In this issue, we have highlighted:

- **8 Corporate Insolvency Cases**
- **5 Cross-border Insolvency Cases**
- **4 Restructuring Cases**
- **2 Corporate Disputes Cases**
- **1 Bankruptcy Case**

Dear Clients and Friends,

I would like to highlight several cases in this January issue of ONC Corporate Disputes and Insolvency Quarterly. Of particular significance to insolvency practitioners would be the Hong Kong case *Osman Mohammed Arab Wong Tak Man Stephen, Joint and Several Liquidators of AGI Logistics (Hong Kong) Ltd (In Compulsory Liquidation) v Commissioner of Inland Revenue* [2016] 5 HKLRD 737. In this case, the Hong Kong Court of Appeal departed from English authorities and held that all dispositions made after a winding-up petition is presented are caught by section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and are thus void, regardless of the impact on creditors and whether it serves only an “intermediary function”. Another interesting case is *Re Lucky Resources (HK) Limited* [2016] 4 HKLRD 301, in which the court held that the presentation of a winding-up petition on the ground of insolvency does not constitute enforcement of an arbitration award. Thus, the petitioner is not required to seek court’s leave under section 84 of the Arbitration Ordinance (Cap 609) to enforce the award before presenting the winding-up petition.

In another important decision on cross-border insolvency, *The Joint Provisional Liquidators of BJB Career Education Co Ltd (In Provisional Liquidation) v Xu Zhendong* HCMP 1139/2016, the Hong Kong court, for the first time, granted powers to foreign liquidators permitting them to orally examine a company director in Hong Kong pursuant to a letter of request issued by Grand Court of Cayman Islands. Further, in the Singaporean case of *Re Gulf Pacific Shipping Ltd (in creditors’ voluntary liquidation) and others* [2016] SGHC 287, the Singapore High Court held the common law power of assistance to foreign liquidation also extends to voluntary winding-up or out of court dissolution. Last but not least, in the English decision of *Kean Lucas (Re J&R Builders (Norwich) Ltd)* [2016] EWHC 2684 (Ch), the English High Court considered that in assessing the validity of claim of a creditor requisitioning a meeting the threshold is low. So long as the claim appears *bona fide* and not obviously wrong, the claim should be accepted for the purpose of calculating claims in order to requisition the meeting. It is for the chairman of the meeting to reject or accept any claim.
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.

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Corporate Insolvency Cases

1. All dispositions made after a winding-up petition is presented are void, regardless of the impact on creditors and whether it serves only an “intermediary function”

Osman Mohammed Arab Wong Tak Man Stephen, Joint and Several Liquidators of AGI Logistics (Hong Kong) Ltd (In Compulsory Liquidation) v Commissioner of Inland Revenue [2016] 5 HKLRD 737

AGI Logistics (Hong Kong) Limited (“the Company”) failed to file a tax return for the year of 2008/9. As a result, the Inland Revenue Department (“the IRD”) estimated the Company’s tax liability and later re-assessed it at the Company’s request. On 8 December 2009, the IRD informed the Company that a tax refund letter would be sent. On the same day, the winding-up petition notice of the Company came to the attention of the IRD. The Company subsequently informed the IRD that the Company no longer had a bank account, and requested that the refund be made payable to Careship International Transportation Limited (“Careship”). The IRD complied with the request and on 27 January 2010, a cheque was issued to Careship and it was cashed on the same day. On 10 February 2010, the Company was wound up and liquidators were appointed.

The liquidators contended that the tax refund due to the Company paid by the IRD to Careship was void under section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), which provides that any disposition of the property of the company made after the commencement of the winding up shall be void, unless the court otherwise orders. At first instance, Anthony Chan J gave judgment in favor of the liquidators. The Commissioner of Inland Revenue (“the CIR”) appealed.

Harris J, giving the judgment on behalf of the Court of Appeal, dismissed the appeal. The Court accepted that the purpose of section 182 is to preserve the assets for the benefit of the general body of creditors. However, the Court considered that there is no basis for reading section 182 to contain a qualification such that a disposition is only void if it has an impact on creditors. To do so would make section 182 harder to apply, as it invites disputes over at what point in time the “impact” is to be assessed and by whom. The Court took the view that any disposition that risks reducing the amount available for creditors is caught by section 182.

The Court of Appeal went on to consider the English decisions, which have developed the view that honouring of cheques by banks does not involve a disposition of a company’s property, as it merely constitutes an intermediary function. The Court of Appeal disagreed with such analysis and determined that a bank, in honouring a cheque, reduces the company’s assets, and as such, it involves a “disposition”.

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Moreover, the Court of Appeal rejected the view that only recipients were liable, because to hold so will severely limit the ability of liquidators to recover payments made especially if, for example, a company trades with trading partners in other jurisdictions.
2. The presentation of a winding-up petition on the ground of insolvency does not constitute enforcement of an arbitration award. Thus, leave is not required

*Re Lucky Resources (HK) Limited* [2016] 4 HKLRD 301

The Petitioner presented a petition to wind up Lucky Resources (HK) Limited ("the Company") on the grounds of insolvency relying on a final arbitration award in the Petitioner’s favor.

The Company contested the petition, alleging that the petition has been improperly presented because the Petitioner has not made an application pursuant to section 84 of the Arbitration Ordinance (Cap 609) to enforce the award.

