

The crossing of paths

A recent decision involving Singapore's CW Group considers the interaction between the Hong Kong and Singaporean insolvency frameworks

1 MINUTE READ

Last year, Singapore introduced sweeping changes to its legislative framework for insolvency and restructuring. In a recent decision concerning CW Advanced Technologies Limited, the Hong Kong court considered whether a moratorium in Singapore as part of a restructuring under the new regime could be recognised and afforded assistance in Hong Kong.

The court's decision provides a useful list of issues for practitioners, corporate groups and their creditors to consider in a cross-border restructuring involving Singapore and Hong Kong aspects.

We examine the decision in the context of recent developments in Hong Kong and what it may signal for the future.

Last year, Singapore introduced sweeping changes to its legislative framework for insolvency and restructuring, driven by a desire to position itself as a hub for international debt restructuring. These changes came into effect on May 23 2017, incorporating features of debt restructuring regimes from other jurisdictions, most notably the debtor-in-possession regime of Chapter 11 of the US Bankruptcy Code, where a company that intends to propose a scheme of arrangement to its creditors may apply to the Singapore court for a moratorium under section 211B of the Singapore Companies Act (s.211B moratorium).

The changes also included the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) (subject to certain modifications) which provides a statutory framework for recognition of foreign insolvency and restructuring proceedings. As a further sign of its universalist approach, Singapore also adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the JIN Guidelines) issued by the Judicial Insolvency Network, a collection of insolvency judges from a growing number of jurisdictions.

While Singapore has moved forward rapidly with extensive reforms to its insolvency laws, the same can't be said for Hong Kong, which lacks a formal corporate rescue procedure and does not have a statutory equivalent of the UK administration process or a s211B moratorium. Similarly, Hong Kong has not adopted the Model Law or the JIN Guidelines. Although proposed reforms to Hong Kong insolvency law to include a formal rescue regime have been under consideration for some time, there are no immediate signs of implementation and these reforms do not contemplate the adoption of either the Model Law or the JIN Guidelines.

In a recent noteworthy decision of the High Court of Hong Kong in respect of CW Advanced Technologies Limited (CWATL), the court considered the intersection of the Singapore and Hong Kong insolvency frameworks. In particular, it looked at the question as to whether a Singapore restructuring might be capable of being recognised and afforded assistance by the Hong Kong court. The decision was the first in Hong Kong to consider certain aspects of the recently implemented restructuring regime in Singapore and is likely to be of particular

significance for multinational corporate groups and their creditors seeking to implement a restructuring involving, among others, the Hong Kong and Singapore jurisdictions.

The s.211B moratorium

A moratorium protecting a company from creditor claims and winding up petitions is an essential element of any corporate rescue procedure. It allows the company to preserve its assets and gives it time to develop a rescue plan. In the absence of a moratorium, any single creditor could present a winding-up petition or otherwise seek to seize the assets of the company, hindering any restructuring efforts.

Following the 2017 amendments to the Singapore Companies Act (the Act), a company that intends to propose a scheme of arrangement to its creditors may now apply to

grant an order with extraterritorial effect, instead only permitting a moratorium preventing creditors from enforcing claims on assets in Singapore, affirming the orthodox position that a scheme of arrangement is territorial in nature and, likewise, so is the protective relief offered in support of a scheme. Following the Singapore court's decision, certain creditors of the company filed a petition for a winding-up of the company in Bermuda, leading to the company filing for bankruptcy in the US under Chapter 11 and abandoning its plans for a Singapore scheme. Since the 2017 legislative reforms have come into effect, EMAS Offshore and its subsidiaries, Hoe Leong Corporation and BLD Investments (a Singapore subsidiary of Indonesian developer PT Bakrieland Development Tbk.) have successfully obtained s.211B moratoriums expressed to have an extraterritorial effect to aid their restructurings.

on conventional grounds such as asset preservation and/or the need for independent investigation into the company's affairs, they may be given restructuring powers where the circumstances so warrant as a corollary of the conventional, principal purpose of their appointment.

