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Principles Governing the Fixing of Insolvency Practitioners' Remuneration

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Principles and Rules on Insolvency Practitioners' Remuneration

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Abstract

Overcharging by insolvency practitioners is a problem which has invited legislative and judicial intervention in several commonwealth jurisdictions, and it continues to be a concern in many of them. Such regulation is justified because of the failure of unsecured creditors to effectively monitor and control the practitioner's charges, leading to failure in the insolvency practitioners' services market. However, the rules on the fixing of the practitioner's remuneration are not always aligned with basic principles, and their applications can be challenging. From the vantage point that regulations should seek to combat market failure, this article elucidates the principles and rules that ought to apply in the fixing of insolvency practitioners' remuneration. It analyses who ought to be empowered to set remuneration, the rules on disclosure, the meaning of the value of services rendered and the approaches of the courts in computing value, by reference to the laws of England, Singapore and Hong Kong SAR, and suggests reforms to make the rules consistent with the identified principles.

Keywords

Insolvency practitioners; liquidators; IP remuneration; liquidators' remuneration; market failure

1 INTRODUCTION

The issue of how to prevent insolvency practitioners ('IPs') from charging excessive fees has troubled several Commonwealth jurisdictions in the last few decades. This has led to judicial innovations and law reforms to regulate the market for IPs' remuneration, which often took cues from similar developments elsewhere. The main problems, principles and rules therefore remain largely similar throughout those Commonwealth jurisdictions, and indeed probably throughout all Commonwealth jurisdictions that adopt the English system of appointing insolvency practitioners as office holders in insolvency proceedings.

This article contributes to the literature on the topic by approaching it from the rationale for the regulation of IPs' remuneration and analysing the extent to which the laws support or undermine that rationale, and in the latter situation, suggesting how the laws may be reformed. It examines the governing principles and rules deriving from the rationale and their applications. While the discussion has relevance to jurisdictions generally where the rationale applies, it is imperative to conduct the discussion by reference to the laws of specific jurisdictions to both give substance for the discussion and to relate it to developments on the ground. For this purpose, the laws of England, Singapore and Hong Kong SAR (Hong Kong) have been chosen. While Hong Kong is not a member of the Commonwealth, it is included because its insolvency laws and its laws on IPs' remuneration belong to the Commonwealth family and offer interesting comparisons to the laws of England and Singapore.

Regulation of the market for IPs' remuneration has been justified mainly on the failure of unsecured creditors to effectively monitor and control the IPs' charges, or in other words, failure in the market for IPs' services. This article argues that the rules on the bodies fixing IPs' remuneration, the people given standing to challenge remuneration and the disclosure of information essential for fixing

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remuneration are not always aligned with basic principles. Some rules bear the burden of historical legacy and have not been updated, while others are inconsistent with the proper functioning of the market for IPs' services. Next, the question of what remuneration is supposed to be a function of is perhaps the most important issue on the fixing of IPs' remuneration. This is not an issue where the market operates well. However, where the court is asked to fix or review remuneration where the market has failed, the question becomes one of central importance. It is thus not surprising that it has attracted much discussion, both in law reform reports and the cases. While there is general consensus in England, Singapore and Hong Kong that remuneration should be a function of the value of services rendered by the IPs, not the cost of the time spent by the IPs, the concept of value is complex and liable to mislead or confuse if not understood correctly. This article analyses the concept of value to sharpen our understanding of it, especially in the relationship between value on the one hand and time spent, costs and returns on the other. A related difficulty to the concept of value is that the factors said to reflect the value of services rendered by IPs are stated at a high level of abstraction and their application can often be challenging. This article examines the approaches adopted in England, Singapore and Hong Kong courts and argues that any working scheme adopted by the court in fixing remuneration must state the issues affecting remuneration, for eg, whether there has been overservicing, overmanning, whether the time spent is proportionate to the to the nature, complexity and extent of the work completed or to be completed etc, and deal with those issues in a logical and consistent fashion. In particular, it argues that in computing the quantum a distinction should be drawn between issues which permeate the entire services rendered and issues which only affect specific heads of claim.

At this juncture, two clarifications on the scope of this article are in order. First, while the discussion should relate to most of the functions performed by IPs, ie, as receivers and managers, liquidators, administrators[1] and trustees in bankruptcy, emphasis will be placed on the rules relating to liquidators. Legislation relating to liquidation tend to be the most complete. This is also more comprehensive, as it would cover both insolvent and solvent liquidations, as well as IP appointments in and out of court. Secondly, while there are also controls over remuneration that do not affect the quantum fixed in a particular case (eg complaints to a professional body),[2] they are outside the scope of this article.

This article proceeds as follows. Section 2 discusses the reasons for market failure in the insolvency practitioners' services market, in particular, the failure of unsecured creditors to effectively monitor and control IPs' charges, by reference to law reform reports and market study. Section 3 analyses the rules on the bodies fixing remuneration, ie, the market (via the creditors or members) and the courts. It argues that the rules on remuneration-setting by the market suffer from the historical emphasis on the distinction between court-ordered and voluntary liquidations. To the extent that they are inconsistent with two basic principles – that the parties which are the residual claimants in liquidations should be entitled to set the IPs' remuneration, and a party with a financial interest in the liquidation ought to be able to challenge the IP's remuneration in court, they should be reformed. Section 4 discusses the rules on the information to be disclosed before remuneration is set, which helps to

[1] The Singapore equivalent of administration is known as judicial management, and there is no Hong Kong equivalent of such a procedure. For the point that remuneration of all such offices are generally guided by the same principles, see *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638, 647 [*Maxwell No 2*]; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21 [21] [*Linda Kao*].

[2] See eg The Insolvency Service, 'Insolvency practitioners: guidance on how to complain about an insolvency practitioner' (4 November 2019) [5.1]–[5.2], < https://www.gov.uk/government/publications/insolvency-practitioners-guidance-for-those-who-want-to-complain/insolvency-practitioners-guidance-on-how-to-complain-about-an-insolvency-practitioner> (accessed 1 August 2020).

combat market failure. It argues that the rules in the three jurisdictions suffer from weaknesses, again mainly because of the between drawn between court-ordered and voluntary liquidations. Section 5 discusses the principles on the computing of IPs' remuneration and their applications. It discusses the concept of value and the approaches the courts have adopted. Section 6 concludes.

2 MARKET FAILURE IN THE INSOLVENCY PRACTITIONERS' SERVICES MARKET

To understand why and how IPs' remuneration is regulated, the reasons for regulation must first be elucidated. As a starting point, IPs are service providers to the beneficiaries of the insolvency process, who are typically creditors and in some cases the members. In the absence of regulations, IPs' remuneration reflects the price that they can command for their services, as with other service providers in a market economy. Generally speaking, complaints about the price set between a willing buyer and seller of a service will not be heard; in the absence of vitiating factors the price will not be reviewed by a court, nor generally speaking will the government step in.

The market for IP's services serves as an exception to the above. Applications to court can be made to review the remuneration in many circumstances,[3] and numerous law reform reports have been published on the problems of IP's remuneration.[4] As the report from the Office of Fair Trading (OFT Study)[5] and Kempson Review concluded, there is evidence of market failure in the insolvency practitioners' services market,[6] such that even market rates may be viewed as excessive.[7] That, and given the importance of the IP's services and the public interest in the proper administration of insolvency procedures,[8] intervention is thought to be necessary.

Why does market failure arise? In the Kempson Review, it was noted that well-resourced repeat players in insolvency proceedings – generally the secured creditors – can control the IP's costs effectively.[9] However, control over remuneration tends to be weak or virtually non-existent where it lies in the hands of the unsecured creditors.[10] This is because unsecured creditors tend to be poorly engaged in the process, due to their limited knowledge and the opportunity cost of engagement.[11]

[3] Discussed in section 3.2 below.

[4] See eg Lord Chancellor's Department, Report of Mr Justice Ferris' Working Party, *The Remuneration of Office-Holders and Certain Related Matters* (1998) [Ferris Report]; Elaine Kempson, *Review of Insolvency Practitioner Fees: Report to the Insolvency Service* (July 2013) [Kempson Review]; The Law Reform Commission of Hong Kong, *Report on The Winding-Up Provisions of The Companies Ordinance* (1999), 17–23; Singapore Academy of Law, Law Reform Committee, *The Remuneration of Corporate Insolvency Practitioners and Certain Related Matters: A Law Reform Discussion Paper* (2005); Australian Government, Treasury, *Review of The Regulation of Corporate Insolvency Practitioners: Report of The Working Party* (June 1997); Australian Senate, Economics References Committee, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for A New Framework* (September 2010); Australian Government, Treasury, *Options Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (June 2011).

[5] Office of Fair Trading, *The Market for Corporate Insolvency Practitioners: A Market Study* (June 2010, OFT1245) [OFT Study].

[6] OFT Study, ibid [1.6], Kempson Review (n 4) [4.2.1].

[7] Suggested in Singapore: *Re Econ Corp Ltd* [2004] 2 SLR(R) 264 [54] [*Re Econ*]; Singapore Academy of Law, Law Reform Committee, *The Remuneration of Corporate Insolvency Practitioners and Certain Related Matters: A Law Reform Discussion Paper* (2005) [46].