Harris J reiterated that the presentation of a petition to wind-up a company on the grounds of insolvency is the exercises of a class right and does not constitute enforcement of either a judgment or an arbitration award. As such, section 84 of the Arbitration Ordinance is irrelevant.
3. Court of Appeal confirms that the Court has jurisdiction to give leave to amend a winding-up petition to include debts which have accrued only after its presentation

Re Hin-Pro International Logistics Ltd CACV 54/2016

In the April issue of our “ONC Corporate Disputes and Insolvency Quarterly” 2016, we discussed the First Instance decision in Re Hin-Pro International Logistics Ltd HCCW 226/2014, in which Ng J gave leave to the Petitioner to amend a creditor’s winding up petition to include debts which have accrued after the petition date. The Company sought leave to appeal against the judgment.

The original petition included only one debt pursuant to a Costs Order, which was however subsequently discharged. Thus, at the hearing, the original debt no longer subsisted. The question before the Court is whether the Petitioner should be allowed to substitute the original debt with a number of subsequently arisen debts.

The Company’s contention mainly focused on the so-called “Eshelby rule” originated from the case Eshelby v Federated European Bank Ltd [1932] 1 KB 254, which held that the court has no jurisdiction to allow amendment of a writ, without the consent of the parties, so as to bring in a cause of action which was non-existent at the time the writ was originally issued. Eshelby rule has been followed in Hong Kong in Cheung Ho Wah v Cheung Kam Wah & Ors [2005] 2 HKLRD 599, which concerned a petition brought by a shareholder for relief under section 168A. Barma J, as he then was, refused to allow amendments to plead post-petition instances of unfairly prejudicial conduct.

The Court of Appeal is in full agreement with Ng J that a creditor’s petition is different from a writ action in that a petitioner in a creditor’s winding-up petition is asserting a class remedy on behalf of all the company’s creditors. Further, public interest, which is normally absent in a writ action, is engaged in a creditor’s winding-up petition. The differences provide sufficient justification for not applying the Eshelby rule in a creditor’s petition. As for the case of Cheung Ho Wah, the Court of Appeal found that Ng J is justified to distinguish it on the basis that the case concerned a section 168A petition, which is essentially a shareholders’ dispute, in which public interest seldom, if at all, comes into play.

Further, the Court of Appeal noted that while the Costs Order was subsequently discharged, it was subsisting and of full legal effect at time of the Petition. Therefore, it cannot be said that there was no cause of action at the time the Petition was presented.

After finding that the Court has jurisdiction to allow amendments to include post-petition debts, the Court went on to consider whether Ng J was justified to exercise his discretion in favor of the Petitioner. In this regard, the Court of Appeal agreed that the Judge has rightly
taken into account the practical implication of a rigid insistence in requiring a fresh petition for each subsequent debt – that it will result in multiplicity of proceedings, unnecessary waste of costs, time and the court’s resources. Moreover, the proposed amendment will not cause the Company any substantive prejudice, which cannot be compensated for by an award of costs.

In conclusion, the Court of Appeal found that there is no basis for the appellant court to interfere with the exercise of the discretion of the Judge. The Company’s appeal was thus dismissed.
4. Legitimate concerns about the impartiality of the liquidators of the company is a consideration for court in determining whether a petition to convert voluntary liquidation into compulsory liquidation should be allowed

*Re Joint Silver Ltd (In Creditors' Voluntary Liquidation)* HCCW 1/2016

Joint Silver Limited ("the Company") was in creditors' voluntary liquidation. The Petitioner, a creditor and contributory of the Company, applied to convert the voluntary liquidation into compulsory winding-up. The Company is a wholly owned subsidiary of Central Shipping Co Limited ("Central Shipping"). The petition is opposed by Central Shipping, which is also a creditor of the Company.

The Court considered that a creditor is entitled to petition for the winding up of a company indebted to him under section 177(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("the Ordinance"). Further, it is well established that if the company is insolvent, it is the interests of its creditors which are the paramount consideration. If one of the creditors wishes to convert the voluntary liquidation into a compulsory liquidation, it is to be expected that this wish will be acceded to unless there is good reason not to do so: section 257 of the Ordinance; *Young Cruise Company Limited* HCCW 788/2000.

However, where a petition to convert a voluntary liquidation into a compulsory liquidation is opposed by another creditor, the court is not bound to make a winding up order but has an unfettered discretion: *STX Pan Ocean (Hong Kong) Co Ltd* [2014] 5 HKLRD 581. The court will determine “whether the class remedy of liquidation is better satisfied by the continuation of the voluntary liquidation or is better served by being superseded by a compulsory liquidation”: *Re Southard & Co Ltd* [1979] 1 WLR 1198. And in doing so, the court will have regard to various considerations.

The Court took the view that in the present case a particularly important factor is any concern that can be substantiated about the impartiality of the liquidators of the Company. The Court noted that what lies at the heart of the present applications is actually a dispute between two camps of beneficial owners of the Company. The Court found it unsurprising that the Petitioner would have concerns about the impartiality of the liquidators of the Company, who had been chosen and appointed by the other camp of beneficial owners.

The Court made a winding-up order.
5. The English Court considered the threshold for liquidators to assess validity of claim of a creditor requisitioning a meeting to be low

Kean v Lucas (Re J&R Builders (Norwich) Ltd) [2016] EWHC 2684 (Ch)

J&R Builders (Norwich) Limited (“the Company”) entered into a creditors’ voluntary liquidation. Liquidator was appointed. The Applicant asked the Liquidator to call and hold a meeting of creditors for the purpose of considering his removal as liquidator. Under the relevant Insolvency Rules, a liquidator will have to summon the meeting if requested by 25% in value of a company’s creditors, excluding those who are connected with it.

