GRR INSIGHT

Asia-Pacific Restructuring Review 2020

ASIA-PACIFIC

RESTRUCTURING REVIEW 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2019
For further information please contact Natalie.Clarke@lbresearch.com

LAW BUSINESS RESEARCH

Mutual Recognition Between China and Hong Kong

Kingsley Ong, Duncan Watt, Joanne Chan and Faith Lee
Eversheds Sutherland

This fiftieth year is sacred – it is a time of freedom and of celebration when everyone will receive back their original property, and slaves will return home to their families.
– Leviticus 25:10 (The Year of Jubilee)

Introduction[1]

The concept of debt forgiveness following the fair and equitable realisation and distribution of a debtor's assets to its creditors is not new, and has its historical roots in biblical times.

In an ideal world, creditors already at risk of suffering significant losses during an insolvency should not be made to bear more unnecessary pain caused by the uncertainty of insolvency outcomes, legal or political conflicts, competing insolvency proceedings or costly duplicative work by appointed insolvency trustees, or unreasonable delays in recovering the debtor's assets. For the law to dictate otherwise would be unjust and inequitable to creditors and debtors. The question of mutual assistance and recognition of foreign insolvency trustees is important in this regard. This issue has gained greater attention in recent years, given significant growth in the amount of global trade, where it is increasingly common for debtors incorporated in one jurisdiction to have significant assets in other jurisdictions. This culminated in the UNCITRAL[2] initiative, the UNCITRAL Model Law on Cross-Border Insolvency,[3] on 30 May 1997, which is intended to encourage harmonisation of cross-border insolvency laws.

On 1 July 1997, Hong Kong reverted to Chinese sovereignty and became the Hong Kong Special Administrative Region of the People's Republic of China (PRC). Hong Kong continues to operate with a high degree of autonomy from the PRC in economic trade, financial and monetary matters under the 'one country, two systems' principle. Hong Kong is consistently

1 We have endeavoured to state the law as at 1 July 2019.

2 United Nations Commission on International Trade Law.

3 Available at: www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

ranked as one of the top international financial centres in the world[4] and is known to be among the world's freest economies.[5] It prides itself on a policy of minimum intervention in the way its market operates. Over the years, Hong Kong has become an ideal hub as a gateway to China, as well as a leading global financial centre. Today, Hong Kong is the largest offshore Chinese yuan market, with deep capital markets, an extensive network of banks, free flow of capital, a sound legal system, a favourable tax environment and an abundance of professionals. It is not surprising that many foreign insolvency trustees have sought assistance and recognition from the Hong Kong courts.

The PRC is the world's second largest economy by nominal GDP[6] and the world's largest economy by purchasing power parity.[7] It has also been Hong Kong's largest trading partner since 1985. Hong Kong is the PRC's fourth largest trading partner (after the US, Japan and Korea), accounting for 6.7 per cent of the PRC's total trade.[8]

Given the volume and interconnected nature of trade between the PRC and Hong Kong, and the significance of both economies to the world, insolvency mutual assistance and recognition between the PRC and Hong Kong is one of the most critical and significant aspects to insolvency practitioners in Asia and beyond. This article will examine the current status of mutual assistance and recognition of insolvency trustees between Hong Kong and the PRC.

Hong Kong

It is common for companies in Hong Kong to have operations and assets in the PRC. Indeed, for many Hong Kong incorporated manufacturers with factories in the PRC, the preponderance of assets will be located in the PRC rather than in Hong Kong itself. These circumstances give rise to potential difficulties when dealing with insolvencies. In particular, it can result in delays in locating, safeguarding and realising assets. These difficulties are exacerbated in circumstances where fraud or misuse of assets is alleged, or a concern where insolvency practitioners may need to move quickly in an environment where the existing officers of the insolvent corporate are uncooperative or even obstructive.

Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. At present there are no statutory provisions empowering Hong Kong courts to render assistance to foreign courts in a cross-border insolvency matter.

4 'Hong Kong joins NY, London as top finance centre', Agence France-Presse, 19 September 2010.

5 The Heritage Foundation has voted Hong Kong as the world's freest economy for the past 25 years (1995–2019). See 'Hong Kong ranked world's freest economy for 25th successive year, beating Singapore at 2nd place and mainland China in 100th', *SCMP*, 25 January 2019.

6 World Bank GDP rankings. Available at: https://datacatalog.worldbank.org/dataset/gdp-ranking.

7 'IMF Report for Selected Country Groups and Subjects (PPP valuation of country GDP)'. Available at: www.imf.org.

