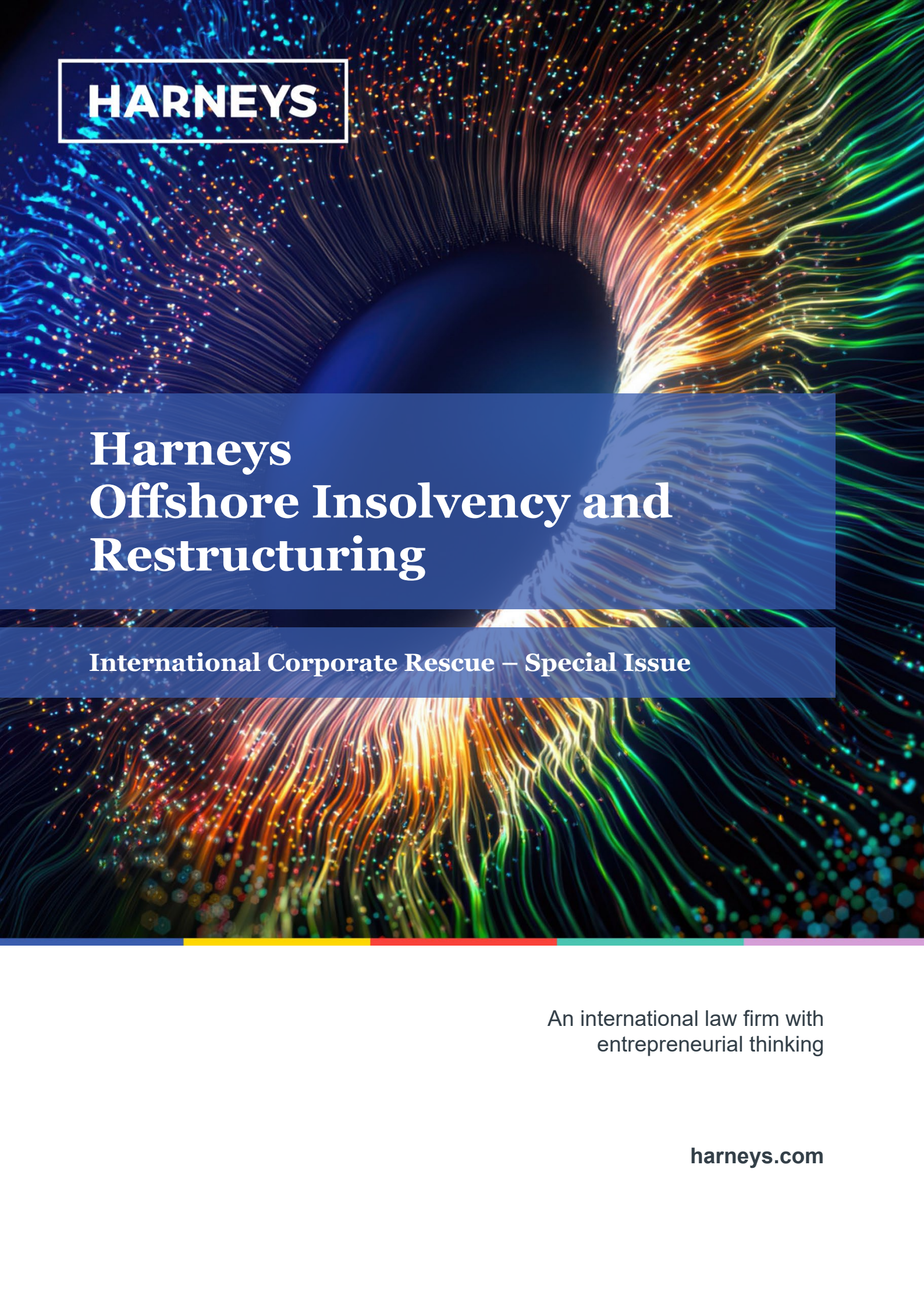




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International Corporate Rescue – Special Issue

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Introduction

It is my pleasure to introduce this special issue of International Corporate Rescue, produced in collaboration with our colleagues across the Harneys global network. Offshore insolvency and restructuring is a dynamic, ever-changing area of practice, and the articles that follow, drawn directly from the work our teams are doing with clients across the leading offshore financial centres, reflect that landscape.

The issue covers a broad range of topics. The Privy Council's decision in *Sian Participation Corp v Halimeda International Ltd* and its divergence from Hong Kong's approach to arbitration contracts in an insolvency context features prominently, as does our analysis of the cross-border implications of the recent *Hyalroute* decision. Further articles address the restructuring officer and provisional liquidator regimes in the Cayman Islands, the BVI's unfair preference regime, what is believed to be the first extra-territorial summoning of a company director by the Bermuda Supreme Court, the immovables rule in cross-border insolvency, and a comparative look at Singapore's Model Law regime alongside the approaches in the BVI, Cayman Islands, and Bermuda.

I hope these articles provide a valuable and practical resource. Please do not hesitate to reach out to any of the contributing authors, or to me directly, if any of the topics are relevant to matters you are currently facing.



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The Interplay between Insolvency and Arbitration and Contrasting Approaches Pre- and Post-*Sian Participation*

John O'Driscoll, Partner, Paul Goss, Counsel, and Julia Iarmukhametova, Associate, Harney Westwood & Riegels (UK) LLP, London, UK

Synopsis

The landmark decision by the Privy Council in *Sian Participation Corp v Halimeda International Ltd* ('*Sian*'),¹ handed down in June 2024, is of significance for insolvency and arbitration practitioners alike because, amongst other matters:

It confirms that a winding-up petition should not be stayed or dismissed merely because the underlying debt is subject to a broadly worded arbitration agreement, thereby endorsing the approach adopted by the courts in the British Virgin Islands ('BVI'). The debt must be disputed on genuine and substantial grounds, which contrasts with the position reached by the English Court of Appeal in *Salford Estates (No. 2) Ltd v Altomart Ltd* (No. 2)² ('*Salford Estates 2*').

It marks the first instance of the Privy Council (as the BVI's highest appeal court) using its powers under *Willers v Joyce* (No. 2)³ to declare a previously leading English authority (*Salford Estates 2*) as having been wrongly decided.

This article explores the evolution of judicial approaches to the interplay between arbitration clauses and winding up proceedings in England and Wales, the BVI and Hong Kong, both before and after *Sian*.

Pre-*Sian*: English approach vs BVI approach

In the BVI, as in England and Wales, the Arbitration Act 2013⁴ ('BVI Arbitration Act') requires that if a dispute arises between parties subject to a valid arbitration agreement, any court proceedings must be referred to arbitration unless the agreement is 'null and void, inoperative, or incapable of being performed', to allow the resolution of the dispute by an arbitral tribunal in accordance with the parties' pre-existing contractual arrangement.

In the context of class remedies such as winding up proceedings, other considerations come into focus such as matters of public interest in ensuring efficient and transparent procedures for liquidating companies that are insolvent.

England and Wales position

In *Salford Estates 2*, the English Court of Appeal demonstrated a strong pro-arbitration stance by establishing that the court's discretionary power under section 122(1) of the English Insolvency Act 1986 (the 'IA 1986') to wind up a company must be exercised in accordance with the parties' prior agreement regarding the appropriate forum for resolution of the underlying dispute. The fact that a debt was not admitted was sufficient to constitute a dispute irrespective of merits.

Sir Terence Etherton C emphasised this point in paragraph 39 of *Salford Estates 2*, stating that:

'My conclusion that the mandatory stay provisions in section 9 of the [Arbitration Act] do not apply in the present case is not, however, the end of the matter. IA 1986 s.122(1) confers on the court a discretionary power to wind up a company. *It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 [Arbitration] Act*⁵ (emphasis added).

He made the following observation at paragraph 40:

'... It would be anomalous, in the circumstances, for the Companies Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded

Notes

1 [2024] UKPC 16.

2 [2014] EWCA Civ 1575.

3 [2016] UKSC 44; [2018] AC 843.

4 Section 18.

5 It provides for a mandatory stay in favour of arbitration in section 9(1) of the English Arbitration Act 1996.

when a creditor has agreed to refer any dispute in relation to the debt to arbitration...’.

BVI approach

The BVI court has demonstrated a more creditor-friendly approach, as illustrated by, in particular, in *C-Mobile Services Ltd v Huawei Technologies Co Limited*⁶ ('C-Mobile') and *Jinpeng Group Limited v Peak Hotels and Resorts Limited*.⁷

In *C-Mobile*, Huawei Technologies Co. Limited ('Huawei'), the respondent, served a statutory demand on C-Mobile, a mobile telecommunications operator incorporated in the BVI, based on a debt arising under a supply contract that contained an arbitration clause (the 'Arbitration Clause').

C-Mobile applied to set aside the statutory demand on the basis that the debt was subject to a substantial dispute as to whether it was due. C-Mobile relied, *inter alia*, on the existence of the Arbitration Clause. However, its application to set aside the statutory demand was dismissed. The first instance judge concluded that there was no good basis for setting aside the statutory demand, as he was not satisfied – applying the test in *Sparkasse*⁸ that there was any real dispute regarding the debt. Huawei subsequently applied to appoint liquidators and wind-up C-Mobile pursuant to the BVI Insolvency Act.

C-Mobile then applied for a stay of the liquidation proceedings, arguing that the Arbitration Clause in the supply contract required the liquidation proceedings to be stayed under section 6(2) of the Arbitration Ordinance⁹ in favour of arbitration. The first instance Court dismissed the application for a stay, finding that the commencement of the winding up proceedings did not engage the Arbitration Clause because the winding up proceedings:

‘...do not seek the resolution of dispute arising out of or in connection with the formation, construction, or performance of the supply contract. Those proceedings seek a class remedy available under statute to an Applicant with locus standi to seek it, if certain of the conditions set out in the statute are satisfied, and if the court in its discretion considers it just and equitable to appoint liquidators ... In my judgment therefore, the commencement of the winding up proceedings did not engage the Arbitration Clause in the contract. Section 6(2) of the Arbitration Ordinance accordingly has no application.’¹⁰

With the leave of the court, C-Mobile appealed the dismissal of its application for a stay.

On appeal, C-Mobile relied heavily on the English approach in *Salford Estates 2*, arguing that it was inappropriate for Huawei to bypass the parties' chosen method of dispute resolution and seek to wind up the company.

C-Mobile's appeal was subsequently dismissed. The Eastern Caribbean Court of Appeal (the 'Court of Appeal'), while expressing 'full agreement with the sentiments' in paragraph 18 in *Salford Estates 2*, made three material observations at paragraphs 13-15. These included that the first instance court had already investigated whether the debt was disputed in good faith on substantial grounds (on the application to set aside the statutory demand) and found that it was not subject to such a dispute. The Court of Appeal essentially agreed with the first instance Court's conclusion that the dispute fell outside the Arbitration Clause, and therefore, there was no basis for compelling the parties to resolve their dispute through arbitration. In other words, the mandatory stay was not engaged.

C-Mobile demonstrated a departure from the English approach by confirming that a creditor would not need to show "exceptional circumstances" for the Court to exercise its discretion to windup a company despite the existence of an arbitration clause. The Court will exercise its discretion based on whether there is a dispute on genuine and substantive grounds.

In *Jinpeng Group Limited v Peak Hotels and Resorts Limited*,¹¹ the judge rejected the approach in *Salford Estates 2*, stating at [47] as follows:

‘... I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the C-Mobile case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction [to wind up] is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.’

The Court continued at [49]:

‘The debt in the case at bar is not disputed on genuine and substantial grounds and it falls under the terms of the arbitration clauses. Therefore, the court has a

Notes

6 BVIHMAP 2014/0006 and BVIHMAP 2014/0017.

7 BVIHMAP2014/0025 (8 December 2015) at paras [45]-[49].

8 *Sparkasse Bregenz Bank AG v Associated Capital Corporation* (BVIHCVAP2002/0010)(delivered 18 June 2003).

9 Being the precursor to the mandatory stay under section 18 of the BVI Arbitration Act.

10 See para [3] of BVIHMAP 2017/0017.

11 BVIHMAP2014/0025 (8 December 2015) at paras [45]-[49].

wide discretion under section 162 of the Insolvency Act, 2003 to stay or dismiss the Originating Application and to force the parties to resolve the dispute by arbitration. *However, the appellant does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order. It has to show that the dispute is not on genuine and substantial grounds and leave it to the court to exercise its discretion under section 162 on the usual bases*’ (emphasis added).

Sian approach

In *Sian*, the respondent company argued that the BVI Court of Appeal should have followed the English position in *Salford Estates 2*, asserting that there is no difference between England and Wales on the one hand and the BVI on the other concerning public policies on enforcing arbitration agreements and liquidation proceedings.

One of the central issues was whether a creditor’s petition for winding up should be stayed in favour of arbitration when the debt, arising from an agreement containing an arbitration clause, is not disputed on substantial grounds?¹²

The Privy Council held that the English Court of Appeal erred in introducing a discretionary stay of winding up petitions ‘where an insubstantial dispute about the creditor’s debt was raised by parties to an arbitration agreement’. In doing so, the Privy Council held that there was ‘an impermissible and unexplained leap in the reasoning of the Court of Appeal as to the extent of the legislative policy behind the [arbitration legislation]’

The Privy Council’s rationale was as follows:

1. The policies underlying the UNCITRAL Model Law on International Commercial Arbitration (1985) which the BVI Arbitration Act is based on, are not undermined by pursuing the liquidation of a company that has failed to settle a debt. Stays would still be available if it could be shown that there was a genuine dispute as to the underlying debt on substantial grounds, which could be resolved by way of arbitration.
2. Liquidation applications do not ordinarily trigger the mandatory stay provisions of section 18 of the BVI Arbitration Act. This is because winding up petitions do not seek to resolve the petitioner’s claim to be owed money by the company. Therefore, they simply do not engage the negative obligation implied in arbitration clauses not to seek to resolve

the claim in court. The fact that section 18 of the Arbitration Act 2013 was not engaged was critical to the appeal and the rejection of *Salford Estates 2*.

3. An arbitration agreement is an agreement between parties to resolve a dispute through arbitration rather than through the courts. Liquidation proceedings fall outside the scope of this agreement, in the absence of clear language to that effect.

The Board determined that: ‘... as a matter of BVI law, the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds. This conclusion applies to a generally worded arbitration agreement or exclusive jurisdiction clause. Different considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application.’

The Board distinguished *FamilyMart China Holding Co. Ltd and Ting Chuan (Cayman Islands) Holding* (*‘FamilyMart’*¹³), handed down in September 2023, which broadly endorsed the *Salford Estates 2* approach. In *FamilyMart*, a dispute arose between shareholders of a successful convenience store business in the People’s Republic of China under the *‘FamilyMart’* brand. The petitioner sought to wind up the company in the Cayman Islands on just and equitable grounds, alleging misconduct and loss of trust. The parties’ relationship was governed by a shareholders’ agreement, which provided that ‘any and all disputes in connection with or arising out of [the SHA shall be] submitted for arbitration’.

The Privy Council in *FamilyMart* emphasised that there was no fundamental principle preventing the court from being bound by an arbitral tribunal’s determination. The Privy Council also established that when determining whether a matter should be referred to arbitration, the court should first identify the issues raised in the court proceedings. Subsequently, for each identified issue, the court must assess if it falls within the scope of the arbitration agreement.

In *Sian*, *FamilyMart* was distinguished on the basis that ‘in the present case [*Sian*] ... it was not disputed that an application to wind up a company on the just and equitable ground were “legal proceedings” so as to fall within the mandatory stay provisions’. However, the Board endorsed *FamilyMart*’s pro-arbitration and expansive approach to interpreting arbitration agreements, observing at [52] that ‘The Arbitration Agreement should be interpreted in a pro-arbitration and

Notes

¹² Whether the debt was disputed on substantial grounds was not in issue in the Privy Council. There was no appeal from the prior determination to that effect.

¹³ JCPC 2020/0055.

expansive manner and whether a “matter” is subject to that agreement should be approached following the guidance set out in *FamilyMart*.’

Hong Kong approach post Sian

The leading case in Hong Kong on the interplay between insolvency and arbitration is *Re Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 (*‘Re Guy 2023’*). By a majority, the Hong Kong Court of Final Appeal (*‘HK Court of Final Appeal’*), in upholding the Court of Appeal’s decision in *Re Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* (*‘Re Guy 2022’*),¹⁴ held that a petition should ordinarily be stayed or dismissed pending the determination of the dispute in the foreign court, where the dispute is subject to an exclusive jurisdiction clause unless strong reasons to the contrary are shown (*‘Strong Cause Approach’*).

The Court of Appeal in *Re Guy 2022* at [86] cited the following examples that could constitute ‘strong causes’:

‘... cases where the debtor may be incontestably massively insolvent quite apart from the disputed petition debt, or it may for other reasons be a menace to commercial society if allowed to continue to trade, or there may be other creditors seeking a winding up whose debts are not subject to any jurisdiction agreement, or the assets may be in jeopardy, or there may be a need to investigate potential wrongdoings, or the effect of a dismissal or stay of the petition would be to deprive the petitioner of a real remedy or would otherwise result in injustice ...’

