Dear Clients and Friends,

This quarterly newsletter is issued four times a year to update practitioners on important and noteworthy cases in the areas of corporate disputes and insolvency in Hong Kong, the UK and other common law countries. In this issue, we have highlighted:

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Our selection of cases and our analysis of them may not be exhaustive. Your comments and suggestions are always most welcome.

Best regards,

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Corporate Insolvency Cases

1. Is an arbitration agreement a bar to presentation of winding-up petition?
   The latest Hong Kong position

*Re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426

The Petitioner issued a petition to wind up Southwest Pacific Bauxite (HK) Ltd (the “Company”) relying on an unsatisfied statutory demand, which sought payment of US$259,700.48 said to arise under a management services agreement (the “Agreement”) entered into between the Petitioner and the Company. The Agreement however contains an arbitration clause, providing for arbitration by a sole arbitrator in accordance with the Hong Kong International Arbitration Centre Administered Arbitration Rules in the event of dispute. The Company applied to strike out the petition.

Harris J devoted a significant part of the judgment in summarizing the previous position of the law in Hong Kong, as embodied in the case of *Re Quicksilver Glorious Sun JV Ltd* [2014] HKLRD 759, in which it was held that in order for the company to defeat the winding-up petition, it must demonstrate that it has a *bona fide* defence on substantial grounds to the claim for the underlying debt. The petition will not be automatically stayed in favour of arbitration simply because the debt arises under an agreement which contains an arbitration clause. This is because winding-up proceedings were not considered an “action” within the meaning of section 20 of the Arbitration Ordinance (Cap 609).

Harris J noted that the position in Hong Kong is not in line with the position in other common law jurisdictions, such as UK and Singapore. For example, in the English case of *Salford Estates (No.2) Limited v Altomart Limited* [2014] EWCA Civ 1575, the English Court of Appeal took the view that while the mandatory stay provisions in the Arbitration Act 1996 had no application to a winding-up petition, the discretion of the court to wind up a company should be exercised, save in exceptional circumstances, consistently with the legislative intent embodied in the Arbitration Act 1996. For courts to exercise their discretion otherwise would inevitably encourage parties to seek to by-pass the arbitration agreement by presenting a winding-up petition. It would also encourage the creditor, through the draconian threat of liquidation, to apply pressure on the alleged debtors to pay up immediately. A winding-up petition should generally be stayed or dismissed so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is *bona fide* disputed on substantial grounds.

His Lordship noted that as in England, there is also a strong leaning in Hong Kong towards advancing a policy encouraging and supporting party autonomy in determining the means by
which a dispute arising between them should be resolved. The Companies Court should thus hold a party to his contractual bargain, namely to resolve any dispute by arbitration.

However, it should be noted that the presence of an arbitration clause does not oust the Companies Court’s jurisdiction. In exceptional circumstances, such as where assets of the company had gone missing, a creditor whose debt is disputed would be justified in issuing a petition before an arbitration had been concluded and apply for the appointment of provisional liquidators: see for example Jinpeng Group v Peak Hotels and Resorts (unreported, BVIHCMAP 2014/25 and 2015/0005, 8 December 2015).

Harris J concluded that he would thus depart from the approach in the earlier Hong Kong decisions and hold that the petition should generally be dismissed:-

1. if company disputes the debt relied on by the petitioner;

2. the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

3. the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affirmation in accordance with Rule 32 of the Companies (Winding Up) Rules (Cap 32H) demonstrating this.

In the present case, the Company disputes the debt and requires the dispute to be resolved in accordance with the arbitration clause contained in the Agreement. Accordingly, his Lordship ordered the winding-up petition be struck out.
2. **The Singapore High Court declines jurisdiction under its insolvency regime in favour of overlapping arbitral proceedings**

*Takenaka Corp v Tam Chee Chong and another* [2018] SGHC 51

Takenaka Corporation is the main contractor for various projects at the Singapore Changi Airport, including the provision of addition and alteration works for Terminal 1 ("the T1E project") and Terminal 4 ("the T4 project"). By way of subcontracts, Takenaka Corporation engaged Acesian Star (S) Pte Ltd ("the Company") for air-conditioning works under the T1E project and the T4 project.

Disputes arose between the parties in relation to projects. The Company applied for Judicial Management, which was ordered in January 2017. In Singapore, Judicial management is a method of debt restructuring where an independent judicial manager is appointed to manage the affairs, business and property of a company under financial distress.

In February 2017, Takenaka Corporation filed a proof of debt for an amount of about $27.8 million under both the T1E and T4 subcontracts against the Company, which was rejected by the Judicial Managers of the Company. Takenaka Corporation then sought an order for the setting aside of the rejection of the proof of debt ("OS 936/2017"). The Judicial Managers sought a stay of OS 936/2017 on the basis of an arbitration agreement between the Company and Takenaka Corporation.

Section 6(1) of the Singapore Arbitration Act permits any party to an arbitration agreement to apply for a stay to a court in which proceedings are instated in respect of a matter subject to the arbitration agreement. Under section 6(2), the Court may stay the proceedings if the Court is satisfied that (a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and (b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

It was not disputed that the dispute in OS 936/2017 fell within the scope of the arbitration agreement. However, Takenaka Corporation argued that it is necessary for the Court to exercise overall supervision and oversight of all proceedings and matters arising from the judicial management of the Company. The Company, on the contrary, argued that stay should not be denied simply because the litigation proceedings are linked to the judicial management as a whole, as holding otherwise would mean that any dispute in respect of a company undergoing judicial management would not be arbitrable.

The Singapore High Court was not persuaded that there was anything much to be gained by the Court's supervision and oversight if the matter proceeded instead of being stayed in favor of arbitration. Further, the Court found that not all aspects of the dispute between the parties
would be canvassed if the court proceedings were to be pursued. In contrast, the arbitration would cover the claim and counterclaim between the parties. Furthermore, the Court found that the Company is ready and willing to arbitrate. The possibility that the Company might not be good for any adverse cost order is not in itself a ground to deny a stay in favor of arbitration. In conclusion, the Court allowed the stay of OS 936/2017.
3. **Creditor who relies on a debt which is subject to a contingency which cannot arise if the company is insolvent has no *locus* to present the winding-up petition**

*Re Golden Gate International Kindergarten and Nursery Ltd* [2018] HKCFI 641

Mr. Wong Shui Fun, who is a shareholder of the Company, petitioned the winding-up of the Company on the grounds of insolvency. It is said that Mr. Wong is a contingent creditor for HK$1,612,605.90 being the total of a series of non-interest-bearing loans made to the Company. The petition is opposed by the estate of the other shareholder, Mr. Wayne Ko.