The disputed creditor is Grand Prix Paint Plant. It was agreed that if the Grand Prix claim were included in the calculation of claims, the requisite 25% would have been reached. The Liquidator carried out extensive investigation regarding the claim and decided that the claim should not be included in the total value of creditors. The Applicant applied to the court for a declaration that the Liquidator wrongfully refused to call the meeting and a direction that he does so.

The English High Court recognized that there is no appeal mechanism dealing with a failure to accept a claim, when calculating the percentage in value of creditors for the purpose of requisitioning a creditors’ meeting. On the other hand, the Insolvency Rules provide an appeal mechanism against a decision of a chairman at a meeting when deciding on a creditor’s entitlement to vote. It follows that at the requisitioning stage, the threshold test should be lower. The only task a liquidator is to undertake when calculating creditor claims for the purpose of determining whether 25% or more in value of creditors request a meeting, is to discount connected party claims and any claim that appears obviously wrong or mala fide.

The Court found that the Liquidator has embarked upon an unnecessary exercise of investigation. Although the evidence of the claim was weak and in parts contradictory, the Court considered that there was insufficient evidence that the claim was mala fide or obviously wrong. The claim should have been accepted for the purpose of calculating claims in order to requisition the meeting. It is at the meeting that the chairman has the power to reject or accept any claim.

The Court thus granted the declaration sought and made directions accordingly.
6. The Singapore High Court granted an injunction to restrain the commencement of winding-up proceedings, finding that the basis of the winding-up proceedings was subject to arbitration

*BDG v BDH* [2016] SGHC 211

The Plaintiff, BDG, contracted with the Defendant, BDH, for the supply of drilling units for fossil fuel production. The contracts included a tiered dispute resolution clause, which provided that the parties shall use all reasonable efforts to reach an agreement and failing so the disputes shall be referred to arbitration. Dispute subsequently arose. Discussions were held between the two sides. The Defendant says ultimately nothing was agreed, while the Plaintiff contended that there was a settlement agreement. The Plaintiff then issued an arbitration notice. The Defendant, however, took the position that there was no dispute subject to the arbitration clause. Rather, the Defendant issued a statutory demand, which led to the Plaintiff’s present application to restrain the commencement of winding-up proceedings. The Plaintiff argued that there was a dispute between them that was governed by an arbitration clause.

The High Court of Singapore noted that there is a conflict between the relevant standards for a stay in favor of arbitration on the one hand, which requires a *prima facie* dispute, and the standard required for a stay of winding up on the other hand, requiring a triable issue. The Court considered that using the triable issue standard would result in the courts usurping the functions of the arbitral tribunal and condoning breach of the arbitration agreement. Following the English decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589, the Court considered that it had the discretion to decline to order a winding up if satisfied that there was a *prima facie* dispute which was subject to an arbitration agreement. The Court was of the view that the parties should be held to their agreement to arbitrate their disputes and the court should not generally step in.

In the present case, the Court found that there is *prima facie* a dispute regarding whether a settlement agreement was reached. Further, the arbitration clause is broad enough to encompass the dispute, i.e. the putative settlement agreement. The Plaintiff has established a *prima facie* case that the dispute falls within the agreement. Other than that, the scope of the arbitration clause would be a matter for the arbitral tribunal to decide on.

In conclusion, the Court granted the injunction sought by the Plaintiff.
7. The Singapore High Court determined that in validation orders, the essential question is to inquiry whether at the time of the payment, it was likely to benefit the general body of unsecured creditors

*Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd* [2016] SGHC 264

Prior to its winding up, the Plaintiff was engaged in the business of supplying bunkers and the Defendant would purchase the bunkers from oil traders including the Defendant in order to supply them to vessels. The parties started their business dealings in May 2013. On 1 July 2013, another creditor of the Plaintiff commenced winding up proceedings against the Plaintiff. The Plaintiff was wound up on 23 August 2013 and Liquidators were appointed.

After the commencement of the winding up, the Plaintiff made five payments totalling US$1,526,803.53 to the Defendant in settlement of various pre-liquidation invoices. After that, the parties entered into another three transactions, the payment of which was outstanding when the Plaintiff was wound up. The Liquidators applied seeking a declaration that the five payments are void under section 259 of the Companies Act, which is equivalent to section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). The Defendant on the other hand relies on the court's discretion to validate the payments.

Section 259 is intended to ensure that there are no preferential payments to pre-liquidation creditors which would infringe the *pari passu* rule: *In re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711. Following the English decision in *Express Electrical Distributors Ltd v Beavis and ors* [2016] EWCA Civ 765, the High Court of Singapore took the view that while the fact that payments were *bona fide* in the ordinary course of business without notice are strong factors in favor of validation, it would not be sufficient to validate the payments. The crucial requirement remains whether there are “special circumstances making such a course desirable in the interest of the unsecured creditors as a body”.

Further, the Singapore High Court considered that the relevant time to determine whether there was “benefit” to the general body of unsecured creditors is the time of the payment, rather than when the payment is sought to be validated: *Jardio Holdings Pty Ltd v Dorcon Construction Pty Ltd* (1984) 2 ACLC 574. So long as the impugned transaction was *likely* to benefit the creditors at the time of the payment, sanction should not be denied because subsequent events prove wrong a judgment reasonably formed at the time of the transaction.

