INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE (ONLINE)

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Module B: Session 15 Materials – Offshore Jurisdiction Practice

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Session 15 – Offshore Jurisdiction Practice

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Program Outline

Topic

- *Introduction: Cross border Offshore Restructurings – Structural Considerations*
- *Universalism, Territorialism and the need for Comity*
- *Recognition of Foreign Insolvencies*
- *Advocacy tips from the offshore Judiciary*

Cross border Restructurings – Structural Considerations

What is the law governing the Insolvency

- Governing law of the Company
- Governing law of the Notes
- Governing law of the Security
- Jurisdiction governing dispute resolution
- Governing law of the listing jurisdiction
- Governing law of the group's operations
- Governing law of onshore debts

Relevance

- Priority of distributions
- Debt compromise
- Capital adjustments and reductions
- Management of the Group and its Assets
- Recognition when it counts, where it counts

Universalism, Territorialism and the Need for Comity

Modified Universalism

- It is the common law principle of fairness between creditors requires a single bankruptcy process of universal application from which Modified universalism derives: *Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

- This principle has since been applied: *Singularis v PWC* and *PWC v Saad* [2014] UKPC 35, [2014] UKPC 36.

Offshore: The place of incorporation and its significance

Dicey & Morris – "*the status of a company is determined by its place of incorporation*"

vs

COMI, governing law of debt, assets, location of creditors, jurisdiction of a foreign Court (sufficient connection)

Sufficient Connection Test

More restrictive approach taken to establishing (exorbitant) jurisdiction to wind up foreign companies:

- Three requirements for discretion:
  - Sufficient connection (watered down)
  - Reasonable possibility of benefit
  - Interested persons subject to jurisdiction

Recognition

- Acknowledging the authority of an insolvency appointee to represent the company they are appointed to
- Accepted as a matter of common law – no theoretical requirement for court process
- In practice, not always accepted by relevant parties (e.g., banks seeking Hong Kong court order to give access to accounts)
- General recognition order:
  - Cost of obtaining vs potential benefit
  - Standardise process for letter of request
  - Need for specific order in any event?

Assistance - general

Singularis Holdings Ltd v PwC

- Cayman liquidators seeking access to documents in Bermuda
- Accepted that no power to compel delivery of documents under Cayman law so application failed even though right available under Bermuda law

Assistance – Hong Kong position

Joint administrators of African Minerals Ltd v Madison Pacific Trust Ltd

- Madison Pacific as Security Agent appointed with instruction to enforce parent share charge to market and sell shares
- Chargor a Bermuda company listed in the UK
- Applied in the UK for appointment of administrators
- Administrators sought assistance of the Hong Kong court to stay the enforcement of security

Decision

- Hong Kong court would have no jurisdiction to make the order sought in respect of a Hong Kong company
  - Stay on security enforcement would not apply on winding up
  - Injunction not sought and basis not argued
- No jurisdiction to make order giving effect to the UK stay in Hong Kong – situation the reverse of *Singularis*

Recognition of Foreign Insolvencies

Recognition of Foreign Insolvencies (Cont'd)

Factors court would consider in recognising and assisting foreign liquidators:

- Whether the statutory insolvency scheme in the foreign jurisdiction would discriminate against creditors outside the jurisdiction
- Whether there is fairness between creditors
- Whether the assistance sought is consistent with justice and with public policy in HK
- Must not contravene HK law

- *A Co v B* [2014] 4 HKLRD 374
- *Re Sinoking Holdings Limited* (HCMP 2080/2014)
- *Re Centaur Litigation SPC* (HCMP 3389/2015)
- *Bay Capital Asia Fund, LP* (HCMP 3104/2015)
- *BJB Career Education Company Limited (In Provisional Liquidation) v Xu Zhendong* (Unreported, HCMP 1139/2016, 18 November 2016)
- *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36
- *In re African Farms* [1906] TS 373
- *Re The Joint Liquidators of Supreme Tycoon Limited* (HCMP 833/2017)
- *China Agrotech Holdings Limited* (FSD 157 of 2017 (NSJ)

Supreme Tycoon Limited

[2018] HKCFI 277

Mr. Justice Harris held that a foreign insolvency liquidation commenced by a shareholder's resolution is eligible for recognition and assistance in Hong Kong under its common law. This contradicts Lord Sumption in Sungularis @ para 25.

