Dear Clients and Friends,

This special newsletter aims to regularly update practitioners on important and noteworthy cases in the areas of corporate disputes and insolvency in Hong Kong, the UK and other common law jurisdictions. In this issue, we have highlighted:

- 5 Corporate Insolvency Cases
- 5 Cross-border Insolvency Cases
- 1 Restructuring Cases
- 3 Corporate Disputes Cases
- 3 Bankruptcy Cases

Our selection of cases and our analysis of them may not be exhaustive. Your comments and suggestions are always most welcome. Please feel free to contact me at ludwig.ng@onc.hk

Best regards,

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HEADLINES OF THIS ISSUE

- Corporate Insolvency Cases

1. To succeed in an unfair preference claim, the question of whether there is the requisite desire to improve the creditor’s or guarantor’s position in the event of an insolvent liquidation must be asked in respect of each person to whom a preference has been given

   Re K C K Garment Factory Ltd [2019] HKCFI 585

2. To validate a post-petition disposition, it must be established at least prima facie that the directors consider the disposition falling within their powers under the company’s constitution, and is necessary or expedient in the interests of the company

   Wong Wai Tung v Lam Chun Fung and Another [2019] HKCFI 801
3. To resist a winding-up petition, the burden of proof lies with the company to demonstrate a bona fide defence on substantial grounds, despite the oddities in the petitioner’s claim

Re Swiss Cosmeceutics (Asia) Ltd [2019] HKCFI 336

4. First occasion on which the English High Court considered whether a dissolved company can apply for freezing order

Yuzu Hair and Beauty Ltd (Dissolved) v Selvathiraviam [2019] EWHC 772 (CH)

5. The mere fact that a debt is disputed is not justification to restrain advertisement of a winding-up petition

Kiu Hung International Holdings Ltd v 绵阳合力医疗健康管理有限公司 [2019] HKCFI 1060

- Cross-border Insolvency Cases

6. Singapore Court recognised US bankruptcy proceedings as foreign main proceedings despite the company being registered in Singapore

Re Zetta Jet Ptd Ltd and others (Asia Aviation Holdings Ptd Ltd, intervener) [2019] SGHC 53

7. Hong Kong Court granted restructuring power to provisional liquidators appointed in Bermuda by way of assistance

Re The Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd (Provisional Liquidators Appointed) (For Restructuring Purposes Only) [2019] HKCFI 805

8. Hong Kong Court, for the first time, recognises non-common law insolvency proceedings

Re Mr Kaoru Takamatsu [2019] HKCFI 802

9. English Court sanctioned the cross-border restructuring of Noble Group Limited

Re Noble Group Limited [2018] EWHC 3092 (Ch)
10. English Court held that recognition can be granted to solvent winding-up proceedings under the UNCITRAL Model Law on Cross-Border Insolvency

*Re Bailey and another (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd) [2019] EWHC 1215 (Ch)*

- **Restructuring Cases**

11. Singapore Court of Appeal held that at the leave stage, the applicant-company must unreservedly disclose all material information to assist the court in determining how the creditors’ meeting is to be conducted

*Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal [2019] SGCA 29*

- **Corporate Disputes Cases**

12. Singapore Court of Appeal upheld that there is no presumption that discount should be applied in the valuation of the minority shares in cases involving companies that are not quasi-partnership

*Thio Syn Kym Wendy and others v Thio Syn Pyn and another [2019] SGCA 19*

13. Singapore High Court affirms that any term attaching to a buyout order, including applying a discount for lack of control or lack of free transferability, must be just and equitable

*Koh Keng Chew & Ors v Liew Kit Fah & Ors [2018] SGHC 262*

14. Singapore Court of Appeal gave guidance on assessing whether to wind up a company on the basis that it has lost its substratum

*Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and other and another appeal [2019] SGCA 18*
Bankruptcy Cases

15. In a section 29 application, the Court has no jurisdiction to order respondent to file an affidavit stating whether documents sought had been in his custody or power, when they were last in his custody or power and reason they were no longer in his custody or power

Re Ho Yuk Wah David (bankrupt) (No 3) [2019] 1 HKLRD 961

16. Court refused to approach the exercise of discretion to bankrupt a foreigner on the same basis as winding up an overseas company in Hong Kong

Re Dai Guoliang [2019] HKCFI 597

17. Arbitration clause which purports to restrict or fetter a creditor’s statutory right to petition for the bankruptcy of a debtor is not enforceable as it is contrary to public policy

Re Sit Kwong Lam [2019] HKCFI 920
Corporate Insolvency Cases

1. To succeed in an unfair preference claim, the question of whether there is the requisite desire to improve the creditor’s or guarantor’s position in the event of an insolvent liquidation must be asked in respect of each person to whom a preference has been given.

Re K C K Garment Factory Ltd [2019] HKCFI 585

Upon a winding up petition presented by itself, K C K Garment Factory Ltd (the “Company”) was wound up on 31 October 2016.

The 1st respondent, Hong Kong Construction Financing Limited, is a licensed money lender. In August 2014, it was approached indirectly for a bridging loan of HK$20 million. The Company offered joint and several personal guarantees by Eric Woo, the 2nd respondent, who was a director of the Company, and Benson Lo, who was Eric Woo’s friend.

The 1st respondent granted two loans, each of HK$10 million for one month repayable on 3 October 2014. Towards the end of September 2014, the Company requested an extension. The 1st respondent agreed to extend the time of repayment of the principal under the 2nd loan if the Company repaid the principal of the 1st loan and the interest that had accrued on both loans. The Company agreed. On 3 October 2014, the amount of the principal and interest under the 1st loan was repaid. On 9 October 2014, the parties entered into a supplemental agreement in respect of the 2nd loan, providing that interest was to be repaid on 10 October 2014, and the principal was to be deferred for one month with interest. On 10 October 2014, the Company paid HK$241,667.

The Liquidators brought an unfair preference claim against the 1st and 2nd respondents, contending that the repayments were not made to satisfy a genuine commercial need of the Company, but to reduce the liabilities of Eric Woo under his guarantee. It is not disputed by the 1st respondent that the Company was insolvent during the material period and that the payments to it had the effect of preferring Eric Woo. However, the 1st respondent argued that the Liquidators failed to show that the repayments were made with an independent desire to prefer the 1st respondent.

In Re MC Bacon Ltd [1990] BCLC 324, Millet J (as he then was) held that to succeed in an unfair preference claim, it is no longer sufficient to establish an intention to prefer. There must be a desire to improve the creditor’s position in the event of an insolvent liquidation.

Citing the English decision in Re Agriplant Services Ltd [1997] 2 BCLC 598, the Liquidators argued that if the Company intended to prefer the guarantor, it follows that in order to produce this result, it must have desired the concomitant result, namely, to reduce the
liabilities to the 1st respondent, which was a necessary step in reducing liabilities under the guarantee.

