An Offshore Insolvency Law Guide: all the questions you were too embarrassed to asked, explained.

1. What is “offshore”? Generally this refers to nil tax jurisdictions whereby corporate structures are used for their legal certainty and flexibility. The jurisdictions themselves have no other involvement in the transaction, and so to attract tax would be inappropriate. Tax advantages are more limited than they ever were, but flexibility and familiarity keep the industry alive.

2. WHY GO OFFSHORE? Example: investments funds.

3. The starting position when considering offshore funds is the use of Cayman Islands and British Virgin Islands vehicles. The Cayman Islands is the leading jurisdiction for the offshore investment funds industry due to its combination of flexible and appropriate regulation, an approachable and effective regulator, professional service provider expertise, high reputation among investors and a tax neutral regime. The BVI and the Channel Islands also offer the same advantages although they are not as popular as Cayman.

4. Some of the offshore advantages for BVI, Bermuda and the Channel and Cayman Islands as jurisdictions include the following:

   (a) neutrality; common law jurisdictions with final recourse to the United Kingdom’s Privy Council; reliable legal / Court system;

   (b) no direct tax; no capital gains tax, inheritance tax or estate duty;

   (c) deferral of repatriation taxes; wrappers to avoid transfer taxes;

   (d) limited information requirements for registration of companies;

   (e) political and economic stability;

   (f) highly flexible corporate infrastructure;

   (g) no capital controls;

   (h) co-operation with international demands for information exchange;

   (i) comprehensive anti-money laundering regimes;

   (j) trusted and familiar to international business community;

   (k) regulatory environment – modern, sophisticated, funds industry driven legislation with freedom of contract paramount;

   (l) speed, cost and flexibility – excellent service providers, low establishment and maintenance fees;
(m) robust AML Standards;
(n) investor familiarity;
(o) no stamp duty for share transfers;
(p) light but effective regulatory constraints;
(q) lack of prohibition on financial assistance;
(r) streamlined and flexible process for various corporate actions (i.e. share buy-backs, distributions, migration, mergers);
(s) creditor friendly regimes; and
(t) stability and rule of law.

5. According to the latest available statistics, there were 11,061 active regulated investment funds established in the Cayman Islands as at 30 June 2015. Regulated Cayman Islands funds are regulated by the Cayman Islands Monetary Authority (CIMA). It is estimated that there is at least this number, if not more, unregulated investment funds that are established in the Cayman Islands which qualify to be exempt from regulation under Cayman law.

6. The closest competitor to the Cayman Islands is the British Virgin Islands, which as at 30 June 2015 had 2,043 regulated funds with the BVI Financial Services Commission (FSC).

**Practical Example: Offshore Investment Funds**

7. We cannot cover every corporate structure in a note such as this. Let’s turn to one example. Investment funds are usually established by an investment manager or advisor to provide a structured investment product through which they can attract and manage investments by their clients. The investment manager will generally dictate the investments made by the fund and usually acts as promoter and distributor of the fund. It is common for managers to have funds established both onshore in their home jurisdiction and offshore in the Cayman Islands.

8. Establishing an offshore fund is an attractive proposition including for the following reasons:

(a) the fund platform is efficient, can be transparent and very effective in terms of governance of the operations of the business interests;

(b) the use of the fund platform can consolidate and streamline operations, removing unnecessary liabilities and costs and streamlining the risks of the business operations;

(c) the fund structure provides for a clearly defined allocation of responsibilities, minimising the potential for duplication and disputes within structures;

(d) the fund platform can be an effective method of ensuring that the risks of the death of key individuals do not affect the on-going business operations;

(e) the fund platform allows for the pooling of resources, to better utilise the pool of investment capital for investment opportunities;
(f) the fund platform provides a robust and flexible structure to permit the investment and withdrawal of third party investment partners; and

(g) in terms of the type of fund vehicles that can be used, companies, limited partnerships and unit trusts are the most commonly used structures for offshore investment funds. The offshore vehicle acts as a collective investment pooling vehicle which invests the capital contributed to it by its investors in securities, investments or other assets in accordance with the fund’s disclosed investment strategy. The investors receive shares, limited partnership interests or units representing a percentage share in such pooled investments and their associated profits and losses.