[8] Department of Trade, *Insolvency Law and Practice: Report of the Review Committee* (Cmd 8558, 1982) [1734]; *Brook v Reed* [2011] EWCA Civ 331, [2011] 3 All ER 743 [5]–[6] [*Brook*].

[9] Kempson Review (n 4) 33, 40.

[10] Kempson Review (n 4) 40; OFT Study (n 5) [4.31]–[4.34]

[11] Kempson Review (n 4) 40; OFT Study (n 5) [4.59], [4.63]–[4.68].

They often have no other experience of corporate insolvency,[12] and expending effort to close the knowledge gap so that they can actively participate is rarely profitable. Any additional recovery would be rateably divided amongst all other creditors anyway. Due to their dispersed interest and free-rider problems, they seldom get involved in insolvency proceedings. 'While there are formal mechanisms for unsecured creditors to influence the process, their limited use indicates that they are impractical. In the majority of situations the costs of getting involved are perceived to outweigh the benefits.'[13] Many unsecured creditors treat the fixing of remuneration as a rubber-stamping exercise.[14] Similarly, it has also been observed in Australia that a key problem concerning remuneration-setting mechanisms is the lack of creditor knowledge and engagement.[15]

Other factors may also contribute towards market failure. For instance, the number of IPs with the necessary qualifications and experience can be too small to create effective competition. This was the problem perceived by the Grand Court of the Cayman Islands when it decided to set guidelines and provide directions for the fixing of liquidators' remuneration.[16] In Australia it has been suggested that opening up the insolvency profession by altering the qualification requirements was 'the best way to resolve the problem of overcharging and over servicing.'[17]

The situation is also made worse by the popularity of time-costing. It has been noted that the 'three main approaches' for the calculation of IPs' remuneration are (i) percentage of recoveries or distributions; (ii) fixed fee; and (iii) time-cost (hourly rates).[18] Time-costing however is the usual basis in England,[19] Singapore,[20] and Hong Kong.[21] While all three bases have their own problems, time-costing in particular exacerbates the effect of market failure. Significant technical expertise and expenditure of time are required to evaluate what is reasonable in relation to the rates and the number of hours charged,[22] which unsecured creditors do not possess and are unwilling to commit respectively. Where controls are weak, time-costing can end up as 'a licence to print money',[23] since the number of hours charged is undefined. This and other issues relating to time-costing will be explored in greater detail subsequently, since its popularity means that many problems associated with remuneration are in fact problems with time-costing.

Broadly speaking, there are two possible responses to this market failure: improve the efficiency and operation of the market; or introduce regulatory remedies so that the market is not the sole

[12] Kempson Review (n 4) 40; OFT Study (n 5) [1.14].
[13] OFT Study (n 5) [1.15].
[14] Kempson Review (n 4) 18.
[15] Australian Government, Treasury, *Review of The Regulation of Corporate Insolvency Practitioners: Report of The Working Party* (June 1997) [10.41]–[10.42].
[16] *Attorney General of the Cayman Islands v James Cleaver* [2006] UKPC 28, [2006] 1 WLR 2245, [39].
[17] Australian Government, Treasury, *Options Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (June 2011) [11.54]. This was suggested even though the Australian market was arguably more competitive than that of the UK: see [5.47].
[18] Eric Baijal *et al*, 'Office-holder Remuneration - Some International Comparisons' (INSOL International: London, 2017) 2.
[19] Kempson Review (n 4) 5
[20] *Re Econ* (n 7) [3].
[21] Eric Baijal *et al*, 'Office-holder Remuneration - Some International Comparisons' (INSOL International: London, 2017) 32; The Law Reform Commission of Hong Kong, *Report on The Winding-Up Provisions of The Companies Ordinance* (1999) [4.9].
[22] Kempson Review (n 4) 21, 47.
[23] Francis Ferris, 'Insolvency Remuneration – Translating Adjectives into Action' (1999) 2 Insolv L 48, 52.

determinant of IPs' remuneration.[24] As will be seen, both approaches are employed by the rules governing remuneration, but those rules do not always operate logically. To be sure, there are other measures to combat market failure, as discussed in the Kempson Review. For example, increase competition in the market of IP services; enhanced monitoring by regulator(s);[25] simple, low-cost mediation and adjudication service for disputes[26] and independent oversight of fees.[27] These measures are outside the ambit of this article.

3 THE PARTIES DETERMINING INSOLVENCY PRACTITIONERS' REMUNERATION

3.1 Remuneration-Setting by the Market

As mentioned, remuneration ought to be fixed by market forces as a starting point; where the market participants are engaged in the process, such control can be adequate.

Where an insolvent liquidation is involved, the market participants are the IPs and the creditors, since the creditors are entitled to distributions of the company's assets net of costs (which includes the IP's remuneration). The Greene Committee noted in 1926 that creditors ought to have control of insolvent voluntary liquidations, including on matters concerning remuneration.[28] Similarly, it was recognised by the Law Reform Committee of the Singapore Academy of Law that creditors should be the first port of call in the determination of remuneration, as they are 'best placed to look after their own interests'.[29]

Conversely, where the company is solvent it is the members who should be entitled to set the remuneration. The creditors have no interest in the performance of the IP or his remuneration, since their debts would be fully discharged in a solvent liquidation. Therefore, the basic principle is that the parties which are the residual claimants in liquidations should be entitled to set the IPs' remuneration. While this may seem straightforward, the laws on who determines IPs' remuneration are not always aligned with the basic principle.

3.1.1 England

Consider court-ordered liquidations (CtOL) in the UK, where remuneration is fixed by the liquidation committee, or alternatively the creditors, where possible.[30] In the context of a solvent CtOL (such as winding up on the just and equitable ground), the liquidation committee will either have a majority of creditor representatives or an equal number of creditor and contributory representatives,[31] unless the creditors decide not to set up a liquidation committee.[32] In short, even where the company is solvent,

[24] Kempson Review (n 4) 42.
[25] ibid 49.
[26] ibid 50.
[27] ibid.
[28] Board of Trade, *Company Law Amendment Committee Report* (1926, Cmd 2657) [77].
[29] Singapore Academy of Law, Law Reform Committee, *The Remuneration of Corporate Insolvency Practitioners and Certain Related Matters: A Law Reform Discussion Paper* (2005) [56].
[30] The Insolvency (England and Wales) Rules 2016, SI 2016/1024, r 18.20(2)–(3) [IR 2016]. The liquidation committee's decision may however be overridden by the creditors on the liquidator's request under r 18.25(2).
[31] Liquidation committees must have between three and five members elected by the creditors, and at most three members elected by the contributories where the grounds for liquidation did not include insolvency: IR 2016, r 17.3(3). See also Insolvency Act 1986 (UK), c 45, s 141 [IA].
[32] Contributories will only make up the entire liquidation committee where the creditors do not decide on the establishment of such a committee, but the contributories decide otherwise: IR 2016, r 17.6.

the IP's remuneration will be fixed in the first instance by a committee that in most cases primarily represents the creditors, and in the alternative involves recourse to the creditors with the contributories having no say at all.

3.1.2 Singapore

To a lesser degree, the same issue also arises with respect to solvent CtOL in Singapore. As with the UK, the liquidation committee is the first port of call. [33] However, the membership of the liquidation committee is decided by both the creditors' and the contributories' meetings, with the court making the determination if differences arise. [34] Where a solvent CtOL is involved, the court can take the view that contributories should at least represent the majority of the committee, [35] in which case remuneration will be determined by the correct party. If remuneration is not determined by the liquidation committee however, the arbitrary result that creditors determine remuneration will again apply in Singapore.

3.1.3 Hong Kong

Hong Kong law is the same as that of Singapore law on this point, with the exception that creditors cannot directly fix remuneration. [36] Thus, Hong Kong law does not face the problem of creditors fixing remuneration in a solvent liquidation, but the creditors are also unable to fix remuneration in an insolvent liquidation.

3.1.4 Historical Emphasis on Distinction Between Court-Ordered and Voluntary Liquidations

It appears that the current state of affairs is caused by the historical emphasis on the distinction between court-ordered and voluntary liquidations, rather than a difference in views on the applicable principle. Liquidation of companies first assumed its modern form with the passage of the Joint Stock Companies Act 1856, which introduced the voluntary liquidation when only CtOL was available previously. [37] The legislation therefore distinguished between CtOL [38] and voluntary liquidations. [39] However, solvent and insolvent liquidations were not distinguished from each other, such that members retained significant control over insolvent companies undergoing voluntary liquidations. This unsatisfactory state of affairs was noted by the Greene Committee, which recommended distinguishing between MVL (solvent) for solvent companies and creditors' voluntary liquidation

[33] The statutory term in Singapore is committee of inspection and not liquidation committee, but all similar bodies will be referred to as liquidation committee for the sake of convenience: Insolvency, Restructuring and Dissolution Act 2018 (Singapore), No 40 of 2018, s 139(3) [IRDA]. Most of the IRDA came into force on 30 July 2020.

[34] IRDA, ss 150–151.

