Building Department under the terms of the lease. In support of this argument, the landlord sought to rely on pre-contractual materials from the negotiation of the lease. The tenant objected to the admission of such evidence and applied to expunge the same. Alternatively, the landlord argued that it gave the requisite notice to the tenant by three separate letters to trigger its obligation to reinstate the premises.

Question 1 – Construction of the Reinstatement Obligation

The first question concerned whether the tenant, in the absence of any notice from the landlord, was required to reinstate the premises in the manner as requested by the landlord under the terms of the lease. The judge answered this question against the landlord.

The judge applied the usual principles on the construction of contracts but highlighted the importance of the language actually used by the parties. Under the express terms of the lease, there was no obligation on the tenant to reinstate the premises to its original layout to the extent permitted by the general building plans as approved by the Building Department. The structure of Clauses 3.27 and Clause 13 of the Third Schedule made it clear that returning the premises in a bare shell state was the default position, with the landlord retaining the right to require the tenant to reinstate the premises by serving a notice on the tenant. The landlord’s construction also suffered from an ambiguity as to what exactly was meant by the “original layout”, which was not defined in the lease. The landlord’s argument on “commercial sense” to support its construction was also rejected as it went against the express wording of the lease and was in any event not supported by evidence.
Insofar as the landlord’s reliance on the pre-contractual materials was concerned, the judge applied the rule that pre-contractual negotiations were ordinarily inadmissible when construing a contract. As none of the exceptions to the rule were applicable, such evidence was inadmissible and the tenant’s application to expunge the same was allowed.

**Question 2 – Validity of Reinstatement Notices**

The second question concerned whether the landlord’s three letters amounted to valid notices under Clauses 3.27 and Clause 13 of the Third Schedule to require the tenant to carry out the reinstatement works as requested by the landlord. The judge answered this question against the landlord as well.

Under the aforementioned clauses, the landlord was required to give notice of “not less than 9 months” and the notice should include what additions, alterations or improvements were required from the tenant.

Each of the three letters relied upon by the landlord did not on their face comply with the requirements of a notice under such clauses (in particular the requirement to provide a notice period of “not less than 9 months”). Nonetheless, the landlord relied upon a line of cases starting with *Mannai Investment Limited v Eagle Star Life Assurance Co Ltd* [1997] AC 749 which held that a notice should have such effect as a reasonable recipient of the notice would have understood it.

The judge distinguished the present case from those cases in which the court construed a *prima facie* invalid notice as a valid one. It was highlighted that the terms of the clauses stipulated a notice period of not less than 9 months (as opposed to a fixed period of 9 months), such that the notice period could have been more than 9 months. In these circumstances, a reasonable recipient could not have just substituted the incorrect date in the alleged notices with a 9-month period and the letters relied upon by the landlord were therefore invalid notices.

In view of the judge’s answers to Questions 1 and 2, there was no obligation on the tenant to reinstate the premises as requested by the landlord. The judge granted judgment in favour of the tenant and dismissed the landlord’s counterclaim for damages for the tenant’s alleged breach of its obligation to reinstate.

**Question 3 – Reinstatement Notice Period Extending Beyond Termination of Lease**

The third question concerned a difficult legal issue as to whether the reinstatement notices (if held to be valid) could validly operate even though the period for the tenant to carry out reinstatement works would have extended beyond the date of termination of the lease. As the judge already held that the reinstatement notices were invalid, this question did not arise for determination.

In deference to the submissions made, the judge observed *obiter* that, even though the authorities were not wholly clear, he would have accepted the landlord’s submissions that the reinstatement notices could have operated beyond the termination of the lease.

Patrick Fung BBS, SC, QC, FCIArb and Justin Lam acted for the tenant.
Through a trio of decisions, Mr Justice Harris has opened a new and commendable era for Hong Kong’s cross-border insolvency regime. The position under this new era is in brief thus:

First, the Hong Kong court is likely to use the debtor’s centre of main interests (“COMI”) as a yardstick to determine eligibility for recognition and assistance.

Secondly, proceedings opened in offshore jurisdictions are less likely to receive extensive insolvency assistance in Hong Kong in the future. That is because debtors are not likely to have their COMI in their jurisdiction of incorporation offshore. Often, other than their offshore registration, the debtors have zero connection with the offshore jurisdiction. For that reason, in international insolvency parlance, offshore jurisdictions are described as “letterbox jurisdictions” (eg In Re Creative Finance Ltd., 543 BR 498 (Bankr SDNY 2016)).

Thirdly, offshore soft-touch provisional liquidation (“PL”) designed to frustrate legitimate Hong Kong winding-up proceedings might not be recognised at all.

Background to the new era

The new era is partly the result of the Hong Kong court witnessing an increasing amount of unscrupulous insolvent offshore companies listed in Hong Kong resorting to offshore soft-touch PL to frustrate legitimate Hong Kong winding-up proceedings. These companies would obtain a soft-touch PL order in their jurisdiction of incorporation, often literally on the eve of the Hong Kong winding-up petition hearing. They would then argue that the Hong Kong court should defer to the offshore court, respect the offshore court’s letter of request as a matter of comity, and thus stay or adjourn the Hong Kong petition. This is notwithstanding the companies’ lack of realistic restructuring prospect.

In Re FDG Electric Vehicles Ltd [2020] HKCFI 2931; [2020] 5 HKLRD 701, Mr Justice Harris held that when the Hong Kong court recognised an offshore PL order, there would not be an automatic stay on proceedings in Hong Kong. And thus an offshore PL order could not serve to stay a Hong Kong winding-up petition. A previous commentary on FDG is available here:

Nevertheless, the tactic of using an offshore soft-touch PL order to oppose a Hong Kong petition continued unabated, as demonstrated in Re Lamtex Holdings Ltd [2021] HKCFI 622 and Re Ping An Securities Group (Holdings) Ltd [2021] HKCFI 651. A previous note on Lamtex is available here:
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“The new era is partly the result of the Hong Kong court witnessing an increasing amount of unscrupulous insolvent offshore companies listed in Hong Kong resorting to offshore soft-touch PL to frustrate legitimate Hong Kong winding-up proceedings.”

The facts and decision in Lamtex and Ping An

In both cases, the Bermuda-incorporated debtors listed in Hong Kong were insolvent and faced with winding-up petitions in Hong Kong. They subsequently obtained Bermuda soft-touch PL orders and the Bermuda court’s letter of request in order to oppose the Hong Kong petitions.

In Lamtex, the Court wound up the debtor because it had no restructuring prospects.

In Ping An, the Court adjourned the petition for two months, only because it appeared that the debtor might be able to show restructuring progress then.

In both cases, the Court made clear that using the Bermuda soft-touch PL order alone to oppose the Hong Kong petition was not an acceptable tactic because the debtors had in Bermuda only a letterbox presence, while the debtors’ COMI was in Hong Kong; and therefore the soft-touch PL order might not be recognised.

In Lamtex, the Court held thus:

“If the three core requirements are satisfied it is not in my view sufficient for the Company simply to point to insolvency proceedings commenced sometime after the Hong Kong Petition was presented in its place of incorporation and request in the face of objection from local creditors this court simply to defer to that of its place of incorporation. It seems to me unrealistic to expect the court not to have regard to the fact that companies such as the present conduct businesses in the People’s Republic of China which commonly is also the location of a high proportion of their shareholders, creditors and assets …

The evidence does not suggest that at the time of the appointment of soft-touch provisional liquidators the Company had, or has now, a credible plan to restructure its debt. It looks considerably more likely that the application in Bermuda was an attempt to engineer a de facto moratorium, which could not be obtained under Hong Kong law, with a view to then searching for a solution to the Company’s financial problems. Viewed from a Hong Kong perspective this is a questionable use of soft-touch provisional liquidation and one, which will encourage the court to view with care similar applications for recognition in the future” (at [34] and [42] (emphasis added)).

In Ping An, the Court applied Lamtex and held thus:

“I conclude that faced with a Hong Kong petition to wind up a foreign incorporated company … whose COMI is located in Hong Kong and an attempt by the company, which is in soft-touch provisional liquidation in its place of incorporation, to adjourn the petition in order to have time to formulate a restructuring and introduce a scheme of arrangement, primacy is not automatically to be given to soft-touch provisional liquidation in the place of incorporation. If a petition has already been issued in Hong Kong and the Petitioner and such other creditors as support it, do not agree to an adjournment the Company is still required to satisfy the criteria by reference to which the Hong Kong court assesses applications on similar grounds by
companies incorporated in Hong Kong. If the Company cannot do so it will be wound up and an application for recognition of the soft-touch provisional liquidation will not be granted” (at [20] (emphasis added)).