Pursuant to an agreement between Mr. Wong and Mr. Ko, it was agreed that the shareholders’ loans would not be repaid until the Company became profitable in anticipation of a new investor contributing finance to the Company’s business. Counsel for Mr. Wong therefore argued that Mr. Wong is a contingent creditor and may present a winding-up petition under section 179(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

As a matter of fact, the Company is clearly insolvent and has ceased business. Harris J took the view that a debt which is subject to a contingency which cannot arise if the company is insolvent cannot be admitted to proof: *Re Lehman Brothers International (Europe) (No 4)* [2017] UKSC 38. For the purpose of section 179(1), the petitioner is not a creditor at all. A creditor must be somebody whose debts can properly be admitted to proof even if the debt is valued at a nominal amount pending a final determination of its value, which may depend on the occurrence of a contingency. In order for the debt to be contingent, there must be some possibility of the contingency occurring. If necessarily it cannot if a winding-up order is made, there is no longer a contingency and, therefore, no longer a contingent debt.

Harris J concluded that the petitioner is not a contingent creditor or a creditor at all and, therefore, did not have locus to present the petition. The petition was accordingly dismissed.
4. English Court held that administrators who paid their fees and expenses ahead of other expense creditors were not guilty of misfeasance, because their fees were paid out of third party funding, which is not company property.

*MK Airlines (in liquidation)* [2018] EWHC 540 (Ch)

Michael Oldham (the “Appellant”) is a former joint administrator, with two others, of MK Airlines Ltd (“MKA”), which incurred substantial losses. Transatlantic Aviation Ltd (“TAA”), a prospective purchaser, entered into a deed of indemnity, under which TAA agreed to provide funding (of up to US$18 million) and to pay the administrators' fees and expenses (and agreed that it would not be subrogated to the administrators' expense claim). TAA also provided a further US$750,000 lump sum to pay certain pre-administration creditors. The funding was paid into MKA's bank accounts and was not segregated. The administrators drew some £854,000 from these accounts to pay their fees and expenses.

The administration was later passed to fresh administrators, and MKA went into liquidation (with debts of over US$100 million) after a few months' trading. The joint liquidators brought claims against the Appellant for misfeasance for having made payments out of company funds in breach of the priority rules in *rule 2.67(1)* of the IR 1986 (and without creditor approval), thus leaving an unacceptable shortfall to the administration expense creditors.

The registrar found the Appellant guilty of misfeasance and ordered him to repay all of the administrators' remuneration, some £854,000 (the other two administrators having entered into a settlement with the company). The Appellant appealed.

Sarah Worthington QC (Hon) sitting as deputy High Court judge held that administrators who paid their fees and expenses ahead of other expense creditors were not guilty of misfeasance. It is because their fees were paid out of post-administration third party funding, and such funding had been provided specifically for this purpose.

The High Court also found that even though the funding had not been segregated from other company funds, it was not company property. As Rule 2.67(1) of the Insolvency Rules 1986 applies only to expenses paid from company assets, it does not apply in the present case.
5. **Someone with a purely proprietary claim to assets held by or on behalf a company is not its “creditor”**

*Lo Kwong Hung and Others v The Registrar of Companies* HCMP 1520/2016

Jensen Limited ("the Company") had in 1999 through a mortgagee’s sale acquired certain land in Yuen Long ("the Land"). Subsequently, the Company found that Mr. Lo Kwong Hung and members of his family were in occupation of the Land and thus made demands to them to deliver vacant possession. In response, in late 2006, Mr. Lo and his brother ("the Applicants") instituted a civil action against the Company, asserting that they had been in possession of the Land adverse to the registered owners since 1967 and that they had acquired all the right, title and interests of and in the Land. They claimed a declaration to that effect. No acknowledgment of service or notice of intention to defend was entered by the Company. Before the Lo brothers could obtain judgment, on 14 September 2007, the Company was struck off the Companies Register pursuant to section 291 of the predecessor Companies Ordinance (Cap 32). The Lo brothers applied to have the Company's name restored to the Register in order to proceed with their action against it and obtain judgment.

Section 765 of the Companies Ordinance (Cap 6220) provides that where a company's name has been struck off the register under section 291 of the predecessor Ordinance, an application to the Court for the restoration of the company to the Companies Register may be made by a person who was a director or member or creditor of the company and feels aggrieved by the striking off. The issue is whether the Applicants can be considered creditor of the company.

The Applicants contended that they had been in sufficiently long adverse possession of the Land, as a result of which the Company's title was extinguished. The learned Judge considered, however, this does not give them any claim for anything (let alone money) from the Company. In other words, their adverse possession may entitle them to the declarations sought in the action, but it does not make the Company owe them anything or any obligation, pecuniary or otherwise.

The Judge concluded that the Applicants are not creditors of the Company within the meaning of section 765(1) of the Companies Ordinance (Cap 622). The application was thus dismissed.
6. English High Court considered the relevant principles in assessing a cross-claim against the petitioning creditor which is said to exceed the value of the uncontested petition debt

*LDX International Group LLP v Misra Ventures Limited* [2018] EWHC 275 (Ch)

LDX International Group LLP ("LDX") has applied for an injunction to restrain Misra Ventures Limited ("MVL") from presenting, advertising or otherwise publicizing a winding-up petition. The debt owed by LDX to MVL is not contested, nor is the statutory demand on which MVL relies. Rather, LDX requests and injunction because it says that it has a cross-claim against MVL which exceeds the value of the uncontested debt, and, hence the winding-up petition would be an abuse of process.

In assessing the cross-claim, the English High Court helpfully drew up several uncontroversial propositions as follows:-

1. In the absence of special circumstances, it will be appropriate to issue an injunction to prevent the presentation and advertisement of a winding-up petition where there is a genuine and serious cross-claim in an amount exceeding the petitioner’s debt. The cross-claim must be genuine and serious (or, in other words, one of substance).

2. If there is a genuine and serious cross-claim, the company should be allowed to establish its cross-claim in ordinary civil proceedings. The Companies Court is not the right forum in which to engage in a detailed examination of claim and counterclaim.

3. It is incumbent on the debtor company to demonstrate, with evidence, that the cross-claim is genuine and serious. Bare assertions will not suffice: there is a minimum evidential threshold.

4. It is not practical or appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side as a lengthy hearing is likely to result in a wasteful duplication of court time.

5. If there is any doubt about the petition debt or the cross-claim, the court should proceed cautiously because a winding-up order is a draconian measure which, if wrongly made, gives the company little commercial prospect of reviving itself.

6. Petitioning creditors must take a realistic view of whether the debtor company is likely to establish a genuine and substantial dispute.

7. A company is not prevented from raising a cross-claim simply because it could have raised or litigated the claim earlier, or because it has delayed in bringing proceedings on
the cross-claim. However, the court is entitled to take any delay into account in its assessment of whether the cross-claim is genuine and serious.