[35] The Australian case of *Re James; Re Cowra Processors Pty Ltd* (1995) 15 ACLC 1582 accepted the logic of this point, agreeing with the argument that 'if there is certain to be a net deficit of realisable assets … then … all members of the Committee should represent creditors. Conversely, if a net surplus is likely, then it is reasonable to expect that contributories should have a fair representation'. In that case the company was insolvent, and it was unnecessary to consider what 'fair representation' means for the contributories means in a solvent company.

[36] Companies (Winding Up and Miscellaneous Provisions) Ordinance (Hong Kong), Cap 32, s 196(2) [CWUO]. For the constitution of the liquidation committee, see s 206.

[37] Andrew Keay, *McPherson & Keay The Law of Company Liquidation* (4th edn, Sweet & Maxwell, 2018) [1-030]–[1-031].

[38] Joint Stock Companies Act 1856, Part III, LXVII et seq.

[39] Ibid Part III, CII et seq.

('CrVL') for insolvent companies.[40] This suggestion was implemented in the Companies Act 1929,[41] but unfortunately this refinement was not applied to CtOL, where the same rules continue to cover both solvent and insolvent liquidations. Consequently, the reverse problem of creditors controlling a solvent CtOL continues to exist. This actually leads to problems beyond the issue of remuneration fixing, but that is beyond the scope of this article.

3.1.5 Conclusion

In summary then, who sets remuneration in the first instance should depend on whether the proceeding involves a solvent or an insolvent company. However, the current legislations in the three jurisdictions instead focus on whether the liquidation is court-ordered or voluntary, which is arbitrary. The problem in England and Singapore is letting creditors determine liquidator remuneration in solvent CtOL. It is recommended that English law and Singapore law should be amended to let the contributories decide on whether to form a liquidation committee, and for the committee to have only contributories or a majority of contributories as members. Where no such committee is formed, the contributories should determine the liquidator's remuneration. Hong Kong law does not suffer the same problem, but it would make sense to amend the law to let creditors fix remuneration in insolvent liquidations.

3.2 Setting or Review of Remuneration by the Court

Given the market failure described at the beginning, market participants may have insufficient incentives to participate in remuneration-setting (in which case no remuneration will be fixed) or be unable to exercise effective oversight (in which case the remuneration will be too high). A mechanism for setting or reviewing the IPs' remuneration must thus be provided for.

Where the problem is that market mechanisms completely fail to fix remuneration, a statutory formula is relied upon for CtOL in the UK, [42] while the court fixes remuneration in MVL and CrVL.[43] In Singapore and Hong Kong, the court fixes remuneration as a fallback mechanism in CtOL,[44] but no such mechanism is directly provided for in the case of MVL and CrVL.[45] It is likely that in such situations the court is also capable of fixing remuneration, by relying on either provisions conferring broad powers in voluntary liquidations or the court's inherent jurisdiction.[46]

3.2.1 Standing to Apply to Court for Review of Remuneration

[40] See the text to n 28.

[41] Distinguishing between 'Provisions applicable to a Members'– Voluntary Winding Up' at s 231 et seq, and 'Provisions applicable to a Creditors' Voluntary Winding Up' at s 237 et seq. See also Keay (n 37) [1-032].

[42] IR 2016, r 18.22.

[43] IR 2016, r 18.23.

[44] IRDA, s 139(3)(c); CWUO, s 196(2)(b). While the Companies (Winding-Up) Rules (Hong Kong), Cap 32H, r 146(2) provides that the liquidator's remuneration in the absence of a liquidation committee should be fixed by the scale fees applicable to the Official Receiver, it has been held that as a matter of construction the court's discretion is unfettered in this regard, and the Official Receiver's scale 'should not be applied as the default basis of the remuneration': *Re Goldlory Restaurant Ltd* [2006] HKCU 1112 [38].

[45] MVL: IRDA, s 164(1); CWUO, s 235(1). CrVL: IRDA, s 167(3); CWUO, s 244(1).

[46] For voluntary liquidations in both Singapore and Hong Kong, the liquidator can apply to court to 'determine any question' or to exercise the powers it has in a CtOL: IRDA, s 181(1); CWUO, s 255. On the inherent jurisdiction, see *Attorney General of the Cayman Islands v James Cleaver* (n 16) [14]. Hong Kong courts have relied on this jurisdiction to fix the remuneration of provisional liquidators: *Re Peregrine Investments Holdings Ltd* [1998] 3 HKC 1, 9 [*Peregrine*].

Where the complaint is that the remuneration fixed is too high, the court is usually empowered in all three jurisdictions to review it. In the UK, creditors in all forms of liquidations, and members in MVL, have standing to make such an application.[47] In Singapore, members with not less than 10% of the issued capital can challenge the remuneration set in a CtOL,[48] whereas all members and creditors have standing in both CrVL and MVL.[49] The Official Receiver can also apply to court to challenge the remuneration set by the liquidation committee if it is 'unnecessarily large' in a CtOL or CrVL.[50] In contrast, review is only available for CtOL under Hong Kong legislation, with the Official Receiver having standing.[51] There is however an additional question of whether review can be sought without relying on legislation. The Hong Kong Court of Appeal has noted in dicta that its control over CtOL is comprehensive, and it could compel a liquidator to submit to taxation of its remuneration even if it has already been approved by the liquidation committee.[52] Similarly, it has been argued in England that the court's powers over its officers (which includes liquidators and trustees in bankruptcy) 'must extend to ensuring that he does not raise unfair or unjustified charges'.[53] Even so, voluntary liquidations may fall outside the reasoning relied on.[54]

All three jurisdictions rely on the court as a remuneration-setting and review body and that is sensible, even though the original impetus for leaving remuneration to the courts probably has got little to do with the notion of market failure as explained above.[55] Though comments have sometimes been made that it is inappropriate for the court to fix remuneration in a discipline which it is unfamiliar with,[56] knowledge of the relevant practice and guidance on the approach to be taken should accumulate with the cases. At the very least, the courts should have more experience with the issues than parties such as unsecured creditors, and could in any event appoint assessors from the profession to assist them

[47] IR 2016, r 18.34. If unsecured creditors or members wish to make an application, they must either represent 10% in value of the unsecured creditors or 10% of the total voting rights of all members, or obtain permission from the court.

[48] IRDA, ss 139(5)–(6).

[49] IRDA, s 175.

[50] Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (Singapore), S 603/2020, r 134(2) read with r 135 (IRDA(R)). Previously only available for CtOL: Companies (Winding Up) Rules (Singapore), Cap 50 R 1, r 142(2).

[51] CWUO, s 196(2A).

[52] *Re Kansa General International Insurance* [1999] 3 HKC 431, 437–438. This was *dicta* because the issue was whether the lower court could sanction a scheme of arrangement subject to the liquidators submitting to taxation, and there was no need to consider the situation outside of a scheme.

[53] *Upton v Taylor* [1999] BPIR 168. That case however did not involve review of remuneration, since there was no valid creditor resolution fixing the trustee in bankruptcy's remuneration in the first place. See also *Ex parte James, Re Condon* (1874) LR 9 Ch App 609; *Lehman Brothers Australia Ltd v Macnamara* [2020] EWCA Civ 321 for the general principal that liquidators who are officers of the court will be directed to act honestly and fairly. Cf *Re Cooper* [2006] NI 103 [18], doubting that this power extends to the determination of remuneration.

[54] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, 287–289. Cf Edward Bailey and Hugo Groves, *Corporate Insolvency: Law and Practice* (5th edn, LexisNexis, 2017) [15.39].

[55] Under earlier legislation the courts were the only body that could set remuneration in a CtOL, presumably because they appointed the liquidator. See eg Joint Stock Companies Act 1856, Part III, XCII; Companies Act 1948 (UK), s 242(2).

[56] Singapore Academy of Law, Law Reform Committee, *The Remuneration of Corporate Insolvency Practitioners and Certain Related Matters: A Law Reform Discussion Paper* (2005) [57], citing *Re Potters Oils Ltd* [1986] 1 WLR 201, 207; The Law Reform Commission of Hong Kong, *Report on The Winding-Up Provisions of The Companies Ordinance* (1999), [4.15]. See also *Mirror Group Newspapers plc v Maxwell* [1999] BCC 684 [*Maxwell (Assessment)*], noting that 'in the case of work undertaken by solicitors, I am able to form an accurate view of what is a reasonable time for any particular task, in relation to the work undertaken by receivers this is far more difficult.'

in complex cases.[57] Further, where the issue is the appropriateness of the remuneration that has been fixed, court procedures allow the dispute between the IP and the creditors/members to be resolved fairly. An alternative is to set up a specialised tribunal involving IPs for this purpose,[58] but additional expenditures in time and costs would be required to maintain such a tribunal, which may also suffer from potential conflicts of interests.[59] The use of a statutory formula, as in the UK for CtOL, is also unobjectionable.[60] But since the formula can only approximate the general market price of a typical liquidation, mechanisms must be in place for revision of fees in exceptional cases, which again leads back to the court.[61]

On the other hand, it is less clear that the selection of parties with standing to challenge remuneration is correct. In principle, a party with a financial interest in the proceeding ought to be able to challenge the IP's remuneration. So it is odd that in Singapore only members and not creditors can challenge the remuneration set in a CtOL. Presumably, the thinking is that the creditors set the remuneration initially, and they should not be challenging their own decision. But as mentioned creditors may not have enough knowledge to evaluate the remuneration at the time of approval, and only gained a better understanding subsequently. Further, the position in CtOL is inconsistent with that in voluntary liquidations, where all members and creditors have a right to challenge remuneration. It is probably better for standing requirements to be less restrictive in this area. It is unlikely that parties without a financial interest in the proceeding will waste time and money on challenging remuneration even if they have standing, whereas not giving standing to parties with a financial interest may cause unnecessary grief.