8 Source: Trade and Industry Department of Hong Kong. Available at www.tid.gov.hk.

Article 8 of the Hong Kong Basic Law provides that the laws previously in force in Hong Kong (ie, the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of Hong Kong. Under article 160 of the Basic Law, the laws of Hong Kong in force from 30 June 1997 were adopted as the laws of Hong Kong, except for those that the Standing Committee of the National People's Congress declared to be in contravention of the Basic Law. To give effect to this, the Hong Kong Reunification Ordinance was adopted by the Hong Kong legislature on 1 July 1997 (Ordinance No. 110 of 1997). Section 7 of this Ordinance provides that 'the laws previously in force in Hong Kong, that is the common law, rules of equity, ordinances, subsidiary legislation and customary law, which have been adopted as the laws of Hong Kong , shall continue to apply'.

Under English common law, the court has power to recognise and grant assistance to foreign insolvency proceedings.[9] In the absence of statutory cross-border corporate rescue and insolvency procedures, the Hong Kong courts have developed common law principles in a pragmatic way to assist foreign insolvency trustees.

CCIC Finance Ltd v Guangdong International Trust and Investment Corp & Anor (Garnishee)

The Hong Kong court considered and recognised insolvency proceedings initiated in the PRC in *CCIC Finance Ltd v Guangdong International Trust and Investment Corp & Anor (Garnishee)* [2005] 2 HKC 589 (*GITIC*). While *GITIC* provides authority that the Hong Kong courts will consider recognition of PRC insolvency proceedings, two things should be noted about the case.

First, prior to recognition of the PRC proceedings, the Hong Kong court had already wound up a GITIC subsidiary in Hong Kong in 1998. As a result, the court's willingness to recognise the PRC proceedings may be limited to the factual circumstances of this case, and a desire to allow both GITIC and GITIC subsidiary's assets to be disposed of together. Nonetheless, the *GITIC* case implied a cooperative approach taken by the Hong Kong court to recognise PRC insolvency proceedings, and also provided some support to the reciprocity between Hong Kong and the PRC.[10]

Second, since the decision in *GITIC*, insolvency law in the PRC has significantly developed with the introduction of the 2006 PRC Enterprise Bankruptcy Law (2006 EBL), which came into effect on 1 June 2007. The 2006 EBL is further discussed below.

9 *Joint Official Liquidators of A Co v B & C* [2014] 5 HKC 152, paragraph 11.

10 Jing-xia Shi, Yuan-yuan Huang, 'An Empirical Study on Cross-Border Insolvency Cooperation between Mainland China and Hong Kong SAR' (2018) 40(5) *Modern Law Science* 170, 172 [J Shi].

Post-GITIC Hong Kong case law development

In the landmark case of *Joint Official Liquidators of A Co v B & C* [2014] 5 HKC 152, the Hong Kong Companies Court granted a recognition order to Cayman liquidators after considering a letter of request from the Cayman court. Harris J held that the Hong Kong court is prepared to grant recognition orders pursuant to a letter of request from a foreign jurisdiction where the following criteria are met:

- the liquidator was appointed to act under the law of the place of incorporation of the corporation;
- the foreign jurisdiction has a 'similar substantive insolvency law'[11] or operates a similar insolvency regime as Hong Kong; and
- the specific order sought is available to a liquidator or a provisional liquidator under Hong Kong's insolvency regime.

Harris J further noted that a request from a foreign liquidator should be treated as if it had come from the board of directors of the insolvent company, without the need for a Hong Kong court order. This would change the previous practice of Hong Kong-based banks requesting foreign liquidators to produce a Hong Kong court order before disclosing any information that they might hold concerning that company.

In *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd* [2015] HKEC 641, the Hong Kong Companies Court considered a letter of request issued by the High Court of England and Wales and declined to provide assistance to the UK administrators. Harris J stated that the Hong Kong court's power to assist a foreign liquidation process is 'limited by the extent to which the type of order sought is available to a liquidator in Hong Kong under [Hong Kong's] insolvency regime and common law and equitable principles'.[12] Since Hong Kong does not have any equivalent to administration and there was no Hong Kong statutory provision providing for a moratorium on the enforcement of secured debt, if assistance sought by the UK administrators was granted, this would exceed what a Hong Kong company's liquidator would be entitled to under Hong Kong law. Therefore, the Hong Kong court decided that this would be an 'impermissible extension of the common law principle'.[13]

In *Joint Official Liquidators of Centaur Litigation SPC* [2016] HKEC 576, Harris J granted Cayman liquidators extensive powers to, among other things, secure the companies' assets, books and records, and to investigate the affairs of the companies in Hong Kong, including freezing orders and conducting third-party examinations, as well as staying proceedings in Hong Kong against the debtor companies.