**Commentary**

The FDG decision punctured a long-standing myth that, because the Hong Kong court could recognise offshore provisional liquidation, obtaining an offshore PL order was a convenient tool to stay and stall Hong Kong winding-up petitions.

**“But resorting to proceedings in letterbox jurisdictions to stonewall creditors and stall legitimate collective insolvency proceedings in the COMI jurisdiction would seem to be the opposite of good forum shopping”**

*Lamtex* and *Ping An* are a continuation and application of FDG.

From the perspective of international insolvency standards – namely, modified universalism and forum shopping – these decisions are eminently correct and commendable.

Modified universalism is premised on the primacy of insolvency proceedings in the ‘home’ jurisdiction with which the debtor maintains a substantial connection (such as COMI), which is distinct from a mere letterbox presence. Thus where the debtor maintains only a letterbox presence offshore, the offshore PL order is not entitled to extensive insolvency assistance.

Indeed a PL order from a letterbox jurisdiction would not be eligible for recognition under the UNCITRAL Model Law on Cross-Border Insolvency which is also premised on modified universalism. See for instance *In re Creative Finance Ltd.*, 543 BR 498 (Bankr SDNY 2016) holding that the application for recognition of the debtors’ BVI liquidation proceedings must be denied. The US Bankruptcy Court reasoned thus (at p. 502):

> “Though they did most of their business in the U.K. and suffered entry of a judgment there, and though their operations were directed out of Spain and Dubai, the Debtors were organized under the law of a letterbox jurisdiction – the British Virgin Islands – though they did not do business there.”

Therefore, Mr Justice Harris rightly rejected the debtors’ argument that “the principles of modified universalism militated in favour of staying local (Hong Kong) proceedings in favour of foreign proceedings opened in the place of incorporation in order to preserve unitary global proceedings” (*Lamtex* at [28]). Such argument stood modified universalism on its head.

International insolvency practice permits forum shopping, that is good forum shopping – where “what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors” (*Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [18]).

But resorting to proceedings in letterbox jurisdictions to stonewall creditors and stall legitimate collective insolvency proceedings in the COMI jurisdiction would seem to be the opposite of good forum shopping (cf. *Budniok v The Adjudicator, Insolvency Service* [2017] EWHC 368 (Ch); [2017] BPIR 521 at [82]).

It is thus only right that the Hong Kong court refuses to lend its recognition regime to assist in such forum shopping.
Finally, developing the Hong Kong common law recognition regime to recognise insolvency proceedings opened in a jurisdiction where the debtor has its COMI is not only a healthy step in the right direction, but it also gives full effect to the doctrine of modified universalism.

Look-Chan Ho authored this article.

In *Re FDG Electric Vehicles Ltd* [2020] HKCFI 2931; [2020] 5 HKLRD 701, DVC’s Tom Ng, acted on behalf of the applicants and Look–Chan Ho, acted on behalf of *FDG Kinetic Limited* (in HCCW 106/2020) & the 12th defendant (in HCA 562/2020)

In *Re Lamtex Holdings Ltd* [2021] HKCFI 622, Michael Lok and Sharon Yuen acted for the joint provisional liquidators

Sharon Yuen acted for the 1st respondent (in HCCW 217/2020) and the applicants (in HCMP 1810/2020)
Milestone decision in cross-border insolvency: the interplay between offshore ‘soft-touch’ provisional liquidation and local winding-up proceedings: **Re Lamtex Holdings Ltd [2021]**

**HKCFI 622**

In *Li Yiqing v Lamtex Holdings Ltd [2021] HKCFI 622*, the Companies Court considered whether to put a Bermuda-incorporated company into immediate liquidation in Hong Kong or to adjourn the local winding-up petition to allow restructuring to proceed with the involvement of joint provisional liquidators appointed in Bermuda.

Harris J refused the adjournment application and made the normal winding up order. His Lordship recognised at the outset of the Judgment that the case “gives rise to an issue of some importance in the development of the principles, which guide the Hong Kong court in dealing with cross-border insolvency, and, in particular, cross-border debt restructuring” (at para. 1).

**The Facts, Briefly Stated**

*Lamtex* Holdings Limited (“Company”) is incorporated in Bermuda and listed on the Main Board of the Stock Exchange of Hong Kong. Prior to the Company’s financial difficulties, it carried on a series of business in the Mainland and Hong Kong: loan financing, securities brokerage, trading and manufacturing electronic businesses in the Mainland and hotel operations in the Mainland.

On 30 October 2020, the Company presented a petition in Bermuda seeking a winding up order and an order of appointment of provisional liquidators for restructuring purposes. The Company also issued an application for the appointment of ‘soft-touch’ provisional liquidators (“JPLs”). On 10 November 2020, the Chief Justice of Bermuda granted the application.

**Common law power to recognise and assist: Place of incorporation**

Unlike some other jurisdictions which have enacted local statutory schemes governing the issue of recognition and assistance of foreign insolvency process, this issue is solely governed by common law in Hong Kong.

The orthodox approach under the English common law is that “recognition is limited to liquidators
appointed in a company’s place of incorporation” (at para. 16), following the UK Supreme Court decision of *Rubin v Eurofinance SA* [2013] 1 AC 236 and the Privy Council decision of *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675.

Harris J identified the relevant private international law principles underlying this orthodox approach as follows:

“[Generally] matters concerning the constitution and management of the affairs of a foreign company are determined by the laws of the place of its incorporation.” (at para. 7)

Consistently, as a general principle, the law of the place of incorporation is the appropriate law and system under which to liquidate a company. Thus, “a winding up in a company’s place of incorporation will be given extra-territorial effect in Hong Kong” (at para. 9).

The extra-territorial effect extends to the distribution of a company’s assets to its creditors. The ordinary principle of private international law is that only the jurisdiction of a person’s domicile can effect a universal succession to its assets. Thus, in the cross-border insolvency context, the place of incorporation should “generally be the system of distribution and a winding up of a company’s assets in Hong Kong is ancillary to it” (at para. 13).

Consistent with the English orthodox approach, “[the] current position in Hong Kong is that the court recognises only insolvency practitioners appointed in the place of incorporation” (at para. 22).

A more flexible approach: Company’s centre of main interest (COMI)

However, while the orthodox approach is consistent with private international law principles, Harris J opined that “we have reached the stage at which this question needs to be reconsidered” (at para. 22).

The primary reason underlying his Lordship’s ruling is the “commercial practice in the SAR and the Mainland” (at para. 22). It is a common feature for business people in Hong Kong to use holding companies incorporated in an offshore jurisdiction with whom they have no connection other than registration, often described as “letterbox” jurisdictions (at para. 19). A strict application of the orthodox approach would mean that the Hong Kong court would lose the flexibility to recognise the insolvency process in some other jurisdictions which have a stronger connection with the company. Therefore, “the restricted view of recognition and assistance ... does not serve Hong Kong well” (at para. 19).
Harris J was content to recognise under Hong Kong common law the concept of COMI from the Model Law and the Singaporean common law prior to Singapore’s adoption of the Model Law.

His Lordship cited the Singaporean High Court decision of Re Opti-Medix Limited [2016] SGHC 108, where Abdullah JC concluded that the common law in Singapore permits the recognition of insolvency proceedings in a company’s centre of main interest (“COMI”) if it is different from its place of incorporation. Abdullah JC put weight on the limitation of the orthodox approach in light of the common commercial practice in Singapore of the use of offshore holding companies.

Therefore, while Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”), Harris J was content to recognise under Hong Kong common law the concept of COMI from the Model Law and the Singaporean common law prior to Singapore’s adoption of the Model Law. His Lordship concluded that “[t]here is nothing in principle preventing recognition of liquidators appointed in a company’s COMI or a jurisdiction with which it has sufficiently strong connection to justify recognition” (at para. 22). The recognition of insolvency proceedings in a company’s COMI “is likely to better reflect the reality” and “it is more efficient and effective for an insolvency process to be managed out of the location of COMI” (at para. 27).

Future Approach

Following the above discussion, Harris J helpfully set out the approach which is to be adopted by the Hong Kong Court when there is a potential contest for recognition between insolvency proceedings in which a company’s COMI is located and in the company’s place of incorporation, at para. 35, as follows:

“(1) Generally, the place of incorporation should be the jurisdiction in which a company should be liquidated; in practice this means it will be the system for distributions to creditors.