For the same reasons, it is also surprising that only the Official Receiver has standing to challenge remuneration under the legislation in Hong Kong. From a practical perspective the point might be taken that creditors/members would rarely have the necessary incentive to challenge remuneration anyway. They foot their own costs while the IP's costs are charged to the estate, and any benefit arising out of the challenge is shared amongst all creditors/members.[62] While that is true, and it makes sense to grant a regulatory body standing to challenge egregious remuneration, there is no reason to deny interested creditors/members standing in the rare situations where they do wish to take the initiative. This may not be as much of an issue if an interested creditor/member can invoke the court's comprehensive control over CtOL to challenge remuneration,[63] but this probably does not apply to voluntary liquidations.

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[57] *Re Independent Insurance Co Ltd (No 2)* [2003] EWHC 51 (Ch), [2003] 1 BCLC 640 [8] [*Independent Insurance No 2*]; *Linda Kao* (n 1) [45]–[46]; *Re Lehman Brothers Securities Asia Ltd (No 2)* [2009] HKCU 1281 [53] [*Lehman Asia (No 2)*].

[58] As suggested in The Law Reform Commission of Hong Kong, *Report on The Winding-Up Provisions of The Companies Ordinance* (1999) [4.26]–[4.40]. Cf *OFT Study* (n 10) [7.13] – [7.16], suggesting the establishment of an independent complaints body which limits IPs' inputs to 'a technical advisory capacity.'

[59] Singapore Academy of Law, Law Reform Committee, *The Remuneration of Corporate Insolvency Practitioners and Certain Related Matters: A Law Reform Discussion Paper* (2005) [58]. See also Kempson Review (n 4) 29.

[60] See the discussion in Francis Ferris, 'Insolvency Remuneration – Translating Adjectives into Action' (1999) 2 Insolv L 48, 50.

[61] IR 2016, r 18.28(3)(c) (application to increase remuneration).

[62] Kempson Review (n 4) 27; Australian Government, Treasury, *Options Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (June 2011) [226].

[63] See the text to n 52.

Thus, while judicial control over IP's remuneration is justified, the list of parties who can invoke the powers of the court is not. Loosening the standing requirements in this area for Singapore and Hong Kong would make sense.

4 INFORMATION TO BE DISCLOSED BEFORE REMUNERATION IS SET

Integral to the remuneration fixing or review process is the information that must be disclosed to the remuneration-setting or review body. As noted above, market failure is present partly because the remuneration-setting body often has insufficient knowledge to evaluate what the IP is seeking. To ameliorate this problem, liquidators are required to provide certain information before their remuneration is fixed, such as estimates of the total remuneration and the tasks to be carried out,[64] and indeed also when their remuneration is reviewed by the courts. Similar procedural safeguards have in fact been implemented in all three jurisdictions, but deficiencies persist, as explained below.

4.1 England

In England, information on the work to be done and the likely expenses must be provided by the IP before the basis of his remuneration is fixed, for all liquidations other than MVL.[65] Additionally, if time-costing is to be utilised, the IP must provide creditors with a fee estimate.[66] Remuneration in excess of the fee estimate requires approval of the body that fixed the remuneration.[67]

It is not entirely clear why the MVL is excluded from these safeguards. They were initially introduced by The Insolvency (Amendment) Rules 2015,[68] which was a result of the Kempson Review and the associated consultations.[69] In the consultation document, the UK government took the position that the proposed reforms need not apply to MVL because 'the company is solvent and all creditors are paid in full'.[70] While the safeguards implemented by the amendment rules are entirely different from what was proposed in the consultation,[71] the reason for disapplying them to the MVL is presumably the same.

However, this reasoning is not easy to understand. The creditors may not have an interest in the fairness of the IP's remuneration when they are paid in full, but the members certainly do. It would be odd if overcharging is a problem when the creditors are affected, but perfectly fine if only the members are affected. As a matter of principle, the exclusion of MVL from the relevant safeguards can only be justified if there is evidence that the members are sufficiently involved and knowledgeable to effectively control IPs' remuneration. This may well be the case; some responses to the consultation

[64] Kempson Review (n 4) 43–45.
[65] IR 2016, r 18.16(6)–(7). Further guidelines on what should be disclosed and the manner of disclosure are provided in Statement of Insolvency Practice 9, England and Wales, *Payments to Insolvency Office Holders and their Associates*. For remuneration applications in court, the information to be provided is set out in Practice Direction – Insolvency Proceedings, Part Six: Applications relating to the Remuneration of Appointees [21.4]–[21.7].
[66] IR 2016, r 18.16(4).
[67] IR 2016, r 18.30.
[68] SI 2015/443.
[69] See the Explanatory Memorandum to the Insolvency (Amendment) Rules 2015 [8.2]–[8.4] ('Explanatory Memorandum'), <https://www.legislation.gov.uk/uksi/2015/443/memorandum/contents> (accessed 1 August 2020).
[70] The Insolvency Service, *Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners: Consultation* (2014) 27.
[71] Explanatory Memorandum (n 69) [8.4].

did point out that members are actively involved in MVLs.[72] But this was not the reason which was given.

4.2 Singapore

As for Singapore, procedural safeguards were introduced through the 2016 case of *Linda Kao*,[73] aspects of which were implemented by the recently introduced IRDA Rules.[74] *Linda Kao* was a case where the court-appointed receivers and managers sought sanction from the court regarding their bills of costs, leading to the court's comment that the system for determining IPs' remuneration was unsatisfactory.[75] The court then proceeded to introduce a system of cost-scheduling to control costs and improve transparency and fairness in remunerating IPs.[76]

A cost schedule is primarily a summary of the estimated costs of appointment and the work that will be undertaken.[77] Under *Linda Kao*, the cost schedule normally has to be submitted to the remuneration-setting body (be it the court or otherwise) within a month of appointment for approval.[78] The cost schedule effectively fixes the IP's remuneration when approved, and the IP is allowed to receive interim payments under it. However, court validation must be sought at the end of the process, and the IP may be required to refund any excessive remuneration.[79] Nonetheless, where the sums claimed fall within 15% of the cost schedule, the claim will normally be approved without any intensive review.[80]

The IRDA Rules generally do not address the above matters, and it is very likely case law continues to apply. Instead, the rules establish the legislative basis for submitting the cost schedule for approval, albeit indirectly. When an IP applies to court for 'approval, determination or review' of the IP's remuneration, the IP must either file an affidavit which verifies the cost schedule that has been approved by the relevant remuneration-setting body,[81] or explain why no such cost schedule has been approved.[82] In the latter scenario, a cost schedule must be directly submitted to the court.[83] On the other hand, where a cost schedule has been approved by the relevant remuneration-setting body but

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[72] See eg, The Insolvency Service, *Public Responses to Consultation* (2014), 294 ('In voluntary arrangements and MVLs, creditor (or shareholder) engagement is typically greater'), 302 ('The members are always engaged in the process on MVLs.') < https://www.gov.uk/government/consultations/insolvency-practitioner-regulation-and-fee-structure> (accessed 1 August 2020).

[73] n 1. Other disclosure obligations are imposed where a creditor's meeting is convened to fix remuneration in a CtOL, but they are limited to 'a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by the him': IRDA, s 139(4).

[74] Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (Singapore), S 603/2020 [IRDA(R)]. They came into operation on 30 July 2020: IRDA(R), r 1. Rules dealing with cost schedules are found in Part 9.

[75] *Linda Kao* (n 1) [4]–[5].

[76] ibid [6], [A.20].

[77] ibid [A.31]. Now defined under IRDA(R) (n 50), r 173(2) as containing 'all information that is necessary for the approving body to properly consider and determine the remuneration and expenses of the officeholder', including but not limited to items listed under r 173(3).

[78] *Linda Kao* (n 1) [A.44]–[A.45].

[79] ibid [A.48], [A.50].

[80] ibid [A.51].

[81] IRDA(R), r 173.

[82] IRDA(R), r 174(2)(a).

[83] IRDA(R)), r 174(2)(b).

a creditor or member wishes to challenge the liquidator's claimed remuneration[84] or the approval itself, the creditor or member must file an affidavit exhibiting the cost schedule and state whether there was any material change in circumstances since the approval.[85] If the IP chooses not to submit a cost schedule, any creditor or member can compel the IP to do so by an application to the court,[86] without waiting for the IP's explanation when seeking court approval. Therefore, the legislative framework on the submission of the cost schedule is more comprehensive than that provided in *Linda Kao*.

