

Recognition of
**HONG
KONG**
INSOLVENCY PROCEEDINGS
IN MAINLAND CHINA

A TEST CASE IN THE MAKING?

RE ANDO PAVES THE WAY FOR A LONG-AWAITED TEST CASE, WHICH HAS EMERGED AT A TIME WHEN A PROPOSED FRAMEWORK FOR COOPERATION BETWEEN COURTS IN HONG KONG AND MAINLAND CHINA IN CROSS-BORDER CORPORATE INSOLVENCY MATTERS IS IN DEVELOPMENT.





NAOMI MOORE
Partner



DANIEL L. COHEN
Partner

Akin Gump
STRAUSS HAUER & FELD

In *Re Ando Credit Limited* [2020] HKCFI 2775 (“*Re Ando*”), the Hong Kong Companies Court recently appointed provisional liquidators over a Hong Kong company, Ando Credit Limited, in novel circumstances with potentially significant consequences. According to the Court’s written reasons dated November 11, 2020 (published in light of the unprecedented nature of the decision), the provisional liquidators were appointed at a hearing on October 23, 2020, for the express purpose of enabling them to seek recognition in Mainland China to facilitate the recovery of very substantial receivables owed to the company by Mainland China-based debtors.

Earlier this year, prior to *Re Ando*, the Hong Kong Companies Court recognized Mainland China-appointed insolvency officeholders for the first time.¹ With the growing number and significance of corporate bankruptcies in Mainland China, one important but unanswered question for international investors and the restructuring community is whether courts in Mainland China are willing and able to reciprocate by recognizing and granting assistance when needed to insolvency officeholders appointed in Hong Kong. *Re Ando* paves the way for a long-awaited test case, which has emerged at a time when a proposed framework for cooperation between courts in Hong Kong and Mainland China in cross-border corporate insolvency matters is in development.

THE CURRENT CROSS-BORDER RECOGNITION FRAMEWORK

At the outset, we note that neither Hong Kong nor Mainland China has adopted the UNCITRAL Model Law on Cross-Border Insolvency (“*Model Law*”), an international framework for determining cross-border insolvency matters that has so far been adopted by 51 jurisdictions around the globe,² although the Hong Kong government has commissioned a consultancy study on the feasibility of adopting the *Model Law*.

HONG KONG

In fact, Hong Kong has no statutory framework at all for dealing with cross-border insolvency matters. Instead, in recent years, the Hong Kong courts have adopted and developed the following core common law principles:

1. The court can recognize collective insolvency proceedings (being a process of collective enforcement of debts for the benefit of the general body of creditors) commenced in a company’s place of incorporation outside Hong Kong.

¹ *Re CEFC Shanghai International Group Limited* [2020] HKLRD 676 (“*CEFC*”).

² https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

2. The court can also grant assistance in Hong Kong to overseas insolvency officeholders in a recognized foreign insolvency proceeding.
3. The court's power to grant assistance is only available to the extent necessary for the performance of an overseas insolvency officeholder's functions and cannot enable the officeholder to do something that he or she could not do under the laws of the jurisdiction in which he or she was appointed. An overarching requirement is that an order granting assistance must be consistent with the substantive law and public policy of Hong Kong.



Under these common law principles, insolvency officeholders appointed in Australia, Bermuda, the British Virgin Islands, the Cayman Islands and Japan have been recognized and granted assistance in Hong Kong. Significant strides towards enhanced cooperation between Hong Kong and Mainland China in corporate insolvency matters were taken earlier this year when, for the first time in the CEFC case, Mainland China was added to this list.

In CEFC, the Hong Kong Court found that a liquidation of a company in Mainland China was a “collective insolvency proceeding” that was capable of satisfying the first of the three common law principles mentioned above. The liquidators in that case (appointed by the Shanghai Intermediate People's Court) were then granted assistance in the form of a stay of a creditor enforcement action against debtor company assets in Hong Kong.

This landmark decision was followed by another decision in May 2020 in which the Hong Kong Court recognized a Mainland China liquidation and granted assistance to the liquidators so that they could take control of debtor company subsidiaries in Hong Kong.³

MAINLAND CHINA

In contrast with Hong Kong, there is a statutory mechanism in Mainland China for the recognition of foreign insolvency proceedings. Article 5 of the Enterprise Bankruptcy Law (“EBL”) provides that a Mainland court can, at the request or application of a foreign court in a bankruptcy case, recognize a foreign judgment concerning debtor property situated in China. Recognition is stated to be in accordance with relevant international treaties to which China has acceded

“ Together with the Judgment Arrangement and multiple other mutual assistance treaties in place between Hong Kong and the Mainland, Hong Kong has a clear edge over other jurisdictions in the region when it comes to cross-border insolvency enforcement matters involving Mainland China

or on the basis of reciprocity of treatment by the foreign jurisdiction in question. Further, the judgment to be recognized must not violate basic principles of Chinese law, jeopardize the sovereignty and security of the Chinese State or public interests, or otherwise undermine the legitimate rights and interests of creditors in China.

Although the EBL has been in force since 2007, Article 5 has not to our knowledge given rise to a recognition decision to date, and China has not yet entered into any relevant treaties with other countries covering corporate insolvency matters.

The key issue of what amounts to “reciprocity” for the purpose of Article 5 has therefore not been tested. Absent the implementation of a reciprocal cross-border insolvency cooperation framework between Mainland China and Hong Kong, *Re Ando* may provide the first opportunity for the point to be explored, with a focus on the recent CEFC and Shenzhen Everich decisions in

³ Shenzhen Everich Supply Chain Co, Ltd (in Liquidation in the Mainland of the People's Republic of China) [2020] HKCFI 965 (“Shenzhen Everich”).



