

Hong Kong Court confirms common law recognition and assistance for foreign voluntary liquidations

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On 8 February 2018, the Hong Kong Court of First Instance (the "**Hong Kong Court**") ruled that the common law power to recognise and assist foreign insolvency proceedings extends to voluntary liquidations. This is the first authority on this issue in Hong Kong.

Background

By a written shareholder's resolution, joint liquidators were appointed to Supreme Tycoon Limited (the "**Company**"), a company incorporated in the British Virgin Islands. The BVI joint liquidators sought and obtained a letter of request from the Eastern Caribbean Supreme Court requesting recognition of their appointment in Hong Kong for the purposes of obtaining information, books and records regarding the Company's affairs from various third parties in Hong Kong. This letter of request was issued on 17 March 2017.

Decision

In determining whether to grant the recognition sought, The Honourable Justice Harris specifically declined to follow *obiter dicta* in *Singularis*, where the Privy Council (by a majority) suggested that the common law power to recognise and assist foreign insolvency proceedings would not extend to voluntary liquidations. There the court noted that:

"...The limits of this power [the common law power of recognition and assistance of a foreign winding-up] are implicit in the reasons for recognising its existence. *In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not for example, be available to assist a voluntary winding up, which is essentially a private arrangement...*"

In arriving at this position, Harris J provided the following reasons for not following the more restrictive approach suggested in *Singularis*:

- it is not obvious that the principle of modified universalism (the rationale underlying the common law power of assistance) and the purpose of cross-border insolvency assistance would call for a distinction between compulsory and voluntary winding-up;
- while there is no doubt a difference between compulsory and voluntary winding-up in the

level of court supervision, the difference is one of degree, not of kind;

- what matters for cross-border insolvency assistance is not whether the foreign insolvency officeholder 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*". It is with collective insolvency proceedings that the principle of modified universalism is concerned;
- the purpose of cross-border insolvency assistance consists in meeting the foreign insolvency officeholders' practical needs. It would seem arbitrary and unduly restrictive to insist that they are not entitled to assistance merely because they were not appointed by the foreign court.

Harris J made it quite clear, however, that such recognition would not expand to foreign solvent liquidations (for instance, a members' voluntary liquidation) as they are not a "collective insolvency proceeding" and are more akin to a "private arrangement". This view explicitly diverges from the Singapore High Court decision in *Re Gulf Pacific Shipping Ltd* which relied on the US Bankruptcy Court of Nevada's decision in *In re Betcorp Limited* which concerned an Australian members' voluntary liquidation being recognised under Chapter 15 of the US Bankruptcy Code. This decision has since been considered controversial from the perspective of the UNCITRAL Model Law on Cross-Border Insolvency.

Conclusions

The Hong Kong Court has long shown its willingness to use the principle of modified universalism in a pragmatic manner. This decision forms part of a series of other decisions of the Hong Kong Court that explicitly recognise the international nature of insolvency proceedings and the need for courts to assist insolvency practitioners appointed to companies with multijurisdictional dimensions in a practical manner through assistance and/or recognition. The Hong Kong Court's decision can also be seen as a workaround to advance international comity in Hong Kong given that Hong Kong is not a party to the UNCITRAL Model Law on Cross-Border Insolvency.

Contacts



Chris

Dobby

Partner

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