(2) However, if the COMI is elsewhere regard is to be had to other factors:

(a) Is the company a holding company and, if so, does the group structure require the place of incorporation to be the primary jurisdiction in order effectively to liquidate or restructure the group.
(b) The extent to which giving primacy to the place of incorporation is artificial having regard to the strength of the COMI’s connection with its location.

(c) The views of creditors.”

The Present Case

Harris J referred to his Lordship’s earlier decision in *Re China Huiyuan Juice Group Limited [2020] HKCFI 2940* on the principles of the determination of an application for an adjournment to permit restructuring. In the present case, his Lordship refused to adjourn the winding-up petition in the present case for the reasons, *inter alia*, that the Company’s COMI was located at all material times in Hong Kong (at para. 39); there is insufficient information about the restructuring exercise (at para. 42); and the creditors of the Company were sceptical of the prospects of the restructuring exercise and the “court will normally defer to the creditors on matters of commercial judgment unless there is a difference between them, which requires determination.” (at para. 43)

On the issue of adjournment of local winding up petitions for the recognition and assistance of foreign soft-touch provisional liquidators, Harris J reiterated the high threshold that needs to be satisfied for such applications:

“All going forward I anticipate that unless the agreement of a petitioner and supporting creditors have been obtained in advance the court will not deal with recognition and assistance applications made by soft-touch provisional liquidators after a winding up petition has been presented in Hong Kong on the papers.” (at para. 42)

*Michael Lok* and *Sharon Yuen* acted for the joint provisional liquidators.
A trio of landmark decisions by Mr Justice Harris have altered and hugely improved the scheme of arrangement practice in Hong Kong. The new scheme practice points are in brief thus:

First, where an offshore incorporated company seeks to restructure its debts by means of a Hong Kong scheme of arrangement, it should not at the same time pursue a parallel offshore scheme just because it is incorporated offshore. Any such unnecessary parallel scheme could entail the following consequences:

(a) The company’s directors, provisional liquidators or liquidators may be found to be in breach of fiduciary duties to creditors.

(b) The Hong Kong court may not sanction the Hong Kong scheme.

Secondly, where a listed company is subject to a delisting decision and in the process of appealing the decision through the listing review committee, the Hong Kong court will not sanction the company’s scheme pending the conclusion of the appeal process.

Thirdly, where a listed company is subject to a delisting decision and in the process of appealing the decision, the company may nevertheless apply to convene a scheme meeting, provided the convening application would not prejudice creditors’ interests.

“The previous auto-pilot practice of pursuing offshore parallel schemes is as outmoded as it is unjustifiable”
Background to the new practice

In recent years, most restructuring schemes in Hong Kong concern offshore incorporated-entities listed in Hong Kong (with predominantly Mainland operations).

Often the trading of shares in such distressed companies has been suspended before they promote the schemes. Thus the key purpose of the schemes is to rescue the companies’ listing status. It is also common for companies to be already subject to the Hong Kong Stock Exchange’s delisting decision by the time the companies’ schemes get to the sanction stage.

As the companies are incorporated offshore, they would pursue parallel schemes as a matter of course.

The facts and decision in China Oil, Burwill and Grand Peace

All three cases concern distressed offshore incorporated-entities listed in Hong Kong (with predominantly Mainland operations).

China Oil

In China Oil, the company had been suspended since July 2019 and was subject to Cayman soft-touch provisional liquidation in November 2019. With the provisional liquidators’ assistance, the company promoted parallel schemes in Hong Kong and the Cayman Islands.

More than 98% of the debts compromised under the schemes were governed by Hong Kong law.

Mr Justice Harris sanctioned the Hong Kong scheme, but held that the Cayman parallel scheme was unnecessary and unjustifiable. As most of the company’s debts were governed by Hong Kong law, the compromise under the Hong Kong scheme was already effective in the Cayman Islands under the Gibbs rule. It follows that the Hong Kong scheme was already internationally effective without the Cayman scheme. The Cayman scheme expenses were thus harmful to creditors:

“In the case of a company listed in Hong Kong, whose debt is very largely governed by Hong Kong law, the principle relevant jurisdiction is Hong Kong. It is Hong Kong in which a scheme is necessary and any restructuring should proceed on this basis. It is only necessary to introduce a scheme in the place of incorporation if there is good reason to think that absent a scheme sanctioned in the place of incorporation there is a genuine risk of the company being wound up there. It would not, for example, make any sense to incur more costs in introducing a scheme in the place of incorporation than the amount of the debt that it is thought might not be compromised by a scheme sanctioned in Hong Kong” (at [28]).

His Lordship reminded the management that incurring parallel scheme expenses unnecessarily would not be consistent with their fiduciary duties to creditors:

“If costs are reduced there will be more available for unsecured creditors. The directors of the Company and the PLs should have been advised that they owe fiduciary duties to protect the
interests of the unsecured creditors and that they should aim to ensure that the maximum amount of the gross proceeds of the subscription were available for distribution to Scheme Creditors. Unless a genuine need to introduce a scheme in the Cayman Islands could be identified it was only necessary to introduce a scheme in Hong Kong” (at [29]).

Burwill

In Burwill, by the time the company applied to sanction the scheme, the company had already been subject to a delisting decision and was seeking to appeal the decision through the listing review committee. Mr Justice Harris adjourned the sanction application until the conclusion of the listing review committee’s process. His Lordship reasoned thus:

“There are two reasons for this. The first is that if the listing is to be cancelled, the Scheme will collapse and the application to the court will have been a waste of judicial resources. Secondly, I do not think it appropriate for the court to make a decision which it might be suggested should influence the Listing Review Committee’s deliberations and ultimate decision” (at [4]).

Grand Peace

In Grand Peace, the company had already been subject to a delisting decision and was appealing the decision. Nevertheless the company would like to commence its scheme process. Mr Justice Harris allowed the company to apply to convene a scheme meeting because convening a scheme meeting is different from sanctioning a scheme. His Lordship reasoned thus:

“I have previously in Re Burwill Holdings Ltd indicated that the court will not hear a petition to sanction a Scheme when a determination by the Listing Review Committee is pending. However, it seems to me that an application for an order that a meeting of creditors is convened will normally fall into a different category, and the court will be amenable to making such an order unless the court is concerned that the interests of unsecured creditors might be prejudiced, which is most likely to arise if the Company proposes to pay the costs itself. Commonly, however the costs will be paid by the prospective investor.”

His Lordship also remarked in obiter that parallel schemes would not be permitted in future without justification:

“Companies such as the present have their assets in Hong Kong and the Mainland, and their debt is normally governed by Hong Kong law. It, therefore, follows that a scheme of arrangement sanctioned in Hong Kong which compromises the debt would normally be expected to be recognised in common law jurisdictions with similar principles to Hong Kong guiding recognition including the well-known English Court of Appeal decision in Antony Gibbs Sons v. La Société Industrielle et Commerciale Des Métaux.

I can see very little justification in most cases for a scheme being introduced in the place of incorporation. In future, I will need to be satisfied by any company or provisional liquidators who propose that parallel schemes are introduced that it is in the genuine best interests of unsecured creditors, that a scheme is introduced in the Company’s place of incorporation” (at [6]–[7]).

Commentary

These landmark decisions are commendably correct and hugely improve the Hong Kong scheme practice.

The previous auto-pilot practice of pursuing offshore parallel schemes is as outmoded as it is unjustifiable
in most cases because (i) the debts subject to the Hong Kong scheme are usually governed by Hong Kong law, and (ii) the offshore jurisdiction of incorporation is merely a letter-box jurisdiction.

“If the Hong Kong court is not satisfied that an offshore parallel scheme is justifiable, the Hong Kong court may indeed refuse to sanction the Hong Kong scheme.”

Even where cross-border insolvency cooperation is needed, the answer must lie in recognition and assistance, not the commencement of parallel plenary proceedings. For example, it would be unthinkable to commence Chapter 11 proceedings just for the purposes of getting cross-border cooperation in the US. The answer in the US lies in Chapter 15.

If the Hong Kong court is not satisfied that an offshore parallel scheme is justifiable, the Hong Kong court may indeed refuse to sanction the Hong Kong scheme.

The policy decision in Burwill must be correct because it would guard against a company seeking to misuse the court’s scheme sanction decision to influence the company’s listing appeal process.