The HK Court of Final Appeal observed at [104] that ‘... While a “strong cause” test is indicative it should not obscure the range of considerations relevant to the court’s discretion’. The Court of Final Appeal further ruled at [105] that the *‘Established Approach’*, which requires a debtor to demonstrate a *bona fide* dispute on substantial grounds to stay or dismiss a petition, is not appropriate where an exclusive jurisdiction clause is involved and that ‘in the ordinary case of an EJC [exclusive jurisdiction clause], absent countervailing factors such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process, the petitioner and the debtor ought to be held to their contract’.

Re Guy 2023 was subsequently applied in *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064 (*‘Re Simplicity’*), where Kwan VP held that the approach in *Re Guy 2023* (the Strong Cause Approach) is equally applicable to arbitration clauses such that the parties’ arbitration agreement should be respected and upheld, such that a petition should ordinarily be stayed

or dismissed pending the determination of the dispute via arbitration unless strong reasons to the contrary are shown.

In *Re Mega Gold Holdings Limited* [2024] HKCFI 2286 (30 August 2024) (*‘Mega Gold’*), the Hong Kong Court of First Instance declined to follow *Sian*. Instead, it followed the reasonings in *Re Guy 2023* and *Re Simplicity* and endorsed the Strong Cause Approach and that the approach of the court in exercising its discretion is ‘multi-factorial’ which depends on a ‘range of considerations’ [63].

At [71], the judge observed:

‘... there is a stark difference between the approach taken by the Privy Council and that adopted by the Hong Kong courts ... the Privy Council’s approach was apparently not accepted in *Guy Lam (CA)* (§§82-87), *Guy Lam (CFA)* (§105) and *Re Simplicity (CA)* (§37). In relation to the approach which should be taken here, as a matter of *stare decisis* and given the analysis provided in the authorities discussed above, I agree with the Company and the Debtor that this Court should follow the reasoning in *Guy Lam (CFA)* and also in *Re Simplicity (CA)*.’

The court further clarified at [72] that:

‘... there is no hard and fast rule on whether a winding-up or bankruptcy order would or would not necessarily “offend” the parties’ arbitration agreement. This essentially turns on the basis of the underlying debt for the purpose of the petition and whether the debt and the alleged dispute fall within the scope of the arbitration agreement. For example, if the debt arises from a sum payable under the agreement containing an arbitration clause and the debtor raises a dispute over creditor’s performance of the terms of the agreement, there is no reason why the debt and also the dispute, in light of their nature and substance, would not constitute a “matter” which should be subject to the arbitration agreement’.

The judge also distinguished between ‘(1) whether a dispute is *bona fide* disputed on substantial grounds in an ordinary winding up or bankruptcy petition with (2) whether a dispute “borders on the frivolous or an abuse of process”’. The latter threshold, being the relevant question in HK following *Re Guy 2023*, is significantly higher. As noted at [75], failing to maintain this distinction could undermine the enforceability of arbitration clauses in insolvency proceedings.

The Court found that the petitioner failed to demonstrate that the waiver/estoppel defence borders on the frivolous or amounts to an abuse of process.

Accordingly, the key distinction between the approaches in England/BVI and Hong Kong is as follows:

Notes

14 [2022] HKCA 1297 (*Re Guy 2022*).

- In Hong Kong, the courts adopt a ‘multi-factorial approach’, whereby winding-up proceedings against a debtor company will generally be dismissed or stayed in favour of arbitration unless strong causes to the contrary are shown including, but not limited to, if the dispute is deemed either frivolous or an abuse of process.
- In England and Wales and in the BVI, where the agreement giving rise to the debt includes an arbitration clause, winding-up proceedings will only be dismissed or stayed in favour of arbitration if the debtor can *bona fide* demonstrate a genuine dispute over the debt on substantial grounds.

Conclusion

It is interesting to see the evolution of the approach in England and Wales and in the BVI when contrasted with that of Hong Kong in balancing the importance of upholding private arbitration agreements versus the public and commercial interest in efficiently winding up companies unable to pay their debts without unnecessary delay.

Although the Privy Council in *Sian* emphasised that ‘there is nothing anti-arbitration’ in the decision, the requirement to demonstrate a ‘genuine and substantial dispute’ is likely to benefit creditors, offering them a more straightforward path to apply to appoint a liquidator where there is a debt outstanding. This approach will help to limit opportunistic attempts to delay legitimate and well-founded creditor liquidation proceedings. This may lead to an increase in liquidation applications going forward notwithstanding the existence of an underlying arbitration clause.

Indeed, finance parties may now be more prepared to use arbitration clauses if they are confident that a liquidator can be appointed in the event of a default on their debt.

On the other hand, it remains to be seen whether a more ‘pro-arbitration’ outcome will be possible with the inclusion of appropriate wording following the Board’s view that the *Sian* decision may not apply where the arbitration clause itself excludes a liquidation application or a creditor’s winding up petition.

Whether *Sian* will result in a more consistent approach in the common law world will also be interesting to observe following the divergent approach taken in Hong Kong.

Restructuring the Cayman Islands Segregated Portfolio Company: A Closer Look at *In re Oakwise Value Fund SPC*¹

James Eggleton, Partner; and Kelsey Sabine, Associate, Harney Westwood & Riegels, Cayman Islands

Synopsis

The Grand Court has recently had cause to consider the interplay between the Cayman Islands restructuring officer regime, which was introduced following legislative changes in 2022, and the traditional ‘light touch’ provisional liquidator regime: *In re Oakwise Value Fund SPC*.

This latest decision clearly indicates that the provisional liquidator restructuring regime, which has survived the introduction of the dedicated restructuring officer regime albeit in modified statutory format, will continue to feature on the Cayman Islands restructuring landscape in the years ahead. Where a restructuring is needed, and subject to the facts of the case, there *appears* now to be a choice on offer: should provisional liquidators be appointed, or dedicated restructuring officers? As is explained below, the answer to that question may depend upon whether, in any given restructuring case, there is an additional need for independent management (in the form of provisional liquidators) to be appointed to protect stakeholder interests.

The *Oakwise* decision also provides a helpful analysis of the application of the winding up jurisdiction of the Cayman Islands court in the context of segregated portfolio companies, in circumstances where some segregated portfolios are solvent, and some are (or may be) insolvent.

The Cayman Islands restructuring officer regime

Now into only its third year, the Cayman Islands restructuring regime allows a company² to present a petition to the Court for the appointment of restructuring officers

(‘ROs’) on the grounds that it is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors (or classes thereof).³ The petition may be presented by the company acting by its directors, without a resolution of its members or an express power in its articles of association.

The presentation of a petition for the appointment of ROs automatically gives rise to an immediate statutory moratorium on all proceedings, other than criminal proceedings, against the company (although this has no bearing on the rights of secured creditors to enforce their security without leave of the Court and without reference to the proposed appointment).⁴ On the hearing of the petition, the Court may make an order for the appointment of ROs, adjourn the hearing conditionally or unconditionally, dismiss the petition or make any other order as the Court thinks fit, *except* an order placing the company into official liquidation.⁵

If ROs are appointed, they shall have the powers and carry out only such functions as the Court may specifically confer on them in the order of appointment. The order of appointment will also set out the manner and extent to which the powers and functions of the ROs affect and modify those of the company’s directors.

The Cayman Islands provisional liquidator regime

At any time after the presentation of a winding up petition but before the making of a winding up order, the Court has the jurisdiction to appoint a liquidator provisionally. As is the case for ROs, provisional liquidators (‘PLs’) shall carry out only such functions as the Court may confer on them and their powers may be limited by the order of appointment. The order of appointment

Notes

- 1 Unreported, FSD 303 of 2024 (IKJ) (16 December 2024).
- 2 For these purposes, the term ‘company’ includes companies incorporated and registered under the Cayman Islands Companies Act, bodies incorporated under any other Act, foreign companies, and any other entity or partnership (including Cayman Islands exempted limited partnerships) to which the restructuring and winding up provisions of the Companies Act applies.
- 3 s.91B(1) of the Companies Act.
- 4 As a matter of Cayman Islands law, the statutory moratorium is of extraterritorial effect.
- 5 The Court may only make a winding up order following the presentation of a winding up petition.

will also specify the powers, if any, remaining with the company's directors.⁶

There have, historically, been two parallel 'tracks' for the appointment of PLs, serving fundamentally different purposes in different cases: (i) applications brought by creditors or contributories in circumstances in which independent management in the form of PLs is necessary in order to prevent the misuse of company assets, oppression or mismanagement; and (ii) applications brought by the company itself in so-called 'light touch' restructuring cases, where there is a need to obtain a statutory moratorium on claims so that restructuring efforts may be pursued.

'Protective' PLs on the application of a creditor or contributory⁷

An application for the appointment of PLs may be made by a creditor or contributory on the grounds that there is a *prima facie* case for making a winding up order and the appointment of PLs is necessary to prevent the dissipation or misuse of company assets, prevent the oppression of minority shareholders or prevent mismanagement or misconduct on the part of the company's directors.⁸

An order for the appointment of PLs in these circumstances is a draconian step to take and will not be made lightly or without 'anxious consideration.'⁹ Clear or strong evidence is needed that PLs are necessary.¹⁰

Restructuring PLs on the application of the company: pre-August 2022

Prior to the introduction of the RO regime on 31 August 2022, the only way in which companies in financial distress were able to obtain a statutory moratorium on claims for the purposes of a restructuring, was for a winding up petition to be presented against the company and, thereafter, for the company to apply to appoint PLs on a so-called 'light-touch' basis. With the breathing space afforded to the company by virtue of the statutory moratorium then in place, the company could then explore potential restructuring options.

The previous regime for the appointment of PLs was generally seen as effective and – as more recent decisions of the Court concerning the RO regime have

shown – previous case law in respect of applications for the appointment of PLs is likely to be relevant and persuasive when it comes to determining applications for the appointment of ROs. This is a function of the fact that: (i) the jurisdictional threshold formerly in place for the appointment of light-touch PLs upon the application of the company (namely, the inability to pay debts and an intention to present a compromise) is the same jurisdictional threshold that is now in place for the appointment of ROs; and (ii) cases under the previous regime record valuable judicial and legal experience in the essentially the same commercial sphere.¹¹

However, there were a number of issues with the previous PL regime, including but not limited to the fact that it could not be accessed without a winding up petition having first been presented against the company. This was, in a certain sense, counterintuitive to the idea of a proposed restructuring (as opposed to a winding up) and was conceptually unattractive from a debtor perspective. The new RO regime was introduced into Cayman Islands law in order to resolve, at least in part, these and other issues.

Restructuring PLs on the application of the company: post-August 2022

Notably, the coming into effect of the RO regime in August 2022 has *not* displaced the jurisdiction of the Court to appoint PLs on the application of the company.

In fact, the jurisdiction of the Court to appoint PLs on the application of the company is now arguably broader than it was previously. Whereas formerly, restructuring PLs could be appointed on the application of the company where it was unable to pay its debts and intended to present a compromise to creditors, the position now is that upon an application by the company, the Court may appoint PLs 'if it considers it appropriate to do so.'¹² This is, on its terms, a broader and far less prescriptive jurisdiction.

What this means in practice for companies wishing to restructure is that they *may* have a choice as to how to go about doing so. In the factual circumstances of any given case, consideration needs to be given to the following question: should the company seek the appointment of ROs or PLs?

Notes

6 CWR O.4, r.4(3).

7 Or, in certain circumstances, the Cayman Islands Monetary Authority.

8 s.104(2) of the Companies Act.

9 *HMRC v Rochdale Drinks Distributors Ltd* [2013] BCC 419 at [76]; *Re a Company (No 007070 of 1996)* [1997] 2 BCLC 139 at page 142.

10 *In re CW Group Holdings Limited*, Unreported, FSD 113 and 122 of 2018 (RPJ) (3 August 2018) at [61]-[62].

11 *In re Aubit International*, Unreported, FSD 240 of 2023 (DDJ) (4 October 2023) citing *In re Oriente Group Limited*, Unreported, FSD 231 of 2022 (8 December 2022).

12 s.104(3) of the Companies Act (current iteration).

The distinctions between the RO and PL regimes

There are obvious distinctions between the RO and restructuring PL regimes:

- The jurisdiction to appoint PLs only arises following the presentation of a winding up petition. That is not the case for the RO regime, which is accessible by petition for the appointment of ROs.
- In cases where PLs are appointed, the statutory moratorium on claims commences upon appointment. With the RO regime, the statutory moratorium commences earlier, upon the filing of the petition and *before* the Court has had an opportunity to consider the merits (although the Court has made clear that the RO regime must not be abused simply in order to obtain the statutory moratorium or add credibility to the company's management;¹³ moreover, unless the Court otherwise directs, the petition for the appointment of ROs must be heard within 21 days of filing in any event, thereby striking a balance between creditor and debtor interests¹⁴).
- As its name suggests, the purpose of the RO regime is essentially confined to a financial restructuring. It is not intended to provide a mechanism whereby the RO's main role is to recover assets, data, documentation and company records or to undertake a forensic investigation into the affairs of the company.¹⁵ Although the Companies Act allows the Court to clothe the RO with appropriate powers and functions which are 'seemingly unlimited in scope,' the Court has held that it is implicit that there is a presumption that, following the appointment of ROs, the directors will retain at least some powers and functions to continue to control the company's day to day operations.¹⁶ By contrast, the restructuring PL regime is more flexible (PLs may be appointed in any case in which the Court thinks it 'appropriate') and may, in particular, be of more utility in circumstances where, in addition to a proposed restructuring, independent management is also required in order to step in and manage the company's affairs in times of instability and/or management disagreement.¹⁷

In re Oakwise Value Fund SPC

The interplay between the RO and PL regimes has very recently been addressed within the context of an application brought by the directors of a segregated portfolio company to appoint PLs. The question for the Court was: 'Can a company present a winding-up petition and appoint PLs for restructuring purposes or is the exclusive restructuring regime now found in the RO regime?'

The *Oakwise* decision also examined the basis upon which PLs may be appointed over an SPC, but with different powers in relation to its solvent and insolvent segregated portfolios. These points are explained below.

Segregated Portfolio Companies

The concept of the Cayman Islands segregated portfolio company ('SPC') is that a company, which remains one single legal entity, may create separate segregated portfolios ('SPs') which do not have separate legal personality. The assets and liabilities of each SP are statutorily ring-fenced from: (i) the assets and liabilities of each other SP; and (ii) the general assets and liabilities of the SPC. Any income and other property of an SPC that is not attributable to a particular SP constitutes the general assets of the SPC. Standard offshore fund structures, such as multi-class hedge funds, umbrella funds and master-feeder structures can benefit from the statutory ring-fencing feature of SPCs in order to protect against cross liability issues between assets and liabilities of different classes with separate equity and debt profiles.

The *Oakwise* application to appoint PLs

Oakwise was an SPC registered as a mutual fund with three active SPs invested in a variety of debt and equity instruments issued by PRC and US companies in various industry sectors. Two of its SPs were said to be solvent but the other segregated portfolio ('EFI SP'), which was invested in Chinese real estate, was arguably no longer solvent on a cash-flow basis.

The factual background to the presentation of the petition for the winding up of the SPC was, in summary, as follows:

Notes

¹³ *Aubit* at [127]-[145] and [171].

¹⁴ CWR O.1A, r.1(6).

¹⁵ *Aubit* at [171]. See also, very recently, *In re Holt Fund SPC*, Unreported, FSD 309 of 2023 (IKJ) (11 February 2025) at [42]-[47], in which the Court, upon an application by ROs for the discharge of their appointment, held that 'investigating management is beyond the scope of their present duties and is the sort of matter which a liquidator could be appointed to deal with in winding up proceedings.'

¹⁶ *In re Kingkey Financial International (Holdings) Ltd*, Unreported, FSD 56 of 2024 (JAJ) (12 April 2024), by reference to s.91B of the Companies Act, at [32]-[35].

¹⁷ *Kingkey* at [37]; [49]; *Oakwise* at [30]-[42], discussed in further detail below.

- On 24 November 2022, following the submission of a redemption request by its largest creditor (CMB International Securities Limited ('CMBI')), and in the light of the downturn in the PRC real estate market, the directors of Oakwise (i.e. the SPC) resolved to suspend redemptions in EFI SP.
- On 23 December 2022, judgment in default was obtained in the Hong Kong court against Oakwise (i.e. the SPC *as a whole*) by three individual redemption creditors of EFI SP (the 'HK Judgment Creditors') for \$3.3m.
- On 29 December 2022, CMBI petitioned for the appointment of receivers, alleging that EFI SP was indebted to it in the sum of in excess of USD\$90m. The receivership application was initially dismissed by the Court (on the basis that it was not satisfied on the balance of probabilities that EFI SP was balance sheet insolvent¹⁸). However, the Court of Appeal, overturning that decision, subsequently remitted the petition in the receivership proceedings back to the Court.¹⁹ The receivership proceedings were outstanding as at the date of this latest hearing.
- On 28 March 2024, the HK Judgment Creditors obtained a garnishee order against the SPC as a whole (as opposed to EFI SP as a single SP). The SPC was, at the date of the application to appoint PLs, in the process of appealing that garnishee order. Notably, although the HK Judgment Creditors were creditors of EFI SP, the garnishee order they had obtained took effect against bank accounts held by Oakwise in respect not only of EFI SP, but also other segregated portfolios.
- In addition, a further approximately US\$10m in unpaid redemption claims from EFI SP was outstanding.