- The Eastern Caribbean Supreme Court (the ***BVI Court***) granted a winding up order and appointed liquidators over China Culture Media International Holdings Limited (***China Culture***).
- China Culture is the sole shareholder of Supreme Tycoon Limited ***(Supreme Tycoon)***. China Culture's liquidators passed a shareholder resolution to wind up Supreme Tycoon and appointed themselves as liquidators of Supreme Tycoon.
- The liquidators of Supreme Tycoon obtained a letter of request from the BVI Court for recognition and assistance by the Hong Kong Court.
- The Hong Kong Court noted that while the winding up of Supreme Tycoon was a result of a shareholder resolution, the liquidation was *"in all respects akin to a compulsory winding up."*

- In *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, the Privy Council suggested in *obiter* that the common law power to recognise foreign proceedings *"is available only to assist 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"*
- The Hong Kong Court distinguished the present case from the position in *Singularis*.
- The Hong Kong Court noted that what matters most is whether the foreign proceeding is collective in nature that *"it is a process of collective enforcement of debts for the benefit of a general body of creditors."*
- Discrimination against non-court appointed office holders is unhelpful.
- Therefore, the mere fact of a foreign liquidation being a voluntary liquidation is no bar to the Hong Kong Court recognising and assisting that liquidation under the principle of modified universalism.

Re Opti-Medix [2016] SGHC 108 (see CW below)

Singapore High Court adopts 'centre of main interest' (**COMI**) as grounds at common law to recognise foreign insolvency proceedings and recognised a Japanese bankruptcy trustee appointed to companies incorporated in the British Virgin Islands (**BVI**):

- which primarily operated in Japan (ie, their COMI was in Japan);
- and had assets (and minor administrative operations) in Singapore.

The Court ordered that all of the Singaporean assets and records be collected and vested in the Japanese bankruptcy trustee.

Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53, Aedit Abdullah J

Common law COMI test?

[72] We have not had the occasion yet, at least in a written judgment, to consider the
interpretation of COMI under the Singapore Model Law. I previously applied a common law COMI test when deciding recognition issues in Re Opti-Medix Ltd (in liquidation) and another matter [2016] 4 SLR 312 ("Opti-Medix") and Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd) [2016] 5 SLR 787. In particular, I was satisfied in Opti-Medix that despite the debtor companies' incorporation in the BVI, their common law COMI was in Japan where the companies carried on business. I thus granted full recognition to the relevant Japanese insolvency orders and the Tokyo District Court-appointed bankruptcy trustee: at [24] and [25].

[73] Singapore has since adopted the Model Law. It would be preferable if the common law and Model Law conceptions of COMI were aligned as far as possible.

Li Yiqing v. Lamtex Holdings Ltd

In his decision, Mr Justice Harris questioned whether the current practice in Hong Kong to only recognise insolvency practitioners appointed in the place of incorporation should be changed, referring to Opti-Medix.

The place of incorporation should be the jurisdiction in which a company should be liquidated - following the private international law rule that the status of a company is determined by its place of incorporation.

However, if the COMI of a company is elsewhere, then regard should be had to other factors:

1. Is the company a holding company, if so, does the group structure require the place of incorporation to be the primary jurisdiction for an effective liquidation or restructuring of the group?

2. The extent to which giving primacy to the place of incorporation is artificial, having regard to the strength of the COMI's connection with its location.

