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ONC Corporate Disputes and Insolvency Quarterly

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:

- 7 Corporate Insolvency Cases
- 1 Cross-border Insolvency Case
- 1 Restructuring Case
- 3 Corporate Disputes Cases
- 6 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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In this Quarterly, unless otherwise stated, the following abbreviations are used:-

- Section numbers refer to those in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32, Laws of Hong Kong);
- Rule numbers refer to those in the Companies (Winding Up) Rules (Cap 32H, Laws of Hong Kong);
- "BO" means the Bankruptcy Ordinance (Cap 6, Laws of Hong Kong);
- "CO" means Companies Ordinance (Cap 622, Laws of Hong Kong);
- "the Company" refers to the company which is the subject matter of the disputes or the winding up petition;
- "PL" means provisional liquidators

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Corporate Insolvency Cases

1. Surmounting the 2nd core requirement - Partial payment to the Petitioner shows that there is benefit in the form of leverage arising as an incident to the presentation of the Petition against the Company

Re Tian Shan Development (Holdings) Ltd [2022] HKCFI 3084

The Company is incorporated in the Cayman Islands and is registered as an overseas company in Hong Kong. The Company's shares have since 15 July 2010 been listed on The Stock Exchange of Hong Kong Ltd (stock code 2118). The Company has a principal place of business in Hong Kong. The Company is an investment holding company and holds a number of subsidiaries incorporated in Hong Kong and the Mainland (together the "**Group**").

The Petitioner holds a bond certificate dated 29 March 2021 for a principal of HK$200 million with interest at 15% p.a. The Company defaulted in redeeming the bond. As at 29 September 2021, the entire principal of HK$200 million remained unpaid (the "**Debt**"). By a statutory demand served on the Company on 5 October 2021, the Company was required to pay the Debt within 21 days. No payment was made by the Company and the Petition was presented on 28 December 2021. In January 2022, the Company made a partial repayment of HK$47,000,002 which was applied by the Petitioner to repay the interest due.

There is no dispute that the first and third core requirements for winding up a foreign company are satisfied. The Petitioner identified the following matters to support the Company's close connections with Hong Kong and the bases for contending that there is a reasonable possibility of benefit to the creditors for the Company to be wound up in Hong Kong:-

(1) The Company's shares are listed on the Main Board and its principal place of business has been in Hong Kong;

(2) The Company has a bank account in Hong Kong held with Bank of China (Hong Kong) Limited;

(3) The Company has significant assets in Hong Kong in the form of 100% shareholding in 2 Hong Kong companies held through its intermediate subsidiaries;

(4) The Company's auditor (KPMG) is located in Hong Kong and at least 2 of the Company's key officers (a director and the Company's authorised representative in Hong Kong and company secretary) are Hong Kong residents and the director resides in Hong Kong;

(5) The 2020 annual general meeting and 3 extraordinary general meetings of the Company took place in Hong Kong; and

(6) The Debt was incurred in Hong Kong, the Bond certificate is governed by Hong Kong laws and contains a non-exclusive jurisdiction clause in favour of Hong Kong court.

The Court further found that the above matters also satisfy the second core requirement, which is reinforced by the fact that:-

(1) After presentation of the Petition, the Company was able to make a partial payment to the Petitioner in January 2022. This demonstrates that there is benefit in the form of leverage arising as an incident to the presentation of the Petition against the Company; and

(2) The Company has substantial assets which can be realised for the benefit of its unsecured creditors, which include cash of RMB3,501,669.36 and receivables of RMB1,260,290,137.68.

For the above reasons, the Court held that it was appropriate to wind up the Company so that liquidators can take steps to preserve, collect and realise the assets of the Company for the benefit of the creditors as a whole.

2. Is the liquidator's perceived lack of independence a ground to convert a voluntary winding up into compulsory winding up?

Re Samwell Spare Parts Limited (In Creditors' Voluntary Liquidation) [2022] HKCFI 2851

The Company owed Airbus Helicopters China HK Limited (the "**Petitioner**") a substantial debt as a result of a partial arbitral award. A special resolution was passed to wind up the Company by way of creditors' voluntary liquidation. By the time of the creditors' meeting, another camp of connected creditors (the "**Connected Creditors**") whose debts constituted over 50% of the total amount appointed the liquidator of their choice (the "**Liquidator**").

The Liquidator found that there were potentially unfair preference payments to some of the Connected Creditors, but did not pursue further investigations citing that he did not have sufficient funds. The Liquidator also experienced some delay retrieving the Company's books and records and other documents.

The Petitioner was dissatisfied with the conduct of the liquidation and complained that it was not pursued by a liquidator that is not only independent, but is also seen to be independent. The Petitioner applied to convert the creditors' voluntary winding up to compulsory winding up. It was not disputed that the Petitioner was the major independent creditor despite the parties' disagreement as to who the majority creditor was after the further costs award ordered by the arbitral tribunal in favour of the Petitioner.

The Court found that:-

(1) The Petitioner is indisputably the majority independent creditor and its view is clearly in favor of a compulsory winding up.

(2) There are various matters that require further investigation and it was not ideal to leave it in abeyance due to a lack of funding.

(3) The views of the majority by number (i.e. the Connected Creditors) are not decisive and the Court will accord lesser weight to them in view of the possible unfair preference transactions.

(4) Whilst there is insufficient evidence to suggest that the Liquidator has been lacking independence, the present arrangements, in particular the Liquidator's decision not to proceed with further investigations, leave a substantial independent creditor with a strong and legitimate sense of grievance.

The Connected Creditors opposed and argued that there is another route or remedy available to the Petitioner, namely the removal or replacement of the Liquidator.

The Court considered that such alternative is not truly available to the Petitioner. First, it is impossible for the Petitioner to convene a meeting under section 244A to consider the removal of liquidator, which requires a resolution to be passed by a majority in number and three-fourths in value of the creditors present and voting on the resolution. Secondly, as there were insufficient ground or evidence suggesting that the Liquidator was in fact biased or partial, the Court would not replace the Liquidator under section 252. Therefore, the Petitioner was justified in not pursuing these theoretically available alternative remedies.

Accordingly, Court ordered that the Company be wound up by way of compulsory winding up.

3. Directors' potential liability for costs for unreasonably opposing a winding-up petition

Re Carnival Group International Holdings Ltd [2022] HKCFI 2668, [2022] HKCFI 3097

The Company was incorporated in Bermuda and registered as a non-Hong Kong company. Its shares are listed on the Hong Kong Stock Exchange. The Company was an investment holding company and holds subsidiaries incorporated in Hong Kong, the Mainland and the BVI (collectively, the "**Group**"). The Group was principally engaged in theme-based leisure and consumption business in the Mainland.

The Petitioner is a holder of senior unsecured bonds issued by the Company with an outstanding principal sum of over HK$30 million (the "**Debt**"). The Petition was supported by 99 other creditors, who are immigration bondholders or unsecured creditors, with an aggregate amount of debts over HK$878 million (the "**Supporting Creditors**").