In these circumstances, the directors applied for the winding up of the SPC as a whole on the grounds that: (i) because EFI SP was arguably not solvent on a cash flow basis, the SPC itself (as a whole) was arguably unable to pay its debts; and (ii) it was just and equitable to wind up the SPC in view of the receivership proceedings, the garnishee proceedings in Hong Kong and the other outstanding redemption requests, in order to facilitate a subsequent application by the directors for the appointment of PLs.

The application for the appointment of PLs was in turn made on the basis that appointing PLs would protect the interests of investors of each of the SPs and would ensure the orderly handing of the affairs of EFI SP specifically. In particular: (i) EFI SP required the appointment of PLs to maximise value from its underlying assets (and this was unlikely to be a short-term exercise and would likely benefit from a form of restructuring rather than a winding up); and (ii) as to the remaining solvent SPs, they would be spun off into a new company following regulatory approval.

The challenge to the PL application

Merits challenge

The HK Judgment Creditors contested the application to appoint PLs on the basis that the application had not been brought for genuine restructuring purposes, but rather to thwart enforcement steps being taken by Oakwise's creditors (including in connection with the garnishee order that had been obtained by the HK Judgment Creditors in Hong Kong). The Court noted at the outset that this was an odd complaint to make, because 'in traditional insolvency terms, one of the most common reasons for appointing PLs is to ensure that all unsecured creditors are treated equally and that the few do not receive preferential payments at the expense of the many.'²⁰

The Court also noted that the HK Judgment Creditors were accused of one of the deadliest of sins an investor in an SPC can commit: failing to recognise the sanctity of the SPC structure (insofar as, in their capacity as investors in EFI SP only, they had obtained a garnishee order taking effect over assets held by other SPs in which they had not invested). Accordingly, this challenge failed, on the basis that the interests of the HK Judgment Creditors were manifestly contrary to the interests of other redemption creditors of EFI SP, and also adverse to the interests of investors in the other solvent SPs.

Jurisdictional challenge

The HK Judgment Creditors also challenged the proposed appointment of PLs on the basis that, based on well-established principles of statutory interpretation,²¹ the Court simply had no statutory jurisdiction to

Notes

- 18 Pursuant to s.224 of the Companies Act, the Court may make a receivership order in respect of an SP (or SPs) if it is satisfied that the SP assets attributable to it are or are likely to be insufficient to discharge the claims of creditors in respect of that SP. The language of the statute 'provide for a flexible balance sheet test which, instead of contemplating a simple assessment of the relative sides of a balance sheet, involves determining on the available evidence, applying the civil standard of proof, whether the assets, taking into account the actual, contingent and prospective liabilities, are now or are likely to be insufficient in the reasonably near future to pay the claims of creditors.' See *In re CMB International Securities Limited v Oakwise Value Fund SPC* [CICA (Civil) Appeal 9 of 2023], 13 June 2024, at [50].
- 19 *In re CMB International Securities Limited v Oakwise Value Fund SPC* [CICA (Civil) Appeal 9 of 2023], 13 June 2024.
- 20 *Oakwise* at [20].
- 21 Citing *Shanda Games Ltd v Maso Capital Invs. Limited* 2020 (1) CILR 293 at [27].

appoint PLs in circumstances where the RO regime was now the only regime available to companies wishing to restructure. This challenge also failed. It was impossible to construe the broad language of the statute, which provides for the appointment of PLs if the Court considers it appropriate to do so, as excluding the possibility of PLs being appointed in circumstances where any of their proposed powers might include the pursuit of a potential restructuring. That would lead to absurd results.

More narrowly, it was contended that if a company is proposing to commence a restructuring whereby the primary function of the appointee is to oversee that restructuring, then the RO regime is the only statutory gateway for doing so. The Court held that this question did not ultimately arise for determination, because this was not such a case.²² There were several reasons for seeking the appointment of PLs in this case – not just a restructuring.²³

The SPC winding up context: solvent and insolvent segregated portfolios

The Judge in *Oakwise* noted the fact that no challenge had been made to the proposition that the winding up jurisdiction applied to SPCs. Building on recent authorities addressing that issue,²⁴ the Court held that that proposition was clearly correct: a straightforward reading of the RO regime suggests that it can be deployed in relation to specific classes of creditors and is not only available where the entirety of the company's business would benefit from a restructuring. Within the context of an SPC with both solvent and insolvent SPs, the automatic stay of all proceedings against the SPC itself could be modified by Court order (so as to ensure its non-applicability in respect of the solvent SPs).

Accordingly, the Court ordered that PLs be appointed in relation to *Oakwise* but with different powers in relation to its solvent and insolvent SPs, in light of differing legal and commercial concerns. It held that:

‘Whether or not there are other solvent portfolios ought as a matter of principle to be irrelevant to the question of whether the winding up jurisdiction is available to a stakeholder with interests limited to a segregated portfolio. It would potentially be relevant to the separate question of whether or not a winding-up order ought ultimately to be made, but ... liquidators of entire SPCs are legally required

to recognise the segregation structure and adopt a “horses for courses” approach. Because a SP has no separate existence and the SPC is liable for its debts, the insolvency of a portfolio results in the insolvency of the SPC as a matter of law.’²⁵

Concluding remarks

In a straightforward restructuring case in which the primary (or only) purpose of the appointee is to oversee that restructuring, the narrow question as to whether the RO regime is now the only available statutory gateway in the Cayman Islands, remains unanswered. However, it is now clear that, more broadly, the RO regime is not the only available option for a restructuring in circumstances where there is an additional need for neutral and independent third parties to be brought in to manage the company's affairs in times of conflict or instability.

The fact that an application to appoint restructuring PLs is made by company itself (as opposed to outside third parties) is, in this respect, highly likely to be a relevant and persuasive factor militating towards the appointment of PLs.²⁶ An additional suggestion made to the Court in *Kingkey* was that the appointment of ROs may, in certain cases, come with its challenges (such as the availability of recognition of the ROs in overseas jurisdictions), which challenges were unlikely to arise for liquidators. It remains to be seen whether that submission receives further judicial attention in due course.

In former times, the Cayman Islands statutory regime provided only for the appointment of ‘protective’ PLs (on the application of creditors or contributories) or ‘light touch’ restructuring PLs (on the application of the company). More choices are now available. The Cayman regime now provides for the appointment of ‘protective’ PLs, ‘light touch’ PLs (including PLs with supplemental powers, to the extent independent management of the company's affairs is required), or ROs. In a restructuring scenario, proper consideration needs to be given at the outset as to the comparative advantages and disadvantages of these parallel regimes, what powers any proposed appointee is likely to need and the jurisdictional thresholds that must be satisfied upon any related application.

Notes

²² *Oakwise* at [42].

²³ *Oakwise* at [41], following *In re Kingkey Financial International (Holdings) Ltd* at [35] and [37].

²⁴ Most notably *In re Holt Fund SPC* (Unreported) FSD 309 of 2023 (IKJ) (26 January 2024) and *In re Performance Insurance Company SPC* (Unreported) FSD 70 of 2021 (RPJ) (6 April 2022)

²⁵ *Oakwise* at [49].

²⁶ *Re United Medical Protection & Ors Ltd* [2002] NSWSC 413. The reasons for this are helpfully explained in *Oakwise* at [52], with the director of *Oakwise* applauded for realising and accepting that, in the difficult circumstances of the case, ‘the gig was up.’

The Distinction between ‘Legal Rights’ and ‘Interests’ when Determining Creditor Classes in a Scheme of Arrangement: An Examination of the Restructuring of *China Aoyuan Group*

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Synopsis

When a scheme of arrangement involving a compromise or arrangement is proposed between a company and its creditors or any class of them,¹ the court is required to consider whether it would be appropriate to convene one or more meetings of creditors for the purposes of considering and voting on the scheme of arrangement.² The question of how creditors are to be classed is a crucial element to any scheme of arrangement as it often affects the bargaining power (and potential veto capabilities) of creditors which ultimately determines whether the relevant scheme will be approved by the requisite majorities at the scheme meeting.

It is well-established that, in determining whether scheme creditors are properly classed, the court looks at whether the creditors voting in the same class have sufficiently similar legal rights such that they can consult together with a view to their common interest. In determining whether a class of creditors can consult together, the court must consider both their existing legal rights and rights in the relevant alternative if the scheme is not implemented.³

It is also well-accepted that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes.

Whilst these principles relating to class composition are relatively uncontroversial, its application is often far less straightforward in practice. Complexities arise when the difference in the scheme creditors’ relative

positions involve different commercial interests and private rights, making it difficult to distinguish between ‘legal rights’ and ‘interests’. This is particularly evident in the context of group restructurings where scheme creditors often consist of some creditors who hold different claims against distinct entities within the same corporate group, and who may, as a result, have additional rights derived from the wider restructuring of the group which the scheme forms part of.

In this article, we explore the case of *China Aoyuan Group*, where the Hong Kong Court of First Instance and the Grand Court of the Cayman Islands grappled with the issue of whether certain creditors who purportedly had a special interest by reason of their ability to vote and receive scheme consideration in both of the inter-conditional schemes proposed by the China Aoyuan Group should be classed separately from other creditors who only had the right to receive consideration in one of the schemes.

In coming to its decision, the courts had to consider whether it should be limiting itself to solely considering a scheme creditor’s rights under the specific scheme in question when deciding class composition, or whether it should also consider how the scheme creditor’s rights would be affected by the broader restructuring (i.e., both inter-conditional schemes) as a whole.

Background

China Aoyuan Group Limited (‘Aoyuan’) is a company incorporated in the Cayman Islands with shares listed

Notes

- 1 The scheme of arrangement provisions in a number of common law jurisdictions (including the Cayman Islands, the British Virgin Islands, Hong Kong, England & Wales and Singapore) are substantially similar. Accordingly, the principles discussed in this article (including the test for class composition) should apply equally in these jurisdictions.
- 2 This would typically be at the convening hearing stage (being the first hearing before the courts at which permission to convene the scheme meeting(s) is granted).
- 3 In determining whether creditors are properly classified, the starting point is to identify the appropriate comparator (i.e., the alternative outcome if the scheme does not proceed). Having done so, the court will analyse: (i) the rights that the creditors would have if the scheme was not implemented (‘rights in’); and (ii) the new rights which the creditors will be entitled to if the scheme was implemented (‘rights out’). If, having carried out that exercise, there is a material difference between the ‘rights in’ and ‘rights out’ of those creditors such that the creditors are so dissimilar as to make it impossible for them to consult together with a view to their common interest, separate meetings must be summoned.

on The Stock Exchange of Hong Kong Limited. Aoyuan is the ultimate holding company of the China Aoyuan Group (the 'Group'), which is in the business of the development and sale of residential and commercial properties in the People's Republic of China. The Group, like many others, had been severely affected by the impact of the COVID-19 pandemic and the general downturn in the real estate sector and capital markets since mid-2021.

In an attempt to alleviate its financial distress and avoid an insolvent liquidation of the Group, Aoyuan, together with its principal subsidiary, Add Hero Holdings Limited ('Add Hero'), promulgated four parallel and inter-conditional schemes of arrangement to restructure the Group's offshore debts of approximately US\$6.25 billion. The schemes comprised two parallel and inter-conditional schemes of arrangement proposed by Aoyuan in Hong Kong and the Cayman Islands in respect of Aoyuan's indebtedness as issuer, borrower and guarantor under the relevant debt instruments (the 'Aoyuan Schemes') and another two parallel and inter-conditional schemes proposed by Add Hero in Hong Kong and the British Virgin Islands which seeks to compromise Add Hero's guarantor obligations under those debt instruments (the 'Add Hero Schemes').

The use of dual schemes of arrangement

Under the Aoyuan Schemes, Aoyuan had two groups of scheme creditors – (1) the '*Overlapping Scheme Creditors*' who, in addition to their primary claims against Aoyuan, had the benefit of guarantees granted by Add Hero, and therefore had structurally senior claims against the Group, and (2) the '*Non-Overlapping Scheme Creditors*' who had structurally subordinated claims as they only had primary claims against Aoyuan.

In order to reflect the Overlapping Scheme Creditors' structural priority and provide the Overlapping Scheme Creditors with an uplift on their recoveries from the restructuring, the Group chose to propose dual schemes of arrangement (namely, the Aoyuan Schemes and the Add Hero Schemes) which allowed the Overlapping Scheme Creditors to participate and vote in respect of the full value of their claims and receive scheme consideration in both schemes. On the other hand, the Non-Overlapping Scheme Creditors with no guarantee claims against Add Hero would only be able to participate in and receive scheme consideration under the Aoyuan Schemes.

Whilst Aoyuan could have restructured its primary obligations owing to both groups of creditors as well as

the guarantee claims of the Overlapping Scheme Creditors in a single scheme of arrangement, this would have meant that the Overlapping Scheme Creditors and the Non-Overlapping Scheme Creditors would likely have had to vote in separate classes due to the difference in the structural priority of their rights against Aoyuan, and the Non-Overlapping Scheme Creditors, being the minority group, would potentially have been afforded a veto right in respect of the Aoyuan Schemes.

By adopting a dual scheme approach, Aoyuan sought to enhance the recoveries to its structurally senior creditors, namely, the Overlapping Scheme Creditors, in the restructuring, whilst at the same time allowing all of its scheme creditors to vote in a single class to avoid a situation where a minority group of dissenting creditors would have the ability to veto the Aoyuan Schemes.

Ping An's objections to the Aoyuan Schemes

At the hearings before the Hong Kong courts, one of the Non-Overlapping Scheme Creditors, China Ping An Insurance Overseas (Holdings) Limited ('Ping An') contended that the Overlapping Scheme Creditors should not have been classed together with the other Non-Overlapping Scheme Creditors as they stood to gain additional benefits under the Add Hero Schemes, which would not otherwise be available to the Non-Overlapping Scheme Creditors. The additional scheme consideration entitlements conferred by the Add Hero Schemes amounted to a difference in rights between the Overlapping Scheme Creditors and the Non-Overlapping Scheme Creditors which rendered the Overlapping Scheme Creditors unable to consult with the Non-Overlapping Scheme Creditors with a view to their common interest.

Ping An argued that the court should adopt a broad approach when determining whether scheme creditors have been properly classed. In this regard, where dual and inter-conditional schemes have been proposed, consideration should be given to the scheme creditors' rights in the context of the restructuring as a whole, instead of simply looking at the scheme in isolation.

In making these arguments, Ping An relied on three English case authorities, namely, *Re Baltic Exchange*,⁴ *Re Sunbird Business Services Ltd*⁵ and *Codere Finance*⁶ where the English courts took a conjunctive approach by considering the scheme creditors' rights not just in the scheme document itself, but in various other restructuring documents that confer other rights or benefits which are provided for under the terms of the scheme, or which are conditional upon it. The English courts found that, as a matter of commercial reality, such scheme

Notes

⁴ *Re Baltic Exchange Ltd* [2016] EWHC 3391.

⁵ *Re Sunbird Business Services Ltd* [2020] EWHC 2860 (Ch).

⁶ *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2441.

creditors would have taken the decision to support the scheme by reference to the 'whole package of rights to which they were entitled'.⁷ Therefore, the courts should not adopt a narrow approach in assessing how creditor classes should be constituted in such circumstances.

Hong Kong decision

In considering Ping An's arguments, the Hong Kong Court placed heavy reliance on the decision of *Re UDL Argos*⁸ and found that the English authorities that Ping An had sought to rely on were inconsistent with the principles outlined by the Hong Kong Court of Final Appeal in that case.

Following the reasoning discussed in *Re UDL Argos*, the Hong Kong Court held that 'it is only the rights compromised by the scheme or granted by it that are relevant to the question of class composition'.⁹ The Court should only look at the rights of the scheme creditors going in and out of the subject scheme in determining whether the scheme creditors have been properly classed. Any rights, interests or benefits arising from separate, or inter-conditional schemes or other linked arrangements, would only go towards a creditor's interests, which would not fracture the relevant class.¹⁰

Nonetheless, the Hong Kong Court cautioned that this should not be taken to completely preclude the possibility of such rights or interests affecting the scheme. In fact, the Hong Kong Court observed that these rights or interests acquired outside of the subject scheme (for instance, in a restructuring of an associated company) may nevertheless be relevant at the sanction stage when the court is asked to consider the fairness of the scheme. At that stage, the court may discount or disregard the votes of these creditors who had such other interests or rights that their support for the scheme cannot be regarded as being fairly representative of the class.¹¹

Cayman decision

Whilst the issue of classification was not expressly challenged in the Cayman proceedings, Justice Doyle of the Grand Court of the Cayman Islands did not see any issues with the Overlapping Scheme Creditors voting in a single class alongside the Non-Overlapping Scheme Creditors.