Harris J however disagreed. The Judge held that the Company could desire to reduce Eric Woo’s liabilities under the guarantees, and in order to achieve the desired result, intentionally reduce its liabilities to the 1st respondent. It does not follow that the Company desired to reduce its liabilities to the 1st respondent. Reducing its liabilities to the 1st respondent was simply an intentional consequence of its desire to reduce liabilities to the guarantors. The question of whether there is the requisite desire must be asked in respect of each person to whom a preference has been given: see *Goode on Principles of Corporate Insolvency Law* 5th edn, at 13-95; also see *Re Kam Toys & Novelty Manufacturing Ltd* (unrep. HCMP 1908/2016, 9 February 2017; unrep. CACV 67/2017, 13 November 2017).

Further, on the facts, the Judge found that the Liquidators also failed to prove that the Company intended to prefer Eric Woo. The totality of the evidence, including the request to extend the loans, is consistent with a genuine, albeit confused and perhaps misconceived, attempt to keep the Company going for a little longer. The Liquidators were appointed provisional liquidators expressly to restructure the Company and its associated companies, which indicates that it was not Eric Woo’s intention to liquidate the Company’s business, and is a reason why he may have wanted to raise additional finance. In conclusion, the Court found that the Liquidators failed to demonstrate the necessary desire to prefer the 1st and 2nd respondents.
2. To validate a post-petition disposition, it must be established at least *prima facie* that the directors consider the disposition falling within their powers under the company’s constitution, and is necessary or expedient in the interests of the company

*Wong Wai Tung v Lam Chun Fung and Another* [2019] HKCFI 801

The Petitioner presented a winding-up petition on just and equitable ground as well as a petition seeking an order that his shares in Meanmax Limited (the “Company”) be bought by the 1st Respondent (R1), on the basis of unfairly prejudicial conduct by R1. There is no dispute that the Company is solvent. R1 applied for a validation order. While the Petitioner consented to the validation order in principle, it was argued that the order should contain the words “For avoidance of doubt, no ‘commission’ should be allowed to be paid to any directors or shareholders of the Company”.

Where it is uncontested that directors working on behalf of a company should be remunerated by way of commission, then that is capable of being an ordinary expense of the company: *Re Everglory Energy Ltd* HCCW 198/2016 (unreported, 20 July 2016). However, the Judge noted that the gist of the unfair prejudice claim was that there has been a variation of the compensation structure by the directors without both shareholders’ consent, which was in breach of the shareholder agreement. The Company has been established by the two shareholders, namely the Petitioner and R1, on the basis of remuneration for directors by fixed salary, and an equal division of profits between the shareholders. Under the new structure, the Petitioner would however get 15% of his team’s income, rather than a fixed salary. The Petitioner claimed this is unfairly prejudicial conduct and that he has suffered consequential loss. In the circumstances, the Judge considered that there was a substantive issue between the parties as to the legitimacy of commission payments by the Company to its directors.

Citing *Re Burton & Deakin Ltd* [1977] 1 WLR 390, the Judge agreed that while a court will not generally interfere with the directors’ management discretion, however, to validate a particular disposition, there must be evidence before the court showing that the directors consider the disposition, falling within their powers under the company’s constitution, is necessary or expedient in the interests of the company. In other words, R1 has to establish at least *prima facie* that the commission payments are necessary or expedient in the interests of the company and must be made prior to the determination of the Petition in order for the Company to continue in business. But there is no such evidence from R1. In conclusion, the Court granted the validation order except for the commission to be paid to any directors or shareholders of the Company.
3. To resist a winding-up petition, the burden of proof lies with the company to demonstrate a *bona fide* defence on substantial grounds, despite the oddities in the petitioner’s claim

_*Re Swiss Cosmeceutics (Asia) Ltd* [2019] HKCFI 336

Swiss Cosmeceutics (Asia) Ltd (the “Company”) was established by the Petitioner, Mr. Yip Hai Tak in 2011 to manufacture cosmetics in Switzerland for distribution and sale in Hong Kong and the Mainland. Between 26 September 2011 and 21 March 2012, Mr. Yip loaned a total of HK$1,213,600 to the Company on seven separate occasions. On or around 27 February 2012, Mr. Yip transferred his shares to one Ms. Kan. Shortly thereafter, the Company and Mr. Yip entered into agreements with a company called Do-Well to sell some of the Company’s sales outlets in Hong Kong for HK$2,000,000.

Mr. Yip brought a petition to wind up the Company on the grounds of insolvency relying on an unsatisfied statutory demand requiring repayment of the loans totalling HK$1,213,600. The Company’s defence was that Mr. Yip had failed to disclose the debts during the transfer of the shares in the Company to Ms. Kan. It was further said that part of the payment from Do-Well to Mr. Yip has been made to settle the sums due to him from the Company.

It is uncontroversial that in order to defeat a winding-up petition the company against which a petition is presented must demonstrate that it has a *bona fide* defence on substantial grounds. The onus is on the company to satisfy the court that its assertions are believable, but in deciding whether the evidence is believable, the evidence is not to be approached with a wholly uncritical eye but is to be looked at against the undisputed background and evidence. The court should caution itself against unsubstantiated and unparticularised assertions. It is incumbent on the company to put forward sufficiently precise factual evidence to substantiate its allegations: *Re Yueshou Environmental Holdings Ltd* (unreported, HCCW 142/2013, 16 July 2014); *Re Hong Kong Construction (Works) Limited* (unreported, HCCW 670/2002, 7 January 2003).

Harris J recognized that there were some oddities in Mr. Yip’s claim. For example, Mr. Yip has waited five years to try and obtain repayment and the circumstances in which Ms. Kan came to acquire the Company were unclear. Despite these oddities, the Judge held that the burden of proof lies with the Company to establish a *bona fide* defence on substantial grounds, which the Company has failed to discharge. However, as the Company has paid HK$1,200,000 into Court as security for the debt, the Court did not make a winding up order.
4. First occasion on which the English High Court considered whether a dissolved company can apply for freezing order

*Yuzu Hair and Beauty Ltd (Dissolved) v Selvathiraviam* [2019] EWHC 772 (CH)

The claimant, Yuzu Hair and Beauty Ltd (the “Company”), a company that is dissolved, applied for a freezing order against the defendant, who was the company’s accountant. There was compelling evidence that the defendant has defrauded the Company of something in excess of £300,000. It also appeared that the defendant has caused, by his inactions, the Company to be struck off. There was a pending application by the Company’s director/shareholder to restore the Company to the register, the effect of which, if granted, would be retrospective.

The Judge expressed some concerns about this approach. He noted that at the time when being asked to make the freezing order, the legal person purporting to make the application does not exist. There is a difference between a court being asked, once a company is restored to the register, to validate steps taken prior to restoration and a court being asked to make orders on the application of a dissolved company before it has been restored to the register. There cannot be certainty that the Company will be restored to the register.