The Company did not dispute the Debt and also admitted that it was unable to pay its debts generally. However, in previous hearings, it opposed to the Petition on the ground that there had been ongoing restructuring effort in respect of its indebtedness which, if implemented, would result in a higher return to the unsecured creditors. Hence, the Company had repeatedly sought and obtained adjournments, which caused a delay of 2.5 years in the winding-up proceedings. The purported restructuring efforts of the Company eventually had resulted in nothing.

Directors' duties: potential breaches

Against this backdrop, the first question the Court raised was: whose interest was the directors of the Company trying to protect? Since the commencement of the winding-up proceedings, the Company had resisted the Petition based on restructuring only. However, the Company continued to oppose the Petition even after the restructuring of the Company proved to be fruitless. This raised concern as to whether the directors had properly carried out their duties to the Company.

The Court highlighted that where a company is insolvent, the directors are under a duty to consider whether there is any reasonable prospect of the company avoiding going into insolvent liquidation. If there is no viable restructuring proposal which is supported by a majority of its creditors, it would be incumbent upon the directors to take step to put the company into liquidation.

In the present case, the Court held that it must be clear to the directors, who had been discussing restructuring proposals with the institutional creditors, that there would be no reasonable prospect of the Company being able to implement any proposals to compromise

its debts such that its liquidation was inevitable. However, the directors continued to oppose the Petition and incurred substantial legal costs in opposing the Petition at the outset.

Jurisdictional challenge: belated and unmeritorious 2nd core requirement argument

With the fall of the purported restructuring plan, the Company opposed the Petition on a single ground: arguing that the 2nd core requirement for winding up a foreign company was not satisfied. It was contended that the Company had no meaningful assets in Hong Kong and there was no possibility of benefits to the Petitioner and the Supporting Creditors if the Company was wound up.

First things first, the Court reminded that any genuine jurisdictional challenge should have been raised at an earlier stage. If the Company had decided not to take issue with the averments in the Petition by way of its affidavit evidence, it would not be open for the Company to raise it at such a late stage (i.e. 2.5 years after the Petition was presented) as the "*last ditch effort to defeat the Petition*".

In any event, the Court held that even if the Company had raised such an argument, it would have no merit. The Court followed the ruling in the recent Court of Final Appeal case of *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd* [2022] HKCFA 11 that the test of the 2nd core requirement has been set at a "*low threshold*".

The Court had no difficulty in finding that the Company was well-connected to Hong Kong and the Petitioner would have enjoyed at least "*some benefits*" by winding up the Company. As illustration:

(1) The Company was a registered company and had a principal place of business in Hong Kong. It listed its shares on the Hong Kong Stock Exchange. It had utilized and benefited from the Hong Kong's financial markets and system, not least in being able to raise funds through the issuance of shares and bonds. Most of its directors were holders of Hong Kong identity cards with residence in Hong Kong and had Hong Kong residential address.

(2) The liquidation analysis produced by the Company suggested that on a conservative estimate, there would be a return in the range of 3.6% to 10.5% to the bondholders of the Company. Despite the low percentage, this would suffice as "benefit".

(3) According to the Company's Annual Report for the period ended 2019, the Company had total assets of HK$4.6 billion. This showed that the Company had substantial assets which can be realised for the benefit of unsecured creditors.

(4) Further, the Company had made substantial payments to its legal advisers and financial advisers for the past 2.5 years. Upon a winding up order made against the

Company, these payments might be held as void and liable to be returned to the Company, and be distributed to the creditors.

(5) The Company suggested, *inter alia*, that all operating subsidiaries were "*valueless*" as most of substantial assets in the Mainland would go to secured creditors. In view of (2) above, this definitely cried out for investigation by the liquidators why billions of dollars' worth of asset were gone, for the benefit of the unsecured creditors, including the Petitioner.

Last but not least, the Company alleged that there were "*cross-border insolvency hurdles*" in the sense that the Company would not be able to access to and gain control of the assets in the Mainland. The Court found this contention to be "*wholly without basis*":

(1) Following *Re NewOcean Energy Holdings Ltd* [2022] HKCFI 2501, it is a matter of fact as to whether the current directors would cooperate with the liquidators in passing control of the direct and indirect subsidiaries. There was no evidence showing that they are unwilling to do so. In the unfortunate event that the directors were unwilling to do so, the liquidators could apply to the Hong Kong and/or Bermuda Court for appropriate reliefs (if necessary).

(2) Further, the recent insolvency cooperation mechanism between the Mainland and Hong Kong could assist Hong Kong liquidators to access Mainland assets or the Company's indirect shareholdings in the Mainland subsidiaries. In this case, although some of the main assets and developments projects were located in Beijing and Shandong, they were indirectly held by subsidiaries in Shenzhen or Shanghai (two of the three pilot areas), which, in turn, were wholly owned by Hong Kong subsidiaries. Once the liquidators take control over these Hong Kong subsidiaries, they can have access to the Mainland subsidiaries and the development projects.

Order for costs

As explained above, the Court considered that the directors owed a duty to cause the Company to be wound up so as to protect and safeguard the interests of the unsecured creditors once they became aware that the restructuring proposals would not come to fruition. But they failed to do so. As a result, the Court ordered that the current executive directors and independent non-executive directors of the Company be personally liable for the Petitioner's costs of and occasioned by the Company's opposition to the Petition from the time the restructuring of the Company had proved to be fruitless.

4. CFI's decision to dismiss the Official Receiver' claim for *ad valorem* fee overturned on appeal – Court of Appeal finding that the court has no power to order the Official Receiver not to charge the *ad valorem* fee, which is fixed by statute

Re GW Electronics Co Ltd [2022] HKCA 1590

In the August issue of ONC Corporate Disputes and Insolvency Quarterly 2021, we reported the Court of First Instance's decision in *Re GW Electronics Co Ltd* [2021] HKCFI 1869. The case concerns the Official Receiver's claim for *ad valorem* fees, which was dismissed as the same was only raised after the winding up proceedings were permanently stayed.

The salient facts of the case are as follows:- On 12 November 2020, upon the application of a contributory of the Company (the "**Applicant**"), the Court granted a permanent stay of all proceedings in the winding up of the Company, subject to the Official Receiver as the PL (the "**ORPL**") complying with the following three conditions:-

(1) The liquidation costs and the fees, costs and expenses of the Official Receiver of and arising out of the winding up of the Company ("**Liquidation Expenses**") be paid out of the cash fund in the Liquidation Account held by the ORPL;

(2) Applying the balance of the cash in the Liquidation Account after deducting liquidation expenses to discharge untaxed costs and the debt owed by the Company to the Petitioner; and

(3) Paying the entire surplus in the Liquidation Account to the Petitioner.

The Court further directed that upon compliance with the conditions, the Applicant shall apply on paper for an order to stay the winding up proceedings permanently and to release the ORPLC as PL of the Company (the "**Conditional Order**"). The terms of the Conditional Order was approved on 25 November 2020 and the Order was sealed on 4 December 2020. On 4 February 2020, the winding up proceedings of the Company were stayed permanently and the ORPL was released as PL.