In coming to this view, Justice Doyle had regard to the seminal decision of *Re Ocean Rig*,¹² where the Cayman courts previously found that inter-conditional schemes of arrangement can properly give effect to the structural priority of different creditors to whom debts are separately and additionally owed by a subsidiary guarantor of the primary obligor. In *Re Ocean Rig*, a dissenting creditor sought to argue that a group of creditors with claims against various companies within the group pursuant to certain guarantees should have been placed in a separate class. However, the court upheld the general rule that only rights against the scheme company, and not as against third parties and other commercial interests, will be taken into account.¹³

Interestingly, the same conclusion was adopted by Justice Kawaley in a recent decision regarding the restructuring of *Kaisa Group Holdings Ltd*, which also involved dual schemes of arrangement proposed by the parent company of the group with second inter-conditional schemes proposed by a subsidiary seeking to compromise its guarantee obligations. In that decision, Justice Kawaley interpreted the decisions in *China Aoyuan Group* (i.e., both the Hong Kong and Cayman Islands decisions) as having 'expressly decided that the existence of some scheme creditors with overlapping claims in the scheme of another company does not require a separate class to be constituted'.¹⁴

Accordingly, the position of the Cayman courts following the decisions in *Re Ocean Rig*, *Re Aoyuan* and *Kaisa Group* appear to be broadly in concert with the Hong Kong Court's position.

English position

How then can the broader approach taken by the English courts in the cases of *Re Baltic Exchange*, *Re Sunbird Business* and *Codere Finance*, which suggests that regard should be had to rights outside of the scheme in a broader restructuring, be reconciled and is the English position truly inconsistent with the decisions in Hong Kong and the Cayman Islands?

It would appear that the better view is to draw a distinction between, on the one hand, cases like *Re Baltic Exchange*, *Re Sunbird Business* and *Codere Finance* where a single scheme of arrangement is being proposed and scheme creditors acquire additional rights as against the scheme company as part of the wider restructuring, and on the other hand, situations where parallel

Notes

7 *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2441 at [49].

8 *Re UDL Argos Engineering v Li* (2001) 4 HKCFAR 358 at [27].

9 *Re Add Hero Holdings Ltd* [2025] HKCFI 310 at [73].

10 *Ibid.*

11 *Ibid.*

12 *Re Ocean Rig UDW* [2017] (2) CILR 495.

13 *Re Ocean Rig UDW* [2017] (2) CILR 495 at [67].

14 *In the Matter of Kaisa Group Holdings Ltd* [2025] CIGC (FSD) 9 (7 February 2025) at [13].

and inter-conditional schemes of arrangement are being proposed pursuant to which creditors receive additional scheme consideration entitlement as a result of distinct pre-existing rights that they already hold as against both entities that are the subject of their respective schemes.

In *Re Baltic Exchange*, *Re Sunbird Business* and *Codere Finance*, the benefits conferred or to be conferred in other agreements that formed part of the scheme, or were conditional on the scheme being effective, gave rise to a difference in rights amongst the scheme creditors as these benefits were held to confer new preferential rights arising from the restructuring which the scheme forms part of, and which, such creditors would in effect receive in exchange for the compromise of their rights against the scheme company.¹⁵

In contrast, the facts of *China Aoyuan* seem to be distinguishable from the aforementioned English authorities on the basis that the Aoyuan Schemes did not purport to artificially grant the Overlapping Scheme Creditors new rights against Aoyuan to be released in exchange for additional scheme consideration. Instead, any additional scheme consideration received by an Overlapping Scheme Creditor under the Add Hero Schemes was derived from a direct and independent right against Add Hero which was pre-existing prior to the restructuring. Therefore, any benefits or entitlements under the Add Hero Schemes were in exchange for the compromise of the Overlapping Scheme Creditors' rights as against Add Hero, and not in exchange for the compromise of their rights against Aoyuan.

Moreover, the benefits or additional rights conferred under the Add Hero Schemes allowed the Group to reflect the structural priority and higher recovery that the Overlapping Scheme Creditors would have been entitled to in a Group-wide liquidation scenario, as compared to the Non-Overlapping Scheme Creditors who would not have been entitled to the same.

Arguably, the English authorities blur the distinction between rights and interests given that consideration is afforded to other interests arising outside of the scheme itself. However, it bears noting that none of the English cases involved parallel and inter-conditional schemes of arrangement. Therefore, it remains to be seen whether the English courts will recognise the distinction as suggested above and adopt the same position as the Hong Kong and Cayman courts should a future debtor opt to replicate the dual scheme approach used by the China Aoyuan Group in restructuring its debts.

Perhaps an argument in favour of the English courts taking the same approach as Hong Kong and the Cayman Islands is the already well-established position under English law that 'cross-holdings'¹⁶ of scheme creditors only give rise to potentially different interests rather than rights and accordingly, do not require separate class meetings to be convened (with such matters being considered at the sanction stage instead).¹⁷ In drawing this analogy, it would only be consistent for the English courts to similarly find that the claims of Overlapping Scheme Creditors which are to be compromised under separate inter-conditional schemes do not fracture class.

Key takeaways

The Hong Kong and Cayman Island decisions relating to the *China Aoyuan Group* helpfully provide clarification on the legal concepts relating to classification of creditors in corporate restructuring proceedings. It reaffirms the important principle that, when considering class composition, focus should be placed on the similarity or dissimilarity of legal rights released or varied by the specific scheme that the relevant court is asked to sanction, as opposed to the difference in interests of scheme creditors (including any other rights that such scheme creditors may derive from a separate scheme, notwithstanding such scheme may be related and inter-conditional to the first scheme in question).

Critically, the decisions also set a helpful precedent for other debtor companies to utilise, at least in Hong Kong and the Cayman Islands, parallel or dual schemes of arrangement as a strategic tool to drastically diminish the bargaining positions of minority creditors in the context of a group restructuring by eliminating any potential veto abilities they may have, particularly where the scheme creditors have structurally differing claims to be compromised under the scheme.

The decisions of the Hong Kong and Cayman courts in *China Aoyuan Group* make it clear that in the absence of any evidence showing that the special interests which an Overlapping Scheme Creditor would receive was a material factor in its decision to approve the scheme such that it renders the votes unrepresentative of a class (which will go towards the fairness of the scheme), there is nothing sinister about Overlapping Scheme Creditors voting in the same class as Non-Overlapping Scheme Creditors. In fact, it appears from these decisions that allowing the Overlapping Scheme

Notes

- 15 Although the English courts accepted that the additional rights and benefits conferred outside the scheme gave rise to a difference in rights between the scheme creditors, in each of these cases, the English courts found that these additional rights did not make it impossible for the scheme creditors to consult together with a view to their common interest such as to require the relevant scheme creditors (who stood to gain from such additional rights) to be placed in a separate class for the purposes of voting on the scheme.
- 16 A scheme creditor has 'cross-holdings' where it holds claims across different classes within the same scheme.
- 17 *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch) at [88].

Creditors to participate in a second scheme of arrangement allows the distinction between rights and interests to be strictly adhered to whilst enabling a debtor company to minimise the possibility of its dissenting creditors blocking the scheme.

Following the decisions in *China Aoyuan Group*, it should also be noted that the approach of proposing dual schemes of arrangement can no longer be

described as unorthodox with other companies such as *Kaisa Group Holdings Ltd* successfully utilising an identical structure to implement its restructuring.¹⁸ Needless to say, this goes to show that the dual schemes approach adopted by the *China Aoyuan Group* is becoming an increasingly desirable option in the restructuring arsenal of debtor companies seeking to restructure their debts.

Notes

- 18 As at the date of this article, Kaisa Group Holdings Ltd's parallel and inter-conditional schemes in Hong Kong and Cayman Islands, which similarly classed its 'Overlapping Scheme Creditors' in the same class as its 'Non-Overlapping Scheme Creditors', were sanctioned on 24 March 2025 and 26 March 2025 respectively.

The Unfair Preference Regime and Challenges to Office Holder Decisions: Reasons to Incorporate in the BVI

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Synopsis

The BVI has robust corporate insolvency legislation, fostering recoveries for creditors in the event of a liquidation. This article examines two areas where the BVI's legislation, as interpreted by its Courts, is particularly developed: unfair preferences and challenges to the decisions of liquidators, as well as other office-holders. The strength of the BVI's corporate insolvency legislation provides a reason for companies to incorporate in the territory.

By way of introduction, unfair preferences, which are one of several voidable transactions provided for by the British Virgin Islands ('BVI') Insolvency Act, Revised Edition 2020 ('BVI IA'), offer an important potential avenue for recovery by a liquidator when a company is wound up. The purpose of the unfair preference regime is to uphold the fundamental insolvency principle of *pari passu* distribution – that all creditors of a particular class should be treated equally in the distribution of assets, or any proceeds from the sale of those assets, and without preference to one another – by ensuring that any payments to creditors that were unfairly made in priority to other creditors during the lead up to a company's insolvency are returned to the liquidation estate. This article examines the key features of the BVI's unfair preference regime including, in particular, the test for what constitutes an unfair preference and how it differs favourably from that applied in certain other common law jurisdictions, facilitating recoveries by liquidators.

Separately, the article also examines the recent landmark Privy Council decision in *Stevanovich v Richardson* [2025] UKPC 18 ('*Stevanovich*'), which clarifies the interpretation of a 'person aggrieved' under section 273 of the BVI IA, a provision which allows for the decisions of liquidators and other office holders to be challenged. By limiting the circumstances in which third parties may challenge such decisions, *Stevanovich* serves to encourage the orderly winding up of BVI companies.

Both the flexible unfair preference regime and the protections afforded by section 273 of the BVI IA highlight the advantages of the BVI as an offshore

jurisdiction, both in terms of the BVI IA and the pragmatic approach of the BVI courts to its interpretation.

The BVI unfair preference regime: key provisions

Per section 245 BVI IA, in order for a transaction to be successfully challenged by a liquidator as an unfair preference it must be demonstrated that the said transaction (i) was an 'insolvency transaction', (ii) that it was entered into by the company within the 'vulnerability period' and (iii) it had 'the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if the transaction had not been entered into'.

Importantly, a transaction will not be an unfair preference if it took place in the ordinary course of business. However, where a transaction entered into by a company within the vulnerability period has the requisite effect and the creditor is a 'connected person', it is presumed that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business. The definition of a 'connected person' with respect to an insolvent company is wide (see section 5(1) BVI IA) and includes any related company and another company which shares a director with the company in liquidation.

An 'insolvency transaction' is defined in section 244(2) of the BVI IA as a transaction which is either (i) entered into at a time when the company insolvent or (ii) which causes the company to become insolvent. For the purposes of unfair preference claims under section 245, a BVI company or a foreign company is insolvent if *inter alia* it is unable to pay its debts as they fall due (i.e., cash flow insolvency with balance sheet insolvency being insufficient for s. 245).

The 'vulnerability period' is defined in section 244(1) as, (i) two years prior to the 'onset of insolvency' (with that term defined in the legislation) for a transaction with a connected person and (ii) for a transaction with any other person, 6 months prior to the same.

Where a liquidator is able to satisfy the court that a transaction amounts to an unfair preference, the court has a wide discretion with respect to the scope of order it may make. Such an order may include setting aside the transaction in whole or in part or making an order to restore the position to what it would have been had the company not entered into that transaction, which could include requiring assets transferred as part of the transaction to be vested in the company. There is no territorial limit to the orders which the court can make, either with respect to the location of the relevant assets or against whom the order may be made. There are statutory safeguards in place, however, to protect third parties who acquired interests in assets in good faith and for value.

Key advantages of the BVI unfair preference regime

No need to prove intention

One of the central advantages of the BVI unfair preference regime is that there is no need to prove an intention or desire to prefer in order for a payment to be categorized as an unfair preference. The relevant requirement is rather, pursuant to section 245 BVI IA, that the transaction *has the effect* of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if the transaction had not been entered into.

In this regard the BVI regime differs from other regimes including that of the Cayman Islands. The Cayman Islands Companies Act provides in section 145 that such a payment must be made ‘with a view to’ giving a creditor a preference over the other creditors. Case-law establishes that this means that the dominant or sole intention must be to prefer the creditor, albeit the Court of Appeal in *Re Weaving Macro Fixed Income* [2016] 2 CILR 514 CA held that there was no need that this intention should carry with it the ‘taint of dishonesty’.

English law has deliberately jettisoned the test of dominant or sole intention to prefer for a different, and many say, lower, standard. The English Insolvency Act 1986 (the ‘English IA’) provides in section 239(5) and (6) that, broadly and in summary, an influence by a *desire* to prefer must be established – albeit there is a rebuttable presumption such a requirement is satisfied when a preference is given by a company to a connected person (other than by reason only of being an employee).

The English provision has, predictably, generated case-law as to its meaning including *Re MC Bacon Ltd* [1990] BCC 78 where Millet J distinguished ‘desire’ from the previous test of dominant intention saying the new test was ‘completely different’:

‘It involves at least two radical departures from the old law. It is no longer necessary to establish a dominant intention to prefer. It is sufficient that the decision was influenced by the requisite desire. That is the first change. The second is that it is no longer sufficient to establish an intention to prefer. There must be a desire to produce the effect mentioned in the subsection.

Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either ... A man is not to be taken as desiring all the necessary consequences of his actions ... It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations. Under the new regime a transaction will not be set aside as a voidable preference unless the company positively wished to improve the creditor’s position in the event of its own insolvent liquidation.’

Nonetheless, the lower test still generates litigation including in respect of factual enquiries as to when the presumption referred to above has been rebutted. Indeed, attempts to summarily dispose of cases have in the past failed because the Court has determined that it was necessary to hear evidence on the desire to prefer. In *Phillips v McGregor-Paterson* [2009] EWHC 2385 (Ch) the Court stated: ‘Save in the clearest of cases, it will only be possible after a trial to determine whether or not the statutory presumption has been rebutted’ (which was cited with approval in *Manolete Partners v Matta* [2020] EWHC 2965 (Ch)) at [57]).

By contrast, by not having an intention or desire requirement the BVI avoids the issues of statutory construction and factual determination which have been described above and facilitates the recovery of unfair preferences. In this regard the BVI regime is similar to that in Australia where, *inter alia*, a transaction is an unfair preference which *results in* the creditor receiving from the company more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company.¹ Similarly, under the US Bankruptcy Code, creditors must repay sums into the debtor’s estate where the debtor files for bankruptcy within 90 days.² The absence of a requirement to demonstrate intention or desire is to be commended.

Notes

¹ Corporations Act 2001, s. 588FA.

² Bankruptcy Code §547.

Ordinary course of business

A further benefit of the BVI regime is the careful control that BVI law has placed on the ambit of the ordinary course of business exception. Section 245(2) BVI IA provides that a 'transaction is not an unfair preference transaction if it took place in the ordinary course of business'. The ambit of this provision is already limited by section 245(4) which provides that:

'Where a transaction entered into by a company within the vulnerability period has the effect specified in subsection (1)(c) in respect of a creditor who is a connected person, unless the contrary is proved, it is presumed that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business.'

The Courts have also been careful to control the ambit of the ordinary course of business exception, with the Eastern Caribbean Court of Appeal ('EC CoA') setting careful limits on it in *Byers v Chen* BVI-HCVAP2015/0011. In that case the Court considered whether the repayment by PFF of a US\$1.3m unsecured loan from a BVI company (Zenato) was an unfair preference. The loan was obtained by PFF in May 2009 and the loan agreement stipulated repayment in two years. The loan was repaid in three monthly instalments in November 2009 at a time when formal insolvency was inevitable – PFF entering provisional liquidation in December 2009. The EC CoA held, *inter alia* that:

'the ordinary course of business defence is intended to enable a company to continue to make payments to ordinary trade creditors so that they continue to supply goods and services to the company thereby enabling the company to continue to trade as a going concern. However, once an insolvency process is inevitable, payments to ordinary creditors can no longer be justified on the basis of continuity of trade. There justification would only lie if their result is an overall positive benefit to creditors as a whole. From the foregoing, it is clear that Zenato payments were not in the ordinary course of business.'

The loan was repaid earlier than required under the loan agreement. However, the EC CoA held that:

'even if the Zenato loan was due for repayment in November 2009, it does not follow that it was a payment in the ordinary course of business. To suggest otherwise, is to render the rules on unlawful preferences wholly otiose as, on Ms. Chen's logic, no payment to a creditor in accordance with obligations under a commercial contract could ever be susceptible to challenge as a preference.'

Section 273 – the process for challenge of a liquidator's decision

A further strength of the BVI's insolvency regime is the careful limits it has placed on the ability to challenge the decision of liquidators and similar office holders. Section 273 of the BVI IA provides:

'A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.'

The question of whom may have standing to bring such an application was the subject of the recent Privy Council decision in *Stevanovich* in which the Court was required to determine whether the appellant, Mr Stevanovich, was such 'a person aggrieved'. As described below, the Privy Council placed careful controls on who had standing to bring such a challenge.

The case concerned a BVI company ('Barrington') which entered voluntary liquidation in 2010 and was dissolved in early 2011, with Barrington's sole director, Mr Stevanovich, having resigned in August 2010.

In October 2010 a US Chapter 11 Trustee ('US Trustee') filed a complaint in US proceedings against Barrington, Mr Stevanovich, and others seeking, *inter alia*, the return of monies remitted by a US company to Barrington as part of a ponzi scheme. The US Trustee had Barrington's dissolution declared void in early 2013 with the result that Barrington was placed back in liquidation with liquidators appointed by the Court (the 'Liquidators'). The Liquidators subsequently admitted a claim (the 'Claim') in the liquidation made by the US Trustee in the sum of US\$398m, thereby rendering Barrington insolvent.

