Dear Clients and Friends,

I would like to highlight several cases in this October issue of ONC Corporate Disputes and Insolvency Quarterly. Of particular interest to insolvency practitioners would be the Hong Kong case *Re Leung Yat Tung* HCB 2019/2000. In this case, the court granted application for priority of payment to funding creditor pursuant to section 38(5B) of the Bankruptcy Ordinance, in recognition of the considerable risk the funding creditor has assumed and the substantial benefits reaped by the bankruptcy estate. Another interesting case is *Joseph Ghossoub v Team Y&R Holdings Hong Kong Ltd and Others* HCMP 1074/2015, in which the court found an exclusive jurisdiction clause to be inoperative, to the extent that it fetters the shareholder’s statutory right to present an unfair prejudice petition. In the English decision of *Fieldfisher LLP v Pennyfeathers Limited* [2016] EWHC 566 (Ch), the English High Court dismissed a creditor’s application for administration order, as the disputed debt was subject to arbitration. In doing so, the court considered that it should, save in wholly exceptional circumstances, exercise its discretion in an application for winding up / administration consistently with the legislative policy embodied in the Arbitration Act. Last but not least, in the Singaporean case of *Koh Keng Chew and others v Liew Kit Fah and others* [2016] SGHC 140, the High Court of Singapore was faced with a rare application by the minority to buy out the majority. In dismissing the application, the court held that a minority buyout order will only be made where majority shareholders are guilty of egregious conduct which renders them unfit to exercise control of the company.

As always, your comments and suggestions are most welcome. If we have missed any case, which you regard as important, please kindly let us know and we shall endeavour to include them in the future.

Ludwig Ng
ONC Lawyers

October 2016
Application for Priority of Payment to Funding Creditor Granted

1. **Re Leung Yat Tung HCB 2019/2000**

It was alleged that in February 1998, Leung Yat Tung (the “Bankrupt”) transferred to Harbour Front Limited (“Harbour Front”) certain shares owned by him at a gross undervalue. In March 2001, the Bankrupt was adjudicated bankrupt and Official Receiver (“OR”) was appointed as trustee in bankruptcy.

Healthy Wharf Limited (the “Petitioning Creditor”) said investigation was called for as to whether the transfer of shares by the Bankrupt to Harbour Front fell foul of section 49 of the Bankruptcy Ordinance (Cap 6) (“BO”). The OR however did not see fit to bring proceedings to recover the shares from Harbour Front.

On 13 September 2005, the Petitioning Creditor applied to court to reverse the OR’s decision (“reversal proceedings”) and for an order directing the OR to enter into a funding agreement with it to enable the OR to proceed with the so-called “Avoidance Proceedings”. Under the Funding Agreement, the Petitioning Creditor undertook to indemnify the OR against all costs, expenses and liabilities made against or incurred by the OR in the Avoidance Proceedings. Further, the Petitioning Creditor paid a HK$1.2 million deposit to the OR as security for its obligation under the Funding Agreement.

In February 2007, the OR lodged the Avoidance Proceedings to set aside the transfer of shares. A solicitors firm was engaged to conduct the proceedings. The Petitioning Creditor directly paid the solicitors firms’ bills of costs and disbursements incurred, which amounted to HK$3 million. Shortly before the scheduled trial, Harbour Front settled with the OR on terms substantially favorable to the OR.

The Petitioning Creditor applied to recover its out-of-pocket expenses and the return of the deposit pursuant to section 38(5B) of the BO, which provides that “where any assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys …, the court may …, make such order as it deems just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk run by them in so doing.”

The Court noted that in the present case, substantial assets have been recovered in the Avoidance Proceedings under an indemnity for costs of litigation provided by the Petitioning Creditor in the Funding Agreement. Moreover, since the Bankrupt’s assets, including choses in action, are vested in the OR (section 58 of the BO), if the OR did not institute the
Avoidance Proceedings, no one else could. In other words, the claim to recover the shares would likely be lost. By the reversal proceedings, the claim, i.e. the chose in action, had been “preserved”.