As for who this cost scheduling system applies to, *Linda Kao* defines it as 'all classes of insolvency practitioners who owe their offices to curial appointment and whose fees are subject to curial approval'.[87] This would include '(a) provisional liquidators; (b) liquidators; (c) judicial managers; and (d) receivers and managers [appointed by the court]', but not private receivers[88] and presumably liquidators in CrVL or MVL, since they are not appointed by the court.[89]

The rationale for disapplying the cost scheduling system to privately appointed IPs is flawed. The court justified this decision by first suggesting that such IPs have 'less of a fiduciary character' and are 'better seen as service providers rather than fiduciaries'.[90] Secondly, it was said that 'market forces play an important role in holding down fees in this area', with parties appointing private practitioners being commercially savvy and wielding considerable market power.[91]

The first reason is hard to follow – it is not clear what difference being appointed by the court makes to IPs' fiduciary character. Focusing on liquidators, they are fiduciaries with respect to the company regardless of how they are appointed.[92] Of course, not all fiduciaries are equal and owe the same duties; the precise relationship between the parties have to be examined.[93] But the reason why liquidators are fiduciaries is because they are agents of the company and are in a loose sense trustees, since they manage and realise the company's assets for the benefit of the creditors or contributories.[94] These characteristics remain the same regardless of whether the winding up is voluntary.[95] To focus on the appointer of the liquidator is to give too much weight to the historical distinctions between

[84] Via the pathways stated in the text to nn 48 and 49.
[85] IRDA(R) r 176.
[86] IRDA(R), r 175.
[87] *Linda Kao* (n 1) [A.41].
[88] ibid [A.36] (i.e. receivers appointed out of court).
[89] IRDA, ss 164(1); 167(1).
[90] *Linda Kao* (n 1) [A.36].
[91] ibid, citing Singapore Academy of Law, Law Reform Committee, *The Remuneration of Corporate Insolvency Practitioners and Certain Related Matters: A Law Reform Discussion Paper* (2005) [40].
[92] *Maxwell No 2* (n 1) 647–648, noting that officer-holders 'are fiduciaries charged with the duty of protecting, getting in, realising and ultimately passing on to others assets and property which belong not to themselves but to creditors or beneficiaries of one kind or another', without distinguishing between their mode of appointment.
[93] *Henderson v Merrett Syndicates* [1995] 2 AC 145, 206; *Tan Yok Koon v Tan Choo Suan* [2017] SGCA 13, [2017] 1 SLR 654 [205].
[94] 'From the practical point of view it does not seem to matter much whether the liquidator is treated as a trustee in the strict sense or simply as an agent, for in either capacity a fiduciary position in relation to the company, its creditors and contributories is occupied.': Keay (n 37) [8-049], cited in *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 [76].
[95] '[T]he essential characteristics of the scheme for dealing with the assets of the company do not differ whichever of these procedures is applicable': *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167, 176.

court-ordered and voluntary liquidations while ignoring the substance of the procedures, a problem discussed above.[96]

The second reason assumes that there is a link between the effectiveness of market forces in controlling remuneration and the mode of appointment, but that is doubtful. The report which was cited by the court dealt specifically with debenture holders who appoint receivers – they are secured creditors and typically in the business of granting credit. Thus, it makes sense that they are capable of taking care of themselves. However, the same reasoning cannot be automatically extended to CrVL and MVL, where there may be no involvement from secured creditors and market failure occurs.[97]

The IRDA Rules has changed the situation, with cost scheduling applying to IPs of a company in judicial management or insolvent liquidation.[98] The idea appears to be that cost scheduling should be used when the company is insolvent or is likely to be insolvent.[99] This recognition that the distinction between solvent and insolvent procedures could be more important than that between court-ordered and voluntary ones should be welcomed. It is however less clear that this insight is properly applied here.

There are situations where effective monitoring of the IP's remuneration in a solvent company is not possible, leaving aside the MVL which was discussed.[100] As *Linda Kao* demonstrated, receivers may be appointed over solvent companies when the shareholders are engaged in disputes, in which case the parties in dispute may be unable to closely monitor or agree on the fees.[101] The same could happen in a just and equitable winding up,[102] which is a remedy for, inter alia, shareholder deadlock.[103] While the common law on cost schedules under *Linda Kao* may continue to apply to these IPs, their exclusion from the IRDA Rules leads to unnecessary confusion and inconsistencies.

4.3 Hong Kong

Hong Kong similarly requires disclosure of a prescribed set of information to the liquidation committee where they determine remuneration in a CtOL. Confirmation that such disclosure has taken place is required when IPs make a request for payment of their remuneration out of the companies liquidation account.[104] However, it appears that this set of information ('Main activities of work performed'; 'Total fees per grade of staff'; etc) relates to the work that has already been done rather than the work to be done, which may increase the likelihood of dispute relative to the early approval procedure adopted in England and Singapore.[105] A prescribed list of information must also be provided to the

[96] See section 3.1.4.
[97] See the text to n 9.
[98] IRDA(R), r 172.
[99] Under IRDA, ss 91 and 94, a condition for a court-ordered or out-of-court judicial management respectively is that the company is or is likely to become unable to pay its debts.
[100] See the text to n 72.
[101] *Linda Kao* (n 1) [A.38]–[A.41].
[102] IRDA, s 125(1)(i).
[103] *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR(R) 362 [21].
[104] Official Receiver's Office Circular No 3/2017, <https://www.oro.gov.hk/eng/publications/circulars.htm> (accessed 1 August 2020). The companies liquidation account is the account into which CtOL liquidators pay the sums which they receive: see CWUO, s 202.
[105] The importance of prior approval is discussed in *Linda Kao* (n 1) [A.26]–[A.28].

court for taxation of the IPs' remuneration.[106] Where remuneration is fixed by the company in general meeting for a MVL or the liquidation committee/creditors for a CrVL,[107] these rules do not apply.

Again, the reasons for differentiating between CtOL, MVL and CrVL for this issue is unclear. Given that these procedural requirements are implemented through an Official Receiver's Office Circular and a Procedural Guide issued by the courts, their scope is probably limited by the nature of the issuing body rather than any consideration of the applicable principles.

Consequently, while all three jurisdictions require the IP to provide specified information to the remuneration-setting or review body, the scope of protection is uneven and defective for the reasons explained. All three jurisdictions would benefit from revising their rules along the lines suggested above.

5 PRINCIPLES ON COMPUTING REMUNERATION AND THEIR APPLICATIONS

5.1 Remuneration as function of value

Perhaps the most important question in the fixing of remuneration is what the remuneration is supposed to be a function of. In one of the most influential cases in this area, *Maxwell No 2*,[108] Ferris J accepted that the five factors to be considered in fixing remuneration are essentially what was set out in r 4.30(2) of the *Insolvency Rules 1986*:[109]

a) Time properly spent by the IP and his staff.
b) The complexity of the case.
c) The responsibilities placed on the IP.
d) The effectiveness of the IP's actions.
e) The value and nature of the property which the IP had to deal with.

He noted that those factors are relevant because they reflect 'the value of the services rendered by the office-holder', and that 'it is this value which is to be rewarded by remuneration'.[110] In particular, in view of the popularity of time-costing, he highlighted that time spent is merely one of the relevant factors and should not be given too much weight. This is because time spent is a function of costs, whereas '[r]emuneration should be fixed so as to reward value, not so as to indemnify against cost.'[111] Unsurprisingly, the same conclusion was reached in a Working Party Report chaired by him,[112] and the same principles are broadly reflected in the current Practice Direction and Insolvency Rules.[113]

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[106] *Procedural Guide for the Taxation / Determination of Bills of Provisional Liquidators or Liquidators by Master*, < https://www.hkicpa.org.hk/professionaltechnical/whatsnew/docs/procedural_guides_A.pdf> (accessed 1 August 2020). See *Re Boldwin Construction Co Ltd* [2006] HKCU 1861 [14]–[17]; *Lehman Asia (No 2)* (n 57) [45]–[48] for a brief description of the nature of the guide.

[107] CWUO, ss 235(1); 244(1).

[108] n 1. Noted to be 'still the leading case on the principles governing the remuneration of an office-holder' in *Re Helen Irene Borodzicz* [2016] BPIR 24 [44].

[109] (UK) SI 1986/1925 [IR 1986], now IR 2016, r 7.38(2). See *Maxwell No 2* (n 1) 650–651.

[110] *Maxwell No 2* ibid 651.

[111] ibid 652.

[112] Ferris Report (n 4) [13.2(5)].

[113] Practice Direction – Insolvency Proceedings, Part Six: Applications relating to the Remuneration of Appointees [21.2], especially [21.2(4)] and [21.2(7)]; IR 2016, r 18.16(9). The status of its predecessor, *Practice Statement: The Fixing and Approval of the Remuneration of Appointees* [2004] BCC 912, was examined in *Brook* (n 8) [43]–[49].

