CW Advanced Technologies Limited – Recognition Issues Considered

In the recent case *Re CW Advanced Technologies Limited*,[1] the Hong Kong court took the opportunity, albeit only *obiter dicta*, to raise and briefly comment on certain unresolved questions surrounding three issues of interest to insolvency practitioners:

- first, whether a scheme moratorium ordered by a Singapore court under Singapore law can qualify for common law recognition in Hong Kong; and
- if yes, second, whether the Hong Kong court may grant assistance by appointing provisional liquidators; and
- third, whether a scheme of arrangement in general can be characterised as a 'collective insolvency proceeding' under Hong Kong law.

Case Background

The scheme company in question sought an order in Singapore for a six-month moratorium to follow an existing automatic 30-day moratorium. It then applied for a winding-up order in Hong Kong to invoke the local statutory protection from proceedings under the Companies (Winding-Up and Miscellaneous Provisions) Ordinance. The petition was subsequently withdrawn and a creditor applied for, and the Hong Kong court granted, the appointment of provisional liquidators. The circumstances and outcome of the case are themselves relatively mundane, but the court raised a number of open questions for future debate, which we consider below.

Current Hong Kong Law

Hong Kong has not enacted the UNCITRAL Model Law on cross-border insolvency and its insolvency legislation does not contain any provisions dealing with cross-border insolvency, nor are there any treaties which may materially facilitate cross-border recognition. The Hong Kong court's power to recognise and grant assistance to foreign insolvency proceedings and foreign insolvency office-holders is founded singularly on common law principles. Therefore, the scope of, and the Hong Kong court's ability to grant, such recognition and assistance is limited by principles set out in case law.

These limitations include, broadly:

1. **Incorporation/Assisting Jurisdiction Availability**. In order for a power, remedy or relief to be exercisable by or available to a Hong Kong court, it must exist in both (a) the jurisdiction of liquidation[2] and (b) the assisting jurisdiction.[3]
2. **Collective Process**. A Hong Kong court may grant assistance in winding up proceedings provided that the foreign liquidation is collective in nature, specifically if it is 'a *process of collective enforcement of debts for the benefit of the general body of creditors*':[4] This means, for example, that judicial assistance will not be given to a solvent liquidation.

1 [2018] HKCFI 1705

2 *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675 – The basis for this view has traditionally referred to the jurisdiction of the place of incorporation of the relevant company, but the Hong Kong court in *African Minerals* noted the possibility of extending the principle to include a jurisdiction that is not the place of incorporation, but in which the liquidation has been granted.

3 *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675, referring to the jurisdiction in which recognition or further relief is sought. *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd* [2015] 4 HKC 215 at paragraphs 11 and 12.

4 *Re Supreme Tycoon Ltd (in liquidation)* [2018] 2 HKC 485 citing Brightman LJ in *Re Lines Bros Ltd* [1983] Ch 1 (CA) at para. 20.

3. **Necessary for the performance of the insolvency practitioner's functions**. A Hong Kong court may assess a power as being vested in the foreign insolvency office-holder only when it is necessary for the performance of the office-holder's functions.[5]

The above principles offer guidance when considering the comments of the court in *Re CW Advanced Technologies Limited*.

The Moratorium

Though the Hong Kong court raised the question of eligibility for recognition of a Singapore scheme moratorium, it went no further than noting potential analogies in other common law jurisdictions that might be drawn upon to support arguments either way. The judge explicitly asked practitioners to consider the merits of such recognition, leaving the issue open for discussion.

Recognition under the current regime is problematic because it potentially falls foul of the above-mentioned incorporation/assisting jurisdiction availability principle, and thus of the applicable common law in Hong Kong.

Looking at the case at hand, section 211B of the Singapore Companies Act sets out a clear two-step scheme moratorium system, comprising (1) an initial automatic moratorium under section 211B(8)(e) of the Companies Act; and (2) a subsequent moratorium applied for by the scheme company and potentially granted by the Singapore court under section 211B(1) of the Companies Act.

While the 30-day automatic moratorium provision under Singapore law could arguably embrace concepts accepted under Hong Kong insolvency law if it were not for its restriction on enforcement of security under section 211B(8)(e) which finds no parallel in Hong Kong law. Further, Hong Kong law does not recognise a moratorium or stay of proceedings against a company while such proposed scheme is being put together,[6] or currently have any equivalent to administration with a corresponding statutory provision providing for a moratorium on the enforcement of secured debt, although in limited circumstances an injunction could be sought by a party in order to restrain an enforcement of security.[7]

Accordingly, the application of the incorporation/assisting jurisdiction availability principle could potentially stand in the way of recognition of an order containing a security enforcement restriction that is sought in Hong Kong for a Singapore scheme moratorium.