The Court went on to say that the Petitioning Creditor assumed considerable risk under the Funding Agreement and the benefits reaped by the bankruptcy estate from the Avoidance Proceedings turned out to be substantial. The primary objective behind section 38(5B) of the BO is to encourage those who are willing to assist trustees/liquidators in recovery of assets, so that trustees/liquidators would not be restrained from taking action to recover assets owing to lack of funding. Accordingly, the Court allowed the application by the Petitioning Creditors.
Funding agreement ordered to be disclosed, despite recognition of real risk that it may enable the defendants to assess the liquidator’s funding

2.  *Enrich Future Ltd and Others v Deloitte Touche Tohmatsu (a firm) HCCL 10/2011*

The provisional liquidators ("Liquidators") of Sunlink International Holdings Limited ("Sunlink") issued a writ against Deloitte Touche Tohmatsu ("Defendant") on 14 April 2011. The writ was subsequently amended to reflect the assignment of Sunlink’s claims to Enrich Future Limited as 1st Plaintiff, and the addition of other Plaintiffs in the action.

The writ was extended on 4 occasions before it was eventually served on the Defendant. The applications for extensions were made on an *ex parte* basis and were supported by the Affidavits of a Mr. David Yen ("Yen affidavits") on each occasion. Orders were made for the supporting affidavits to be kept confidential.

Upon the service of the writ, the Defendant applied to seek disclosure of the Yen affidavits. The Plaintiffs subsequently disclosed redacted copies of Yen affidavits. The redactions were said to relate to, *inter alia*, a funding agreement entered into by Sunlink for the litigation.

The Court accepted that there is a real risk that disclosure of the amount of funding available to the liquidator may enable the proposed defendants to assess and implement the extent to which they could, by way of interlocutory processes, eat up the liquidator’s funding before the conclusion of the trial, thereby frustrating or impeding the purpose of the funding agreement: *Re Kingsheath Club of Clubs Ltd* [2003] FCA 1034.

However, the Court noted that the funding arrangement was disclosed to the Court as being relevant to the Court’s consideration of the application for the extensions. The Defendant, however, was not able to make submissions on the relevance of the material, since it has not been given an opportunity to review the redacted materials. The Court considered it to be contrary to the fundamental notion of open justice, that a party is entitled to know the case asserted against it, to see the evidence put against it, and to be given the opportunity to meet the case advanced against it: *Al Rawi v Security Service* [2012] 1 AC 531.

The Court was not satisfied that there is any sound reason to deprive the Defendant the opportunity to consider fully the evidence presented to the Court when the plaintiffs applied for and obtained the extensions. The Defendant’s application for copies of the redacted materials and information withheld was thus granted.
The Proviso for late registered charge does not affect rights attached to unsecured debt and a Committee of Inspection is not to be dispensed with unless there is good reason to do so


Fameway Finance Limited ("Fameway") is a creditor of Joy Rich Development Ltd (the "Company") in the sum of HK$98,234,621.92. The debt is secured by a charge executed on 9 September 2010 over the Company's sole asset ("Property"). But Fameway failed to register the charge as required by section 80 of the predecessor Companies Ordinance (Cap 32), with the consequence that the charge is void against liquidators or any creditors.

In January 2011, the Company obtained a loan from Greatstep International Limited for HK$200,712,328.77. The loan was subsequently assigned to Reverly Gains Limited ("Revelry Gains"). The loan was secured by a floating charge executed on 26 January over the same Property, which was also not registered against the Company within the required time limit. However, the date for registration was extended by a court order, which contained a proviso in the following term: "The Order is without prejudice to the rights of any creditors acquired between 1 March 2011 (being the [end of the] 5 weeks prescribed by section 80(1) for registration of the floating charge) and the date of registration pursuant to this order."

Fameway sought to have its proof of debt admitted for voting purposes, which was rejected by the liquidators (the "Liquidators") of Joy Rich Development Ltd. The Liquidators took the view that by virtue of the proviso, Fameway may have acquired priority to Revelry Gain and, therefore, be able to recover in full against the Property over which it has security.

Harris J held that the proviso was intended to protect only rights acquired against, or affecting, the Property compromised in the unregistered charge, in the intervening period between the date of the creation of the unregistered charge and the registration of such charge. The proviso was not intended to protect an unsecured creditor: *In re Ashpurton Estates Ltd* [1983] 1 Ch 110 (CA).

The forced sale value of the Property is HK$360,000,000. Revelry Gain’s current debt is HK$283,361,861.49. Fameway’s debt is HK$98,234,621.92. It follows that Fameway is an unsecured creditor of HK$21,596,438.41. It is entitled to be admitted to vote for this amount.