8. Solvency is not part of the assessment to be made as to whether a cross-claim is genuine and serious.

9. An injunction should not be conditional upon payment into court by the debtor.

Having reviewed the evidence, the Court took the view that LDX has established that the cross-claim is of substance – it is genuine and serious. The Court thus granted LDX’s application for an injunction to restrain MVL from presenting, advertising or otherwise publicizing a petition to wind up LDX.
7. Directors are entitled to be indemnified against expenses *bona fide* incurred by them in the due execution of their duties and hence become creditors of the company

*Lau Reimer Mary Jean v Ting Wai Monastery Ltd* HCCW 286/2017

Relying on an unsatisfied statutory demand, the Petitioner petitioned the winding-up of Ting Wai Monastery Ltd (“the Company”) on the ground of insolvency. The Company is a charitable company formed to promote and support the Buddhist faith and to do so through the operation of a monastery known as Ting Wai Monastery.

Evidence shows that the way in which the Company has been managed in terms of corporate governance since its incorporation in 1963 has been unsatisfactory and as a consequence, there appears to be no reliable records, which demonstrate that anybody has been properly appointed as a member or a director of the Company.

There is no dispute that the Petitioner made a total payment of over HK$2 million to the Government to settle a demand note issued by the Buildings Department. The issue is whether the Petitioner has a right to be reimbursed the amount that she has paid to the Government and thus has *locus* to present the petition.

Harris J considered that at the time of the payment, the Petitioner was clearly proceeding on the basis that she was a director and that the payment was made to settle a debt owed by the Company and that it was in the Company’s best interest that this took place in order to avoid further interest accruing on the liability to the Government. Citing the decision of the English Court of Appeal in *Re German Mining Co* (1854) 4 De GM & G 19; 43 ER 415, Harris J held that directors stand in some degree in the position of trustees and all trustees are entitled to be indemnified against expenses *bona fide* incurred by them in the due execution of their trust. Accordingly, the Petitioner is a creditor of the Company and has *locus* to present the petition.

Further, Harris J considered that given the entirely unsatisfactory state of the records of the Company and the uncertainty about its membership and directors, it is desirable that provisional liquidators be appointed so that they can immediately proceed to take charge of the Company’s affairs. In conclusion, the Court made the normal winding-up order and appointed provisional liquidators.
8. Fully-paid up shareholder held as contributories and are entitled to inspect proof of debt in compulsorily wound up companies if it can show legitimate interest in doing so

*Burnden Group Holdings Ltd v Hunt* [2018] EWHC 463 (Ch)

Burnden Holdings (UK) Limited (“The Company”) was compulsorily wound up. All the issued ordinary shares in the Company were registered in the name of Burnden Group Holdings Limited (“Group”). Stephen Hunt (“Mr Hunt”) was appointed liquidator of the Company. The question for determination on this appeal case is whether the District Judge erred in law in deciding that Group (as sole shareholder in the Company) was entitled to inspect all proofs of debt in the liquidation of the Company. The answer to that question involves deciding two issues:-

- Did Group have standing to apply to inspect the proofs?
- If so, did the judge properly order inspection?

In deciding the two issues, the High Court considered whether a holder of fully paid up shares is included as a "contributory" in the context of the Insolvency Act 1986 (“IA 1986”) and the Insolvency Rules 1986 (“IR 1986”), and whether a contributory had any standing to challenge a liquidator's decision not to allow the contributory to inspect proofs of debt submitted in the company's liquidation.

Norris J of the High Court held that references to a contributory in the IA 1986 and the IR 1986 are generally to be taken in a broad sense. They include not just holders of partly paid up shares in a company but also the holders of fully paid up shares. While Section 79 of the IA 1986 defines contributories as members liable to contribute to the company's assets in liquidation, Section 74 imposes theoretical liability to contribute on every past and present member (so that they are all "contributories"), but quantifies the liability as nil where a member only holds fully paid up shares. Norris J held that these two sections have to be read together.

This meant that a parent company had standing to apply to inspect proofs of debt submitted in its subsidiary's liquidation, under rule 4.79 of the IR 1986. However, on the facts of the case, Norris J held that the Group did not have a legitimate interest in seeking to overturn Mr. Hunt's decision to refuse it to inspect of the proofs. The Group had an entirely speculative interest in any distributable surplus from the Company's liquidation, and had not provided any evidence itself that a surplus was likely. Accordingly, the Group had not discharged the burden on it of establishing that it had a legitimate interest in the relief sought.
9. Supreme Court of UK – No limitation period applies where directors misappropriated company assets

*Burnden Holdings (UK) Limited (Respondent) v Fielding and another (Appellants)* [2018] UKSC14

The Claimant was a holding company with a number of trading subsidiaries, one of which is Vital Energi Utilities Ltd (“Vital”). The Defendants were the directors of the Claimant at all material times. As part of a larger scheme, the Defendants distributed the Claimant’s shareholding in Vital to a company called, BHU Holdings Ltd (“BHUH”), in which they were majority shareholders and directors.

More than six years after the distribution, the Claimant, by its liquidator, issued proceedings against the Defendants for the unlawful distribution. The Defendants applied for summary judgment on the ground that the claim was outside of the six-year limitation period set out in section 21(3) of the Limitation Act 1980 in respect of an action by a beneficiary for breach of trust.

For the purpose of the present appeal, it was assumed that the distribution was unlawful. Further, it was assumed that the Defendants’ participation in it amounted to a breach of their fiduciary duties to the Claimant; the distribution was one from which they derived a substantial benefit.

Under section 21(3) of the Limitation Act, a six-year limitation period applies in respect of an action by a beneficiary for breach of trust. However, section 21(1)(b) provides that no period of limitation shall apply to an action by a beneficiary under a trust, being an action to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.”

The Court has to decide whether the 6-year limitation applies in the present appeal. Section 21 of the English Limitation Act is equivalent to section 20 of the Hong Kong Limitation Ordinance (Cap 347).

Counsel for the Defendants argued that section 21(1)(b) is inapplicable because the misappropriated property has remained legally and beneficially owned by corporate vehicles throughout, rather than becoming vested in law or in equity in the defaulting directors. The corporate vehicles are not solely (though by majority) owned by the Defendants.

The Court did not find such arguments attractive. It was held that in the context of company property, directors are to be treated as being in possession of the trust property from the outset, because the directors are the fiduciary stewards of the company’s property. If they have misappropriated the property before action is brought by the company (which is the
beneficiary for this purpose) to recover it, they may or may not by that time still be in possession of it. But if their misappropriation of the company’s property amounts to a conversion of it to their own use, they will still necessarily have previously received it, by virtue of being the fiduciary stewards of it as directors.

In the present case, the Court found that the Defendant directors converted the Claimant’s shareholding in Vital when they procured or participated in the unlawful distribution of it to BHUH. It was a conversion because, if the distribution was unlawful, it was a taking of the company's property in defiance of the company's rights of ownership of it. It was a conversion of the shareholding to their own use because of the economic benefit which they stood to derive from being the majority shareholders in the company to which the distribution was made. By the time of that conversion the Defendants had previously received the property because, as directors of the Claimant, they had been its fiduciary stewards from the outset. Accordingly, the Court held that section 21(1)(b) applies and the action is not time-barred.

