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ARTICLE

Universally Territorial: Recognisable?

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Synopsis

Questions around the extent to, and conditions under, which foreign insolvency proceedings and judgments should be given effect in jurisdictions outside that in which they are being conducted are increasingly the subject of debate as a consequence of the progressively international nature of insolvency law; and fall within one of the areas being considered by the UNCITRAL Model Law working group.[1]

For example, the principle in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*[2] (the 'Gibbs rule'), which broadly provides that a debt governed by one law cannot be discharged or compromised by a foreign insolvency proceeding under another law, will soon be put under the microscope in an appeal from a decision in the English High Court.

Similarly, whilst the place of incorporation is frequently considered the appropriate forum for the winding up of a company, the prevalence of offshore incorporated holding vehicles for operations headquartered in financial centres like Hong Kong gives rise to recognition considerations and the need to utilise the available regime most appropriate to the circumstances.

This article reviews certain courts' recent approach to these issues, touching on certain developments in cross border insolvency in England, Hong Kong and, by extension, certain Caribbean jurisdictions.

IBA restructuring rulings

Following rulings[3] in the English High Court in relation to the restructuring under Azeri law of certain indebtedness of the OJSC International Bank of Azerbaijan ('IBA'), in which the Gibbs rule has been upheld, the rule will be put under the microscope in the appeal being pursued by the IBA. As explained above the Gibbs rule means that discharge of a debt under the insolvency law of a foreign jurisdiction is only treated as having that effect if the discharge is effective under the law applicable to the contract, so that, for example, a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding.[4]

IBA is registered in Azerbaijan and largely owned by the Azerbaijan Government. IBA had been placed into a restructuring proceeding ('Restructuring Proceeding') under Azeri law and the English court had earlier granted an order[5] recognising the Restructuring Proceeding as a foreign main proceeding ('Recognition Order') under the UK's Cross Border Insolvency Regulations 2006[6] and imposing a moratorium akin to that under an English administration proceeding.

The restructuring plan proposed by IBA was approved by a substantial majority at the creditors' meeting and sanctioned by the Azeri Court, meaning as a matter of Azeri law it binds all the dissenting creditors, including the Respondents in the case, whose lending to IBA is governed by English law and who did not participate in the Restructuring Proceeding.[7]

IBA's foreign representative sought an order to extend the moratorium which took effect as a consequence of the Recognition Order and that the moratorium should not be lifted by the English court to allow the Respondents to enforce their creditor rights in England, by bringing litigation/arbitration proceedings.

The Respondents opposed the extension of the moratorium on the basis of the Gibbs rule. In January 2018,

Notes

1 UNCITRAL Working Group V – see for example the report of the fifty third session on 7-11 May 2018 on 'Recognition and enforcement of insolvency –related judgments: draft guide to enactment of the model law'.
2 (1890) LR 25 QBD 399.
3 *In The Matter Of The OJSC International Bank of Azerbaijan and In The Matter Of The Cross-Border Insolvency Regulations 2006* [2018] EWHC 59 (Ch); [2018] EWHC 792 (Ch).
4 See Dicey, Morris & Collins on the Conflict of Laws (15th Ed, 2012) at paragraphs 31R-092 and 31-096.
5 *In The Matter Of The OJSC International Bank of Azerbaijan* [2017] EWHC 2075 (Ch).
6 In the UK, the Model Law adopted by the United Nations Commissions on International Trade Law (UNCITRAL) is implemented by the Cross-Border Insolvency Regulations 2006 ('CBIR').
7 The exception to the Gibbs rule – broadly where a creditor submits to a foreign insolvency proceeding (for example, by submitting a proof of debt in a liquidation or participating in a scheme of arrangement) – did not therefore apply.

the English court did not extend the moratorium and further declined to allow procedural relief to vary or discharge substantive rights under English law (such as using a permanent stay as a way of avoiding the Gibbs rule). The Respondents had not participated in the Azeri restructuring proceeding or otherwise submitted to the jurisdiction of the Azeri courts.

