MAY 2026

DENIS CHANG'S CHAMBERS

DCC COMMERCIAL DIGEST

Issue No. 17

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TABLE OF CONTENTS

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Sabina was called to the Bar after completing her pupillage with Mr Robert Pang SC, Mr Simon Wong, Mr Jeffrey Tam and Mr Albert NB Wong. She graduated from the University of Hong Kong, where she obtained her LLB and PCLL (Distinction). She later earned her LLM with Distinction in Human Rights Law Specialism from the London School of Economics and Political Science.

During her studies, Sabina received various scholarships and awards, including the Personal Injuries Elective Prize and the Haldanes Prize in Criminal Litigation.

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Case 1

Application to Stay Reciprocal Enforcement of PRC Judgment based on Retrial Application Refused

兴业银行股份有限公司宁波分行 v 宁波百丰选矿有限公司 [2026] HKCFI 2455

Date of Judgment: 4 May 2026
Coram: DHCJ Jonathan Wong

Background

The Plaintiff entered into a loan agreement and letters of credit agreements with D1 as borrower. D2, D3 and D4 were D1's guarantors. D1 defaulted on its repayment obligations. The Plaintiff commenced proceedings against the Defendants in the Intermediate People's Court of Ningbo, which handed down its judgment in favour of the Plaintiff ("First Instance Judgment"). The Defendants' appeal to the Higher People's Court of Zhejiang Province was dismissed ("Second Instance Judgment"). The Plaintiff registered the Second Instance Judgment in Hong Kong under the Mainland Judgments (Reciprocal Enforcement) Ordinance Cap 597 ("MJREO"). Following D3 and D4's application for a retrial of the Second Instance Judgment, D3 and D4 sought to set aside the registration of the Second Instance Judgment and to stay the proceedings pending the retrial application in the PRC.

The Stay Application

The Court dismissed the stay application. While section 19 of the MJREO did not expressly contemplate that a retrial application (as opposed to an order for retrial) was sufficient to justify setting aside registration or granting an adjournment, section 19 informs on how the Court should exercise its discretion under the stay scenario. The Court has a wide discretion in terms of whether it may adjourn a set aside application where there is an appeal or retrial ordered against the judgment. There is no material or practical difference between an application made under section 19 or couched under the guise of a stay. It was held that the Court's general case management powers should not be exercised in a manner which has the effect of circumventing the statutory criteria set out in section 19. As the MJREO's purpose was to facilitate the recognition and enforcement of PRC judgments through a simple and expeditious process of registration, permitting a stay based on the retrial application – where no order has been made and the outcome remains uncertain – would run counter to that legislative purpose and reintroduce the uncertainty that the MJREO was designed to eliminate.

Setting Aside based on Public Policy

One of the grounds advanced by D3 and D4 in respect of their setting aside application was that enforcement of the Second Instance Judgment would be contrary to public policy under section 18(1)(j) of the MJREO. They contended that the PRC proceedings leading to the First Instance Judgment contained serious procedural defects, in that the PRC court did not deal with D3 and D4's applications to adjourn the hearing and their jurisdictional challenge.

After considering the Bills Committee Report for the MJREO, the Court held that the public policy ground under section 18(1)(j) encompassed the defence of procedural fairness or natural justice. The two essential requirements are: (i) that the court gave the litigant notice that it was about to determine his rights; and (ii) that having given such notice, the court afforded him a genuine opportunity to present his case.

The Court held that there was no basis to set aside the registration of the Second Instance Judgment by reason of public policy. For the adjournment applications in the PRC, the Court observed that on the evidence the court documents were validly served on the defendants, and that the defendants did not raise any issues with the PRC courts despite having ample opportunity to do so. As for the jurisdictional challenge, there was no procedural unfairness as D3 and D4 did not formally file it with the PRC court. Even if it was formally filed, it was filed out of time and under PRC law a party who fails to raise a timely objection may be deemed to have submitted to the PRC courts' jurisdiction.

Setting Aside based on Penalty

Following the Court of Appeal's approach in *Hung Fung Enterprises Holdings Ltd v Agricultural Bank of China* [2012] 3 HKLRD 679, the Court held that the order made under the Second Instance Judgment granting enhanced interest at 0.0175% per day on the principal was not to compensate for the loss suffered but to punish the defendant and deter others from acting in the same way. This constituted a "fine or other penalty" within the meaning of section 5(2)(e) of the MJREO, and as such the enhanced interest element of the Second Instance Judgment was set aside to that extent.

Takeaway

This case reinforces the MJREO's policy of facilitating enforcement of PRC judgments in Hong Kong with simplicity and certainty. A pending Mainland retrial application, without a retrial order or stay of enforcement, will not ordinarily justify a stay or adjournment of setting-aside proceedings in Hong Kong. This in turn strengthens lenders' confidence when structuring cross-border finance with Mainland counterparties and guarantees.