To recover amounts in the admitted Claim the Liquidators, in 2016, brought BVI proceedings against Mr Stevanovich for misfeasance as a director and fraudulent trading (the 'Proceedings'). In 2018 Mr Stevanovich challenged the Liquidators' admission of the Claim under s. 273 of the Act and at both first instance and the Court of Appeal Mr Stevanovich's challenge failed, on the basis that he was not a 'person aggrieved' and so had no standing to bring a challenge.

The Privy Council noted the similarities between s273 BVI IA and section 168(5) of the English IA and was accordingly guided by the decision of the UK Supreme Court ('UK SC') in *Brake v The Chedington Court Estate Ltd* [2023] UKSC 29 ('Brake').

In *Brake*, Lord Justice Richards confirmed that standing, for the purposes of provisions such as section 168(5) of the English IA, is restricted to three broad categories:

- a. First, subject to limited exceptions, a bankrupt or contributory in a corporate insolvency who can show that there is or is likely to be a surplus of assets once all liabilities to creditors and the costs and

expenses of the bankruptcy/ liquidation have been paid;

- b. Second, a creditor who is affected in his capacity as creditor, or a bankrupt who is affected in his capacity as a bankrupt; and
- c. Third, 'other, very limited, circumstances which will provide standing to an applicant, whether or not the applicant is the bankrupt, a creditor or a contributory... those circumstances are confined to cases where the challenge concerns a matter which could only arise in a bankruptcy or liquidation and in which the applicant has a direct and legitimate interest'.

Mr Stevanovich's claim to standing depended on the third category, and the Privy Council held that it was unsatisfied. Mr Stevanovich was not directly affected by the Liquidator's decision to admit the Claim (but instead by their subsequent issue of proceedings against him seeking a contribution from him as a former director).

Stevanovich is a further example of the strength of the BVI's insolvency regime. Despite the broad statutory

language, the Court has placed careful limits on who is able to challenge the decisions of liquidators and similar office-holders.

Similarly, while section 273 does not expressly provide for any time limit within a challenge must be brought, the BVI Court has ruled it must be brought within a 'reasonable' period: *FCS Asian Millenium Ltd BVIHCV2005/0274*. Again, BVI case-law has applied careful controls to the ability to challenge the decisions of liquidators and similar office-holders.

Conclusion

Provisions such as sections 245 and 273, together with the Court's careful control of those provisions, have ensured that the BVI has a robust insolvency regime enabling clarity and high-degree of certainty as to when assets may be recovered for the benefit of an estate. It is a further strength of the BVI's corporate legal framework and a reason in favour of incorporating in the BVI.

Cross-Border Insolvency and the Immovables Rule

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Synopsis

This article examines how the ‘immovables rule’ intersects with the practice of modern cross-border insolvency under English common law. The English conflict of laws position holds that rights to land are governed by the law and courts of the country where the land is located (the *lex situs*). However, in cross-border insolvency, the principle of modified universalism encourages English courts to assist foreign liquidation proceedings to achieve a unified asset distribution. The Supreme Court addressed the tension between these principles in *Kireeva v Bedzhamov* [2024] UKSC 39 (*‘Kireeva’*).

This article discusses certain aspects of English law for general informational purposes only. However, Harney Westwood & Riegels do not practise English law and the contents should not be construed as legal advice on English law.

Introduction

On one hand, one of the cornerstones of the English conflict of laws is that (a) questions as regards rights to and interests in land and other immovable property are governed by the law of the country in which the property is situated (the *lex situs*), and (b) that jurisdiction to decide those questions belongs to the courts of that country.

On the other, within the context of cross-border insolvency the basic principle of modified universalism requires that ‘English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution’ (*Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21 at para [30]). The Supreme Court had to resolve what happens when these two positions conflict in *Kireeva*.

Kireeva v Bedzhamov: the facts

The main background facts can be summarised briefly:

- a. The respondent, Mr Bedzhamov, was a Russian national who left Russia in 2015 and had lived in

the United Kingdom since 2017. He acquired an interest in a property in Belgrave Square, London which had substantial value.

- b. During 2016 two judgments were awarded against him in by the Russian courts. In 2018 the Russian courts declared Mr Bedzhamov bankrupt and appointed Ms Kireeva, the appellant, to a position which was the equivalent of a trustee in bankruptcy under English law.
- c. In 2021, the English courts granted formal recognition to Ms Kireeva at common law as the trustee in bankruptcy of Mr Bedzhamov under Russian law.
- d. The issue which was ultimately appealed all the way to the Supreme Court was whether the English courts could assist the Russian bankruptcy trustee with respect to the property in Belgrave Square or whether such assistance was precluded by the immovables rule.

Seeking recognition and assistance: English law

There are three ways under English law that a foreign insolvency official can formally seek recognition and assistance from the courts in this country: (1) under the Insolvency Act 1986, s. 426; (2) pursuant to the Cross-Border Insolvency Regulations 2006; or (3) at common law. However in this case neither of the first two options were available. The provisions under section 426 only apply to designated countries, and Russia is not so designated. And the Cross-Border Insolvency Regulations 2006 would apply to officials appointed in the country where the debtor has ‘the centre of its main interests’. But, in this case, Mr Bedzhamov had left Russia years before the bankruptcy proceedings. Hence the Russian bankruptcy trustee was solely reliant upon recognition and assistance under the common law rules.

The judgment

Common law required to fill the statutory lacuna

Lord Lloyd-Jones and Lord Richards gave a joint judgment with which all the other members of the court

agreed. They noted that if the application for recognition had been granted either under section 426 or pursuant to the Cross-Border Insolvency Regulations 2006 then a foreign trustee in bankruptcy could have power to deal with immovable property in England because the relevant language was, in each case, expressed in terms wide enough to include immovable property (at para [53] and para [60]). But in the absence of express language making such provision in a statute or statutory instrument, the position with respect to recognition at common law fell to be adjudicated solely according to the common law rules and subject to the normal application of the immovable property rule.

The appointment of a bankruptcy trustee by the Russian courts was, in effect, an exercise of sovereign authority by a foreign court in relation to the execution of a judgment (para [32]). They cited with approval the remarks of Lord Templeman in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 at p 428 ('There is undoubtedly a domestic and international rule which prevents one sovereign state from changing title to property so long as that property is situate in another state') and Lord Hoffman in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260 Lord Hoffmann at para [54]:

'The execution of a judgment is ... a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state.'

The authorities relating to the 'immovable rule'

The court reviewed the immovable property rule itself and its rationale, both under English law and noting that a number of foreign jurisdictions had a largely identical rule presumably for largely identical reasons. They cited with approval the remarks of Farwell LJ in *Re Hoyles* [1911] 1 Ch 179 at pp 185-186:

'[n]o country can be expected to allow questions affecting its own land, or the extent and nature of the interests in its own land which should be regarded as immovable, to be determined otherwise than by its own Courts in accordance with its own interests'.

They also noted that whilst the rule had a number of exceptions with respect to the willingness of English courts to deal with matters relating to immovable property overseas, it admitted none when it came to recognising the power of foreign courts to deal with immovable property within this country. Although the English courts have in the past been prepared to modify the application of the immovables rules through

judicial decisions (notably in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508), they felt the refusal of the House of Lords to modify the rule itself in that case was significant. They were also mindful to the comments of Lord Collins in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at para [128] of the risks of 'a radical departure from substantially settled law' in relation to the application of settled conflict of laws principles within the context of cross-border insolvency.

In support of their application counsel for the Russian bankruptcy trustee relied upon *Re Kooperman* [1928] WN 101, (1928) 13 B&CR 49. In that case a trustee in a Belgian bankruptcy was appointed as the receiver of immovable property in England owned by the bankrupt. That case was widely cited in textbooks in cross-border insolvency for the proposition upon which the appellants relied: that the court had power to appoint a foreign bankruptcy trustee as an equitable receiver over immovable property in this country. But the Supreme Court was unimpressed, noting that the first instance decision was unopposed, and that Astbury J did not give a reasoned judgment. They noted that no other reported case supported the granting of such a power, and they held *Re Kooperman* to have been wrongly decided.

Accordingly, the Supreme Court, affirmed (at para [69]):

'It follows that the common law does not recognise the Property as being part of the assets that are within the scope of the Respondent's bankruptcy in Russia. As a matter of English law, his interests in the Property are unaffected by the Russian bankruptcy order. Therefore, subject to any statutory provision to contrary effect, it is not open to an English court to take steps to deprive the Respondent of his interests in the Property in favour of the Appellant as trustee in the Russian bankruptcy.'

Analysis: the Supreme Court's judgment

The decision reaffirms the doctrinal purity of the immovables rule within the English conflict of laws, but will be seen as a further blow to the concept of modified universalism at the hands of conflicts lawyers. The Supreme Court seemed to anticipate that their decision was likely to be criticised on that basis, both for the practical effect of the ruling and also on a similar basis that the decision in *Rubin* was criticised for undermining universalism. Their Lordships noted the surprising effects of their ruling (at para [110]):

'It may be said, with some justification, that the application of the immovables rule in the case of a foreign bankruptcy produces a surprising result in leaving the bankrupt's immovable property in this country to be enjoyed by the bankrupt or to be taken in

execution by individual creditors on a first come, first served basis, when in a bankruptcy under the laws of both this country and the foreign state (in this case, Russia), immovable property would form part of the bankrupt's estate.'

Respectfully, it may be that a third option is more likely: that the overseas creditors of the bankrupt would commence parallel bankruptcy proceedings within this jurisdiction to appoint an English bankruptcy trustee and thereby take advantage of the automatic vesting provisions in relation to real property under the Land Registration Act 2002, s. 27(5)(a) and section 306 of the Insolvency Act 1986. That would be the very antithesis of modified universalism – resulting in two independent bankruptcies under the laws of two different jurisdictions doubling the costs of administration and requiring (for the English bankruptcy at least) the application of the Hotchpot rule to try and do justice between the two different pools of claimants and assets. That outcome seems all the more invidious because of the inconsistency – it will only arise when an application or recognition falls under the common law rules, but not when it falls granted either under section 426 or pursuant to the Cross-Border Insolvency Regulations 2006.

There are two further criticisms which might respectfully be made of their Lordships' decision:

- a. First, their decision was heavily predicated on the importance of the immovable rule as a matter of public policy, both in this country and elsewhere. But Parliament has already seen fit to make inroads into the rule twice in this area of law. That is also true in the two other countries which Lord Lloyd-Jones and Lord Richards considered in their judgment – Australia and the United States – both of which have also adopted the UNCITRAL Model Law on Cross-Border Insolvency which underpins section 426. Their judgment arguably overstates how immutable that principle is.
- b. Secondly, it was central to their Lordships' judgment that the execution of the judgment of a foreign court is a sovereign act and should not affect immovable property rights in this country. But the Supreme Court gave little weight to the fact that the application was for the appointment of

an equitable receiver by the courts of this country, and that such orders operate *in personam* against a respondent within the court's jurisdiction. In *Masri v Consolidated Contractors International (UK) Ltd (No. 2)* [2008] EWCA Civ 303, [2009] QB 450 Lawrence Collins LJ affirmed that a receivership order 'has effect as an injunction restraining the judgment debtor from receiving any part of the property which it covers ... but it does not vest the property in the receiver' (para [53]). In the same case he also cited with approval the comments in Snell's Equity (31st ed.) at para 17-25 that the appointment of an equitable receiver 'was not 'execution' in the ordinary sense of the word, but a form of equitable relief for cases where execution was not possible.' Although the immovables rule relates to possession (which a receivership order clearly does affect) as well as title, the outcome is nevertheless an uncomfortable one.

If the position is now that a judge in this country has no power to make an equitable receivership order to assist a foreign judgment creditor (whether that judgment creditor is a single creditor or a class representative of a class of creditors) in relation to immovable property in England in which the judgment debtor has an interest, then that suggests some potentially far reaching implications with respect to the power of the English courts to help judgment creditors chase down the assets of recalcitrant debtors within this country, both inside and outside of insolvency situations. If it really is the case that the appointment of an equitable receiver over land in this country in support of execution of a foreign judgment is precluded by the immovables rule, then the implications of that may stretch out beyond the cross-border insolvency regime.

Conclusion

In their decision their Lordships stressed that it would not be proper for the courts to cut down the application of the immovables rule within English law - that was a job for Parliament. But it is possible that their decision will have the opposite effect and expand the effect of the rule beyond what was previously understood.

Exempted Limited Partnerships in the Cayman Islands: Wind Down, Removing the General Partner and the Grand Court's Flexibility

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Synopsis

- Section 36(13) of the Exempted Limited Partnership Act (2021 Revision) ('ELPA') gives the Grand Court of the Cayman Islands the power to override a limited partnership agreement and replace the general partner ('GP') of an exempted limited partnership ('ELP') during its winding up, if necessary for a proper dissolution.
- Recent cases, notably *In the matter of One Thousand & One Voices Africa Fund I, LP (In Voluntary Liquidation)* FSD 22 of 2024 (IKJ) ('1K1V') and *In the matter of Sensegain Vorak Investment L.P. (in voluntary liquidation)* FSD 62 of 2025 (DDJ) ('Sensegain') confirm the primacy of the commercial will of the limited partners ('LPs'), while highlighting the readiness of the Court to intervene where trust and cooperation with the GP have broken down.
- The ongoing case of *Kuwait Ports Authority v Port Link GP Ltd* FSD 236 of 2020 (RPJ) ('Port Fund') litigation illustrates how the Court handles deadlock and conflicts, sometimes promoting hybrid governance solutions such as receivership and ongoing case management to protect investor value.
- Each case points to a general rule: robust consensus by LPs, fully documented processes and prompt engagement with statutory remedies are all essential to overcome obstructive GPs and bring Cayman funds to an orderly close.
- Drafting best practice now includes explicit recognition of statutory rights, including section 36(13) of the ELPA, in all Limited Partnership Agreements ('LPAs'); effective winding down depends more on commercial alignment and process discipline rather than the words of the partnership agreement.

Introduction: statutory safeguards and partnership autonomy

Cayman ELPs have become the private fund vehicle of choice for global private equity and alternative investment sponsors. These statutory trust structures promise contractual flexibility with tax neutrality, managed by a single GP holding legal title to underlying assets. In practice, the ability of LPs to hold the GP to account is often not tested during the investment period, but at the moment of dissolution and winding up. This is where the true strength of the LPA is put to the test, often influenced by the practical interests of investors and, if necessary, the oversight of the Court.

Section 36(13) of the ELPA allows any partner, creditor or liquidator to ask the Court to override the winding up process provided for by the LPA and appoint an independent party to complete the task. The rationale is straightforward: even the best drafting cannot exclude the need to protect the economic interests of investors when confidence in the GP is lost, or a deadlock or dispute threatens the value of what remains.¹

Section 36(13) ELPA: the court's discretionary safety net

Section 36(13) of the ELPA provides:

'Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).'

Section 36(3)(g) of the ELPA confirms that Part V of the Companies Act (2025 Revision) and the Companies Winding Up Rules (2023 Consolidation) shall apply to the winding up of an ELP and that 'on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and

Notes

1 1K1V, [2024] (1) CILR 371 at [32] to [34].

dissolution of an exempted limited partnership as may be just and equitable.’

The statutory mechanism in section 36(13) is often repeated in modern LPAs, but nothing in this section, or elsewhere in the ELPA, permits an LPA to ‘opt out’ of the Court’s ultimate authority. Section 36(13) is therefore a deliberate and robust safety net that can be relied upon when the Court considers it necessary.

The power under section 36(13) goes beyond filling a gap in a LPA or avoiding practical impossibility: the Court will not treat the terms of a LPA as an absolute bar,² nor will it limit itself to situations in which the LPA is silent or has failed.³ The Court may intervene wherever allowing the GP to remain would be unjust or commercially unrealistic.

Practical consequences of this power include:

- The wishes of the economic majority carry great weight provided there is *bona fide* process and evidence.
- Misconduct is not required, although it will justify Court action.⁴ The threshold is, on an objective basis, the loss of confidence of the LPs.
- Any attempt by a GP to thwart the proper winding up (especially where value may be dissipated) exposes it to adverse costs and outright removal.⁵

1K1V: commercial reality over technicalities

The facts in this case reflect a familiar pattern: LPs seek changes to fund management, the GP exercises its rights to respond, and litigation ensues as the parties seek to resolve their differing views.

In this case, when 97% of LPs called for the removal of the GP and for independent liquidators to be appointed, the GP refused and proceedings were commenced. Justice Kawaley ruled that the Court’s jurisdiction was clear: overwhelming LP support for change cannot be defeated by technical arguments, nor can the incumbent GP further delay by commencing parallel proceedings.

In his judgment, Justice Kawaley stated in terms that ‘the likelihood that this Court can find a rational basis for declining to grant the relief sought by the Petitioner seems quite fanciful in all the circumstances’.⁶ Persistent and procedural challenge by the GP, where the commercial consensus is clear, will be taken as further

evidence of a GP’s unfitness to wind down a partnership, not a basis for deference to the LPA.

Key judicial findings

Justice Kawaley delivered a clear summary, evidencing three themes to be taken from the Court’s approach:

- Statutory primacy: section 36(13) grants an ‘unfettered discretion’ to the Court. It is not limited to situations where the contract fails, nor is it defeated by the terms of a LPA.⁷
- Majority LP will: the test, derived from the notion of the sanctity of property rights, is whether there is a *bona fide* majority wish for removal, evidenced by notice and process, not whether there has been GP fraud or malfeasance.⁸
- Collateral proceedings: the GP’s decision to initiate proceedings in the United States was a ‘flagrant collateral attack’ and an abuse of process. The Court stated in direct terms that there was no rational basis for the GP to insist on remaining in office.⁹

Kawaley J found the GP’s strategy – one of delaying on technical grounds and reaching for foreign courts – made the reasons for removal even more plain and costs were awarded against the GP.