9. The diagram below sets out the typical fund structures for an offshore fund.

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**TYPICAL OFFSHORE ISLANDS FUND STRUCTURES**

- **Exempted Company** (Managed by Board of Directors)
  - $$$
  - Projects/Assets

- **Limited Partnership** (Managed by General Partner)
  - $$$
  - Projects/Assets

- **Unit Trust** (Managed by Trustee and Manager)
  - $$$
  - Projects/Assets

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A Cayman Islands exempted company (which is the usual company type of an offshore fund) is established to act as the fund vehicle, which vehicle then issues voting non-participating
shares (usually held by the fund promoter/investment manager) and non-voting participating shares (which are held by the investors as they provide the economic rights such as the entitlement to dividends/distributions from the fund etc).

11. It is usual to establish Cayman Islands private equity funds as limited partnerships but it is also possible for funds to be established as a company or unit trust. Cayman Islands companies or limited partnerships are the most common form of offshore investment structures for investment funds targeted at non-US investors.

**What does an offshore insolvency and restructuring practice comprise?**

12. The place of incorporation and its significance. Rule 160 of Dicey & Morris – “the status of a company is determined by its place of incorporation.”

13. Offshore insolvency law in a nutshell – see Appendix 1 – contents page of Harneys’ offshore insolvency guide - all very familiar to an English lawyer.

**Bermuda – Restructuring Provisional Liquidator**

14. In Bermuda, the Supreme Court of Bermuda has used provisional liquidation as a mechanism by which to implement financial or operational restructurings in order to effect corporate rescues, preserve value in the business for stakeholders, and ensure the company/group in question is able to continue as a viable enterprise going forward. The seminal judgment laying the foundation for the use of a restructuring provisional liquidator is the judgment of Ward CJ (as he then was) in *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69. (see also *In The Matter Of Titan Petrochemicals Limited* [2013] SC (Bda) 74 Com). In order to appoint provisional liquidators with soft powers, for example to monitor the management while restructuring takes place, it is first necessary to present a winding up petition to the Court under s. 161 of the Companies Act 1981. The Company can then make an application to appoint a provisional liquidator with limited powers, based on the Court’s powers under ss. 164 and 170 of the Companies Act 1981. In Bermuda, the situation is more flexible than the Cayman Islands, and a restructuring provisional liquidator can in theory be appointed by, not only the company, but also the creditors.

**Cayman Islands - Restructuring Provisional Liquidator**

15. In the Cayman Islands, companies can seek to appoint provisional liquidators pursuant to Part V of the Companies Law (2013 Revision) (“Companies Law”), specifically s. 104(3), to assist the company in promoting a compromise or arrangement with its creditors or members. An application under s. 104(3) can, where appropriate, be made by the company on an *ex parte* basis on the grounds that the company is or is likely to become unable to pay its debts as they fall due and, as mentioned above, the company intends to present a compromise or arrangement to its creditors and investors – most commonly by the promotion of a scheme of arrangement pursuant to s. 86 of the Companies Law.

16. The Companies Law in its current state does not specifically provide for a creditor or contributory or the Cayman Islands Monetary Authority (in the case of regulated entities) to seek the appointment of provisional liquidators to promote a “light-touch restructuring” similar to s. 104(3). Instead, to have provisional liquidators appointed, these parties must first demonstrate that there are *prima facie* grounds to wind up the company, and that the
appointment of provisional liquidators is necessary to prevent the dissipation or misuse of assets, oppression of minority shareholders or mismanagement or misconduct by the company’s directors (s. 104(2) of the Companies Law). In such cases, the powers of the incoming provisional liquidators will be limited to safeguarding the assets on behalf of those with a financial interest and preventing any further oppression or misconduct pending the hearing of the winding up petition.

Observations for Both Jurisdictions

17. In both jurisdictions, on the appointment of provisional liquidators, the Court will determine which corporate powers will remain with the directors and which will be vested in the provisional liquidators. The appointment of provisional liquidators invokes the statutory moratorium on any proceedings, including winding-up proceedings by a disgruntled creditor, being brought against the company. A moratorium is also available to the provisional liquidators for risk of dissipation.