Harris J in *Rennie Produce (Aust) Pty Ltd* [2016] HKEC 2012, recognised Australian liquidators and granted orders for the production of documents by two Hong Kong banks pursuant to a letter of request issued by the Federal Court of Australia. For the benefit of insolvency practitioners, Harris J also introduced a standard form of the order the court would be willing

11 Paragraph 18 of Judgment.

12 Paragraph 11 of Judgment.

13 Paragraph 12 of Judgment.

to make, which now serves as a helpful guide for insolvency practitioners acting for foreign liquidators, thereby saving time and costs of creditors of a foreign company when making applications of this kind.

In *Bay Capital Asia Fund LP v DBS Bank (Hong Kong) Ltd* [2016] HKEC 2377, DBS Bank refused to produce any information or documents to Cayman liquidators without a Hong Kong court order. It was held that 'once DBS was satisfied that the Liquidators had been properly appointed (which could have been done by asking for a letter confirming this from Cayman Island lawyers if DBS was not satisfied with copies of the order), [DBS] should have provided [the requested information and documents]'.[14] Harris J also warned that if the bank unreasonably insisted on a Hong Kong court order for recognition before handing over information and documents of the foreign debtor companies to the Cayman liquidators, he would order that bank to pay the liquidators' costs on an indemnity basis.[15]

The *Bay Capital Asia Fund LP v DBS Bank (Hong Kong) Ltd* authority is not without limits. In *Re China Lumena New Materials Corp* [2018] HKCFI 276, the Cayman appointed provisional liquidators tried to rely on *Bay Capital Asia Fund LP v DBS Bank (Hong Kong) Ltd* and argued that since they were entitled to information from the banks without a Hong Kong recognition order, it followed that they could also request Hong Kong banks to transfer the credit balances without a Hong Kong recognition order. However, Harris J considered that this 'would be going too far and would go even further than international insolvency standards embodied in the UNCITRAL Model Law on Cross-Border Insolvency',[16] and drew a distinction between the liquidators' access to information and their power to deal with assets. It was held that while information can be obtained from third parties in Hong Kong without a Hong Kong recognition order, foreign insolvency office holders who wish to take possession of or deal with assets in Hong Kong must first obtain a Hong Kong recognition order. Harris J subsequently granted the recognition order to the Cayman provisional liquidators on the basis that the Cayman insolvency proceedings are 'collective insolvency proceedings'.[17]

In *BJB Career Education Co Ltd* [2017] 1 HKLRD 113, Harris J held that the common law power of assistance extended to ordering an oral examination of the Cayman Islands debtor company's former management on the basis that such a power existed in the Cayman Islands (being the jurisdiction of incorporation and insolvency) and in Hong Kong (being the assisting jurisdiction). Harris J further noted that 'reciprocity is not a necessary component'[18] for recognition of and assistance to foreign liquidators. The power to provide judicial assistance is rooted in common law and hence the grant of the said order would not infringe article 96 of the Hong Kong Basic Law.[19]

14 Paragraph 11 of Judgment

15 Paragraph 4 of Judgment.

16 Paragraph 6 of Judgment.

17 [2018] HKCFI 276 2, unrep.

18 Paragraph 13 of Judgment.

19 Article 96 of the Basic Law provides that: 'With the assistance or authorization of the Central People's Government, the Government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance.'

In *Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* [2017] HKEC 146, the Hong Kong Companies Court recognised the appointment of BVI liquidators and granted an order for the liquidators to seek documents and information from third parties in Hong Kong pursuant to the letter of request from the East Caribbean Supreme Court.

In *Re Supreme Tycoon Ltd* [2018] 1 HKLRD 1120, which concerned a BVI company liquidated by shareholders' resolution, Harris J in the Hong Kong Companies court held that the mere fact that a foreign liquidation is a voluntary liquidation was not a bar to the Hong Kong courts recognising and assisting the liquidation under the principle of modified universalism. It is worth noting that the English Privy Council judgment in *Singularis Holdings v PwC* [2015] BCC 66 was not followed. However, the Hong Kong Court noted that this principle will not apply to foreign solvent liquidation. Such a liquidation would not represent collective insolvency proceedings under Hong Kong law and would be more akin to 'private arrangement'.