The Judge however considered that there is another route to achieving the same end, which is to make a freezing order in the context of the application by the director/shareholder to restore the company to the register. The Judge held that under section 37 of the Senior Courts Act 1981, which is substantially similar to section 21L of the High Court Ordinance (Cap 4), the court has jurisdiction to make a freezing order in the context of an application to restore and an injunction would be justified in those circumstances as protecting the interests of the director/shareholder by preserving the assets of the Company, thus ensuring that the restoration application achieve its objective. There is an analogy to that of a petitioning creditor in a company winding-up. It is well established that the court’s jurisdiction under section 37 of the Senior Courts Act 1981 is wide enough to permit a petitioning creditor to obtain a freezing order against a third-party debtor of the company: *HMRC v Egleton* [2006] EWHC 2313 (Ch).

In conclusion, the Judge ordered the director/shareholder be added as an applicant and granted an interim freezing order against the defendant, pending the Company’s restoration to the register.
5. The mere fact that a debt is disputed is not justification to restrain advertisement of a winding-up petition

*Kiu Hung International Holdings Ltd v 绵阳合力医疗健康管理有限公司* [2019] HKCFI 1060

The plaintiff entered into two loan agreements with the defendant. When demands were made by the defendant for repayment of the loans, the plaintiff disputed the validity of the loan agreements and effectively said that the loan agreements were shams. That resulted in the defendant commencing winding-up proceedings against the plaintiff. That set of winding-up proceedings was subsequently settled by a settlement agreement dated 13 December 2018, which provided for the plaintiff to pay certain sums to the defendant. The plaintiff failed to make the payments as required. The defendant, on 18 March 2019, presented a petition for the winding-up of the plaintiff. The plaintiff sought, *inter alia*, an order to restrain the defendant from advertising the petition.

Citing *Re Kwong Yuen Construction Co Ltd* (HCCM 336/2001, 22 June 2001), the G Lam J agreed with Kwan J (as she then was) that the test for determining whether an injunction of this kind should be granted is the same as that for determining whether a petition should be struck out on the ground that there is a *bona fide* dispute on substantial grounds as to the company's liability to pay the debt. On the facts, the Judge was not satisfied that the winding-up petition would be bound to be dismissed on the basis that the debts were disputed as and when the petition comes on for hearing.

Further, the Judge noted that some banks did not know about the winding-up petition yet. Banks and other parties who may have financial dealings with the plaintiff are among the persons that the requirement of advertisement of a winding-up petition is aimed at protecting: *In re a Company (No 007923/1994)* [1995] 1 WLR 953. The mere fact that the company has disputed the debt and the fact that it has indicated an intention to apply for validation orders are, in the Judge’s opinion, not justification for keeping other creditors, banks and other traders of the company in the dark. In conclusion, the Judge refused to restrain the advertisement of the petition.
Cross-border Insolvency Cases

6. Singapore Court recognised US bankruptcy proceedings as foreign main proceedings despite the company being registered in Singapore

Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Ptd Ltd, intervener) [2019] SGHC 53

In the April issue of ONC Corporate Disputes and Insolvency Quarterly 2018, we discussed the Singapore High Court decision in Re Zetta Jet Pte Ltd and Others [2018] SGHC 16, in which the Singapore High Court declined to accord full recognition of an insolvency proceedings commenced in the United States, on the basis that the foreign insolvency proceedings did not comply with a Singapore court order.

The case concerns Zetta Jet Pte Ltd ("Zetta Jet Singapore"), a company incorporated in Singapore and one of its wholly-owned subsidiary, Zetta Jet USA, Inc ("Zetta Jet USA"), which is a company incorporated in California, USA (together the "Zetta Entities"). In September 2017, Chapter 11 bankruptcy proceedings were filed against the Zetta Entities in the US Bankruptcy Court (the "US Bankruptcy Proceedings"). Trustee of the Zetta Entities in the US Bankruptcy Proceedings was appointed.

Soon thereafter, the Singapore High Court, upon the application of a shareholder of Zetta Jet Singapore, granted an injunction enjoining the relevant parties from carrying out any further steps in and relating to the US Bankruptcy Proceedings. Notwithstanding the Singapore injunction, the US Bankruptcy Proceedings continued. The Trustee subsequently applied for his recognition in Singapore. The High Court granted limited recognition to the Trustee only for the purpose of applying to set aside or appeal the Singapore injunction. On 9 March 2018, an application to set aside the injunction was made and the injunction was discharged by consent of the parties on 12 July 2018.

At issue is whether the US Bankruptcy Proceedings should be recognised as a main proceeding or a non-main proceeding. Under the Singapore Companies Act, which has adopted and incorporated the UNCITRAL Model Law on Cross-Border Insolvency, a foreign representative can apply to the Singapore Court for recognition of the foreign insolvency proceedings. But there is a distinction between recognition of the foreign insolvency proceedings as either a main proceeding or a non-main proceeding, with each engendering different reliefs and consequences. A main proceeding is one taking place where the debtor has its centre of main interests ("COMI").

The Court held that the relevant date to determine the COMI is the date when the application for recognition is filed. The Court also recognized that it is not objectionable for companies to shift COMI to another jurisdiction after the commencement of the foreign insolvency
proceedings, where they have better prospects of achieving an effective restructuring, save that there is no evasion of criminal or similar laws.

Further, the Court found that under Article 16(3) of the Companies Act, there is a presumption that the place of the debtor’s registered office is its COMI. The presumption, however, operates as a starting point subject to displacement by other factors depending on circumstances of the specific case. On an overall assessment of various factors, including the location from which control and direction was administered, the location of clients, the location of creditors, the location of employees, the location of operations, dealings with third parties and etc., the Singapore High Court concluded that the presumption here was displaced because (i) the central management and direction of Zetta Jet Singapore were conducted from the US at all relevant time; (2) corporate representations indicated it operated from the US; and (3) a substantial portion of its creditors were located in the US. The Court was satisfied on the evidence that Zetta Entities’ COMI was at all material times located in the US. The US Bankruptcy Proceedings was accordingly recognised as foreign main proceedings in Singapore.
7. **Hong Kong Court granted restructuring power to provisional liquidators appointed in Bermuda by way of assistance**

*Re The Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd (Provisional Liquidators Appointed) (For Restructuring Purposes Only)* [2019] HKCFI 805

Hsin Chong Group Holdings Ltd (the “Company”) is incorporated in Bermuda and listed on the Main Board of The Stock Exchange of Hong Kong Limited. The Company is in provisional liquidation in Bermuda and soft-touch joint provisional liquidators (“JPLs”) have been appointed. The JPLs applied for recognition and assistance by the Hong Kong High Court pursuant to a letter of request. The order sought contains some provisions in relation to a proposed restructuring intended to be carried out in Hong Kong.

It is now well-settled that the Hong Kong court will recognize foreign insolvency proceedings that are collective in nature and are commenced in the company’s country of incorporation: *Re Joint Provisional Liquidators of China Lumena New Materials Corp* [2018] HKCFI 276; *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] 1 HKLRD 1120. Upon the foreign insolvency proceedings being recognized, the Hong Kong court will grant assistance to the foreign officeholders, which may include allowing the foreign officeholders to pursue restructuring options in Hong Kong: *Re Joint Liquidators of Supreme Tycoon Ltd; Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165.