The Court also opined that the Claimant’s reliance on section 32 of the Limitation Act 1980 to postpone limitation period in case of fraud, concealment or mistake is an arguable point in this case. This point was not pleaded in the original claim hence the Court did not delve into it. In any event, when issues under section 32 arise, the case would not be one suitable for summary determination.
10. There is no general rule that the court will not hear a party in contempt. The proper approach is to ask whether the interests of justice in the particular case are best served by hearing the party in contempt or refusing to do so.

*China Medical Technologies, Inc. (in liquidation) v Samson Tsang Tak Yung* [2018] HKCA 112

China Medical Technologies, Inc. ("the Company") was incorporated in the Cayman Islands. It was wound up in the Cayman Islands in July 2012. Acting through its Joint Official Liquidators appointed by the Cayman Islands courts, the Company petitioned for its own winding-up in Hong Kong. The petition was opposed by Mr. Samson Tsang Tak Yung ("Mr. Tsang"), a contributory of the Company.

On 1 September 2014, Harris J ordered that the Company be wound up in Hong Kong. Mr. Tsang lodged a Notice of Appeal against Harris J’s order winding up the Company. The Company sought to strike out Mr. Tsang’s Notice of Appeal, contending, *inter alia*, that Mr. Tsang should not be heard in relation to the appeal since he fails to comply with, and remains in contempt of, an order made by Harris J on 15 September 2014 requiring him to attend court to be examined in relation to his knowledge of the affairs of the Company (the “section 221 Order”).

The Court held that the proper approach to the question of whether or not a party in contempt should be heard by the court is to ask whether the interests of justice in the particular case are best served by hearing the party in contempt or refusing to do so, rather than to seek to apply a general rule that the court will not hear a party in contempt save in specified exceptional circumstances: *Motorola Credit Corporation v Uzan [No 2]* [2004] 1 WLR 113.

Here, Mr. Tsang is appealing against the winding-up order in respect of the Company, absent which the section 221 Order in respect of which he is said to be in contempt could not have been made. In other words, he is saying that the section 221 Order should never have been made, as the Company should not have been wound up in the first place. In the circumstances, the Court took the view that the interests of justice do not require that he should be shut out from prosecuting his appeal against the winding-up order. Accordingly, the Court dismissed the Company’s strike out application.
11. English High Court ordered the identity of the funders to be disclosed in a litigation as early as in the stage of application for security for costs

Re Hellas Telecommunications (Luxembourg) [2017] EWHC 3465 (Ch)

The applicants, who are the defendants in a litigation brought by the liquidators of Hellas Communications (Luxembourg), applied for an order for disclosure of the identity of the funders for the purpose of determining whether to make an application for security for costs. The applicants relied on the English Civil Procedure Rules (“CPR”) 25.14(2)(b), which provides that the English court may make an order for security for costs against a person who has contributed or agreed to contribute to the claimant’s costs in return for a share for any money or property which the claimant may recover in the proceedings.

The Court referred to Wall v Royal Bank of Scotland Plc [2017] 4 WLR 2 and held that it has an inherent or implied jurisdiction to order disclosure of the identity of the third party funders in order to give effect to the power to grant security for costs under CPR 25.14. Such jurisdiction exists notwithstanding that there is no pre-existing costs order against any party in the proceedings. In particular, the Court considered that so long as an application for security for costs is pursued on proper grounds and has a serious prospect of success, as opposed to being speculative or fanciful, then it is a material prejudice to deprive an applicant of the opportunity to make and pursue that application by keeping it out of knowing the identity of the proper respondent.

In light of all the evidence, the Court was of the view that for the pursuit of the litigation, the liquidators were reliant upon third party funders, including but not limited to the creditors of the company in liquidation. Furthermore, the Court considered that the application for security for costs would be properly brought with a realistic prospect of success and that it is not a speculative or fanciful application or one being pursued for improper tactical reasons. As such, the Court was prepared to order disclosure of both the identity of the funders and the terms on which the funding has been provided to the liquidators. In determining the terms upon which disclosure should be made, the Court held that in exercising its inherent or implied power, the Court can and should craft the disclosure order so as to ensure that the legitimate interest in protecting the confidentiality attaching to both the identity of the funders and the terms of the funding arrangement are preserved as far as possible. As such, the Court ordered the disclosure only be made to named individuals and required them to undertake that the information will not be disclosed to any third parties or used other than for the purpose of determining whether to make an application for security for costs.

It is noted that Hong Kong does not have the equivalent of CPR25.14. Hence a similar application in Hong Kong may not have the same results. Yet this case illustrates that in considering application to disclose funding arrangement, the court will weigh the balancing factors of protecting the claimant’s privilege and the prejudice to the defendant.
Cross-border Insolvency Cases

12. Recognition order granted to foreign insolvent liquidation commenced by a shareholders’ resolution

*Re The Joint Liquidators of Supreme Tycoon Limited (In Liquidation in the British Virgin Islands)* [2018] HKCU 492

Supreme Tycoon Limited (the “Company”) is a company incorporated in the British Virgin Islands (“BVI”). By a written shareholders’ resolution dated 6 September 2016, the Company was put into voluntary winding-up. The joint liquidators (“Liquidators”) of the Company would like to obtain information, books and records about the Company’s affairs from various third parties and there might also be assets in Hong Kong to recover. Hence, the Liquidators applied to the Court of First Instance for recognition and assistance. The letter of request was issued by the East Caribbean Supreme Court on 17 March 2017. The Liquidators argued that the Company’s liquidation in BVI is in all respects akin to a compulsory winding-up, although its entry route was via a shareholders’ resolution.

The common law power of assistance, Harris J explained, exists for the purpose of surmounting the practical problems posed for a worldwide winding-up of a company’s affairs by the territorial limits of the powers of each country’s court. The rationale underlying it is modified universalism. Further, while there is no doubt a difference between compulsory and voluntary winding-up in terms of the level of court supervision, the difference is one of degree, not of kind. In voluntary winding up, the court is in the background to be referred to if the necessity should arise.

Harris J considered that the main issue for cross-border insolvency assistance is not whether the foreign insolvency officeholder is or is not an officer of the foreign court, but whether the foreign proceeding is collective in nature, in the sense that it is “a process of collective enforcement of debts for the benefit of the general body of creditors”. The mere fact of a foreign liquidation being a voluntary liquidation is no bar to the Hong Kong court recognizing and assisting that liquidation under the principle of modified universalism. However, if the foreign liquidation is a solvent liquidation, it would not fall within the principle of modified universalism.