The proposition that remuneration ought to be a function of value rather than costs has also been adopted by Singapore courts, with the elaboration that value is a measure of the difference that the IP made in relation to the objectives of the appointment. [114] This elaboration serves as a useful reminder that only work done within the terms of the appointment is relevant for the calculation of value. That aside, the same set of factors have been referred to.[115]

The position in Hong Kong is less clear cut. While *Maxwell No 2* has been approved for its focus on value rather than costs,[116] there is some uncertainty as to whether value has the same meaning as that in England and Singapore. In the leading case of *Peregrine*, [117] Le Pichon J approved and summarised certain principles set out in *Maxwell No 2*.[118] Surprisingly however, the court rejected the application of the factors set out in IR 1986 r 4.30(2). The court was of the view that:

> The basis of remuneration could have been on one of several bases: a time basis, a realisation basis or, the all encompassing test under r 4.30. Once one basis has been selected, it would not be consistent with the order to apply a basis which has effectively been rejected.[119]

We submit, with respect, that this comment is difficult to understand. IR 1986 r 4.30(2) is concerned with the factors that the court should take into account, not the basis of remuneration, but the court treated r 4.30(2) as a basis much like time-cost and percentage of realisation. This leaves the question of what factors ought to be taken into account when determining value unanswered, beyond a reference to the 'reasonably prudent businessman' test.[120] Curiously, a subsequent Hong Kong case accepted the applicability of the five factors, though the *Peregrine* case was not cited.[121]

5.1.1 Value and Time-costing

While the concept of value is a useful one, it has to be treated carefully – it is liable to mislead if not properly understood.[122] It is important to note that the emphasis on value is in some ways a response to the ubiquity of time-costing and the criticisms levied against it. Without controls to ensure that the charging rate is appropriate, and that the time spent is proportionate to the difficulty or utility of the task performed, the person charging would have carte blanch to charge a headline rate and spend any length of time he deems fit. A similar point has been made in the following oft-cited quote from *Re Carton, Ltd*:

> Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks. Moreover, it is quite impossible to check charges based on such a

[114] *Re Econ* (n 7) [47], [50]; *Linda Kao* (n 1) [31]–[33].
[115] *Linda Kao* (n 1) [40].
[116] *Re the Incorporated Owners of Tai Chi Factory Building* [2020] HKCU 436 [29].
[117] n 46.
[118] ibid, 9–10, 13. This formulation of the principles is 'well established and no doubt familiar to the Masters of the High Court' in relation to taxation of fees: *Re Hong Kong Chiu Chow Po Hing Buddhism Association Ltd (No 2)* [2018] HKCFI 1104, [2018] 3 HKLRD 270 [21], n 1.
[119] *Peregrine* (n 46), 13. On the facts time-costing was specified in the order appointing provisional liquidators: see ibid, 9.
[120] Ibid, 10, 13. See also the text to n 130.
[121] *Re CA Pacific Finance Ltd* [2012] HKCFI 1325 [26] [*CA Pacific Finance*]. This was an application concerning the liquidator's remuneration for administering assets held by the company on trust.
[122] Stephen Baister, 'Remuneration, the Insolvency Practitioner and the Courts' (2006) 22(2) IL&P 50, 52.

> system and to gauge the value of odd hours said to have been spent on the affairs of the company.[123]

Focusing on an evaluation of value limits these flaws of time-costing, by highlighting that long hours should not be rewarded if the work done was unnecessary, while efficiency and success should be compensated for even if little time was spent.[124]

5.1.2 Value and Returns

At the same time, the concept of value may also mislead by creating the impression that only efforts which lead to returns are relevant. The Law Reform Commission of Hong Kong considered that there was too much emphasis on value for money and realizations in the *Ferris Report*, and that remuneration for investigations and actions which do not ultimately bear fruit can be justified.[125] For that reason, the Commission suggested taking into account an additional factor when assessing remuneration: 'the need for and desirability of investigatory work *which may or may not* lead to additional realizations'.[126] This is a variant of a proposed factor in the *Ferris Report*,[127] with the italicised text added in. Indeed, the Ferris Report decided not to include it and other proposed factors, because they were already embraced within one or other of the five factors and listing too many details may lead to 'a tendency to regard this as a mere check-list susceptible to formal answers.'[128] Indeed, as explained below, there is no substantive difference between the report of the Law Reform Commission of Hong Kong and the Ferris Report on the issue.

It is crucial to note that the concept of value as envisaged by Ferris J is dependent on the relevant insolvency proceeding within which the IP performs his or her duties in fulfilment of the purposes of the insolvency proceeding. If a piece of work falls within the duties of the IP, and the IP has performed the work with proper care and skill, this would generally constitute value even if it does not lead to any realisation. Two situations have been much discussed in relation to that proposition.

First, the duties of liquidators, as pointed out in the Ferris Report, include 'the carrying out of certain investigations and the recognition of the public interest element as well as the administration of the assets.'[129] Some investigations may lead to recoveries for the benefit of the creditors, but regardless of the outcome, where IPs are under duties to investigate, it is only proper that they are remunerated for the proper discharge of their duties of investigation. It may be queried why the creditors of insolvent companies, instead of the State, should bear the costs of 'public-interests' investigations. That issue, however, is not the concern of this article.

Secondly, Ferris J noted in *Maxwell No 2* that expensive failures can be remunerated, so long as a reasonably prudent person would have done what the IP did.[130] Indeed, even though he described the

[123] (1923) 39 TLR 194, 197, cited in *Maxwell No 2* (n 1) 651; *Peregrine* (n 46) 17; *Re Econ* (n 7) [45].
[124] Ferris Report (n 4) [6.9]–[6.10]. See also the discussion on the relevance of success in *Jacob v UIC Insurance Co Ltd* [2007] Bus LR 568 [90]–[92].
[125] The Law Reform Commission of Hong Kong, *Report on The Winding-Up Provisions of The Companies Ordinance* (1999) [4.25].
[126] ibid [4.24]. Emphasis in original.
[127] Ferris Report (n 4) [6.6]–[6.7].
[128] ibid [6.7].
[129] ibid [4.2].
[130] *Maxwell No 2* (n 1) 649. See also *Linda Kao* (n 1) [35]–[36]; *Peregrine* (n 46) 10H. For an example of a case where remuneration was awarded for work done on a time-barred claim, see *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd* [2015] 4 SLR 955 [54]–[57] [*Dovechem*].

costs and remuneration sought as 'profoundly shocking' (£1,628,572, compared with the net assets of £1,672,500),[131] most of what was claimed was allowed in the subsequent assessment as potentially valuable assets turned out to be worthless or unrecoverable due to the 'immensely complex financial labyrinth' involved.[132]

5.1.3 Value and Costs

That value is not a simple function of monetary returns reveals another important point. The ritual incantation that remuneration is a function of value, not costs; and the associated criticism of time-costing on the basis that time used is merely a function of costs – cannot be taken too literally.[133] Where there is a justifiable but expensive failure, the only appropriate measure of remuneration is the time and effort put in, which are reflective of costs. That value and costs are related is also evident from how time properly spent is one of the five widely accepted factors, which cannot be the case if value and costs are completely distinct, and time is only a function of costs. The key word here is *properly*; value can be correlated to costs and by extension time spent if they were properly incurred in the circumstances. The focus on value should lead to an analysis of what was properly done, and not a rejection of the relevance of costs.

For these reasons, the court in *Linda Kao* probably went too far when it seemingly accepted that 'the quantum produced by time-based costing has little to do with the actual value of the service rendered', [134] and that if a more objective alternative can be found time-costing should be jettisoned.[135] With respect, time-costing, if done properly, can be strongly correlated with value. That may be why no better alternatives have been found.

5.1.4 In Defence of Time-costing

That time-costing is not an inherently bad measure of value can also be proven by examining the issue from first principles. At the beginning it was noted that remuneration ought to be fixed by market forces, but intervention is justified because market failure arises in specific situations. It follows that value should be equivalent to the market value of the IP's service in a competitive market, ie, the remuneration which the creditors would have agreed to if they, possessed of the requisite knowledge and bargaining strength, were making the decision. Indeed, this is the conventional approach to valuing services in the market. Thus, where the court is fixing remuneration, it is 'in effect, a hypothetical client negotiating the terms after the event.'[136] The approach of the court and that of any other remuneration-setting body should be the same.[137]

This focus on market value may be criticised on the basis that it is not practically useful, as courts cannot effectively emulate market participants. After all, their word is final without the need for negotiations, and they do not face the financial consequences of their decisions.

Even so, this conceptualisation provides two related insights. First, it confirms that time-costing can be an accurate measure of value. This is because value is equal to whatever knowledgeable creditors accept, and in practice time-costing is accepted by creditors such as banks, although they typically

[131] *Maxwell No 2* (n 1) 644–645.
[132] *Maxwell (Assessment)* (n 56).
[133] See the text to n 111.
[134] *Linda Kao* (n 1) [52].
[135] See also the comments made in *Peregrine* (n 46) 17.
[136] *Independent Insurance No 2* (n 57) [19].
[137] Ferris Report (n 4) [7.2]; *Linda Kao* (n 1) [A.45]–[A.46].

require a fee estimate which also operates as a cap.[138] Second, the principled way to anchor the valuation exercise is to use the market rates for assignments of similar complexity as the starting point (especially if they are rates set in a competitive subset of the market), before making further adjustments.[139] Thus, the need for compilation of information on market rates,[140] or alternatively fee guidelines by professional bodies,[141] has frequently been recognised. Unfortunately, there has been little action on this front amongst the three jurisdictions. In contrast, the Australian Securities & Investments Commission has made publicly available data on IPs' remuneration by region and industry, based on the IP's estimate of the collectible amount of remuneration when submitting statutory reports.[142] Such data would be helpful to both the courts and any other remuneration-setting body when they assess what the IP seeks. Otherwise, market rates have to be proven on a case by case basis through evidence,[143] which creates additional costs.