The court refused the moratorium extension because the application sought an order intended to bar forever the Respondents from exercising their rights under English law. In the court's opinion, such restriction of rights is not merely a 'procedural' matter and the Respondents' rights under English law should not be negated and substituted by a foreign law right.[8] This key issue is now under appeal, with the appeal expected to be heard before the English Court of Appeal in the Autumn of 2018.

In contrast, a few days after the above English decision was made, a US bankruptcy court approved IBA's restructuring plan and ordered that all creditors are 'permanently enjoined' from commencing or continuing any action in the US to exercise their creditors' rights and barred from commencing actions to settle disputes arising out of the plan in the US.[9]

The matter came back before the English High Court in the days after the January judgment was handed down. Although the Azeri restructuring proceeding had effectively been approved and was in the course of implementation, amendments were made to Azeri law to allow the courts to extend it beyond the expiry date which had been in place (30 January 2018) and which would have in turn been the date the moratorium in England potentially fell away. The same creditors who had been the Respondents were now the Applicants, seeking an order lifting the moratorium under the CBIR to allow them to pursue litigation/arbitration proceedings in respect of debts which as a matter of Azeri law had been restructured. Whilst the court considered that the moratorium should be lifted, while the appeal was on foot, it was concerned to ensure that there were no developments which might render it nugatory. On the provision of an undertaking by one Applicant not to enforce any judgment obtained in proceedings until further order, that Applicant was permitted to proceed with court proceedings seeking payment of the debt in question. A suitable undertaking was not provided by the other Applicant (for reasons with which this article is not concerned), and the lifting of the moratorium was stayed to allow for further submissions to be made on a suitable order.

Hong Kong restructurings

Enterprises running businesses through Hong Kong (listed or not) will often do so using multi-jurisdictional corporate structures, whilst the underlying assets are frequently situated outside Hong Kong.

Two associated aspects have been the subject of continued judicial consideration, given the growing global trend of cross-border insolvencies: jurisdiction of the Hong Kong courts to enable provisional liquidators appointed in Hong Kong to pursue restructurings and recognition of foreign liquidation proceedings. Hong Kong has not enacted the UNCITRAL Model Law on Insolvency, so there is no statutory process for the formal recognition of foreign proceedings. Consequently the courts must rely on common law principles and the ingenuity of practitioners; and Hong Kong has a growing jurisprudence on common law recognition relating to overseas insolvency processes.

A typical restructuring in Hong Kong will involve an offshore, Hong Kong-listed entity with debt governed by offshore law (for example New York law). It is not uncommon to see that the law governing a loan document is different from that of the debtor company's place of incorporation.

The Gibbs rule in Hong Kong

Singapore appears to have declined to follow the Gibbs rule,[10] but it remains live in Hong Kong. In a creditors' scheme purporting to vary contractual rights, the effectiveness of the scheme may require that the debtor seeks not only the sanction of the court in its jurisdiction of incorporation but also of the courts in the jurisdictions that govern its contractual debt obligations, to ensure that dissenting creditors cannot enforce their claims against the debtor company in those other jurisdictions.[11]

In certain restructurings, such as of LDK Solar Co Ltd,[12] debts dealt with by the Hong Kong schemes were at least in part governed by Hong Kong law. This generally assists in satisfying the 'sufficient connection' test when the court considers sanction of a Hong Kong scheme for a foreign incorporated company.[13]

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8 See also *Pan Ocean Co Ltd, Re* [2014] EWHC 2124 (Ch).

9 *In re International Bank of Azerbaijan, Debtor in a Foreign Proceeding.*

10 *Pacific Andes Resources Development Ltd* [2016] SGHC 210.

11 See *Re Drax Holdings Ltd* [2004] 1 WLR 1049.

12 *Re LDK Solar Co Ltd* [2014] HKCU 2855.