Case 2

"All" means all: Former Liquidators held in Contempt for Failing to Produce All Documents Belonging to a Company

Luen Tat Watch Band Manufacturer Limited v Stephen Liu Yiu Keung [2026] HKCFI 2564

Date of Decision: 7 May 2026
Coram: Winnie Tsui J

Background

Luen Tat was formerly subject to a winding up order, which was later stayed permanently. The Defendants were appointed as joint and several liquidators until their removal in 2017 for serious misconduct. After their removal, the Plaintiff requested the return of all documents kept by the Defendants in their administration of the liquidation.

In 2020, the Defendants were ordered to hand over certain documents, including all documents generated in the course of the liquidation of the Plaintiff and/or in the course of acting as the liquidators of the Plaintiff. The deadline was extended until 28 April 2021. On the day of the deadline, the Defendants delivered 49 boxes of documents and filed affidavits confirming that they had returned all documents in compliance with the order.

The Plaintiff considered the production plainly deficient and commenced committal proceedings in October 2021. They contended that the Defendants' methodology for document review was demonstrably unable to achieve the result mandated by the production order. For example, instead of conducting a manual review, the Defendants came up with a selection of 85 keywords, and applied them to the documents and emails found on computers in order to retrieve the documents. This methodology would effectively screen out any documents which fell within the ambit of the order but somehow did not contain any of the 85 keywords. The Plaintiff also alleged that the scope of document review was deficient, including that the documents belonging to certain members of staff were not reviewed.

The Defendants contended, *inter alia,* that the order only required them to conduct a reasonable search of the documents, as it was an impossible task to review the huge volume of documents in the limited time. They also contended that the *mens rea* for contempt was not satisfied as they reasonably believed that the 85 keywords selected by them would identify all documents responsive to the production order, and did not intentionally omit any keywords which they knew would result in the exclusion of responsive documents.

Breach of the Order to Produce "All" Documents

The Court held that the production order should be given its literal meaning. “All” means all. The Defendants were ordered to return to the Plaintiff what belongs to it. It is difficult to see why a reasonableness test should be introduced which will allow the Defendants to return only some, but not all, of the Plaintiff’s own documents.

In terms of the defendants’ argument based on impossibility, the Court held that this goes to the *actus reus* of contempt in that the plaintiff bears the burden to prove that it was within the power of the defendant to comply with the order. It is also relevant to *mens rea*: if the mandatory injunction was impossible to perform, the omission would be regarded as unintentional and involuntary such that *mens rea* is not proven.

The Court held that it was within the power of the Defendants to devise a methodology which, if properly executed, could effectively retrieve all of the documents. This was evident from the different tranches of production made by the Defendants, which collectively were comprehensive and capable of retrieving all documents within the ambit of the order. As such, the Defendants were in breach of the order.

Mens Rea for Contempt

As for the requisite *mens rea*, the Court held that the mental element is proved if it is shown that the defendant knew the facts which are said to make his act or omission a breach of the court order in question, unless the breach was “casual or accidental and unintentional”. It is not necessary to prove that the defendant appreciated that it did breach the order. It is also not necessary to show that there was a direct intention to disobey the order or otherwise to interfere with the administration of justice.

In the present context of a mandatory order requiring a defendant to achieve a certain state of affairs, the necessary state of mind was that the defendant must have consciously and voluntarily adopted the methodology in question. Before a defendant could invoke the “accidental and unintentional” exception, the defendant must have taken all the steps which were reasonably required of him in the circumstances when devising his methodology and he had executed it with reasonable care.

Applying these principles, the Court held that *mens rea* was established for the Defendants’ breaches under the keyword searches, the limited scope of some searches conducted in respect of a number of employees but not others, and the failure to retrieve emails and documents of support and administrative staff.

Ruling on Contempt

However, although the Court found that the three elements of contempt have been established, the contempt had already been purged by subsequent production of documents. As such, the Court exercised its discretion not to make any order on the committal application.

Takeaway

Where former liquidators are ordered to produce all documents belonging to the company, it is not enough for them to say they have made a reasonable effort to comply without producing all documents, failing which they run the risk of being held in contempt. In considering the breach of the order and the requisite mental state, the Court may consider the impossibility of the acts mandated by the order. Nonetheless, it is incumbent on the liquidator to devise a suitable methodology in document review, no matter how voluminous they may be.

Case 3

Framework for challenging emergency arbitration relief enforcement orders

W v GH [2026] HKCFI 2966

Date of judgment: 21 May 2026
Coram: Hon Mimmie Chan J

Background

W and GH were parties to a Framework Agreement. In November 2025, W commenced arbitration and obtained an interim award on emergency measures (the "Emergency Award"), ordering GH to observe key obligations under the Framework Agreement and to refrain from acting in breach thereof. The Court of First Instance later granted leave for W to enforce the Emergency Award (the "Enforcement Order").

GH responded on two fronts: a summons in January 2026 to set aside the Enforcement Order (the "Setting Aside Summons"), and a further summons in April 2026 seeking a stay of enforcement proceedings (the "Stay Summons") pending the arbitration tribunal's separate determination of GH's application to discharge the Emergency Award (the "Discharge Application").