18. In neither jurisdiction, does the moratorium prohibit secured creditors from enforcing their security. The “light touch” restructuring procedure is recognised as a robust, flexible restructuring tool that can allow the company time to put in place, for example, new funding, negotiate the cram down of debts with its creditors, release of claims and to ultimately continue as a going concern. Upon the appointment of provisional liquidators, the hearing of the winding up petition will most likely be adjourned.

19. A provisional liquidator can only carry out such functions conferred on him and his powers may be limited by the order appointing him. This means that a company, working closely with its legal advisers, can request that the Court make an order in such terms that the directors of the company, subject to suitable Court supervision, remain key to managing the company’s affairs and give effect to any proposed restructuring. As such, the provisional liquidator’s powers may be tailored to the company’s needs.

20. Whilst the powers of a provisional liquidator are wide-ranging and similar in some ways to those which may be bestowed on official liquidators, (unless the powers have been limited by the Court as mentioned above) the effect of a winding up order over an insolvent company is drastically different to the appointment of provisional liquidators. A winding up order would simply lead to a liquidation of the company, and in most cases a diminution in asset value, whereas provisional liquidators would attempt to restructure the debts of the company in order to potentially increase the return to creditors.

Why is a Bermuda and Cayman Islands provisional liquidator restructuring so popular in Hong Kong? Cross-Border Rehabilitation of Bermuda and Cayman Islands Companies with Assets in Asia

21. Hong Kong does not have an equivalent regime to the United States “debtor in possession” Chapter 11 Bankruptcy Code or United Kingdom administration to facilitate the rescue of an insolvent company. Nor does it have a debtor-driven restructuring provisional liquidation tool (see Re Legend International Resorts Ltd [2006] 2 HKLRD 192). However, in Bermuda and the Cayman Islands, through the common law, and legislative provision, respectively, there is a bespoke restructuring provisional liquidation tool. This tool has recently proved useful for
stakeholders in relation to Bermuda and Cayman Islands companies publically listed in Hong Kong.

Common law co-operation (the UNCITRAL Model Law on Cross Border Insolvency not being applicable) between the offshore Courts and the Hong Kong Courts

Successful Restructurings

22. We now turn to two recent examples of successful restructurings using offshore Court provisional liquidation as a pivot, and the Hong Kong Courts in an equally important support function. The essential idea is to use the greater flexibility of offshore restructuring tools to effect a cross-border rehabilitation of global assets and liabilities.

Restructuring of LDK Solar Co Ltd

23. The restructuring of LDK Solar Co Ltd’s US$700 million of offshore claims provides a useful and recent example of parallel schemes of arrangement being successfully implemented in multiple jurisdictions, and is regarded as one of the headline restructurings of 2014. At its zenith, LDK Solar was the largest solar cell manufacturer in the PRC and was listed on the New York Stock Exchange. The restructuring of the LDK group is regarded as the first judicially approved, multi-jurisdictional debt restructuring of a China-based group, with two schemes of arrangement being sanctioned by the Grand Court of the Cayman Islands, three schemes of arrangement being sanctioned by the Hong Kong courts, a plan approved under Chapter 11 of the US Bankruptcy Code, and an application under Chapter 15 of the US Bankruptcy Code for recognition of the Cayman scheme.

24. In April 2013, the company announced partial non-payment of its 4.75 percent convertible bonds due later that month. This was followed by several months of further negotiations with its creditors and the eventual appointment of joint provisional liquidators pursuant to s. 104(3) of the Companies Law. With the support of the provisional liquidators, the company entered into negotiations with the holders of its 10 percent senior notes and its convertible preferred shareholders, and sought emergency funding. The successful recognition of a scheme of arrangement in a number of jurisdictions can be of significant importance to ensure that creditors cannot take unilateral action against a debtor’s assets in those jurisdictions.