3. The views of creditors.

Mainland to HKSAR “Recognition”

In a highly significant development, on 14 May 2021 Yang Wangming, vice-president of the Supreme People’s Court and Hong Kong Secretary for Justice, Teresa Cheng signed a “record of meeting” implementing an arrangement between the courts of the mainland and the Hong Kong SAR concerning mutual recognition of corporate insolvencies.

Article 5, Enterprise Bankruptcy Law 2006, PRC

Previous refusals to grant insolvency recognition:

- Moulin Global Eyecare (2006)
- Ocean Grand Holdings Limited (2007)
- Golden Dynasty Enterprises Limited (2008)
- Norstar Automobile Enterprises Limited (2008)
- Re Insigma Technology Co Ltd (Harris J observations of Norstar and unlikelihood of PRC recognition) HCCW 224/2013

Cayman, BVI and Bermuda compared

The restructuring PL - Bermuda

The Supreme Court of Bermuda has used provisional liquidation as a mechanism by which to implement financial or operational restructurings in order to effect corporate rescues, preserve value in the business for stakeholders, and ensure the company/group in question is able to continue as a viable enterprise going forward.

The seminal judgment laying the foundation for the use of a restructuring provisional liquidator is the judgment of L. Austin Ward CJ (as he then was) 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".*

Reform to the Cayman Islands legislation to replace the provisional liquidation for restructuring purposes regime with a new "Company Restructuring" regime

Companies Act Amendment Act 2021 enacted on 15 December 2021 and expected to be brought into force in mid-2022 will repeal the existing provisional liquidation for restructuring purposes regime, which is similar to the Bermuda regime but with a very slender express statutory basis. It will permit any company liable to be wound-up to:

- apply to the Court appoint a restructuring officer (or interim restructuring officer) on the grounds that it is likely to become insolvent and it proposes to present a scheme or pursue a consensual restructuring. The court will be obliged to, inter alia, give directions for creditors to be notified of the proceedings ;
- receive the benefit of a stay of proceedings against the company (without prejudice to the right of secured creditors to enforce their security);
- conduct a restructuring under court supervision under the oversight of a suitably empowered insolvency practitioner without commencing proceedings which either in substance or form signify that the company is liable to be wound-up;
- commence a restructuring proceeding on the authority of the directors in the absence of an express power in the article to do so;

Cayman and Bermuda - Provisional Liquidation

- Provisional liquidation as a mechanism by which to implement financial or operational restructurings in order to effect corporate rescues, preserve value in the business for stakeholders, and ensure the company/group in question is able to continue as a viable enterprise going forward.
- Allows a company to present a winding up petition and make an application to the Court to appoint provisional liquidators where:
  - the company is or is likely to become unable to pay its debts; and
  - the company intends to present a compromise or arrangement to its creditors.
- Similar in effect to the US Chapter 11 or UK administration regimes.
- There is an automatic moratorium on (stay of) proceedings.

Re Legend International Resorts Ltd [2006] 2 HKLRD 192 (*Re Legend*)

"The power of the court under section 192 is to appoint a liquidator or liquidators for the purposes of the winding-up not for the purposes of avoiding the winding up. Whatever benefits may be said to arise and however convenient it may be said to be for the court to be able to appoint provisional liquidators for other purposes it seems to me that [the] primary purpose of appointing provisional liquidators must always be the purposes of winding up. Restructuring of a company is an alternative to a winding up"

- Re Legend (Justice of Appeal Rogers) at [35]-[36]

Z-Obee Holdings Limited

[2018] 1 HKLRD 165, [2017] SC (Bda) 16 Com

- Z-Obee Holdings Limited (***Z-Obee***) is a Bermuda incorporated company that is listed on the Stock Exchange of Hong Kong (***SEHK***).
- The High Court of HKSAR (***Hong Kong Court***) appointed provisional liquidators to Z-Obee ***(Hong Kong PLs*****).**
- The Hong Kong PLs found a 'white knight' investor and wanted to restructure Z-Obee. However, after being appointed for three years there was a concern whether the Hong Kong PLs could restructure the debts and liabilities given the decision in *Re Legend* (i.e. the assets were no longer in jeopardy).
- Z-Obee decided to file an application with the Supreme Court of Bermuda (***Bermuda Court***) to appoint restructuring PLs.
- In a remarkable piece of judicial cooperation, Mr. Justice Harris in the Hong Kong Court adjourned the Hong Kong winding-up petition to allow Z-Obee to bring its application in Bermuda.