13 In discussing the circumstances in which the Hong Kong Companies Court will exercise its discretionary jurisdiction to sanction a scheme between a foreign incorporated company and its creditors, the court noted in *Z-Obee Holdings Limited* that a substantial proportion of the debt to be compromised in that case was governed by Hong Kong law: it being 'an established principle of Hong Kong law that a debt can only be

However, in *Winsway*,[14] the debt subject to the Hong Kong scheme of arrangement was governed exclusively by New York law. The law governing the debt was not the only factor to be taken into account when considering a sufficient connection with Hong Kong, which was established by reference to, among other things, the company's listing and the residence of some of its directors, shareholders and creditors in Hong Kong. Regardless of the governing law of the debt, the Hong Kong scheme would prevent a dissenting creditor taking action within the jurisdiction of the Hong Kong courts: one of the principal reasons for proposing a scheme in Hong Kong. Perhaps most importantly as regards the court's decision to exercise its scheme jurisdiction, the court was also satisfied that the purpose of the scheme was likely to be achieved, as Chapter 15 recognition was likely to be granted in respect of the New York law governed bonds, and therefore the Hong Kong court sanctioned the Hong Kong scheme, compromising debt governed exclusively by foreign law.

In the Singaporean *Pacific Andes* case, where it had to consider whether it could grant a moratorium to certain foreign companies to allow them to develop a restructuring plan, the court there decided that the *Gibbs* rule did not bind the Singapore High Court and ruled that a Bermuda-incorporated, Singapore-listed holding company had standing to restructure English and Hong Kong law-governed debt under a Singaporean scheme of arrangement, notwithstanding that the proposed scheme would not by itself necessarily give a good discharge of those debts.

Application of the Gibbs rule in the scheme context gives rise to a further interesting dimension. Where the scheme has been propounded in connection with the insolvency of the debtor (whether or not actually in liquidation), the statutory insolvency regime may be expected to apply, which itself would supplant the general contractual rights of creditors.

However, where the scheme simply involves the variation of contractual rights, it may be less clear that the Gibbs rule should be abandoned: when the parties entered into the contractual arrangements governing the debt, they can fairly be expected to have chosen the governing law of those arrangements deliberately (whereas those same parties may also be expected to have understood that upon the insolvency of one of them, the domestic law of that party's place of incorporation or asset holding may more appropriately apply).

On one level, therefore, there is creditor certainty in selecting English or Hong Kong law to govern one's debt arrangements, whilst use of Singapore law may anticipate submission to an alternative legal regime where applicable. In practice, invocation of the debt's governing law will, broadly, only be meaningful where there are assets of the debtor in that jurisdiction and as the markets are already aware a parallel scheme, notwithstanding the additional cost, is likely to preclude such invocation in a fairly straightforward manner for many cases. However, if such a parallel scheme is not proposed and a jurisdiction in which the scheme company has material assets would follow the Gibbs principle, that may be a sufficient reason for the court to which the scheme is presented to refuse its sanction.

Recognition of foreign proceedings

In *Singularis*,[15] the Privy Council Board considered the doctrine of modified universalism (whereby, broadly speaking, a court will give such assistance as it can to foreign insolvency proceedings, consistent with local law and local public policy, to ensure that a company's assets are distributed under a single system), and held by a majority that there was a common law power to assist a foreign insolvency, although the power could not be used to enable foreign liquidators to do something that they could not do under the law of the liquidation under which they were appointed. The application of such a power has resonated with similar common law jurisdictions globally.

Common law assistance in Hong Kong

In Hong Kong, foreign liquidators seeking assistance from Hong Kong courts previously would wind up the company in Hong Kong to avail themselves of the statutory powers as local liquidators. *Joint Official Liquidators of A Co v B & C*[16] confirmed, in granting recognition to Cayman liquidators pursuant to a letter of request from the Cayman Court, that the authority of a liquidator appointed under the law of a company's place of incorporation should be recognised in Hong Kong. It is now broadly established that a recipient, such as a bank, of a request from a foreign liquidator would be expected to respond as if the request were from a director of that company, rather than requiring a Hong Kong court order before releasing information requested, having satisfied itself that the liquidators have been appointed by the court of the place of the

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compromised under the law governing the debt' (i.e., the Gibbs rule) and 'the desire to protect Z-Obee's listed status in Hong Kong, which is central to the efficacy of this crossborder restructuring, clearly provide sufficient connection between Hong Kong and the scheme to justify this court exercising jurisdiction under section 673 [of the Hong Kong Companies Ordinance].' [2018] 1 HKLRD 165 at paragraph 17.

