INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

Session 14: Offshore Jurisdiction Practice

The Hon Mr. Justice Nick Segal, Grand Court of the Cayman Islands

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The Cayman Islands

- Tax Neutral
- Business friendly laws, c. 120,000 companies and 35,000 partnerships registered
- Significant inward and outward investment involving the USA, Hong Kong SAR and the PRC
- Common law and statute based on the English model
- Procedural rules are based on the English pre-1999 Rules of the Supreme Court (the Court uses the 1999 White Book: Practice Direction 2 of 2024 encourages reference to the Hong Kong White Book)

Cayman Corporate Insolvency Law

- Companies Act (2023 Revision)
- Companies Winding Up Rules (2023 Consolidation)
- Insolvency Practitioners Regulations 2018 (as amended)
- Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018

The British Virgin Islands

- Tax Neutral
- Business friendly c.400,000 active companies
- English common law framework
- Increasing focus on arbitration
- Appeal from the High Court (Civil and Commercial Division) are heard by the Court of Appeal of the Eastern Caribbean Supreme Court. The Court of Appeal rotates through the Caribbean member states and usually sits in the BVI three times a year. A further appeal is available to the Privy Council
- Procedure in the High Court is governed by the ECSC Civil Procedure Rules 2023 and practice directions

BVI Corporate Insolvency Law

- Insolvency Act 2003
- Insolvency Rules 2020
- BVI Business Companies Act 2004 (as amended)

Bermuda

- One of the first offshore financial centres
- Approximately 20,000 entities
- Initial focus on insurance and reinsurance
- Significant connectivity with New York, Hong Kong, London and Singapore
- Appeals from the Supreme Court are heard by the Bermuda Court of Appeal with a final appeal to the Privy Council
- Procedure in the Supreme Court is governed by the Rules of Supreme Court of Bermuda 1985 (as amended)

Bermuda Insolvency Law

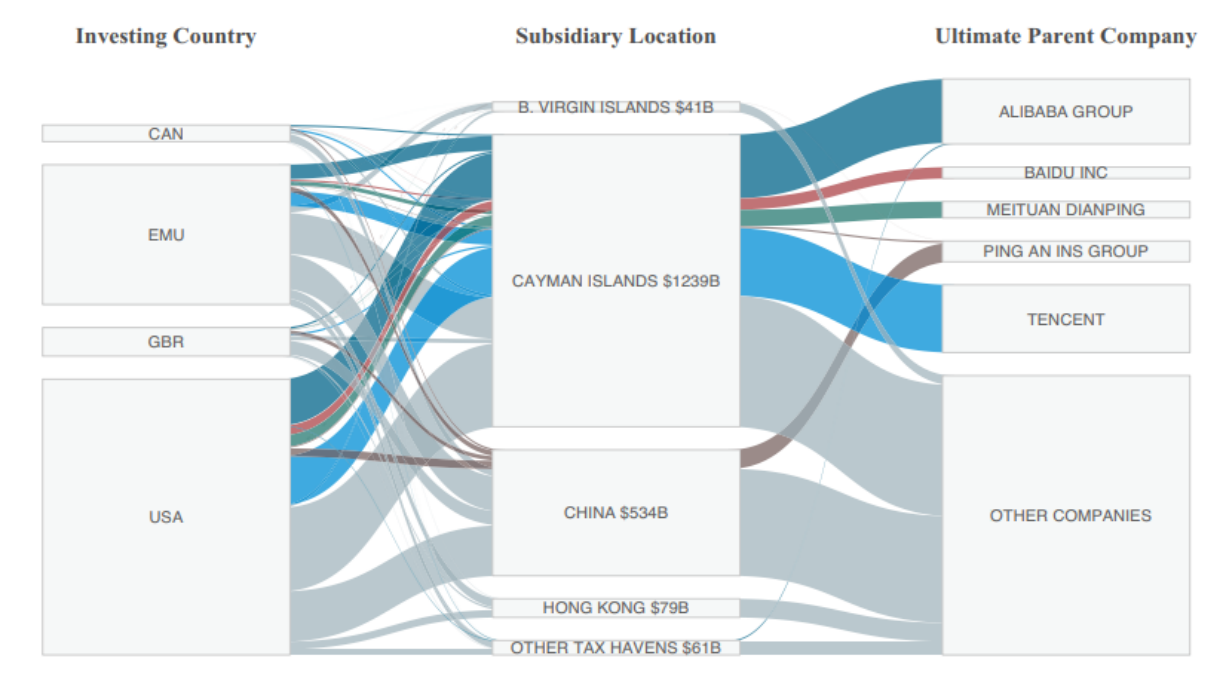
- Companies Act 1981
- Companies (Winding Up) Rules 1982
- Rules of Supreme Court 1995

The Offshore Connection - HKEX

Domicile	No of companies (primary listing)	Percentage
Cayman Islands	1,550	59.82
Bermuda	452	17.45
China (Mainland)	340	13.12
Hong Kong	204	7.87
British Virgin Islands	12	0.46
Singapore	12	0.46
Canada	4	0.15
England & Wales	3	0.12
Australia	3	0.12
Luxembourg	2	0.08
Jersey	2	0.08
Italy	2	0.08
Japan	2	0.08
Israel	1	0.04
USA	1	0.04
Russia	1	0.04
Total companies	**2,591**	**100.00**

NBER Research – China & Offshore Jurisdictions*

(*National Bureau of Economic Research Working Paper 30865 "*China in Tax Havens*" January 2023



Interplay between primary legislation, local jurisprudence and common law decisions

- Primary legislation is the primary source of the law.
- Drafting often influenced by United Kingdom statutes.
- All three jurisdictions have constitutions, so legislature does not have free rein.
- Sophisticated body of local case law establish local common law - highest appellate court is the Privy Council.
- Reference to the wider common law (and particularly England & Wales) to fill the gaps.
- Issues can arise as to whether the wider common law does or should be treated and applied as local law.

Can shareholders who have been induced to subscribe for their shares claim damages for deceit in the winding up of the issuer?

- This issue has arisen recently in two Cayman liquidations of investment funds.
- Two points: (a) ranking; and (b) priority.
- The Court has had to consider the proper meaning of several nineteenth century English cases and whether they should be applied locally.
- The Court also had to consider the impact of decisions of foreign courts and legislatures.
- The main English decision is *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 - regarded as deciding no right to prove.
- This was overturned by statute (Section 111A of UK Companies Act 1984).

Shareholders' right to prove: the case law

- The Supreme Court of Bermuda had decided not to apply *Houldsworth* in Bermuda.
- In the first of the recent Cayman cases (*HQP*), Justice Doyle also decided not to apply *Houldsworth* in Cayman.
- In the second recent decision (*Direct Lending*), Justice Segal decided *Houldsworth* did apply and explained its proper scope an effect.
- The Cayman Court of Appeal will hear an appeal in *HQP* (probably on the way to the Privy Council).
- Demonstrate that offshore jurisdictions have their own policies, and the local common law can be different.

In-Court Restructuring – the Restructuring Officer Regime in the Cayman Islands

- Introduced in summer 2022 and was seen as an improvement of the previous mechanism of appointing 'light-touch' provisional liquidators.
- Company may present a petition seeking to appoint restructuring officers on the grounds that: (i) the company is or is likely to become unable to pay its debts; and (ii) intends to present a compromise or arrangement to its creditors. Court has residual direction as to whether to appoint RO.
- Automatic moratorium from the date of filing – similar to a United States Chapter 11 stay or English administration moratorium.
- Directors will be permitted to present the petition without being required to present a winding up petition or without a shareholder resolution and/or an express provision in the articles.

In-Court Restructuring – the Restructuring Officer Regime in the Cayman Islands

- No usage of the 'liquidation' wrapper. Clear to creditors that this is a rescue process, not a liquidation.
- The application is advertised and creditors or others wishing to appear must give notice although in urgent cases an interim RO may be appointed *ex parte*.
- Court has flexibility as to the terms of the appointment of the restructuring officer.
- Secured creditors remain unaffected by the moratorium.
- First appointment was made by Kawaley J on 11 November 2022 in *Re Oriente Group Ltd*.

In-Court Restructuring – the Restructuring Officer Regime in the Cayman Islands

Case law guidance – *In the Matter of Aubit International* (Unreported, 4 October 2023)

In *Aubit* the application to appoint restructuring officers was dismissed, but Doyle J helpfully listed factors the Court would consider when determining an application.

- Previous case law concerning 'light-touch' provisional liquidators would be both relevant and persuasive.
- The Court must be satisfied – on the balance of probabilities – that the company is or will soon be insolvent and intends to present a compromise and credible evidence must be provided in this regard.
- The Court must be satisfied that the application is in the interests of those with a financial stake in the company and will guard against abusive applications.
- Due weight should be given to the views of creditors, with whom the company should engage.
- The intention to submit a compromise to creditors must be a "*realistic, genuine, bona fide held intention on adequate grounds, even if it is only provided "in outline"*.
- The Court would ordinarily benefit from independent evidence of the merits of a restructuring over a winding up.
- Management should be able to provide an accurate snapshot of the company's current financial position.
- A company and its creditors cannot confer jurisdiction on the Court; the Court must be satisfied that the statutory requirements are met.

In-Court Restructuring – does the 'light-touch' option still exist?

- Whilst the provisional liquidation provisions were not repealed, it was envisaged that the restructuring officer regime would be the route to obtaining a moratorium pending a restructuring.

- Did *Aubit* push debtors back towards the 'light-touch' regime?

- In *The Matter of Kingkey Financial International (Holdings) Limited* (Unreported, 12 April 2024) Justice Asif appointed 'light-touch' PLs, partly on the basis that the company did not have any restructuring plan.

In- Court Restructuring – BVI and Bermuda equivalent

- There are no statutory rescue provisions in the BVI or Bermuda, though both jurisdictions recognise the benefits of a restructuring provisional liquidator.

<u>Bermuda</u>

- Longstanding ability to appoint restructuring PLs. Seminal judgment of L. Austin Ward CJ in *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69:

"I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court".

In- Court Restructuring – BVI and Bermuda equivalent

BVI (1)

- The 'light-touch' provisional liquidator did not make an appearance in the BVI until the *Constellation* decision in 2018.
- The companies in the Constellation group were headquartered in Brazil and were involved in offshore drilling for the oil and gas industry. Each of the companies were already the subject of a RJ process in Brazil and continued business under the supervision of the Brazilian court. Certain group companies also sought Chapter 15 relief in the US. Those entities incorporated in the BVI also sought the protection of a moratorium in the jurisdiction of incorporation.
- In *Constellation* Justice Adderley determined that the provisions of BVI law permitted the appointment of a provisional liquidator could also be invoked to protect assets from creditors pending a restructuring.
- Had been some debate as to whether a 'light-touch liquidator' could be appointed due to legislative provisions in the BVI (that had never been brought into force) which were similar in material respects to the administration regime under the English Insolvency Act.

In- Court Restructuring – BVI and Bermuda equivalent

BVI (2)

- Justice Adderley [Ag] avoided the question head on but determined that as there was no specific statutory provisions in force enabling the Court to appoint an administrator it could use its broad powers to appoint a restructuring PL.

- But no automatic moratorium in BVI. Again question was not dealt with head on due to ongoing Brazilian RJ proceedings and the moratorium imposed as a consequence.

- Court also took comfort from the *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* which specify that:

"The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted".

In-Court Restructuring – No 'Light-Touch' Appointments in Hong Kong

- Hong Kong does not permit the appointment of a PL for the purpose of facilitating a restructuring - PLs can be appointed for the purpose of a winding up, but not to avoid it. See *Re Legend International Resorts* [2006] 2 HKLRD 192

- Restructuring PLs appointed in other jurisdictions can be granted recognition and assistance in certain circumstances.

- The relevance of the company's place of incorporation and COMI – recent case law indicates that when considering the type of assistance to be granted, the HK Court will expect the lead proceedings to be in the COMI jurisdiction.

- If restructuring PLs are appointed in the place of incorporation where the COMI is in HK, they will only be recognised for limited purposes.

In-Court Restructuring – No 'Light-Touch' Appointments in Hong Kong

- Assistance per modified universalism is intended to ensure that all a company's assets are distributed to creditors in a winding up under a single system of distribution, a collective process *(Singularis*).
- Foreign (here Bermudian) 'light touch' PLs seeking recognition and assistance may not be entitled to a stay of proceedings in Hong Kong. Light touch PL appointment is not necessarily in support of a single system of distribution:

  In the Matter of FDG Electric Vehicles [2020] HKCFI 2931 (Justice Harris)
- Bermudian appointed officeholders faced increasing HK Court frustration with number of light touch PL requests for recognition and assistance from PLs appointed offshore. Focus on COMI:

  Global Brands Group Holding Limited [2022] HKCFI 1789 (Justice Harris)
- Recognition of Cayman appointees, but assistance may be limited:

  China Bozza Development Holdings [2021] HKCFI 123 (Justice Harris)

In-Court Restructuring – No 'Light-Touch' Appointments in Hong Kong

- Dicey, Morris & Collins on the Conflict of Laws 30-145:

"…the law of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act then their authority should also be recognized here"

- *Silver Base Group Holdings Limited* FSD 329 of 2021 (DDJ)

22 Nov 2021 – Application to Cayman Court for PLs adjourned: inadequate notice to creditors & comity concerns in light of pending Hong Kong winding up petition. Cayman judge seeks all material before Hong Kong court

8 Dec 2021 – Cayman judge reviews Hong Kong case law and determines that the appointment of JPLs in Cayman will not stop proceedings in Hong Kong if Hong Kong decides not to recognize Cayman's statutory moratorium but through Cayman Court's eyes *'it would be sensible and appropriate for the Hong Kong court to recognize and give assistance to the JPLS which this court has appointed over a company incorporated under the laws of the Cayman Islands'*

5 May 2022 – Winding up order in the Cayman Islands.

In-Court Restructuring – No ‘Light-Touch’ Appointments in Hong Kong

Silver Base Group Holdings Limited [2022] HKCFI 2386

- Cayman liquidators withdraw recognition application after *Global Brands* decision
- Justice Harris makes winding up order since:
  - Company’s listing in Hong Kong a sufficient connection
  - Assets in Hong Kong mean there will be benefit to creditors if Hong Kong order
  - There are creditors in Hong Kong over whom Hong Kong court can exercise jurisdiction.
- Held that liquidation outside the place of incorporation is not necessarily ancillary to the Hong Kong jurisdiction.

In-Court Restructuring – No 'Light-Touch' Appointments in Hong Kong

Increasing number of companies being wound up in Hong Kong despite offshore place of incorporation offshore provided:

- a sufficient connection with Hong Kong;
- a reasonable possibility that winding up will benefit creditors; and
- jurisdiction over one or more persons interested in the distribution of assets.

For example see:

- *Li Yiging v Lamtex Holdings* [2021] HKCFI 622 (Justice Harris wound up the Bermuda incorporated company on the basis that its COMI was in Hong Kong)
- *Ping An Securities Group Holdings* Ltd [2021] HKCFI 1394 (Justice Harris wound up the Bermuda incorporated company on the basis that its COMI was in Hong Kong despite previously granting recognition and assistance to the Bermudian PLs)
- *Up Energy Development Group Ltd* [2022] HKCFI 1329 (Justice Chan wound up the Bermuda incorporated company on the basis that its COMI was in Hong Kong)

In- Court Restructuring – PLs and/or ROs are not always necessary

- Not appropriate in all circumstances.
- Typically, of assistance in urgent circumstances when facing the possibility or reality of winding up proceedings.
- In larger holistic restructurings, creditors will often sign up to a restructuring support agreement contractually prohibiting them from presenting a winding up petition.

Recognition of foreign proceedings: statutory powers - I

- Statutory powers enacted in both Cayman and BVI.
- None of Cayman, the BVI or Bermuda have adopted the UNCITRAL Model Law.

<u>BVI</u>

- Part XVIII of the BVI Insolvency Act contains provisions based on the UNCITRAL Model Law but not in force.
- Part XIX of the BVI Insolvency Act: orders in aid.
- Applies to Australia, New Zealand, Hong Kong, Japan, Canada, the UK, the USA and Jersey.

Recognition of foreign proceedings: statutory powers - II

- Section 467(3): lists 7 types of order the court can make including “such order as it considers appropriate”

- Section 468: in deciding whether to make such an order the court is to guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with just treatment of all persons claiming in the foreign proceeding; protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding; prevention of preferential or fraudulent dispositions; need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency; and (e) comity

Recognition of foreign proceedings: statutory powers - III

- Section 468(2): cannot affect right of any creditor to benefit from insolvency set-off or prejudicing the recoveries of a preferential creditor – section 468(3): cannot make an order that is contrary to public policy

Cayman Islands

- Cayman Companies Act (2023 Revision): Part XVII - orders ancillary to a foreign bankruptcy proceeding

- Only applies to foreign representatives appointed in the country of incorporation of the debtor

- Covers reorganisation and rehabilitation proceedings

Recognition of foreign proceedings: statutory powers - IV

- Section 241: court may make orders for the purposes of recognising the right of a foreign representative to act in the Islands on behalf of a debtor; enjoining the commencement or staying the continuation of legal proceedings against a debtor; staying the enforcement of any judgment against a debtor; requiring a person in possession of information relating to the debtor to be examined by and produce documents to its foreign representative and ordering the turnover to a representative of any property belonging to a debtor.

Recognition of foreign proceedings: statutory powers - V

- Section 242: court must have regard to matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled; protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding; the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate; distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed under Cayman law; recognition and enforcement of security interests created by the debtor; the non-enforcement of foreign taxes, fines and penalties and comity.

Recognition of foreign proceedings: statutory powers - VI

- See *Picard v Primeo Fund 2014 (1) CILR 379* – Primeo was an open-ended investment fund incorporated and in liquidation in the Cayman Islands. It invested in Bernard L Madoff Investment Securities LLC (BLMIS). The US court appointed trustee of BLMIS commenced actions in Cayman against Primeo seeking to recover sums received by Primeo from BLMIS based on the transaction avoidance provisions of the US Bankruptcy Code and separately a voidable preference claim under section 145 of the Cayman Companies Act (and alternatively at common law).

Recognition of foreign proceedings: statutory powers - VII

- The Court of Appeal held that the court did not have jurisdiction under sections 241 and 242 to apply transaction avoidance provisions of foreign insolvency law. The claims based on the US Bankruptcy Code were struck out. But the was jurisdiction under those sections to apply transaction avoidance provisions of the Companies Act so that the Cayman preference claims could proceed (the Court did not decide whether there was also a right at common law). Chadwick P held that the making of a transaction avoidance order in aid of foreign bankruptcy proceedings was the making of an order ancillary to foreign bankruptcy proceedings for the purposes of section 241.

Recognition of foreign proceedings: statutory powers - VII

- Cayman, BVI and Bermuda have, by practice directions issued by the court, adopted the Judicial Insolvency Network's Guidelines on Court-to-Court Communications.

- See *In the Matter of LATAM Finance Limited* [2020] (2) CILR 787 in which Justice Kawaley approved a court-to-court protocol in cross border proceedings to facilitate insolvency proceedings in New York, Chile and Colombia

- In Cayman official liquidators are under a duty to consider whether it is appropriate to enter into an international protocol with any foreign officeholder. The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder. Companies Winding Up Rules Order 21, rule 2.

Recognition of foreign proceedings – non-statutory powers - I

- In Cayman, BVI and Bermuda there is a non-statutory (common law) power to grant assistance to foreign insolvency officeholders and foreign proceedings.

- The court has a power which if the circumstances justify its use and subject to the limitations on its use allows the forum court to make suitable orders for the purpose of allowing the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits on the foreign court's powers.

Recognition of foreign proceedings – non-statutory powers - II

- Assistance can be granted to foreign proceedings in the place of incorporation and if the circumstances so permit in other jurisdictions: see *Re China Agrotech* [2017 (2) CILR 526]

- But there are limits on the court's power: court can only make orders based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it) – and can only assist by allowing foreign officeholder to exercise the

Recognition of foreign proceedings – non-statutory powers - III

Bermuda

- *Singularis Holdings Limited v PricewaterhouseCoopers* [2015] AC 1675 (JCPC on appeal from Bermuda)
- *Hunt v Transworld Payment Solutions Limited* [2020] SC (Bermuda) 14 Com

Schemes of Arrangement

- Statutory and court-based process to restructure debt available in each of the jurisdictions.

- Cayman – s86 of the Companies Act
- BVI – s179A of the Business Companies Act
- Bermuda – s99 of the Companies Act

- Two stage Court process:

1) 'Convening' or 'first' hearing;
2) Sanction Hearing

- A scheme will bind scheme creditors in that class if approved by a majority in number representing 75% in value of those creditors attending and voting at the Scheme Meeting.
- At present there is no procedure that permits a cross-class cram down (so that a dissenting class cannot be bound) but the possibility of its introduction is under review in some jurisdictions.
- Similar to process in England & Wales and Hong Kong. English jurisprudence heavily relied on.

Schemes of Arrangement

International Effectiveness

"The court will not generally make any order which has no substantial effect, and before the court will sanction a scheme it will need to be satisfied that the scheme will achieve its purpose". – per David Richard J in *Re Magyar Telecom BV* [2014] B.C.C

- In *E-House (China) Enterprise Holdings Limited* (Unreported, 17 November 2022) Segal J explained that:

"At the convening hearing, the Court also needs to consider, at that stage on a preliminary basis, whether there is no point in convening a meeting of creditors because even if scheme creditors were to vote in favour and the Court were to sanction the scheme it would ultimately be ineffective since the scheme would not bind creditors and would be of no effect in other jurisdictions in which the company concerned had valuable assets or could be subject to insolvency proceedings (and there was a real risk that dissenting creditors might take action there). The Court will not act in vain and will not sanction a scheme which will not be substantially effective and achieve its core purpose."

Scheme of Arrangement

International effectiveness

- Recognition of a scheme is relevant to discretion but not required. Must be a reasonable prospect that the scheme will be recognized and given effect so as not to be undermined by dissenting creditors – see *Re KCA Deutag UK Finance plc* [2020]
- The Court will consider all relevant factors and take the following approach (per Justice Segal in *E-House*):

1. The Court should be provided with evidence as to the circumstances and the realistic risks of a non-bound creditor.
2. In light of those risks the Court needs to determine whether it should sanction despite those risks.
3. The Court will also consider fairness in this regard. Should some creditors be bound to take a hair cut if others can take action elsewhere and recover the full value of the debt?

Schemes of Arrangement

- Why is international effectiveness so important in the offshore context?

- Commercial activities of offshore entities typically occur onshore.

- Debt is often governed by the laws of other jurisdictions.

Recognition of Foreign Schemes

- Schemes involve the variation or discharge of debt or other liabilities (or of rights attached to shares) - the rules governing the effectiveness of a discharge under foreign schemes or proceedings is, at common law, different from the rules on the recognition of the powers of foreign insolvency officeholders and foreign statutory stays.

- Dicey, Morris & Collins' Rule 211: *A discharge from any debt or liability under the bankruptcy law of a foreign country outside the UK is a discharge therefrom in England if and only if it is a discharge under the law applicable to the contract.*

Recognition of foreign schemes

- Dicey adds that in principle the same rule applies to foreign compositions and that English courts have not looked on the foreign insolvency or restructuring proceeding and any discharge under it as a judgment or order of the foreign court.

- Parallel schemes in order to achieve a global discharge – in the place of the debtor's assets (COMI) and of incorporation

Recognition of foreign schemes

- Parallel schemes involving Cayman and Hong Kong: see *Re China Agrotech* (HK liquidation, no Cayman proceeding) and *Re Freeman Fintech 2021 (1) CILR 426* (parallel schemes in Cayman and HK)

- Schemes for Cayman companies with HK listing and COMI discharging New York governed debt: *Re E-House (China) Enterprise Holdings Limited* (unreported, 17 November 2022)

Recognition of foreign schemes

- *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686
- *Re Modern Land (China) Co Ltd* 22-10707 (MG)
- *Re E-House (China) Enterprise Holdings Limited* (unreported, 17 November 2022)

Schemes of Arrangement

Recognition of offshore scheme in Hong Kong

- Contrast with the US position due to the *Rule in Gibbs*.
- Rule notes that only the governing law of a contract can amend or discharge it.
- Harris J made clear that the rule was alive and kicking in *Rare Earth*.
- The solution? A parallel Hong Kong scheme (or only a Hong Kong scheme).
- However note (i) the warning in *Da Yu Financial Holdings Limited* [2019] HKCFI 2531 describing a parallel scheme as *"the antithesis of cross-border insolvency co-operation"*; and (ii) the acknowledgment that a creditor participating in a foreign scheme process will amount to an exception to the rule – see ***Re China Oil Gangran Energy Group Holdings Ltd*** **[2021] HKCFI 1592**.
- Hong Kong Court will permit the promotion of a scheme by a foreign company when there is a sufficient connection with Hong Kong (such as it being listed on the HKSE) – see *Re China Oil*.

What of the PRC?

- Supreme People's Court and the Government of Hong Kong – Mutual Recognition & Consensus
- May 2021 – records consensus relating to mutual recognition to improve the mechanism for judicial assistance between the PRC and Hong Kong in insolvency proceedings
- *Re Samson Paper* [2020] HKCFI 2931 – 1st HK Letter of Request to China
- *Oznar Water International Holding Limited (in liquidation)* [2022] HKCFI 363 (letter of request)
- *Hong Kong Fresh Water International Group Limited* (in liquidation) [2022] HKCFI 924 (letter of request to Shanghai court)
- *Re Guangdong Overseas Construction Corporation* [2023] HKCFI 1340 (letter of request to the HK Court by the PRC court. Recognition and assistance granted under the common law)

What of the PRC?

Industrial Bank Financial Leasing Co Ltd v Xing Libing BVIHC (COM) 2018/32

- BVI Court recognition and assistance in enforcement of a PRC judgment

Ge Wu v Xun Liu BVIHC (COM) 2021/103

- Application for an interim charging order over shares in a BVI company so as to enforce a judgment of the People's Court of Xichgeng District in Beijing

What of the PRC?

Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR – in force Jan 2024

- Covers both civil and commercial monetary and non-monetary judgments; criminal judgments containing an order for payment of compensation or damages, certain intellectual property rights
- Excludes matrimonial, family, succession, estate administration/distribution, insolvency/restructuring/bankruptcy, confirmation of validity of an arbitration agreement, setting aside an arbitral award, recognition or enforcement of judgment/arbitral award given by a court outside the Mainland or when the place of arbitration was not in the Mainland.

Effective advocacy before an Offshore Judge

DO NOT:

- Alienate local counsel by trying to run the case from onshore;
- Assume offshore practice mirrors onshore practice;
- Overlook the need to explain the offshore proceeding adequately in any Chapter 11 plan;
- Ignore the need for an offshore proceeding;
- Cite persuasive onshore case law and ignore local jurisprudence.