The Company’s liquidation in the BVI was held to be a collective insolvency proceeding. In conclusion, Harris J held that there is no bar to Hong Kong court recognising and assisting the Liquidators as joint liquidators of the Company, despite the fact that the Company’s liquidation was commenced by a shareholders’ resolution.
13. **English Court does not have jurisdiction under the Cross-Border Insolvency Regulations 2006 to permanently stay legal proceedings or enforcement action in respect of English law debt obligations owed by a foreign debtor**

*Bakhshiyeva v Sberbank of Russia and others* [2018] EWHC 59 (Ch)

OJSC International Bank of Azerbaijan (“IBA”), an Azerbaijani bank, went into restructuring proceedings in Azerbaijan in mid-2017, during which it proposed a restructuring plan to its creditors. While the restructuring plan was being negotiated, IBA's foreign representative sought and obtained an order from the English High Court recognizing the restructuring proceedings as foreign main proceedings under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (“CBIR 2006”). The High Court also granted discretionary relief under article 21 of the CBIR 2006 in the form of the administration moratorium, therefore including a stay on the enforcement of security.

The restructuring plan was agreed by a large majority of the IBA's creditors and became binding on all creditors to which it applied under Azeri law. However, a small percentage of IBA's creditors, whose debt obligations were governed by English law, objected to the restructuring plan and did not agree that they were bound by it as a matter of Azeri law. Those creditors sought to enforce their English law debt against the English assets of IBA once the stay granted by the English court lapsed. It was common ground, that, unless extended, the stay would lapse when the Azerbaijani restructuring proceedings ended. The foreign representative accordingly sought an order from the High Court to extend indefinitely the stay that the court had previously granted under the CBIR 2006, and a further provision that the court would not lift the stay to allow the objecting creditors to enforce their debt. The objecting creditors both opposed the application of IBA and made a counter application for the existing stay to be lifted to allow them to enforce their debt.

Hildyard J of the High Court held that the Court does not have jurisdiction under the CBIR 2006 to permanently stay legal proceedings or enforcement action in respect of English law debt obligations owed by a foreign debtor. To do so would breach the rule in *Antony Gibbs and sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 that English legal obligations can only be discharged under English law, unless the creditor otherwise agrees. Hildyard J considered that if the Court ordered a permanent stay on the enforcement of such obligations (to assist the debtor's foreign restructuring proceedings) it was effectively giving effect to a foreign law discharge of the English debts. Hildyard J also observed that the Court's powers under the CBIR 2006 were purely procedural, and to grant a permanent stay would be to interfere substantively with parties' rights and obligations. Such relief would never be "appropriate" as required by the relevant provisions of the CBIR 2006.
14. Court of Appeal confirmed that in an appropriate case, the failure to satisfy the third core requirement would not be fatal to the making of a winding-up order, if the company’s connection with Hong Kong is sufficiently strong and the benefit of making a Hong Kong winding-up order is sufficiently significant

*Re China Medical Technologies, Inc. (in liquidation) v Samson Tsang Tak Yung* [2018] HKCA 111

China Medical Technologies, Inc. ("the Company"), incorporated in the Cayman Islands, was not registered in Hong Kong. It was wound up in the Cayman Islands in July 2012. Acting through its Joint Official Liquidators appointed by the Cayman Islands courts, the Company petitioned for its own winding-up in Hong Kong. When the petition was presented there was only one Hong Kong creditor, with a debt of just over US$4,000. The petition was opposed by Mr. Samson Tsang Tak Yung ("Mr. Tsang"), a contributory of the Company.

In winding up a foreign company, there are three so-called core requirements as laid down in *Re Real Estate Development Company* [1991] BCLC 210, namely:-

1. that there must be a sufficient connection with Hong Kong
2. that there must be a reasonable possibility if a winding-up order is made, of benefit to those applying for the winding-up order; and
3. one or more persons interests in the distribution of the assets of the company must be persons over whom the court can exercise a jurisdiction.

The three core requirements are held to go to the exercise of discretion rather than the jurisdiction to wind up a foreign company. Harris J considered that there is sufficient connection with Hong Kong, which justified the making of a winding-up order, notwithstanding that the third core requirement was not satisfied. Mr. Tsang appealed against Harris J’s order winding-up the Company, arguing, *inter alia*, that the Judge had erred in principle in winding up the Company when the third core requirement had not been satisfied.

The Court of Appeal made it clear that in light of the judgment of the Court of Final Appeal in *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501, the three core requirements go to the court’s discretion rather than jurisdiction. In determining whether the Court should exercise its discretion to wind up an overseas company, the overall inquiry is directed at the question of whether the connections with Hong Kong are such as to justify the making of a winding up order over a foreign company, thereby putting in motion the full machinery of winding up in respect of it. The three core requirements are aspects of the enquiry into the sufficiency of the connection between the company and Hong Kong.
The Court of Appeal agreed with Harris J that in an appropriate case, the failure to satisfy the third condition would not be fatal to the making of a winding-up order, if the company’s connection with Hong Kong is sufficiently strong and the benefit of making a Hong Kong winding-up order is sufficiently significant. In the present case, even though the Company has neither significant assets nor creditors in Hong Kong, there may still be good reason for thinking that it would be desirable for there to be a winding up in Hong Kong. There are significant inquiries to be made which are centred on the Company’s activities in Hong Kong, which will involve the examination of a potentially large number of persons or entities in Hong Kong, that may lead to the identification of avenues of recovery (for example by the bringing of misfeasance claims) for the benefit of the Company’s creditors. The appeal was accordingly dismissed.
15. In assisting foreign insolvency officeholders, a balance has to be drawn between the foreign insolvency officeholders’ need for convenience and the need for supervision which the creditors may expect

Re The Joint Provisional Liquidators of China Lumena New Materials Corp (In Provisional Liquidation) HCMP 494/2017

The applicants were appointed Provisional Liquidators of China Lumena New Materials Corp (“the Company”) by the Grand Court of the Cayman Islands. In taking control of the Company’s bank accounts in Hong Kong, the Provisional Liquidators encountered some difficulties with some banks wanting to see a Hong Kong court order before they would be prepared to comply with the Provisional Liquidators’ request for a transfer of the Company’s credit balances. Accordingly, the Provisional Liquidators applied to the Cayman Court to issue a letter of request for recognition of the Provisional Liquidators’ appointment on terms that would allow them to collect in the Company’s assets.

Referring to his own decision in Bay Capital Asia Fund, LP v DBS Bank (Hong Kong) Ltd [2016] HKEC 2377, Harris J reiterated that where foreign insolvency officeholders are appointed by the court in the country of incorporation of the company, their ability to obtain documents relating to the company’s bank accounts located in Hong Kong is generally not dependent on getting a prior Hong Kong court order:

“If a bank receives a request from liquidators of a company which has an account with them, once it is satisfied, which should be straightforward, that the liquidators have been properly appointed by the court of the place of the company’s incorporation they will hand over documents to which the directors of the company would have been entitled.”

However, if the foreign insolvency officeholders would like to deal with assets located in Hong Kong, they should obtain a prior Hong Kong court order. Therefore, in relation to the transfer of credit balances in Hong Kong, the foreign insolvency officeholders should make an application to the court for an order authorizing such transfer.