In the present case, the Court found that the Defendant did not have actual notice of the winding up when the payments were made, which is a factor in favor of validation. Further, the Court considered that the fact that the transactions with the Plaintiff were subject to a credit limit of US$1.2 million has an important bearing on the application. The Plaintiff is in the business of supplying bunkers to vessels. Its business is entirely dependent on sourcing
for favorable bunker prices from oil traders such as the Defendant. The Plaintiff’s primary business model is to earn a margin from the onward sales to vessels. It stands to reason that in order for the business to continue, the Plaintiff must be able to secure supplies on credit terms from traders like the Defendant. The five payments by the Plaintiff would have the effect of refreshing the credit limit. The Defendant’s continuing supply is therefore the source of the Plaintiff’s business without which the Plaintiff would not be able to stay afloat. Thus, the payments were at the material time “likely” or “apt” to be for the benefit of the Plaintiff and the general body of creditors.

In conclusion, the payments to the Defendant are validated and the Liquidators’ application is dismissed.
8. Shareholders of a solvent company should have the opportunity to comment on the liquidator’s bill

Re Astrotec Company Limited HCCW 377/2014

The petitioner, being unable to enforce an order in his favor in previous unfair prejudice proceedings that the 1st respondent buy out his shares in the Company, presented a winding-up petition against the Company. Joint and several liquidators (“the Liquidators”) were appointed. The parties subsequently settled their dispute and the Liquidators were discharged. The Court ordered that the Liquidators’ fees and costs be paid out of the assets of the Company, subject to approval of the Court or the agreement of the Company.

The Company issued a summons seeking the taxation package provided to the Taxing Master by the Liquidators and the opportunity to comment on their bills.

Harris J noted that while the court’s Procedural Guide for taxation/determination of bills in liquidation process does not provide for the involvement of the Company or the shareholders of a company in the case of the assessment of the fees and disbursements of joint and several provisional liquidators of a solvent company, his Lordship was of the view that with regard to a solvent company, shareholders usually have a legitimate financial interest in the outcome of the taxation procedure such that they should have the opportunity to comment on the amount sought by the Liquidators.

Thus, the Court ordered the Liquidators to provide the Company with a copy of the taxation package.
9. Scottish Court adopted a restrictive approach with regard to modified universalism

*Hooley Ltd v The Victoria Jute Company Ltd and others* [2016] ScotCS CSOH 141

The Victoria Jute Company Limited, The Samnuggur Jute Factory Limited and Titaghur plc (collectively “the Companies”) are incorporated in Scotland but carrying on business in India. The Companies went into liquidation in India. Subsequently, the Companies were also put into Scottish administration by order of the Scottish Court. The Companies’ assets were all located in India.

The Administrator of the Companies purported to sell the assets to the petitioner, Hooley. The petitioner sought a declaration from the Scottish Court that the Administrator was entitled to do so. One of the issues before the Court was whether the powers of the Administrator are limited by the Indian insolvency proceedings, so that those powers are exercisable in relation to the non-UK property of the Scottish Companies only to the extent that their exercise is recognized as legally valid by the law of India.

The Court recognized that there may be a principal liquidation in the country of the company’s incorporation and an ancillary liquidation in another jurisdiction. But citing *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2014] UKPC 36, the Court held that the principle of modified universalism only applies where the winding-up proceedings which the Scottish courts were being asked to assist were commenced in the jurisdiction in which the company is incorporated.

In the present case, the Companies are incorporated in Scotland. The Court thus rejected the proposition that the powers of the Administrator are exercisable only to the extent that their exercise is recognized as legally valid by Indian law. On the contrary, any proceedings in India must be regarded as ancillary to insolvency proceedings in Scotland.
10. The English High Court found exceptional circumstances to lift the automatic stay imposed under the Cross Border Insolvency Regulations 2006 to allow litigation proceedings to be continued in England

*Ronelp Marine Ltd v STX Offshore & Shipbuilding Co Ltd* [2016] EWHC 2228 (Ch)

STX Offshore & Shipbuilding Co Ltd (“STX”) is a Korean shipbuilding company. It gave a guarantee in respect of its wholly owned Chinese subsidiary (“Dalian”), in relation to the construction of five ships that Dalian had contracted to build. Both the guarantee and the shipbuilding contracts are governed by English law. Subsequently, Dalian entered into a Chinese insolvency process and the ships were not built. The Buyers commenced proceedings in England against STX under the guarantee. STX argued, among other things, that the shipbuilding contracts are unenforceable on ground of illegality.

14 months into the litigation, STX went into rehabilitation proceedings itself in Korea. The Korean rehabilitation proceedings were subsequently recognized in England as “the foreign main proceedings” under the Cross Border Insolvency Regulations 2006. Upon the making of a recognition order, no legal process was to be continued against STX except with the consent of the Administrator or the permission of the court.

The Buyers seek the permission of the Court to lift the stay imposed by the recognition order. The sole object is to obtain an adjudication of the claim, with a view to presenting the outcome to the Korean Court.

Following *AES Barry Ltd v TXU Europe Energy Trading* [2004] EWHC 1757, the Court held that the applicant creditor must demonstrate a circumstance or combination of circumstances of sufficient weight to overcome the strong imperative to have all the claims dealt with in the same way by the insolvency court.

The Court gave great weight to the fact that the English law on illegality is a particularly complex one. It was not appropriate for the Korean court to have to decide the matter based on expert foreign law evidence. Second, the Court also considered that the English proceedings were already well advanced and the parties had expended considerable sums in preparation for the trial. Further, granting permission would not impede the achievement of the Korean rehabilitation plan. Rather, resolving a genuinely difficult issue of foreign law would assist the insolvency process. Lastly, the Court moved to balance the interest of the Buyers and of the other creditors of STX and concluded that allowing the litigation to proceed would not unduly advance the interests of the Buyers over the interest of creditors as a whole.