- Z-Obee submitted to the Bermuda Court that: there is an established practice of appointing PLs to manage a restructuring in Bermuda; and if Bermuda PLs are appointed, they will seek recognition of their powers in Hong Kong to restructure Z-Obee.

- Chief Justice Kawaley in the Bermuda Court appointed the Bermuda PLs and issued a letter of request to the Hong Kong Court for recognition and assistance.

- Mr. Justice Harris in Hong Kong subsequently recognised the Bermuda PLs' restructuring powers.

- Both the Bermuda Court and the Hong Kong Court subsequently granted orders for Z-Obee to convene scheme meeting of unsecured creditors and to sanction parallel schemes of arrangement in Bermuda and Hong Kong.

Cayman, BVI and Bermuda Compared

Common Law Approach Compared:

Cayman

- Fuji Food & Catering (unreported)
- Irving Picard & Bernard Madoff v Primeo Fund

BVI

- Irving Picard v Bernard Madoff Investment Securities LLC (BVIHCV 0140 of 2010)
- Re C (A Bankrupt)(BVIHC0080 of 2013)

Bermuda

- Re Dickson Group Holdings [2008] Bda LR 34
- Re Founding Partners Global Fund [2009] SC (Bda) 36 Com
- PWC v Saad Investments Company Limited and Singularis Holdings [2013] CA (BDA) 7 Cov

Suggested further reading - Cross-Border Judicial Cooperation in Offshore Litigation: (the British Offshore World), 2nd ed (Wildy Simmonds & Hill: London, 2016).

Reverse recognition

Changgang Dunxin Enterprise Company Limited [2018] FSD 270 of 2017 (IMJ) (Unreported, 1 March 2018)

- Grand Court of the Cayman Islands (the Grand Court) recognised the appointment of PLs appointed by the Hong Kong Court
- PLs were appointed to Changgang Dunxin Enterprise Company Limited (the ***Company***) by the Hong Kong Court.
- The Hong Kong PLs filed an application to be recognised by the Grand Court so that they can adopt a Z-Obee style 'slingshot' approach and enjoy powers to restructure under the Cayman Islands law.
- Grand Court granted the recognition: *"It is appropriate to grant the HK JPLs recognition to act in the name of and on behalf of the company for the purpose of making an application to the Court for the winding up of the Company*" and to be appointed as PLs under Cayman Islands law.
- But what about locus standi?

Impact of the Rule in Gibbs

Antony Gibbs & Sons v La Societe Industrielle et Commerciale de Metaux (1890) LR 25 QBD 398

It refers to the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. In fact, the proposition goes further: discharge of a debt under the insolvency law of a foreign country is only treated as a discharge in England if it is a discharge under the law applicable to the contract.

Goldman Sachs International v Novo Banco SA [2018] UKSC 34 at [12]

Lord Sumption JSC in the recent decision of the English Supreme Court explained (emphasis added):

"…***At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded:*** *Adams v National Bank of Greece SA [1961] AC 255".*

OJSC International Bank of Azerbaijan v Sberbank of Russia [2018] EWCA Civ 2802

The Supreme Court refused permission to appeal to challenge the continued application of the “rule in Gibbs”. The rule is recognised and applied in Hong Kong and, as far as we are aware, its application has not been doubted by the Courts in the Cayman Islands, Bermuda or the BVI .

Parallel Schemes of Arrangement (1)

- The successful recognition of a scheme of arrangement in a number of jurisdictions can be of significant importance to ensure that creditors cannot take unilateral action against a debtor's assets in those jurisdictions.
- *In the Matter of Contel Corporation Limited* [2011] SC (Bda) 14 Com the Supreme Court of Bermuda had been asked to recognise a scheme of arrangement in respect of a local company in circumstances where a parallel scheme had not been implemented.
- The Bermuda court was asked on an *ex parte* application to recognise a scheme of arrangement in respect of a Bermudian-incorporated company listed on the Singapore Stock Exchange that had been sanctioned by the Singapore courts.
- The Bermuda court recognised the scheme, relying upon the 'extremely wide' common law discretionary power to recognise foreign restructuring orders made in respect of local companies (citing Lord Hoffmann in *Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508).

Parallel Schemes of Arrangement (2)

In circumstances where there are already proceedings on foot with an international aspect, those extant proceedings will be the principal liquidation. Alternative principal liquidation proceedings should not then be commenced: Galbraith v Grimshaw [1910] A.C. 508; Eurofinance v Rubin [2013] 1 AC 236. This could arise in at least two sets of circumstances:

a) a company submits to a universal process in a foreign court. For example, the Chapter 11 proceedings to which Navigator had submitted in Cambridge Gas - there was no doubt that the Chapter 11 proceedings had international jurisdiction in that respect: Rubin. Also, further the "soft touch" liquidation cases, where the off-shore incorporated company had commenced "primary liquidations" under Chapter 11: e.g. Re ICO Global Communications (Holdings) Ltd [1999] Bda LR 69; Re Fruit of the Loom 2000 CILR N7;

b) a foreign court commences winding-up proceedings at the place of a company's main establishment (or Centre of Main Interest- “COMI”) which are viewed as having universal effect under the law of that jurisdiction: e.g. Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd (1888) 15 R 935; Re Stewart & Matthews (1916) 10 WWR 154; Re Lancelot Investment Fund Ltd [2009] CILR 7.

Deputy HCJ William Wong SC

Da Yu Financial Holdings Limited [2019] HKCFI 2531

See also In the Matter of Grand Peace Group Holdings Limited "parallel schemes of arrangement in both the company's place of incorporation and Hong Kong, where the offshore company is listed in Hong Kong, would seem generally to be unnecessary"

At paragraphs [49] – [53].

"I am of the view that the idea that parallel schemes are needed in such circumstances appears to be an outmoded way of conducting cross-border restructuring. Requiring foreign office-holders to commence parallel proceedings is the very antithesis of cross-border insolvency cooperation. A crucial feature of cross-border insolvency cooperation is the recognition of foreign proceedings…"

Re Magyar Telecom BV [2014] B.C.C 448

In exercising its discretion whether to sanction a scheme, must be satisfied that there is a reasonable prospect of the scheme having real effectiveness.

Re Apcoa Parking Holdings GmbH [2014] 2 BCLC 285 per Hildyard J at [19].

In cases with an international dimension, this translates into the court needing to be *"persuaded that the countries in the jurisdictions where the creditors would otherwise have been likely to seek enforcement would recognise the effectiveness of the court order"*.

Impact of the “Rule in Gibbs” on the International Effectiveness of Schemes

Scenario 1

A Hong Kong scheme of arrangement seeks only to vary the Hong Kong law governed contractual obligations of a company incorporated in the Cayman Islands.

Scenario 2

A Hong Kong scheme of arrangement seeks only to vary the New York law governed contractual obligations of a company incorporated in the Cayman Islands and the company obtains recognition of the scheme in New York pursuant to Chapter 15 of the US Bankruptcy Code.

Scenario 3

A Hong Kong scheme of arrangement includes a variation of English law governed contractual obligations of a company incorporated in the Cayman Islands.

Scenario 4

A Hong Kong scheme of arrangement includes a debt for equity swap in relation to a company incorporated in the Cayman Islands.

Scenario 5

A Hong Kong scheme of arrangement seeks to vary or compromise the rights of members of a company incorporated in the Cayman Islands.

Reform to the Cayman Islands legislation to address the issues raised in China Milk and China Shanshui

Companies Act Amendment Act 2021 enacted on 15 December 2021 and expected to be brought into force in mid-2022 by replacing the existing section 94(2) with new subsections (2), (2A) and (2B). The new subsections provide:

(a) a company may petition for its winding-up at the instance of its directors where expressly permitted to do so by its articles;

(b) unless otherwise provided in the articles, the directors of a company incorporated after the commencement of the Amendment Act can authorize the presentation of a winding-up petition on the grounds of insolvency and/or apply to appoint provisional liquidators;

(c) the articles of a company can expressly remove or modify the directors' said authority to petition, etc. on insolvency grounds.

CW Advanced Technologies Limited [2018] HKCFI 1705

CW Advanced Technologies Limited (***CW Advanced***) is a Hong Kong private company with its headquarters and principal place of business in Singapore.

CW Advanced's holding company is CW Group Holdings Limited (***CW Group***). CW Group is a Cayman Islands company listed on the SEHK.

CW Group, CW Advanced and two other entities in the group applied to the Singapore Court under section 211B of the Singapore Companies (Amendment) Act 2017. The filing triggered a 30-day moratorium (the ***Singapore Moratorium***).

CW Advanced then filed an application to appoint PLs in Hong Kong but later withdrew it. Instead, its largest creditor (Bank of China (***BOC***)) filed an application to appoint PLs.

The Hong Kong Court appointed PLs to CW Advanced.

- The Hong Kong Court noted that CW Advanced's provisional liquidation application in Hong Kong was to assist and implement the entire group's restructuring efforts in Singapore.

- The group's restructuring efforts in Singapore did not progress as planned - creditors began filing against the group in different jurisdictions.

- The Hong Kong Court observed the following lessons for practitioners for the future:

- The group failed to consult its largest creditor before the Singapore Moratorium applications were filed. This led to the creditor's provisional liquidation application in Hong Kong.

- The Hong Kong Court was never asked to recognise and assist the Singapore Moratorium.

- The Hong Kong Court pointed out the relevant issues to be considered in the recognition of the Singapore Moratorium:
- Whether the Singapore Moratorium is eligible for recognition in Hong Kong; and
- If yes, whether the Hong Kong Court may grant assistance by way of appointing PLs.
- The Hong Kong Court also pointed out the following unresolved questions that will need to be considered:
- It is unclear if the Singapore Moratorium is a collective insolvency proceeding for common law recognition purposes.
- If yes, there is no Hong Kong authority on whether the court may recognise the foreign collective insolvency proceeding if the foreign jurisdiction is not the country of incorporation.
- Assuming the Singapore Moratorium is eligible for recognition, can the Hong Kong Court assist by way of appointing PLs?

CW Group Holdings Limited FSD 113 and FSD 122 of 2018 (Unreported , 3 August 2018)

- In the Cayman Islands, the Grand Court's decision highlights the hurdle to appoint "heavy touch" PLs to a company.
- When CW Advanced withdrew its application in Hong Kong, CW Group applied for the appointment of PLs in the Grand Court. BOC objected.
- CW Group sought the appointment of "light touch" PLs, while BOC sought the appointment of "heavy touch" PLs. The Grand Court found in favour of CW Group and held that:
- BOC failed to discharge the heavy burden of providing clear or strong evidence to prove that PLs are necessary to prevent the dissipation or misuse of assets and mismanagement by the directors; and
- Affirmed the principle that it is not necessary for there to be a formulated plan at the stage where a company seeks to appoint "light touch" PLs.

Effective advocacy before an Offshore Judge

Don’t:

- alienate local counsel by trying to run the case from onshore;
- assume offshore practice is the same as onshore;
- overlook the need to explain the offshore proceeding adequately in a parallel Chapter 11 Plan;
- ignore the need for an offshore proceeding altogether to give effect to an onshore restructuring;
- cite persuasive case law and ignore offshore judge own local decisions.

Q & A