25. In LDK Solar, where parallel schemes were successfully promoted in the Cayman Islands and in Hong Kong, each scheme being linked and inter-conditional insofar as it only took effect if the other schemes were also sanctioned by the courts. The Hong Kong courts were also satisfied that Hong Kong had jurisdiction to sanction the schemes of arrangement in respect of the foreign company (the Cayman Islands incorporated LDK Solar), and that there was “sufficient connection” with Hong Kong, citing the test in the English case of Re Rodenstock [2011] EWHC 1104 (Ch). No single criterion, however, is to be considered an essential precondition for meeting the requirement of sufficient connection. Rather, it is a matter of judgment to be made in light of the evidence presented to the Court and in light of the object and purposes of the jurisdiction invoked. “Sufficient connection” for these purposes has been found where key finance documents were governed by English law. The Hong Kong courts also consider other factors, such as whether it is likely that the scheme will achieve its purpose. The courts have to be satisfied that the scheme will be effective in practice to bind creditors opposing a variation of their rights, and that the scheme will have “substantial effect”. In
considering whether a scheme will serve its purpose, the courts will also consider whether it will be recognised in those jurisdictions, for example, in which substantial assets of the company are located.

**Jersey and Guernsey: Developing cross-bailiwick restructuring laws: The Guernsey and Jersey Royal Courts sanction cross-border pooling of assets and liabilities of insolvent companies: the Huelin-Renouf Group case**

26. In decisions delivered on 24 August 2015 and 7 October 2015 the Royal Courts of Guernsey Court and Jersey respectively held that where the affairs of two insolvent companies (incorporated in Jersey and Guernsey respectively) are so intermingled that the expense of unravelling them would adversely affect distributions to creditors, it can be appropriate to treat the companies as a single entity.

27. Having concluded that there was no bar in the legislative framework of Guernsey which would prevent such an application and with the interests of creditors firmly to the fore, the Deputy Bailiff of Guernsey granted a proposal by the Joint Liquidators (from Grant Thornton) to consolidate the assets and liabilities of a Guernsey company with the assets and liabilities of a related, but separate company incorporated in Jersey subject to the sanction of the Jersey Court. The Jersey Court subsequently reached a similar conclusion in terms of its jurisdiction to grant a pooling order.

28. This is the first time the Guernsey Court has considered and granted such an order, which has allowed a procedure which, on its face, would appear to contradict basic principles i.e. separate legal personality and that creditors can only share in the assets of the company against which they are entitled to lodge a claim. Acknowledging the inevitable rise of cross-jurisdictional corporate insolvencies, the Guernsey Court confirmed that the basic purpose of a liquidation was the realisation of a company’s assets for the benefit of its creditors and held that where there was a solution whereby creditors would receive more than they otherwise would, then common sense dictated that such a solution should find favour with the Court. Whilst the Jersey Court has granted a similar application previously in the context of two Jersey companies, it was the first time that an application had considered the pooling of assets and liabilities of a Jersey company with those of a foreign company. Furthermore, it was the first time that such an order has been made in the context of a just and equitable winding up.

**The Common Law and Recognition of Foreign Liquidation Proceedings – non UNCITRAL Model Law countries**

29. Hong Kong is not a signatory to the UNCITRAL Model Law concerning cross-border insolvencies, and nor are various offshore jurisdictions. For example, the common law jurisdiction of the Cayman Islands is not a signatory, Bermuda is not a signatory and nor are Guernsey or Jersey; and whilst the BVI has signed up, it has not put the enabling statute into effect. These common law jurisdictions are, as is well recognised, very frequently involved as jurisdictions of incorporation of companies with Hong Kong connections and business.

30. Within the common law world, the Caribbean Courts and the Hong Kong Courts are clearly open to the incremental increase in their power to assist with foreign insolvency proceedings, seemingly despite the recent apparent mauling of the principle “modified universalism” in the UK Supreme Court decision of *Singularis Holdings Limited v PricewaterhouseCoopers* [2014]
UKPA 597. It should be noted that the principle of modified universalism at least still exists according to the dicta of Lord Sumption in *Singularis* and is said to be “part of the common law”. However, and although this is not the place for a comprehensive analysis, *Singularis* has put serious restrictions on the utility of modified universalism.