In the latest case of *Re Kaoru Takamatsu* [2019] HKCFI 802, Harris J in the Hong Kong Companies Court recognised a trustee in bankruptcy appointed under Japanese insolvency law. It is worth noting that this is the first time Hong Kong has recognised a foreign insolvency trustee appointed under a civil law system. Harris J held that there were sufficient similarities between the trustee's powers in Japan and a Hong Kong-appointed liquidator to allow recognition. In particular, Harris J had regard to evidence presented to him that the trustee is granted similar (although not identical) rights of administering a company's assets and seeking documents and information as a liquidator under Hong Kong law.

Mainland China

In order to understand the PRC bankruptcy law framework and system, it is first necessary to obtain some perspective on the history and development of Chinese bankruptcy law jurisprudence.[20]

Traditional Chinese jurisprudence

Historically, the Chinese legal system never formally recognised the concept of bankruptcy. It was noted that the Chinese tradition was that 'debts incurred by the father shall be assumed by the son'.[21] Hence, traditionally enshrined in Chinese culture (even though not necessarily protected by a formal legal framework), creditors' rights were unquestionable and debts were never forgiven – debts were passed down to the next generation.

20 It is acknowledged that this section is cited from an article first published by the first author in: Kingsley Ong et al, 'From ISDA to NAFMII: Insolvency stalemate and PRC bankruptcy jurisprudence' (2013) *Capital Markets Law Journal* 77.

21 Shuguang Li, 'Bankruptcy Law in China: Lessons of the Past Twelve Years' (2001) 5(1) *Harvard Asia Quarterly* (23 Feb 2006) [S Li].

The first attempt to introduce the concept of bankruptcy law (with the concept of debt resolution) in China was in 1906 during the late Qing Dynasty. However, this effort was annulled in 1908 by Emperor Guang Xu due to difficulties of implementation. In 1935, the Nationalist government published a bankruptcy law that is still in force in Taiwan today.[22]

Influence of Marxism

When the Communist Party established the PRC in 1949, all laws enacted by the Nationalist government were abolished. Many former privately owned enterprises were turned into state-owned enterprises.[23] State-owned enterprises became the backbone of the economy, providing goods, services, employment and other benefits. State-owned enterprises were supported by the state and did not have to bear their losses (or profits) independently, so bankruptcy was never an issue.

As state-owned enterprises were not profitable entities in their own right, the state was required to support them financially. In practical terms, state-owned enterprises proved to be economic disasters.[24] It came to a stage where certain state-owned enterprises that found themselves in serious financial difficulties could no longer continue to operate. However, the PRC government feared that strict application of bankruptcy laws to insolvent state-owned enterprises would create two serious problems:

- high unemployment, which could result in social unrest; and
- a knock-on effect on the banking sector leading to the bankruptcy of many state-owned banks.[25]

Amazingly, these factors are strikingly similar to the reasons provided by Western governments to justify the bailing out of Western banks following the 2008 financial crisis.

Given these overriding fears, unsustainable state-owned enterprises had to be closed, suspended or consolidated, their business models would be changed by administrative orders, or they went bankrupt automatically without going through any legal procedure. The facts surrounding bankruptcies were also kept secret. In such cases, bankruptcy or insolvency would occur without any legal recourse and nothing would be due or owing to creditors.[26] Hence, following the communist revolution, there was a complete shift in policy and attitude away from creditors' rights. From traditionally having supreme and unquestionable rights, creditors suddenly found themselves having practically no rights in a bankruptcy.

22 Ibid.

23 This was in line with the Marxist theory that the production of capital belonged to the people of China. See Kingsley Ong et al, 'A Comparative Study of Fundamental Elements of Chinese and English Company Law' (1999) 48(1) *ICLQ* 88 [K Ong & C Baxter].

24 Ibid, p91.

25 Charles D Booth, 'The 2006 PRC Enterprise Bankruptcy Law: The Wait is Finally Over' (2008) 20 *SAcLJ* 275, 285 [C Booth].

26 S Li, supra No. 21.

1986 PRC Enterprise Bankruptcy Law

In the early 1980s, shortly following the inauguration of the PRC's 'open door policy', the PRC government realised the drawbacks of the Marxist planned economy model in dealing with insolvent enterprises. This resulted in the enactment of the PRC's Enterprise Bankruptcy Law in December 1986 (1986 EBL), which dealt with bankruptcies of state-owned enterprises. This was the first significant attempt at bankruptcy reform under the Chinese Communist Party and was significant in that it provided a legitimate method for the bankruptcy of state-owned enterprises (which previously could not enter proper bankruptcy).