In short, remuneration ought to reflect value – a measure of what the IP has contributed to the goals of the procedure. While time-costing is both the most prevalent and widely criticised basis for measuring remuneration, it is a perfectly legitimate method for doing so. What should be avoided is the acceptance of the IP's rates and recorded hours at face value. Instead, they have to be evaluated based on the relevant qualitative factors to ensure that the rates are justified and that the hours are what a reasonably prudent person would have spent. In this regard, market rates provide helpful guidance as a starting point.

5.2 Burden of Proof

In relation to the proof of facts relevant to the determination of value, the IP's fiduciary status is critical. In *Maxwell No 2*, it was noted that as fiduciaries, the fundamental obligation of IPs is the duty to account. Consequently, they must justify their claim if they seek to be remunerated.[144] In practical terms, this means that they must explain what they did and why they did it; show that their rates are in line with market rates; and keep proper records. If justification is lacking, doubts will be resolved against them.[145] This principle is uncontroversial and has been accepted in Singapore and Hong Kong.[146]

Beyond its doctrinal justifications under the law of fiduciaries, this principle can also be seen as a response to the market failure highlighted at the beginning. The general duty to account complements

[138] Kempson Review (n 4) 13–14.
[139] *Re Cabletel Installations Ltd* [2005] BPIR 28 [19] [*Cabletel*]; *Independent Insurance No 2* (n 57) [22]. This is to be distinguished from the normal charge out rate for a particular IP, since that may reflect expertise that is unnecessary in the context of a straightforward assignment: *Re Secondus* [2013] Lexis Citation 99 [12]. Cf *Re Econ* (n 7) [54], [66].
[140] Kempson Review (n 4) 44–45; Ferris Report (n 4) [5.9].
[141] *Linda Kao* (n 1) [50]; Baister (n 122) 53.
[142] ASIC, *Insolvency statistics – Series 3: External administrator reports*, URL: https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/ (last accessed 1 August 2020). See especially Series 3.1 and 3.2.
[143] As noted in *Maxwell No 2* (n 1) 648: 'The charging rate claimed must also be proved by evidence; and what is relevant is not the charging rate of the particular individual but the broad average or general rate charged by persons of the relevant status and qualifications'. See also *Dovechem* (n 130) [70].
[144] *Maxwell No 2* (n 1) 648.
[145] ibid 648–649.
[146] *Linda Kao* (n 1) [26]–[30]; *Peregrine* (n 46) 9–10.

specific rules on disclosure to the remuneration-setting body,[147] allowing them to have better control over the IP's remuneration.

Not all principles relating to the justification of remuneration point in the same direction, however. In England, the guiding principles enumerated in paragraph 21.2 of the Practice Direction – Insolvency Proceedings[148] neatly demonstrate this. While principles (1) and (2) reflect the fiduciary principle – it is for the IP to justify his remuneration and doubts are to be resolved against him – principle (3) undermines this by requiring the court to give weight to the fact that the IP is a member of a profession and an officer of the court. In *Simion v Brown,* this principle was applied such that charges which 'appear on the high side' were not rejected or reduced.[149] This is sometimes couched as the idea that IPs ought to be allowed a margin of appreciation since they were appointed to exercise their own judgment,[150] a point which has been accepted in Singapore.[151]

These contradictory ideas may partly be explained by principle (6), 'proportionality of information': the nature and extent of information to be provided by the IP should be proportionate to the quantum of remuneration and other matters such as the nature and complexity of the work. Consequently, IPs cannot be expected to maintain extensive contemporaneous records of everything they do so that they can justify their actions subsequently; inconvenience and additional costs would be incurred otherwise.[152] It follows that a claim should not be disallowed simply because there are gaps in the documentation, and the IP's professional status can be relied upon to allow the claim despite such gaps.

Another reason for this tension is that IPs are expected to act reasonably and not perfectly,[153] but the line between an unjustified action and a reasonable but flawed one can be difficult to draw. In *Independent Insurance No 2*, the total cost of documentary management amounted to £1.3 million, because most of it was carried out by the IPs' own staff.[154] The assessor noted that it would have been significantly cheaper if contract or agency staff were engaged instead.[155] The IP justified the expenditure by reference to the exceptional importance of such work on the facts, due to the nature of the insurance business, the need to co-operate with external agencies such as the Serious Fraud Office, and so on.[156] The court did not explore the details of the justification, and considered that the choice was within the IPs' margin of appreciation, even if another IP would have resolved the issue more cheaply.[157] However, another court may well have reasonably come to the conclusion that the justifications ought to be scrutinised in detail, and if there was any doubt as to whether the costs were necessary, the doubt should be resolved against the IP.

These difficulties reflect the broader point that while it is important to prevent IPs from charging excessive remuneration, it is equally important that they are fairly remunerated, or they would simply

[147] See Part IV, above.
[148] Practice Direction – Insolvency Proceedings, Part Six: Applications relating to the Remuneration of Appointees.
[149] [2007] EWHC 511 (Ch) [38] [*Simion*].
[150] *Independent Insurance No 2* (n 57) [15].
[151] *Linda Kao* (n 1) [35].
[152] *Re Econ* (n 7) [68]. See also *Cabletel* (n 139) [86].
[153] n 130.
[154] *Independent Insurance No 2* (n 57) 14.
[155] ibid.
[156] ibid [15].
[157] ibid.

exit the profession, to the detriment of all concerned.[158] Thus, while the presence of such conflicting principles may render the remuneration-setting exercise difficult and to some extent unpredictable, such tension is inevitable and the courts must balance them as best they could in their application to the facts.[159]

5.3 Application of the Principles on Computing Remuneration

A major problem with the principles highlighted above is that they operate at a high level of abstraction and cannot give specific guidance on the appropriate quantum of remuneration in any particular case. The end result is that the quantum arrived at by the courts may be said to be arbitrary, since that specific sum cannot be justified by a mathematical formula.[160] That however is all that can be hoped for, since the services provided in any particular case are unique to that case, and the court must utilise its own judgment when evaluating the value of the services. However, the resulting uncertainty should not be overstated. After all, such uncertainty exists regardless of who sets the remuneration – market participants or the court.

Nonetheless, unlike market participants, courts must justify their decisions and cannot be seen as acting arbitrarily. The discretion which courts have is to be exercised judicially, taking into account all of the relevant principles and information presented.[161] For this to be done in a consistent manner, the high-level principles highlighted above must be operationalised into a working scheme such that there is a standardised method of applying them.

Unfortunately, there are few cases amongst the three jurisdictions where the court goes into the details on the taxation of remuneration. It is therefore difficult to conclude that any consistent working scheme has been established either within any single jurisdiction or between all of them. Nonetheless, the cases have demonstrated certain commonalities and interesting points of distinction in the application of the principles.

In general, cases in all three jurisdictions start by reviewing the IP's time-costs, scrutinising the number of hours spent by the relevant staff on a particular task and the justifications for doing so. The court may find at this stage that the remuneration sought for a task cannot be allowed in full or at all for a variety of reasons. For instance, work done by support staff tends to be entirely discounted, since it should be included in the rates of the professional staff.[162] The court will also scrutinise whether work could have been done more cheaply by farming it out to third parties,[163] to the support staff,[164] or to more junior staff.[165] Conversely, if work has been hived out to third parties (eg solicitors for legal proceedings), the court would critically examine claims made by the IP for the same matter to ensure that they are not charging for unnecessary work.[166] A claim may also be criticised for being excessive

[158] Ferris Report (n 4) [4.2]. See also *Linda Kao* (n 1) [A.27].
[159] *Brook* (n 8) [49].
[160] *Linda Kao* (n 1) [4]; *Cabletel* (n 139) [89].
[161] *Linda Kao* ibid [44].
[162] *Linda Kao* ibid [80]; *Cabletel* (n 139) [23]; *Independent Insurance No 2* (n 57) [30]–[33]. But see *Re Super Aguri F1 Ltd* [2011] BCC 452 [51]–[54] [*Super Aguri F1*].
[163] *Cabletel* ibid [51].
[164] *Linda Kao* (n 1) [71]–[72].
[165] *Linda Kao* ibid [53(b)]; *Cabletel* (n 139) [67]; *CA Pacific Finance* (n 121) [84].
[166] *Linda Kao* (n 1) [74]–[77]; *Cabletel* ibid [57]–[58]; *CA Pacific Finance* ibid [40]. Cf *Dovechem* (n 130) [46].

and disproportionate relative to its complexity and value,[167] or even entirely unnecessary.[168] Naturally, the list of reasons for rejecting the quantum sought in relation to a particular task is not closed.

However, the cases demonstrate different approaches towards how remuneration is calculated once issues have been identified.