Further, Harris J went on to consider the Liquidators’ application to have the Committee of Inspection ("COI") dissolved on the grounds that the creditors split into two distinct camps. The Liquidators said that in these circumstances, a COI would be unconstructive and difficult to work with. His Lordship noted that there is no express provision in the statute, which...
provides for the power to dissolve a COI where it has already been constituted, and where the majority of the creditors are in favor of the continued existence of the COI. Harris J took the view that, in the absence of clear answer, the better approach is that the Liquidators approach the Official Receiver and ask the Official Received to issue the application. Moreover, Harris J found that it desirable that liquidations be conducted with the assistance of a COI, as liquidation process is primarily intended to protect and advance the interests of creditors. As such, a COI is not to be dispensed with unless there is good reason to do so. His Lordship was not satisfied that there was sufficient reason to dissolve the COI in the present case.

In conclusion, the court found in favor of Fameway.
The court has a discretion to annul a bankruptcy order if petitioner failed to plead security in the bankruptcy petition, but the court may not do so if an bankruptcy order is inevitable

4. **Re Chung Sun Kwan HCB 21283/2002**

On 27 February 2001, Bank of China ("BOC") obtained a charging order over 4 pieces of land owned by Mr. Chung (the "Debtor") in order to secure a judgment debt. On 13 December 2001, BOC, via its then solicitors ("Robertsons"), issued a statutory demand ("SD"), which however, did not mention anything about the charging order. Being unable to serve the SD on the Debtor in person, Robertsons made enquiry with Messrs. Cheng, Chan & Co., which at the material time was acting for the Debtor in another set of proceedings. Messrs. Cheng, Chan & Co. confirmed that they had no instructions from the Debtor to accept service of the SD. Robertson therefore advertised the SD in a Chinese newspaper circulating in Hong Kong on 29 April 2002. BOC subsequently issued the bankruptcy petition and served the same on the Debtor by way of substituted service. In the petition, the BOC pleaded that it did not hold any security on the Debtor’s estate for payment of the judgment debt. On 18 December 2002, the bankruptcy order was made against the Debtor in his absence. The Debtor was discharged from bankruptcy automatically pursuant to section 30A of the Bankruptcy Ordinance (the "Ordinance") on 18 December 2006.

The Debtor applied to annul the bankruptcy order on the ground that the bankruptcy order ought not to have been made, pursuant to section 33(1)(a) of the Ordinance. In gist, the Debtor contended that BOC has failed to disclose in the SD and the petition the existence of the charging order. Further, BOC has failed to serve the SD and the petition on the Debtor properly.

The Court found that BOC failed to reveal the existence of the charging order contrary to Rule 44(5) of the Bankruptcy Rules ("Rules"). However, despite non-compliance with the rule, the court has discretion not to set aside a SD, if it was of the view that it would not be unjust for BOC to be allowed to rely on the SD: **Re Chan Chi Loi** [2008] 2 HKLRD 444. The Court pointed to two affirmations filed by the Debtor, in which he said that he "had never been served with nor was he aware of the SD." If it were the case, whether BOC had specified the security in the SD made no difference. Thus, the Court rejected the argument that the bankruptcy order ought not to have been made by reason of the non-compliance with Rule 44(5).

However, the Court found that there was a breach of section 6B of the Bankruptcy Ordinance for failing to mention the charging order at all in the petition. It follows that the bankruptcy order ought not to have been made.
As far as the service of the SD is concerned, the Court was of the view that BOC had done all that was reasonable in locating the Debtor in the circumstances of the present case, in compliance with Rule 46(2). The question is whether BOC knew, or believed with reasonable cause, that the Debtor had absconded or was keeping out of the way with a view to avoiding service, so that BOC was justified to advertise the SD on newspapers in accordance with Rule 46(3).

Given the fact that Messrs. Cheng Chan & Co were representing the Debtor in another set of related proceedings which were ongoing at the material time, the Court held that the refusal to authorize his solicitors in accepting service of the SD amounted to “keeping out of the way with a view to avoiding service” under Rule 46(3). Hence, BOC was entitled to advertise the SD.

Having found that the bankruptcy order ought not to have been made by reason of the failure on the part of BOC to comply with section 6B of the Ordinance, the Court went on to consider whether it should exercise its discretion in annuling the bankruptcy order. In this regard, the Court has to consider whether the debtor will be declared bankrupt again, if the bankruptcy order is annulled: *Kam Hung Cheung v Bank of China (Hong Kong) Ltd* [2009] 3 HKLRD 597. Upon its annulment, the bankruptcy order would be treated as if it has never been made. So the benefit of “automatic discharge” would not be available to the Debtor. The Court, after careful examination of the evidence before it, concluded that even if the bankruptcy order is annulled, another bankruptcy order against the debtor is unavoidable. Thus, the Court considered it inappropriate to exercise its discretion in annuling the bankruptcy order.