In April 1991, the National People's Congress issued an amendment to the Code of Civil Procedure that provided a direct basis for handling bankruptcies of non-state-owned enterprises. The Code provided that repayment procedures specified in the 1986 EBL be applicable to all legal entities. This resulted in a major increase in company insolvency cases involving both state-owned and non-state-owned enterprises.[27]

Notwithstanding these developments, creditors still faced great difficulty recovering their debts from bankrupt Chinese companies. Consistent with Marxist ideology on protecting workers' rights,[28] money recovered from bankrupt companies must be used to settle employees first. In addition, bank creditors have priority over non-bank creditors for the remaining money (if any).[29] There is often little or no money left after settling employee creditors, such that even bank creditors generally oppose bankruptcy filings. The bankruptcy process is made even more challenging by concerns about 'identity' and 'instability' and the need to resettle employees into new jobs. This is because fundamental to communist ideology, state employees (or government servants) were guaranteed an 'iron rice bowl' or life-time employment.[30] These challenges meant that for non-bank creditors it was simply commercially not worth initiating or pursuing bankruptcy. Commentators have noted that 'legal mechanisms to guarantee creditors' interests are weak at best',[31] and the 1986 EBL was no more than a 'paper tiger'.[32]

2006 PRC Enterprise Bankruptcy Law

The PRC insolvency law received a major overhaul following the introduction of the 2006 EBL. The 2006 EBL, which became effective on 1 June 2007, introduced a uniform bankruptcy law for all legal persons in the PRC. The 2006 EBL imported concepts drawn from international market bankruptcy standards for restructuring, reorganisation and conciliation.

Of particular interest is the strong protection afforded to creditors. For example, the 2006 EBL entitles creditors to enforce a foreign bankruptcy decision against a debtor's assets inside China in accordance with bilateral or multilateral treaties or the principle of reciprocity.

27 Ibid. Reportedly, over 16,000 cases between 1988 to 2006.

28 K Ong & C Baxter, supra No. 23.

29 This was because the major creditors of state-owned enterprises were state-owned banks.

30 S Li, supra No. 21.

31 Ibid.

32 C Booth, supra No. 25, p285.

Although there remain some concerns about its proper function in practice,[33] the 2006 EBL nevertheless has improved creditors' standing in bankruptcy cases.

Recognition of cross-border insolvency proceedings in the PRC

For the first time in China's bankruptcy jurisprudence, the 2006 EBL formally provided for the recognition and enforcement of foreign insolvency proceedings in China.

Article 5 of the 2006 EBL provides as follows:

> *Bankruptcy proceedings initiated according to this Law shall be effective with respect to the debtor's property located outside the territory of the People's Republic of China. With regard to a legally effective ruling or decision on a bankruptcy case made by a foreign country, if such ruling or decision involves the property of the debtor within the territory of the People's Republic of China, and an application or a petition for the recognition and execution thereof is filed with the People's Court, the People's Court shall, according to international treaties concluded or participated by the People's Republic of China or the principle of reciprocity, review the ruling or decision, and shall decide to recognise or execute the ruling or decision when believing that such reorganisation or execution does not violate the fundamental principles of the law of the People's Republic of China, impair the state sovereignty, security and social public interests or impair the legitimate rights and interests of the creditors within the People's Republic of China.* (Emphasis added.)

Commentators have generally criticised article 5 for not being clear; for example, what do the concepts of 'fundamental principles' and 'social public interests' actually cover?[34]

Putting that aside, article 5 sets out three conditions that must be met:

- there are relevant treaties or reciprocal relations between such country and the PRC;
- the bankruptcy proceeding outside the PRC does not violate the state sovereignty, national security or social public interest of the PRC; and
- the bankruptcy proceeding outside the PRC does not harm the lawful rights and interests of the creditors in the PRC.

33 Xinzhen Lan, 'Outdated Bankruptcy Law Upgraded: China submits new drafts of bankruptcy law to facilitate move towards a full market economy' *The Beijing Review*. Available at www.bjreview.cn/EN/200430/Business-200430(B).htm.

34 Xinyi Gong, 'To Recognise or Not to Recognise? Comparative Study of Lehman Brothers Cases in Mainland China and Taiwan' (2013) 10(4) *International Corporate Rescue* 240.

Article 5 represents a significant milestone in the development of China's bankruptcy jurisprudence. In settling the 2006 EBL, the PRC government also studied the UNCITRAL Model Law on Cross-Border Insolvency and adopted the principle of universalism from the Model Law.[35] This included incorporating a more universalist approach to cross-border insolvency recognition under article 5.

