BRIEFINGNOTE

STEPHENSON HARWOOD
罗夏信律师事务所

June 2022

Global Brands – common law foreign recognition regime is alive and well, with a new COMI test introduced

***In the matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)* [2022] HKCFI 1789 (date of decision: 23 June 2022)**

The Hong Kong Court has recently granted recognition and assistance to the Bermuda provisional liquidator of Global Brands Group Holding Limited (in liquidation) (**Global Brands / Company**). Stephenson Harwood acted for the provisional liquidator.

The case helpfully confirms that the common law foreign recognition regime is alive and well (which was somewhat in doubt following the decision in *Up Energy* (see our previous article here)). However, the situations in which recognition will be granted have been limited.

The new approach for assessing whether a foreign insolvency proceeding should be recognised, is to determine whether the foreign insolvency process is in the jurisdiction where the company's Centre of Main Interests (**COMI**) is located at the time the application for recognition is made.

Background

Global Brands is an investment holding company whose group is engaged in business design, development, marketing, and sale of fashion and lifestyle products in North America and Europe. It was incorporated in Bermuda and listed on the HKEX.

Global Brands' financial position deteriorated in 2020 due to the COVID-19 pandemic, geopolitical uncertainties, and structural shifts in the retail industry. Having considered various restructuring options in 2021, the board of the Company decided it was in the Company's interests to commence its own winding-up proceedings and apply to the Bermuda Court to appoint a Provisional Liquidator (**PL**) with limited powers. Global Brands appointed John McKenna as its PL on 16 September 2021. The board and PL were unable to implement a successful restructuring and a winding up order was made by the Bermuda court on 5 November 2021. Since his appointment, the PL had been seeking to take possession of the Company's assets in Hong Kong including (i) approximately HK$8 million cash balances held by Computershare Hong Kong Trustee Limited (**Computershare**) arising from the Company group's employee shares schemes; and (ii) some small balances held in the Company's bank account with HSBC.

Computershare and HSBC were unwilling to transfer the amounts without an order of the Hong Kong Court. We assisted the PL to make the application seeking recognition of the Bermuda liquidation and assistance from the Hong Kong Court. The application was heard by Justice Harris on 1 June 2022. At the hearing, Justice Harris sought to be addressed on the question of the Company's COMI at the time of winding-up and at the time of the application.

Recognition and limited assistance granted

The Court granted an order for recognition of and assistance to the PL. The assistance is limited to the power to receive and transfer out of Hong Kong the balances held with Computershare and HSBC. This allows the PL to collect in those funds for the benefit of the estate of the Company.

The Court granted recognition because this was an application from a PL appointed over a company in liquidation in its place of incorporation. The PL was given powers incidental to his authority, which might be described as "managerial assistance". This is one of the exceptions to the standard COMI test which has been introduced by Harris J in this decision (more details below). Such assistance is consistent with common law assistance which is justified by establish principles of private international law.

The powers granted to the PL in Hong Kong are more limited in nature to some of the other recognition orders in recent years. Whilst the common law recognition regime remains intact, it has been limited significantly in scope.

New COMI test

Modified universalism – recognising foreign insolvency from the home jurisdiction

Modified universalism is the foundation of the common law power to recognise and assist a foreign insolvency process. Modified universalism is the legal concept that national courts should strive to administer the estate of insolvent companies in the spirit of international comity recognising the "home" or "principal" insolvency jurisdiction, with discretion to assess whether the overseas proceedings are consistent with their own local principles of justice and public policy. The criteria for determining the home jurisdiction have developed over time.

In the decision Harris J tracks the development of determining the "home" jurisdiction in various jurisdictions and forms the conclusion that the criteria for recognition should in the future primarily be determined by the location of a company's COMI. Harris J considers that adopting a COMI criteria would bring Hong Kong in line

with the approach in the Mainland. In fact, the Hong Kong and Mainland Cooperation Mechanism[1] already uses a COMI criteria (see our previous article here).

The criteria to be adopted for determining whether an insolvency proceeding should be recognised and assistance granted are:

i. that the foreign proceedings constitute a collective insolvency process; and

ii. that the foreign proceedings (subject to limited exceptions below) are conducted in the jurisdiction in which the company's COMI is located at the time the application for recognition is made.