Lastly, the Court referred to the Court of Appeal decision in *Kam Hung Cheung v Bank of China* [2009] 3 HKLRD 597 and held that the Debtor must provide reasonable and credible explanation for his absence where the bankruptcy order was made in default of his appearance. On the facts, the Court found that the reason that Debtor did not have any notice of the bankruptcy proceedings was entirely because he had adopted a “catch me if you can” approach. The Debtor could not blame anyone but himself.

In conclusion, the Court dismissed the Debtor’s application.
Exclusive jurisdiction clause held to be inoperative, to the extent that it fetters the shareholder’s statutory right to present an unfair prejudice petition

5. *Joseph Ghossoub v Team Y&R Holdings Hong Kong Ltd and Others* HCMP 1074/2015

Team Y&R Holdings Hong Kong Limited (the “Company”) was incorporated in Hong Kong in 2007. The shareholding of the Company is as follows:

![Shareholding Diagram]

In 2008, for the purpose of implementing a restructuring plan, the parties executed a series of agreement, including a sale and purchase agreement (the “SPA”), under which the petitioner agreed to sell to Cavendish certain shares in the Company. Clause 23.2 of the SPA provides that “the English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts.”

The relationship between the parties turned sour and the Petitioner presented a petition pursuant to section 724 of the Companies Ordinance (Cap 622) based on the unfairly prejudicial conduct of the Company by WPP, Cavendish and Y&R and sought an order for a buyout of his 20% shareholding in the Company. The respondents applied for a stay of the petition, contending that the disputes arise out of or are connected with the SPA and are therefore subject to the exclusive jurisdiction of the English court.

First of all, the Court considered that since the Company was incorporated in Hong Kong, the Hong Kong court is the most natural and appropriate forum for determining matters concerning its legal status and internal affairs.

Further, while it is *prima facie* that the petitioner is bound by the jurisdiction clause vis-a-vis Cavendish, it is not clear whether the petitioner should also be debarred from bringing the petition against the remaining three respondents namely the Company, Y&R and WPP who
are not parties to the SPA. The Court considered that the true construction of the exclusive jurisdiction clause must depend upon its own terms.

The Court found that the exclusive jurisdiction clause, which reads “and the parties submit…” is a clear and express limitation of the submission to jurisdiction to the parties inter se. Therefore, the jurisdiction clause is not a bar to the petitioner from bringing proceedings against the Company, Y&R and WPP in Hong Kong.

The Court went on to consider whether Cavendish is entitled to enforce the jurisdiction clause under the SPA. The Court, applying In re Peveril Gold Mines Ltd [1898] 1 Ch 122, considered that the right to present an unfair prejudice petition, being a statutory right, cannot be circumvented by some private agreement between shareholders. The exclusive jurisdiction clause therefore must be held to be inoperative, to the extent that it fetters the petitioner’s statutory right to present an unfair prejudice petition.

Lastly, the Court found that the petitioner would not be able to obtain effective remedy in the English court, because the remedy of buyout is not available.

In conclusion, for all the reasons considered, the Court refused to grant a stay of the proceedings.
Lee Jong Rong v Great Choice Consultants Ltd CACV152/2015

The petitioners and the 2nd-5th respondents are the shareholders of Great Choice Consultants Ltd (the “Company”), which is a company incorporated in BVI. The Company is not registered in Hong Kong. The Company is the holding company of some private Hong Kong companies, including Top Trend Investment Ltd (“Top Trend”), whose business is the holding of properties including office premises in Hong Kong.

On 11 November 2013, the petitioners presented a petition to wind up the Company under s.327(3)(c) of the Companies Ordinance Cap 32 (the “Ordinance”); or alternatively a buyout order under s.168A of the Ordinance. The petition was dismissed at first instance. The petitioners appealed.

The Court of Appeal took the opportunity to consider and apply the principles set out in the Court of Final Appeal decision in Yung Kee.

Section 327(3)(c) of the Ordinance gave the Hong Kong court a discretionary jurisdiction to wind up a foreign unregistered company. But the exercise of discretion is subject to three “core requirements”: Re Beauty China Holdings Ltd [2009] 6 HKC 351. The only issue in the present case is whether there is sufficient connection between the Company and Hong Kong.

The Court noted that the Company derived rental income from business carried on by Top Trend, a Hong Kong company with underlying assets in Hong Kong. Applying the Court of Final Appeal decision in Yung Kee, the Court took the view that there is sufficient connection between the Company and Hong Kong that would enable the Hong Kong court to wind up the Company if deemed appropriate. Accordingly, the Court of Appeal allowed this part of the petitioners’ appeal.

