

## The First Test Case of the Cross-Border Arrangement Between Hong Kong and Mainland China on Insolvency and Restructuring Matters

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In the groundbreaking recent decision in *Re Samson Paper Company Limited (in Creditors' Voluntary Liquidation)* [2021] HKCFI 2151 ("Samson"), the Hong Kong Companies Court (the "Hong Kong court") has for the first time issued a letter of request to a court in mainland China under the new cross-border mutual recognition, assistance and cooperation arrangement between Hong Kong and mainland China (the "Mainland") in relation to corporate insolvency and restructuring matters (the "Cooperation Arrangement"), which took effect on May 14, 2021. The key features of the Cooperation Arrangement and an overview of how it compares with the chapter 15 recognition procedure under the United States Bankruptcy Code can be seen [here](#) in our recent Client Alert.

In this update, we provide a brief overview of the decision in Samson and its potential practical implications, bearing in mind that the application in question was the first to be made under the Cooperation Arrangement (in Hong Kong or the Mainland) and represents, therefore, in the summation of the court, a significant development for cooperation between Hong Kong and the Mainland in the sphere of corporate insolvency.

### The Application

The application to the Hong Kong court for the issue of a letter of request was made by the voluntary liquidators of Samson Paper Company Limited (the "Company"), a Hong Kong-incorporated subsidiary of a group headed by the Bermuda-incorporated, Hong Kong-listed Samson Paper Holdings Limited, which had itself been placed into "soft-touch" provisional liquidation in Bermuda. The voluntary liquidators (appointed in Hong Kong in August 2020 when its immediate parent resolved to wind up the Company on the grounds of insolvency) had formed the view that recognition and assistance from the Bankruptcy Court of the Shenzhen Intermediate People's Court in Shenzhen in the Mainland (the "Shenzhen court") under the Cooperation Arrangement was necessary to enable them to deal with the Company's assets in the Mainland. Shenzhen is designated as one of the pilot jurisdictions under the Cooperation Arrangement, along with Shanghai and Xiamen.

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The Company's assets in the Mainland are principally comprised of (i) wholly owned subsidiaries in Shenzhen and Shanghai, (ii) receivables from Mainland-incorporated companies totaling in excess of HKD420 million and (iii) an apartment in Beijing (which is not within one of the pilot areas under the Cooperation Arrangement).

The Hong Kong court, being satisfied that it was desirable for the voluntary liquidators' appointment to be recognized in the Mainland so that they are able to collect the assets of the Company, issued the letter of request to the Shenzhen court. Pursuant to the letter of request, the Shenzhen court is invited to make orders (i) recognizing the creditors' voluntary liquidation proceedings in Hong Kong and the appointment of the voluntary liquidators and (ii) directing that the voluntary liquidators have and may exercise such powers as are available to them under Hong Kong law and to the fullest extent permitted by the law of the Mainland.

To assist the Shenzhen court, the Hong Kong court set out in the letter of request details of a number of the key powers of voluntary liquidators in Hong Kong.

### Centre of Main Interests

One key open question following the announcement of the Cooperation Arrangement was how the Hong Kong court would approach the issue of determining centre of main interests ("COMI") in this context (which, prior to the court's decision in *Re Lamtex* - see [here](#) for our prior client alert on this case - was not a feature of Hong Kong's common law recognition and assistance regime). Under the Cooperation Arrangement, the applicant is required to establish that the relevant debtor company (here, the Company) has had its COMI in Hong Kong for at least six months prior to the date of the application.

In *Samson*, the Hong Kong court noted that "As the Company is incorporated in Hong Kong it follows that unless there are matters, which demonstrate that its centre of main interests are located elsewhere the SPC Opinion applies to the Company and its Liquidators and this is a proper case in which to seek recognition and assistance." The Hong Kong court was satisfied that the Company's COMI had been in Hong Kong since its incorporation, noting that "it has always been run out of Hong Kong."

It therefore appears that the facts in *Samson* made the COMI determination relatively straightforward for the Hong Kong court on this occasion. It remains to be seen how the Hong Kong court will approach a COMI determination in a similar application by a foreign-incorporated company with its shares listed in Hong Kong, although the court did refer in a footnote of the decision to an explanation of the criteria for determining COMI in the recent English High Court decision in *Re Melars Group Ltd* [2021] EWHC 1523 (Ch), which may be a signal that the authorities referred to in that decision and the approach adopted by the English court will be relevant and/or persuasive in future COMI determinations.

In *Re Melars Group Ltd*, the English court sets out seven key principles to be applied by the court when determining where a company's COMI is located:

1. COMI should be capable of ascertainment by reference to publicly available objective features from the perspective of typical third parties.
2. In the case of corporate debtors, there is a statutory presumption that COMI is in the place of the registered office. Creditors can assume, absent other factors which are ascertainable and which point the other way, that COMI will be that place.

3. The presumption of COMI based on registered office can be rebutted by other evidence. It is likely to be easier to rebut the presumption where the registered office may be seen as a letterbox, rather than the place of actual administrative conduct, but it nonetheless remains a real presumption.
4. The burden is on a party seeking to rebut the presumption to show that there is another place where the debtor conducts the administration of its interests on a regular basis.
5. The focus is on the place where the interests of the debtor are being administered, not where it happens to operate commercially (though these may be relevant to determining the former).
6. The matter has to be examined at the date of the petition. Earlier or later events may be relevant, but only insofar as they may throw helpful light on the position as at that date.
7. The COMI of a debtor may change, but the concept of COMI connotes a degree of permanence.

### Practical Implications

The decision in Samson is a critical first step in the practical implementation of the Cooperation Arrangement. Market participants will be watching closely to see how the Shenzhen court responds to the letter of request and, in particular, whether the voluntary liquidators will be recognized and, if so, the extent of any legal and practical assistance granted to them.

It will also be interesting to see the jurisdictional scope of any such relief, including whether the Shenzhen court will be prepared to grant assistance to the voluntary liquidators to take control of assets that are outside of the pilot area (such as the apartment in Beijing or branches of the Company's Shenzhen subsidiary located in Nanning and Xiamen, the latter also being a pilot jurisdiction under the Cooperation Arrangement).

In any event, the Samson decision is an important and welcome development in the path towards greater cross-border cooperation between Hong Kong and the Mainland in corporate insolvency matters.

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