

Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

NOVEMBER/DECEMBER 2018

Editor's Note: In the Courts
Victoria Prussen Spears

Creditors Typically May Not Offset Section 303(i) Judgments Against Claims Against Debtors
Stuart I. Gordon and Matthew V. Spero

A Lease by Any Other Name Would Not Smell as Sweet: Fifth Circuit Denies "True Lease" Status to a "Sale" of Software
James Heiser, James P. Sullivan, Stephen R. Tetro II, and Franklin H. Top III

***In re Franchise Services of North America, Inc.*: The Fifth Circuit Explores Restrictions on Bankruptcy Filing**
Mark A. Speiser and Harold A. Olsen

Seventh Circuit Holds That the Illinois Department of Revenue Must Present Evidence to Support the Value of Its Claim for Adequate Protection in a Section 363 Sale
Michael T. Benz, Bryan E. Jacobson, and James P. Sullivan

Ya Gotta Have [Good] Faith: Ninth Circuit Holds That in the Context of Plan Voting, a Bad Faith Showing Requires More Than a Negative Impact on Creditors
Fredric Sosnick, Joel Moss, Solomon J. Noh, and Ned S. Schodek

Eleventh Circuit Issues Opinion on New Value Defense to a Preference Claim
Edward M. Fitzgerald and Alan M. Weiss

Bankruptcy Court Enforces Non-Consensual Third-Party Releases in Chapter 15 Case
Shantel Watters-Rogers

A Check Is Transferred When It Is Honored, Not Delivered
Matt Barr and Lauren Tauro

Tenth Circuit B.A.P. on Novinda's Classification: No Gerrymandering, No(n)-Creditor Interest, No Problem
Andriana Georgallas

Delaware Bankruptcy Court Declines to Bind Credit Bidders to the Mast
Matthew Goren and Kevin Bostel

Getting Off on the Right Foot: Bankruptcy Court Rejects U.S. Trustee's Unconventional Position That Management Consultant Must Be Retained Under Section 327 of the Bankruptcy Code
Debra Hoehne and Gaby Smith

More Cautionary Tales in Puerto Rico's Restructuring
Laura E. Appleby, James Heiser, and Aaron M. Krieger

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
Naomi Moore and Daniel Cohen



LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 14

NUMBER 8

NOV./DEC. 2018

Editor's Note: In the Courts . . . Victoria Prussen Spears	359
Creditors Typically May Not Offset Section 303(i) Judgments Against Claims Against Debtors Stuart I. Gordon and Matthew V. Spero	363
A Lease by Any Other Name Would Not Smell as Sweet: Fifth Circuit Denies "True Lease" Status to a "Sale" of Software James Heiser, James P. Sullivan, Stephen R. Tetro II, and Franklin H. Top III	369
<i>In re Franchise Services of North America, Inc.</i>: The Fifth Circuit Explores Restrictions on Bankruptcy Filing Mark A. Speiser and Harold A. Olsen	374
Seventh Circuit Holds That the Illinois Department of Revenue Must Present Evidence to Support the Value of Its Claim for Adequate Protection in a Section 363 Sale Michael T. Benz, Bryan E. Jacobson, and James P. Sullivan	378
Ya Gotta Have [Good] Faith: Ninth Circuit Holds That in the Context of Plan Voting, a Bad Faith Showing Requires More Than a Negative Impact on Creditors Fredric Sosnick, Joel Moss, Solomon J. Noh, and Ned S. Schodek	382
Eleventh Circuit Issues Opinion on New Value Defense to a Preference Claim Edward M. Fitzgerald and Alan M. Weiss	385
Bankruptcy Court Enforces Non-Consensual Third-Party Releases in Chapter 15 Case Shantel Watters-Rogers	388
A Check Is Transferred When It Is Honored, Not Delivered Matt Barr and Lauren Tauro	393

Tenth Circuit B.A.P. on Novinda’s Classification: No Gerrymandering, No(n)-Creditor Interest, No Problem Andriana Georgallas	396
Delaware Bankruptcy Court Declines to Bind Credit Bidders to the Mast Matthew Goren and Kevin Bostel	400
Getting Off on the Right Foot: Bankruptcy Court Rejects U.S. Trustee’s Unconventional Position That Management Consultant Must Be Retained Under Section 327 of the Bankruptcy Code Debora Hoehne and Gaby Smith	404
More Cautionary Tales in Puerto Rico’s Restructuring Laura E. Appleby, James Heiser, and Aaron M. Krieger	408
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 Naomi Moore and Daniel Cohen	412

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Kent K. B. Hanson, J.D., at 415-908-3207

Email: kent.hanson@lexisnexis.com

Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844

Outside the United States and Canada, please call (518) 487-3385

Fax Number (800) 828-8341

Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940

Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 PRATT'S JOURNAL OF BANKRUPTCY LAW 349 (2014)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design and A.S. Pratt are registered trademarks of Matthew Bender & Company, Inc.

Copyright © 2018 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SCOTT L. BAENA

Bilzin Sumberg Baena Price & Axelrod LLP

LESLIE A. BERKOFF

Moritt Hock & Hamroff LLP

TED A. BERKOWITZ

Farrell Fritz, P.C.

ANDREW P. BROZMAN

Clifford Chance US LLP

MICHAEL L. COOK

Schulte Roth & Zabel LLP

MARK G. DOUGLAS

Jones Day

MARK J. FRIEDMAN

DLA Piper

STUART I. GORDON

Rivkin Radler LLP

PATRICK E. MEARS

Barnes & Thornburg LLP

PRATT'S JOURNAL OF BANKRUPTCY LAW is published eight times a year by Matthew Bender & Company, Inc. Copyright 2018 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Journal of Bankruptcy Law*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844.

Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, No. 18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, Attn: Customer Service, 9443 Springboro Pike, Miamisburg, OH 45342-9907.

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

*By Naomi Moore and Daniel Cohen**

The authors of this article discuss a recent decision by the High Court of Hong Kong reaffirming the court's pragmatic approach to cross-border restructuring.

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

* Naomi Moore is a partner at Akin Gump Strauss Hauer & Feld in Hong Kong focusing her practice on finance and alternative credit transactions, cross-border restructurings, insolvencies and workouts. Daniel Cohen is a partner at Akin Gump Strauss Hauer & Feld LLP and a consultant at Akin Gump Strauss Hauer & Feld in Hong Kong acting for investment firms, corporations and insolvency office holders on a range of contentious matters in the Asia-Pacific region. The authors may be reached at naomi.moore@akingump.com and daniel.cohen@akingump.com, respectively.

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.

BACKGROUND

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

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:

- 1) the true nature of the Singapore Moratorium and whether it should be treated as a collective insolvency proceeding;
- 2) 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
- 3) 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.