One of the main issues in the Applicant's stay application was the solvency of the Company, specifically whether the fund kept in the Liquidation Account was sufficient to discharge the Company's liability to pay the Liquidation Expenses payable to the ORPL, as well as the debt and the untaxed costs payable to the Petitioner. The Applicant and the Petitioner both relied on the information and evidence adduced by the ORPL including the followings:

(1) ORPL's report stating that the Company appears to be solvent as of 29 December 2017; and

(2) ORPL's letter dated 23 June 2020 stating that she would seek her fees and costs in the total of HK$ 64,443.50.

It was not until after the terms of the Conditional Order were approved, the ORPL, in her letter dated 25 November 2020, for the first time, asserted her entitlement to charge *ad valorem* fee ("**AV Fee**") said to be chargeable under Item I of Table B of Schedule 3 to the Companies (Fees and Percentages) Order (Cap 32C) ("**CFPO**") out of the Liquidation Account, which eventually resulted in two Summonses taken out by the ORPL for an order to allow her to pay the AV Fee in the sum of HK$2,076,400 out of the Liquidation Account.

The Honourable Madam Justice Linda Chan dismissed both Summonses. The Judge was concerned with the important public interest in the finality of litigation and the potential prejudice to the other parties from being vexed by further argument. The ORPL appealed.

On appeal, the Court of Appeal held that while the Judge was understandably indignant and critical, the mandatory and automatic nature of AV Fee has to be taken into consideration in the court's exercise of the court's powers.

Section 296(2) stipulates that the rules and orders made under that section, which include Companies (Fees and Percentages) Order (Cap 32C) ("**CFPO**"), shall be "judicially noticed". Paragraph 6 of the CFPO provides that the fees and percentages set out in Schedule 3 "shall be taken in the office of the Official Receiver", thereby imposing a duty on the Official Receiver to collect them.

Further, Item I, Table B of Schedule 3 of CFPO is a fixed scale, allowing for no discretion on the part of the ORPL and requiring no determination by the court. Paragraph 9 of the CFPO confers power on the court, that on the application of the ORPL, to sanction a reduction of the fees or percentage in Table B where they would be excessive. But neither ORPL nor the court has on its own the power to waive or reduce the amount of the prescribed fees. It was thus an error of law for the court to order the ORPL not to charge the fee in this case.

In any event, the Court of Appeal found that the assets of the Company were sufficient to meet its liabilities (even taking into account the AV Fee), so that the Judge's reasoning in favour of the permanent stay would not be fundamentally affected by the AV Fee.

For the above reasons, the Court of Appeal allowed ORPL's appeal.

5. Singapore High Court clarifies a contributory's standing to oppose a creditors' winding up application

Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd [2022] SGHC 258

The Claimant had granted a loan facility to the Defendant's subsidiary company (the "**Subsidiary**"). The loan was guaranteed by the Defendant. The Subsidiary defaulted. The Claimant then sought payment from the Defendant under the guarantee. The Defendant did not comply. After issuing a statutory demand to the Defendant, the Claimant proceeded to file an application for winding up against the Defendant.

Monica Kochhar, a 32.6% shareholder and contributory of the Defendant, sought and obtained leave to oppose the application. Monica submitted that the debt owed by the Defendant was disputed, that the Defendant remained a going concern, and that the winding up application was an abuse of process by the Claimant.

The issue before the Court was whether Monica had legal standing to oppose the winding up application and, if so, whether she had successfully challenged the application.

At the outset, the Singapore High Court noted that as Monica had been granted leave by a High Court Judge to file his affidavit to oppose the Claimant's application, technically the issue had already been resolved in her favor. In any event, having reviewed the English authorities on this point, the High Court agreed that Monica had the legal standing as a shareholder / contributory to oppose the winding up application. However, the Court still retain a discretion not to allow such application, acknowledging the need to prevent shareholders / contributories from flooding the Court with frivolous applications to oppose a winding up.

The Court considered that the following non-exhaustive list of factors shall be useful when guiding the Court in determining whether leave should be granted for shareholders / contributories to oppose a winding up application:-

(1) Whether the shareholder / contributory owns a significant portion of the company's shareholding such that they have a substantial interest in opposing the winding up application;

(2) Whether the shareholder / contributory can demonstrate that the company is solvent;

(3) Whether the shareholder / contributory is acting *bona fide* (e.g. no delaying the winding up proceedings unnecessarily); and

(4) The weighing of the interest of the shareholder / contributory against the wishes of an unpaid creditor. In this regard, the Court would ordinarily attach little weight to the wishes of shareholders / contributories in comparison to the weight it would attach to the wishes of any creditor in the situation where the creditor proves both that he is unpaid and that the company is "unable to pay its debts".

On the evidence, the Court found that Monica had shown the existence of a substantial and *bona fide* dispute of the debt underlying the statutory demand. The Claimant's application for a winding up order was thus dismissed.

6. Singapore High Court provides guidance on when the transfer of shares in insolvent company will be allowed

Ong Boon Chuan v Tong Guan Food Products Pte Ltd [2022] SGHC 181

The Applicant and the Respondent, who are brothers, are the shareholders of the Company. The Respondent had commenced and failed in a minority oppression claim against the Applicant and was order to pay the Applicant his costs in the sum of S$262,562.79.

The Company was subsequently ordered to be wound up on the basis of insolvency, and was placed under the control of the liquidators. As the costs outstanding to the Applicant remained unpaid, the Applicant filed a writ of seizure and sale on 26 October 2021 to seize and sell the Respondent's shares in the Company. The Applicant then sought a validation order for the transfer of the Respondent's shares in the Company under section 130 of the Insolvency, Restructuring and Dissolution Act 2018 (in substantially similar wording to our section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), which provides that:-

> "Any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void".

The parties agreed that the objection of section 130 is to ensure that there is no evasion of liability by contributories. Therefore, transfers should be allowed if there is no risk of evasion of such liability. In the present case, the Court is satisfied that since the shares are all fully paid, there would be no risk of evasion.

However, the Singapore High Court observed that the use of partly paid shares is now very rare in modern times. A more appropriate rationale for section 130 may be the maintenance of the *status quo* of a company's position pending resolution of the winding-up petition. The Court held that it would lean in favor of not granting an application under section 130 in order to maintain the *status quo*, unless an applicant can demonstrate reasons for the Court to exercise its discretion otherwise.

On the facts, the Court accepted that the shares could potentially offer an avenue for recovery of the unpaid costs orders. Further, there was nothing to show any impact on the Company's liquidation or the distribution of its assets. The Court was satisfied that the Applicant was able to demonstrate why the application should be granted and that the *status quo* would not be adversely affected.

7. When does directors' duty to creditors arise?

BTI 2014 LLC v Sequana S.A. [2022] UKSC 25

In May 2009, the 2nd and 3rd Respondents, who were the directors of AWA (the "**Company**"), caused the Company to distribute a dividend of €135 million (the "**Dividend**") to the Company's sole shareholder (the "**1st Respondent**") by way of setting off the debt that the 1st Respondent owed to the Company. At the time the Dividend was paid, the Company was solvent on both balance sheet and cash flow basis. However, the Company had a long-term pollution related contingent liabilities of an uncertain amount which gave rise to a real risk that the Company might become insolvent in the future.

