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Cross-border insolvency - Hong Kong Court confirms common law recognition and assistance does not extend to solvent liquidations



Seahawk China Dynamic Fund [2022] HKCFI 1994 (date of reasons for decision: 4 July 2022)

Introduction

In the recent case of *Seahawk China Dynamic Fund* (In provisional liquidation in the Cayman Islands) [2022] HKCFI 1994, the Hong Kong Court made a declaratory order confirming that the joint provisional liquidators appointed by the Grand Court of the Cayman Islands ("**JPLs**") of a solvent entity Seahawk China Dynamic Fund (incorporated in the Cayman Islands) ("**Seahawk**") have the powers to take control of assets in Hong Kong. The decision helpfully clarified that (i) the common law power to recognise and assist foreign officeholders does not extend to solvent liquidations and the COMI test has no relevance, and (ii) the conflict of laws principles apply to the solvent liquidations.

Background of the case

Seahawk is a registered mutual fund incorporated in the Cayman Islands. It carries out investment activity through financial institutions whose service team are mainly based in Hong Kong. Seahawk is solvent with net assets amounting to around US\$346 million, of which around US\$35 million is cash deposited in various financial institutions in Hong Kong.

In February 2022, a winding up petition was presented against Seahawk in the Cayman Islands by one of its contributories on just and equitable grounds. Subsequently, upon the application of the petitioner, the JPLs were appointed following allegations that there are serious risks in respect of dissipation and/or misuse of Seahawk's assets and mismanagement and/or misconduct on the part of one of Seahawk's directors.

When the JPLs tried to get hold of Seahawk's assets in Hong Kong, certain financial institutions have insisted on a Hong Kong recognition order. Also, as some financial institutions have terminated Seahawk's accounts, the JPLs required a recognition order to access to such accounts. The JPLs therefore applied for recognition and assistance with the Hong Kong Court, supported by a letter of request from the Grand Court of the Cayman Islands.

The Court's ruling

Issue 1 - whether the JPLs' appointment should be recognised and assisted?

Harris J considered that common law recognition is not available for foreign solvent liquidations¹ because of the following reasons:

- (1) recognition and assistance in cross-border insolvency is a matter of common law and only applies to collective insolvency processes, and the underpinning principle for recognition and assistance is modified universalism;
- (2) common law recognition and assistance is therefore not available for foreign solvent liquidations as they are not collective insolvency processes; and
- (3) In determining the JPLs' request, the correct principles to apply are the conflict of laws principles applicable to corporations, which are independent of cross-border insolvency principles.

Issue 2 - is the COMI test introduced in the Global Brands case relevant here?

In the Global Brands case (see our previous article [here](#)), Harris J confirmed that, save for limited exceptions, the new approach for assessing whether a foreign insolvency liquidation should be recognised is to see whether the foreign insolvency proceedings take place in a company's centre of main interests (the "**COMI**") rather than its place of incorporation.

In Seahawk, the JPLs accepted that the COMI of Seahawk is not in the Cayman Islands. It followed that, if the COMI test were to apply, the JPLs might not be recognised unless it falls within one of the

¹ The Court did not adopt the approach in *In re Betcorp Ltd* 400 BR 266 (Bankr D Nev 2009) in which recognition and assistance of a foreign solvent liquidation process was provided by the US Court under Chapter 15 of the United States Bankruptcy Code.

exceptions. Harris J confirmed that the COMI test would not be engaged as the present application concerning solvent liquidation is not a matter of cross-border insolvency.

In light of the above, Harris J made an order confirming that the JPLs have the power and authority to act as the agent and on behalf of and in the name of Seahawk in Hong Kong, which included the power to secure and take possession of all of Seahawk's assets in Hong Kong and to conduct the legal proceedings in the name of Seahawk in Hong Kong.

The Court's message to financial institutions

Harris J explained that:

- (1) Banks and other sophisticated organisations should be clear that liquidators of a company in solvent liquidation are able to exercise the more conventional powers of a company's agent (similar to the company's board of directors) such as taking control of its books and records, particularly where these powers are expressly provided for in the order appointing them.
- (2) As banks would generally act in accordance with a Cayman Islands company's board resolutions and feel comfortable in opening and operating bank accounts for offshore companies without a Court approval, they should not require foreign liquidators obtain orders from the Hong Kong Court confirming that the liquidators have such powers.

Harris J made it clear that if financial institutions insist on a recognition order unnecessarily and are subsequently made a respondent, they may be exposed to an adverse costs order.² It would appear that it remains the case that it is proper for foreign officeholders to obtain a court order in order to deal with local assets.

Takeaway points

- (1) The decision shows the readiness of the Hong Kong Court to assist foreign officeholders in cross-border solvent liquidation scenarios, despite the reaffirmation that the common law power to recognise and assist foreign liquidators does not extend to solvent liquidations.
- (2) The importance of the law of the company's place of incorporation is emphasised - In solvent liquidations, the law of the place of incorporation is the appropriate law to determine the foreign liquidators' power and authority and the Hong Kong Court could render assistance by confirming such power and authority by virtue of the liquidators' appointment in the company's place of incorporation.
- (3) Financial institution may risk bearing the costs of a court application if they insist on asking the foreign officeholders (irrespective of whether the entity is solvent or not) to obtain a Hong Kong court order concerning the officeholders' powers if the powers to be exercised are no more than the conventional powers of a company's agent, such as taking control of books and records.

² Similar messages from Harris J were made in the case of *Bay Capital Asai Fund LP (in Official Liquidation) v DBS Bank (Hong Kong) Ltd* (HCMP 3104 of 2015 dated 2 November 2016) and *China Lumena New Materials Corp (in provisional liquidation)* [2018] HKCFI 276

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