But it must be correct to permit a company to convene a scheme meeting even though the company is already subject to a delisting decision. The scheme meeting would serve the purpose of allowing the creditors to express their views on the company’s restructuring plan. The listing review committee may then properly take account of the creditors’ views when deciding on the sufficiency of the company’s restructuring plan.

In sum, these decisions make perfect policy sense, comport with international insolvency practice, and ensure that the Hong Kong restructuring practice sufficiently protects creditors’ interests.

First Hong Kong Decision Refusing to Assist Offshore Soft-Touch Provisional Liquidators:  
**Re China Bozza Development Holdings Ltd**

This Case Report was authored by Look-Chan Ho and Terrence Tai.

<table>
<thead>
<tr>
<th>Hot on the heels of a trio of decisions concerning offshore provisional liquidation, which opened a new and commendable era for Hong Kong’s cross-border insolvency regime, see:</th>
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<tr>
<td>Mr Justice Harris has continued this trend in <em>Re China Bozza Development Holdings Ltd</em> [2021] HKCFI 1235 where his Lordship granted an order limited to the recognition of offshore soft-touch provisional liquidators (“SPLs”), but without assistance. This is because the Court had concerns about the protection of creditors’ interests.</td>
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<tr>
<td>The Judgment is commendably correct, well-reasoned, and well-written.</td>
</tr>
<tr>
<td>The familiar background of Hong Kong winding-up petition followed by offshore soft-touch provisional liquidation</td>
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<td>China Bozza Development Holdings Limited (“Company”), a Cayman company listed in Hong Kong, was in financial distress.</td>
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<td>In May 2020, the Company became subject to a Hong Kong winding-up petition.</td>
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<td>In December 2020, the Company obtained a Cayman court order appointing SPLs over itself. The SPLs then sought recognition and assistance in Hong Kong.</td>
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<td>Mr Justice Harris granted recognition to the SPLs, recognising their status as such, but without granting any assistance. Instead, the SPLs were granted general liberty to apply for assistance if they required it and could justify it in future.</td>
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<tr>
<td>His Lordship’s reasoning strongly emphasised the need to protect creditors’ interests. That is because when a company is insolvent, the interests of its</td>
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creditors become paramount, and the directors’ fiduciary duties are owed to the general body of the company’s creditors, rather than to the shareholders. Consistent with these principles, creditors should have a central role in the development of any restructuring plan (at [12]–[16]).

“His Lordship concluded that the Court should police closely the use of soft-touch provisional liquidation in future to prevent it from being abused and to ensure that the creditors were not exploited.”

However, recent cases coming before the Companies Court were very different. In many of these cases, the owners and boards of these companies were more interested in avoiding liquidation and the creditors were not involved in or driving the restructuring process. There was a real concern that the creditors, whose interests were paramount, were not being considered and/or adequately protected (at [12], [18] and [22]).

His Lordship concluded that the Court should police closely the use of soft-touch provisional liquidation in future to prevent it from being abused and to ensure that the creditors were not exploited. In the present case, his Lordship was not prepared to grant an order providing general assistance to the SPLs because of concerns about the way in which the SPLs were approaching the case and other cases (at [22] and [23]).

Commentary

This decision is yet another classic from Mr Justice Harris, further strengthening Hong Kong’s cross-border insolvency regime and ensuring its proper use in future cases.

As his Lordship pointed out before, the whole point of offshore soft-touch provisional liquidation for Hong Kong listed companies is to get recognition and assistance in Hong Kong:

“Recognition and assistance has come to be used in one of two situations. The first is to avoid arguments over jurisdiction that can arise if a winding-up petition is presented in Hong Kong. The second involves the use of soft-touch provisional liquidation in the jurisdiction of incorporation, which has come to be used as a technique to overcome the limitations in Hong Kong’s own system. As will be apparent from this summary, the applications are not driven by events occurring in the offshore jurisdictions. They are driven by events occurring in Hong Kong and the Mainland and techniques developed in Hong Kong” (Re Agritrade Resources Ltd [2020] HKCFI 1967; [2020] 4 HKLRD 616 at [4] (emphasis added)).
It is thus apt that the Hong Kong Court must ensure that the recognition of offshore soft-touch provisional liquidation is consonant with general insolvency law and principles in Hong Kong, in particular the need to protect Hong Kong creditors' interests.

Indeed, his Lordship’s emphasis on directors’ duties to creditors is sorely needed. In view of the current Hong Kong corporate governance culture, one can reasonably anticipate that the Hong Kong Court might soon stop recognising offshore soft-touch provisional liquidation as a matter of policy, except in special circumstances. Z-Obee itself would probably fall within the category of special circumstances.

This approach would tie in the Hong Kong Court’s continued willingness to recognise offshore liquidators and assist in the proper performance of their functions, such as protecting the companies' assets for the benefit of creditors. A recent example is *Re The Joint Liquidators of Nuoxi Capital Ltd* [2021] HKCFI 572; [2021] HKCLC 205 where the Hong Kong Court recognised the BVI liquidators to protect the company's assets, being the proceeds of claims against Peking University Founder Group.

Look-Chan Ho authored this article and acted for the BVI liquidators in *Re The Joint Liquidators of Nuoxi Capital Ltd* [2021] HKCFI 572; [2021] HKCLC 205.

Terrence Tai acted for the soft-touch provisional liquidators in *Re China Bozza Development Holdings Ltd* [2021] HKCFI 1235.
In **Re China Huiyuan Juice Group Limited** [2020] HKCFI 2940, Harris J discussed in detail the difficulties which liquidators appointed in Hong Kong over a foreign incorporated holding company may have in obtaining control of operating subsidiaries in the Mainland, if the group's structure includes intermediate subsidiaries incorporated in the British Virgin Islands (the “BVI”).

Things have moved on substantially since **Re China Huiyuan** was decided in November 2020. On 14 May 2021, the Secretary for Justice and the Supreme People’s Court signed a cooperation mechanism for mutual recognition of insolvency processes (the “Mechanism”). The Mechanism provides for the first time a mechanism by which the courts of three intermediate jurisdictions in the Mainland have the jurisdiction to recognise liquidators appointed in Hong Kong. If, in the six-month period before an application for recognition is made, the centre of main interest of the relevant company is located in Hong Kong, then, regardless of where the company is incorporated, the Mainland court may recognise the liquidators appointed by the Hong Kong court and grant them assistance to carry out their function within that court’s jurisdiction.

The Mechanism will initially be implemented as a pilot program by the people's courts in Shanghai Municipality, Xiamen Municipality in Fujian Province and Shenzhen Municipality in Guangdong Province given their close financial and business connections with Hong Kong.

The above development in relation to the Mechanism was recently featured in the case of **Re China All Access (Holdings) Limited** [2021] HKCFI 1842. The company in question (the “Company”) sought to rely on the decision of **Re China Huiyuan** to contend that the second of the “three requirements” which have to be satisfied before the court exercises its discretionary jurisdiction to wind up a company incorporated in a foreign jurisdiction, in this case the Cayman Islands, could not be satisfied. In particular, it was contended that the majority of the Company’s assets were located in Shenzhen through its Shenzhen subsidiaries, and that the operating subsidiaries were separated from the holding company by intermediate subsidiaries incorporated in the BVI.

Harris J rejected the Company's argument on the basis, among other things, that in view of the Mechanism, it was, on the face of the matter, reasonably likely that the liquidators appointed over the Company by the Hong Kong Court, with its centre of main interest in Hong Kong, could be recognised in Shenzhen. Similarly, liquidators in Hong Kong appointed over subsidiaries incorporated in the BVI could also be recognised in Shenzhen. The liquidators could then take steps to take control of the Mainland subsidiaries, of which the BVI subsidiaries are the immediate holding companies. In the circumstances, the Petitioner was able to demonstrate that there was a real possibility of the winding up order benefiting it and that the second core requirement was satisfied.

**Rosa Lee** acted for the petitioner and the supporting creditor in this case.
3 things to watch out for in Privatisation Schemes

The statutory regime for privatisation schemes is contained in sections 670 to 674 of the Companies Ordinance (Cap. 622) (“CO”). Below are 3 points worth considering in carrying out a privatisation scheme:

1. Identify the disinterested shares

In the case of takeover offers, a company needs to satisfy what is known as the “negative 10% test” as contained in s.673(2) of the CO, namely that the votes cast against the arrangement at the meeting do not exceed 10% of the total voting rights attached to all disinterested shares in the company. This requires the application of the rules set out in s.673(3) of the CO on which shares are considered to be “disinterested shares”.