Recent Hong Kong cross-border insolvency cases

The purported worldwide effect of the s.211B moratorium is inspired by that of the Chapter 11 stay, which has historically been effective given many international companies have a connection with the US and by reason of the broad economic reach of the US generally. Although Singapore is one of Asia's financial hubs and the Singapore court would have jurisdiction over financial institutions with a Singapore presence, it remains to be seen the extent to which foreign creditors with a connection to Singapore will abide by a worldwide s.211 moratorium and whether such a moratorium will be recognised by foreign courts.

The CWATL decision tested this issue in a Hong Kong context. To understand the significance of the decision, it is instructive to look back at other insolvency and restructuring related cases in recent years which have given rise to what may be considered a restrained development of the common law recognition and assistance regime in Hong Kong.

Although critics have long called for the adoption of the Model Law by Hong Kong given its status as a key financial centre in Asia and the number of large multi-jurisdictional restructurings with a Hong Kong nexus, there is still no statutory regime for the recognition of foreign insolvencies in Hong Kong. Instead, the extent to which the Hong Kong court will lend assistance to foreign insolvency proceedings under common law principles has been clarified and developed in a series of judgments given in recent years by Mr. Justice Jonathan Harris of the Hong Kong Companies Court in situations in which foreign insolvency officeholders have sought recognition and assistance from the court.

An obvious starting point is the 2014 decision of Harris J. in *Joint Official Liquidators of A Co. v B*, where it was confirmed that the authority of a liquidator appointed in the place of incorporation of the company concerned is recognised in Hong Kong and, furthermore, that a mechanism existed to enable a foreign liquidator to obtain information and

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the Singapore court for a s.211B moratorium. The application can be made so long as the company can show that it has the intention to present a restructuring proposal to creditors as soon as practicable. The scope of the moratorium potentially includes a stay on enforcement actions by secured creditors and the moratorium may be extended to the company's related entities, including any subsidiary or holding company. The filing of the application itself will trigger an automatic 30-day moratorium against creditor action. The Act further provides that a s.211B moratorium 'may be expressed to apply to any act of any person in Singapore or within the jurisdiction of the Court, whether the act takes place in Singapore or elsewhere'.

In 2016 and prior to the amendments to Singapore's insolvency laws, Pacific Andes Resources Development (PARC), a Bermuda incorporated company with a listing and its centre of main interests (COMI) in Singapore, applied to the Singapore court to extend a moratorium order that had previously been granted by the Singapore court. The language of the court order implied that the moratorium had extraterritorial effect. The court allowed PARC's application to extend the moratorium but found that it did not have jurisdiction to

In contrast to the position in Singapore, while a scheme of arrangement remains the primary restructuring tool in Hong Kong, a moratorium is not available to a company seeking to implement a Hong Kong scheme, forcing the company to seek standstill arrangements with its creditors and leaving it vulnerable to actions taken by any rogue creditor. As a result, schemes of arrangement are often undertaken in tandem with provisional liquidation, in order to take advantage of the automatic moratorium provided by that process. However, such a pairing was made more difficult following the 2006 decision of the Hong Kong Court of Appeal in *Re Legend International Resorts*, where it was held that provisional liquidators may not be appointed if the sole purpose of their appointment is to carry out a restructuring of the company's business or debts.

This does not mean provisional liquidators in Hong Kong cannot further the purposes of or implement a restructuring. Decisions subsequent to *Re Legend* confirm, within limits, they can. In the recent case of *Re China Solar Energy Holdings*, in 2018, the court considered the principles articulated in *Re Legend* and clarified the position that while provisional liquidators in Hong Kong must be appointed

documents without having to wind up the company in Hong Kong. More generally, the court held that it could, pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law make an order of a type which is available to an officeholder under Hong Kong's insolvency regime. Harris J. referred to a number of common law authorities in this context, including *Rubin v Eurofinance*, which in 2013 considered the concept of modified universalism.

(including an order for an automatic stay of the commencement or continuation of proceedings against the company or its assets in Hong Kong without leave of the court) which the court will usually be prepared to grant fairly rapidly on receipt of a letter of request issued by the court of the jurisdiction of incorporation in support of an application for recognition and assistance.