31. Despite this, it may be that the common law courts of the non-Model Law jurisdictions will strain at the bit in the next few years to do everything possible to make cross-border insolvency and restructuring effective for a company or group of companies across borders. The limits of this are still being tested.

32. For example, in a Hong Kong Companies Court case called *Joint Official Liquidators of A Co. v B* [2014] 4 HKLRD 374, Mr. Justice Harris found: the common law provides the Court with power to recognise foreign liquidators and to assist the courts of the place of the company’s incorporation to properly investigate the affairs of that company, provided that this foreign jurisdiction operates a similar insolvency regime; the law of the place of the company’s incorporation was determinative of who was entitled to act on behalf of a corporation. If a liquidator was appointed over a company pursuant to that law, his authority to act would be recognised in Hong Kong; and the Hong Kong Companies Court could, and should, pursuant to a letter of request from a common law jurisdiction with similar insolvency law, make an order of a type which was available to a liquidator or a provisional liquidator under Hong Kong’s insolvency regime.

33. Therefore, whilst there are certain limitations, the Hong Kong courts are willing and open to providing assistance to other common law jurisdictions with their domestic insolvency proceedings.

**African Minerals**

34. In a recent case from the High Court of Hong Kong, *The Joint Administrators of African Minerals Ltd (in administration) v Madison Pacific Trust Ltd and Shandong Steel Hong Kong Zengli Limited* [2015] HKEC 608 (“*African Minerals*”), Mr. Justice Harris was asked to decide whether the Hong Kong Companies Court should provide assistance to insolvency proceedings in London – in this case an administration under the supervision of the English High Court. The company in administration, African Minerals Ltd (the “Company”), was incorporated in Canada and continued in Bermuda. It was thus neither a Hong Kong nor an English company.

35. Mr. Justice Harris found that whilst the courts are able to take a “generous view of its power to assist a foreign liquidation process this is limited by the extent to which the type of order sought is available to a liquidator in Hong Kong under [its] insolvency regime and common law and equitable principles”. In doing so, he cited the decision of Lord Sumption in *Singularis* where it was held that the common law empowered courts to recognise and grant assistance to foreign office-holders in insolvencies with an international element. Recognition of a foreign insolvency carries with it the active assistance of the court. However, the principle is subject to local law, and to local public policy: a Court can only act within the limits of its own statutory and common-law powers.

36. In *African Minerals*, the Administrators had not sought an injunction to prevent an alleged breach of an obligation or duty, but had sought recognition of the English proceedings, along
with an order restraining the enforcement of the security on the same terms as the order from the English High Court.

37. Mr. Justice Harris considered that only in limited circumstances could a Hong Kong company or liquidator seek an order to achieve the effect of that sought by the Administrators, for example if the proposed enforcement would improperly prejudice the equity of redemption, or if it would be inequitable to allow enforcement of the security because the Company was now in a position to meet its payment obligations. In each case, the application would be for an injunction, which was not sought. He therefore found that to grant the order as sought “would be an impermissible extension of the common law principle that requires the Court to recognise foreign liquidators and assist them”.

38. The next question must surely be whether a Hong Kong, BVI or Cayman Islands Court would recognise foreign liquidation proceedings in a country other than that of the company’s incorporation, where the decision turns on this question. For example, would these Courts recognise an English Court appointed liquidator appointed over a Bermuda company? There seems no reason in principle why recognition and concomitant assistance should not be granted in these circumstances all being equal.

**Recognition the other way round: Offshore Courts recognizing onshore insolvency proceedings**

**BVI**

39. In the BVI, Part XIX of BVI’s Insolvency Act 2003 provides a framework enabling the BVI Court to provide assistance in foreign insolvency proceedings in relation to BVI companies or assets of a foreign company subject to BVI law or held within the BVI. It operates on an application-by-application basis for recognition and gives a foreign representative express rights to apply to the Court for orders in aid, but without conferring status (*Irving H Picard v Bernard L Madoff Investment Securities LLC* (BVIHCV 0140/2010)). Part XIX allows a foreign representative from certain jurisdictions (including Hong Kong) who has been appointed as a result of foreign proceedings to apply to the BVI Court for assistance.