Taking into these factors into account, the Court is satisfied that this is an exceptional case and the stay on the action should be lifted.
11. Singapore High Court held the common law power of assistance to foreign liquidation also extends to voluntary winding-up

*Re Gulf Pacific Shipping Ltd (in creditors’ voluntary liquidation) and others* [2016] SGHC 287

Gulf Pacific Shipping Limited ("the Company") was incorporated in Hong Kong. In 2016, the Company was put into creditors’ voluntary winding up. Liquidators were appointed. The Company had a bank account with ABN AMRO Bank NV Singapore Branch, which was closed in 2013. The Liquidators sought copies of bank statements from 2011 to 2013. ABN Singapore requested that the liquidators obtain a court order giving sanction to their appointment and request, which led to the present application for recognition of the liquidators.

The Court was satisfied that recognition should be granted, since the recognition was sought by liquidators appointed in the place of incorporation and no prejudice would appear to arise in respect of Singapore persons or entities. The issue is whether recognition should be denied as the Company was liquidated through a voluntary winding-up. The Singapore High Court noted the view of Lord Sumption in the Privy Council decision *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 that common law powers of assistance to foreign liquidation did not extend to voluntary winding up. The Singapore Court, however, adopted the view that as the foundational doctrine in the recognition of foreign insolvency proceedings is the promotion and facilitation of the orderly distribution of assets, as well as the orderly resolution and dissolution of the affairs of entities being wound up, no distinction should be drawn between voluntary and compulsory process, or between in court and out of court dissolution.

The application was granted.
12. A court order is unnecessary where the liquidators of a foreign corporation, properly appointed in the place of incorporation, request for routine documents from a person/corporation in Hong Kong. Such request should be complied with

*Re Bay Capital Asia Fund, LP HCMP 3104/2015*

Bay Capital Asia Fund, LP ("the Fund") is in liquidation in the Cayman Islands in which it is incorporated. The Liquidators of the Fund have applied for orders recognizing their appointment and that the balances of bank accounts with DBS and the relevant documents be delivered up to them. DBS however refused to do so in the absence of a court order. By the time the matter came before the Court, the only matter that remained for determination was costs.

Harris J referred to his own judgment in *A Co v B* [2014] 4 HKLRD 374 and reiterated that if a person in Hong Kong receives a request or instruction from a liquidator of a foreign corporation, once he is satisfied that the liquidators have been properly appointed by the court of the place of the company's incorporation, he should act upon the request/instruction and hand over documents to which the directors of the company would have been entitled. A distinction does, however, need to be made between information and assets. If a foreign liquidator wishes to deal with the assets of the company in Hong Kong, he should obtain an order from the Hong Kong Court authorizing him to do so and, if relevant, vest him with title.

It follows that it was necessary for the Liquidators to make an application to the Court for an order authorizing transfer of the balances in the DBS accounts, but not the routine banking documents that they sought from the bank.

Taking into consideration the refusal of DBS to provide the documents sought as well as the fact that the Liquidators would have had to come to court for an order even if DBS had provided the documents, the Court made no order as to costs.
13. Hong Kong Court granted powers to foreign liquidators permitting them to orally examine a company director in Hong Kong pursuant to a letter of request made by Grand Court of Cayman Islands

The Joint Provisional Liquidators of BJB Career Education Co Ltd (In Provisional Liquidation) v Xu Zhendong HCMP 1139/2016

BJB Career Education Company Limited ("the Company") is incorporated in the Cayman Islands. On 3 July 2016, it was put into liquidation by order of the Grand Court of the Cayman Islands and Provisional Liquidators were appointed. On 16 March 2016, the Grand Court of the Cayman Islands issued a letter of request, seeking Hong Kong court’s assistance. The Provisional Liquidators subsequently issued an originating summons seeking orders for Mr. Xu Zhendong, the former chairman and director of the Company, to produce documents, answer interrogatories and attend court for oral examination.

Harris J first referred to his own decision in Joint Official Liquidators of A Co v B [2014] 4 HKLRD 374, in which he explained that the Hong Kong Court may pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law make an order of a type which is available to a provisional liquidator or liquidator under Hong Kong’s insolvency regime. The foreign liquidators are empowered, without further order of the court, to take possession and control of the company’s property and investigate its affairs and to bring proceedings to facilitate these processes. But it is undecided whether an order can be made for the oral examination of an officer of a foreign company.

Citing the Privy Council decision in Singularis Holdings Ltd v PricewaterhouseCoopers [2014] BCLC 597, Harris J considers that the common law power of assistance extends to ordering an oral examination if such a power (a) exists in the jurisdiction of liquidation and that is the jurisdiction of the place of incorporation and (b) the power exists in the assisting jurisdiction. Section 103 of the Companies Law in the Cayman Islands grants the court similar powers to order the production of documents by a director of a company and an oral examination of a director as are contained in section 221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). It follows that in the exercise of its common law powers the Hong Kong Companies Court can order the oral examination of a director of a Cayman Island company in liquidation in the Cayman Islands if satisfied that it is necessary and that it would not infringe the established limitations on the exercise of the power conferred by section 221. In the present case, Harris J was satisfied that the examination and order for production of documents is necessary.

His Lordship then went on to consider whether Article 96 of the Basic Law provides an impediment to making such an order. In essence, Article 96 of the Basic Law provides that with the authorization of the Central People’s Government, the Hong Kong Government may make appropriate arrangements with foreign states for reciprocal judicial assistance. The
question for the Court is whether the granting of an order of recognition and assistance in response to a letter of request is caught by Article 96. Upon examination of various authorities, Harris J concluded that reciprocity is not a necessary component of recognition and assistance and therefore it is erroneous to view an order recognizing the appointment of a liquidator and an order providing assistance as an arrangement for reciprocal judicial assistance. It follows that the order for examination and production of documents does not infringe Article 96.
14. Court reiterated that the jurisdiction of provisional liquidation is to allow court to appoint provisional liquidators in order to preserve the company’s assets rather than to be used as a mechanism to restructure debts.