The Provisional Liquidators sought to argue that if the provisional liquidators could request banks to provide bank account documents without a prior Hong Kong court order on the basis that the directors of the Company would be entitled to obtain the documents from the banks, then logically the provisional liquidators could also request the banks to transfer the credit balances without a prior Hong Kong court order because the directors of the Company would be entitled to make the same request of the banks.

Pursuant to such logic, foreign insolvency officeholders appointed in the country of incorporation would be able to do everything in Hong Kong that are within the powers of the
company’s directors without a prior Hong Kong court order. Harris J took the view that such argument would be going too far. A balance has to be drawn between the foreign insolvency officeholders’ need for convenience and the need for supervision which the creditors may expect. Therefore, a distinction does have to be drawn between the foreign insolvency officeholders’ information needs and their ability to deal with assets in Hong Kong.
16. Singapore High Court declined to accord full recognition of insolvency proceedings commenced in the United States, on the basis that the foreign insolvency proceedings did not comply with a Singapore court order

_Re Zetta Jet Pte Ltd and Others_ [2018] SGHC 16

Zetta Jet Pte Ltd ("Zetta Jet Singapore") is a company incorporated in Singapore and Zetta Jet USA, Inc ("Zetta Jet USA") is a company incorporated in California, USA and is wholly owned by Zetta Jet Singapore (collectively the “Zetta Entities”). On 15 September 2017, Chapter 11 bankruptcy proceedings were filed against the Zetta Entities in the US Bankruptcy Court and a worldwide automatic moratorium in the US came into effect. On 18 September 2017, a shareholder of Zetta Jet Singapore, namely Asia Aviation Holdings Pte Ltd (“AAH”), commenced proceedings in Singapore, alleging that the Chapter 11 proceedings were in breach of the Shareholders’ Agreement. On 19 September 2017, the High Court of Singapore granted an injunction enjoining the relevant parties from carrying out any further steps in and relating to the bankruptcy filings relating to the Zetta Entities in the US Bankruptcy Court.

Notwithstanding the Singapore injunction, proceedings in the US Bankruptcy Court continued. Subsequently, Trustee of the Zetta Entities in the US bankruptcy proceedings was appointed. The Trustee applied for his recognition in Singapore. The application was however was opposed by AAH.

Under Article 6 of the Singapore Model Law, a Singapore court may refuse recognition if such recognition would be “contrary” to the public policy of Singapore. The Court noted that the Singapore injunction prohibited the pursuit of the very proceedings that were the basis of the Trustee’s appointment. Orders issued by a court are to be complied with. Those who do not comply cannot generally seek the assistance of the courts unless the non-compliance is rectified or purged. The Court further held that while its power to refuse recognition under Article 6 of the Singapore Model Law is discretionary, it would be rare for the court not to refuse recognition where there has been non-compliance with a Singapore court order.

However, the Court noted that if recognition is denied to the Trustee, arguably no one else can come in to try to set the Singapore injunction aside. As such, the Court granted limited recognition to the Trustee only for the purpose of applying to set aside or appeal the Singapore injunction, or matters directly related to such applications, such as extensions of time.
Restructuring Cases

17. Court held that the reliance on *Re Legend* to discharge the provisional liquidators on the basis that the power of the provisional liquidators came to an end when the restructuring exercise became their only purpose is misconceived

*Re China Solar Energy Holdings Ltd* [2018] HKCFI 555

China Solar Energy Holdings Ltd ("the Company") is incorporated in Bermuda and listed on the Hong Kong Stock Exchange. In March 2015, Crown Master International Trading Co Ltd presented a winding-up petition against the Company due to its inability to answer a statutory demand. In August 2015, on the Company’s application, the Company was placed into provisional liquidation and the provisional liquidators ("PLs") were appointed. Subsequently, Ankang Ltd ("Ankang") was substituted as the Petitioner in place of Crown Master.

Pursuant to the terms of the order of appointment, the PLs were granted a range of powers, including the power for the purpose of restructuring the Company. The PLs intended to procure a restructuring and Ankang was one of the potential investors in discussions with the PLs to explore how the Company could be restructured. The PLs however subsequently entered into an exclusivity agreement with another investor, Happy Fountain Limited ("Happy Fountain") to progress the potential restructuring. The PL’s current primary task is to complete the restructuring exercise, which if carried out successfully, will render all the Company’s creditors be paid in full. Otherwise, the Company’s creditors are unlikely to obtain any substantial recovery. Ankang is now against the Company’s restructuring deal being conducted with Happy Fountain. Ankang contended that the PLs should be discharged, relying on the decision in *Re Legend International Resorts Ltd* [2006] 2 HKLRD192, in which it was held that provisional liquidation cannot be permitted when the sole or primary function of the provisional liquidators is to carry out business or debt restructuring. Provisional liquidation must be for the purpose of a winding-up, and not for the purpose of avoiding a winding-up.

The Court held that it is well established that where the circumstances warrant the appointment of provisional liquidators, the provisional liquidators may be granted powers to explore and facilitate a restructuring of the company. In fact, restructuring is in many circumstances consistent with the provisional liquidator’s duty to preserve assets, because a reduction of the company’s liabilities is the correlative of the protection of its assets.

Further, the Court took the view that the Court of Appeal in *Re Legend* was merely emphasizing that, where the matters associated with a winding-up are absent, in particular where the company’s assets are not in jeopardy, it would not be appropriate to order a provisional liquidation, despite the company’s general need for a restructuring. The Court of
Appeal was certainly not saying that, because a successful restructuring would obviate the need for a winding-up, restructuring must be incompatible with provisional liquidation. Forcing the PLs to jettison the restructuring midway could undo their previous efforts, wasting the associated costs to the detriment of the creditors. The law could not be intended to prescribe such a perverse result. In fact, terminating the PLs’ appointment in the manner suggested by Ankang would be inconsistent with the overarching purposes of section 193 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap 32), namely, that the company’s assets are protected and their value maintained.

The Court concluded that Ankang’s reliance on *Re Legend* to discharge the PLs and derail their restructuring endeavors is misconceived in principle. The application to discharge the PLs was thus dismissed.
18. Liquidators are duty bound to account strictly for the work for which they seek to be paid, and to produce relevant documents and information supporting their claim

*Re The Grande Holdings Ltd* HCCW 177/2011

In the taxation of their fees, Master Hui ordered the former joint and several provisional liquidators ("Provisional Liquidators") of The Grande Holdings Limited (the "Company") to produce certain documents (the "Discovery Order"). The Provisional Liquidators appealed.

The taxation has come about from the restructuring of the Company. In total, the Provisional Liquidators and their agents have incurred at least HK$166.5 million in costs, of which HK$158.7 million has already been paid and received. The Provisional Liquidators contended, among other things, that compliance with the Discovery Order will be very time consuming (they estimate that the documents consist of approximately 90 conventional 3-inch box files) and expensive (they estimate the costs of providing the documents at approximately HK$2 million).