For example, in *Re China Power Clean Energy Development Company Limited* [2019] HKCFI 2098, consideration was given to whether three shareholders were disinterested as they, like the offeror, were ultimately held by the State-owned Assets Supervision and Administration Commission of the State Council of the People’s Republic of China (“SASAC”). Applying s.673(3) of the CO, which in turn required an application of s.667(1)(b) and s.2 of the CO, this ultimately turned on whether SASAC was a “body corporate” within the meaning of the CO. On the facts, the issue was ultimately academic as the “negative 10% test” could be met in any event.

“Public health regulations on how physical meetings can be held in times of Covid-19 may pose challenges to the convening of physical scheme meetings.”

2. Ensure that the explanatory statement is adequate

s.671 of the CO not only requires explanatory statements to be issued or made available to creditors or members when a scheme meeting is summoned, it also stipulates requirements as to its contents. In particular, under s.671(3), an explanatory statement must explain the effect of the arrangement or compromise, and must state (i) any material interests of the company’s directors, whether as directors or as members or as creditors of the company or otherwise, under the arrangement or compromise, and (ii) the effect of the arrangement or compromise on those interests, in so far as the effect is different from the effect on the like interests of other persons.
Whether the members are given sufficient information in the explanatory statement to make an informed decision whether to support the scheme of arrangement is one of the factors the Court may take into account in deciding whether to sanction a scheme of arrangement: see *Re China Power Clean Energy Development Company Limited* (supra.) at §8. Care must be taken in preparing this important document.

3. Consider the appropriate form of the scheme meeting, especially in times of Covid-19

Public health regulations on how physical meetings can be held in times of Covid-19 may pose challenges to the convening of physical scheme meetings. In this regard, the Court has power to summon such meetings in any manner as it directs under s.670(1)(a) of the CO. Consideration should be given to whether alternative means of holding meetings, such as with the aid of telephone or video conference facilities, would be necessary, and if so, how it can be ensured that those who attend the scheme meeting remotely can effectively listen, speak and vote at the meeting.

Ultimately, much will depend on the circumstances, including the size of the scheme, the number of shareholders, the location of shareholders etc…, as well as any relevant requirements contained in the company’s articles of association.

Hong Kong’s Inaugural Recognition of Mainland Reorganisation Proceedings: Re HNA Group Co Limited

This Case Report was authored by Anson Wong SC and Look-Chan Ho

In Re HNA Group Co Limited [2021] HKCFI 2897, the Hong Kong Court recognised for the first time reorganisation proceedings commenced under the Mainland Enterprise Bankruptcy Law (“Mainland Reorganisation Proceedings”).

This decision marks the first practical step towards cross-border restructuring cooperation between Hong Kong and the Mainland, and will help the Mainland court’s recognition of Hong Kong schemes of arrangement under The Supreme People’s Court’s Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region (“Pilot Measure”).

The facts and decision in brief

HNA Group Co Limited (“Company”) was incorporated on the Mainland, an investment holding company, and part of a conglomerate with diverse businesses.

In February 2021, the Hainan court commenced the Mainland Reorganisation Proceedings against the Company, and appointed administrators (“Administrators”) to oversee the Company’s restructuring.

The Administrators needed the Hong Kong Court’s recognition and assistance in order to progress the Company’s restructuring. Accordingly, the Hainan court issued a letter of request to enable the Administrators’ application for recognition and assistance in Hong Kong.

Upon the Administrators’ application, Mr Justice Harris granted the recognition and assistance sought. His Lordship reasoned that the Mainland Reorganisation Proceedings constituted a collective insolvency process and thus were eligible for recognition under Hong Kong’s common law recognition regime.

Further, although the Hainan court was not part of the Pilot Measure and might not recognise Hong Kong insolvency proceedings, this would be no bar to the Hong Kong Court granting recognition because Hong Kong’s common law recognition regime is not based on reciprocity.

Commentary

This decision marks another welcome and important development in cross-border insolvency cooperation between Hong Kong and the Mainland.

It also demonstrates the rapid cross-border insolvency cooperation between the two jurisdictions over the past two years:
(a) Just less than two years ago, Mr Justice Harris recognised and assisted Mainland liquidators for the first time ([Re CEFC Shanghai International Group Ltd [2020] HKCFI 167; [2020] HKCLC 1]).

(b) In May 2020, Mr Justice Harris recognised and assisted Mainland liquidators for the second time ([Re Shenzhen Everich Supply Chain Co Ltd [2020] HKCFI 965; [2020] HKCLC 891]).

(c) In May 2021, the Pilot Measure came into effect.

(d) In July 2021, Mr Justice Harris used the Pilot Measure to request that the Mainland court recognise and assist Hong Kong liquidators ([Re Samson Paper Co Ltd [2021] HKCFI 2151; [2021] HKCLC 1053]).

(e) Now Mr Justice Harris has broken new ground again by recognising the Mainland Reorganisation Proceedings.

This decision has made it easier for the Mainland courts to recognise Hong Kong schemes of arrangement under the Pilot Measure in future. When that day arrives, it will achieve the most important purpose of the Pilot Measure.

In sum, this pragmatic decision is a big practical step towards Hong Kong/Mainland cross-border restructuring cooperation.

Anson Wong SC and Look-Chan Ho acted for the applicants (the Administrators) in this case.

Look-Chan Ho also acted for the applicants in CEFC, Shenzhen Everich and Samson Paper.
Cross-Border Insolvency and Keepwell Dispute Resolution: *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd*

This Case Report was authored by Patrick Fung BBS, SC, QC, FCIarb and Look-Chan Ho

Cross-Border Insolvency and Keepwell Dispute Resolution: *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd*

In *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd [2021] HKCFI 3817*, Mr Justice Harris held that keepwell disputes should be determined in Hong Kong in accordance with the contractual exclusive jurisdiction clause, notwithstanding the Court recognising the keepwell provider’s Mainland insolvency proceedings.

As the determination of the disputes would involve some Mainland law issues, his Lordship would welcome coordination with the Mainland court.

Harris J’s Decision is momentous and ground-breaking in far-reaching implications, learned in reasoning, and pragmatic in outcome. It provides a golden opportunity for practical cross-border restructuring and dispute resolution cooperation between the courts in Hong Kong and on the Mainland.

The material facts

Peking University Founder Group Co Ltd ("PUFG") was incorporated on the Mainland, an investment holding company, and part of a conglomerate with diverse businesses.

The PUFG group issued bonds through BVI subsidiaries ("Issuers"), and the bonds were guaranteed by Hong Kong subsidiaries ("Guarantors").

The bonds were also backed by Keepwell Deeds between PUFG, the Issuers and the Guarantors. In brief, the Keepwell Deeds required PUFG to cause each of the Issuers and Guarantors: (1) to have a consolidated net worth of at least US$1 at all times, and (2) to have sufficient liquidity to ensure timely payment by each of the Issuers and Guarantors of any amounts payable under the bonds. The Keepwell Deeds were expressly governed by English law and contained an exclusive jurisdiction clause in favour of the Hong Kong courts.

In February 2020, on the application of a bank, the specific Beijing court issued an order that PUFG should commence reorganisation pursuant to the Enterprise Bankruptcy Law ("Mainland Reorganisation"), and appointed administrators ("Administrator") to oversee PUFG’s reorganisation.

The Issuers and Guarantors defaulted on the bonds. They themselves were wound up in their own respective jurisdictions and liquidators of them were appointed.

The Issuers and Guarantors (all in liquidation) in turn claimed that PUFG had defaulted on its obligations to them under the Keepwell Deeds. They first lodged claims to the Administrator in Beijing on the basis of the Keepwell Deeds. Such claims were rejected by the Administrator. They then issued proceedings against PUFG in Hong Kong ("Writ Actions").

In response, PUFG applied to stay the Writ Actions on the basis that the Issuers and Guarantors had submitted proofs of debt in the Mainland Reorganisation.

Further, the Administrator requested the Hong Kong court to recognise and assist the Mainland Reorganisation by staying the Writ Actions.

Harris J’s decision
Mr Justice Harris held that:

(1) The Writ Actions would not be stayed.

(2) The Court would recognise the Mainland Reorganisation, but would not impose a stay on the Writ Actions.