For instance, in *Re Joint Official Liquidators of Centaur Litigation SPC (in liquidation)*, in 2016, Harris J. confirmed that the powers available to a foreign office holder duly

soft touch provisional liquidation in Hong Kong for the sole purpose of effecting a restructuring, the Hong Kong court has demonstrated a degree of flexibility in this area through the application of recognition and assistance principles. In *Z-Obee Holdings*, Hong Kong provisional liquidators of a Bermuda incorporated company with a listing on the Hong Kong Stock Exchange (HKEx) identified a potential white knight investor and sought to have the company restructured rather than wound up. The Hong Kong court adjourned a winding up petition in Hong Kong against the company to allow the Hong Kong provisional liquidators to apply to the Bermuda court for their appointment as soft touch provisional liquidators. Following their appointment as soft touch provisional liquidators in Bermuda, the Hong Kong provisional liquidators applied to be discharged and for their appointment in Bermuda to be recognised in Hong Kong. The Hong Kong court recognised the Bermuda provisional liquidators in a demonstration of judicial comity and opened the door for offshore incorporated and Hong Kong listed companies to access the soft touch provisional liquidation available in certain offshore insolvency regimes, notwithstanding the *Re Legend* decision.

One important issue left on the table by these decisions is the extent to which a collective insolvency process, such as a Singapore restructuring coupled with a s.211B moratorium, is capable of being recognised in Hong Kong. The CWATL decision does not resolve this issue but highlights the relevant questions to be answered in this context and possible further development of the law in this area in Hong Kong.

Re CW Advanced Technologies Limited (2018)

CWATL is a Hong Kong domiciled company which is part of a group of companies (CW Group) headquartered in Singapore whose holding company is CW Group Holdings (CWG), a company incorporated in the Cayman Islands and listed on the HKEx. 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) (BoC) and subsequent payment defaults under certain of CW Group's debt instruments.

The CW Group proposed to address the group's financial difficulties through a debt

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The limits of this principle were illustrated in *The Joint Administrators of African Minerals (in administration) v Madison Pacific Trust and Shandong Steel Hong Kong Zengli*, in 2015. Harris J said the court was asked to recognise an English administration proceeding and a moratorium in that context restraining the enforcement of security without the agreement of the joint administrators or an order of the English High Court. Harris J. observed that the Hong Kong court could take a generous view of its power to assist a foreign liquidation process, but he repeated his earlier finding in *A Co. v B* that this was limited by the extent to which the type of order sought is available to a liquidator in Hong Kong under the Hong Kong insolvency regime and common law and equitable principles. Since Hong Kong does not have an equivalent to administration or a statutory provision which provides for a moratorium on the enforcement of a secured debt, the court refused to provide the assistance sought. To find otherwise, Harris J. said, would be an impermissible extension of the Hong Kong common law recognition and assistance regime. Interestingly, he left open the question as to whether or not the court could recognise an English administration in circumstances in which England was not the place of incorporation of the company and Hong Kong has no equivalent rescue procedure. He assumed, without deciding the point, that in principle such a foreign insolvency proceeding could be recognised in Hong Kong.

Other cases have further developed the broad contours of the recognition and assistance regime in Hong Kong and have also led to the development of a set of standard orders

recognised in Hong Kong are, without further order of the court, the same as the powers available to liquidators under Hong Kong law, including the ability to take possession of the assets and books and records of the company and to bring legal proceedings. In *Joint Provisional Liquidators of BJB Career Education Company (in provisional liquidation) v Xu Zhendong*, also in 2016, the court made an order allowing the foreign provisional liquidators to examine and require the former chairman and director of the company in provisional liquidation to, amongst other things, attend an oral examination in Hong Kong and swear an affidavit in answer to written interrogatories (thereby dismissing a constitutional challenge under Hong Kong's Basic Law to the making of such an order).