JEREMY HAYWOOD
Counsel



JESSICA LAMBACH
Registered Foreign Lawyer



JINGLI JIANG
Counsel

Hong Kong. This possibility is foreshadowed in an article published by three judges of the Shenzhen Bankruptcy Court that is annexed to the *Re Ando* decision.

A NEW FRAMEWORK FOR RECIPROCAL COOPERATION BETWEEN MAINLAND CHINA AND HONG KONG?

In parallel with developments in *Re Ando*, discussions continue between the Hong Kong government and the Supreme People's Court in the Mainland to agree a framework for cross-border cooperation in corporate insolvency matters. In June 2020, the Legislative Council Panel on Administration of Justice and Legal Services in Hong Kong (the "Panel") published a consultation paper setting out details of a proposed framework (the "Framework")

Under the Framework, it is proposed that Hong Kong would continue to rely on the common law principles developed by the courts (see above) to underpin recognition of Mainland "collective insolvency proceedings" and new Mainland legislation based on the Model Law would be enacted to facilitate recognition of Hong Kong insolvency proceedings, namely:

1. compulsory winding up commenced pursuant to the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO");

2. creditors' voluntary winding up commenced pursuant to the CWUMPO; and
3. "schemes of arrangement" for restructuring debt, sanctioned by the Hong Kong Court under section 673 of the Companies Ordinance (Cap. 622).

The consultation paper and the Framework were discussed at a meeting of the Panel on June 22, 2020, and the Court in *Re Ando* made the encouraging observation that a protocol for mutual recognition would be entered into in "the near future".

The implementation of the Framework would significantly enhance and complement the existing suite of mutual assistance treaties between Hong Kong and Mainland China. These include an arrangement providing for the recognition of certain judgments in civil and commercial matters, which was recently expanded by an updated arrangement signed in January 2019 ("Judgment Arrangement").⁴ Another example is the groundbreaking arrangement signed in April 2019, which enables a party to a Hong Kong-seated arbitration to seek interim measures in aid of the arbitration from courts in Mainland China (something that was only previously possible in respect of Mainland China-seated arbitrations).⁵

⁴ Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region.

⁵ Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region.

OBSERVATIONS

It is uncertain whether the Framework will be in place by the time any Mainland China recognition application in *Re Ando* is heard, but it is very encouraging that cross-border cooperation in insolvency matters remains firmly on the agenda for both jurisdictions.

The implementation of the Framework and/or recognition of Hong Kong-appointed insolvency officeholders in Mainland China under the EBL would further reinforce Hong Kong's position as a major financial center and its status as the gateway to Mainland China. Together with the Judgment Arrangement

and multiple other mutual assistance treaties in place between Hong Kong and the Mainland, Hong Kong has a clear edge over other jurisdictions in the region when it comes to cross-border insolvency and enforcement matters involving Mainland China.

This edge would be further sharpened if and when a long-awaited domestic corporate rescue regime for Hong Kong becomes a reality. To this end, a much-debated provisional supervision regime remains under active consideration - the latest indication from the Financial Services and Treasury Bureau suggests that a draft bill may be introduced into the Hong Kong legislature in 2021. Watch this space.

Author: Naomi Moore

Designation: Partner

Naomi Moore focuses her practice on finance and alternative credit transactions, cross-border restructurings, insolvencies and workouts. She has considerable experience in Australia, China, Hong Kong, India, Indonesia, Korea, London, Japan, Singapore, Bermuda, the Cayman Islands and the British Virgin Islands. Naomi has been involved in many complex and high-profile restructurings, with a particular focus on schemes of arrangement. She also regularly assists investment fund clients and other financial institutions with private lending and other credit transactions in the Asian region including secured and unsecured financings implemented by way of facility agreements, notes or other debt instruments.

Author: Daniel L. Cohen

Designation: Partner

Daniel Cohen acts for investment firms, corporations and insolvency office holders on disputes and other contentious matters that are typically cross-border in nature and raise complex jurisdictional, regulatory and enforcement issues. His engagements cover a broad range of subject matter areas including debt and equity investments; shareholder disputes and activism campaigns; directors' duties; corporate restructuring and insolvency; commercial fraud; and securities, market abuse and other regulatory issues.

Author: Jeremy Haywood

Designation: Counsel

Jeremy Haywood has experience advising on all aspects of corporate restructuring and insolvency. He handles restructuring and insolvency matters in the Asia-Pacific region with considerable recent experience in Australia, China, Hong Kong, India, Vietnam and Taiwan.

Author: Jessica Lambach

Designation: Registered Foreign Lawyer

Jessica Lambach has experience advising on a wide range of contentious issues involving, among other things, enforcement and recovery proceedings, shareholder actions, disputes concerning complex debt and equity investments, contentious regulatory matters, contentious insolvency and restructuring related situations.

Author: Jingli Jiang

Designation: Counsel

Jingli Jiang focuses on regulatory and corporate advice for clients in the Greater China region in connection with regulatory enforcement actions, sanctions and export controls compliance, antitrust, outbound and inbound mergers and acquisitions, and private equity and venture capital investment. She has significant experience in advising on complex regulatory and corporate issues for large Chinese state-owned and private companies in high-profile transactions.



Disclaimer – The views expressed in this article are the personal views of the authors and are purely informative in nature.