

# Cross-border insolvency in Hong Kong – pushing the boundaries

In the continued absence of any statutory regime for cross-border insolvency recognition in Hong Kong, two recent decisions of Mr Justice Harris in the Court of First Instance have provided guidance to liquidators yet also given banks pause for thought as to how best to proceed when faced with requests for assistance from foreign liquidators of companies being wound up in their places of incorporation. In one of the cases, the Court went further than before in ordering the oral examination of a director of a Cayman Islands company resident in Hong Kong. In the other, Harris J cautioned banks against requiring liquidators to come to court to make what he described as unnecessary applications.

## Cross-border assistance

***In Joint Provisional Liquidators of BJB Career Education Company Limited (in provisional liquidation) v Xu Zhendong* [2016] HKEC 2516, the Companies Judge, Harris J, returned to his theme of the court's powers to grant assistance to foreign liquidators.**

As highlighted in our briefing, ["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. As a result, cross-border insolvency dynamics loom large before the Hong Kong Companies Court.

In a series of decisions starting in mid-2014, Harris J 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.

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 foreign companies being 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.

*BJB Career Education Company Limited* (the Company) was similarly

## Key issues

- Hong Kong courts have powers under the common law to assist foreign regulators.
- In *BJB Career Education Company*, the court confirmed these powers extend to ordering the examination of directors and compelling the response to interrogatories.
- In *Bay Capital Asia*, the Court repeated that banks should give assistance to foreign liquidators seeking information on receipt of a letter of request without a Hong Kong court order.

incorporated in the Cayman Islands. Through its subsidiaries, it had been engaged in the business of providing vocational technology education in

the PRC. On 3 July 2016, it was put into liquidation by a court in the Cayman Islands and provisional liquidators were appointed. On 14 March 2016, the Cayman court made an order that the court should issue a letter of request, which it did on 16 March 2016, requesting the Hong Kong court make various orders in respect of the respondent to the application, Xu Zhendong, the former chairman and director of the Company. The orders requested would allow the provisional liquidators to examine and require Mr Xu to attend for oral examination in Hong Kong; require him to swear an affidavit in answer to written interrogatories; require him to transfer or deliver up any property or documents belonging to the company; and/or require him to provide in writing any other information relating to the company requested by the provisional liquidators.

In reaching his decision, Harris J considered two points in particular: the relevant common law principles that would justify making the type of order for delivery up of documents and oral examination that would be made in the case of a domestic liquidation under section 221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32; and second, whether making such an order would infringe Article 96 of the Basic Law.

## Common law powers

Harris J said that since his decision in *A Co*, there had been a series of applications for assistance from foreign liquidators which had allowed the development of a standard order empowering the foreign liquidators to take possession and control of the company's property and investigate its affairs. The order provides for an

automatic stay of the commencement or continuation of proceedings against the company or its assets in Hong Kong without the leave of the court.

What had remained undecided, was whether an order could be made for the oral examination of an officer of a foreign company or other persons in possession of information which the foreign liquidator requires to conduct properly his investigations into the company's affairs, in other words the sort of order that would in the domestic context be made pursuant to section 221.

Citing the Privy Council authority in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, Harris said that it followed that the Hong Kong Companies Court can order the oral examination of a director of a Cayman Islands-incorporated company in liquidation in the Cayman Islands if satisfied that is necessary and that it would not infringe the established limitations on the exercise of the power conferred by section 221, unless Article 96 of the Basic Law provided an impediment in doing so.

## Basic Law

Article 96 says that "*with the assistance or authorisation of the Central People's Government, the Government of the Hong Kong Special Administration Region, may make appropriate arrangements with foreign states for reciprocal judicial assistance.*" The question was whether the granting of an order of recognition and assistance in response to a letter of request is caught by Article 96.

Citing Lord Collins' judgment in *Rubin v Eurofinance SA* [2013] 1 AC 236, Harris J said that there was nothing to suggest that granting assistance to

foreign insolvency proceedings was based on notions of reciprocity. It was "*erroneous to view an order recognising the appointment of a liquidator appointed in the place of a company's incorporation and an order providing assistance to allow him to carry out his function as an arrangement for reciprocal juridical assistance.*" The common law power of recognition and assistance was "*clearly part of the laws in force in Hong Kong prior to 1997*" and there was no reason to suggest they contravene the Basic Law.

## A dilemma for banks

A few days earlier, Harris J had given a judgment in *Bay Capital Asia LP v DBS Bank (Hong Kong) Ltd* [2016] HKEC 2377 in which the liquidators of the Cayman Islands-incorporated company applied amongst other things for an order recognising their appointment.

An argument about costs had arisen because, Harris J said, solicitors for neither the liquidators nor the bank had understood his earlier decision in *A Co*. As summarised by Harris J:

*"If a bank receives a request from liquidators of a company which has an account with them, once it is satisfied, which should be straightforward, that the liquidators have been properly appointed by the court of the place of the company's incorporation they will hand over documents to which the directors of the company would have been entitled", without a court order.*

He said that, if advised responsibly, an international bank in Hong Kong "*should have no difficulty in establishing quickly that they should comply with the request.*" What the liquidators asked for was routine, and the bank should have provided it,

once the bank 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"*.

In practice – given their duty of confidentiality to their clients – banks will need to feel comfortable that the liquidators have been properly appointed, particularly if the liquidator in question has not been appointed by the court but rather voluntarily. The Court warned that, if the only issue in contention had been the recognition of the liquidators, he would have ordered costs against the bank on an indemnity basis.

Banks will also need to interpret the letter from the foreign law firm confirming the liquidators' appointment, and they may take the view that, in accordance with usual banking practice, the signatures of the liquidators should be verified.

Banks may therefore find themselves, when presented with requests for assistance from foreign liquidators, facing tricky practical issues, despite the Court's guidance in *Bay Capital Asia*.

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