The Court went on to consider section 168A of the Ordinance. It was noted that section 168A only applies to Hong Kong company or a non-Hong Kong company, the latter is defined as “companies which established a place of business in Hong Kong”. In Yung Kee, it was held that this required some degree of regularity and permanence of the location. The petitioners have failed to make out a case that the Company has established a place of business in Hong Kong. This part of the appeal was thus dismissed.
The English High Court held that action for wrongful trading against directors could not succeed unless there was net increased in deficiency caused by the directors.

7. **Stephen Paul Grant and James Richard Tickell (Joint Liquidators of Ralls Builders Limited) v William Ralph Ralls, Nicholas Lee Ralls and Gary Christopher Hailstones** [2016] EWHC 243 (Ch)

The joint liquidators (the “Liquidators”) of Ralls Builders Limited (the “Company”) brought a claim against three former directors (the “Directors”) of the Company for wrongful trading under section 214 of the Insolvency Act 1986. The Court found that the Directors ought to have concluded that there was no reasonable prospect of the Company avoiding liquidation by 31 August 2010. However, the Court refused to make a declaration that the Directors should make a contribution to the assets of the Company in respect of any losses caused to the Company during the period after 31 August 2010, because the Court did not find it proven that the net deficiency of the Company increased during that period.

The Liquidators then applied to the Court for an order that the additional costs and expenses incurred by them in dealing with the wrongful trading claim, which amounted to £256,160.75, be contributed by the Directors to the assets of the Company.

The Court found that as a general rule, a litigant cannot recover expenses which he incurs in connection with the litigation other than by way of an order for costs: *Avrahami v Biran* [2013] EWHC 1776 (Ch); *Cockburn v Edwards* (1881) 18 Ch D 449. Further, the time costs and expenses of insolvency office-holders in respect of litigation are generally not recoverable as costs in the litigation: *SISU Capital Fund v Tucker* [2006] BCC 463.

Moreover, the Court pointed out that it had found that the continued trading did not result in any increase in the net deficiency of the Company. It would be illogical if the Court, despite such findings, nevertheless ordered the Directors to pay for the additional fees and costs incurred by the Liquidators in investigating and unsuccessfully trying to prove that some loss was sustained.

In conclusion, the Court held that the Liquidators cannot recover their costs and expenses by way of an order for contribution under section 214 of the Insolvency Act 1986.
The English High Court dismissed a creditor’s application for administration order, where the debt was subject to arbitration

8. **Fieldfisher LLP v Pennyfeathers Limited [2016] EWHC 566 (Ch)**

Fieldfisher LLP (“FF”), a firm of solicitors, brought an application for an administration order in relation to Pennyfeathers Limited (the “Company”) based on a disputed debt in the parties’ conditional fee agreement (“CFA”).

The evidence disclosed that there is a good arguable case that FF is owed large sums and is therefore a creditor with sufficient status to apply for an administration order: *Hammonds v Pro-fit USA Ltd* [2007] EWHC 1998 (Ch). However, the CFA contains an arbitration clause, whereby the parties agree to refer any dispute arising out of or in connection with the CFA to arbitration.

The English High Court referred to the Court of Appeal decision in *Salford Estates (No.2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575, in which it was held that the court should, save in wholly exceptional circumstances, exercise its discretion in an application for winding up consistently with the legislative policy embodied in the Arbitration Act 1996.

The Court noted that exercise of the discretion otherwise than consistently with the policy underlying the Arbitration Act 1996 would inevitably encourage parties to an arbitration agreement to bypass the arbitration agreement by invoking insolvency procedures in the Companies Court. Parties should not be allowed to do so, since it would be entirely contrary to the parties’ agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the Arbitration Act 1996: *Salford Estates*.

Although the principle in Salford Estates was laid down in the context of winding up, the Court considered that it equally applies in the case of administration. The Court held that the circumstances of the present case were not exceptional. As such, the relevant CFA clause prevented judicial investigation.

The application was accordingly dismissed.
Singapore High Court endorsed the Universalist approach in cross-border insolvency by locating the primary place of insolvency proceedings at the center of main interest of the insolvent company, not the place of incorporation.


Medical Trend Limited and Opti-Medix Limited (collectively, the “Companies”) were incorporated in the BVI. Their main business was in Japan. The proceeds of the business were however transferred to their bank accounts in Singapore. In late 2015, bankruptcy orders were granted by the Tokyo District Court, and the Applicant was appointed as their Bankruptcy Trustee. The Applicant sought the recognition in Singapore of the foreign insolvency proceedings in respect of the Companies.

