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"Valerie is quick-witted, articulate in her advocacy and very knowledgeable with a sharp legal intuition. She is definitely a rising star in the legal industry and one to look out for."

Rising Stars
Legal 500 Asia-Pacific 2025
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Valerie enjoys a broad civil practice with a focus on company and commercial law. She is also well-versed in family law, and has experience in land, probate, personal injuries, employment and mental health-related matters. Apart from her law practice, Valerie is also a part-time lecturer at the Chinese University of Hong Kong and regularly contributes to practitioner publications. Most recently, she was commissioned by LexisNexis to author Issue 107 of Atkin's Court Forms Hong Kong – Companies (Winding-up). **Check Valerie's profile**

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"Vivien is pragmatic, reasonable and gives sensible advice." "She has in-depth knowledge on family litigation."
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"Vivien is technical and meticulous. Her written submissions are thorough and covers all grounds. She is calming and reassuring to clients."
"Vivien has a strong presence in court and does not shy away from a battle. She has never been intimidated by an opponent or witness and she is meticulous, having covered the key points in cross-examinations and re-examinations."

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Case 1

Court orders production of company documents relevant to ascertaining the members' entitlement to dividends and reaffirms principle that only the documents of a subsidiary company which the parent company is currently in possession of or is entitled to possession of are regarded as the company's records under section 740 of the Companies Ordinance

Lam Yan Yee v This This Rice (Hong Kong) Ltd [2025] HKCFI 1378

Date of Decision: 3 April 2025
Coram: Deputy Judge Lam

In a shareholders' dispute relating to a restaurant chain, the plaintiff shareholders were successful in obtaining production of the company's documents relevant to determining their dividend entitlements but were unsuccessful in obtaining production of the documents of the company's subsidiaries on the ground they had failed to prove that those documents were in the possession of the company or were documents the possession of which the company was entitled.

The company operated different branches of a restaurant chain known as This This Rice under the brand through various subsidiary companies. The plaintiffs held about 67% of the shares. Under the shareholders' agreement, the board of directors shall determine the distribution of dividends according to the profit of the company. At about the same time when the shareholders' agreement was entered into, the plaintiffs and the 2nd defendant as directors of the company signed an undated written resolution which provided that according to the company's dividend policy, if the company makes net profits for 3 consecutive months , shareholders may receive a share of the profits every month based on their respective shareholdings in the company.

The company never declared and distributed any dividends and has not had its financial statements audited. There is no evidence that the board had ever met to review its accounts, audited or not, to determine whether there has been any 3 consecutive months of net profits.

The plaintiffs sought documents of the company consisting of daily reports, expenses vouchers, cheque stubs, bank statements, purchases and subcontracting orders, salary list, employer's returns and MPF records, inventory list, business contracts, loans and hire purchase agreements for the purpose of determining whether the company has made any profits for dividends under the dividend clause. The plaintiffs further sought certain documents of the company's subsidiaries not specifically stated in the judgment.

The court summarized the principles for production of documents under section 740 as follows:

1. Whether the inspection of the documents sought by the plaintiffs is for a proper purpose;
2. Whether the application is made in good faith;

3. Assuming that the answers to the above are in the affirmative, whether the Court order should include the records and documents of the subsidiary companies.

The court allowed production of the company's records for the following reasons:

1. First, the defendants have not explained why the audited accounts of the company had not been prepared.
2. Second, despite the expansion of the business by way of opening more branches, no dividend has yet been declared.
3. Third, while the 2nd defendant said in a TV programme that he welcomed the shareholders to look at the accounts, no accounts have been produced.
4. Fourth, the plaintiffs were not consulted about the opening of or investment in the new branches, using the company's brand name and using the company's funds with the 2nd defendant's mother and his personal friend. The defendants gave no explanation in this regard.
5. Fifth, the company had not convened any shareholders' meeting and there were irregularities in the procedures by which the plaintiffs were removed as directors.
6. Sixth, since the removal of the plaintiffs as directors, the 2nd defendant has been the sole director and there has been no attempt to appoint any director.

Taking all of these considerations into account, the court came to a view that there were reasonable grounds for the plaintiffs to believe that some wrongful conduct had been committed against the plaintiffs as shareholders. The defendants' removal of the plaintiffs as directors of the company may have been motivated by an intention to deprive them of access to the company's documents and/or to make it more difficult for them to gain access to the company's documents.