*Re Easy Carry Ltd* HCCW 297/2014

The five winding-up petitions before the Court were issued on 17th October 2014 and provisional liquidators were appointed. The petitions have been adjourned frequently during the course of the last two years in order to give the contributories the opportunity to introduce a plan for restructuring the debt of the companies. But the contributories were unable to produce any firm proposal.

Harris J described what has happened during the last two years as an unsatisfactory example of the misuse of the provisional liquidation jurisdiction. His Lordship recognized that despite the decision of Court of Appeal in *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192, the jurisdiction has continued to be used as a mechanism through which the debt, particularly of listed companies, is restructured. However, it should be clear that in Hong Kong, the purpose of the jurisdiction is to allow the court to appoint provisional liquidators to protect the assets of a company in order that their value is maintained for the benefit of the creditors.

Harris J found that it is now clear that the stage has been reached where it would be inappropriate to continue to allow the provisional liquidations to continue. The normal winding-up orders were made in respect of each of the five companies.
15. In determining the extent to which the votes of related party creditors should be discounted in a Scheme, the Court would adopt a broad-brush approach, informed by the relationships in question and consider previous conduct of the parties

*Re Conchubar Aromatics Ltd and another matter* [2016] SGHC 279

Pursuant to a court order, Conchubar Aromatics Ltd and UVM Investment Corporation (collectively “the Applicants”) each convened a meeting of their respective creditors for the purpose of considering and approving a proposed Scheme of Arrangement (“the Proposed Scheme”). The statutory requirements have been met and the Applicants sought court’s approval of the Proposed Scheme. The application was however opposed by a creditor of the Applicants, contending that three of the creditors were related to the Applicants and thus their vote should be disregarded completely.

Upon a detailed examination of the evidence, the Court determined that the three creditors were related creditors. Citing *The Royal Bank of Scotland NV (formerly known as ABN AMRO Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213, the Singapore High Court held that it is “the norm for the votes of related party creditors to be discounted in light of their special interests to support a proposed scheme”, because “a related party may have been motivated by personal or special interests to disregard the interests of the class as such and vote in a self-centred manner”. The Court was of the view that “special interests” should not be interpreted narrowly. It simply means interests that a party may have that differ from that of ordinary, independent and objective creditors of the same class that may cause that party to exercise its vote in a manner that differs from that of ordinary, independent and objective creditors of the class.

Having determined that the three creditors were related parties, the Court proceeded to consider whether and to what extent their votes should be discounted. The Court was unable to ascertain with scientific precision what the appropriate discount ought to be, due to the complex relationship between the related creditors and the Applicants. Under such circumstances, the Court was of the view that it should adopt a broad-brush approach, informed by the relationships in question and consider previous conduct of the parties. The Court found that that in the present case, a discount not exceeding 25 per cent of the value of the debt owed to the related creditors was appropriate. But such a discount did not sufficiently tilt the balance. The requisite statutory majority was still met in respect of the Proposed Scheme for the Applicant despite the discount.

The Court thus sanctioned the Proposed Scheme.
16. High Court sanctioned a Scheme of a foreign company, after finding that there is a sufficient connection with Hong Kong. Further, the Court considered a reasonable sum of “lock-up” fee does not create a separate class.

*Re Winsway Enterprises Holdings Limited* HCMP 453/2016

Winway Enterprises Limited ("the Company") is incorporated in BVI and is registered as a non-Hong Kong company. Also, the Company is listed on the Hong Kong Stock Exchange.

On 21 March 2016, Harris J gave leave to the Company to convene a meeting of Scheme Creditors in order that they could consider and vote on a proposed scheme of arrangement to restructure a debt arising under some senior notes ("the Scheme"). Accordingly, a meeting was held and the Scheme Creditors voted in favor of the Scheme by approximately 96.5% in number and 98.3% in value, thus achieving the required statutory majority under section 674(1) of the Companies Ordinance (Cap 622) ("the CO"). The Company applied to seek the Court’s sanction of the Scheme.

The statutory procedure by which a company can compromise its debts with its creditor is contained in Part XIII of the CO. The Court is satisfied that in the present case, the Scheme Creditors constitute a discrete group whose legal rights are identical and will be affected in identical terms under the Scheme. The fact that the Scheme will result in the release of guarantors under the notes is not material to the constitution of the class. The release is a justifiable component of a compromise between a creditor and the company.

Further, Harris J considered whether the payment of a fee to the creditor for agreeing in advance to be bound by a proposed scheme creates a separate class. Following *DX Holdings Ltd* [2010] EWHC 1513, the Court held that the question to ask is whether the right to be paid an additional sum is likely to influence materially a scheme creditor in deciding how to vote? Whether or not it may be likely to depend on whether or not the sum is substantial and has been offered in a manner, which creditors are likely to consider fair regardless of whether or not they took advantage of the opportunity to agree in advance to vote in favor of the restructuring. In the present case, the Court found that the “lock-up fee” was available to all Scheme Creditors and it appears to have been a *bona fide* attempt to introduce certainty in the progress of restructuring. The Court thus formed the view that it is unlikely to have material influence on how a Scheme Creditor voted and thus did not require Scheme Creditors to be divided into two classes for voting purposes.