In October 2018, the Company went into insolvent administration and BTI 2014 LLC ("**BTI**"), the assignee of the Company's claim, sought to recover an amount equivalent to the Dividend on the basis that the 2nd and 3rd Respondents' decision to distribute the Dividend was a breach of the creditor duty pursuant to section 172(3) of the Companies Act 2006 (i.e. the directors must have proper regard to the interests of the creditors of the company in certain circumstances).

The claim was rejected by the English High Court. On appeal, the Court of Appeal maintained the decision finding that the creditor duty did not arise until the Company was insolvent or headed for insolvency. A risk of insolvency in the future was insufficient for a creditor's interest duty to arise unless it amounted to a probability. As the Company was still solvent at the time of the distribution of the Dividend in May 2009, the creditor duty claim had to fail. BTI appealed to the UK Supreme Court (the "**Appeal**").

The Supreme Court dismissed the Appeal after considering the following issues:

1. whether there is a common law creditor duty;
2. if so, when is the creditor duty engaged;
3. what is the content of the creditor duty; and
4. whether the creditor duty apply to a decision by the directors to pay an otherwise lawful dividend.

Common law creditor duty

The Supreme Court unanimously held that a creditor duty is considered as part of the directors' fiduciary duty to act in the interests of the company. Pursuant to section 172(1) of the Companies Act 2006, a director of a company must act in good faith to promote the success of the company for the benefit of the shareholders as a whole. With that being said,

in certain circumstances, this duty is modified by the common law that the company's interests are taken to include the interests of the company's creditors as a whole.

The timing of the engagement of creditor duty

The Supreme Court held that a real and not remote risk of insolvency was not a sufficient trigger for the engagement of the creditor duty. The majority of the Supreme Court considered that the creditor duty arises when the directors of the company knew or ought to know that the company was insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable. On the facts of this case, all of the members of the Supreme Court agree that the creditor duty was not engaged. This is because, at the time the Dividend was distributed, the Company was not actually or imminently insolvent, nor was insolvency even probable.

The content of creditor duty

As mentioned above, a creditor duty is a duty to consider the creditors' interests and to balance them against shareholders' interest where they might conflict. The Supreme Court held that before liquidation becomes inevitable, to balance the relative interests of creditors and shareholders is a fact sensitive issue and the directors are sometimes required to treat shareholders' interests as subordinate to those of the creditors. Furthermore, when the company is irretrievably insolvent, the interests of the creditors must become a paramount consideration in the directors' decision-making. However, Lady Arden stated that the duty was to consider and not to materially harm the creditor's interests but the directors are not obliged to act for the benefit of the creditors.

Application of creditor duty to payment of a lawful dividend

Although the Supreme Court determined that the creditor duty was not engaged in the current case, it unanimously held that the creditor duty can apply to a decision by directors to pay an otherwise lawful dividend. Pursuant to Part 23 of the Companies Act 2006, the payment of dividends is subject to any rule of law to the contrary. As established above, the creditor duty is part of the common law. Therefore, the payment of dividend is not excluded by Part 23 of the Companies Act. Additionally, it is possible for a company to have a surplus in the balance sheet whilst at the same time being cash flow insolvent.

8. Singapore High Court: when determining COMI, a hospital bed, or a crypt, does not count

Re Tantleff Alan [2022] SGHC 147

The Applicant, Alan Tantleff, had been appointed by the United States Bankruptcy Court for the District of Delaware to be the foreign representative of the following companies/entities:-

- Eagle Hospitality Real Estate Investment Trust (**EH-REIT**)
- Eagle Hospitality Trust S1 Pte Ltd (**S1**), an investment holding company incorporated in Singapore; and
- Eagle Hospitality Trust S2 Pte Ltd (**S2**), also an investment holding company incorporated in Singapore.

Pursuant to the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**"), Mr. Tantleff applied for the insolvency proceedings and orders for the Chapter 11 plan of liquidation in the United States to be recognized by the Singapore High Court.

As regards recognition of the Applicant as the representative of EH-REIT, the Singapore High Court denied the application, finding that the Model Law only dealt with companies and corporations and not collective investment schemes, which are not separate legal entities under Singapore law.

For S1 and S2, which fell within the Model Law, the only issue was whether their centre of main interest ("**COMI**") should be determined to be the US or Singapore. Under the Model Law, insolvency proceedings commenced in the jurisdiction of the company's COMI would be recognised as main proceedings.

The Court held that the presumptive COMI "may be displaced if the place of the company's central administration and various factors which are objectively ascertainable by third parties, particularly creditors and potential creditors of the debtor company, point the COMI away from the place of registration to some other location". The Court found that:-

(1) While S1 and S2 are incorporated in Singapore, they are only investment holdings companies and are not active, operational companies. Rather, they are part of the Eagle Hospitality Group, which has its main business operations and assets in the US.

(2) The substantial assets consisted of a portfolio of 18 full-service hotels, which are all located in the US where the income would be derived as well.

(3) US law is the governing law of the various agreements between S1/S2 and their creditors.

Accordingly, the Court concluded that given that (1) the operations and assets of S1 and S2 are in the US, (2) that the larger creditors are located in the US, and (3) that US law governs the various agreements, the presumption under Article 16(3) of the Model Law has been displaced and the COMI for both S1 and S2 is the US.

In reaching this conclusion, the Singapore High Court rejected the contention that the "control and supervision of the US Bankruptcy Court, and the activities of the Applicant as the chief restructuring officer and subsequently as liquidating trustee, are relevant factors" in determining the COMI. The Court made the following important remark:-

> "the "jurisprudential basis of the COMI requirement is to determine the centre of gravity of the company's commercial activity" i.e. when "it was alive and flourishing – in other words, a corporation's real home. A hospital bed, or a crypt, does not count."

9. A statutory scheme only modifies the liabilities included in the plan. It does not impact on the rights and liabilities of third parties

Oceanfill Limited v Nuffield Wellbeing Limited and another [2022] EWHC 2178 (Ch)

Oceanfill Limited ("**Oceanfill**") is the landlord under a 25-year lease of a gym in Leeds. In May 2021, the English High Court approved a restructuring plan (the "**Restructuring Plan**") proposed by the tenant, Virgin Active Limited ("**VAL**"). Under the Restructuring Plan, any sums payable by the tenant to the landlord under the lease were reduced to nil. Oceanfill subsequently brought a claim against the guarantors of the lease for amounts that, but for the Restructuring Plan, would have been payable by the tenant.

The English High Court granted summary judgment in favour of the landlord's claim, finding that the Restructuring Plan does not impact on the rights and liabilities of third parties. As a result, the Restructuring Plan had released VAL from future liabilities under the lease, but not the guarantors.