On the other hand, the court dismissed the plaintiffs' application for production of the subsidiary companies' documents for the following reasons:

1. First, there is no evidence that the documents are in the company's possession.
2. Second, even though the company holds shares in the subsidiaries, the company itself is not entitled to the documents of the subsidiary companies.
3. Third, although it was suggested that the 2nd and 3rd defendants, being directors of certain subsidiary companies, are entitled to the company's documents, they were not joined in their capacities as directors of the subsidiary companies.
4. Fourth, there is no basis for the defendants to accede to the plaintiffs' request for the defendants' confirmation on whether such documents of the subsidiary companies are in the possession of the company, as the plaintiffs bear the burden of proof.

Case 2

Application for a key factual witness claiming to be a "fugitive of justice" to give evidence by video-conferencing facilities ("VCF") rejected – the importance of giving live evidence under solemn atmosphere of court room reaffirmed

Imperial Pacific International (CNMI) LLC v Chan Chi Hung [2025] HKCFI 1512

Date of Decision: 11 April 2025
Coram: Deputy Judge Li

At a pre-trial review hearing concerning a commercial dispute over repayment of non-negotiable gambling chips and unjust enrichment, the Court rejected the plaintiff's application for the evidence of its main factual witness to be given via VCF at the trial. It was claimed that the witness was a "fugitive of justice" who would not set foot in Hong Kong for fear of criminal prosecution on an unrelated matter.

The learned Judge cited and affirmed the principles laid down in, inter alia, *Re Chow Kam Fai, ex p Rambas Marketing Co LLC* [2004] 2 HKLRD 260 and *Re Nobility School Ltd* [2020] HKCFI 891 (unrep., 20 May 2020) and summarized the principles as follows:

1. The giving of evidence by VCF is an exception.
2. The starting point is that proceedings are conducted in court . It is more important when it comes to a trial.
3. Sound reason is required to justify a departure from the starting point.
4. The solemnity of court proceedings and its atmosphere is highly important in the taking of evidence.
5. The court may be more disposed to exercise its discretion to allow evidence by VCF in respect of technical or purely factual evidence which involves no serious issue on credibility or relatively unimportant evidence;
6. Where the credibility of the witness is seriously contested, it is important for the witness to be examined under the solemn atmosphere of the court;
7. Costs and convenience may be important considerations which the court will have to weigh in the determination of the application;
8. Ultimately, it is a matter of judgment of the court choosing the course best calculated to achieve a just result by taking into account all the material considerations, including whether the witness is capable of attending the proceedings, any prejudice to the other party, the underlying objectives, any delay to the proceedings and practical considerations like the availability of the facilities.

The learned Judge came to a view that the pendulum has clearly swung and that the older line of cases of *Sun Legend Investments Ltd v Ho Yuk Wah* [2008] 4 HKLRD 239 and *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637 that the plaintiff had sought to rely upon and which gave higher flexibility to give evidence remotely must be seen in light of subsequent and more updated authorities.

A few days after the hearing of the case above, on 28 March 2025, the Courts (Remote Hearing) Ordinance (Cap. 654) ("Ordinance") took effect upon gazettal. Under section 9 of the Ordinance, in deciding whether to make, affirm, vary or revoke a remote hearing order, the court must consider the following factors (if applicable):

(a) the nature, complexity and urgency of the proceeding;
(b) the nature of the evidence intended to be adduced;
(c) the views of the parties;
(d) the ability of the parties to engage with and follow the proceeding (if conducted through a remote medium);
(e) the personal or special circumstances of the parties, including any physical, visual or auditory impairment, cognitive difference and mental or psychological health issue;
(f) the maintenance of the rights of the parties;
(g) whether the parties are legally represented;
(h) whether the privileged communication between the parties and their respective legal representatives may be affected;
(i) whether the parties and the parties' legal representatives can conduct their case effectively;
(j) the measures to be taken to ensure that evidence is given freely without coercion or other influence;
(k) the potential impact of the order on the assessment of the credibility of witnesses and the reliability of the evidence presented;
(l) whether the use of the remote medium is likely to promote fair and efficient disposal of the proceeding;
(m) whether the right to a fair trial can be effectively maintained;
(n) the quality and security of the remote hearing facilities and their availability to the parties;
(o) whether there is any public order, security, public health or emergency concern that makes it undesirable or impracticable for the parties to attend the proceeding in person;
(p) any other relevant considerations.