**Cayman Islands**

40. In the Cayman Islands, Part XVII of the Companies Law codifies the Grand Court’s powers to make orders in aid of foreign insolvency proceedings, and does so in terms substantially similar to the key tenets of the UNCITRAL Model Law. However, under Part XVII, the Grand Court at all times retains its discretion in relation to making orders ancillary to or in assistance of a foreign proceeding.

41. However, in *Rubin v Eurofinance* [2013] 1 AC 236 Lord Collins identified the general rule that “the English Court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation (Dicey, 15th ed, para. 30R-100)”, and contrasted this position with the “modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000 (“the EC Insolvency Regulation”) and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties).”
In the Matter of Contel Corporation Limited [2011] Bda LR 13, the Bermuda Supreme Court was asked on an ex parte application to recognise a scheme of arrangement in respect of a Bermudian-incorporated company listed on the Singapore Stock Exchange that had been sanctioned by the Singapore courts. The Bermuda Court recognised the scheme, relying upon the “extremely wide” common law discretionary power to recognise foreign restructuring orders made in respect of local companies. In a scheme that seeks to alter contractual rights, the effectiveness or “efficacy” of the scheme internationally probably requires that the debtor seek not only the sanction of the Court in its country of incorporation, but also of the Court in the country whose law governs the contractual obligations, to ensure that dissenting creditors cannot enforce their claims against the debtor’s assets in countries other than that of its incorporation.

Issues with the PRC

Hong Kong is a Special Administrative Region of the PRC and therefore applies its own laws and is based on an English common law system. The PRC is quite different.

It is common practice in the People’s Republic of China (“PRC”) for companies to be part of a structure headed by an offshore holding company. This practice provides, amongst other things, access to foreign capital via debt or equity markets outside of the PRC. When these groups encounter financial difficulty, it is usually the providers of that capital, seeking to enforce their rights, who will turn to an offshore insolvency practitioner (“IP”) to take control of the holding company. The IP will face unique challenges in securing assets and obtaining sufficient information from the underlying subsidiaries to understand the group’s financial position.

A joint appointment with a Hong Kong / PRC insolvency practitioner with expertise in the language, cultural, and legal nuances of the PRC will mitigate these issues, deal with asset recovery and information gathering, whilst the IP will address the statutory requirements in the jurisdiction of the holding company. In our experience, fraud may be the underlying cause of insolvency in such groups and information is crucial to enabling a full investigation into the debtor’s affairs. We will consider the difficulties faced by IPs, and examine the methods adopted to obtain financial information and conduct investigations.

The Enterprise Bankruptcy Law 2006 (“EBL”) was introduced in 2007 and was the first comprehensive bankruptcy law introduced in the PRC. Article 5 of the EBL provides a mechanism for recognition of foreign proceedings in a bankruptcy case in the PRC. *Prima facie*, the PRC Courts (“the Courts”) will consider an application where a treaty exists between the PRC and the jurisdiction of the foreign proceeding, or based on the principle of reciprocity. Further, Article 5 requires the Courts to recognise the foreign judgement or order if it does not (a) breach the fundamental principles of PRC law, (b) impair the PRC’s sovereignty, and (c) impair the rights and lawful interests of creditors in the PRC.

In practice, the Courts have been reluctant to apply this Article, thus making it difficult for IPs to secure assets or obtain information from the PRC subsidiaries. There are various factors which contribute to uncertainty regarding the application of the EBL for IPs.
48. The Courts have been hesitant to grant recognition, either because no treaty exists or where local creditors will not have their claims satisfied in full. In some cases the Courts have also proven unwilling to allow assets to be sold by IPs and funds repatriated out of the PRC for the benefit of foreign creditors. This is in stark contrast to common law jurisdictions which have a long tradition of comity between courts and the adoption by many countries of the UNCITRAL model law on cross border insolvency, which has significantly aided an IP’s ability to progress cross border assignments with assistance from various courts.

49. There have also been mixed results where the EBL has been used to seek to gain control of the PRC subsidiaries. Petitions submitted to the Courts seeking the liquidation or reorganisation of a PRC company have been subject to significant delays due to a variety of factors. These may include the Courts’ limited resources, relative inexperience in complex bankruptcy matters, reliance on Government direction and the case load of the Courts. The Courts often take direction from government on bankruptcy applications, particularly where there are public policy grounds, for example, the potential triggering of social unrest as a result of large insolvencies.

