

In the Matter of CW Advanced Technologies Limited – An Intriguing Decision in Hong Kong Concerning Cross-border Insolvencies and Restructurings and the New Singaporean Restructuring Regime

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Key Points

- The High Court of Hong Kong has handed down an intriguing insolvency and restructuring decision which reaffirms the Hong Kong court's pragmatic approach to cross-border restructuring. The decision addresses, for the first time in Hong Kong, the cross-border aspects of a recently enacted restructuring regime in Singapore which is, in part, modeled on the Chapter 11 debt restructuring framework.
- The court raised the possibility that, if the statutory moratorium under the new Singapore regime or a scheme of arrangement facilitated by it can be characterized as a collective insolvency proceeding for common law recognition purposes, the Hong Kong court may be prepared to recognize, and render assistance to facilitate, the Singapore proceedings. The judge asked rhetorically whether the "assistance" in such circumstances could be the appointment of provisional liquidators in Hong Kong – a novel and interesting suggestion since provisional liquidators cannot currently be appointed in Hong Kong on a "soft touch" basis for the primary purpose of facilitating a restructuring.
- Further, the CW Advanced Technologies Limited (CWATL) decision arguably brings us a step closer to establishing whether a foreign debtor-in-possession restructuring or rehabilitation process, such as a Chapter 11 debt restructuring, is capable of being recognized in Hong Kong. If it is, the decision may in time prove to be an important milestone on the path to the further development of the cross-border recognition and assistance regime in Hong Kong. For now, the decision leaves us with a number of unresolved questions concerning the extent to which collective insolvency proceedings are capable of being recognized in Hong Kong.

Contact

Naomi Moore

Partner
naomi.moore@akingump.com
Hong Kong
+852 3694.3050

Daniel Cohen

Partner
daniel.cohen@akingump.com
Hong Kong
+852 3694.3032

Background and Facts

Unlike jurisdictions which have incorporated the UNCITRAL Model Law on Cross-Border Insolvency or similar instruments into their national legislative frameworks, Hong Kong does not currently have a statutory cross-border insolvency regime. In the absence of a statutory regime, the Hong Kong court has developed and applied common law recognition and assistance powers in the insolvency and restructuring context. These powers have typically been exercised in situations in which foreign officeholders, such as liquidators or trustees in bankruptcy, have sought recognition in Hong Kong to enable them to exercise powers available to local Hong Kong officeholders. A number of court decisions have been rendered in this context in recent years and have given rise to a restrained evolution of the common law recognition and assistance regime in Hong Kong.

The CWATL decision was handed down on July 19, 2018 and constitutes the written reasons of the Honorable Mr. Justice Jonathan Harris for his decision to appoint provisional liquidators for CWATL on July 11, 2018. Although the case did not involve an application to recognize and provide assistance to a foreign insolvency officeholder or process, the facts of the case and developments which occurred while the court was seized with it provided an opportunity for Mr. Justice Harris to explore within his written decision a number of important recognition and assistance issues in the restructuring and insolvency context.

The facts of the case concern CWATL, a Hong Kong domiciled company which is part of a group of companies (the CW Group) headquartered in Singapore and in the business of providing precision engineering solutions. The holding company of the CW Group and the indirect parent company of CWATL is CW Group Holdings Limited (CWG), a company incorporated in the Cayman Islands and listed on the Hong Kong Stock Exchange.

CW Group fell into financial distress which ultimately led to the termination of a number of its trade finance lines, statutory demands being served on CWG and CWATL by the Bank of China (Hong Kong) Limited (BOC) and subsequent payment defaults under certain of CW Group's debt instruments. CWATL accepted that the CW Group (including CWATL) was unable to pay its debts and was cash flow insolvent.

The CW Group proposed to address the group's financial difficulties through a debt restructuring. A restructuring advisor was appointed in Singapore and, on June 22, 2018, CWG, CWATL and two of CW Group's Singapore-domiciled subsidiaries made an application to the Singapore High Court under section 211B of the Singapore Companies Act for a six-month moratorium (the Singapore Moratorium) to allow CW Group to attempt a restructuring of its debts by proposing a compromise or arrangement with its creditors (the Singapore Application). The Singapore Application triggered a statutory 30-day automatic moratorium from the date of filing of the application.