The judgment comes as a timely reminder of the need to gauge considerations of balance of fairness and justice against technology initiatives aimed at enhancing the efficiency of court operations. The Judiciary will be issuing practice directions by phases to specify the operational details for conducting remote hearings, including the application, guidelines and related issues.

Case 3

Tainted by Foreign Illegality? Unenforceability of Contract does not necessarily preclude Claim in Restitution

Wong Chi Hung v Lo Wing Pun & Anor [2025] HKCA 370

Date of Judgment: 17 April 2025
Coram: Hon Kwan Ag CJHC, Au and G Lam JJA

Background

The defendants operated a money exchange business in Hong Kong. In the course of the business, the defendants entered into a money exchange contract (the "Contract") with the plaintiff, under which the plaintiff

was to exchange RMB 1 million he had in the PRC into HKD.

Pursuant to the Contract, the plaintiff paid the sum into a PRC bank account specified by the defendants. However, shortly after, the said PRC bank account was frozen as a result of criminal investigation into an illegal pyramid selling scheme. The entire balance, including the RMB 1 million deposited by the plaintiff, in the PRC account was subsequently withdrawn pursuant to a PRC judgment which ordered confiscation of monies illegally obtained by various other unrelated individuals.

Thereafter, the plaintiff commenced proceedings in Hong Kong in contract and unjust enrichment, as it was unable to recover the money from the defendants in the PRC.

At first instance, the District Court rejected the plaintiff's claim in contract. It was held that the Contract was illegal under PRC law, and as such, it followed that the Contract was unenforceable as a matter of Hong Kong public policy. The plaintiff's claim in unjust enrichment on the basis of total failure of consideration was however allowed.

The defendants appealed in relation to the claim of unjust enrichment. In gist, it was contended that a claim in contract and a claim in unjust enrichment are too interrelated for there to be any difference in their proper treatment. Where the court finds the contract unenforceable as it offended international comity, the court ought also to reject the claim in unjust enrichment.

Decision

The Court of Appeal dismissed the appeal, and summarised the applicable analysis at §54 of the Judgment where a restitutionary claim potentially tainted by foreign illegality is concerned.

Noting the protean nature of public policy being something which must evolve as the law itself develops, the Court of Appeal recognised that foreign illegality can *potentially* afford a defence to a claim in restitution.

However, in the present case, distinction can be drawn between the contractual and restitutionary claims put forward by the plaintiff. While enforcement of the Contract would necessarily face the problem of foreign illegality, the Court held that the obligation to restore the unjust enrichment is one independently imposed by law and separate from the Contract. As such, by allowing the restitution, the Court will not be giving effect to an illegal agreement under PRC law but is simply restoring the parties to their position upon the failure of the transaction under Hong Kong law.

Takeaway

The judgment provides much guidance on how restitutionary claims potentially tainted by foreign illegality are to be dealt with, and is also a modern application of the UK Supreme Court's decision in ***Patel v Mirza*** [2016] UKSC 42 last followed in ***Monat Investment Limited v All persons in occupation*** [2023] HKCA 479. As held by Lord Neuberger in ***Patel***, where money was paid pursuant to a contract or carry out an illegal activity, but the illegal activity was not proceeded with due to matters out of parties' control, the general rule is that the payer is still entitled to the return of the money he has paid. To reject an otherwise valid claim based on public policy and comity is a "*strong thing*".

Case 4

Committee of Inspection in the Context of Regulating Orders: Only "Creditor" and Contributory Eligible for Membership

Re China Evergrande Group (in liquidation) [2025] HKCFI 1638

Date of Judgment: 17 April 2025
Coram: Hon Linda Chan J

Background

The matter concerns an application made by the liquidators of the company for directions on appointment and composition of a committee of inspection ("COI"). The main issue is whether a person holding an economic interest, as opposed to a legal right, in a note or bond may be appointed as a member of the COI when a regulating order is made against the company.