Harris J considered that the recognition of the Company’s proceedings in Bermuda is consistent with the existing Companies Court’s practice. In relation to the order sought for the purpose of the restructuring, Harris J referred to his own decision in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338, in which his Lordship explained that it is not permissible to appoint provisional liquidators in Hong Kong in order to restructure the debt of the company. It is however permissible to appoint provisional liquidators for orthodox reasons and, after the provisional liquidators have familiarized themselves with the affairs of the company, for an interested party (commonly the provisional liquidators) to apply to court if it is thought desirable for restructuring powers to be granted to the provisional liquidators. His Lordship held the view that it is not inconsistent with Hong Kong law for restructuring powers to be granted by way of assistance to a provisional liquidator appointed over a foreign company by the court of its place of incorporation, in which a soft-touch provisional liquidation is permissible, as such powers can be granted, albeit in the more limited circumstances as discussed in *China Solar*, to a Hong Kong provisional liquidator.

For the benefit of the practitioners, the order is appended to the reasons.
8. Hong Kong Court, for the first time, recognises non-common law insolvency proceedings

*Re Mr Kaoru Takamatsu* [2019] HKCFI 802

Japan Life Co, Ltd (the “Company”), a company incorporated in Japan, was ordered to be wound up on 1 March 2018 by the District Court of Tokyo, Twentieth Civil Division on the grounds of insolvency. The trustee in bankruptcy, Mr. Takamatsu Kaoru, applied for recognition in Hong Kong in order to enable him to deal with the Company’s affairs in Hong Kong. He obtained from the Tokyo Court a letter of request seeking an order for recognition and assistance in substantially the form commonly granted by Hong Kong Court.

This is the first application by a trustee in bankruptcy appointed in Japan over a Japanese incorporated company in compulsory liquidation in Japan for a formal order recognizing the Japanese winding up and providing assistance. It is now well-settled that the Hong Kong court will recognize foreign insolvency proceedings that are collective in nature and are commenced in the company’s country of incorporation: *Re Joint Provisional Liquidators of China Lumena New Materials Corp* [2018] HKCFI 276; *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] 1 HKLRD 1120.

Harris J noted that Japan has a civil law system. However, he considered that it is clear from the evidence filed in support of the application (affirmation of a Japanese lawyer explaining elements of the Japanese bankruptcy code) that the Company is in a collective insolvency proceedings in its place of incorporation. Hence, the proceedings should be recognized. Further, upon analyzing various provisions in Japan’s Bankruptcy Act, Harris J noted that although not identical, the status and powers of a trustee in bankruptcy appointed in Japan is similar to those of a liquidator appointed in Hong Kong.

The Court therefore granted Mr. Takamatsu the powers in the standard order set out in *Re Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* (unrep, HCMP 3560/2016, 27 January 2017). The standard order in paragraphs 2(a), (b) & (c) confers on a foreign liquidator general power to administer a company’s assets and seek documents and information, which are powers that a trustee has under the Japanese insolvency regime. However, the standard order in paragraph 2(e) confers include the right to apply for certain orders, such as under s286B of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) for an order for examination of a person concerning the affairs of a company or to seek documents from a third party concerning a company’s affairs. Harris J emphasized that if such an application were to be made, it would be necessary for Mr. Takamatsu to demonstrate that a like power exists in the Japanese regime and that it is appropriate to grant such an order on the evidence. For the benefit of the practitioners, Harris J appended the order to the judgment.
9. **English Court sanctioned the cross-border restructuring of Noble Group Limited**

*Re Noble Group Limited [2018] EWHC 3092 (Ch)*

Noble Group Limited (the “Company”), the ultimate holding company of the Noble Group, is incorporated and has its registered office in Bermuda and is listed in Singapore. The Company applied for an order sanctioning a scheme of arrangement (the “Scheme”) between the Company and its Scheme Creditors.

The Scheme is part of a broader restructuring of the Noble Group, pursuant to which, in return for the release of the Scheme Creditors’ claims, substantially all of the Company’s assets will be transferred to newly incorporated subsidiaries of a newly incorporated holding company (“New Noble”) and new debt instruments will be issued to Scheme Creditors by companies in the New Noble Group. In addition, the Scheme Creditors will also receive 70% of the equity in New Noble. The Scheme has been overwhelmingly approved by the Scheme Creditors.

The principal matters that the court has to consider at the sanction hearing are whether:

- a) The provisions of the statute have been complied with, including questions of class composition, statutory majorities and the adequacy of explanatory statement;
- b) The class was fairly represented, and whether the majority coerced the minority to promote interests adverse to the class whom they purported to represent;
- c) The scheme is fair;
- d) There is any defect or blot in the scheme that would make it unlawful or otherwise inoperable.

In an international case, such as the present one, the court would also consider if there is a sufficient connection between the scheme and England, and whether there is a reasonable prospect of the scheme being effective, having regard, in particular to its prospects for recognition in other relevant jurisdictions.

Snowden J, after a thorough examination of the matters that require consideration, sanctioned the Scheme. Some of the key issues are summarized here.

**Compliance with statute**

The Scheme provided for a wide release of Scheme Creditor’s claims against the Company as well as against the “Released Parties”, which included each member of the ad hoc creditor group that had been formed to negotiate the terms of the Company’s restructuring, and their “Related Parties”, which was also a very wide definition.
Snowden J held that the court has jurisdiction to sanction a scheme which includes a mechanism under which scheme creditors are required to release claims against third parties where such a release is necessary in order to give effect to the arrangement between the company and the scheme creditors. The most relevant example will be where the scheme compromises debts which are guaranteed and where, absent such a release, pursuit of the guarantor by a scheme creditor would undermine the compromise between the creditor and the company. Further, the jurisdiction is not limited to guarantees and claims closely connected to scheme claims. A release of claims against persons involved in the preparation, negotiation or implementation of a scheme and their legal advisers was also justifiable to prevent scheme creditors from undermining the scheme. Snowden J concluded that the class had been correctly constituted.

Whether the class was fairly represented

In deciding whether the majority had been acting properly, Snowden J referred to *Re Lehman Brothers International (Europe) [2018] EWHC 1980 (Ch)*, in which Hildyard J held that the relevant test should be *whether a particular creditor or group of creditors in the majority would not have voted for the scheme “but for” their special interest*. Snowden J noted that various fees have been paid or will become payable if the Scheme is sanctioned. However, the Judge also observed that a large proportion of the fees were not dependent on the scheme being approved; the “Backstop Fees”, which were conditional upon the Scheme being sanction, were market rate; and most significantly, the great majority of Scheme Creditor who would not be paid Backstop Fees had still voted in favour of the Scheme.

Snowden J concluded that the Scheme Creditors who comprised the majority at the meeting were acting *bona fide* and were not voting so as to promote interests adverse to the class that they purported to represent.

