

A CRUCIAL STEP – MUTUAL RECOGNITION AND ASSISTANCE TO INSOLVENCY/BANKRUPTCY PROCEEDINGS BETWEEN HONG KONG AND THE MAINLAND



On 14 May 2021, the Government of HKSAR and the Supreme People's Court signed the "Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region" which effects a cooperation mechanism for Hong Kong liquidators and Mainland administrators to seek mutual recognition and assistance. This is no doubt a significant development in furthering judicial cooperation on cross-border insolvency matters between the jurisdictions.

The New Cooperation Mechanism (the "New Mechanism")

Pursuant to "The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region" (the "**Opinion**") a Hong Kong liquidator or provisional liquidator may apply to the Mainland Courts for recognition and assistance. Likewise, Mainland bankruptcy administrators may do the same in reverse. Personal bankruptcy is not included in the New Mechanism.

Key highlights of the Opinion are:-

1. "**Hong Kong Insolvency Proceedings**" covers (i) compulsory winding up; (ii) creditors' voluntary winding up; and (iii) schemes of arrangement: provided that Hong Kong is the **centre of main interests** of the wound-up company/debtor (collectively referred to as "**Debtor**") for at least 6 months continuously before the making of the application.
2. "**Centre of main interests**" means the place of incorporation of the Debtor, but the Supreme People's Court will consider other factors in making the final determination, including: (i) the place of principal office; (ii) the principal place of business; and (iii) the place of principal assets of the Debtor.
3. Both **liquidators** and **provisional liquidators** in Hong Kong Insolvency Proceedings may apply to the Mainland Courts for recognition and assistance.
4. The Supreme People's Court has initially designated **Shanghai, Xiamen and Shenzhen** as the **pilot areas**. It is expected that the cooperation mechanism will gradually extend beyond these areas.
5. Applications can be made under the New Mechanism where the Debtor's principal assets, place of business or representative office is situated in a pilot area.
6. Procedures for making the recognition application are to be made in accordance with the rules of the relevant pilot area.
7. After Mainland recognition of the Hong Kong Insolvency Proceedings (i) payment of debts made by the Debtor to individual creditors will be invalid; (ii) civil proceedings or arbitration involving the Debtor that have not yet concluded will be suspended; and (iii) Mainland measures for preserving the Debtor's property will be lifted and any execution suspended (in other words a creditor moratorium).
8. An application for recognition and assistance may be refused by the Mainland Court on any one of the following grounds:
 - a. Hong Kong is not the centre of main interests of the Debtor or it has been situated in Hong Kong for less than 6 months continuously before the making of the application;
 - b. Article 2 of the Enterprise Bankruptcy Law of the People's Republic of China is not satisfied. Article 2 sets out the circumstances under which a Debtor can make a bankruptcy application to

the People's Court, namely where the Debtor cannot pay off his debts due and his assets are not enough for paying off all the debts, or he apparently lacks the ability to pay off his debts;

- c. Mainland creditors are unfairly treated;
- d. There is fraud (presumably committed by the Debtor although this is not expressly set out in the Opinion); or
- e. Other circumstance where the Supreme People's Court considers that recognition or assistance should not be rendered (e.g. recognition or assistance may "violate the basic principles of the law of the Mainland or offend public order or good morals").

Details of the New Mechanism, including documents required for making an application and the powers of recognised Hong Kong liquidators and Mainland administrators are set out in the [Opinion](#) and a [Practical Guide](#) issued by the Government of the HKSAR.

Significance of the New Mechanism

There can be no doubt that the New Mechanism marks an important development in the Hong Kong R&I market.

It has long been recognised that it would be desirable to introduce a formal insolvency recognition regime between Hong Kong and the Mainland given the volume and interconnected nature of their economies. In the absence of a formal mechanism, Justice Harris of the Hong Kong High Court has adopted, developed and relied on a number of core common law principles to recognise and grant assistance to foreign liquidators. More recently His Honour recognised bankruptcy administrator appointments made by the Mainland Courts:

- *Re CEFC Shanghai International Group Limited (in Liquidation in the Mainland of the People's Republic of China)* [2020] HKCFI 167 - the Hong Kong Court for the first time granted an order that a Mainland administrator appointed over a Chinese company be recognised in Hong Kong. Justice Harris held that before the Court would recognise foreign liquidators and provide the necessary judicial assistance, the following criteria must be met:
 - The foreign insolvency proceedings are collective insolvency proceedings in the sense that it is a process of collective enforcement of debts for the benefit of the general body of creditors; and
 - The foreign insolvency proceedings are opened/commenced in the company's country of incorporation.

Click here to see our Client Alert on "[First recognition order granted by the Hong Kong Court to PRC insolvency practitioners](#)"

- *Re Shenzhen Everich Supply Chain Co. Ltd (in Liquidation in the Mainland of the People's Republic of China)* [2020] HKCFI 965 - the Hong Kong Court recognised and assisted an administrator appointed by the Shenzhen Court.

For Mainland companies outside the pilot areas, the Hong Kong Court will continue to adopt the above jurisprudence when considering a recognition application.

The New Mechanism is precisely what the Hong Kong R&I market has been waiting for over many years. The reach of Hong Kong liquidators will now extend across the border into the Mainland: a right not afforded to overseas appointment takers and thereby entrenching Hong Kong as the primary restructuring hub for Greater China.

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