The question of eligibility is significant in the present case, given that a substantial amount of debts provable in the company's liquidation, being "CEG Notes", are registered in the name of a single "Holder" and are administered by a "Trustee". Both are financial institutions, and the Trustee has indicated that it would not take an active role even if appointed on the COI. On the other hand, the "Ultimate Holders", being those holding economic interests in the CEG Notes, have been actively involved in the company's restructuring and the winding-up petition.

On the issue, the Official Receiver is of the view that only creditors holding the legal right of the CEG Notes are eligible to be appointed to the COI pursuant to Section 206(5) of the Companies (Winding-up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUMPO"). The Ultimate Holders consider that they are eligible for appointment, and that Section 206(5) of CWUMPO has no applicable where a regulating order has been made pursuant to Section 227A of the CWUMPO. Rather, Section 227B(1A) of CWUMPO applies and the Court may appoint any "*qualified persons*" as it thinks fit to the COI. The Liquidators have taken a neutral stance, but take a similar view to the Ultimate Holders.

Decision

In the Decision, the Court retraced the provisions governing the appointment and constitution of a COI at the time when Sections 227A to 227E (governing regulating orders) of CWUMPO were enacted (the "Pre-2016 Ordinance").

Upon reviewing the relevant provisions in the Pre-2016 Ordinance, the Court held that the legislature did not intend to modify or disapply the requirement under Section 207 that the COI shall only consist of creditors and contributories. Rather, it is only the procedural requirement of holding a first meeting of creditors and

contributories that is displaced (being dispensed with where a regulating order is made). The reference to "*any qualified persons*" has not been defined, and the Court found that this must be a reference to creditors or contributories of the company.

The Court went on to hold that the Ultimate Holder is not a "*creditor*" under Section 206(5) of CWUMPO, which is a reference to "*a person holding a legal right over a debt or liability owed by the company as at the date of the commencement of winding up*" (at §40). The Ultimate Holder is only a person holding a beneficial or economic interest in a debt/obligation that cannot take any action against the company, and is therefore not a "*creditor*" as such. Such a construction is in line with the general principle of insolvency law that it operates on the basis of legal right. The Court also notes that the person holding the beneficial or economic interest in a debt would still have recourse through the person holding the legal right, whether by requiring him to take action or for the debt to be assigned or transferred to himself.

Takeaway

This is the first time where the Court has considered the issue of whether an Ultimate Holder holding an interest in but not the legal right to the debt, can be appointed as members of COI. The Decision clarifies the matter and in the course of doing so, also provides a useful and detailed discussion on the definitions of "*creditors*" in other parts of the compulsory winding-up scheme.

Case 5

Striking Out Unfair Prejudice Petitions

Leung King Lun Danny & Ors v Ng Louie Kwok Kuen & Ors [2025] HKCFI 1583

Date of Judgment: 22 April 2025
Coram: DHCJ Le Pichon

Background

In this case, the Respondents applied to strike out the relief sought by the Petitioners in their Unfair Prejudice Petition, being a buyout order of their shares in one Prosperous Pacific Limited ("PPL").

PPL is a Hong Kong company with a number of subsidiaries. Specifically, PPL indirectly owns 2 Hong Kong subsidiaries which are under the Petitioners' control, and 2 Australian subsidiaries which are under the Respondents' control.

Pursuant to a Shareholders' Agreement, it was agreed that PPL cannot enter into unusual commercial transactions or to incur loans of over AUD 5 million without the consent of 75% shareholders, which in turn means that the Petitioners who hold 25.4% of the shares of PPL have a right to veto such transactions.

On 7 August 2019, the PPL group acquired an Australian mine (the "Mine"). Part of the purchase price was paid, with the balance being financed by a loan advanced by the vendor of the Mine (the "Vendor") secured by security interests over the Mine. Subsequently, the PPL group was unable to repay the loan, and the Vendor assigned and novated the debt and security interests to one MS Australia Finance Pty Ltd ("MS Australia" and the "Assignment"). It later transpired that R2 (being R1's wife) was the sole director and shareholder of MS Australia.

Thereafter, MS Australia refused to grant extensions for PPL's repayment. On that basis, an urgent board meeting was held (without P1) which ultimately resulted in the transfer of businesses from the Hong Kong subsidiaries to the Australian subsidiaries (controlled by the Respondents).