Fairness

The Scheme includes a claims adjudication process. Snowden J considered that it is “entirely legitimate” for a scheme to restrict the access of creditors to the courts through the use of an independent adjudicator. The Judge is satisfied that the adjudication process in this case is both consistent with established legal principles and fair, because:

a) The adjudication process mirrors the proof of debt process in a liquidation;
b) It provides that the adjudicator’s decision would be final and binding but only “insofar as the law allows”;
c) The adjudicators are highly experienced and impartial; and
d) It enables the adjudicators to extend timeframes and adopt procedures appropriate to the issues in hand.
Defects in the Scheme

Snowden J noted that certain subordinated creditors were excluded from the Scheme, while the Company’s existing shareholders and existing management were to receive 20% and 10% equity in the New Noble respectively. Snowden J agreed that subordinated creditors would ordinarily rank ahead of the shareholders in an insolvency. However this was not considered a “blot” on the Scheme, as there were commercial reasons for doing so. The shareholders’ consent to the disposal of the Company was needed and it was also necessary to keep the existing management on board to ensure continuity and retain key suppliers and customers.

International context

In relation to the international considerations, Snowden J found that the Scheme has sufficient connection with England. For example, the Company has relocated its centre of main interests (“COMI”) from Hong Kong to England; the Company has an establishment registered in the UK; books and records are kept in London; three of the Company’s independent non-executive directors are now based in the UK and etc. Further, Snowden J was satisfied that the Scheme was likely to be effective due to the following factors:

a) It was not likely that Scheme Creditors would pursue an action abroad;
b) The Company was to be dissolved, which means that claims were less likely;
c) An identical scheme was being promulgated in Bermuda;
d) Many of the finance documents were subject to English law and English jurisdiction clauses; and

e) As to the notes which are governed by New York Law, an opinion had been obtained from a former judge of the US Bankruptcy Court that the Scheme would be recognized in the US.

The Judge concluded that it is appropriate to exercise his discretion to sanction the Scheme.
10. English Court held that recognition can be granted to solvent winding-up proceedings under the UNCITRAL Model Law on Cross-Border Insolvency

*Re Bailey and another (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd)* [2019] EWHC 1215 (Ch)

Sturgeon Central Asia Balanced Fund Ltd (the “Company”) was incorporated under the laws of Bermuda in March 2007. The Company was ordered to be wound up on the just and equitable basis under section 161 of the Bermuda Companies Act 1981 in Bermuda. The Company was however clearly solvent and the majority of its assets were managed in England. The Bermuda provisional liquidators applied to the English High Court for recognition of the Bermuda liquidation as main proceedings under the Cross-Border Insolvency Regulations 2006 (the “CBIR”).

Under the CBIR, which has adopted and incorporated the UNCITRAL Model Law on Cross-Border Insolvency (the “Model Law”), a foreign representative can apply to the English Court for recognition of the foreign insolvency proceedings. But there is a distinction between recognition of the foreign insolvency proceedings as either a main proceeding or a non-main proceeding, with each engendering different reliefs and consequences. A foreign main proceeding is one taking place where the debtor has its centre of main interests (“COMI”).

“Foreign proceeding” is defined in Article 2(i) of the Model Law as “a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”. The question at issue is whether the solvent liquidation of the Company and that its winding up has been sought for reasons other than insolvency met the definition of “foreign proceedings” under the Model Law.

Following the dicta of the US Bankruptcy Court in *Re Betcorp Ltd* (2009) 400 BR 266 and the discussion in the Working Group report from the 18th session, the English High Court held that the Bermuda liquidation proceedings were clearly collective, despite the fact that the Bermuda proceeding were not for the purpose of realising assets for distribution to the creditors, but to dissolve the Company and distribute the assets to the shareholders.

The English Court further considered whether section 161 of the Bermuda Companies Act can fairly be described as a “law relating to insolvency”. Citing *Re Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), *Re Chow Cho Poon (Private) Limited* [2011] NSWSC 300 and *In re Agrokor dd* [2017] EWHC 2791, where it was accepted that the law could be a law relating to insolvency if insolvent was one of the grounds on which a proceeding could be brought, the English High Court held that section 161 of the Bermuda Companies Act was a “law relating to insolvency”, in that the section contemplates a court ordered winding up in
various situations which include inability to pay debts, as well as just and equitable grounds. Moreover, the Court noted the concept of just and equitable grounds also conventionally includes insolvency. It would be artificial and quite wrong to distinguish between different reasons why a just and equitable winding-up order might be made.

The Judge accepted that the wording in the 2014 version of the Guide to Enactment and Interpretation of the Model Law, which provides that “a simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress”, contradicts his conclusion. The Judge however took the view that the factual enquiry that would be required in determining whether a company is insolvent or in financial distress would run contrary to the aim of allowing recognition on an efficient basis.

In conclusion, the Court granted recognition of the winding up proceeding in Bermuda as a foreign main proceeding.
Restructuring Cases

11. Singapore Court of Appeal held that at the leave stage, the applicant-company must unreservedly disclose all material information to assist the court in determining how the creditors’ meeting is to be conducted

Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal [2019] SGCA 29

Empire Capital Resources Pte Ltd ("Empire Capital"), a company incorporated in Singapore, is a member of the Berau Group, which is one of the world’s biggest coal producers. The Berau Group faced financial difficulties since a crash in global coal prices in 2014 to 2015. In April 2017, Empire Capital filed the present application under section 210 of the Singapore Companies Act seeking, amongst other things, leave to convene a creditor’s meeting to consider and vote on a proposed scheme of arrangement (the “Proposed Scheme”).

The Proposed Scheme sought to compromise two sets of notes, the 2015 Notes and the 2017 Notes issued by Berau Capital Resources Pte Ltd (“BCR”) and PT Berau Coal Energy Tbk (“BCE”) respectively, that were guaranteed by Empire Capital. Under the Proposed Scheme, the liabilities of Empire Capital and that of related parties including BCR and BCE under the existing notes would be discharged. In exchange, new notes will be issued to the existing noteholders by PT Berau Coal (“Berau Coal”), also a company within the Berau Group. Pathfinder Strategic Credit LP and BV Investment LLC (collectively, the “Minority Creditors”) opposed the leave application. The High Court Judge granted leave for Empire Capital to convene the creditor’s meeting. The Minority Creditors appealed against the High Court Judge’s decision.

Amongst other things, the Court of Appeal has to consider “what is the extent of a company’s disclosure obligation at the stage where leave to convene a creditor’s meeting is sought under section 210(1) of the Companies Act and whether, in this case, proper and sufficient financial information has been disclosed by Empire Capital”.