The Court’s approach in *1K1V* provides a blueprint for disgruntled LPs: maintain a clear, contemporaneous record of LP votes and notices, adhere to the procedural requirements of the LPA as far as possible, and act promptly where the GP’s conduct endangers value or delays closure.

Sensegain: early concession, early resolution

Sensegain involved a very similar wind down scenario. The majority of LPs (being around 82% by value and representing all unconnected partnership interests) called for removal of the GP as voluntary liquidator and appointment of independent professionals.

The GP accepted (properly so) that the wishes of the majority of the LPs could not be considered irrational and, on that basis, did not oppose this outcome or make any attempt to contest the action. Having considered Kawaley J’s reasoning in *1K1V* and similar decisions of

Notes

² *Ibid.*, at [14] to [17]

³ *Ibid.*, at [24] to [28]

⁴ *Malaysia Venture Capital Management Berhad v ECM Straits Fund I LP*, FSD 230 of 2022 (RPJ), judgment, 20 December 2022 at [36].

⁵ *1K1V*, [2024] (1) CILR 371; unreported, 9 May 2024; Costs Ruling, unreported 23 July 2024.

⁶ *1K1V*, [2024] (1) CILR 371 at [34]

⁷ *1K1V*, [2024] (1) CILR 371 at [31]

⁸ *1K1V*, unreported, 9 May 2024 at [24] and [25]

⁹ *1K1V*, unreported, 23 July 2024 at [24]

the Court,¹⁰ Justice Doyle followed the prevailing logic: where the LP majority's wishes are objectively reasonable and substantively unimpeachable, technical resistance from a GP only causes cost and delay, for which the Court will have no patience. The order removing the GP was therefore made by consent and there was no need to investigate the facts further, resulting in the saving of costs for all parties.

As for key takeaways, if the GP cannot demonstrate good cause or a factual dispute, conceding early should not be seen as a weakness, rather it is sensible risk management. The Court is not impressed by procedural holdouts and does not require underlying misconduct as a predicate for removal.

The *Port Fund* litigation: receivers, hybrid orders and judicial flexibility

The ongoing *Port Fund* saga offers further helpful guidance and highlights the tools available when deadlock is reached and governance fails. The facts are challenging on multiple fronts, and the resulting judgments demonstrate the Cayman Court's procedural and remedial creativity in contentious ELP dissolutions:

- Misconduct at the GP level, factional battles, and competing claims required the Court to sanction joint receivership, at times over both the GP and the fund.
- Facing the potential for dissipation and the paralysis of value recovery, the Court's decision not to force the GP into full supervised liquidation, but to accept sequenced, hybrid orders, demonstrates a capacity for practical supervision tailored to the reality of multi-jurisdictional claims and asset recoveries.
- Litigation and receivership were (and have been) managed simultaneously, with the Court declining to allow procedural complexity or party infighting to dissipate value or prevent asset recovery.

Thus the Court has set out that there is no single template, but rather a solution adapted to the shifting risks in the ongoing proceedings.

Notably, the Court in several related decisions rejected any strict sequencing or forced conversion to official liquidation, prioritising a pragmatic, value-protective regime that gave Court officers power but did not disrupt pending claims. Each remedial step was tailored to the needs of the fund and its investors at that point.

Statutory purpose and company law analogies

Kawaley J's analysis in *1K1V* expressly rejects the proposition that the ELPA's endorsement of LPA autonomy defeats the supervisory jurisdiction of the Court. Importantly:

- Section 36(13) is deliberately broad and there is no ability to contract out of it.
- The statutory override is intended as a deliberate safety net, with analogies to (but less burdensome than) just and equitable winding up for companies or trusts. It therefore does not require the demonstration of a deadlock or breakdown of substratum.¹⁴
- The commercial will of the majority, provided it is *bona fide* and evidenced with process, is treated as decisive absent credible, countervailing reasons. This includes circumstances in which collective investor interests are at risk.

On the above bases, while the Cayman Courts are clearly alive to the nuances of fund structures as compared to companies, there is little tolerance for technical points being used to defeat the real substance of the investment bargain.

Current themes and strategic takeaways

- Keep processes and records beyond reproach. The GP's refusal of the majority will, alongside attempts to exclude petitioning LPs through last-minute procedural 'removal', has proven pivotal in the Court's willingness to act.
- A GP should act promptly. Slow action, or failed engagement on the part of a GP, creates a vacuum where the Court will step in, sometimes summarily.
- Parallel proceedings are a risk for GPs. As in *1K1V*, using foreign actions to frustrate the Cayman process can result in indemnity costs and reputational damage.
- Custom drafting of an LPA is key, but never absolute. Attempted restrictions on Court intervention through the provisions of a LPA are likely to be of little persuasive force.
- Complex disputes invite the Court to adopt creative supervisory approaches. As in *Port Fund*, the Court may stitch together receivership and partial liquidation or make hybrid orders to protect value, maintain litigation, and manage competing interests.

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¹⁰ *Sensegain*, unreported, 2 May 2025 at [13] to [23].

Practice and drafting – key lessons

- Do not rely on the terms of a LPA to protect against section 36(13). No exclusion is effective against the statutory override. LPs should anticipate breakdown risks by insisting on clear LPA provisions for removal and replacement, in both going concern and winding down situations.
- Consult the Court early if a deadlock looms. The Grand Court's approach in both *1K1V* and *Port Fund* affirms that prompt intervention on a clear record is rewarded. Conversely, GPs should be mindful that attempts to forum shop, delay, or resist where the commercial consensus is overwhelming will simply lead to cost sanctions and reputation damage.
- Similarly, GPs should make no assumption that delay or technical resistance will 'wear down' LPs or slow their petition. That time has passed, as both case law and the Court's approach to costs consequences now make clear.
- Anticipate bespoke remedy needs, as cross-border assets, litigation, or value-protection may require creative combinations of receivership, hybrid liquidators, or split mandates.
- Take early professional advice and, if necessary, offer an orderly handover to an independent officeholder.

Broader themes and judicial trends

Recent authorities confirm a decisive shift in the Cayman Islands towards an investor friendly, equitable and functional approach to the supervision and winding up of ELPs. The Court has made clear that process should not be allowed to defeat substance: where there is genuine investor consensus, it will take priority over technical or procedural formalities. Judicial tolerance for GPs who try to cling to their position, frustrate wind-downs, or resist investor direction for personal or defensive reasons is at an all-time low.

As complex fund structures continue to give rise to increasingly multi-jurisdictional disputes, the Cayman Courts have shown not only flexibility, but a clear determination to close loopholes, align oversight with the realities of post-investment fund management, and reassert confidence in ELPs as the global industry standard. Where LPs coalesce around a restructuring or exit solution, the Court will need compelling commercial reasons not to adhere to those wishes. Where a GP is dysfunctional, conflicted or uncooperative, the expectation should be Court facilitated transition on the basis that value preservation will be prioritised over any argument of procedural purity.

The decisions in *1K1V* and *Sensegain* have reinforced the primacy of investor consensus and confirmed the Court's role as a backstop to support fair and efficient outcomes, as opposed to a referee for GP intransigence. In the *Port Fund* litigation, the Court has demonstrated its willingness to adopt creative, hybrid mechanisms for contentious or high-value wind downs, including managing live litigation and reconciling competing claims within a flexible supervisory framework.

A More Common Thread Running Through the Common Law? The Supreme Court of Bermuda Grants What Is Believed To Be the First-Ever Extra-Territorial Summoning of a Company Director to Appear Before It for a Private Examination by Joint Provisional Liquidators

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Synopsis

In a landmark decision of the Supreme Court of Bermuda ('Court'), Harneys and the joint provisional liquidators ('JPLs') of a Bermuda company (the 'Company') successfully argued that the Court's power to summon officers of a company in liquidation or provisional liquidation before it for a private examination and delivery up of books and records under the Companies Act, 1981 ('Companies Act') has extra-territorial effect.

The Company is a Class C long-term insurer registered under the Bermuda Insurance Act 1978 ('IA'), and is a segregated accounts company under section 6 of the Segregated Accounts Companies Act 2000 ('SAC Act'). It has been licenced by the Bermuda Monetary Authority ('BMA') since 2013.

Background

The Petition

In November 2023, the BMA, acting pursuant to its statutory powers and functions under the Bermuda Monetary Authority Act 1969, filed a winding-up petition against the Company ('Petition'). The BMA alleged that the Company was in breach of sections 15, 15A, 16, and 17 of the IA, which cover the maintenance of adequate capital and solvency margins, the keeping of proper books and records, and the requirement for regulatory approval of controllers, directors, and officers. The BMA sought the immediate appointment of joint provisional liquidators to displace the incumbent Board of Directors ('Board') on the following alleged bases:

- (1) Regulatory Breach: the Company had remained in breach of its licensing requirements for a considerable amount of time. Specifically, it had failed to make statutory filings for two consecutive years,

with no realistic prospect of this breach being rectified. In the BMA's view, the Company had not been operating prudently;

- (2) Governance Failures: At the time of filing the Petition, the Company had been operating without an independent auditor and was at imminent risk of operating without a principal representative;
- (3) Lack of Transparency: the BMA was unable to ascertain the Company's true financial position, and the Board had failed to cooperate with the BMA's investigations; and
- (4) Loss of Confidence: the BMA therefore had no confidence in the Board and believed that the policyholders were therefore at risk.

The JPLs were appointed in late November 2023 with full powers to displace the incumbent Board, and if possible, pursue a restructuring (the 'Restructuring') of the Company, if this option would be in the best interests of the stakeholders, being primarily the policyholders.

The law

Upon a company entering liquidation in Bermuda, it is essential that the appointed liquidators (including any joint provisional liquidators), *take into his custody and control all the property and things in action to which the company is or appears to be entitled*.¹ To achieve that objective, company officers must act swiftly and cooperate with the liquidators to ensure that immediate steps are taken to safeguard and preserve the company's remaining assets. Without this timely assistance the liquidators may have to reconstruct the company's books and records from scratch, which not only wastes valuable time and increases costs, but also puts any unsecured assets at considerable risk.

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1 Section 174 of the Companies Act 1981.

The founder and ultimate beneficial owner of the Company held office as the sole remaining director of the Company at the time of the appointment of the JPLs, having consented to their appointment on behalf of the Company (the ‘Director’). However, it became apparent soon after the JPLs’ appointment that the Director would not cooperate with or provide any meaningful assistance to the JPLs. This lack of engagement has significantly hindered the JPLs’ ability to carry out their duties efficiently, resulting in delays, increased costs, and the exposure of policyholder assets to unnecessary heightened risk.

Section 195 application

Under these circumstances, a liquidator or a provisional liquidator is entitled to apply to the Court, pursuant to section 195 of the Companies Act, for an order to summon any officer of the company or any persons known or suspected to have in their possession any property of the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company, to attend a private examination, and for such officer (or person suspected to hold company property) to produce any books and papers in their custody or power relating to the company in liquidation or provisional liquidation.

In April 2024, the JPLs successfully applied to the Court by summons seeking the private examination of the Director under section 195. The Court ordered the Director to appear before the Court for private examination in early May 2024. The private examination went on to be adjourned on four different occasions for various reasons such as (i) the Director failed to deliver up the information and make production of the documents as ordered, (ii) the Director failed to present himself before the Court for examination, and (iii) the Director requested further adjournments owing to his personal circumstances.

In June 2024, after the Director had communicated with the JPLs on the morning of the scheduled examination but subsequently failed to appear, the Court declared the Director to be held in contempt of court for (i) failing to produce the documents he had been ordered to produce; and (ii) for failing to appear for examination before the Court.

Extra-territorial effect

While the Court’s powers under section 195 of the Companies Act clearly apply within Bermuda, there are no reported cases of non-resident directors (or

other parties caught by section 195, as referenced above), being compelled to appear before the Court. In this case, the Director resides outside Bermuda and the key question for the Court was therefore whether the provisions of section 195 could be construed as having extra-territorial effect, such that the Court could compel the attendance of a non-resident Director for examination under its provisions.

Harneys argued, based on the case law discussed in detail below, that section 195 may be interpreted sufficiently broadly to permit the Court to compel the attendance of directors and officers wherever they reside. They submitted that the provision contains no territorial limitation, and that modern insolvency practice supports a pragmatic approach enabling effective supervision in cross-border matters. Although the Chief Justice did not issue written reasons at the time, he accepted these submissions in full and granted such an order.

Decision

In his decision, the Chief Justice accepted the submissions made on behalf of the JPLs that section 195 of the Companies Act does indeed have extraterritorial effect, notwithstanding: (a) the presumption that legislation is generally not intended to have extra-territorial effect (see *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2 at para 21 per Lord Lloyd-Jones) and; (b) an English Court of Appeal decision² (*Re Tucker*) which confirmed that the equivalent English private examination provision does not have extra-territorial effect.

In reaching this conclusion, the Chief Justice endorsed the views and adopted the more recent pragmatic approach taken by the British Virgin Islands (‘BVI’) and Abu Dhabi Global Market courts (‘ADGM’) in *BVIHC (COM) 2022/0119, Russell Crumpler and Christopher Farmer as Joint Liquidators of Three Arrows Capital Ltd (in liquidation) -and- (1) Zhu Su (2) Kyle Davies (‘Three Arrows’) and NMC Healthcare Ltd (In Administration) (Subject To A Deed Of Company Arrangement) And Others* [2023] ADGMCFI 0022 (‘NMC’) respectively.

The Chief Justice accepted that *Re Tucker* was distinguishable because: (a) unlike the position in the UK, there was no provision in section 195 of the Companies Act that expressly restricted the jurisdiction of the Court to persons residing within Bermuda; (b) notwithstanding such a restriction in the UK legislation, there were still conflicting decisions that supported an extra-territorial view in the English courts.

Furthermore, and by applying the rationale in *Three Arrows* (in which the Court confirmed that it should

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² *In re Tucker (RC) (a Bankrupt)* [1990] Ch 148.

depart from one of its prior judgments in *Ocean Sino Limited (in Liquidation) Chu Kong v John Greenwood and Roy Bailey* ('Chu'),³ the Chief Justice accepted that: (a) the Court can exercise personal jurisdiction over any person who (i) is resident within the jurisdiction; (ii) whom proceedings can be served out; or (iii) has submitted to the jurisdiction.

The gateways for service outside of the jurisdiction in Bermuda are provided for in Order 11/1 of the Rules of the Supreme Court 1985. The application fell within gateway 11/1 1(1)(ff), which permits service where the claim concerns a person who is or was a director of a company registered in Bermuda, and the subject matter of the claim relates to the rights and duties of that director. It was also argued that the Director, in his capacity as such, had effectively submitted to the jurisdiction of the Court, as he was a director at the time of the appointment of the JPLs, and had moreover consented to their appointment on behalf of the Company. By accepting and continuing in the office of director, the Director, it was argued, is deemed to have submitted to the jurisdiction of the Court for the purposes of any enquiry into the Company's affairs.

Lastly, the Court accepted counsel's argument that section 195 can properly be construed as having extra-territorial effect based on the following factors:

- (1) Bermuda is an offshore jurisdiction;
- (2) In most cases, directors of offshore companies are mostly resident overseas and may never enter the jurisdiction (as was the case with the Director); and

- (3) Bermuda-registered external companies mostly have no other physical connection with the offshore jurisdiction other than locating their registered agent and office there for statutory compliance purposes, with no actual assets situated within the jurisdiction.

The Court was therefore satisfied that, in appropriate cases, persons resident abroad may well fall within the ambit of section 195 of the Companies Act. It was also noted that such an interpretation poses no practical difficulty as a non-resident officer or person, can readily be summoned to appear for examination via remote electronic platforms such as Zoom or Teams, with minimal inconvenience.

Conclusion

This decision is likely to have a significant impact across the industry. Most notably, it confers on Bermuda liquidators a broad and previously unavailable power to obtain information and recover property belonging to exempt companies from those caught by section 195 who are resident outside of Bermuda. This development is expected to streamline the restructuring and liquidation process by reducing the need to seek corresponding relief through foreign courts (such as under the Chapter 15 regime in the United States), particularly where non-compliant individuals are located outside the jurisdiction. The judgment was delivered by the Chief Justice without full written reasons, which are awaited; this briefing note will be updated once they are received.

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3 In which it was held that the BVI equivalent provision did not have extra-territorial effect.

Navigating the Arbitration-Insolvency Interplay: *Hyalroute* and the Cross-Border Implications for Creditors

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Synopsis

It's a familiar dilemma: a debt remains unpaid under a contract and the creditor wishes to pursue payment of the debt. The contract contains an arbitration agreement requiring disputes to be resolved in arbitration. The debtor disputes liability to pay the debt. The creditor is left to weigh its options – should it seek to wind up the company on the basis of the unpaid debt, or refer the dispute to arbitration?