More recently, in *Bay Capital Asia v DBS Bank (Hong Kong)* and *Re China Lumena New Materials*, Harris J. clarified that banks should, at the request of foreign liquidators duly appointed by the court of the place of the company's incorporation, provide the liquidators with information about the relevant accounts without the need to first obtain any order from the court. This is to be contrasted with a situation in which a foreign liquidator wishes to take possession of, or deal with, assets in Hong Kong, where an order would be required from the Hong Kong court for the bank to transfer funds at the request of the foreign office holder. In *Re Supreme Tycoon*, Harris J. confirmed that there was no bar to the Hong Kong court recognising and assisting a foreign insolvency proceeding in the form of a creditors' voluntary liquidation.

Finally, while *Re Legend* does not allow for

restructuring and, on June 22 2018, CWG, CWATL and two of CW Group's Singapore-domiciled subsidiaries made an application to the Singapore High Court for a six-month s.211B moratorium to allow CW Group to attempt a restructuring of its debts by way of a scheme of arrangement (the Singapore application), triggering a statutory 30-day automatic moratorium upon filing of the application.

Shortly thereafter, 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 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 Harris J. 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 (the Cayman PL Applications). 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 on the conventional grounds of preventing dissipation of CWG's assets and preventing mismanagement or misconduct on the part of CWG's directors.

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, 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 court noted in its written decision the cross-border context in which CWATL's provisional liquidation application was made, indicating that it appeared to the court that CW

Group had intended to conduct a group-wide restructuring through a s.211B moratorium and associated scheme of arrangement, with recognition and assistance given by other relevant jurisdictions in which the CW Group members are located. The court also noted that CW Group's Singapore-based restructuring efforts had not progressed as planned in view of the opposition put forth by BoC, being the largest creditor of the CW Group, and suggested that CW Group's decision to make the Singapore application without consulting BoC may have raised BoC's suspicion.

Although it was ultimately not necessary for the court to determine any cross-border issues, Harris J. invited practitioners to consider, in future scenarios where a s.211B moratorium is involved in a cross-border restructuring process, whether a s.211 moratorium is eligible for recognition in Hong Kong and, if it is, whether the court may grant assistance by way of appointing provisional liquidators.

Having raised this intriguing proposition, Harris J. did not attempt to provide any definitive answers or guidance on whether a s.211 moratorium would be capable of recognition in Hong Kong or on 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:

- the true nature of a s.211 moratorium and whether it should be treated as a collective insolvency proceeding;
- whether a collective insolvency proceeding which is not conducted within the jurisdiction of domicile of the company concerned (such as the Singapore restructuring and s.211B moratorium so far as it related to CWATL) is capable of being recognised in Hong Kong (noting an absence of Hong Kong authority on this point – the question having been left open in the *African Minerals* decision); and
- 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).

Harris J. acknowledged the questions would remain unresolved until another case involving suitable facts for a decision that can provide clarity on these issues, but 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.

The determination of Harris J.'s second question above – whether the Hong Kong court can recognise a collective debtor-in-possession proceeding – will ultimately be relevant to whether Chapter 11 proceedings can be recognised in Hong Kong. Obtaining clarity on that issue would be particularly useful given that New York law is a common choice of governing law by Hong Kong incorporated or HKEx listed companies when issuing bond debt, which could potentially be restructured in Chapter 11. The use of Chapter 11 by corporate groups with a connection to Asia is increasingly being considered as an option, which recent cases like PARD and EMAS Chiyoda Subsea illustrate.

The challenges facing a company looking to restructure its debts in Hong Kong are further highlighted by the strikingly different outcome in the case of the Cayman PL Applications. Despite support for BoC's application from a number of Hong Kong and Singapore creditor banks, the Cayman court dismissed BOC's application for provisional liquidators on conventional grounds and granted CWG's application for soft touch provisional liquidation. The Cayman court's decision was driven considerably by the contrasting prospects faced by CWG's creditors in a soft touch restructuring versus a liquidation. As at the time of writing this article, the decision of the Cayman court is pending appeal.

Notwithstanding these challenges, *Re CW Advanced Technologies Limited* provides a useful list of issues to consider for practitioners and corporate groups participating in a cross-border restructuring involving the recognition of Singapore insolvency proceedings in Hong Kong and sets the scene nicely for further development of this very interesting area of Hong Kong cross border insolvency law.



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