The Court of Appeal held that generally, a less onerous standard of disclosure is required of the applicant company at the leave stage than at the sanction stage. However, there remains a minimal standard of disclosure that a company must satisfy before leave will be granted. At the leave stage, the Court held, the company bears a duty of unreserved disclosure to assist the court in determining whether and how the creditors’ meeting is to be conducted. This requires at least such disclosure as would enable the court to determine the issues that it must properly consider at this stage, such as the classification of creditors, the proposal’s realistic prospects of success, and any allegation of abuse of process. In particular, the applicant company must provide financial disclosure in such a manner and to such an extent
as is reasonably necessary for the court to be satisfied that fair conduct of the creditors’ meeting is possible.

However, the Court did recognize the concerns of and difficulties faced by applicant-companies who seek refuge of the scheme regime in times of financial turmoil. Disclosure obligations that are oppressive may fetter genuine attempts at restructuring, especially by smaller companies lacking resources and bargaining power. As such, it is only in clear and obvious cases that the court would intervene at the leave stage solely on the ground of inadequate disclosure and the sufficiency of disclosure depends on what is reasonable in the circumstances, and the relevant factors include the size and resources of the company, the size of the debt, the urgency of the application, and the reasons for the company’s inability to provide further disclosure.

On the facts, the Court found that Empire Capital had failed to provide the scheme creditors with the minimum level of financial disclosure reasonably necessary to satisfy the Court that fair conduct of the creditors’ meeting was possible:

1. There was a complete lack of updated financial information on the companies whose debts were sought to be compromised. No financial disclosure had been made in relation to any member of the Berau Group except for Berau Coal even though the proposed scheme sought to compromise the debts of 10 other obligors within the Berau Group;

2. Even in relation to Berau Coal, the latest set of audited accounts provided came from almost four years prior to the first hearing of the appeals;

3. Little weight could be placed on a position assessment by Deloitte & Touche Corporate Financial Pte Ltd, the financial advisor engaged by the Berau Group, which was prepared based on deficient primary information; and

4. Although some updated unaudited statements of Berau Coal were belatedly disclosed, the information was so sparse and unreliable that it did not constitute meaningful disclosure.

On account of the woefully inadequate disclosure, the Singapore Court of Appeal set aside the order below granting leave for Empire Capital to proceed with the creditors’ meeting to consider the Proposed Scheme.
12. Singapore Court of Appeal upheld that there is no presumption that discount should be applied in the valuation of the minority shares in cases involving companies that are not quasi-partnership

*Thio Syn Kym Wendy and others v Thio Syn Pyn and another* [2019] SGCA 19

In the April issue of ONC Corporate Disputes and Insolvency Quarterly 2018, we discussed the Singapore High Court decision in this minority oppression case concerning a family company, Malaysia Dairy Industries Pte Ltd (“MDI”). On the plaintiffs’ claim against the 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 plaintiff’s minority shares. The Court found that although MDI is a family company, it was not operated on the basis of a relationship of mutual trust and confidence. Hence, it was neither a quasi-partnership nor a company akin to a quasi-partnership.

The High Court held that in cases involving companies that are not quasi-partnerships, there is no presumption that a discount should be applied. Rather, the court must look at all the facts and circumstances when determining whether a discount should be applied in any case. The court would be more inclined to not order a 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 where the majority is entirely responsible for precipitating the breakdown in the parties’ relationship. In contrast, the court would be likely to order a discount where the conduct of the minority contributed to their exclusion from the company or the oppressive conduct complained of. The defendants appealed against the High Court decision in this regard.

Upon a detailed review of the relevant case law as well as legal literature, the Court of Appeal agreed that there ought not to be a presumption of a discount in the context of non-quasi-partnerships. What the court ought to do is simply to look at *all the facts and circumstances* of the case in arriving at its decision as to whether a discount ought or ought not to be applied.

The Court of Appeal noted that the shares in MDI were meant to be “financial provision” for the plaintiffs. Allowing the defendants to purchase the shares at a discount would undermine the intentions behind the gift. Further, the result of the buyout in this case is that there will be a direct impact on the control that the defendants will gain. They will control 76% of the shareholdings in the company up from 56%. This significantly increased control over the company will result in numerous benefits to the defendants, such as enabling the defendants to alter or add to the constitution of MDI. The Court of Appeal took the view that these
benefits which the defendants will obtain from the buyout order should be reflected in the price of the shares. In conclusion, the Court of Appeal upheld the valuation of the shares on an undiscounted and full value basis.
13. **Singapore High Court affirms that any term attaching to a buyout order, including applying a discount for lack of control or lack of free transferability, must be just and equitable**

*Koh Keng Chew & Ors v Liew Kit Fah & Ors* [2018] SGHC 262

The plaintiffs, who are minority shareholders of the Samwoh group of companies ("Samwoh Group"), brought an unfair prejudice action under section 216 of the Singapore Companies Act against the defendant majority shareholders. The parties agreed that the relationship of mutual trust and confidence had broken down. The High Court, in a previous judgment, ordered the majority shareholders to purchase the minority shareholders’ shares in the Samwoh Group. The parties however could not agree on whether the value of the plaintiffs’ shares should be discounted.

The defendants contended that a discount should be applied, reasons being that (a) the shares lack control because they are minority shares; and/or (b) the shares lack transferability because, being shares in privately held companies, they are subject to share transfer restrictions.

The Singapore High Court affirmed that, the overriding principle when making a buyout order under section 216(2) is that the order, including the application of any discount for lack of control or lack of free transferability, must be just and equitable. As a starting point, the price for the shares that are subject to the buyout order should be fixed *pro rata* according to the value of all the shares in the company as a whole. The party asserting that a discount should be applied has to show that applying the discount is just and equitable in the circumstances of the case. Further, a discount for lack of control reflects the realities of a freely-negotiated transaction, i.e. a transaction between a willing seller and willing buyer. A buyout order, on the other hand, is an exercise of the court’s coercive power. Therefore, applying a discount whether for lack of control or for lack of free transferability cannot be considered to be just and equitable merely on the ground that such discounts are common in freely-negotiated commercial transactions. Lastly, the Court held that whether a case involves a quasi-partnership is not a determining factor as to the general applicability of a discount for a minority shareholding.

As the defendants were unable to show why it would be just and equitable to apply discounts for lack of control and lack of free transferability, the High Court directed that such discounts were not to be applied to the valuation of the minority shareholders’ shares.
14. **Singapore Court of Appeal gave guidance on assessing whether to wind up a company on the basis that it has lost its substratum**

*Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and others and another appeal*

[2019] SGCA 18

The appeal concerns two companies, namely Trillion Investment Pte Ltd ("Trillion") and Double Ace Trading Company (Private) Limited ("Double Ace"). The Appellant, Mdm Kathryn Ma Wai Fong, is the widow of the late Wong Kie Nie ("WKN") and the executrix of his estate. WKN was a shareholder and director of Trillion and Double Ace (collectively the "Companies") with his two brothers. He ran the Companies until 2011 when he fell ill and subsequently passed away in 2013. Prior to the death of WKN, the Appellant was not a shareholder of Trillion or Double Ace and was never involved in the management of the Companies. The Appellant petitioned to wind up the Companies on the basis that it is just and equitable to do so. She contended, *inter alia*, that there had been a loss of substratum.