14 [2017] 1 HKLRD 1.

15 *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675.

16 [2014] 4 HKLRD 374.

company's incorporation.[17] However, a distinction is to be made with regard to assets, where the judge indicated that a foreign liquidator would need to apply for an order vesting him with title to the local property.[18]

In *BJB Career Educational Co Ltd (in provisional liquidation) v Xu Zhendong*,[19] the court noted[20] that:

> '... in the exercise of its common law powers the Hong Kong Companies Court can order the oral examination of a director of a Cayman Island company in liquidation in the Cayman Islands if satisfied that it is necessary and that it would not infringe the established limitations on the exercise of the power conferred by section 221 [of the Companies (Winding Up and Miscellaneous Provisions) Ordinance].'[21]

Recognition of voluntary liquidations

The Hong Kong Court of First Instance recently granted a recognition order in favour of foreign liquidators appointed in an insolvent liquidation commenced by a shareholders' resolution.[22] In so recognising the foreign liquidators, the Court confirmed that its exercise of the common law power of assistance extends to foreign insolvent voluntary windings-up, an issue that has been in doubt following the *obiter dicta* views expressed by Lord Sumption in the *Singularis* decision.[23]

In reaching this decision, the Judge made the observation that '...what matters for cross-border insolvency assistance is not whether the foreign insolvency office-holder is or is not an officer of the foreign court. What matters is whether the foreign proceeding is collective in nature, in the sense that it is "a process of collective enforcement of debts for the benefit of the general body of creditors"[2] *Re Lines Bros Ltd* [1983] Ch 1, 20. It is with collective insolvency proceedings that the principle of modified universalism is concerned [3] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2007] 1 AC 508'. The Judge therefore concluded that recognition should not be provided to liquidators appointed in a foreign solvent liquidation on the basis that it is not a collective insolvency proceeding but rather '... more akin to the "private arrangement" the Privy Council was referring to [in *Singularis*] [4] [2015] AC 1675 at [25]'.[24]

Schemes and restructuring powers of Hong Kong provisional liquidators

Schemes remain an important restructuring tool in Hong Kong but the absence of a statutory moratorium means that corporate debtors have frequently sought provisional liquidation to provide a stay on proceedings while a restructuring is engineered through the scheme process.

However, the Hong Kong Court of Appeal's 2006 decision in the liquidation of *Legend International Resorts Limited*[25] cast some doubt on the role of provisional liquidators in restructurings in Hong Kong. In the words of Kwan J (as her Ladyship then was) in the subsequent case of *Re Plus Holdings Limited*,[26] the *Legend* decision:

> '... held that the statutory power to appoint provisional liquidators under section 193 must be for the purposes of the winding up and that there is a significant difference between appointing provisional liquidators on the basis that the company is insolvent and assets are in jeopardy, which is permissible, and appointing provisional liquidators solely to facilitate a corporate rescue, which is not permissible.'[27]

It is only when 'the purposes of the winding up' exist that 'there is no objection to extra powers being given to the provisional liquidator(s), for example those that would enable the presentation of an application under section 166 [of the old Hong Kong Companies Ordinance to propose and seek sanction of a scheme of arrangement]'.[28]

Since the *Legend* decision, the general view has been that Hong Kong law does not strictly allow 'soft touch' provisional liquidation to restructure a company.