Following the Singapore Application, CWATL presented a petition for its own winding-up in Hong Kong and applied to the Hong Kong court for the appointment of provisional liquidators in order to preserve CWATL's assets and avoid a "free-fall" winding-up.

At the initial hearing on June 27, 2018 of CWATL's application to appoint provisional liquidators in Hong Kong, BOC did not object to the application but proposed its own

nominees as provisional liquidators in lieu of those nominated by CWATL. The hearing was adjourned, in large part because Mr. Justice Harris was of the view that the case raised issues of importance concerning the impact in Hong Kong of the Singapore Application and the automatic moratorium. The court requested the Official Receiver of Hong Kong to provide *amicus* assistance on such issues.

In the meantime, winding-up petitions were presented and separate provisional liquidation applications were filed in respect of CWG in the Grand Court of the Cayman Islands by CWG and BOC, respectively. CWG's application sought the appointment of "soft touch" provisional liquidators with a view to supporting CWG's intention of making a compromise or arrangement with its creditors. BOC filed its own, competing, application for different provisional liquidators.

In light of these and other developments and CWATL's limited resources, CWATL applied to withdraw its own application for the appointment of provisional liquidators in Hong Kong, and BOC subsequently filed its own application for provisional liquidators to be appointed to CWATL in Hong Kong. When the matter returned to court on July 11, 2018, Mr. Justice Harris granted BOC's application for the appointment of provisional liquidators in respect of CWATL noting that the relevant criteria had been fulfilled.

The Decision

While no other substantive orders (costs aside) had been sought, Mr. Justice Harris used the opportunity of providing written reasons for his July 11, 2018 decision to appoint provisional liquidators for CWATL to provide some important observations about the situation in the larger cross-border context.

The court noted its belief that CW Group intended to conduct a group-wide restructuring through a Singapore Moratorium and associated scheme of arrangement, with recognition and assistance given by other relevant jurisdictions in which the CW Group members are located. This, indicated the court, was the context within which CWATL had made its application in Hong Kong for the appointment of provisional liquidators.

At the same time, the court also noted that CW Group's Singapore-based restructuring efforts had not progressed as planned in the sense that BOC had opposed CWATL's attempt to appoint provisional liquidators and was arguing that the Singapore Moratorium could not be recognized in Hong Kong. The situation prompted Mr. Justice Harris to observe that, where, as here, a Singapore Moratorium is involved in a cross-border restructuring process, thought should be given to whether the moratorium is eligible for recognition in Hong Kong and, if it is, whether the court may grant assistance by way of appointing provisional liquidators.

Solving the Cross-border Challenges Is for Another Day

Having raised such a tantalizing prospect, Mr. Justice Harris did not attempt to provide any definitive answers or guidance on whether the Singapore Moratorium would be capable of recognition in Hong Kong or the assistance the court might provide if recognition was a possibility. Instead, he set out three "unresolved questions" (and some related observations) of relevance to the analysis, being, in summary:

- I. the true nature of the Singapore Moratorium and whether it should be treated as a collective insolvency proceeding;
- II. whether a collective insolvency proceeding which is not conducted within the jurisdiction of domicile of the company concerned (such as the Singapore Moratorium so far as it relates to CWATL) is capable of being recognized in Hong Kong (noting an absence of Hong Kong authority on this point); and
- III. the assistance that could be rendered by the court in this context and, in particular, whether the assistance could be by way of the appointment of provisional liquidators (a thought-provoking question given the absence of any “soft touch” provisional liquidation regime in Hong Kong currently).

Mr. Justice Harris remarked that the cross-border challenges encapsulated by these questions were for another day, so we will need to wait for another case involving suitable facts for a decision that can provide clarity on these issues. For now, Mr. Justice Harris underscored the need for careful planning in respect of insolvency filings in cross-border cases and reiterated to policy makers the need for a statutory cross-border insolvency regime in Hong Kong.