It is well established that provisional liquidators have a duty to account to those whose assets they were appointed to protect and justify the remuneration they seek to be paid: *Mirror Group Newspapers Plc v Maxwell & Others* [1998] BCC 324; *Re Peregrine Investments Holdings Limited* [1998] 2 HKLRD 670. This, in the view of Harris J, allows creditors or beneficiaries to require the provisional liquidators to account strictly for the work for which they seek to be paid, and to produce relevant documents and information supporting their claim. Further, his Lordship noted that the present taxation is adversarial. If the Company wishes to scrutinize the bill item by item, and if they challenge particular items or parts of particular items it will be necessary to consider the contemporaneous documents and the taxing Master will need to have regard to their content when determining each objection. Lastly, Harris J considered that given the high level of fees involved, the Discovery Order is not oppressive and is not out of proportion. Accordingly, the appeal was dismissed.
Corporate Disputes Cases

19. Removal of information from the Companies Registry is to be ordered only if the applicant can show that the continuing presence of the incorrect information will cause material damage to the company and that the company’s interest in removing the information outweighs the interest of other persons in the information continuing to appear on the register.

Cheer Holdings Ltd and Another v Cheung Kin Wah [2018] HKCFI 404

The Applicants have been operating 4 care homes, including what was known the Bridge of Rehab Home (康橋之家). The respondent, Mr. Cheung, had been the warden of the Bridge of Rehab Home. He was arrested and charged for sexual offences committed on female inmates who had mental disabilities. Though the charges against Mr. Cheung were eventually dropped, the matter provoked public outcry and caused the certificate in relation to the Bridge of Rehab Home to be revoked.

After the charges were dropped, Mr. Cheung did a series of acts culminating in the removal of the then directors of the Applicants and his appointment as sole director of the Applicants. The Applicants applied for an order that statutory forms filed by Mr. Cheung showing that he was appointed as sole director of each of the Applicants (“the Impugned Forms”) be removed from the Companies Registry.

The Court found that the appointment was made as a result of a meeting invalidly convened and the filing of the Impugned Forms was done without the Applicants’ authority. The issue is whether the Impugned Forms should be removed pursuant to section 42(4) of the Companies Ordinance (Cap 622).

Section 42(1) empower the Court to make an order, directing the Registrar to rectify any information on the Companies Register or to remove any information from it if the Court is satisfied that the information derives from anything that is invalid or ineffective has been done without the company’s authority.

The Court observed that rectification is the ordinary remedy. Removal is to be ordered only if the applicant can show that the continuing presence of the incorrect information will cause material damage to the company and that the company’s interest in removing the information outweighs the interest of other persons in the information continuing to appear on the register. The fact that the information is incorrect, or has been filed without proper authority of the company in question, is not in itself a sufficient reason for removing it as opposed to rectifying it.
The Court is satisfied that the continuing presence of information as to Mr. Cheung’s directorship on the Companies Register will cause material damage to the Applicants financially and irreparable damage in terms of reputation. The public’s confidence in the responsible running of a care home for the mentally disabled was shattered upon the arrest of Mr. Cheung. The risk of damage to the reputation of the Applicants was and is real. Also, if the certificate for a care home is not renewed, the prejudice to its inmates in having to be relocated is also real. In conclusion, the Court considered that the Applicants’ interest in removing the information outweighs the interest of Mr. Cheung in the information continuing to appear in the Companies Register. Accordingly, the Court ordered the Impugned Forms be removed from the Companies Registry.
20. **Singapore Court of Appeal confirmed that where an exit mechanism is available, applicant would be unable to establish the unfairness required for the court to exercise its “just and equitable” jurisdiction**

*Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] SGCA 11

In the July issue of ONC Corporate Disputes and Insolvency Quarterly 2017, we discussed the Singapore High Court decision in *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other matters* [2017] SGHC 84, in which the Singapore High Court refused to order the winding-up of the companies in question on just and equitable ground as the companies’ articles of association allowed the plaintiff shareholders to exit at fair value for their shares. Please refer to our [previous quarterly](#) for a summary of the factual background of the case. The plaintiffs appealed against the trial judge’s decision.

On appeal, the Court of Appeal confirmed that in situations of deadlock between the shareholders of a company, unfairness stems from the shareholders’ inability to exit rather than the deadlock *per se*. It therefore follows that in the usual case, having a mechanism for exit negates the unfairness required to justify winding up on the just and equitable ground. The Court of Appeal agreed that the approach in *Ting Shwu Ping (Administrator of the estate of Chong Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 should be followed, i.e. if the company’s articles provide an exit mechanism, that mechanism should generally be adopted, unless:-

(a) the disaffected shareholder has a legitimate expectation that he is entitled to have his shares valued in some way other than that provided in the articles; or

(b) there is bad faith or plain impropriety in the respondents’ conduct (e.g. by conduct which has affected the value of the shares); or

(c) the articles provide for some arbitrary or artificial method of valuation.

In the present case, it was not disputed that the shareholder of the respondent companies were mired in a deadlock. However, given that the articles of the respondent companies allowed a shareholder to “exit” the respective companies, there was no situation of “lock-in” on which a finding of unfairness could be made. The fact that the plaintiffs did not wish to sell but instead wanted to buy out the other shareholder’s interest is irrelevant.

The inquiry of who should exit the company would only arise after the court finds that it has jurisdiction in the matter. Where an exit mechanism existed in the articles of association, it could not be said that any party was unable to exit, no unfairness could arise, and the court would not need to consider “who is to stay and who is to go”, because it simply had no jurisdiction to decide on the matter. Accordingly, the Court of Appeal dismissed the appeal.
21. Director who caused the company to oppose application for derivative action may be held personally liable for costs if the opposition is found to be unjustified

_Tang Siu Choi v Man Lung Textiles Ltd and Another_ [2018] HKCFI 125

The applicant, Madam Tang Siu Choi, applied under section 732(1) of the Companies Ordinance (Cap 622) for leave to commence a statutory derivative action in the name of the 1st Respondent, Man Lung Textiles Limited ("the Company"), against its director, the 2nd Respondent, Mr. Tam Tak Yam ("Tam").

Having considered all the materials, the Court was satisfied that there is a serious question to be tried and it appears to be in the interest of the Company that leave be granted. The Court found that Tam’s opposition was unjustified.