Under the new approach, Hong Kong common law recognition is open to insolvency practitioners appointed in the jurisdiction of the COMI of the company (where that isn't the jurisdiction of incorporation).

How do you determine the COMI of company?

In considering what matters should be considered in determining the location of a company's COMI, the Court considers the factors noted by Judge Glenn in the US decision in *In re Ocean Rig UDW Inc*[2] to be relevant. The relevant factors in that case were: the location of directors and board meeting, the location of the companies' principal officers, notices of relation to the Cayman Islands, location of operations, location of assets, location of bank accounts, location of books and records and the location in which the restructuring activities took place.

The exceptions: what if the application comes from a foreign officeholder from the place of incorporation (that isn't the COMI)?

Whilst COMI is the key consideration for recognition, the Court will still consider applications made from insolvency practitioners appointed in the country of incorporation. If the recognition application is made by a liquidator appointed in the place of incorporation of the company (but which is not the COMI of the company), then recognition and assistance will be declined unless application falls within one of these categories:

- the assistance is limited in nature, rather than broader insolvency type powers granted to a liquidator under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*. This is what Harris J calls "managerial assistance" (e.g. obtaining copies of books & records of the Company and assets owned by the Company); or

- the assistance is necessary as a matter of practicality (the type of situation Abdullah JC describes as justifying assistance on practical grounds in the Singapore case of *Opti-Medix*[3]).

The recognition and assistance application in Global Brands fell under the first exception.

Will offshore "soft-touch" PLs be recognised in Hong Kong?

Harris J also took the opportunity to confirm that given the recent jurisprudence (in particular in light of the decision in *Up Energy*) that in the future the Court will generally decline to recognise "soft-touch" provisional liquidators appointed by an offshore jurisdiction (i.e. Cayman Islands, BVI or Bermuda).

---

[1] "*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*" dated 14 May 2021.
[2] 570 B.R. 687 (Bank. S.D.N.Y Aug 24, 2017); the decision was upheld on appeal 585 B.R. 31 (S.D.N.Y. April 5, 2018).
[3] *Re Opti-Medix Ltd* [2016] SGHC 108 [17] - [18] (Aedit Abdullah JC).

Takeaway points

Common law foreign recognition is still possible but is much more limited in scope and the scope of assistance has narrowed. Liquidators will be able to get recognition, but it will be a real challenge for soft-touch provisional liquidators.

There is a lot of uncertainty for companies and financial advisors trying to restructure companies listed on HKEX (**Listcos**). Offshore "soft-touch" provisional liquidators are no longer able to obtain recognition and assistance in Hong Kong (to obtain a stay of proceedings which acts as a moratorium). So, in advance of launching a scheme, debtor Listcos will need to enter consensual agreements or understandings with creditors (i.e. restructuring support agreements) to fend-off Hong Kong winding-up petitions being issued by unhappy creditors. Alternatively, those Listcos may need to appoint provisional liquidators in Hong Kong. However, to do so, they need to ensure the asset dissipation test is satisfied (to comply with *Re Legend*[4]). A Hong Kong provisional liquidation is a blunter tool than the "soft-touch" offshore option because it fully displaces the directors of the Company. It therefore often isn't as an attractive option for directors of companies looking to restructure.

We expect to see more discussion and jurisprudence in this evolving area.

Contact us

Eloise Matsui
Partner
T: +852 2533 2704
E: eloise.matsui@shlegal.com

Vivian Lau
Associate
T: +852 2533 2767
E: vivian.lau@shlegal.com

Stephenson Harwood is a law firm of over 1100 people worldwide, including 190 partners. Our people are committed to achieving the goals of our clients – listed and private companies, institutions and individuals.

We assemble teams of bright thinkers to match our clients' needs and give the right advice from the right person at the right time. Dedicating the highest calibre of legal talent to overcome the most complex issues, we deliver pragmatic, expert advice that is set squarely in the real world.

Our headquarters are in London, with eight offices across Asia, Europe and the Middle East. In addition, we have forged close ties with other high quality law firms. This diverse mix of expertise and culture results in a combination of deep local insight and the capability to provide a seamless international service.

[4] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192.

STEPHENSON HARWOOD
罗夏信律师事务所