The Judge in the first instance found that the Appellant did not have any standing to raise this argument. It was held that, on the facts, it could not be said that the Appellant’s participation in the Companies was predicated on the assumption that the Companies would be conducting any specific business.

On appeal, the Singapore Court of Appeal held that the loss of substratum argument could be relied on by any shareholder, not just the ones who had been a member of the company since its incorporation. A company’s substratum is the main object which it was formed to achieve and when it is no longer able to carry on that object, any member may petition for a winding up order on the just and equitable ground: *Re Goodwealth Trading Ptd Ltd* [1990] 2 SLR(R) 691. This is only fair because in situations where the main objective of the company can no longer be achieved through no fault on the part of the parties, the unfairness lies in holding the parties to the association despite the loss of substratum and a winding up order on just and equitable ground is often justified: *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763. The Court of Appeal further said that another situation where the loss of substratum argument is available to an aggrieved shareholder is where the company is effectively dormant at the time of the application (contrary to what it was set up to do) and its finances are poor such that the company is no longer viable. In such a situation, it can be said that the company had stopped conducting the business it was set up to do and, given its poor financial state, there is no longer any reasonable prospect that the company will achieve its substratum: *Ng Sing King and others v PSA International Pte Ltd and others* [2005] 2 SLR (R) 56. In other words, the guiding principle when assessing whether to wind up a company on the basis that it has lost its substratum is to consider whether there is unfairness in keeping the aggrieved
shareholder (irrespective of her reason for becoming a member of the company) locked into a company which is no longer carrying out and/or can no longer carry out the business it set out to do.

Trillion is an investment holding company, investing in real estate. It acquired an office unit in 1984 and since has been renting it to Double Ace. On the other hand, Double Ace was set up for the purpose of trading in spare parts to supply other companies in the group. The Court of Appeal found on the facts that Trillion had not lost its substratum since it was still acting as an investment holding company but Double Ace had because after WKN fell ill in 2011, no business was transacted through Double Ace.

Having concluding that there was a basis on which to wind up Double Ace on the just and equitable ground, the Court went on to consider whether the fact that the Appellant could have recourse to the exit mechanism provided by the respective articles to exit the Companies negate any unfairness. In this regard, the Court of Appeal held that given that some aspects of Double Ace’s financial affairs were unclear, it was unlikely that a fair and proper valuation of Double Ace could be done without a thorough investigation into Double Ace’s financial records and activities. A liquidator with the appropriate powers could achieve this and would be a neutral party. Accordingly, the Court found that it was just and equitable to wind up Double Ace and that the exit mechanism provided by the articles did not negate the unfairness that had been established.
Bankruptcy Cases

15. In a section 29 application, the Court has no jurisdiction to order respondent to file an affidavit stating whether documents sought had been in his custody or power, when they were last in his custody or power and reason they were no longer in his custody or power

Re Ho Yuk Wah David (bankrupt) (No 3) [2019] 1 HKLRD 961

Pursuant to a previous application, the respondents who are the trustees in bankruptcy of Lee Siu Fung Siegfried (“LSF”), provided the applicants who the trustees in bankruptcy (the “Trustees”) of Ho Yuk Wah David (the “Bankrupt”) certain documents (the “LSF Agreements”), which showed that Keentrade Investments Limited (“Keentrade”) provided consultancy services to the respondents in connection with the respondents’ litigation against LSF and other parties (the “LSF Litigation”) and Sinowood International Limited (“Sinowood”) provided funding for the LSF Litigation. The Trustees claimed that the Bankrupt controlled Keentrade and Sinowood and stood to benefit from any payments that Keentrade and Sinowood might receive from the respondents under the LSF Agreements. The Trustees applied under section 29 of the Bankruptcy Ordinance (Cap 6) for the production of documents from the respondents including those leading up to, arising out of or in connection with the LSF Agreements (Category 1) and other funding agreements in relation to the claims against LSF and the documents arising out of or in connection with those agreements (Category 2).

To succeed in a section 29 application, the applicant must satisfy the court that the provision of information or documents was reasonably required for him to carry out his functions. In considering this question, great weight should be given to the applicant’s views. The applicant must also establish a prima facie case that the respondent was able to provide such information or documents. If these criteria are met, the court must carefully strike a balance between the applicant’s reasonable requirements and the need to avoid making an order which was wholly unreasonable, unnecessary or oppressive to the person concerned. The burden was on the applicant to demonstrate, after balancing all the relevant factors, a proper case for such an order to be made. The applicant must not embark on a “fishing expedition” that ignored costs and proportionality: Joint & Several Liquidators of Kong Wah Holdings Ltd v Grande Holdings Ltd (2006) 9 HKCFAR 766, Hau Po Man Stanley (in bankruptcy) v Joint and Several Trustees [2008] 1 HKC 256.

On the evidence, the Judge found that in relation to the Category 1 documents, there was cogent evidence to support the Trustees’ belief that the Bankrupt at the material times controlled Keentrade and Sinowood, had been involved in the LSF Litigation through Keentrade and Sinowood and stood to benefit from any payments that Keentrade and Sinowood received from the respondents under the LSF Agreements. Further, the Judge
considered that to order the respondents to produce the Category 1 documents would not be oppressive to the respondents.

In relation to the Category 2 documents, the Judge found that the Trustees failed to discharge their burden to satisfy the court that they were reasonably required for them to carry out their functions. Nevertheless, in the event he was wrong to reach his conclusion, the Judge considered the respondents’ assertion of legal professional privilege over the Category 2 documents. In their affirmation, it was asserted that “the funding agreement would give the readers clues as to the funding mechanism, the litigation strategy, the legal actions that have been contemplated, and the advice that the respondents intend to seek from lawyers in relation to the merits of the case, as well as other matters such as overall strategy and tactics.” The Judge held that the respondents failed to follow the guidance laid down by the Court of Appeal in *Citic Pacific Ltd v Secretary for Justice (No 2) [2015] 4 HKLRD 20*, to set out the special bases and the full factual context upon which legal advice privilege and litigation privilege were claimed in respect of the Category 2 documents and thus did not consider that the respondents’ claim of privilege is made out.

The Trustees further sought an order pursuant to Order 24 rule 7 of the Rules of the High Court (“RHC”) that if any or the documents sought “had never been or is no longer in his/her/its custody and/or power, [the respondent should] file an affidavit/affirmation stating in respect of each document whether it had been in his/her custody and/or power, and if it had been, when it was last in his/her custody and/or power and the reason it is now no longer in his/her custody and/or power” (the “Proposed Affidavit”). The Judge noted that the application was made pursuant to section 29 of the Bankruptcy Ordinance, which does not confer any power on the court to order a party to file the Proposed Affidavit, and the power conferred on the court under Order 24 rule 7 RHC has no relevance in such an application.