In relation to costs, the applicant sought “costs of and incidental to the application and the derivative action be indemnified by the Company out of its assets or, alternatively, be paid by Tam personally on an indemnity basis. Given Tam’s unjustified opposition, the Court took the view that such costs should not be paid out of the Company’s assets, because doing so will only serve to encourage unjustified opposition by the intended defendant to the proposed derivative action in the future. Thus, the Court ordered that the costs of this application be borne by Tam. With regard to the costs of the derivative action, the Court directed to defer the matter to a subsequent occasion when the outcome of the statutory derivative action is known or when the position is clearer: _Re Grand Field Group Holdings Ltd_ (unreported, HCMP 1059/2008, 26 February 2009)
22. There is no general rule in cases involving companies that are not quasi-partnership as to whether discount should be applied in the valuation of the minority shares. The court must look at all the facts and circumstances

*Thio Syn Kym Wendy v Thio Syn Pyn* [2018] SGHC 54

The case concerns a family company called Malaysia Dairy Industries Pte Ltd (“MDI”). On the plaintiffs’ minority oppression claim against the 1st and 2nd defendants, the Court ordered a buyout of the plaintiff’s shares in MDI. The parties were however unable to agree on whether a discount (including discount for lack of control and discount for lack of marketability) should be applied in the valuation of the plaintiffs’ minority shares and therefore sought court’s determination on this issue. Though MDI is a family company, the Judge found that it was not operated on the basis of a relationship of mutual trust and confidence. Hence, MDI was neither quasi-partnership nor companies akin to quasi-partnerships.

The Singapore High Court noted that the legal principles on the applicability of minority discounts are not fully settled. Where the company in question is a quasi-partnership, there is a strong presumption that no discount should be applied. This presumption may be displaced in special circumstances, such as when the minority shareholder has acted in such a manner as to deserve his exclusion from the company or has contributed to the oppressive conduct of the majority: *In re Bird Precision Bellows Ltd* [1984] 1 Ch 419. However, the legal position is far less certain as to whether the converse is true such that there would be a presumption of a discount for shares in companies that are not quasi-partnerships.

The Court took the view that there is no general rule in cases involving companies that are not quasi-partnerships. Instead, the court must look at all the facts and circumstances when determining whether a discount for lack of control should be applied in any case. For instance, the court will be more inclined to order no discount where the majority’s oppressive conduct was directed at worsening the position of the minority as shareholders so as to compel them to sell out, or entirely responsible for precipitating the breakdown in the parties’ relationship. The court will also consider relevant background facts such as whether the minority had originally purchased their shares at a discounted price to reflect their minority status, or for full value. Ultimately, the broad task for the courts is to ensure that the forced buyout is fair, just and equitable for the parties in all the circumstances.

In relation to whether to apply a discount for non-marketability, the Court held that this question should ordinarily be left to be determined by the independent valuer in his expertise.

In the present case, the Court found that none of the parties had behaved in a manner that would militate strongly in favour of either outcome. Although the Court found oppressive
conduct on the part of the 1\textsuperscript{st} and 2\textsuperscript{nd} defendant, their actions had not been specifically directed at worsening the plaintiffs’ positions as shareholders to compel them to sell their shares. Further, the Court found that the breakdown in the parties’ relationship is not the sole responsibility of the defendants. On the balance, the Court considered that no minority discount should apply to the sale of the plaintiffs’ shares in MDI. However, the Court left it to the joint valuer to consider whether it would be appropriate to apply any discount for a lack of marketability of MDI’s shares.
Bankruptcy Cases

23. English High Court – In calculating loss and claiming compensation for void disposition in bankruptcy, the date from which the loss in value should be calculated was the date on which the trustee in bankruptcy would have been actually able to sell the relevant property for the benefit of the estate if it had not been wrongly transferred

*Ahmed and others v Ingram and another* [2018] EWCA Civ 519

The bankrupt and the appellants are siblings. Between the presentation of a bankruptcy petition in 2007 and the making of a bankruptcy order in 2009, the bankrupt transferred his minority shareholdings in three private companies to the 1st appellant. The 1st appellant subsequently transferred the shares to other siblings in the family. Some 14 months after the bankruptcy order, those siblings retransferred their shares to the 1st appellant.

Shortly before trial, all the appellants accepted that the share transfers made by the bankrupt were void pursuant to section 284 of the Insolvency Act (which is equivalent to section 42 of the Bankruptcy Ordinance (Cap 6)) and delivered executed transfer forms to the trustees in bankruptcy to restore the bankrupt’s estate. The trustees in bankruptcy sought equitable compensation against the appellants. At first instance, the English High Court awarded compensation to the trustees in bankruptcy for the loss of value of the shares suffered by the bankrupt’s estate between the void transfer of shares being made by the bankrupt and the shares’ subsequent restoration to the estate. The appellants appealed.

Section 284 of the Insolvency Act provides that any disposition of property made by a bankrupt during the period from the date of the presentation of a bankruptcy petition until their estate vests in a trustee in bankruptcy is void, unless otherwise ordered by the court. The Court of Appeal held that section 284 only operates to avoid relevant dispositions. There is no automatic right for a trustee in bankruptcy to recover compensation from the transferees for breach of trust. Rather, compensation for breach of trust is only available where a claimant can establish loss to the estate caused by the breach of trust.

The Court of Appeal then went on to consider what is the date as at which loss should be calculated. It was held that the loss to the bankrupt’s estate should be calculated by starting with the date at which the trustees in bankruptcy would have actually sold the shares. The relevant loss was the difference between the shares’ value when they could have been sold and the date of their actual return to the trustee in bankruptcy shortly before trial. On the evidence, the Court of Appeal considered that the trustee in bankruptcy would not have been in a position to sell the shares until some 14 months after the making of the bankruptcy order. Accordingly, only the loss in value after this date should be taken into account.
24. A foreign judgment must first be registered before it can be used as a basis for issue of a statutory demand in bankruptcy proceedings

_Rede James Chor Cheung Wong_ HCB 1048/2017

The creditor presented a bankruptcy petition against the debtor on the ground of failure to comply with a statutory demand. The petitioning debt is a sum of AUD 114,763.92, being the legal costs and interest which the debtor was ordered to pay the petitioner pursuant to two costs orders of the Supreme Court of Queensland dated 5 August 2015.

The debtor contended that the costs order, being a foreign court order, which has not been enforced or recognized in Hong Kong, could not form the basis of the statutory demand and hence the petitioning debt. On the contrary, the petitioner argued that there is no requirement to register a foreign order in Hong Kong before it may be used to found a statutory demand, as opposed to enforcing them by other usual means, such as by way of a charging order or garnishee proceedings.

Section 8 of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) provides that “no _proceedings_ for the recovery of a sum payable under a foreign judgment, being a judgment to which the provisions of this Ordinance apply, other than proceedings by way of registration of the judgment, shall be entertained in any court in the Colony.”

Citing the English decision _In re A Judgment Debtor_ [1939] Ch 601, the Court considered that the word “proceedings” in section 8 (as well as in section 4(2) of Cap 319) is not to be read as being limited to execution whether in the broad or narrow sense. The word has to be given its ordinary meaning and include bankruptcy proceedings. Thus, if a judgment has not been registered, the court will not entertain its use as a basis for issue of a statutory demand in bankruptcy proceedings. Accordingly, a bankruptcy petition on failure to comply with a statutory demand founded on an unregistered foreign court order is misconceived. The petition was accordingly dismissed.
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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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