Decision and Takeaways

The Petitioners primarily complain about 2 matters. First, there was a conflict of interest between R1 who deliberately concealed his wife's interest in MS Australia and in taking control of the Mine, and PPL which had an interest in maintaining possession of the Mine. Second, R1 breached his fiduciaries duty *qua* director of PPL by allowing R2 / MS Australia to use the threat of enforcing the security over the Mine to influence the affairs of PPL.

Regarding the first complaint, the Respondents contend that there was no financial loss, and hence there can be no unfair prejudice. The Assignment was a commercial necessity, and that even if the Respondents did not enter into the Assignment, the Vendor would have exercised its security rights over the Mine in any event. As to the second complaint, the Respondents submitted that there was no breach of duty as R2 was entitled to exercise commercial pressure on PPL.

In dismissing the Respondent's striking out application, the Court made *inter alia* the following observations:

1. **Prejudice need not be financial in nature**. Rather, whether there is unfair prejudice depends on the nature of the conduct involved and is a highly fact sensitive matter. In the present case, the Court noted that there was **concealment**, which deprived the Petitioners of the opportunity of considering alternatives to resolve the matter. Specifically, P1 was only given a copy of the Assignment after he requested for the same 5 months after the relevant board meeting was held, and R1 failed to declare his interest at any prior time.
2. Insofar as the Petitioners' claim of breach of duty is concerned, in the context of a **strike out application**, it is irrelevant whether the Petitioners will succeed at the end of the day. The question is **whether the Respondents can demonstrate that the Petitioners' claim is obviously unsustainable and bound to fail**. It was held that the Respondents did not meet the requisite threshold.
3. To strike out the buyout relief, one also has to demonstrate that **the relevant shares would definitely have been worthless, even without the alleged unfairly prejudicial conduct**. This was again not made out by the Respondents on the evidence.
4. Lastly, the Court rejected the Respondents' contention that the proper forum for relief should be a derivative action brought by PPL (through its liquidators). Following the case of *Re Gen2 Partners Inc*, the Court agreed that **persistent misconduct and breach of duty by a director may properly be regarded as also amounting to mismanagement** supporting a claim of unfair prejudice for a buyout order.

Case 6

Bona Fides of Judgment Debts Challenged: Garnishee Order Absolute and Variation of Mareva Injunction Declined

Fengli Group (Hong Kong) Co., Limited v HT Steel (World) International Trade Holding Co., Limited & Anor [2025] HKCFI 1747

Date of Judgment: 28 April 2025
Coram: Hon Au-Yeung J

Background

The matter concerns 2 camps.

On one hand, Nanjing Hanen was the Plaintiffs in HCMP 1472 and 1931/2020. Upon obtaining a PRC judgment against one Wu Hui Di ("WHD") and Wu Li ("WL"), Nanjing Hanen registered the said PRC judgment in Hong Kong, and obtained Mareva injunction orders against WHD, WL and other related companies under the *Chabra* jurisdiction, with the latter including one Fengli Group (Hongkong) Co., Limited ("Fengli HK") and HT Steel (World) International Trade Holdings Co., Limited ("HT Steel").

On the other hand, Fengli HK and one Ready Success Group Limited are the Judgment Creditors of HT Steel. The underlying judgments were obtained by default.

Upon obtaining judgment, the Judgment Creditors applied for garnishee orders absolute against HT Steel and to vary the Mareva injunction orders obtained by Nanjing Hanen to release the funds in HT Steel's bank accounts.

Nanjing Hanen opposed on the basis that there are suspicious circumstances which warrant the Court's investigation into the *bona fides* of the underlying judgment debts.

Decision

The burden of proof rested on the Judgment Creditors to establish that the debt is a *bona fide* one. In the present case, the Court found suspicious circumstances arising from the following, and dismissed the Judgment Creditors' applications:

1. There were doubtful **time gaps** between, *inter alia*, the transfer of funds by the Judgment Creditors and the relevant loan arrangement. The Court found that funds previously transferred by the Judgment Creditors could not be explained by an *ex post facto* decision to pool funds.