10. The mere use of the company chops, *per se*, could not constitute any representation for the purpose of apparent authority

Zhang Kan v SPH (Hong Kong) International Trading Co Ltd [2022] 3 HKLRD 813

The plaintiff was a customer of the defendant, which is a limited company incorporated in Hong Kong, carrying out the business of wholesale and retail of apparels. At the material times, it had 4 directors, one of whom was Chen. The plaintiff claimed that he advanced a loan of US$300,000 to the defendant on 25 March 2015, upon Chen's request, pursuant to a loan agreement (the "**Loan Agreement**"). The Loan Agreement bore the defendant's company chops and Chen's signature. The next day, the money was transferred out of the defendant's bank account to some unknown parties. Subsequently, the plaintiff received a payment from the defendant in the sum of US$200,000, which the plaintiff took to be a repayment in accordance with the Loan Agreement. The plaintiff claimed against the defendant for the remaining US$100,000 with interest based on the Loan Agreement and/or unjust enrichment.

The defendant resisted the claim contending, amongst other things, that Chen did not have any actual / apparent authority to enter into the Loan Agreement on behalf of the defendant. There had been no board resolution that authorised Chen to do so. The defendant further counterclaimed that the plaintiff is liable to repay the defendant the US$200,000 on unjust enrichment.

At issue *inter alia* were (1) whether the company chops affixed on the Loan Agreement constituted a representation by the defendant that Chen had authority to enter into the agreement on the defendant's behalf; and (2) whether the plaintiff could rely on section 117 of the CO, which provides that "… in favor of a person dealing with a company in good faith, the power of the company's **directors** to bind the company … is to be regarded as free of any limitation under any relevant document of the company" to contend that the act of Chen, a single director, could bind the defendant company to the Loan Agreement.

The legal principles in respect of apparent authority are well established. In gist:-

(1) That a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(2) That such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates, and in principle, such a person making

such representation can be the agent himself although practically, this should be "very rare and unusual" and it is hard to conceive any such circumstances;

(3) That the contractor was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and

(4) That under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

The Court found that the mere use of the company chops, *per se*, could not constitute any representation for the purpose of apparent authority. The permission to use the chop is only a factor to be considered, but is not conclusive. Further, the representation constituted by the permission to use the company chop (if any) is that the apparent agent "*had authority to act for the defendant in situations where the use of the defendant's rubber chop would suffice*". In other words, the permission to use the company chop is not a blank cheque for the apparent agent to act on behalf of the company in all aspects. It is only for situations where the use of the chop would suffice. In the present case, the Court found that the Loan Agreement was not an agreement for which the use of the chops would suffice, given that the loan amount was significant and it was not in the usual course of dealings for such borrowing to occur between the parties, where the plaintiff was a customer of the defendant. As Chen was found to have no apparent authority, the indoor management rule would not assist the plaintiff.

The Court then went on to consider whether the plaintiff could avail himself of section 117 of the CO. The crux of the question is whether the expression "directors", in plural, also include "a director" in singular. The Court answered this question in negative, for the following reasons:-

(1) First, the wording of the section, its explanatory memorandum and the relevant legislative material did not indicate that the section was intended to displace the common law rule in respect of the need for actual or apparent authority on the part of the individual directors.

(2) Second, the purpose of the section was to strike a balance between the need to protect outsiders dealing with a company in good faith, and on the other hand, the need to protect the company from directors acting outside their authority. If section 117 would apply to a single director, then it will practically leave the company with no defence to the outsider's claim and this cannot be right.

In the present case, since only Chen purported to act on behalf of the defendant company, section 117 of the CO is not applicable.

On the plaintiff's unjust enrichment claim, the Court found that the defendant had established the defence of ministerial receipt, which was available to the defendant as Chen's agent or nominee, whose account simply acted as a conduit to channel his unauthorised borrowing to others. Given the Court's above findings, it follows that the defendant's payment to the plaintiff in the sum of US$200,000 was without authority and proper basis and that the plaintiff had been unjustly enriched and was liable to return the payment.

11. Can a director, who is also an employee of the company, vote in favour of a board resolution to pay bonus to himself?

Li Jian Chao v TC Orient Lighting Holdings Ltd [2022] HKCFI 2324

The plaintiff, Li Jian Chao ("**Li**"), was employed as an executive director and chief executive officer by the defendant Company at a monthly salary of $200,000. The contract of employment provided that Li may be entitled to a discretionary bonus in respect of each financial year of the Company in an amount to be determined by the board in its absolute discretion. Li resigned with immediate effect on 5 June 2015.

The Company passed four resolutions to pay bonuses or special bonuses to Li (among others) at four board meetings on 30 December 2014, 26 January 2015, 14 April 2015 and 4 June 2015 respectively (Li resigned the following day) (the "**1st resolution**", "**2nd resolution**", "**3rd resolution**" and "**4th resolution**" respectively). Pursuant to the four resolutions, the Company had paid Li a total sum of HK$5,240,000. In May 2016, Li commenced an action against the Company for an outstanding sum of HK$1,640,000, representing the outstanding amount of the special bonus payable to him under the 4th resolution.

Amongst other defences, the Company contended that Li was in breach of his fiduciary duties in procuring and taking part in the passing of the 1st to 3rd resolutions. The Company also counterclaimed against Li for HK$5,240,000 on the basis of unjust enrichment.

Article 116(1) of the Company's constitutional documents provides that the quorum for board meeting is two. Article 103(1) further provides that a director shall not be counted in the quorum on any resolution of the board approving any arrangement in which is materially interested.

The 1st to 3rd purported resolutions were resolutions to pay special bonuses or bonuses to directors. Li and other directors, who would receive the bonuses under the resolutions if passed, were therefore materially interested in the arrangements. They were therefore disqualified from voting and did not count towards the quorum on each occasion. As a result, the three purported meetings were all inquorate and the three purported resolutions were invalid. Li should therefore pay back the three sums to the Company with interest.

Further or alternatively, the Court found that in light of the poor financial condition of the Company at the time, the succession of a series of bonus payments within a very short space of time, the large size of the bonuses when compared to the monthly salary of Li, the bonuses under the 1st to 3rd purported resolutions call for an explanation. Li was however unable to provide any satisfactory explanation save for a general assertion that the payments were not in conflict with the interests of the Company. The Court concluded that by taking

part in passing the resolutions, he failed to act in the best interests of the Company and was in breach of his fiduciary duties.

In respect of the 4th purported resolution, the Court found that the 4th purported meeting was invalidly convened as notice had not been given to all the directors. For this reason, the 4th purported resolution was invalid. Li should return the first instalment of the bonus to the Company and the Company is not liable to pay him the second instalment. Further or alternatively, the Court found that the bonus purportedly payable to Li under the 4th resolution was in the nature of compensation for his loss of office. Approval was thus required from the general meeting and the Remuneration Committee. No such approval was obtained. The 4th purported resolution was therefore invalid.

In conclusion, Li's claim was dismissed and Li was ordered to repay the sum of HK$5,240,000 plus interest to the Company.

12. Court orders Sound Global Chairman to purchase investors' shares pursuant to section 214 of the Securities and Futures Ordinance for having orchestrated schemes to falsify and inflate the Group's financial position

Securities and Futures Commission v Sound Global Ltd and Others [2022] HKCFI 3025

The Company is an investment holding company. Its shares have since 30 September 2010 been listed on the Main Board of SEHK. On 13 April 2016, trading in the Company's shares was suspended and has not resumed to-date. The Company through its subsidiaries in the Mainland (together the "**Group**") carries on business in turnkey water and wastewater treatment. The 2nd Respondent, Wen, is the founder of the Group and executive director and Chairman of the Company from 7 November 2005. He is also the controlling shareholder of the Company.