PRC cases

Notwithstanding the landmark legislative framework for recognition provided under the 2006 EBL, in practice to date, the PRC courts have consistently refused to recognise the Hong Kong insolvency proceedings under the 2006 EBL.

In *Moulin Global Eyecare Holdings Ltd* (2006) (immediately following the introduction of the 2006 EBL), the PRC court refused to assist in asset distribution in relation to insolvency proceedings initiated in Hong Kong, despite the finding by the Hong Kong High Court that the Moulin group had assets in the PRC.[36]

In *Ocean Grand Holdings Limited* (2007), a Hong Kong court-appointed provisional liquidator was also refused recognition in the PRC court.[37]

In both cases, the PRC court did not publish a judgment and as a result the rationale for the PRC courts' approach is unclear.

In *Golden Dynasty Enterprises Limited* (2008), the PRC court was again asked to recognise and provide assistance to a Hong Kong court-appointed interim receiver.[38] The PRC court refused to provide recognition or assistance on the grounds that the notion of 'receivership' does not exist in the PRC insolvency laws.[39]

In *Norstar Automobile Industrial Holding Limited* (2009), the Hong Kong-appointed liquidators of Norstar Automobile Industrial Holding Limited sought recognition in the PRC. The matter was brought before the Supreme People's Court. The Supreme People's Court overturned a lower PRC court's decision to recognise a Hong Kong court winding-up order, and refused to grant recognition and assistance. The Supreme People's Court issued a short reply dated 28 September 2011 (the Reply),[40] which stated:

35 Weiguo Wang, 'National Report for the People's Republic of China' in Dennis Faber et al (eds), *Commencement of Insolvency Proceedings*, pp172-173 (OUP 2012).

36 *Re Moulin Global Eyecare Trading Ltd* [2010] 1 HKLRD 851; J Shi, supra No. 10, p173; Emily Lee, 'Comparing Hong Kong and Chinese Insolvency Laws and Their Cross-Border Complexities' (2015) 9(2) *The Journal of Comparative Law* 259, 273-274 [E Lee].

37 *Re Ocean Grand Holdings Ltd* [2008] HKEC 664; J Shi, ibid; Xinyi Gong, 'When Hong Kong Becomes SAR, is the Mainland Ready? Problems of Judgments Recognition in Cross-border Insolvency Matters' 2011 20(1) *International Insolvency Review*, 60-63.

38 *McDonald v Golden Dynasty Enterprises Ltd* [2008] 5 HKLRD 569.

39 J Shi, supra No. 10; E Lee, supra No. 36, p276.

40 Reply of the Supreme People's Court to the Request for Instructions on Norstar Automobile Industrial Holding Limited's Application for Recognition of a Court Order of the Hong Kong Special Administrative Region dated 28 September 2011.

> *This case concerns an application for recognition of a winding-up order issued by High Court of Hong Kong Special Administrative Region. According to Article 1 of Arrangement of the Supreme People's Court between the Courts of the Mainland and the Hong Kong Special Administrative Region on Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases under the Jurisdiction as Agreed to by the Parties Concerned, the winding-up order concerned in this case shall not be deemed as a mutual recognition and enforcement of judgment stipulated in such Arrangement, so the Arrangement shall not be applicable to this case. Article 265 of Civil Procedure Law of the People's Republic of China and the Article 5 of the Enterprise Bankruptcy Law of the People's Republic of China are to regulate the recognition and enforcement of the judgments made by foreign courts and they are not applicable to this case too. Your reasons of applying the aforementioned legal provisions for recognising the winding-up order are not agreed.*
>
> *In a word, currently there is no legal basis for PRC courts to recognise any winding-up order issued by the High Court of the Hong Kong Special Administrative Region, so the winding-up order concerned in this case shall not be recognised.* (Emphasis added.)

The Supreme People's Court did not explain why it considered article 5 of the 2006 EBL to be 'not applicable to this case', notwithstanding that the lower PRC court considered that *GITIC* supported a reciprocal insolvency recognition relationship between Hong Kong and the PRC.