A scheme as a collective insolvency proceeding

The court in *Re CW Advanced Technologies Limited* indicated the possibility of recognition of a Singapore moratorium in Hong Kong by generally characterising a scheme of arrangement (of which the scheme moratorium under Singapore law forms a part) as a 'collective insolvency proceeding.' By placing a scheme of arrangement under the umbrella of this legal concept in Hong Kong law, recognition could theoretically be achieved via inclusion of the moratorium within the scope of the collective insolvency proceeding, which can be recognised under Hong Kong law – a potentially clean solution.

In raising the issue, the court referred to a number of different sources of analysis, such as Chapter 15 of the U.S. Bankruptcy Code, section 426 of the U.K. Insolvency Act 1986 and English authorities reviewing Regulation (EU) No 1215/2012, but without proffering a conclusion. However, the court suggested that the doctrine of modified universalism would not preclude recognition in those circumstances and noted the Singapore and Cayman authorities purportedly supporting that conclusion.[8]

5 In *Supreme Tycoon*, the Hong Kong court simply refers to a foreign insolvency office-holder irrespective of whether such office-holder is officer of the foreign court. This is wider than the meaning in *Singularis* where the Privy Council refers to 'officers of a foreign court of insolvency jurisdiction or equivalent public officers'. The difference means that a Hong Kong court would likely recognise and assist insolvency practitioners who are not appointed by a court while courts who follow the dicta of the Privy Council in Singularis would likely only assist and recognise court appointed insolvency practitioners.

6 *Credit Lyonnais v. SK Global Hong Kong Ltd.* [2003] 4 HKC 104 and *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd* [2015] 4 HKC 215. At para. 10 of *SK Global*, the Hong Kong Court of Appeal noted that *"[i]t is not up to the court to use its inherent jurisdiction to create a regime in which a judgment creditor or insolvent company is able to obtain a moratorium on its debts (or to put it more crudely, to give it some 'breathing space' to allow it to negotiate with creditors)."*

7 *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd* [2015] 4 HKC 215.

8 *Re Opti-Medix Ltd* [2016] SGHC 108; *Re China Agrotech Holdings Ltd* (Cayman Grand Court, 19 September 2017)

However, a scheme of arrangement is a statutory procedure which allows a company to reach an arrangement or compromise with its members or creditors (or any class of them) and is not limited to the insolvency context. A scheme outside insolvency proceedings would not fall under the definition of collective insolvency proceedings since it is not '*a collective enforcement of debts for the benefit of the general body of creditors*',[9] similar to Harris J's observations about voluntary liquidations in Supreme Tycoon.

Should it be determined that a scheme of arrangement in the insolvency context is to be classified as a collective insolvency proceeding, a statutory limit or restriction should be created to ensure confusion is avoided as to how the concept is applied.

A scheme put in place after the opening of an insolvency proceeding could more easily qualify as a collective insolvency proceeding and indeed facilitate recognition in Hong Kong. It seems arguable that it is the insolvency proceeding rather than the scheme which constitutes the '*collective enforcement of debt*', and that the scheme is merely a means to implement the enforcement efficiently. In that event, the analysis might return to conventional lines: are the foreign office-holders entitled to recognition (rather than being a question of whether the statutory scheme moratorium is eligible for recognition).

Importantly, much depends on the terms of an individual scheme and whether it is put in place for the benefit of the general body of creditors. It seems that were a scheme to fall within the scope of a collective insolvency proceeding it should qualify for recognition in the same way as any other plan in an insolvency proceeding.[10]

It therefore seems that there is room for recognition under available common law principles for recognition in Hong Kong of a Singapore moratorium (1) as long as the order for such moratorium does not include a stay on enforcement of security; (2) as long as the scheme of arrangement qualifies as a collective insolvency proceeding; and (3) if the court can recognise a foreign collective insolvency proceeding in a jurisdiction that is not that of the debtor's incorporation following the modified universalism doctrine.

Appointment of provisional liquidators

In *Re CW Advanced Technologies Limited*, the Hong Kong court also considered whether it may grant assistance by way of appointing provisional liquidators. The court emphasized that there was no Hong Kong authority to support such relief, but did offer analogies that could be drawn from English law to support such an appointment.

For a company incorporated in a foreign jurisdiction subject to a Singapore scheme moratorium, there is nothing to prevent the Hong Kong court from employing a standard recognition order which recognises an insolvency practitioner appointed in its place of incorporation and accords him/her the applicable powers granted under a Hong Kong winding up order in Hong Kong.[11] This would offer an easy, clean solution.