In early 2015, Emerson Research Analysts Co, an equities research firm, issued 2 reports in relation to the Company, which suggested, *inter alia*, that the Group's profitability was significantly inflated in its financial report for the financial year of 2013. Concerned about whether false or misleading information had been disclosed or provided by the Company, the SFC launched an investigation against the Company.

The investigation revealed that the Group's financial position in the Group's consolidated financial statements for the year ended 31 December 2012 ("**2012 AFS**") and the year ended 31 December 2013 ("**2013 AFS**") had been falsely and substantially inflated as a result of the fictitious balances in the 5 out of the 8 bank accounts maintained by the Company's subsidiaries (the "**Falsification Scheme**"), and that Wen knowingly caused, directed and/or orchestrated the Falsification Scheme and/or the fabrication of falsified bank statements and bank balance confirmations to support the inflated and fictitious bank balances (the "**Fabrication Scheme**") (collectively the "**Schemes**").

On 14 June 2019, the SFC presented a petition under section 214 of the Securities and Futures Ordinance (Cap 571) ("**SFO**") against the Company and Wen, seeking, *inter alia*, (1) a disqualification order against Wen; and (2) an order requiring him to purchase the shares of the Company from the other members of the Company at a price to be determined by the court.

On the evidence, the Court found that the Schemes were devised and perpetrated on the 5 bank accounts. As a result of the Schemes, the bank balance of the Group stated in the 2012 AFS and 2013 AFS had been inflated by RMB 2.18 billion and RMB 2.72 billion respectively, and Wen plainly had knowledge of and was involved in causing, directing and orchestrating the Schemes.

In view of the above findings, the Court considered that there is more than sufficient bases to conclude that the business and affairs of the Company were conducted by Wen in the manner within the meaning of section 214 of the SFO.

Given the very serious nature of the misconduct, which involved fraud and dishonesty on the part of Wen, who is found to have caused, directed and perpetrated the Schemes for over 2 years, the Court granted a disqualification order for 12 years. The Court then went on to consider whether to grant the purchase order as sought by the SFC.

In deciding whether to make a share purchase order in the context of a listed company, the court may take into account the following factors:-

(1) whether there is a lesser remedy sufficient to deal with the unfairly prejudicial conduct and there is no likelihood of the conduct repeating;

(2) where there are difficulties or impracticalities in framing orders for regulating the company's affairs in future or to remedy the misconduct;

(3) whether the other members would otherwise be locked in the company due to difficulties in disposing of the shares;

(4) whether the person against whom the order is sought was in control of the company at the material times of the misconduct and his interests in the company; whether he acted in clear disregard of the interests of the minority shareholders; his pattern of conduct and whether he acted in breach of the Listing Rules and other applicable regulations; and

(5) whether the respondent has the financial means to comply with the order.

Applying the above principles, the Court considered that it is an appropriate case where the court should make an order requiring Wen to make an offer to purchase the shares held by other members for the following reasons:-

(1) First, as a result of the Schemes, the true financial state of the Company and of the Group remains unclear.

(2) Second, the prejudice suffered by the Company and its members is substantial and irreversible. In particular, the trading in the Company's shares remain suspended and for so long as trading remains suspended, the other members will not be able to sell their shares through the SEHK. It is no answer to say that these members may still sell their shares through private agreements as the members acquired their shares on the basis that the Company's shares could be traded on the SEHK. SEHK may even cancel the listing of the Company's shares at any time.

(3) Third, there is no lesser remedy which may redress the wrongs done to the Company.

(4) Fourth, there is no suggestion that Wen does not have the financial means to purchase the shares of the other members.

In conclusion, the Court made the following orders against Wen:

(1) A disqualification order for 12 years from the date of this Judgment; and

(2) An order that Wen shall make an offer to purchase the shares held by the other members of the Company at the price to be determined by the court at a further hearing.

Bankruptcy Cases

13. A bankrupt's duty is to positively cooperate with the trustee in the administration of his estate. It is not good enough to adopt a purely passive or reactive role

Re Chu Yung (A Bankrupt) [2022] HKCFI 2487

On 13 April 2018, the Bankrupt petitioned for his own bankruptcy. He deposed, *inter alia*, that he owed debts to 4 banks/finance companies in the total sum of about HK$1.6 million. The investigation by the Official Receiver however revealed that the Bankrupt had not disclosed a sale of a land property by him on 16 January 2018, within 3 months before the filing of the petition, at HK$4.68 million. As a result, the Bankrupt amended his Statement of Affairs and prepared two affirmations to explain the position. On 19 June 2018, a bankruptcy order was made against the Bankrupt.

On 20 May 2022, the Trustees applied for suspension of automatic discharge of bankruptcy on the basis that the Bankrupt's conduct was unsatisfactory and uncooperative. Particulars of the complaints include:-

(1) There was a "suspected unfair preference" given by the Bankrupt to one Mr C C Yip ("**Yip**") for HK$2.1 million, 3 months before the filing of the petition;

(2) The Bankrupt has failed to account for the whereabouts of about HK$1.9 million of the sale proceeds which he only made general assertion that they were used to repay creditors but had lost the receipts;

(3) Despite investigation by the Trustees, including a letter of 18 September 2019, the Bankrupt did not provide a satisfactory account and it prejudiced the administration of the estate of the Bankrupt.

The Court found that the answer and explanation given by the Bankrupt are difficult, if not impossible, to be believed. In particular, in relation to the repayment of HK$2.1 million to Yip, not even a single document has been produced by the Bankrupt apart from the pay-in slips. No particulars were produced to explain how they were incurred and paid. The Bankrupt's explanation as to the identity of Yip had also been inconsistent. All in all, the Court found that the Bankrupt did not adopt a positive duty to cooperate with the Trustees in the administration of his estate. He has been adopting a "catch me if you can" approach.

After taking into account the quantum involved, the contribution made by the Bankrupt towards the estate over the past 4 years and that there is no complaint of failure to provide statement of affairs, the Court ordered that the automatic discharge be suspended for 2

years. The Bankrupt was also ordered to pay the costs of the Trustees, summarily assessed at HK$55,359.

14. TIBs are reminded to take neutral stance in relation to disputes over the validity of the bankruptcy order

Re Wang Huimin [2022] HKCFI 2271

In the March issue of ONC Corporate Disputes and Insolvency Quarterly 2022, we reported the Court of First Instance's decision in *Re Wang Huimin* [2021] HKCFI 3472. In gist, the case concerns Madam Wang's application for annulment of the Bankruptcy Order made against her on 3 February 2021 in her absence on the basis that the requirement under section 4(1)(c)(ii) of the BO (which confers the court jurisdiction to make a bankruptcy order when a debtor has carried on business in Hong Kong at any time in the period of 3 years ending with the date of the presentation of the bankruptcy petition) was not satisfied (the "**Annulment Application**").