Z-Obee Holdings Limited

In a first in Hong Kong, the Companies Court sanctioned a creditors' scheme of arrangement proposed

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17 See *Bay Capital Asia LP v DBS Bank (Hong Kong) Ltd* [2016] HKEC 2377.
18 [2014] HKEC 1294 at paragraph 6.
19 [2016] HKEC 2516.
20 *Ibid.*, at paragraph 7.
21 The approach in *BJB* was also followed in *Re Pacific Andes Enterprises (BVI) Ltd.* [2017] HKEC 146.
22 *Re Supreme Tycoon Limited* [2018] HKCFI 277.
23 [2015] AC 1675 at [25].
24 This view diverges from that expressed by the Singapore High Court in *Re Gulf Pacific Shipping Ltd* [2006] SGHC 287, which relied on a U.S. Bankruptcy Court of Nevada decision concerning recognition of an Australian members' voluntary liquidation under Chapter 15 of the U.S. Bankruptcy Code.
25 [2006] 2 HKLRD 192.
26 [2007] 2 HKLRD 725.
27 Paragraph 7, *Plus Holdings*.
28 Paragraph 35, *Legend*.

by a Bermuda-incorporated, Hong Kong-listed company by approving an alternative process pursued by the company and its provisional liquidators so as to overcome the potential constraints in *Legend*. In *Z-Obee Holdings Limited*,[29] a winding-up petition was initially presented in Hong Kong for the winding-up of the company and on the same day, a summons was filed seeking the appointment of provisional liquidators. Provisional liquidators were appointed by the Companies Court to preserve the assets of the company on the traditional basis, but the primary matter remaining for consideration by the provisional liquidators after completing those duties was a potential restructuring of the company. Z-Obee's lengthy status in provisional liquidation for the eventual sole purpose of restructuring ran the risk of being inconsistent with *Legend*. Seeking to avoid possible limitations in Hong Kong, the provisional liquidators took steps to invoke the jurisdiction of the company's place of incorporation (Bermuda), where provisional liquidators may be appointed, in appropriate circumstances, to facilitate a restructuring.

Having subsequently been appointed as provisional liquidators by the Bermuda court and obtained recognition in Hong Kong by a letter of request in a procedure that is now well-established in the Hong Kong Companies Court, the Hong Kong provisional liquidators were then discharged, the Hong Kong winding-up petition stayed, and a restructuring of the company proceeded with the company having the protection of a statutory moratorium via the Bermudan provisional liquidation. This alternative process mitigated the risk that the Hong Kong court might proceed with the winding-up of the Company, which would preclude any restructuring. The courts of both Hong Kong and Bermuda sanctioned the schemes and the shares of the restructured Hong Kong-listed company resumed trading.

The Companies Judge also directed the parties to consider how the recent *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* formulated by the Judicial Insolvency Network could potentially be applied in the case. The guidelines aim to enhance the efficiency in the administration of parallel insolvency proceedings by establishing a framework for close cooperation between courts of different jurisdictions.

Changgang Dunxin Holdings Limited

A similar scenario arose for Changgang Dunxin Holdings Limited, incorporated in the Cayman Islands. To address the potential limitations provided by *Legend*, the Hong Kong appointed provisional liquidators sought their appointment as Cayman provisional liquidators to enable them to exercise the broader restructuring powers more clearly available in that jurisdiction.

This proposal was sanctioned by the Hong Kong court, leading to: an application for common law recognition of the Hong Kong provisional liquidators' powers as foreign liquidators to act in the name and on behalf of the company for the limited purpose of making an application to wind it up in the Cayman Islands and to be appointed as Cayman provisional liquidators; following recognition being granted in the Cayman Islands, the presentation of a winding up petition in the Cayman Islands and the issue of an application for the appointment of the Hong Kong provisional liquidators as Cayman provisional liquidators. With a subsequent discharge of the Hong Kong provisional liquidators and their Cayman appointment recognised in Hong Kong, the Cayman provisional liquidators will then be able to undertake the proposed preparation and promotion of parallel schemes of arrangement in the Cayman Islands and Hong Kong, if appropriate.

It was not clear whether common law recognition could be used to permit foreign insolvency representatives (i.e. appointed somewhere other than the place of incorporation of the company) to present a petition to wind up a company in its place of incorporation and seek their own appointment as provisional liquidators. In *Singularis*,[30] the Privy Council held that liquidators appointed in the Cayman Islands (the place of incorporation) could not be treated as if they had been appointed in Bermuda, where the relevant statutory power was broader: the Supreme Court of Bermuda could only provide assistance if the Cayman Court could make the equivalent order. By contrast, Changgang's Hong Kong provisional liquidators were seeking to bring the proceedings back to the place of incorporation and to be appointed provisional liquidators in the Cayman Islands.