In conclusion, only the application for Category 1 documents was allowed.
16. Court refused to approach the exercise of discretion to bankrupt a foreigner on the same basis as winding up an overseas company in Hong Kong

_Re Dai Guoliang_ [2019] HKCFI 597

Sino Pacific Global Multi-Strategy Fund (the “Petitioner”) presented a bankruptcy petition against the debtor, Dai Guoliang. The debt relied upon by the Petitioner is based on a guarantee executed by the debtor in its favour. The underlying debt was owed by one Centron Telecom International Holding Limited (“Centro Telecom”), which is a company incorporated in the Cayman Islands but listed on the Hong Kong Stock Exchange.

Section 4 of the Bankruptcy Ordinance (Cap 6) (“BO”) provides, inter alia, that:-

“A bankruptcy petition shall not be presented to the court under section 3(1)(a) or (b) unless the debtor

(a) is domiciled in Hong Kong;

(b) is personally present in Hong Kong on the day on which the petition is presented; or

(c) at any time in the period of 3 years ending with that day

i. has been ordinarily resident, or has had a place of residence, in Hong Kong; or

ii. has carried on business in Hong Kong.”

The debtor argued that though he was present in Hong Kong on the day on which the petition was presented, the Court should as a matter of discretion dismiss or stay the petition, by reason of his lack of sufficient connection with Hong Kong. The debtor contended that the Court should approach the exercise of discretion to bankrupt a foreigner albeit one who was in the jurisdiction on the day the petition was served, on the same basis as an overseas company which was sought to be wound up under section 327 of the Companies Ordinance, which would involve applying the so called three core requirements. For a detailed explanation of the basis for winding up foreign companies, please refer to the Court of Final Appeal’s decision in _Kam Leung Sui Kwan v Kam Kwan Lai_ (2015) 18 HKCFAR 501.

The Judge declined to effectively adopt the winding up approach in personal bankruptcy cases, noting that whereas section 4 of the BO sets out clear and different jurisdictional gateways, section 327 of the Companies Ordinance was left in broad terms for the court to develop. Moreover, the Judge noted that whereas jurisdiction can be founded by presenting a petition when the debtor is physically present in Hong Kong, there can be no exact equivalent in the winding up context for obvious reasons.

The Judge did accept that if one were dealing with a tourist, who otherwise would have no connection to Hong Kong, this may well be the sort of case where the court would refuse to
exercise its discretion notwithstanding that jurisdiction had been established, because the connection would simply be too tenuous or fleeting. However, in the present case, the Judge did not agree that the debtor’s connection with Hong Kong was too tenuous - the debtor is a Hong Kong Identity Card holder, a former director and substantial shareholder of Centron Telecom, a company listed on the Stock Exchange of Hong Kong, and he agreed to guarantee the listco’s debts, with the guarantee using Hong Kong law as the governing law and jurisdiction clause. A usual bankruptcy order was therefore made.
17. **Arbitration clause which purports to restrict or fetter a creditor’s statutory right to petition for the bankruptcy of a debtor is not enforceable as it is contrary to public policy**

*Re Sit Kwong Lam* [2019] HKCFI 920

Mr. Sit Kwong Lam (the “Debtor”) is the indirect controlling shareholder and chairman of Brightoil Petroleum (Holdings) Limited (“Holdings”), a company listed on the Hong Kong Stock Exchange. Brightoil Petroleum (Singapore) Pte Ltd (“Brightoil Singapore”), a wholly-owned subsidiary of Holdings, bought goods from the Petitioner totalling over US$30 million but had difficulty paying. The Debtor guaranteed the punctual performance by Brightoil Singapore of its obligation to pay the sum due by a Deed of Personal Guarantee dated 23 April 2018 (“Personal Guarantee”) executed by the Debtor in favour of the Petitioner.

The Petitioner and Brightoil Singapore subsequently entered into a settlement agreement on 12 July 2018 (“Settlement Agreement”) which contains an arbitration clause at Clause 7 for arbitration in Singapore. Pursuant to the Settlement Agreement, the Debtor executed an addendum to the Personal Guarantee (“PG Addendum”) in favour of the Petitioner on 16 July 2018 to cover the performance of Brightoil Singapore’s obligations under the Settlement Agreement. Brightoil Singapore failed to discharge its payment obligations under the Settlement Agreement. By a statutory demand, the Petitioner demanded from the Debtor payment of the outstanding settlement sum pursuant to the Personal Guarantee and the PG Addendum. The statutory demand was not complied with. The Petitioner then presented a bankruptcy petition against the Debtor for the sum of over US$30 million.

The Debtor argued, *inter alia*, that the Court should exercise its discretion to stay or dismiss the petition due to the existence of an arbitration clause. The Debtor relied on Clause 4 of the PG Addendum, which provides that “all other terms and conditions of the Personal Guarantee, including the arbitration clause, shall remain unchanged and this Addendum shall constitute an integral part of the Personal Guarantee”. It was contended that since the Petitioner relied on the Personal Guarantee, the Settlement Agreement and the PG Addendum to hold the Debtor liable, the PG Addendum should be construed as containing an arbitration clause in the same term as Clause 7 of the Settlement Agreement. Looking at the actual language used in Clause 4 of the PG Addendum, the Judge held that he was not able to find (i) any reference to the arbitration clause in the Settlement Agreement at all, or (ii) any purported attempt to incorporate the arbitration clause in the Settlement Agreement into the PG Addendum. All one can find in Clause 4 is a reference to a non-existent arbitration clause in the Personal Guarantee. The Judge agreed with the Petitioner that the reference to “arbitration clause” was indeed a clerical mistake and should be ignored as a matter of construction.
In obiter, the Judge noted that even assuming the PG Addendum is governed by an arbitration clause in the same term as Clause 7 of the Settlement Agreement, it will not be enforced as being contrary to public policy: *Re Greater Beijing Region Expressways Ltd* [1999] 3 HKLRD 862. In *Re Greater Beijing Region Expressways Ltd*, the Court of Appeal held that the articles of association of a company cannot preclude the statutory rights of the contributories to present a winding-up petition, reason being that it is contrary to public policy that the contributory’s right would be fettered. The Court of Appeal further held that if a matter is contrary to public policy, the courts will not give effect to an agreement whether the agreement is constituted by the articles or whether it is constituted by some outside agreement. Ng J took the view that the principle laid down by the Court of Appeal in *Re Greater Beijing Region Expressways Ltd* applies by analogy to an arbitration clause in a contract, if and in so far as the clause purports to restrict or fetter a creditor’s statutory right to petition for the bankruptcy of a debtor. Ng J concluded that even if the PG Addendum did contain a term identical to Clause 7, it would not be enforced by the Court, as contrary to public policy.

It is noteworthy that this decision does not sit well with Harris J’s judgment in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 (discussed in our *April issue of ONC Corporate Disputes and Insolvency Quarterly 2018*), in which Harris J decided to depart from the approach in the earlier Hong Kong decisions and held that a winding-up petition should generally be dismissed if the debt relied on by the petitioner is disputed and the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt.