

Cross-border assistance in insolvency proceedings – and a warning to banks

It is a well known fact that many companies conducting business in Hong Kong are actually incorporated in offshore jurisdictions such as the Cayman Islands, the BVI and Bermuda and as a result cross-border insolvency dynamics loom large before the Hong Kong Companies Court.

In a series of decisions starting in mid-2014, the Companies Judge, the Honourable Mr Justice Harris, has made orders recognising in Hong Kong the appointment of foreign liquidators and granting them powers to secure the assets and records of foreign-incorporated companies and to investigate those companies' affairs in Hong Kong, saving foreign liquidators from the cost and delay of winding-up such companies in Hong Kong. The application for a recognition order is made *ex parte* on the papers, with a letter of request from the foreign court.

In *Joint Official Liquidators of Company A Co* [2014] 4 HKLRD 374 and *Re G Ltd* [2016] 1 HKLRD 167, Harris J held that the Hong Kong Court has the power to recognise and assist foreign liquidators of companies wound up in their places of incorporation (where such places have similar insolvency regimes to Hong Kong) by giving them substantially similar powers to those of Hong Kong liquidators.

In *A Co*, Harris J - in recognising the appointment of Cayman liquidators and ordering that the respondents produce certain documents to them - criticised the practice of Hong Kong banks to refuse to cooperate with foreign liquidators' requests for information and documents, absent a

Hong Kong Court order, thereby forcing the foreign liquidators to seek winding-up orders in Hong Kong. He noted that a request from a foreign liquidator should be treated as if it had come from the board of directors of the company, without the need for a Hong Kong Court order. Indeed in a recent presentation, Harris J said banks may be at risk of wrongdoing if they follow the unauthorised directions of the former management rather than those of the liquidators.

The power of the Hong Kong Court to make orders assisting foreign liquidators is limited by the extent to which the type of order sought is available under the Hong Kong insolvency regime, a point emphasised by the Privy Council in *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36. Taking his cue from *Singularis*, Harris J refused the application sought in *The Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd* [2015] HKEC 608 for an order restraining the enforcement of a secured debt, because that order was not available to Hong Kong liquidators (although it was available under the English insolvency regime).

In *Joint Official Liquidators of Centaur Litigation SPC* (HCMP 3389/2015, 3391/2015 and 3393/2015, [2016] HKEC 576), Harris J granted Cayman liquidators extensive powers, amongst other things, to secure the

Key issues

- The Hong Kong courts have the power to assist foreign liquidators by giving them substantially similar powers to those of Hong Kong liquidators.
- These powers include granting them powers to secure the assets and records of foreign incorporated companies.
- This recognition could extend to provisional liquidators of overseas liquidations.
- Banks may be at risk of wrongdoing if they follow the unauthorised directions of the former management rather than those of the liquidators.

companies' assets, books and records and to investigate the affairs of the companies in Hong Kong - including by seeking freezing orders and conducting third party examinations - as well as staying proceedings in Hong Kong against the companies.

The jurisdiction in this area is still developing. As Harris J has himself said in his recent talk, recognition orders could, in principle, extend to the recognition of foreign provisional liquidators in Hong Kong.

Contacts



Scott Bache
Partner

T: + 852 2826 3493
E: scott.bache
@cliffordchance.com



Brian Gilchrist
Partner

T: + 852 2825 8878
E: brian.gilchrist
@cliffordchance.com



Mark Hyde
Partner

T: + 852 2825 8855
E: mark.hyde
@cliffordchance.com



Donna Wacker
Partner

T: + 852 2826 3478
E: donna.wacker
@cliffordchance.com



Joanna Charter
Senior Associate

T: + 852 2826 2458
E: joanna.charter
@cliffordchance.com



Jonathan Denniss
Senior Associate

T: + 852 2826 2487
E: jonathan.denniss
@cliffordchance.com

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