50. Article 7 of the Judicial Interpretation of the EBL issued in 2011, to provide additional guidance to the Courts on the implementation of the EBL, requires the Courts to conduct a timely examination of the eligibility of the applicant to initiate bankruptcy procedures and the debtor’s cause of bankruptcy. However, there is continuing concern amongst professionals regarding the time the Courts have taken to make decisions on EBL applications. In one case in which we were involved, applications were made under the EBL in 2010 for the formal liquidation/reorganisation of several subsidiaries in different regions in the PRC. Three years later we are still awaiting a decision from the Courts on the commencement of those proceedings.

51. Given the uncertainty whether EBL will be applied, and if so, how long this route may take, IPs will take other steps to secure assets and obtain books and records, including changing the directors and the legal representative (“LR”). Changing the LR requires the consent of the incumbent. If he/she does not cooperate, the IPs may still need to make an application to the relevant government authority and/or the Courts, and while there is no certainty as to these types of applications the respective authorities seem more familiar with these requests and more likely to approve them.

52. To alleviate the uncertainties, a multi-faceted approach is often successful in such cases, particularly where fraud has led to the collapse. The IP will engage experienced, respected PRC Counsel to navigate through the Courts’ processes, engage with the government authorities responsible for the case and at the same time seek to exert measured pressure on management for access to information. Such pressure may include initiating proceedings through the Courts under the EBL, or other commercial or criminal remedies, depending on the circumstances.

53. Where the activities involve multiple jurisdictions, the IP may also consider obtaining recognition of the proceedings to facilitate investigations in jurisdictions outside the PRC in which the holding company has a presence. Recognition may enable the IP to obtain records, and issue demands for documentation against service providers and other third parties outside the PRC, to provide information in relation to the company’s affairs. This will often
assist the IP in his investigations and/or in formulating a litigation strategy to recover assets for the benefit of stakeholders.
APPENDIX 1

1. Insolvency
   (a) Cash Flow Insolvency
   (b) Statutory Demands
   (c) Balance Sheet Insolvency
   (d) Disputed Debts
   (e) Insurance Companies
   (f) Segregated Accounts Companies
   (g) Trusts

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3. Compulsory Winding up
   (a) Who May Petition
   (b) Conduct of the Petition
   (c) Voluntary Winding Up in Tandem
   (d) Court’s Powers on a Petition
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5. Contributories

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   (a) Pari passu Principle
   (b) Proofs of Debt
   (c) Manner of Proof
   (d) Priority of Claims
   (e) Set-Off
(f) Assets Available to the Liquidator

(g) Floating Charges

7. End of the liquidation

8. Provisional Liquidation

9. Creditors’ Arrangements

10. Improving the Insolvent Estate

(a) Introduction

(b) Fraudulent Conveyances

(c) Fraudulent Preferences

(d) Voidable Floating Charges

(e) Onerous Transactions

(f) Post-Petition Dispositions

(g) Claims Against Directors

   (i) Fraudulent Trading

   (ii) Misfeasance and Breach of Trust

   (iii) Shadow Directors and de facto Directors

   (iv) Indemnity Clauses

11. Restructuring

(a) “Light touch” Provisional Liquidation

(b) Restructuring versus Winding Up

(c) Procedure

12. Schemes of Arrangement

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(b) Scheme Documentation

(c) The Meetings

(d) Utility of Schemes of Arrangement

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(c) Structuring Options
   (i) Debt for Equity Swaps
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14. Cross-border Restructuring
   (a) The Gibbs Jurisdiction
   (b) Cross-Border Recognition and Parallel Schemes
   (c) The Tambrook Jurisdiction
   (d) Modified Universalism in the Post-Singularis Era
   (e) Significance of Domicile
   (f) Forum conveniens and Submission to the Jurisdiction
   (g) “Light-touch” Liquidation in Support of Foreign Liquidation

15. Orders in Aid of Foreign Proceedings.