Since the Reply, the lower PRC courts have consistently refused to recognise insolvency proceedings initiated in Hong Kong. For example, in *LDK Solar Co, Ltd* in 2015, separate PRC insolvency proceedings had to be initiated in the PRC against LDK Group companies concurrent to proceedings already initiated in three jurisdictions: the US, Hong Kong and the Cayman Islands.[41] The PRC court also mandated a restructuring in accordance to the PRC law.[42]

The remote likelihood of a PRC court recognising the appointment of a Hong Kong court-appointed liquidator was noted by Harris J in *Re Insigma Technology Co Ltd*,[43] concerning a petition to wind up Insigma Technology Co Ltd (a PRC company) in Hong Kong. In refusing the petition, Harris J noted that, in light of the Supreme People's Court decision in *Norstar*, he:

> *cannot see how, if this is the view the Supreme People's Court took in respect of an order made in Hong Kong to wind up a company incorporated [in Hong Kong], it can sensibly be argued that there is a realistic possibility that a lower court in the Mainland will . . . take the opposite view in respect of a company incorporated in the Mainland.*

41 J Shi, supra No. 10.

42 Decision of the PRC proceedings available at: http://pccz.court.gov.cn/pcajxxw/pcws/wsxq?id=C9B05982CD222AC1953529C04CE73DE6.

43 Unreported, HCCW 224/2013.

Conclusion

There is currently no reported case where Hong Kong courts have been asked to provide assistance to PRC insolvency trustees since *GITIC*. This probably reflects the commercial reality that many Hong Kong companies are structured to hold PRC assets, but not the other way round. It does not reflect any lack of reciprocity or absence of a legal framework to recognise PRC insolvency proceedings in Hong Kong.

Since the case of *Joint Official Liquidators of A Co v B & C*, applications for recognition and assistance have become increasingly common. Notwithstanding the absence of a statutory framework, with the exception of *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*, the Hong Kong courts has shown willingness to grant recognition orders. This extended to insolvency trustees of a civil law jurisdiction in *Re Kaoru Takamatsu*. Therefore, the fact that the PRC is a civil law jurisdiction does not prevent the recognition of a PRC-appointed insolvency trustee in Hong Kong. It is submitted that Hong Kong has a proper legal framework to recognise PRC insolvency proceedings. Since *GITIC*, the PRC's adoption of the 2006 EBL is a positive development, and provides additional reason to believe that the Hong Kong courts would be even more favourably disposed if PRC-appointed insolvency trustees sought for assistance in Hong Kong today.

Ironically, although article 5 of the 2006 EBL provides the PRC courts with explicit powers to assist foreign liquidators, the PRC's Reply in *Norstar* has made this very challenging. The result is that the PRC courts have not recognised Hong Kong court-appointed liquidators since. This has often been detrimental to creditors. The inability of Hong Kong-appointed liquidators and creditors to have an equitable right of access to the PRC courts to seek assistance and recognition will complicate insolvency procedures, necessitate time-consuming and costly competing processes, increase uncertainty in insolvency outcomes and prevent Hong Kong liquidators and creditors from reliefs necessary for the orderly and fair conduct of Hong Kong or PRC insolvencies.

It is worth noting that the Hong Kong government has informed the industry that it is exploring entering into reciprocal agreement with China for Hong Kong insolvency proceedings to be recognised in China (and vice versa).[44] If this reciprocal agreement does materialise, it would certainly become a game changer for Hong Kong and cement Hong Kong's role as a major restructuring hub.

44 Nick Stern, 'Roadmap announced for the introduction this year of a corporate rescue regime in Hong Kong', *Lexology*, 21 January 2019.

Kingsley Ong
Eversheds Sutherland

Kingsley Ong leads the firm's restructuring, insolvency, structured finance, derivatives and DCM practices in Asia. He is a notary public, FCIArb, FHKIArb, solicitor (Hong Kong), barrister and solicitor-advocate (England), and advocate and solicitor (Singapore).

Legal directories have described Kingsley as 'Revered for his ability to advise on complex financial structures' (*Chambers* 2017); 'Go-to counsel' (*Legal* 500 2017); 'An absolute superstar. An all-rounder in the corporate finance space, whose practice also extends into contentious restructuring and insolvency' (*IFLR1000 2019*); 'Kingsley Ong has a phenomenal client base among Mainland China and the Cantonese community. That is what differentiates him from other professionals in the market' (*Chambers 2018*); and 'Market-leading reputation for unwinding securitisations, derivatives and complex structured products' (*Legal* 500 *2019*).

Kingsley is also an adjunct professor at the University of Hong Kong's Law Faculty. His published opinions have been cited as legal authority in the US courts (*LBSF v BNY*, 2010), the Hong Kong Standing Committee on Company Law Reform, the Financial Stability Board and leading textbooks. In 2016, Kingsley served as a Hong Kong law expert witness before the US Bankruptcy Court in *Re Manley Toys*, where the recognition of Hong Kong liquidators appointed under Hong Kong's voluntary liquidation regime was contested.