Courts of several leading common law jurisdictions have long grappled with the inherent tension between insolvency proceedings and arbitration. In the past decade, this debate intensified following the decision of the English Court of Appeal in *Salford Estates (No.2) Ltd vs Altomart Ltd (No.2)*¹ ('*Salford Estates*').

Following *Salford Estates*, certain leading common law jurisdictions have diverged in their approach to the interaction between insolvency and arbitration proceedings. In particular, there has been a marked divergence in the approaches taken by the courts of Hong Kong when compared with the approach taken in England (and the leading offshore jurisdictions closely associated with it²). Since 2023, this divergence has crystallised in the landmark decisions of the Hong Kong Court of Final Appeal in *Re Guy Kwok-Hung Lam ('Re Guy Lam')*³ and the decision of the Judicial Committee of the Privy Council⁴ in *Sian Participation Corp v Halimeda International Ltd ('Sian Participation')*.⁵

Now, Hong Kong law, as established in *Re Guy Lam* and subsequently *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064 ('*Simplicity*'), generally gives primacy to upholding arbitration agreements. The Hong Kong courts will stay winding up proceedings in favour of arbitration, unless there is a strong reason not to do so, such as the dispute being deemed frivolous or an abuse of process. In contrast, English law, following *Sian Participation*, requires a debtor to demonstrate a *bona fide* dispute on substantial grounds before a creditor's winding up petition will be dismissed or stayed.

Against this backdrop of divergent approaches, the recent decision by the Court of First Instance of the High Court of Hong Kong (the 'Hong Kong Court') in *Hyalroute Communication Group Limited v Industrial and Commercial Bank of China (Asia) Limited* [2025] HKCFI 2417 represents a significant and welcome development.

The case marks the first time the Hong Kong Court had to consider whether an anti-suit injunction should be granted to restrain a creditor from presenting a winding up petition in the Cayman Islands (or another similar common law jurisdiction which applies the *Sian Participation* approach⁶) despite the existence of an arbitration agreement requiring the dispute to be '*finally resolved*' through Hong Kong arbitration. It raises an important question as to the relevant law when the Hong Kong courts determine whether to restrain

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- [2014] EWCA Civ 1575, a strongly 'pro-arbitration' decision which held that insolvency proceedings would in almost all cases be stayed in favour of arbitration simply if the debt in question was 'not admitted'.
- Including the Cayman Islands, Bermuda and the British Virgin Islands (BVI).
- [2023] HKCEA 9.
- Sian Participation* was an appeal from the court of the BVI. However, in its judgment the Privy Council made a direction in line with *Willers v Joyce (No.2)* to declare the decision in *Sian Participation* as representing a correct representation of English law (thereby overturning *Salford Estates*). This decision will also be of very strong persuasive authority in other jurisdictions for which the Privy Council serves as apex court, and whose law in this area closely tracks the position in England and the BVI (including in particular, the Cayman Islands and Bermuda).
- [2024] UKPC 16.
- Whilst, strictly, *Sian Participation* is binding only as a matter of English and BVI law, it will almost certainly be applied in the Cayman Islands, and this article proceeds on that assumption (see footnote 3 above). Similarly, although the decision in *Hyalroute* specifically concerned the jurisdiction of the Hong Kong Court to grant an anti-suit injunction to restrain winding up proceedings in the Cayman Islands, its reasoning and implications are likely to extend to insolvency proceedings in other common law jurisdictions which follow, or are overwhelmingly likely to follow, the *Sian Participation* approach.

foreign winding up proceedings in jurisdictions that are now bound, or likely, to apply the approach in *Sian Participation* in favour of a Hong Kong arbitration.

Background

The plaintiff, Hyalroute Communication Group Limited (the ‘Company’), is a company incorporated in the Cayman Islands. In July 2018, two of the Company’s subsidiaries entered into a Term Facility Agreement (the ‘TFA’) with the defendant, Industrial and Commercial Bank of China (Asia) Limited (‘ICBC’) pursuant to which ICBC advanced a loan to them. The Company is a guarantor under the TFA.

The TFA contained an arbitration agreement mandating that ‘any dispute, controversy or claim arising in any way out of or in connection with [the TFA] (including (i) any issue regarding contractual, pre-contractual or non-contractual rights, obligations or liabilities and (ii) any issue as to the existence, validity, breach or termination of [the TFA]) ... shall be referred to and *finally resolved* by binding arbitration administered by the Hong Kong International Arbitration Centre ...’ (emphasis added) (the ‘HK Arbitration Clause’)

A dispute between the parties concerning the Company’s guarantee obligation to repay the loan under the TFA arose, after which, ICBC served a statutory demand on the Company in the Cayman Islands demanding, amongst others, the outstanding sums due to it under the TFA.

In turn, the Company applied to the Hong Kong Court for an anti-suit injunction seeking to restrain ICBC from presenting a winding up petition against it in the Cayman Islands on the ground that any dispute arising from the TFA should be resolved by arbitration, and the presentation of a winding up petition in the Cayman Islands would be in breach of the HK Arbitration Clause.

Under Hong Kong law, it is well established that foreign proceedings in breach of a valid and binding arbitration agreement will ordinarily be restrained unless strong reasons to the contrary are shown.⁷ In cases involving contractual anti-suit injunctions (as in the present case), the court’s focus is on enforcing the parties’ agreement to arbitrate.⁸ In this respect, the court will look at whether there is a valid and binding arbitration agreement between the parties, and grant the contractual anti-suit injunction where the subject matter or scope of the dispute raised in the legal proceedings falls within the arbitration agreement.⁹

Accordingly, the central question for the Hong Kong Court in this case was whether ICBC’s intended presentation of a winding up petition in the Cayman Islands would amount to a breach of the specific arbitration agreement in the TFA (i.e., the HK Arbitration Clause). Specifically, in view of the language of the HK Arbitration Clause, the Hong Kong Court had to determine whether such proceedings would have the effect of ‘*finally resolving*’ the dispute arising under the TFA, within the meaning of the HK Arbitration Clause. The Hong Kong Court’s decision carries broader significance, as the wording of the HK Arbitration Clause (requiring disputes to be ‘*finally resolved*’ by arbitration), or its close equivalent, is commonly used in arbitration agreements across various jurisdictions.

The Company’s argument – Hong Kong approach

The Company contended that Hong Kong law, as the governing law of the HK Arbitration Clause, should determine whether the Cayman winding up proceedings would ‘*finally resolve*’ the dispute. Under Hong Kong law, winding up proceedings have the effect of determining the parties’ rights and obligations. Therefore, the presentation of a winding up petition by ICBC in the Cayman Islands would breach its obligation under the HK Arbitration Clause to finally resolve the dispute by arbitration.

This approach accords with the Hong Kong Court’s decision in *Re Guy Lam*,¹⁰ where the court rejected the principle that winding up proceedings based on a disputed debt do not, of themselves, determine the underlying dispute. The court in that case drew an analogy between winding up proceedings and summary judgment applications, and noted that both processes are capable of determining a dispute because they could give rise to an estoppel over the precise issues decided, if the usual conditions are satisfied. This position has been applied in later decisions in Hong Kong, such as in *Simplicity*.

ICBC’s argument – Cayman approach

ICBC, on the other hand, adopted a different analytical lens. It submitted that, as a matter of Cayman law, both the presentation of a winding up petition and a winding up order will not have the effect of determining or resolving the parties’ rights and obligations under the

Notes

7 *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] 2 HKLRD 313 at §27.

8 *Hyalroute Communication Group Limited v Industrial and Commercial Bank of China (Asia) Limited* [2025] HKCFI 2417 (‘Judgment’) at §38.

9 Judgment at §63; *Riverrock Securities Ltd v International Bank of St Petersburg JSC* [2020] 2 CLC 547 at §33.

10 *Re Guy Lam* at §68-70.

TFA. As such, the Cayman winding up proceedings do not fall within the ambit of the HK Arbitration Clause, and accordingly, the requirements for granting the anti-suit injunction are not met.¹¹

Under Cayman law, following the Privy Council's decision in *Sian Participation*, the adjudication of a winding up petition would not resolve any underlying dispute over the debt claimed. The Cayman court will only determine the threshold question of whether there is a *bona fide* dispute on substantial grounds before deciding whether to grant, dismiss or stay a winding up petition.¹²

Decision of the Hong Kong Court

The Hong Kong Court ultimately refused to grant the anti-suit injunction. It held that the intended Cayman Islands winding up proceeding would not constitute a breach of the HK Arbitration Clause as it would not 'finally resolve' the parties' substantive dispute. Consequently, since there would be no breach of the HK Arbitration Clause, there were no grounds to restrain the presentation of a winding up petition.

In reaching its decision, the Hong Kong Court made the following observations:

- As a starting point, the Hong Kong Court would apply Hong Kong law (being the governing law of the HK Arbitration Clause) to determine its proper construction and specifically, whether the intended Cayman winding up proceedings falls within its scope. In doing so, the Hong Kong Court first examined the express language of the HK Arbitration Clause. It found that the HK Arbitration Clause imposed a positive obligation on the parties to resolve their disputes by way of arbitration, and a negative obligation not to resolve disputes in a non-contractual forum. The Court further held that the phrase 'finally resolved' necessarily engages the doctrines of *res judicata* and estoppel, implying that a breach of HK Arbitration Clause would only occur if the Cayman proceedings were capable of conclusively determining the parties' rights and obligations.¹³ In other words, the clause would be breached only if the winding up petition had the effect of finally resolving the underlying dispute, thereby triggering preclusionary consequences under *res judicata* or estoppel.
- Given the express language of the HK Arbitration Clause, the Hong Kong Court would be required as a matter of Hong Kong law to refer to Cayman law in order to consider the nature and effect of the Cayman winding up proceedings under the HK Arbitration Clause¹⁴ and specifically whether the intended proceedings would *finally resolve* the dispute within the meaning of the HK Arbitration Clause. As a matter of principle, for a foreign judgment to give rise to an estoppel, the issue in question must be treated as *res judicata* according to the law of the foreign jurisdiction.¹⁵ The Hong Kong Court therefore had to consider Cayman law to determine the question of *res judicata* or finality in relation to a Cayman winding up order.
- Accordingly, the Hong Kong Court considered the decisions in *Sian Participation* and *Re BPGIC Holdings Ltd*,¹⁶ and found that, unlike the position under Hong Kong law, Cayman law does not treat winding up proceedings as having the effect of 'finally resolving' the underlying dispute within the meaning of the HK Arbitration Clause. That being so, the Hong Kong Court cannot give more conclusive force than what Cayman law would give in the Cayman winding up proceedings to the treatment of the parties' dispute under the TFA.¹⁷
- As the intended winding up petition would not 'finally resolve' the dispute between the parties under Cayman Islands law, such proceedings could not be regarded as having that effect for the purposes of interpreting the HK Arbitration Clause. Accordingly, the Hong Kong Court was satisfied that the presentation of a winding up petition in the Cayman Islands would not breach the HK Arbitration Clause, and therefore found no basis to grant the Company anti-suit relief to restrain the petition.

Key takeaways

The *Hyalroute* decision marks a significant and welcome development for creditors of Hong Kong-based debtors incorporated offshore. This applies particularly in the case of debtors incorporated in jurisdictions which follow *Sian Participation*, and which are commonly used in Hong Kong corporate structures, such as the leading

Notes

¹¹ Judgment at §59-62.

¹² ICBC also relied on a decision of the Grand Court of the Cayman Islands in *Re BPGIC Holdings Ltd* FSD 248 of 2023 which is consistent with the decision in *Sian Participation*.

¹³ Judgment at §82-84.

¹⁴ Judgment at §86 and §101.

¹⁵ Judgment at §99 citing *MAD Atelier International BV v Manes* [2020] QB 971 at §47, §49-51, §61.

¹⁶ FSD 248 of 2023

¹⁷ Judgment at §126.

offshore jurisdictions of the BVI, Cayman Islands, and Bermuda.

The decision confirms that, notwithstanding Hong Kong's pro-arbitration stance (as reflected in *Re Guy Lam* and *Simplicity*), the mere existence of an arbitration agreement does not necessarily preclude enforcement of a party's debt repayment obligations through properly initiated insolvency proceedings in the debtor's jurisdiction of incorporation. Ultimately, the right to pursue such enforcement will depend on the precise wording of the applicable arbitration agreement, and whether on its true construction it carries with it an obligation on parties not to commence such actions overseas.

Against the backdrop of the Privy Council's decision in *Sian Participation*, the *Hyalroute* decision opens the door for creditors to pursue enforcement offshore, especially where the relevant facility documents contain arbitration agreements similar to that in *Hyalroute*. Where creditors are bound by arbitration agreements, they now have to consider whether on a proper construction of the arbitration agreement in question, the agreement prevents them from pursuing insolvency proceedings in the home jurisdiction of the debtor.

The Hong Kong Court's decision in *Hyalroute* ultimately turned on its interpretation of the HK Arbitration Clause, specifically the phrase '*finally resolved*.'

Accordingly, parties remain free to draft arbitration agreements in broader terms to restrain winding up petitions in offshore jurisdictions. It is probably worth noting that each case is therefore likely to turn on its facts and precise wording and interpretation of the arbitration agreement in question.

Concluding remarks

At the time of writing, the *Hyalroute* case is pending appeal. Following the Hong Kong Court's decision at first instance, the Hong Kong Court of Appeal has dismissed the Company's renewed application for an interim anti-suit injunction against ICBC, pending determination of its appeal in *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936. While the decision engages with the principles governing the grant of interim injunctions pending appeal – matters that fall outside the scope of this article – the Court of Appeal did comment that the Company had a reasonably arguable case that the construction applied to the HK Arbitration Clause at first instance was wrong.¹⁸ It remains to be seen whether the Company will pursue its appeal and, if so, whether the Hong Kong Court of Appeal upholds the lower court's decision.

Notes

18 *Hyalroute Communication Group Ltd v Industrial and Commercial Bank of China (Asia) Ltd* [2025] HKCA 936 at §17-18.

Recognition and Assistance of Foreign Insolvency Proceedings: A Comparison of Singapore's Model Law Regime with the Approaches of the BVI, Cayman and Bermuda Courts

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Synopsis

In 2017, Singapore incorporated the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law') into its domestic legislation,¹ providing a comprehensive and structured framework for the recognition and assistance of foreign corporate insolvency proceedings. By contrast, the offshore jurisdictions of the British Virgin Islands, the Cayman Islands, and Bermuda have not adopted the Model Law. Each relies on its own domestic statutory mechanisms and common law principles. The Singapore Model Law regime thus provides a useful reference point against which to examine the more varied approaches taken in the BVI, Cayman and Bermuda. This article offers a comparative analysis of the recognition regimes with a view to identifying the practical tools available to insolvency practitioners seeking recognition and assistance in these jurisdictions.

This article addresses certain aspects of Singapore law for general informational purposes only. Harney Westwood & Riegels do not practise Singapore law and its contents should not be construed or relied upon as legal advice on Singapore law.

I. Singapore's Model Law Framework under the IRDA

Singapore has adopted the Model Law with modifications ('SG Model Law') as set out in the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ('IRDA'). The regime provides a streamlined statutory framework enabling foreign

representatives to apply to the Singapore Court for recognition of foreign insolvency or restructuring proceedings in which they were appointed.

Pursuant to Article 17(1), the Singapore Court must recognise a foreign proceeding where (i) it falls within the statutory definition of 'foreign proceeding' in Article 2(h)², (ii) the application is brought by a 'foreign representative' as defined in Article 2(i),³ and (iii) recognition would not be contrary to Singapore public policy.

If the threshold requirements are met, recognition is mandatory. The proceeding will either be recognised as a foreign main proceeding (if it takes place in the debtor's centre of main interests ('COMI'), presumed in the absence of evidence to the contrary to be the debtor's registered office⁴) or as a foreign non-main proceeding (if the debtor has an establishment in the foreign state). The scope of relief depends on the classification:

- a. Recognition as a foreign main proceeding triggers automatic relief,⁵ including a stay of proceedings and of enforcement against the debtor and its assets.
- b. In all cases (whether the proceeding is recognised as main or non-main), the Singapore Court has the power to grant a wide range of discretionary relief, including:
 - i. staying proceedings against the debtor and its assets;
 - ii. staying execution against the debtor's assets;
 - iii. suspending the right to transfer, encumber or otherwise dispose of the debtor's assets;

Notes

- 1 The Model Law was originally enacted via the Companies (Amendment) Act 2017, Act 15 of 2017, with adaptations, and is now codified in the Third Schedule to the IRDA.
- 2 Article 2(h) defines 'foreign proceeding' as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation'.
- 3 Article 2(i) defines 'foreign representative' as 'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding'.
- 4 Pursuant to Article 16(3)
- 5 Pursuant to Article 20(1)

- iv. providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities;
 - v. entrusting the administration or realisation of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court; and
 - vi. granting any additional relief that may be available to a Singapore insolvency officeholder.
- c. In all cases, the Singapore Court may also entrust the distribution of assets located in Singapore to the foreign representative or other person designated by the Court, provided that the court is satisfied that the interests of creditors in Singapore are adequately protected.