The Annulment Application was opposed by the Petitioner and Milestone F&B I Limited ("**Milestone**"), a supporting creditor. The Annulment Application was also opposed by the Trustees in Bankruptcy of Madam Wang. By Judgment dated 29 November 2021, the Annulment Application was allowed. The only issue remains is the costs. Madam Wang seeks an order that the Petitioner, the Trustees and Milestone shall jointly and severally bear her costs on an indemnity basis.

In relation to the costs against the Petitioner, the Court agreed that such costs shall be on an indemnity basis, as the Petitioner was guilty of serious non-disclosure and misstatements in obtaining the order for substituted service of the Petition, which conduct is the kind of underhand conduct that renders indemnity costs "appropriate". As to the costs against Milestone, the Court does not agree that Milestone should bear indemnity costs, in view of the fact that they were not responsible for the Petitioner's serious non-disclosure and misstatements in obtaining the order for substituted service.

Lastly, with regard to the costs against the Trustees, the Court expressed disapproval of the Trustees strenuously opposing the Annulment Application. The Trustees, the Court held, are there to administer the estate of Madam Wang on the basis that the Bankruptcy Order is valid, and they may properly bring any matter to the attention of the Court given their power to investigate Madam Wang's affairs. But the Trustees should not be concerned with the disputes between the Petitioner and Madam Wang as to the validity of the Bankruptcy Order. Hence, taking a neutral stance was the only reasonable and sensible course for the Trustees to take. The Trustees were ordered to be personally liable for the costs of and occasioned by the Annulment Application, such costs to be taxed on party and party basis if not agreed.

15. Approval of an Individual Voluntary Arrangement ordered to be revoked for material irregularity at or in relation to the creditors' meeting

Re Chui Tak Keung Duncan [2022] HKCFI 3018

On 10 November 2020, Profit Big Enterprises Limited ("**Profit Big**") presented a bankruptcy petition against the Debtor, Mr. Chui. Before the petition was heard, on 4 January 2021, Mr. Chui applied for an interim order, seeking to stay the proceedings against him. He filed a supporting affirmation on 4 January 2021 exhibiting a proposal for an individual voluntary arrangement ("**IVA Proposal**"). Under the IVA Proposal, Mr. Chiu proposed HK$13 million, to be provided by a "white knight", as a full and final settlement of 3.19% of all his indebtedness. The list of creditors at Annex 2 to the IVA Proposal gave the figure of $206,800,000 for "Family Members".

On 22 February 2021, the Court granted an interim order. Effectively, during the period for which the interim order is in force, no bankruptcy petition (and other forms of legal proceedings) relating to the debtor can be presented or proceeded with. Nominees were appointed to act in relation to the IVA Proposal.

The creditors considered the IVA Proposal at the creditors' meeting on 24 March 2021 (the "**Meeting**"). However, the total amounts of the debts claimed against Mr. Chui, whether by Family Members or other creditors, had increased, from HK$614,315,485 to HK$904,434,808.16. Of these, the debts owed to the Family Members (the "**Family Debts**") had increased from HK$206,800,000 to HK$427,822,285.38. The debts of other unsecured creditors had increased from HK$267,115,485 to HK$304,135,682.04, some of these claims being brought forward only at the Meeting. As a result, the rate of return was lowered from the originally anticipated 3.19% to 2.73%. The IVA Proposal was approved by 79.38% of the vote by value of the creditors' claims, including those of the Family Members (the "**Decision**"). The Nominees ceased to act as from 28 February 2022.

By Summons dated 9 April 2021, Zhongcai Finance Limited ("**Zhongcai**"), another creditor of the Debtor, applied pursuant to section 20J of the BO for, *inter alia*, an order that the approval of the voluntary arrangement given at the Meeting be revoked or suspended on the basis that there was a material irregularity at or in relation to the Meeting, within the meaning of s.20J(1)(b) BO.

For the purposes of s.20J(1)(b) of the BO, an irregularity in a statement of affairs or a proposal for an IVA is capable of constituting an irregularity: *Re Chin Wai Kay Geordie* [2010] 3 HKLRD 456. This would include material errors or omissions in the debtor's proposal or his statement of affairs. As to materiality, generally, an irregularity will not be material for the purposes of s.20J(1)(b) unless the court is satisfied that had it not occurred, the result of the meeting would have been different. The assessment is to be made objectively.

Most of the irregularities complained of by Zhongcai relate to the Family Debts, which Zhong Cai claimed to be all “concoctions”. The Court held that the determinative issue, in the circumstances of the case, was not so much whether Zhongcai has established that there is sufficiently cogent evidence necessary to sustain serious allegations of this nature, but rather, whether, on a balance of probabilities, Mr. Chui has shown that the debts he relies are established for voting purposes.

On the evidence, the Court found that some of the Family Debts have not been established on a balance of probabilities. Had these Family Debts not been taken into account for voting purpose, the claims voting in favour of the IVA Proposal would have been 65.53%, less than the requisite 75% majority for the IVA Proposal to pass. There was therefore a material irregularity at the Meeting. The IVA Proposal ought not to have been approved, and the Decision should therefore be revoked.

The Court however disagreed that there was material irregularity in lowered rate of return. First of all, this reduction in the rate of return was not due to the increase in the Family Debts, as the Family Members had chosen to forgo their entitlement to receive any return. Rather, the reduction arose due to the increase in the debts claimed by other creditors to be owed to them. In any event, the Court was not persuaded that a change from 3.19% to 2.73% was material.

In conclusion, the Court ordered that the Decision be revoked.

16. Court of Appeal clarified the effect of an Exclusive Jurisdiction Clause on insolvency proceedings

Re Guy Kwok-Hung Lam [2022] HKCA 1297

In the December issue of ONC Corporate Disputes and Insolvency Quarterly 2021, we reported the Court of First Instance decision in *Re Guy Kwok-Hung Lam* [2021] HKCFI 2135. In gist, pursuant to a credit and guaranty agreement (the "**Agreement**") between CP Global Inc. (the "**Borrower**"), Tor Asia Credit Master Fund LP, the lender (the "**Petitioner**"), and Lam Kwok-Hung Guy, the personal guarantor ("**Lam**"), the Petitioner advanced various term loans in the amount of US$29,500,000 (the "**Term Loans**") to the Borrower. The Term Loans were secured by the personal guarantee given by Lam in favour of the Petitioner.

The Borrower did not repay the Term Loans by the deadline. The Petitioner thus presented a petition seeking a bankruptcy order against Lam. The Agreement contains an exclusive jurisdiction clause ("**EJC**"), which provides that the parties agreed to submit to the exclusive jurisdiction of the New York court for the purpose of all legal proceedings arising out the Agreement. Lam disputed that there was an event of default. Amongst other things, Lam contended that the Petitioner is required to litigate the dispute in the New York court before coming to Hong Kong to invoke the bankruptcy regime.

At first instance, the Judge held that an EJC does not *per se* prevent the Companies Court from considering the issue whether the creditor has the *locus* to present a winding up/bankruptcy petition. This is because unless and until the company/debtor is able to demonstrate to the Court that there is a *bona fide* dispute on substantial ground in respect of the debt, there is no proper basis for the company to contend that there is a dispute which must be litigated in accordance with the contractually agreed forum. Putting it in another way, it would be a pointless exercise to require the creditor to first obtain an award or a judgment from the agreed forum when there is no real dispute on the debt.