China Solar Energy Holdings Limited

In *Re China Solar*,[31] the Hong Kong Companies Court (at first instance) has determined that where warranted by the circumstances, provisional liquidators may be given restructuring powers and pursue the restructuring through to completion, clarifying the position post *Legend*.

Provisional liquidators were appointed to China Solar Energy Holdings Limited (China Solar), a Bermuda incorporated, Hong Kong-listed company, on the basis that provisional liquidators were needed to safeguard the company's assets and to investigate transactions entered

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29 [2018] 1 HKLRD 165.
30 [2014] UKPC 36; [2015] AC 1675.
31 [2018] HKCFI 555.

into by the company. Their powers on appointment included an ability to pursue a restructuring. A creditor later issued a summons for, *inter alia,* the winding-up of the company and the discharge of the provisional liquidators, arguing that because they had finished their asset preservation role the primary remaining focus would be the company's restructuring, which should be impermissible as a result of the *Legend*[32] decision.

In dismissing the application, the Judge confirmed that provisional liquidators should not be appointed for the sole purpose of restructuring; however, provisional liquidators may be given restructuring powers in appropriate circumstances and should be permitted to complete the restructuring, even if they have completed asset preservation and other tasks. Termination of their office because restructuring is the remaining primary task would be inconsistent with the statutory purpose underlying their appointment.

Whilst the place of incorporation is frequently considered the appropriate forum for the winding up of a company, many Caribbean-incorporated companies are registered in Hong Kong with listings, creditors and assets there, and it seems that the Hong Kong provisional liquidation regime can continue to aid such companies achieve a restructuring without the need for recognitive contortions.

CW Advanced Technologies Limited

In a recent decision in *In the Matter of CW Advanced Technologies Limited*,[33] the Hong Kong court raised some further issues for development (as well as exhorting policy-makers to enact a statutory cross-border insolvency regime). The facts and outcome of the case are perhaps of themselves unremarkable: the company in question, along with certain affiliates, applied in Singapore for the scheme moratorium now available under section 211B of the Singapore Companies Act; then applied for a winding-up order in Hong Kong to take the benefit of the statutory moratorium under Hong Kong winding up legislation. The company's petition was subsequently withdrawn and a bank creditor applied for, and the Hong Kong court granted, the appointment of provisional liquidators on traditional grounds (that is, jeopardy to assets).

Leaving aside the considerations raised around organisation of a multi-jurisdictional restructuring, the court raised a number of open questions, which will no doubt be the subject of future debate as the number of cross-border cases grows. These include (and we paraphrase the issues that were mentioned under our own interpretation): whether the moratorium available under Singapore's scheme regime would be eligible for recognition in Hong Kong, for example would a scheme of arrangement qualify as a 'collective insolvency proceeding';[34] if insolvency practitioners are appointed in a jurisdiction outside that of the debtor company's place of incorporation, should they be recognised in a third common law jurisdiction, such as Hong Kong;[35] what recognitive assistance could the Hong Kong court provide in the circumstances, such as appointment of provisional liquidators.

Whilst the court noted that solutions to these challenges were for another day, the issues raised demonstrate the myriad avenues left for navigation as the common law recognition jurisprudence grows.

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32 See footnote 25.

33 [2018] HKCFI 1705.

34 The Judge noted, for example, the impact of *Rubin v Eurofinance* [2012] UKSC 46, as well as interpretations under Chapter 15 of the U.S. Bankruptcy Code, section 426 of the UK Insolvency Act 1986 and English authorities reviewing Regulation (EU) No 1215/2012.

35 See *Re Opti-Medix Ltd* [2016] SGHC 108; *Re China Agrotech Holdings Ltd* FSD 157 of 2017 (NSJ).

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