2. While there were transfer slips showing the transfer of funds, there **was no evidence demonstrating a genuine loan relationship**. In particular, there was complete silence on the terms of the purported loan, such as the date of repayment, the number of instalments and whether interest would be charged. The Judgment Creditors also failed to adduce their own audited reports, which would and should have recorded the relevant loan entry.
3. The **circumstances under which the judgment debts were incurred were also doubtful**. In particular, it appeared that certain relevant documents were not disclosed in related PRC enforcement proceedings, which indirectly casts doubt on the purported loan relationships between the Judgment Creditors and HT Steel.
4. Generally, the Court also observed that the Judgment Creditors' case has changed and evolved over time from affirmation to affirmation.

Takeaway

The starting point is that a judgment creditor is entitled to enforce a judgment against the judgment debtor. This remains the case where the relevant funds to be garnisheed are subject to a Mareva injunction obtained by someone other than the successful judgment creditor. The Court however retains a discretion to make or refuse to make a garnishee order absolute. In particular, the Court is entitled to examine the circumstances leading to the judgment to access the *bona fides* of the judgment debt.

Featured Article

Insolvency and Arbitration/EJCs – Where does this leave Hong Kong?

Authored by ***James Wood*** *and* ***Thomas WK Wong***

The interplay between insolvency proceedings and arbitration/exclusive jurisdiction clauses (EJC) has been a well-trodden subject in recent years. A decision of the Grand Court of the Cayman Islands in April 2025, however, further threatens to leave Hong Kong as the odd man out in the insolvency versus arbitration/EJC debate.

In ***In re NaaS Technology Inc.*** [2025] CIGC (FSD) 28, the Grand Court of the Cayman Islands for the first time considered and applied the judgment of the Judicial Committee of the Privy Council (JCPC) in ***Sian Participation Corp (in liquidation) v Halimeda International Ltd*** [2024] UKPC 16 and in so doing dismissed the application of NaaS Technology, one of the largest electric vehicle charging service providers in the PRC, to restrain the presentation of a winding up petition against it.

In re NaaS Technology potentially further isolates Hong Kong from the common law jurisdictions that are most relevant in day-to-day restructuring and insolvency law practice in the Special Administrative Region.

The position in England and the British Virgin Islands

To recap, in ***Sian Participation*** (on appeal from the BVI), the JCPC held that when a company is subject to a winding-up petition, if the debt is disputed and is subject to a *generally* worded arbitration agreement or EJC, then the court's discretion to grant a winding-up order shall be based on "*whether the debt is disputed on genuine and substantial grounds*". In other words, the court can proceed to make a winding-up order and shall not blindly require the petitioner to obtain an arbitral award or court decision first confirming the relevant debt. In the words of Lord Briggs and Lord Hamblen in ***Sian Participation*** at [92] "*To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose …*"

The juridical basis of this conclusion was that a creditor's winding-up petition or similar liquidation application did not seek to, and did not, resolve or determine anything about the claim of the petitioner to be owed money by the company (or its validity or amount). Therefore, the presentation of such a petition or application did not offend either the arbitration agreement or the provisions or policy embodied in arbitration legislation that claims covered by an arbitration agreement should be resolved in arbitration and not in court: see [88] – [99].

Sian Participation was an unusual decision in that for the first time the JCPC exercised a power given to it by the UK Supreme Court in ***Willers v Joyce (No 2)*** [2016] UKSC 44 to direct that the decision is binding not only on the courts of the BVI, but also on the English courts as well. Thus, the test under Sian Participation now also represents the law in England and not just the BVI. In deciding ***Sian Participation***, the JCPC overturned the decision of the English Court of Appeal in ***Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*** [2014] EWCA Civ 1575 and held that it was wrongly decided. In ***Salford Estates***, the court held that it should stay or dismiss a creditors' winding-up petition based on the presence of a generally worded arbitration clause (or an EJC) pertaining to the disputed debt in question. In Hong Kong, ***Salford Estates*** was followed in ***Re Southwest Pacific Bauxite (HK) Ltd*** [2018] HKCFI 426 (***Lasmos***) and was referred to locally as the '*Lasmos approach*'.