In conclusion, the Court was satisfied that the class was properly constituted, the necessary statutory majority was obtained, the Scheme was adequately explained through the Explanatory Statement and that the Scheme was one that a creditor might reasonably approve: *Buckley on the Companies Act (14th ed) at page 473.*
After reaching this conclusion, his Lordship went on to consider whether the Court has jurisdiction to sanction the Scheme as the Company is incorporated in BVI and the significance of the debt arising under agreements governed by the law of New York.

Citing *LDK Solar Co Ltd* [2015] 1 HKLRD 458, Harris J was of the view that Hong Kong Courts has jurisdiction to sanction the Scheme provided that there is sufficient connection with Hong Kong. In the present case, the Court noted that the Company is listed in Hong Kong, it has a registered office here and leases premises in which it has four staff. It keeps books and accounting records at the office and its auditors are KPMG Hong Kong. Approximately 53.6% of its shareholders are resident in Hong Kong, where it holds its AGMs and EGMs. Further, the Company files tax returns on an annual basis with the Hong Kong Inland Revenue. A number of its directors and senior employees are residents in Hong Kong for parts of the year and approximately half of the Scheme Creditors are located in Hong Kong. The Court was satisfied that these matters constitute sufficient connection to give Hong Kong court jurisdiction to sanction the Scheme.

Regarding the significance of the debt being governed by the laws of the State of New York, Harris J considered that the Scheme will prevent action being taken within the jurisdiction of the Hong Kong courts regardless of the governing law of the debt, which is one of the principal reasons for introducing a scheme such as the present one.

In conclusion, the Court was satisfied that the Scheme should be sanctioned.
17. Where a scheme is proposed as an alternative to liquidation, the appropriate comparator is the insolvent liquidation of the company. As such, the differences in the contractual rights of scheme creditors might be irrelevant in determining the constitution of classes

Re Kaisa Group Holdings Ltd HCMP 708/2016

Kaisa Group Holdings Limited (“the Company”) is incorporated in the Cayman Islands. The Company has been registered as a non-Hong Kong company and it has a place of business in Hong Kong. Its shares are listed on the Hong Kong Stock Exchange.

The Company is undergoing a restructure of its debts. The Scheme meeting was convened on 20 May 2016 pursuant to a court order. At the Scheme meeting, the necessary statutory majorities required by section 674 of the Companies Ordinance (Cap 622) were overwhelmingly attained. The Company applied to seek the Court’s sanction of the Scheme.

Harris J first considered the fundamental rules in determining the constitution of classes of scheme creditors as laid down by Lord Millett in the Court of Final Appeal decision in Re UDL Holdings Ltd (2001) 4 HKCFAR 358. In essence, 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, whereas persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings.

In considering the rights of creditors which are affected by the Scheme, it is essential to identify the appropriate comparator. In the case of rights against an insolvent company where the scheme is proposed as an alternative to liquidation, the appropriate comparator is the insolvent liquidation of the company.

Citing Re Co-operative Bank PLC [2013] EWHC 4072 with approval, Harris J was of the view that in an insolvent liquidation, the differences in the contractual rights of scheme creditors such as differences in maturity dates and different rates of interest are not relevant in determining the constitution of classes, because their rights would be the same if the comparator was “the possibility or real likelihood of insolvency”.

In the present case, one of the Scheme Creditors, HSBC, has interest in a collateral in respect of one obligation owed to it. But the liquidation analysis prepared by Deloitte indicated that the value likely to be realized from that collateral is negligible. Thus, the Court was of the view that it was correct for HSBC to vote in the same class of creditors who had the notional advantage of an interest in the collateral.

Further, Harris J referred to his own decision in Re Winsway Enterprises Holdings Limited HCMP 453/2016 and held that the “lock-up fee” has no impact on the constitution of the class. Lastly, as explained in Winsway Enterprises, the fact that the Scheme will have the effect of
releasing the guarantors under the debt is held to be immaterial to the constitution of the class.

Harris J then went on to consider if the Hong Kong Court has jurisdiction to sanction the Scheme. His Lordship found that the current Scheme shares a lot of similarities to the one in *Winsway Enterprises*. The Company is listed in Hong Kong. Two of the loans are governed by Hong Kong law. It is therefore necessary for the Scheme to be introduced and sanctioned in Hong Kong in order to prevent a dissentient creditor taking steps in Hong Kong, which would interfere with the restructuring the Scheme is intended to effect.

In conclusion, the Court was of the view that the Scheme Creditors properly voted as one class and the statutory requirements have been complied with. Thus, the Scheme should be sanctioned.
Corporate Disputes Cases

18. The test in granting leave to commence a statutory derivate action is whether the intended action is in the interest of the company, not the applicant

*Chu Kong v Up Profit Limited* HCMP 305/2016

The Applicant, Mr Chu, applied for leave to commence a statutory derivate action against Wat Fung Ying ("Ms Wat"), the sole director of Up Profit Limited ("the Company"), pursuant to sections 732 and 733 of the Companies Ordinance (Cap 622) ("the Intended Derivative Action").

The Company is wholly owned by Sun Harvest Holdings Limited, a BVI company, which is in turn owned by Mr Chu and a Mr Lau equally. The Company is used to hold a property in Hong Kong. Ms Wat is said to be a nominee director. The relationship between Mr Chu and Mr Lau subsequently became sour. Mr Chu alleged that Ms Wat should have rent out or sold the property. Instead, Ms Wat has preferred Mr Lau by allowing him to have exclusive possession of the property.