On the facts, the Court of First Instance found that there is no *bona fide* dispute that (1) there was event of default under the Agreement and, therefore, the Petitioner was entitled to enforce the security provided by the various parties, and (2) Lam was liable but failed to repay the Term Loans to the Petitioner on or before 31 December 2019. Accordingly, the Court made a usual bankruptcy order against Lam.

Lam appealed. The Court of Appeal unanimously allowed the appeal.

First of all, the Court of Appeal found that the EJC was engaged in this case. There was a dispute between the Petitioner and Lam as to whether Lam was indebted to the Petitioner under the Agreement. The hearing of the bankruptcy petition may well entail a determination of that dispute which fell within the EJC.

Second, as to the effect of an EJC on insolvency petitions, the Court of Appeal held that there are cogent reasons for applying the court's approach to a stay in ordinary actions, i.e. there should be a stay in the absence of strong reasons to the contrary. *Prima facie*, parties should be held to their exclusive jurisdiction agreements. It would also be an anomaly that a party bound by an EJC in favor of a foreign forum could not expect to proceed with an ordinary action in Hong Kong for his claim, but could resort to the more draconian measure of presenting a petition here for winding up or bankruptcy on the basis of the claimed debt and expect the court to deal with it in usual way by determining whether the other party had raised any *bona fide* dispute of the debt on substantial grounds.

Applying this approach, where the debt on which a winding-up or bankruptcy petition was based was disputed and the parties were bound by an exclusive jurisdiction clause in favor of another forum precluding the determination of that dispute by the Hong Kong court, the petition should not be allowed to proceed, in the absence of strong reasons, pending the determination of the dispute in the agreed forum. While there is no hard definition for "strong reasons", these could include situations where:-

(1) the debtor is incontestably and massively insolvent apart from the disputed debt;

(2) the debtor will be a menace to commercial society if allowed to continue to trade;

(3) there are other creditors seeking a winding up order whose debts are not subject to any jurisdiction agreement;

(4) the assets may be in jeopardy;

(5) there is a need to investigate potential wrongdoings; and

(6) the effect of a dismissal or stay will be to deprive the petitioner of a real remedy or result in injustice otherwise.

Applying the above to the facts, the Court of Appeal considered that there was a dispute which ought to be determined first in accordance with the EJC. As the Petitioner did not advance any special cause to the contrary, the Petition was dismissed.

At the time of writing, the Court of Appeal has granted leave to the Petitioner to the Court of Final Appeal on the following question:-

Where:-

(1) parties to an agreement have agreed to submit to the exclusive jurisdiction of a specified foreign court for the purposes of all legal proceedings arising out of or relating to their agreement or the transactions contemplated thereby,

(2) one of the parties has petitioned in Hong Kong for the bankruptcy of another party on the basis of a debt arising under the agreement, and

(3) the debt is disputed by the latter party,

what is the proper approach of Hong Kong court to the petition? In particular, should the petition ordinarily be stayed or dismissed pending the determination of the dispute in the foreign court unless there are strong reasons to the contrary (on the footing that the petitioner may not seek to demonstrate such strong reasons by showing that there is no *bona fide* dispute of the debt on substantial grounds)?

17. English High Court held that a claim for restitution based on unjust enrichment is, by its nature, not for a liquidated sum and hence cannot found a winding-up/bankruptcy petition

Dusoruth v Orca Finance UK Ltd (in liquidation) [2022] EWHC 2346 (Ch)

Mr. Dusoruth was the sole director of Orca Finance UK Limited ("**Orca**") at the date of its liquidation. Orca was owned by a company registered in Malta, which was in turn owned by Mr. Dusoruth.

The liquidators of Orca discovered that Mr. Dusoruth had misapplied company funds towards his own personal credit card bills and rental payments (the "**Misappropriated Sums**"). The evidence was overwhelming. It was on this basis that a bankruptcy petition was presented against Mr. Dusoruth and a bankruptcy order was subsequently made on 16 November 2020. Mr. Dusoruth applied for an annulment of the bankruptcy order, contending, amongst other things, that the Misappropriated Sums were not liquidated sums, which rendered the bankruptcy petition irredeemably defective. Orca's liquidators' position was that, in circumstances where the claim was for restitution for the unjust enrichment of Mr Dusoruth, nothing further was required to quantify the claim.

The English High Court held that a claim for restitution based on unjust enrichment is, by its nature, not for a liquidated sum for the purpose of section 267(2) of the Insolvency Act 1986. This is so even if the creditor can specify an exact amount for the claim. The reason behind is that before the debtor can avail itself of the remedy of equitable subrogation to pursue such a claim, there must first be a determination by the court that the debtor has been unjustly enriched.

Notwithstanding the findings above, the Court ultimately exercised its discretion to refuse to annul the bankruptcy order.

18. Trustees found to have waived privilege by summarising a piece of Russian legal advice in witness statements, and were ordered to disclose the relevant part of the legal advice and all instructions / communications leading to the advice

Re Yurov; Thomas and others v Metro Bank plc and others [2022] EWHC 2112 (Ch)

The Trustees in Bankruptcy of Mr. Yurov applied for an order under section 366 of the Insolvency Act 1986 (inquiry into a bankrupt's dealings and property) against the 1st – 4th Respondents, which are UK banks. The bank accounts were all registered under the sole name of Mr. Yurov's wife, Mrs. Yurov. The Trustees want the banks to provide them with access to bank statements in relation to those accounts. The Trustees contended, amongst other things, that 50% of the balances in Mrs. Yurov's account belonged to Mr. Yurov.

In support of this ground, the Trustees, in their witness statements, referred to a piece of legal advice they had received in relation to Russian Law on Matrimonial Property. While it was expressly stated that the Trustees do not waive privilege in that advice, a summary of that legal advice was included in the witness statements and the Trustees also explained the impact of this Russian law advice on the s.366 application. Mrs. Yurov claimed that the Trustees, by summarising the advice in their witness statements, had waived privilege in that advice and asked for a copy of the said Russian law advice.

At the outset, the Court noted that it was unusual for there to be an application for disclosure by a respondent to s.366 application. The point of a s.366 application is for the trustee in bankruptcy to obtain information or property from a person who appears to have it. However, the Court did agree that there is a risk of injustice to Mrs Yurov if the Trustees are to rely on assertions in a witness statement based on extracts from legal advice they have received. Those extracts could well be misleading, or could be misinterpreted whether by Mrs Yurov or the court.

Taking into account all the circumstances of the case and the overriding objective of a s.366 application, the Court only ordered the Trustees to disclose the following:-

(1) Legal advice received in relation to the Russian law of matrimonial property as it relates to monies held in bank accounts in the name of one of the spouses, including in particular advice addressing the facts of the present case;

(2) Instructions which led to such advice being given, insofar as those instructions deal with these issues, with redactions to remove any other instructions; and

(3) Any communications between the advising lawyer and those giving instructions concerning the substance of the disclosable instructions or the disclosable advice, if separate from the advice or instructions themselves.

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