The primary issue before the Court was whether liquidation in a jurisdiction other than that of the place of incorporation should be recognized.

The Court recognized that in cross-border insolvency, there has been a general movement away from the traditional, territorial focus on the interests of the local creditors, towards recognition that universal cooperation between jurisdictions is a necessary part of the contemporary world. Under the Universalist approach, one court takes the lead while other courts assist in administering the liquidation. Further, the Court accepted that the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The approach of locating the primary place of insolvency proceedings at the center of main interest ("COMI") of the company has much to commend it as a matter of practicality. In the present case, Japan was the only COMI for the Companies. The Court agreed with the statement made by Lord Hoffman in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 that for companies incorporated in an offshore island, they usually don't have real connection with the place.

The Court agreed that Japan was essentially the sole place where actual business was carried on. Singapore was primarily a center for managing funds received in the first instance in Japan. Further, there was no competing jurisdiction interested in the winding-up of the Companies. On the other hand, Japan had moved in favor of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose.

In conclusion, the High Court of Singapore allowed the application and granted recognition of the bankruptcy orders of the Tokyo District Court and the appointment of the Applicant as the Bankruptcy Trustee of the Companies in Singapore.
Shareholders may voluntarily agree to waive or forgo their right to participate in the meeting to vote on a scheme of arrangement by agreeing to give undertakings to the court, at the sanction stage, to be bound by the scheme.

10. *Re SABMiller Plc* [2016] EWHC 2153 (Ch)

SABMiller Plc (the “Company”) applied for an order summoning a single meeting of all the ordinary shareholders except two largest shareholders, Altria Group Inc. (“Altria”) and BEVCO Ltd. (“BEVCO”), for the purpose of considering a scheme of arrangement (the “Scheme”). Altria and BEVCO voluntarily agreed to waive their right to participate in the meeting by agreeing to give undertakings to the court to be bound by the Scheme at sanction. This however faced objection from a group of minority shareholders (the “Minority Shareholder”) of the Company.

The process for implementing a scheme of arrangement begins with an application in the Court for an order summoning meeting(s) of the relevant class (or classes) of members in such a manner as the court directs (section 896, Companies Act 2006). It is well established that, persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings, whereas persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting: *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573; *Re UDL Argos Engineering* [2001] HKCFA 54.

The Minority Shareholder argued that there is no distinction in rights between Altria and BEVCO and the other ordinary shareholders to justify two separate classes being constituted. It follows that the Court has no jurisdiction to order a meeting to be summoned from which Altria and BEVCO are excluded. In fact, the Minority Shareholder is supportive of the Scheme. It wanted Altria and BEVCO to be included in the meeting so that with their very large blocks of votes cast in favor of the Scheme, there was a much higher chance of any dissentient members being outvoted and the necessary statutory majorities being achieved.

The Court held that there is nothing in the statutory wording to suggest that a member cannot voluntarily agree to waive or forgo that right to participate in the meeting. Even if a particular member is included in a particular class for a scheme meeting, the court cannot compel that member to attend and vote. Further, Altria and BEVCO were not acting under compulsion. There was no confiscation of their property or rights, and no injustice to them. Accordingly, the Court held that it does have jurisdiction to order a shareholders’ meeting to be summoned which does not include Altria and BEVCO.
Whether a petitioner has an ulterior object in seeking a bankruptcy order may be relevant where other creditors oppose the petition, as this goes to the question of whether an order is in the best interests of creditors as a whole

11. **Maud v Aabar Block SARL and another** [2016] EWHC 2175 (Ch)

In the last issue of our “ONC Corporate Disputes and Insolvency Quarterly”, we discussed the decision in *Aabar Block S.A.R.L, Edgeworth Capital (Luxembourg) S.A.R.L v Glenn Maud* [2016] EWHC 1016 (Ch). There has been a further development in relation to this case.

Aabar Block S.A.R.L and Edgeworth Capital (Luxembourg) S.A.R.L (together the “Petitioners”) presented a bankruptcy petition against Mr. Glenn Maud (the “debtor”). The petition was opposed on the ground that the Petitioners had an ulterior object in seeking a bankrupt order against the debtor.

The Registrar, relying on three Irish cases, held that there is a subtle distinction between collateral purpose and ulterior object. If the only reason for presenting the petition is improper it is collateral and an abuse of process, whereas if one of the purposes is not proper it is ulterior to the bankruptcy scheme. If the Court is satisfied that an ulterior object exists, the burden of proof shifts to the petitioner to prove on the balance of probabilities that an immediate order is required in the interests of the class or it is otherwise necessary.