The Court is satisfied that the Intended Derivative Action gives rise to a serious issue to be tried, because it is seriously arguable that a company director, a nominee or not, is under a duty properly to realize the economic value of the property, whether by renting it out or by sale. And generally, when it is established that the intended claim discloses a serious issue to be tried, it follows that it would be in the Company's interests for leave to be granted. Further, the Court makes the remark that whether Mr Chu may have anything to gain from this Intended Derivative Action is of itself beside the point. The Court is only concerned about whether the Intended Derivative Action is in the interests of the Company.

Accordingly, the Court is satisfied that leave to commence the Intended Derivative Action should be granted.
19. Breach of shareholders’ agreement can amount to unfair prejudice and the Court will grant tailored remedies in order to give justice in individual cases

_Dennis Kwok Hon Ming v Poon Sui Cheong Albert_ HCMP 1528/2013

In late 1991, the Petitioner and 6 other investors came together to pursue land investment in Lantau. Three Companies were incorporated to this end. A Shareholders’ Agreement was entered into, which applies equally to all the Companies. The Petitioner is appointed as one of the Shareholder Managers.

The Shareholders’ Agreement sets out that the Companies are to sell some of the Non-Core Land parcels in order to repay the shareholders’ loans in the short term, and to retain the balance of the Land for medium term and long-term objectives. Moreover, the Managers are charged with using their best efforts to dispose of the Non-Core Land as soon as possible, in order to repay the shareholder loans. If an offer is received from an outside buyer, the land will be sold to this outside buyer if no shareholder matches the offer within 7 days. Lastly, a decision to sell any land asset is a decision requiring 100% shareholder approval. As to Managers’ remuneration, the Shareholders’ Agreement provides that the Managers would receive no remuneration, but that when cumulative cash receipts from land sales reached the sum of HK$7 million, the Managers would be entitled to a bonus.

Over a course of 15 years, the Petitioner, with the other Manager, secured several offers from outside buyers. But due to the uncooperative attitude of the other shareholders, the deals never went through. The relationship between the Petitioner and the other shareholders turned sour and ultimately in May 2008, the shareholders passed a resolution to remove the Petitioner as Manager. The Petitioner demanded compensation in respect of the termination as Manager pursuant to the Shareholders’ Agreement, which was however never paid.

On 20 June 2013, the Petitioner issued the present petition pursuant to section 168A of the former Companies Ordinance (Cap 32), seeking a share buy-out and other relief on the basis of unfairly prejudicial conduct by the Majority Shareholders of the Companies.

The Court found that the Petitioner brought Non-Core Land sales offers to the other shareholders. But the Majority Shareholders, in breach of the Shareholders’ Agreement, did not match the offer or approve the sales, but declined to approve the proposed sales. As a consequence, there was no revenue to the Companies and repayment of the shareholder loans. If there had been no breach, the shareholder loans would have been repaid in full shortly after September 1997. Instead, the shareholder loans, including interest, amount to HK$1,784,211,574 as at August 2016. At face value, the Companies were hopelessly insolvent in light of the accrued interest on the shareholder loans. But the Court took the view...
that such interest has only accrued because the shareholder loans were not repaid as soon as possible pursuant to the Shareholders’ Agreement, which is attributable to the Majority Shareholders’ conduct.

Further, the Court found that the majority shareholders also breached the Shareholders’ Agreement by removing the Petitioner as Manager in May 2008, as there was a failure to pay the Petitioner any compensation. In conclusion, the Court was satisfied that the Petitioner has established unfairly prejudicial conduct by the Majority Shareholders.

The Court ordered the Majority Shareholders to buy out the Petitioner’s shares in each of the Companies at a value to be fixed by the court. It is noteworthy that the Court tailored the remedies directing the Petitioner’s shareholding to be valued on the basis that all the shareholder loans were fully discharged shortly after September 1997. Otherwise, a buy-out order would be of no value to the Petitioner, as the companies are hopelessly insolvent now and but for the Majority Shareholder’s breach, the interest on the shareholder loans would not have accrued and the companies would not have become insolvent. Further, the Court ordered the Majority Shareholders to cause the Companies to pay remuneration to the Petitioner pursuant to the Shareholders’ Agreement.
Bankruptcy Cases

20. An IVA is not void on the ground that the debtor lacks mental capacity

*Fehily and another v Atkinson and another* [2016] EWHC 3069 (Ch)

HMRC issued a petition seeking bankruptcy order against Mrs Fehily (“the debtor”). Shortly before the petition was due to be heard, the debtor entered into an individual voluntary arrangements (“IVA”). But she failed to comply with the terms of the IVA. As a result, the supervisor of the IVA issued a bankruptcy petition against the debtor. Bankruptcy order was granted. The debtor applied for orders annulling the bankruptcy orders contending that the IVA was of no effect because she lacked the mental capacity to enter into an IVA.

The English High Court found that the debtor had failed to prove that she lacked capacity to enter into the IVA and even if she lacked such capacity, the IVA was binding on her. The Court was of the view that an IVA is closely analogous to a contract and gives rise to rights that have the characteristics of contractual rights. It takes effect as a contract between the debtor and all his or her creditors. Further, a contract entered into for consideration by a person without the mental capacity to understand the transaction is not void. A contract will be valid and binding unless the other contracting party was aware of her incapacity, or ought to have been aware, in which case the contract is voidable, and the incapacitated person has the right to rescind the contract: *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, and *Hart v O’Connor* [1985] AC 1000. By analogy, an IVA is not void on the grounds of the debtor’s mental capacity.

Accordingly, the court dismissed the appeal.

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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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