5.3.1 England

In the English case of *Cabletel*,[169] the court dealt with the calculations in two stages. First, for objections to the time utilised and claimed for a particular head of work that were accepted, the court reduced the number of hours claimed for that head, eg reduction by one-third.[170] The court then applied the total number of hours allowed to the average hourly rate claimed, leading to a figure that reflected the remuneration based on 'time properly spent' as opposed to 'time actually spent'.[171]

Second, the court separately considered other factors that were not directly connected to the time spent. The court specified the quantum of discount linked to a particular factor where it was possible (eg a discount of £10,000 for changing solicitors unnecessarily).[172] For other factors which affected the value provided by the IP more generally (such as the difficulty of the tasks, whether effective costs controls were put in place, and the failure to act promptly to discharge the administration),[173] they were taken into account together for an additional percentage discount (20% on the facts).[174]

5.3.2 Singapore

A very similar two-stage approach was in theory followed by the Singapore case of *Linda Kao*. Citing an Australian case,[175] the court agreed that at the first stage, the court should arrive at a working figure. This was derived by checking whether the hourly rates were reasonable, and if so, multiplying it by the hours reasonably spent after accounting for unsubstantiated or unjustifiable claims, much like the focus on 'time properly spent' in *Cabletel*.[176] At the second stage, the court would take into account any other factor which allowed for a quantifiable adjustment. It would then apply a further percentage reduction using a 'broad brush' to determine what a fair and reasonable sum is, presumably taking into account the remaining factors at this stage.[177]

Having said that, the court's application of the principles in *Linda Kao* was rather different from that of *Cabletel*. At the first stage the court only focused on the hourly rates charged, and accepted that the discounted figure for the overall bill offered by the receivers could serve as the starting point.[178] No deduction for any particular head of work was made. Instead, everything else was taken into account together in the second stage, leading to a broad-brush discount of a further 10% from the

[167] *Cabletel* ibid [27], [41]; *CA Pacific Finance* ibid [106].
[168] *Super Aguri F1* (n 162) [34].
[169] n 139.
[170] ibid [40], [46], [53], [68].
[171] ibid [88].
[172] ibid [87].
[173] ibid [89]–[90].
[174] ibid [90]–[91].
[175] *Re Stockford Ltd* [2004] FCA 1682, (2004) 52 ACSR 279.
[176] *Linda Kao* (n 1) [43].
[177] ibid.
[178] ibid [85]–[86].

discounted figure.[179] The only deduction which was correlated to a specific claim concerned the time-costs of an administrative staff, which was disallowed entirely.[180]

We submit respectfully that the two-stage approach which was in fact applied in *Linda Kao* is hard to understand. Consider the issue on duplication of work between the liquidators and the instructed solicitors. In *Cabletel* the court allowed 75 hours out of almost 300 that was claimed for this reason,[181] in *Linda Kao* no specific figure was given and the court simply considered it with everything else to produce a general 10% discount.[182]

This is inconsistent with *Linda Kao*'s own statements of principle in two respects. First, the court held that courts should 'determine whether the hours claimed for were reasonably spent' at the first stage.[183] For work done on two legal suits the hours claimed were held to be unreasonable,[184] and so the issue should not have been dealt with at the second stage. More importantly, the court had accepted that even if there were issues concerning 'particular discrete parts of the claim', it 'does not support the inference of a systemic problem that justifies a reduction in other (unconnected) parts of the claim'.[185] By grouping the specific issue of duplication of work in relation to two legal suits with other unrelated matters to produce an overall 10% discount, the court allowed unconnected issues to influence each other. This failure to treat distinct heads of claim separately where possible created unnecessary arbitrariness in the valuation exercise.

Linda Kao's application of the principles was likely influenced by the fact that the receivers offered a discount on their bill. The court was inclined to use the discounted figure as the working figure under the first stage, since the court ought not to 'prescribe, in intimate detail, the appropriate charge-out rates'.[186] The necessary consequence was that all relevant factors were considered at the second stage. In effect, the court substituted stage one of the exercise for the IPs' views on the appropriate overall discount, when there is no reason to think that the latter is in any way a good proxy for the former.

This can be contrasted with the other Singapore case of *Dovechem*. The court first discounted the fees sought for specific heads of work,[187] before taking into account more general considerations and making a further deduction.[188] This is more consistent with the *Cabletel* approach, and the principles as stated in *Linda Kao*.

5.1.3 Hong Kong

The approaches discussed thus far may be contrasted with what was done in the Hong Kong case of *CA Pacific Finance*. In that case, the court was assisted by an expert assessor (an accountant with insolvency experience), who proposed a broad-brush discount to items requiring accounting experience to assess.[189] Other items were assessed by the judge.[190] The judge utilised fairly precise

[179] ibid [87].
[180] ibid [80], [87].
[181] *Cabletel* (n 139) [57]–[58].
[182] *Linda Kao* (n 1) [73]–[77], [87].
[183] ibid [43].
[184] ibid [74], [76].
[185] ibid [44], citing *Conlan v Adams* [2008] WASCA 61, (2008) 65 ACSR 521.
[186] *Linda Kao* (n 1) [86].
[187] *Dovechem* (n 130) [79]–[80].
[188] ibid [83]–[84].
[189] *CA Pacific Finance* (n 121) [22], [48].
[190] ibid [22].

formulas for some items, which involved assessing how many staff ought to have been employed, the appropriate level of seniority, and the number of hours each ought to have spent.[191] Some items were assessed by linking up the quantum claimed in different time periods. The quantum allowed in one period may be linked to the following from another time period: (i) the numerical quantum allowed;[192] the ratio of the approved quantum to the claimed quantum;[193] and the ratio of the approved quantum to the value of the portfolio being managed.[194] A simple discount was also adopted.[195] The case therefore offers a good illustration of the variety of methods that can be used when assessing a particular head of work. It is not always necessary to focus on 'time properly spent', as was done in *Cabletel* and *Linda Kao*.[196]

Unlike the two-stage approach adopted in the cases discussed above however, the total remuneration allowed in *CA Pacific Finance* was simply the sum of the allowed quantum for each head of work,[197] and the case is not unique in this regard.[198] This is unobjectionable, since each stage addresses different factors and the need to go through both depends on what factors are present.

5.1.4 Conclusion

Ultimately, when fixing remuneration what is critical is that the relevant principles are applied by the court in a transparent and consistent manner, such that justice is done and seen to be done. To achieve this, the working scheme employed by the court must reveal what the relevant issues are, and how those issues are considered in a logical fashion when ascertaining quantum. An issue which may broadly permeate the entire services rendered could justifiably lead to a percentage discount of the overall claim. Conversely, it is difficult to justify the same if the issue only affects a specific head of claim.[199] So long as the critique and its link to the calculation is clear, it would be difficult to say that any outcome is wrong even if someone else would have approached the problem differently.

6 CONCLUSION

The discussion above proceeds from the vantage point that intervention in relation to IPs' remuneration is required in some situations because of market failure, which is typically a problem in situations where control of remuneration lies in the hands of unsecured creditors. Nevertheless, to improve the operation of the market, efforts have been made in England, Singapore and Hong Kong to improve and encourage unsecured creditors to participate in the remuneration setting, with courts serving as the fall-back mechanism if no remuneration is set or if it is complained that the remuneration is excessive. Further, to combat market failure, rules are imposed on IPs to provide the remuneration-setting body with better information on the remuneration sought, so that the lack of experience in this area is less of an impediment. The rule that IPs bear the burden of justifying the remuneration sought because they are fiduciaries also achieves a similar effect.

[191] See eg ibid [59], [63], [76], [84].
[192] ibid [105], [111].
[193] ibid [106].
[194] ibid [112].
[195] ibid [102]–[103].
[196] See also *Phillips v Treharne* [2011] Lexis Citation 101 [39] (fixing the remuneration for a head of work by reference to the judge's 'feel' for what was appropriate in the circumstances).
[197] *CA Pacific Finance* (n 121) [121].
[198] See eg, *Simion* (n 149).
[199] See the text to n 181 onwards.

Unfortunately, the rules on the bodies empowered to set remuneration, the persons given standing to apply to courts to review remuneration and disclosure of information suffer from the historical emphasis on distinguishing between court-ordered and voluntary liquidations and pay too little regard to the need to distinguish between solvent and insolvent liquidations. To the extent that they are inconsistent with two basic principles – that the parties which are the residual claimants in liquidations should be entitled to set the IPs' remuneration, and a party with a financial interest in the liquidation ought to be able to challenge the IP's remuneration in court, they should be reformed.

There has been much discussion of the principle that remuneration ought to be a function of value, not time spent, costs or returns. Reservations have been expressed about the appropriateness of time-costing. However, it is crucial to understand how markets for professional services operate and the role of the courts in reviewing and fixing remuneration. Since the best valuation of an IP's services is that reached by a competitive market, the courts should also be guided by the market when reviewing and fixing remuneration. Matters such as market rates, and the factors which knowledgeable market participants would have taken into account, are relevant. Consequently, the courts should not be too bothered by the use of time-costing, as it is widely accepted in competitive segments of the market. The important point is that time-costing should not be abused, which is why courts have correctly focused on the value provided by the IP rather than the time spent simpliciter. Of course, the courts cannot perfectly replicate what a market participant would do, and valuation is ultimately an art and not a science. So long as the judgment clearly indicates that the court has applied its mind to the relevant principles and applied them logically and consistently, in particular, distinguishing between issues that permeate the entire services rendered and issues that affect only specific heads of claim, there would be little justification for challenging the conclusion that has been reached.