On the facts, the Registrar found that there was insufficient evidence to support an ulterior object. The Petitioners, as judgment creditors for a very large sum, are *prima facie* entitled ex debito justitiae to a winding up order. Given that the debtor failed to provide any evidence as to why a bankruptcy order should not be made, the Registrar concluded that it was appropriate to make a bankruptcy order. The debtor appealed.

The main question of law that arose on appeal was the extent (if at all) to which questions of whether the petitioner had an ulterior object were relevant to making a bankruptcy order.

Above all, the English High Court considered that bankruptcy is a “class remedy”, so that the court should, throughout, assess whether it is in the interests of the creditors as a whole to make a bankruptcy order: *Re Crigglestone Coal Company Limited* [1906] 2 Ch 327; *Re Leigh Estates (UK) Limited* [1994] BCC 292.

Further, the Court held that motives or objectives of the petitioner in presenting and pursing a petition are not necessarily relevant, particularly where the petitioner has another legitimate purpose in pursuing the petition. However, given the collective nature of the bankruptcy proceedings, the motives or objectives of the petitioner may be relevant if the petition is opposed by other creditors. In such circumstances, the court is required to evaluate the
wishes of the creditors and attribute weight to views of individual creditors in deciding whether to grant the relief sought is in the interests of the class.

In conclusion, the High Court allowed the debtor’s application for permission to appeal and ordered that the petition be relisted for another hearing, so that creditors who might wish to support or oppose the petition, are given an opportunity to express their views.
An order to buy out the majority will only be made where majority shareholders are guilty of egregious conduct which renders them unfit to exercise control of the company.

12. **Koh Keng Chew and others v Liew Kit Fah and others** [2016] SGHC 140

The dispute involved the shareholders of the Samwoh Group (the “Group”). The Plaintiffs were family members of one of the founders of the Group, and together owned 28.125% of the shares in the Group. The defendants held the remaining 71.875% of the shares.

Despite much commercial success the Group has achieved, some degree of friction eventually arose between the shareholders and directors, which led to the plaintiffs initiating a claim for minority oppression under section 216 of the Companies Act. Although the defendants did not admit the plaintiff’s allegations of oppressive conduct, they agreed that a buyout order should be made on the basis that the relationship of mutual trust and confidence between the parties had broken down. However, whilst the defendants were prepared to buy out the plaintiffs, the plaintiffs wanted instead to buy out the majority shares. The only issue that the High Court of Singapore had to determine is whether the court should order a majority buyout or a minority buyout.

Above all, the Court agreed that it has the power to grant a minority buyout order under section 216 of the Companies Act. However, a minority buyout order is the less usual remedy. This is because a minority buyout order exceeds the purpose of allowing the minority shareholders to exit the company. Instead, it punishes the majority shareholders and amounts to an expropriation of the majority’s shares.

The Court was of the view that mere oppressive or unfair conduct is insufficient to warrant a minority buyout. Rather, the majority shareholders must be guilty of egregious conduct which renders them unfit to exercise control of the company, in that such control would be damaging to the company or its business, or would pose a serious risk to the public.

Against this test, the Court considered the plaintiff’s allegations against the defendants. While the Court acknowledged that the plaintiffs suffered some grievances because of the defendants’ misconduct, the Court did not agree that such misconduct renders them unfit to exercise control of the Group. The usual buyout order suffices to address the plaintiff’s grievances. Accordingly, the Court ordered the defendants to purchase the shares of the plaintiffs.

As obiter, the Court made two further observations. First, a minority buyout could raise competition law issues since the 2nd plaintiff has started a similar business after he left the
Group. Second, a minority buyout could be disruptive. It would result in a likely replacement of four out of five directors and would trigger certain default clauses in banking facilities due to the significant change of shareholding. The Court said that if it had been minded to make a minority buyout order, it would take into account these issues and determine whether a minority buyout order would be in the interests of the company.
In respect of derivative action, time does not cease to run when the application for leave to commence derivative action is filed

13.  *Sinwa SS (HK) Co Ltd v Nordic International Ltd and another* [2016] SGHC 111

Mr. Innhaug, being the founding shareholder of Nordic International Limited (the “Company”) entered into a Shareholders’ Agreement with Sinwa SS (Hong Kong) Co Ltd (“Sinwa”), which took up 50% stake in the Company. Not long after, disputes surfaced between the parties and the parties have since been involved in multiple litigation and arbitration proceedings.