(3) Before proceeding further with the Writ Actions, the Court would welcome a coordination with the Beijing court as “it may be possible for the courts to agree the way in which the issues are to be determined, with the Hong Kong court dealing with issues of construction of the Keepwell Deeds” (at [70]).

His Lordship reasoned as follows.

First, the Court would enforce the exclusive jurisdiction clause unless there were strong reasons for not doing so. The Court would not deprive a party’s right to rely on the exclusive jurisdiction clause unless a compelling reason was demonstrated.

Second, PUFG could not demonstrate a compelling reason for the Court to depart from the exclusive jurisdiction clause just because the Issuers and Guarantors submitted proofs of debt in the Mainland Reorganisation. There is a distinction between a creditor seeking adjudication of a dispute only and a creditor seeking to recover in a debtor’s foreign insolvency. The submission of a proof of debt does not prejudice a creditor seeking adjudication of a dispute in a jurisdiction which is not the insolvency jurisdiction.

Third, the Hong Kong court would be better placed than the Beijing court to determine issues of English law, and the Hong Kong court’s judgment on the substantive dispute would be expected to carry weight in the Mainland court.

Commentary

This Decision is undoubtedly the most momentous and ground-breaking cross-border insolvency decision issued by the Hong Kong court in a generation. It paves the way for a seamless cooperation between the Hong Kong and Mainland courts in the management of large insolvencies, consistent with the cooperation spirit enshrined in The Supreme People’s Court’s Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region.

Supported by many authorities cited in the judgment, Mr Justice Harris’s approach demonstrates how mature insolvency systems deal with potential conflict between jurisdictions.

As his Lordship pointed out, the Mainland cross-border insolvency regime is still in a nascent state. This judgment thus provides the best teaching materials for everyone interested in cross-border insolvency in the Greater China region.

Indeed, the Decision can be described as a landmark decision wherein the principle of “one country two systems” is enshrined.

Patrick Fung BBS, SC, QC, FCIArb and Look-Chan Ho acted for the Issuers and Guarantors in this case, and co-authored this article.

José-Antonio Maurellet SC and Tom Ng acted for PUFG and the Administrator.
DVC is pleased to announce that all of its 9-month pupils this year have been offered tenancy.

DVC is delighted to welcome:

**Arthur Poon**
Arthur is a Bar Scholar who graduated first in class from the University of Hong Kong in 2018, reading Bachelor of Social Sciences (Government and Laws) and Bachelor of Laws. As a visiting student, he obtained first class results in all subjects in Law Tripos Part II at the University of Cambridge. Upon graduation, he further obtained his BCL at the University of Oxford with distinction in all subjects and his PCLL at the University of Hong Kong with distinction.

**Adrian Lee**
Adrian graduated from the University of Oxford with a BA in Jurisprudence, where he ranked top of the year in Company Law. He went on to obtain his LLM from UCL and University of Cambridge with distinctions and prizes. He is a Bar Scholar, and was a Judicial Assistant in the Court of Final Appeal.
**Terri Ha**
Terri studied her BA in law at the University of Cambridge. She continued her studies at Cambridge with the LLM, obtaining First Class Honours in all subjects.

**Zixin Jiang**
Zixin graduated first in class from the University of Hong Kong with a JD. He went on to obtain the BCL with Distinction from the University of Oxford, where he won the faculty prize in Civilian Foundations of Contract Law. In 2019, he was appointed a Part-time Lecturer at the University of Hong Kong. He was awarded the Bar Scholarship in 2020. Prior to studying law, he read Philosophy, Politics and Economics at Oxford.

**Sim Jing En**
Jing En graduated from the University of Cambridge with a BA in Law with Double First Class Honours, where he was awarded various scholarships and prizes, including the Cambridgeshire and District Law Society Prize in Criminology, Sentencing & the Penal System. He went on to obtain the BCL with Distinction from the University of Oxford, where he was awarded the Law Faculty Prize for International Commercial Arbitration.

**Kwan Ping Kan**
Ping Kan graduated with Distinction in BCL from the University of Oxford, where he came top of his class in Advanced Property and Trusts and Constitutional Theory. Prior to Ping Kan’s transition to the Bar, he qualified as a solicitor from 2018 to 2019 following his training at Latham & Watkins LLP from 2016 to 2017. In 2014, Ping Kan graduated with a First in BA (Law) from the University of Cambridge.
DVC’s Ian Pennicott QC, SC and Calvin Cheuk launch “Commissions of Inquiry in Hong Kong” – a unique book in the HK landscape

DVC is pleased to announce that its members, Mr. Ian Pennicott QC, SC and Mr. Calvin Cheuk, launched their book “Commissions of Inquiry in Hong Kong” on 1 December 2021.

Commissions of Inquiry ("COIs") are a regular occurrence in Hong Kong. By their very nature, they attract much public and media interest. COIs are governed by the Commissions of Inquiries Ordinance (Cap.86). Only the Chief Executive in Council has the power to set up a COI. This power will be exercised when a matter of “public importance” merits investigation. The last three COIs, upon which the text primarily draws, have been (a) the Lamma Ferry collision; (b) Excess lead in the water at public housing developments; and (c) the Hung Hom Station Extension project.

This is the first text that "tells you all you want to know" about COIs in Hong Kong. It is a practical guide drawing on the experience and expertise of the Authors who served as counsel at and to recent COIs (a) Excess lead in the water at public housing developments and (b) the Hung Hom Station Extension project.

Click [here](#) for the order link.
DVC is delighted to announce that 15 Senior Counsel and 16 Juniors have been accredited by Chambers & Partners Greater China 2022, with 6 new debuts this year.

**Senior Counsel**

- John Scott SC, QC, JP
- Charles Sussex SC
- Simon Westbrook SC
- Clifford Smith SC
- Joseph Tse SC
- Winnie Tam SC, SBS, JP
- Johnny Mok SC, BBS, JP
- Barrie Barlow SC
- William Wong SC, JP
- Ian Pennicott SC, QC
- Anson Wong SC
- Douglas Lam SC
- José-Antonio Maurellet SC
- Jenkin Suen SC
- Rachel Lam SC
For an overview of members’ accolades from Chambers & Partners Greater China 2022, click here.
DVC is delighted to share that the following Senior Counsel have been accredited in this year’s rankings.
DVC is delighted to announce that the following Juniors have been accredited in this year’s rankings, with 2 new debuts.

Click here to read DVC’s commentary and members’ accolades.
DVC is delighted to announce that 7 Silks and 3 Juniors have been accredited in the latest Who's Who Legal 2021–2022 rankings

The following barristers from DVC have been recognised as variously, Global Elite, Global, National and Future Thought Leaders for 2021–2022 by Who’s Who Legal:

**Silks**

- **Global Leader | Construction 2021**
  - John Scott SC, QC, JP
- **Global Leader | Arbitration 2022**
  - Anthony Houghton SC
- **Global Leader | Construction 2021**
  - Ian Pennicott SC, QC
- **Global Leader | Construction 2021**
  - José-Antonio Maurellet SC
- **Global Leader | IP Copyright 2021, IP Trademarks 2021**
  - Winnie Tam SC, SBS, JP
- **Global Leader | Arbitration 2021**
  - William Wong SC, JP
- **Global Leader | Commercial Litigation 2021**
  - Anson Wong SC
- **National Leader | Mainland China & Hong Kong SAR – Arbitration 2021**
- **National Leader | Mainland China & Hong Kong SAR – Construction 2021**
- **National Leader | Mainland China & Hong Kong SAR – Litigation 2021**
- **National Leader | Mainland China & Hong Kong SAR – Trademarks 2021**
- **Global Leader | Construction 2021**
  - Winnie Tam SC, SBS, JP
- **Global Leader | Construction 2021**
  - William Wong SC, JP
- **National Leader | Mainland China & Hong Kong SAR – Arbitration 2021**
- **National Leader | Mainland China & Hong Kong SAR – Construction 2021**
- **National Leader | Mainland China & Hong Kong SAR – Litigation 2021**
- **National Leader | Mainland China & Hong Kong SAR – Trademarks 2021**
Juniors

Future Leaders | Construction Non-Partners 2021!