Duncan Watt
Eversheds Sutherland

Duncan is a consultant specialising in insolvency matters, financial services disputes and contentious regulatory issues. Duncan advises on all aspects of financial markets disputes, including disputes involving alleged breaches of mandate, breaches of investment restrictions, suitability, investment advice and mis-selling. He also regularly advises investment banks and brokers on issues arising out of the closing out of clients' positions, termination and default of derivatives trades, asset tracing and international enforcement.

Joanne Chan
Eversheds Sutherland

Joanne is a trainee solicitor in the structured finance, debt capital markets and restructuring team.

Born and raised in Hong Kong, Joanne studied double majors in LLB and BBA at the University of Hong Kong where she gained interest in corporate law and practice and subsequently obtained her postgraduate certificate in law. In her third year at the University, she studied abroad at King's College London.

Having graduated from the University of Hong Kong, she started her legal career at Eversheds Sutherland. In her current seat, she assisted Kingsley Ong in advising international banks and listed companies on insolvency, restructuring and financing matters. She also has experience in structured finance, securitisation, derivatives, debt capital markets, M&A and private equity transactions involving various jurisdictions, including Hong Kong, the PRC, Taiwan, Singapore, India, Korea, the Philippines and England and Wales.

Faith Lee
Eversheds Sutherland

Faith is a trainee solicitor in the litigation team. She has experience in commercial disputes and regulatory matters, including a spectrum of contentious and advisory work in contractual, shareholders' and directors' disputes for international corporate clients, insolvency, debt recovery and trade finance disputes for banks, and financial regulatory investigations by the Hong Kong Monetary Authority. Faith's recent experience also includes acting for a high net-worth individual in resisting fraud claims and cross-border freezing injunction application by liquidators of a NASDAQ listed company, and judicial review proceedings for a public broadcasting and telecoms regulator.

Faith previously seconded to the intellectual property and media team of Eversheds Sutherland's London office, where her experience ranged from advising in transactional IP matters for retail and media clients, to contentious trade mark infringement disputes.

EVERSHEDS SUTHERLAND
安睿順德倫國際律師事務所

With 66 offices in 32 countries across Africa, Asia, Europe, the Middle East and the United States, Eversheds Sutherland is among the largest global law firms.

To implement an effective restructuring, whether from the perspective of lender or borrower, you need to address a range of issues. These may include renegotiation or refinancing of banking facilities and restructuring equity stakes, as well as the use of insolvency or enforcement processes where necessary.

Eversheds Sutherland has a unique team of specialist restructuring lawyers to help you achieve this, who deal with informal restructurings and workouts, and act for insolvency practitioners appointed as liquidators, administrators or receivers. We regularly work with lawyers from our banking, private equity and tax teams to restructure corporates that are stressed or distressed.

As well as structuring and implementing refinancing arrangements and enforcements, we also provide legal advice relating to the operation of the underlying business. We can add significant value by bringing our sector experience to restructuring cases. Recent cases have included the areas of healthcare, pensions, financial services, retail, electronics, metals and commodities trading. In each of these sectors, Eversheds has market leading experts who work alongside the core lawyers to ensure that the needs of the business are properly addressed. We find this part of our work is often the most valuable element of the advice we deliver to our clients, helping them to better understand and control the underlying business.

37/F, One Taikoo Place
Taikoo Place, 979 King's Road
Quarry Bay
Hong Kong
Tel: +852 2186 3239
Fax: +852 2186 3201

www.eversheds-sutherland.com

Kingsley Ong
kingsleyong@eversheds-sutherland.com

Duncan Watt
duncanwatt@eversheds-sutherland.com

Joanne Chan
joannechan@eversheds-sutherland.com

Faith Lee
faithlee@eversheds-sutherland.com

The *Asia-Pacific Restructuring Review 2020* provides exclusive insight, direct from pre-eminent practitioners. In this volume, our experts in Singapore provide an overview of the Omnibus Act as well as an assessment of transparency in the court system, and note the judicial cooperation in cross-border insolvency matters between the courts of Singapore and the US.

The *Review* examines the current status of mutual assistance and recognition of insolvency trustees between Hong Kong and the PRC, given the volume and interconnected trade and their economies' impact on the world. This edition also provides an overview of legislative reforms targeted at 'phoenixing' activity and the voting of related parties at creditor meetings in Australia. Additionally, our expert panel consider the criticisms of the Indonesian restructuring legislation and provide jurisdictional updates in Hong Kong, India, Japan, Korea, Malaysia and Singapore.

Visit globalrestructuringreview.com
Follow @GRR_Alerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-299-9