The applicable grounds and threshold for setting aside under section 22B

GH's Setting Aside Summons invoked sections 81 and 89 of the Arbitration Ordinance (Cap 609) (the "Ordinance"), the provisions governing refusal of enforcement and setting aside of arbitral awards. The Court rejected this approach. The Enforcement Order was not an arbitral award: it did not involve any final determination of any claim or issue in the arbitration. The grounds set out under sections 81, 86, 89, and 95 of the Ordinance are directed at final awards and have no application to enforcement of emergency relief under section 22B. Any challenge to an Enforcement Order made under section 22B must be brought within the four corners of that section alone. Not being a final award, the grounds of inability to present a case, or public policy, could not apply.

The Court further held that Order 73 rule 10(6) of the Rules of the High Court (Cap 4A) — which permits a debtor to apply to set aside an order granting leave for enforcement — does not open the door to the sections 81/86 grounds either. The application to set aside may be on the ground of: (i) material non-disclosure in the *ex parte* application; or (ii) the argument that section 22B(1) or (2) does not apply on the facts.

Considering the threshold, the Court accepted that the Enforcement Order could in principle be set aside where there is not even a *prima facie* case for the existence of an arbitration agreement. However, the threshold cannot be high — by analogy with the threshold applicable to an application to stay an action to arbitration under section 20 of the Ordinance — and the Court refused to resolve contested questions of authority or breach of fiduciary duty at the enforcement stage. On the facts, there was a clear *prima facie* case of an arbitration agreement contained in the Framework Agreement, and the Court declined to go further.

The Court's jurisdiction to stay enforcement proceedings

Concerning GH's stay application, the Court held it retained jurisdiction — under section 16(3) of the High Court Ordinance (Cap 4) — to stay enforcement proceedings where justice requires. Balancing the risk of prejudice to GH if it had to comply in the interim and the Discharge Application later succeeded, and noting the Tribunal's decision was expected in August 2026, the Court granted a stay until the Tribunal's determination.

Takeaway

This decision clarifies that the grounds available for challenging or setting aside a court order enforcing emergency relief under section 22B of the Ordinance are confined to the four corners of that section. Further, a party seeking to resist enforcement of emergency relief by challenging the existence of the arbitration agreement faces a high bar. The Court will only intervene where the absence of a valid arbitration agreement is beyond question.

Case 4

No derivative action in liquidation: the Court of Appeal reaffirms the primacy of the insolvency regime

Chu Kong v Lau Wing Yan and Others [2026] HKCA 1004

Date of judgment: 29 May 2026
Coram: Hon Kwan VP, Chu VP and Cheng J

Background

The Appellant brought the appeal against the decision of Au-Yeung J on 20 October 2023 (the "Decision"). By the Decision, the judge struck out the double derivative action in HCA 1885/2021 which Chu purported to bring on behalf of the 5th and 6th Defendants ("OSL" and "PBM"). OSL was the parent company of PBM and both were in liquidation.

Au-Yeung J struck out the action as the Appellant had no *locus standi* to bring a derivative action, which is not available where a company is in liquidation. He failed to establish that OSL and PBM were under the control of wrongdoers. The judgment also struck out the action for issue estoppel and abuse of process.

No locus standi

This was the starting and finishing point. The Court of Appeal confirmed the well-established rule that a derivative action is not available where a company is in liquidation. Once a company enters liquidation, it — together with any wholly-owned subsidiary — comes under the control of the court through the liquidator, who acts as an officer of that court. The company is therefore no longer in the hands of the wrongdoers, and the foundational premise for a derivative action falls away.

The appropriate remedy for an aggrieved contributory lies within the insolvency framework: applying to the companies court for an order that the liquidator brings the action in the name of the company, or that he is given the right to bring the action in the name of the company, upon the usual indemnity given by the contributory against any consequences of that litigation.

The rationale is that the court is concerned to protect the integrity of the winding-up process under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which would wrongfully impede that process.

The cross-border dimension

Counsel for one of the Respondents submitted further that in a cross-border context, the principle of modified universalism directs an aggrieved party to seek appropriate directions from the appointing court — here, the BVI court — rather than commencing proceedings in Hong Kong against the liquidators in the local court. To permit otherwise would risk interfering with the integrity of the foreign liquidation process under the supervising court's control. This is consistent with the Hong Kong court's approach of assisting foreign insolvency proceedings and recognising foreign court-appointed office-holders. The Court of Appeal was inclined to agree.

On the Appellant's lack of *locus standi* alone, the Appellant's appeal failed. The Court also found the other grounds of appeal to be without merit.

Takeaway

Once a company is in liquidation, its court-supervised liquidator displaces the shareholders as the proper party to pursue corporate wrongs. A contributory's remedies lie within the insolvency framework, not in a parallel derivative action. In the cross-border context, this principle may apply to direct the aggrieved parties to seek relevant directions from the appointing court.

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