Global Leader | Commercial Litigation - Future Leaders - Non-Partners 2021

Global Leader | Restructuring & Insolvency 2022
National Leader | Mainland China & Hong Kong SAR - Restructuring & Insolvency 2021
A number of DVC’s members were recognised by the Doyles Guide 2021 for Leading Construction & Infrastructure Litigation Barristers – Hong Kong

Ian Pennicott QC, SC has been recognised in the Preeminent Senior Counsel category by the Doyles Guide for Leading Construction & Infrastructure Litigation Barristers – Hong Kong, 2021, and he is joined by Anthony Houghton SC who received acclaim in the Leading Senior Counsel bracket and John Scott QC, SC, JP who was recognised in the Recommended Senior Counsel bracket.

Calvin Cheuk is accredited in the Preeminent Junior Counsel category, while David Tsang is acknowledged in the Leading Junior Counsel category and Kaiser Leung in the Recommended Junior Counsel category for Construction.

Click here to read more about these accolades.
Members were recognised in the Doyles Guide 2021 for Maritime & Shipping Law

The Doyle's Guide 2021 has identified 3 DVC Senior Counsel as the leading Maritime, Shipping and Transport law silks in Hong Kong, and has identified Christopher Chain as a junior recommended by senior transport solicitors across Hong Kong and Asia Pacific.

Click here to view these accolades.

Recognition of DVC’s members’ strengths in Family & Divorce Law in the latest Doyles Guide 2021

John Scott SC has been recognised by Doyles as a Leading Senior Counsel for Hong Kong family, Divorce and Matrimonial matters in 2021.

For the 5th year in a row, Mairéad Rattigan has been acclaimed by Doyles as a Preeminent Junior Counsel for her expertise in Hong Kong Family, Divorce and Matrimonial law.

Frances Irving has similarly been recognised by Doyles as a Leading Junior Counsel in the Family, Divorce and Matrimonial arena.

Click here to read more about this accolade.
Kerby Lau and Frances Lok were accredited for Estates & Probate Litigation in the Doyles Guide 2021

Kerby Lau has been ranked in the Leading Junior Counsel category by the Doyles Guide 2021 for Leading Estates & Probate Litigation Barristers – Hong Kong and Frances Lok was recognised in the Recommended Junior Counsel category.

Click here to read more about this accolade.

Standout Recognition in Employment Law in the Doyles Guide 2021

José-Antonio Maurellet SC is singularly accredited for the first time in the Doyles Guide 2021 as a Recommended Silk for Employment Law.

The 2021 listing of leading Hong Kong Employment Barristers details counsels practising within the areas of employment and industrial relations matters across the Hong Kong & PRC legal market who have been identified by the region's solicitors and peers for their expertise and abilities in these areas.

Click here to read more about this accolade.
8 members of Des Voeux Chambers appointed to ShIAC

Chambers is pleased to announce that eight of its members namely Patrick Fung BBS, SC, QC, FCIArb, Winnie Tam SBS, SC, JP, William Wong SC, JP, José-Antonio Maurellet SC, Catrina Lam, John Hui, Benny Lo and Connie Lee have been appointed to the Panel of Arbitrators of the Shanghai International Arbitration Center as from 1.8.2021 to 30.4.2026.

Many members of Chambers also sit on ad hoc arbitrations and are on the Panel of various international arbitration institutions.

Dr William Wong SC, JP was appointed as a Committee Member of the Shanghai International Economic and Trade Arbitration Commission

DVC is delighted to announce that Dr William Wong SC, JP has been appointed as a Committee Member of the Shanghai International Economic and Trade Arbitration Commission. Dr Wong looks forward to promoting in-depth cooperation between Hong Kong and Shanghai and developing the Shanghai International Economic and Trade Arbitration Commission both regionally and internationally.
DVC members passed the first ever Guangdong–Hong Kong–Macao Greater Bay Area Legal Professional Examination

Winnie Tam SBS, SC, JP, William Wong SC, Adrian Lai, Sabrina Ho and Connie Lee successfully passed the first ever Guangdong–Hong Kong–Macao Greater Bay Area Legal Professional Examination.

DVC’s John Scott QC, SC, JP is quoted in a recent CNN article on new proposals slated to come under the Hong Kong Companies Registry

DVC’s John Scott QC, SC, JP, was asked to comment on the HK government's proposal to make the Companies Registry less transparent by masking company directors' ID Card numbers and/or home addresses given an upsurge in the number of doxxing campaigns recently. Read his thoughts in this recent CNN article here.
DVC’s Winnie Tam SBS, SC, JP delivered a presentation at the recent BIP (Business of IP Asia) Forum on 3rd December 2021. More specifically, she deliberated on issues that came under the banner of: “Your successful IP strategy: Deal Making and Dispute Resolution in Hong Kong.”

Winnie was joined by a panel of esteemed experts in the Intellectual Property arena as they collectively considered what makes Hong Kong a favourable venue for resolving IP disputes both at a local and a regional level.

A summary of her presentation appears below:

1. Under the 14.5 Plan, HK has a pivotal role to play as an international hub in IP trading, thanks to HK as an established financial centre, a legal services hub, and a dispute resolution centre.

2. Winnie also identified a rising trend in cross-border IP infringement cases in E-commerce that gave rise to interesting legal questions on territoriality of IP rights and jurisdictional limits of HK courts over acts of infringement in mainland China.

3. The resolution of disputes in IP trading, such as licensing and tech transfer between contracting parties is best done through arbitration applying HK law, with the unique arrangements with the mainland courts for interim measures and a robust pro-arbitration judiciary as back-up.
Winnie Tam SBS, SC, JP spoke at the Joint Opening Ceremony of the International Arbitration Center of China’s Greater Bay Area and China (Shenzhen) IP Arbitration Center

On 24 April 2021, Shenzhen Municipal City Leading Group Office for the Construction of Shenzhen-Hong Kong Science & Technology Innovation Cooperation Zone and the Shenzhen Court of International Arbitration jointly hosted the Joint Opening Ceremony of the International Arbitration Center of the China’s Greater Bay Area and China (Shenzhen) Intellectual Property Arbitration Center. Fu Tian, member of the Shenzhen CPC Standing Committee and the CPC Leadership Group, Xiaochun Liu, Secretary General of the CPC Leadership Group and the Director of the Shenzhen Court of the International Arbitration, Wei Huang, Deputy Director of the Leading Group Office of the Construction of Shenzhen Hetao Shenzhen-Hong Kong Science & Technology Innovation Cooperation Zone, and Zhao Jing, Deputy Director of the Greater Bay Area Office of the CPC Shenzhen Municipal Committee attended the ceremony.

DVC’s Head, Winnie Tam SBS, SC, JP, attended the ceremony and delivered a speech as the representative of the legal community of Hong Kong and Macao. In her statement, Winnie mentioned that, “the International Arbitration Center of the China’s Greater Bay Area not only facilitates development of arbitration practice among lawyers and arbitrators in the Greater Bay Area, it also creates a platform for professional exchanges in Guangdong, Hong Kong and Macao conducive to the integration of the Greater Bay Area.” Winnie also stated that, “the establishment of the China (Shenzhen) Intellectual Property Arbitration Center is of great significance to deepen exchanges and cooperation in the field of intellectual property in the tech and innovation hub of Shenzhen, so that lawyers from Guangdong, Hong Kong and Macao can share resources, exchange best practices and jointly build an advanced IP dispute resolution mechanism.”

In addition, approximately 100 representatives from the business, legal and academic communities of the Greater Bay Area attended the ceremony. DVC’s Ellen Pang, also participated in the event remotely.

Winnie Tam SBS, SC, JP was recently featured in a podcast with Boase Cohen & Collins’ Senior Partner, Colin Cohen

Winnie Tam SBS, SC, JP was invited to join Senior Partner, Colin Cohen of Boase Cohen & Collins for a recent podcast. In it she discussed the details how she dovetails her successful career as a barrister with outstanding public service, which includes chairing the Communications Authority. Winnie talked about her busy life, love of music and her hopes for the future of Hong Kong

Click here to listen to the podcast.
Kaiser Leung presented at the Society of Construction Law HK International Conference 2021

The Society of Construction Law Hong Kong International Conference 2021 was successfully held on 12 November 2021. The theme for this year’s conference was Hong Kong Tomorrow – Opportunities and Challenges for Future Projects.

Kaiser Leung chaired the panel session on “Construction 2.0 – Project governance issues in previous infrastructure projects, lessons learnt and what can be done for future projects?”.

Kaiser had the pleasure of being joined by Mr. Paul Shieh SC, Mr. James Niehorster, Mr. Channi Matharu and Mr. Boyd Merrett.