The position in Hong Kong

The *Lasmos* approach was endorsed by the Hong Kong Court of Final Appeal in ***Re Guy Kwok Hung Lam and Ex Parte Tor Asia Credit Master Fund L.P.*** [2023] HKCFA 9.

Guy Lam involved a disputed debt arising under a loan agreement governed by an EJC in favour of the New York courts, and the CFA held at [105] that in such circumstances the (bankruptcy) petition should be dismissed in favour of court proceedings in accordance with the EJC in the absence of "*countervailing factors such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process*". In other words, "*the petitioner and the debtor ought to be held to their contract.*" The juridical basis for this approach was that the determination of the threshold question of whether the petitioning debt was *bona fide* disputed on substantial grounds "*leaves room for the exercise of a discretion by the court to decline to exercise the jurisdiction to determine that question. A circumstance enlivening that discretion is the fact that the parties agreed to have all their disputes under the agreement giving rise to the debt be determined exclusively in another forum*" [100].[1]

The approach in ***Guy Lam*** has been applied by the Hong Kong Court of Appeal in ***Re Simplicity & Vogue Retailing (HK) Co Ltd*** [2024] HKCA 299 and ***Re Shandong Chenming Paper Holdings Ltd*** [2024] HKCA 352 to winding-up petitions where the debts in question were governed by arbitration agreements. Unsurprisingly, in ***Re Mega Gold Holdings Ltd*** [2024] HKCFI 2286, Recorder Richard Khaw SC recently concluded that, as a matter of stare decisis and given the analysis provided in the relevant authorities, ***Guy Lam*** and ***Re Simplicity*** should be followed.

The position in the Cayman Islands (and Bermuda too)

On 9 Apil 2025, in ***In re NaaS Technology Inc.*** [2025] CIGC (FSD) 28, the Grand Court of the Cayman Islands applied ***Sian Participation*** and dismissed NaaS Technology's application to restrain the presentation of a winding up petition against it. On the evidence before the court, the Hon. Doyle J was not persuaded that there was a 'genuine and substantial dispute' regarding the debt giving rise to the proposed petition, despite an arbitration having been commenced by NaaS Technology.

In following ***Sian Participation***, the Hon. Doyle J also relied on the judgment of the Hon. Ramsay-Hale CJ in ***BPGIC Holdings Ltd*** (FSD unreported judgment 20 November 2023), who had earlier declined to follow ***Salford Estates***. In ***BPGIC***, the CJ stated that "*The legislative policy in the Cayman Islands, unlike the UK following Salford Estates, is not that the Court should stay or dismiss a petition once the debt is disputed, but that it should inquire into the question of whether the debt is bona fide disputed on substantial grounds.*"

In addition to the BVI and Cayman Islands, Bermuda will also surely follow ***Sian Participation*** because JCPC decisions on general common law issues unaffected by local statutes are binding on the Bermudian courts, even if the appeal to the JCPC originated from another jurisdiction such as the BVI or the Cayman Islands.

Where does this leave Hong Kong?

Hong Kong is quickly heading towards becoming the odd man out in the debate regarding whether insolvency or bankruptcy proceedings should be stayed or dismissed when the debt giving rise to the petition is disputed and subject to arbitration or an EJC.

Will the CFA overturn ***Guy Lam***? This seems somewhat unlikely in circumstances where ***Guy Lam*** was decided only one year before ***Sian Participation***. What seems more likely to occur – at least in the foreseeable future – is that ***Guy Lam*** might be interpreted and applied in a such a way that in practice it more closely accords with the approach in ***Sian Participation***. For example, we might see the Hong Kong courts: (i) coming to the realisation that a petition, by its very nature, does not seek to, and does not, resolve or determine anything about the petitioning debt as such; and/or (ii) lowering the threshold for what constitutes a frivolous or abusive dispute, such that the disputed debt should not be sent to arbitration or litigation and thus allowing the petition to proceed. Such an approach by the Hong Kong courts would make the old adage '*every single case is only ever won on the facts, even the ones that supposedly aren't*' even more relevant.