Since the SG Model Law was first enacted in 2017, it has been the subject of over 20 written judgments from the Singapore courts which have recognised proceedings from a wide range of jurisdictions, including the US,⁶ China,⁷ India,⁸ Japan,⁹ Malaysia,¹⁰ Indonesia,¹¹ as well as the BVI,¹² the Cayman Islands,¹³ and Bermuda.¹⁴ Most notably, the cases show that the Singapore courts have adopted an expansive and facilitative approach towards foreign proceedings by:

- a. recognising and, where appropriate, enforcing foreign restructuring plans and schemes that potentially compromise Singapore-law governed debt, subject to conditions designed to protect the interests of local creditors;¹⁵
- b. confirming that the statutory definition of 'foreign proceeding' under the SG Model Law is deliberately broad and extends to foreign insolvency, restructuring, or liquidation proceedings concerning companies that are solvent, not only those that are insolvent or in severe financial distress;¹⁶
- c. exercising a wide discretionary power to grant relief, including forms of assistance not otherwise available under Singapore law, noting that the Singapore legislature had expressly modified the Model Law language to empower the Court to

grant 'any additional relief that may be available to a Singapore insolvency officeholder'.¹⁷

II. The offshore regimes: BVI, Cayman, Bermuda

Unlike Singapore, the BVI, Cayman Islands, and Bermuda have not adopted the Model Law and continue to rely on a combination of local statutory provisions and common law principles. The following sections examine each of these offshore regimes in turn.

A. BVI

Overview of dual regime

The position in the BVI is more nuanced. The BVI Insolvency Act 2003 ('IA 2003') contains two parts that address cross-border recognition and assistance: (i) Part XVIII, which enacts the Model Law, but has not been brought into force; and (ii) Part XIX, which is in force and establishes a statutory framework for granting assistance to foreign representatives from designated jurisdictions in specified types of insolvency proceedings.

The leading authority in this area is the decision of the Eastern Caribbean Court of Appeal ('EC CoA') in *Net International Property Ltd v Adv Eitan Erez* (BVIHCPMAP 2019/0010, 20 September 2021) ('*Net International*'), in which the EC CoA clarified the operation of the dual regime of recognition and assistance under BVI law. In that case, Mr Erez, an Israeli trustee in bankruptcy, had obtained recognition of his appointment at first instance and sought assistance in the form of orders rectifying the register of members of a BVI company and permitting him to deal with assets situated in the jurisdiction.

Following a comprehensive review of the authorities, the EC CoA affirmed that recognition at common law remains available to foreign representatives from any jurisdiction, giving them standing before the BVI Court. However, the EC CoA held that substantive assistance (such as the power to deal with assets located in the BVI) could only be granted under Part XIX of the IA 2003 to representatives appointed in a designated

Notes

⁶ *Re Tantleff, Alan* [2022] SGHC 147

⁷ *Re King & Wood Mallesons* [2025] SGHC 67

⁸ *Re Compuage Infocom Ltd* [2025] SGHC 49

⁹ *Re Rams Challenge Shipping Pte Ltd* [2022] SGHC 220

¹⁰ *United Securities Sdn Bhd v UOB Ltd* [2021] SGCA 78

¹¹ *Re PT Garuda Indonesia (Persero) Tbk* [2024] SGHC(I) 1

¹² *Re Fullerton Capital Ltd (in liquidation)* [2024] SGHC 155; *Re Fullerton Capital Ltd (in liquidation)* [2025] SGCA 11

¹³ *Ascentra Holdings, Inc v SPGK Pte Ltd* [2023] SGCA 32

¹⁴ *British Steamship P&I Association v Thresh* [2024] SGCA 43

¹⁵ *Re PT Garuda Indonesia (Persero) Tbk* [2025] SGHC(I) 4; *Re Tantleff, Alan* [2022] SGHC 147; *Re Terraform Labs Pte. Ltd.* [2025] SGHC(I) 4

¹⁶ *Ascentra Holdings, Inc v SPGK Pte Ltd* [2023] SGCA 32

¹⁷ *Re Tantleff, Alan* [2022] SGHC 147

country. As Israel was not on the designated list, the orders granting assistance were set aside.

The reasoning of the EC CoA, and the position in the BVI, may be summarised as follows:

- a. **Recognition:** Recognition refers to the BVI Court's formal act of treating a foreign representative as having status in accordance with his or her appointment by the foreign court. While Part XVIII of the IA 2003 provides a comprehensive scheme for recognition that may be sufficient to abolish the common law of recognition, Part XVIII had not been brought into force. Accordingly, the common law right of recognition survives in the BVI, and the BVI Court continues to have the power to grant recognition pursuant to its common law jurisdiction.
- a. **Assistance:** By contrast, assistance refers to the broad powers that may be granted by the BVI Court to foreign representatives in relation to assets in the BVI. As noted, Part XIX of the IA 2003 provides a complete framework for foreign representatives from designated foreign countries to apply to the BVI Court for assistance. The EC CoA held that in light of Part XIX coming into force, the common law right of assistance had been abrogated.

While there has not been any further published judgments in the BVI on applications for recognition and assistance since *Net International*, in practice such applications may often be unopposed and determined by short *ex tempore* decisions that are not published. One recent example is the widely publicised but unreported decision involving Terraform Labs Limited, the BVI subsidiary of Terraform Labs Pte Ltd, which sought common law recognition of its US Chapter 11 proceedings together with statutory assistance pursuant to Part XIX from the BVI Court.¹⁸

Statutory assistance for designated jurisdictions under Part XIX

Under Part XIX,¹⁹ a foreign representative in specified types of insolvency proceedings taking place in a designated jurisdiction may apply to the BVI Court for a wide range of relief in aid of the foreign proceeding. Eligible proceedings are defined as collective judicial or administrative proceedings pursuant to a law relating to insolvency, in which the debtor's property and affairs are subject to control or supervision by a foreign court.

Until recently, the list of designated jurisdictions was relatively limited. However, on 18 September 2024, in a significant development, the BVI expanded the list of

designated jurisdictions from the original nine²⁰ to a total of 33. The expanded list includes not only most major onshore jurisdictions (e.g. US, UK, Australia, Hong Kong, Japan, and Singapore), but also principal offshore jurisdictions with close ties to the BVI (e.g. previously only Jersey, and now also Cayman Islands and Bermuda).

Pursuant to section 467 of the IA 2003, the BVI Court may grant a wide range of relief including stays of proceedings, restraints on asset dispositions, appointment of interim receivers, examination orders, and any other order the court considers appropriate. In exercising these powers, the BVI Court is guided by section 468(1), which emphasises (i) just treatment of all claimants, (ii) protection of local creditors, (iii) prevention of fraud, and (iv) promotion of judicial comity.

Limited assistance for non-designated jurisdictions

Foreign officeholders from non-designated jurisdictions face a more limited position. While they may obtain recognition at common law, they cannot access the substantive assistance powers conferred by Part XIX. In such cases, the following alternative pathways may be considered:

- a. Commencing fresh BVI insolvency proceedings (e.g. appointing a BVI liquidator) to deal with local assets;
- b. Seeking substantive relief through ordinary civil proceedings available to any claimant with standing, such as claims for breach of trust, fraud, or unjust enrichment. In *Net International*, for instance, the trustee in bankruptcy might have had to bring a rectification claim; and
- c. Relying on remedies such as freezing injunctions or proprietary claims where jurisdictional gateways are met.

In summary, the BVI's approach to recognition and assistance is defined by a dual regime: common law recognition, available to foreign officeholders from any jurisdiction, and statutory assistance under Part XIX, which is confined to foreign representatives from designated jurisdictions. Although the decision in *Net International* narrows the options of officeholders from non-designated jurisdictions, the recent expansion of the designated list has significantly broadened the scope of Part XIX. This development demonstrates the BVI's commitment to maintaining its position as a jurisdiction willing and able to assist in cross-border insolvency cases from a wide range of countries.

Notes

¹⁸ Based on the Claim Form filed in *Re Terraform Labs Limited* (BVIHCCOM2024/0368).

¹⁹ Section 467(2) of the IA 2003

²⁰ Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and United States of America

B. Cayman Islands

The Cayman Islands employs both legislation and common law principles to recognise and assist foreign insolvency proceedings. In each case, the applicable regime will be determined by the debtor's place of incorporation and the jurisdiction in which the foreign proceedings were commenced.

Statutory recognition and assistance

Sections 240 to 242 under Part XVII of the Companies Act (2025 Revision) ('CA 2025') deal with the circumstances in which the Grand Court may grant relief to recognise and assist foreign insolvency proceedings. There are a number of threshold requirements. Firstly, the debtor in question must be a foreign corporation or other foreign legal entity (i.e. it must be foreign with a separate legal personality). Secondly, the debtor must be subject to a foreign bankruptcy proceeding, defined to include proceedings to reorganise and rehabilitate an insolvent debtor, in its country of incorporation or establishment. In other words, the debtor must be insolvent. Thirdly, the application must be brought by a 'foreign representative', defined as a trustee, liquidator or other official appointed in respect of the debtor for the purpose of a foreign bankruptcy proceeding.

If the above requirements are satisfied, section 241 of the CA 2025 empowers the Grand Court to order a range of relief to (i) recognise the foreign representative, (ii) restrain or stay proceedings against the debtor, (iii) stay enforcement of any judgment against the debtor, (iv) make examination and disclosure orders against persons with information relating to the debtor's affairs and business, and (v) order the turnover of the debtor's property to the foreign representative.

Section 242 of the CA 2005 guides the Grand Court's discretion in granting such relief. The Grand Court will seek an economic and expeditious administration consistent with: (i) ensuring the just treatment of all creditors (wherever located), (ii) protecting local creditors from undue prejudice or inconvenience in the foreign bankruptcy proceeding, (iii) preventing fraudulent or preferential transfers, (iv) respecting local priority rules in distributions, (v) upholding valid security interests, (vi) refusing to enforce foreign revenue or penal claims, and (vii) observing comity.

In practice, Part XVII is commonly used for the recognition of insolvency proceedings of non-Cayman companies, including Chapter 11 proceedings of insolvent

companies incorporated in and subject to the laws of the United States.

Common law recognition and assistance

In cases falling outside the ambit of Part XVII, often cases involving Cayman-incorporated companies or cases where a foreign officeholder has been appointed in a non-place of incorporation, the Grand Court has affirmed that it applies the common law principle of modified universalism as articulated in the landmark Privy Council decision of *Singularis Holdings Ltd v Price-waterhouseCoopers* [2014] UKPC 36 ('*Singularis*')²¹ to recognise and assist foreign insolvency proceedings. This principle is founded on the idea that it serves the public interest for a foreign court exercising insolvency jurisdiction over a debtor company to be able to carry out a single, orderly, and worldwide insolvency process, with other courts lending assistance to the extent consistent with their own laws and public policy.

In *Singularis*, the Privy Council held that the common law power of assistance was subject to a number of limitations. First, it applied only to assist the officeholder of a foreign court of insolvency jurisdiction and would not be available to assist a voluntary winding up. Second, it was a power of assistance which exists to enable courts to surmount territorial limits of their powers, and could not enable the foreign officeholder to do what they were not permitted to do under the law by which they were appointed. Third, it was available only when it was necessary for the performance of the officeholders' functions. Fourth, the assistance must be consistent with the substantive law and public policy of the assisting court.

Case law from the Cayman Islands further shows that in considering whether to grant recognition and assistance, the Grand Court considers factors such as: (i) whether the non-place of incorporation insolvency proceeding is taking place in the company's locus of business (or COMI); (ii) whether parallel proceedings would serve to incur additional costs and unnecessary delay; (iii) whether any local reputational, regulatory or policy reasons militate in favour of a Cayman liquidation or provisional liquidation; (iv) the purpose for which the court is asked to recognise the foreign officeholders (e.g. whether to facilitate a restructuring or otherwise facilitate a winding up); and (v) whether there are any limitations on the court's power (in particular, the court cannot rely on common law recognition to grant relief that would only be available under a domestic statutory power that does not exist).

Notes

²¹ In *Singularis*, the Cayman-appointed liquidators of a Cayman company sought disclosure in the Bermuda court of documents belonging to the company's auditors, principally their working papers. Under Cayman law, however, only documents belonging to the company itself could be produced. The Privy Council held that the Bermuda Court could not order production pursuant to Bermuda companies legislation by analogy 'as if' the company had been wound up in Bermuda. Further, it was not a proper use of an assisting court's common law power of assistance to override a limitation imposed by the law of the foreign court of insolvency jurisdiction on the powers of its own officeholders.

Applying these principles, the Grand Court has in appropriate cases recognised and assisted foreign insolvency officeholders of Cayman-incorporated companies for limited and specific purposes, such as granting recognition to Hong Kong provisional liquidators to promote a parallel scheme in the Cayman Islands without Cayman liquidation proceedings.

C. Bermuda

Unlike the BVI and Cayman Islands, Bermuda has not enacted any legislation for the recognition and assistance of foreign insolvency proceedings. Recognition and assistance are therefore only available under the common law.

The Bermuda Court, like the Cayman Grand Court, applies the principle of modified universalism articulated in *Singularis* (as set out above) to determine whether to grant relief in aid of foreign insolvency proceedings. Following *Singularis*, the Bermuda courts have consistently demonstrated a facilitative approach, recognising and granting relief in multiple published decisions in support of US Chapter 11 reorganisation plans.²² It should be noted for completeness that none of the orders in these cases ‘recognised’ the relevant reorganisation plans by giving them substantive effect in Bermuda in the sense of directly varying Bermuda-law governed rights in breach of the *Gibbs* rule.²³ Rather, the Bermuda court in each case proceeded on the basis that the relevant stakeholders had participated in, or were otherwise bound by, the US Chapter 11 proceedings. Recognition was accordingly granted by way of stays or injunctions restraining proceedings in Bermuda, with the effect that rights could not be enforced locally against those parties.

III. Comparative analysis

A. Breadth of frameworks

As set out above, the breadth of the legal framework differs significantly across the four jurisdictions. Singapore’s Model Law regime is the most expansive as it applies to proceedings from any jurisdiction, including solvent restructurings,²⁴ so long as they fall within the statutory definition of a ‘foreign proceeding.’

On the other hand, the offshore jurisdictions have opted for more targeted frameworks. The BVI’s dual

system preserves common law recognition for all foreign officeholders, with substantive assistance through Part XIX for representatives from designated jurisdictions. The Cayman Islands employ a split regime: statutory recognition under Part XVII for foreign insolvent companies undergoing insolvency proceedings in their place of incorporation, and common law recognition under the principle of modified universalism in other cases. Bermuda, while operating solely under the common law, applies those same principles with a consistent willingness to assist.

B. Relief

The SG Model Law offers automatic relief upon recognition as a foreign main proceeding, including an immediate stay of proceedings and execution against the debtor’s assets. None of the offshore jurisdictions provides equivalent automatic relief on recognition. Relief in the BVI, Cayman Islands, and Bermuda is always discretionary. It bears mention, however, that the Cayman Islands has introduced a restructuring officer (‘RO’) regime, pursuant to which a statutory moratorium takes effect on the making of an RO application.

While all four jurisdictions offer a wide range of discretionary relief, including stays of proceedings, examination orders, disclosure orders, and orders restraining asset dispositions, Singapore’s framework expressly allows the court to grant ‘any additional relief available to a Singapore insolvency officeholder,’ facilitating the enforcement of foreign court orders that would not otherwise exist under domestic law. By contrast, the offshore courts’ powers to grant relief is limited to that provided by statute (BVI Part XIX; Cayman Part XVII) or as noted in *Singularis*, relief available in the foreign court exercising insolvency jurisdiction.

C. Recognition and foreign schemes

Singapore law recognises and, in appropriate cases, gives substantive effect to foreign restructuring schemes, including those that discharge Singapore-law governed debt, subject to public policy and creditor protection safeguards. On the other hand, notwithstanding the largely facilitative approach adopted by the three offshore jurisdictions, it is unlikely that a foreign scheme would be as readily enforceable in the

Notes

22 *Re Energy XXI Ltd* [2016] SC (Bda) 79 Com; *Re C & J Energy Services Ltd* [2017] Bda LR 22; *Re Seadrill Limited* [2018] SC (Bda) 30

23 The *Gibbs* Rule (from *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* [1890] 25 QBD 399) provides that the discharge of a debt is not effective unless it is in accordance with the law governing that debt. However, the *Gibbs* Rule does not apply where a creditor submits to the jurisdiction of a foreign court, either by submitting its claims in the foreign insolvency proceeding or otherwise agreeing to be bound thereby.

24 The offshore courts are likely to require insolvency as a threshold condition, following the English approach in *Re Sturgeon Central Asia Balanced Fund Ltd (in liquidation)* (No 2) [2020] EWHC 123 (Ch).

BVI, Cayman Islands and Bermuda. Hence, in practice, parallel schemes are still often required.

IV. Conclusion

Insolvency practitioners rarely have free rein in choosing the primary forum for insolvency proceedings as factors such as incorporation, centre of main interests, and asset location usually dictate that choice. Within that framework, Singapore and the offshore jurisdictions of BVI, Cayman and Bermuda play

complementary roles to protect local assets, safeguard creditor interests, and enable cross-border cooperation. Singapore offers the broadest and most predictable recognition framework, extending to solvent restructurings and capable of directly enforcing foreign schemes. The BVI, Cayman Islands, and Bermuda courts, while operating within more targeted statutory and common law limits, each provide effective tools to meet the needs of insolvency practitioners operating in a global context, and have shown a consistent readiness to work with foreign officeholders and to tailor relief to meet commercial needs.

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