In recent years, the Hong Kong construction industry has witnessed a series of incidents concerning high profile projects, giving rise to issues such as commissioning delays, site safety and construction delivery quality. The Government has been advocating “Construction 2.0”, with various measures to ensure the overall productivity, quality, safety and environmental performance of the industry which have given rise to changes to the corresponding contractual arrangements, health and safety legislation reform. The insightful session explored the risks arising and how they could be addressed.
DVC’s Connie Lee Participated in The Panel Discussion “Outside the realms of UNCITRAL – asset recovery involving insolvent PRC parties” at the Virtual Conference of Asset Recovery Asia 2021

The Virtual Conference of Asset Recovery Asia this year was successfully held from 30 November 2021 to 1 December 2021.

Connie Lee had the pleasure of joining Ms. Erica Gao, Partner from Zhong Lun (PRC) and Mr. Lingqi Wang, Partner from Fangda Partners (PRC) in an interactive panel session on “Outside the realms of UNCITRAL – asset recovery involving insolvent PRC parties” moderated by Ms. Wendy Lin, Partner from WongPartnership LLP (Singapore) and organized by Informa Conference’s Conference Director, Mr. Vincent Beard.

In recent years, there has been increasing need for foreign and Hong Kong parties to participate in recovery and insolvency proceedings in the PRC. The panelists shared their views on how best they can approach asset recovery litigations involving a PRC counterparty and assets in the PRC.

Mr. Lingqi Wang and Ms. Erica Gao started off the engaging session by providing an overview of the features of the Chinese insolvency/bankruptcy process which are unique to the PRC. They then explained the difficulties encountered by foreign creditors seeking to participate in the process. Connie then weighed in with the difficulties faced by Hong Kong creditors and insolvency practitioners seeking to attach the assets in the PRC. The panel then concluded by sharing their take on the new Cooperation Agreement for Mutual Recognition of and assistance to insolvency proceedings between the Courts of the Mainland and of the HKSAR which came into effect on 14 May 2021. This included the inaugural decision in Hong Kong issuing the first Letter of Request to Mainland Court for cross-border insolvency assistance under this new cooperation agreement, see: Re Samson Paper Company Limited [2021] HKCFI 2151; and the nuts and bolts of participating in the actual process in the PRC despite the coming into effect of this new cooperation agreement.
Find out about the newly published IBA Toolkit on Insolvency and Arbitration for Hong Kong

DVC's Look–Chan Ho and Robert Rhoda of Dentons served as the Rapporteurs for Hong Kong in the newly published IBA Toolkit on Insolvency and Arbitration which covers 19 jurisdictions. This is an excellent and timely publication, at a time when insolvency and arbitration increasingly intersect.

Click here to download the IBA Toolkit on Insolvency and Arbitration, the national reports by country and more.

Look–Chan Ho explains the recent Hong Kong/Mainland China cross-border insolvency arrangement in BlackOak LLC’s video blog series

DVC’s Look–Chan Ho participated in BlackOak LLC’s video blog series to discuss (a) the HK/Mainland cross-border insolvency arrangement, (b) the HK court’s use of COMI as the eligibility criterion for recognition of foreign proceedings, and (c) the HK court’s recent concerns about offshore soft-touch provisional liquidation.

Click here to watch the video.
Read more about the “Why Hong Kong Law?” Webinar featuring two of DVC’s members.

In a CPD accredited webinar entitled "Why Use Hong Kong Law" an eminent cohort of legal practitioners, including DVC’s William Wong SC, JP and Look-Chan Ho, spotlighted key issues arising in the restructuring, litigation and intellectual property domains. This webinar constituted part of a series entitled 'Why Hong Kong?' and the discussion highlighted pivotal advantages and the prime benefits associated with using Hong Kong law.

A recap from The Cross-border Insolvency Cooperation Forum between the Mainland China and Hong Kong SAR

Mr Justice Harris delivered a keynote speech at the Cross-Border Insolvency Cooperation Forum on 14 May 2021, launching the much-anticipated cross-border insolvency arrangement between Hong Kong and the Mainland. This is the most momentous cross-border insolvency development in a generation.

The panellists representing Hong Kong included DVC’s Look-Chan Ho, Ludwig Ng of ONC Lawyers, Tiffany Wong of Alvarez & Marsal, and Terry Kan of Shinewing.

The Forum was organised by the Shenzhen Intermediate People’s Court with the support of the Hong Kong Department of Justice.
A Two Part Webinar on Confidentiality & Privilege in Arbitration and Mediation

On 13 September 2021, DVC’s José-Antonio Maurellet SC, CW Ling and Catrina Lam came together and were joined by the HKIAC’s Xiaojun Wang to host a well-attended CPD accredited webinar, the first of a two-part series, on Confidentiality and Privilege in Arbitration and Mediation with a total audience made up of over 400 attendees. The webinar was co-hosted by DVC and the HKIAC.

The webinar covered a multitude of niche topics within the arbitration and mediation domain, many of which were anchored in the mainstay of confidentiality. Interwoven into this webinar were critical concepts relating to legal protection under legislation, common law and institutional rules, key exceptions to the confidentiality principle, and special measures to safeguard trade secrets and confidential information.

The key takeaways were as follows:
- Confidentiality and privacy are the core values of international arbitration
- Law of seat, statute and institutional rules may provide important exceptions
- Courts and tribunals play a part in enforcing confidentiality
- Enhanced protection for trade secrets are to be balanced against the need for the other party's ability to present its case

On 24 September 2021, Part 2 was delivered by DVC’s CW Ling who once again moderated the session, in concert with Michel Kallipetis QC from Independent Mediators Ltd, UK, Dwight Golann, Professor of Law, from Suffolk University in Boston, and Jody Sin, Fellow of the International Academy of Mediators. The webinar, attended by over 200 participants, provided an informed guide in relation to Confidentiality and "Without Prejudice Privilege" (WPP) in mediation. The speakers provided a detailed overview and aggregated case law into their talk, with numerous rules, a comparative study and anecdotes cited in support. They wrapped up their webinar with vital takeaways which included the following:

- Confidentiality and WPP were the core values of mediation
- In general, confidentiality is not a bar to disclosure in litigation unless WPP applies
- WPP carries limited though significant exceptions e.g, "unambiguous impropriety"
- There is a growing demand for a free-standing "mediation privilege"
DVC’s Patrick Fung BBS, SC, QC, FCIArb and Ellen Pang delivered a presentation on international arbitration for Peking University

Patrick Fung BBS, SC, QC, FCIArb and Ellen Pang of DVC delivered a lecture in Peking University’s International Commercial Dispute Settlement Course. The presentation focused on various aspects of arbitration agreement including:

- Incorporation and amendment of arbitration rules by arbitration agreement;
- Practical tips for drafting arbitration agreements;
- Considerations in deciding the seat, arbitration institution, number of arbitrators and language of an arbitration; and
- Differences between ad hoc arbitration and institutional arbitration

One of the key takeaways from the lecture was the significance of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of Mainland and of the Hong Kong Special Administrative Region (“Arrangement”). Prior to the Arrangement, parties to a non-Mainland arbitration could not apply for interim measures within Mainland China. Since the Arrangement came into effect on 1 October 2019, parties to a Hong Kong arbitration may now make an application to Mainland Courts for interim measures in support of the arbitration. Hence, in choosing Hong Kong as the seat of arbitration, parties will enjoy a unique advantage of being able to utilize the Mainland Courts’ interim measures. This distinct advantage is absent in other overseas jurisdictions.
International Women’s Day 2022 and DVC’s collaboration with Inspiring Girls

DVC was pleased to partner with Inspiring Girls in a nod to International Women’s Day. By acting as mentors, and through regular engagement, many of our female members will aim to instil confidence and guide and shape their careers by providing advice and support networks for the future.

The following members of DVC will be collaborating with Inspiring Girls:

Winnie Tam SC, SBS, JP had this to say:

“Empowering and inspiring girls in the same profession is as much an empowering act to myself as it is to others, a reminder of the path I have travelled and how fortunate I have been to have had mentorship and inspiration from great women along the way, so that I can pass on the legacy to those who follow. It humbles me to know the diverse challenges that women of today face as they strive to realize their potential.”

Ines Gafsi, Chair, Inspiring Girls

"Inspiring Girls promotes a diversity of career opportunities; it's an important message that should resonate with most women and it's an easy way to contribute to the success of the next generation of women."
GET IN TOUCH

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

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