A strict application of ***Guy Lam*** would risk leaving Hong Kong as the odd man out in the common law world. Further, a strict application of ***Guy Lam*** could put the Companies Court's recent approach of liberally winding-up

offshore companies in Hong Kong (as seen initially in ***Re Lamtex Holdings Limited*** [2021] HKCFI 622 and ***Re Up Energy Development Group Limited*** [2022] HKCFI 1329) in jeopardy and make insolvency proceedings in the BVI, Cayman Islands and Bermuda more attractive for petitioners (i.e. easier places to obtain winding-up orders). In fact, the CFA itself recognised in ***Guy Lam*** that the bluntness of its approach could be softened where "*countervailing factors* [exist] *such as the risk of insolvency affecting third parties"* [105] and/or *"a creditor community [being] at risk*" [102]. Such softening would, in effect, bring ***Guy Lam*** more in line with ***Sian Participa*tion**.

PS Singapore…

For the sake of completeness, it should be noted that, for the moment, Singapore is also still applying a ***Salford Estates / Lasmos*** type approach as laid down by the Singapore Court of Appeal in ***AnAn Group (Singapore) v VTB Bank*** [2020] 1 SLR 1158. The Singapore court will ordinarily dismiss the petition, or in exceptional circumstances, grant a stay of the proceedings against the debtor if (i) there is a valid arbitration agreement between the parties; and (ii) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not raised in abuse of process.

To date the issue of whether to follow ***Sian Participation*** has been side-stepped in Singapore, with Judge Aedit Abdullah concluding in ***Re Sapura Fabrication Sdn Bhd*** [2024] SGHC 241: "*To sum up, it is evident from the overview above that the conflict between the international arbitration and insolvency regimes is not an easy one to resolve, as there exist potential arguments on both sides that the one should trump the other. However, as it is not necessary to resolve the matter in the present case, I leave further arguments and a conclusive decision to be made on a future occasion*".

The appeal in ***Re Sapura*** was dismissed by the Singapore Court of Appeal ([2025] SGCA 13) and the issue of whether not to follow ***Sian Participation*** was further side-stepped. The Court of Appeal, however, did expressly refer to the decision in ***Sian Participation*** at [6] and stated at [99] that in the circumstances of the case before it "*we also do not think it necessary at this juncture to revisit our decision in AnAn*" (emphasis added).

Nonetheless, given Singapore's strong desire to do the needful to make itself an attractive destination for restructuring and insolvency cases and the nation state's 'top down' policy approach, one can expect ***Sian Participation*** to become the law of the city-state as soon as practicable notwithstanding Singapore's pro-arbitration stance. When that happens, Hong Kong will be all alone…

PS2 – And what became of Mr Guy Lam?

Whilst Mr Guy Lam was able to stave off bankruptcy in 2024 following the CFA's decision in ***Guy Lam***, his luck finally ran out on 24 March 2025, when the Companies Judge, the Hon. Linda Chan J, adjudged him bankrupt in ***Re Guy Kwok Hung Lam*** [2025] HKCFI 1220 based on a substantial unpaid costs order.

The costs order was made by the Companies Court on 21 July 2021 in HCMP 1647/2020, which had been commenced by the out of court appointed receivers (from FTI) of Mr Guy Lam's company (CP Assets Ltd) to compel Mr Guy Lam to deliver up and provide access to the books, records and assets of the company. At the

outset of the hearing on 21 July 2021, upon the learned Judge's invitation, Mr Guy Lam consented to the receiver's delivery up application and costs were ordered against him.

In adjudging Mr Guy Lam bankrupt almost four years after the costs order was made, the Companies Judge held in ***Re Guy Kwok Hung Lam*** [2025] HKCFI 1220 at [46] that "*As Lam is unable to pay the Debt [costs order] and has failed to discharge the burden of showing that there is a bona fide dispute on substantial grounds in respect of the Debt, Ps are entitled to seek an immediate order against him.*"

Coincidentally, James Wood represented the receivers at the hearing on 21 July 2021 that gave rise to the substantial unpaid costs order which ultimately sealed Mr Guy Lam's fate.

[1] See Thomas WK Wong, *To stay or not to stay: the English approach to (not) staying petitions presented despite exclusive jurisdiction clause ("EJC")*, originally published in Issue 14 of ThoughtLeaders4 FIRE Magazine; available also at https://www.twentyessex.com/to-stay-or-not-to-stay-the-english-approach-to-not-staying-petitions-presented-despite-exclusive-jurisdiction-clause-ejc/.

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