Despite the multiple pending proceedings, Sinwa has brought the current suit to obtain leave of the court to commence a common law derivative action on behalf of the Company against Nordic Maritime, the former ship manager of the Company, by way of arbitration in Singapore. The notice of arbitration however has yet to be issued. Mr. Innhaug challenged the application on the ground that all claims, save for one claim, were time-barred.

The issue before the Court is when time in respect of the derivative action ceases to run under the Limitation Act. Is it the date when the notice of arbitration is issued against Nordic Maritime after leave is granted, or the earlier date when the application for leave to commence the derivative action was filed?

Section 6(1) of the Limitation Act (equivalent to section 4(1) of the Hong Kong Limitation Ordinance) provides that actions founded on a contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. The High Court of Singapore considered that as the leave application is a preliminary step to the arbitration, it may be tempting to view these two proceedings as one single “action” for the purpose of s.6(1). But they are in fact clearly distinct – the two proceedings are tied to different forums, and feature different plaintiffs and different defendants. The intended arbitration is the only “action” in which the relevant causes of action vested in the Company will be prosecuted against Nordic Maritime. Thus, Sinwa’s current application for leave does not have the effect of stopping the limitation period from running.

The Court suggested that Sinwa could have issued a notice of arbitration without first having obtained leave, then sought leave retrospectively. In any event, a common law derivate action is ordinarily commenced in court without leave.

In conclusion, the Court held that all claims, save for one claim, were time-barred since no notice of arbitration was issued in respect of these claims within six-year limitation period.
Singapore Court granted Hanjin restraint and stay orders, in recognition of Hanjin’s rehabilitation proceedings in Korea. Orderly marshalling of the assets, the Court emphasized, is to the ultimate overall benefit of all creditors.

14. Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd) [2016] SGHC 195

Hanjin Shipping Co Ltd (“Hanjin”), a company incorporated in the Republic of Korea, is the largest container-shipping firm in Korea and the ninth largest in the world. Faced with financial difficulties, on 31 August 2016, Hanjin filed an application for rehabilitation proceedings (similar to a statutory scheme of arrangement) to the Korean Bankruptcy Court. An order was subsequently granted by the Seoul Central District Court.

On 9 September 2016, Mr. Taisoo Suk (the “Applicant”), the foreign representative of Hanjin, filed an urgent ex parte application in Singapore, seeking interim orders for, inter alia, recognition of Hanjin’s rehabilitation proceedings in Korea, restraint of all pending, contingent or fresh proceedings against Hanjin and its Singapore subsidiaries or any enforcement or execution against any of their assets, and stay of all present proceedings against Hanjin and its Singapore subsidiaries, until 25 January 2017. It was said that the restraint and stay orders would allow Hanjin’s assets to be marshalled and its rehabilitation to be coordinated.

The High Court of Singapore agreed with the Applicant that the benefits of a universalist approach in winding up are now recognized worldwide and noted that the local courts could render assistance to foreign winding up proceedings: Cunard Steamship Co Ltd v Salen Reefer Services AB 773 F 2d 452(1985); CCIC Finance Ltd v Guangdong International Trust & Investment Corporation [2005] 2 HKC 589; and Beluga Chartering Gmbh (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation and another ) (deugro (Singapore) Pte Ltd, non-party) [2014] 2 SLR 815

The Court was therefore satisfied that Hanjin’s common law center of main interest was in Korea, since Hanjin had its head office in Korea and was also listed there. Further, all of Hanjin’s representative directors were Korean citizens and residents. The Court considered that it provided a very strong connecting factor between Hanjin and the Korean court, justifying recognition of the company’s rehabilitation proceedings there.

Further, the Court held that recognition and assistance would not be given in respect of foreign rehabilitation proceedings if those proceedings would lead to a result that would be unfair to the creditors as a whole, or which would not facilitate the orderly rehabilitation of the company. On the facts, the Court was satisfied that the proposed steps in the rehabilitation proceedings would in its general process be fair to foreign, including Singaporean creditors.
The Applicant had provided assurance that all creditors in the same class would be treated equally regardless of nationality. All creditors would be allowed to participate in the meetings and to vote on the rehabilitation plan.

The Court recognized that the interests of creditors may be affected by the outcome, and some of them may indeed be worse off than if they had been able to assert and enforce individual claims against the assets of the insolvent company. However, the Court was of the view that orderly marshalling and compromise or arrangement in respect of restructuring and rehabilitation would be to the ultimate overall benefit of all creditors.

In conclusion, the Court granted the application and made interim orders pending the *inter partes* hearing of the application.