Alternatively, a provisional liquidator could be appointed under Hong Kong law if the requisite requirements are met, but the appointment of provisional liquidators would simply be the exercise of a power vested in the Hong Kong court by the Companies (Winding-Up and Miscellaneous Provisions) Ordinance as supported by case law

Recognition of foreign jurisdiction

It is a general principle that the law of the state of incorporation of a company governs its status from creation to dissolution. Thus, as regards foreign liquidations, the general rule is that the Hong Kong court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation.[12] In *African Minerals* the Hong Kong court noted that it may also be possible to recognise a liquidator appointed in a jurisdiction other than the place of incorporation[13] as has now been done subsequently by other common law courts.[14]

9 See, for example, *Re Rodenstock GmbH* [2011] EWHC 1004.

10 The comparator in a scheme of, or in connection with, an insolvent company is liquidation, the general body of creditors must be understood as a reference to unsecured creditors who still have an economic interest in the company, see *Re Tea Corporation* [1904] 1 Ch 12, *In the matter of Telewest Communications PLC* [2004] EWCH 924, *Re Hawk Insurance* [2011] BCLC, *Re Yaohan Hongkong Corporation Ltd.* (in liquidation) [2001] 1 HKLRD 363.

11 *Z-Obee Holdings Limited* [2018] 1 HKLRD 165.

12 *Baden, Delvaux & Lecuit v Société Générale pour Favorisor le Développement* [1983] BCLC 325.

13 *African Minerals.*

14 *Re Opti-Medix Ltd* [2016] SGHC 108; [2016] 4 SLR 312; *Re China Agrotech Holdings Ltd* (Cayman Grand Court, 19 September 2017).

This is a sensible approach given that in determining whether to exercise its jurisdiction to wind up a foreign corporation, a Hong Kong court will consider whether there exists any other jurisdiction which is more appropriate for the winding up, and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation.[15] Also, this approach seems to be in line with international and regional instruments, as such the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) and the UNCITRAL Model Law, where the jurisdiction with international competence is broadly that of the country of the centre of main interests of the debtor.

However, one may object on the basis of private international law if the appointment of a liquidator would not be recognised by the laws of the place of incorporation.

Whether the Hong Kong court should recognise (as other courts have done) and assist foreign insolvency officers of a Hong Kong incorporated company would likely depend on the facts of the case. In any liquidation of substance, due deference should be given to the primacy of the law of the place of incorporation, the processes in Hong Kong and the entitlement of creditors to have recourse to the courts of Hong Kong and its winding-up jurisdiction. However, where the company is a mere brass-plate at its place of incorporation and if no winding-up proceedings are taking place in Hong Kong (where there are no material assets or creditors in Hong Kong), it may be that the foreign proceedings can be considered to be the most appropriate way in which to wind up the company.[16]

Comment

The Hong Kong legislature could take a first step and with some ingenuity perhaps fashion the UNCITRAL model law principles into a working template for Hong Kong.[17] The model law principles would be a tested and internationally accepted improvement in the first instance, before considering further how to create a system in which there is sufficient flexibility to address the needs of all parties in such a way that will allow all involved to make good their claims and invoke legal remedies that are available to them across jurisdictions.

The UNCITRAL model law recognises the continued differences among national procedural laws and instead of attempting the unification of substantive insolvency law, focuses on encouraging cooperation and coordination between jurisdictions. Its adoption (or incorporation of similar concepts in domestic law) is therefore only a first step, and the sorts of issue raised in the *CW Advanced Technologies* case would remain to be addressed under the common law, if not specifically addressed through additional legislative provisions.

The continued line of decisions shows that to the extent established common law principles require the Hong Kong court to recognise foreign liquidators, it is both prepared and willing to provide assistance to them in appropriate circumstances. However, the court also continues to raise a perceived need for a statutory cross-border insolvency regime in Hong Kong.

15 *Re A Company (No. 00359 of 1987)* [1988] 1 Ch 210; *Re MKI Corporation Ltd* [1998] 1 HKLRD 28; *Re Solar Touch Ltd* [2004] 3 HKLRD 154.

16 Philip R Wood, Principles of International Insolvency Law, 2nd edition (Sweet and Maxwell: London, 2007), Volume 2, paragraph 28-041; Ian F. Fletcher, Insolvency in Private International Law, Second Edition (Oxford University Press: Oxford, 2005) paragraph 3.93.

17 The authors acknowledge the issues that would be encountered in the adoption of the UNCITRAL model law by virtue of the concept of 'state' within the model law.

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