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## Clear as mud



As the title suggests the state of recognition and assistance jurisprudence & practice in Hong Kong is less than clear. This follows the recent (mostly) conflicting 1<sup>st</sup> instance decisions of *Up Energy* and *Global Brands*. Here are my views about (i) what I believe is settled; (ii) the points of judicial difference; and (iii) what remains unclear.

### Settled

- No R&A for soft touch foreign liquidators.
- R&A powers do not permit foreign liquidators to conduct a HK winding-up.
- R&A powers do not afford foreign liquidators HK insolvency statutory powers.
- R&A powers cannot afford foreign liquidators a power which does not exist either in their home jurisdiction or under HK law.

### Points of difference

- Whether R&A applications are to be heard by the Honourable Madam Justice L Chan or the Honourable Mr Justice Harris.
- Whether a R&A application should be *ex-parte* or *inter-partes* (note: the "Practical Guide" published by the HK Department of Justice for Mainland Administrators seeking R&A in HK directs as a starting point that an *ex parte* application be made).
- Whether HK R&A and winding-up jurisdiction is distinct and separate from each other.

## Unclear

- Whether all Judges agree that R&A jurisdiction continues to exist in HK.
- The scope of future R&A orders: ranging from "managerial" type assistance to "full assistance".
- Whether the Court will continue granting "back door" HK creditor monitoriums via R&A orders.
- Whether other Judges / Court of Appeal will accept the R&A / COMI jurisdiction articulated in *Global Brands*.
- Whether R&A applications from Mainland Administrators should be made *ex-parte or inter-partes*.
- How to restructure a HK listco without a creditor monitorium? (back to the future and apply for PLs provided asset dissipation can be established?).
- Or is practical reality that the HK Court will not wind-up if a credible HK scheme of arrangement is on the table?
- Is *Global Brands* hinting that R&I proceedings be initiated in Mainland China, and then R&A be sought in HK? (but problematic given uncertainty around whether the PRC Enterprise Bankruptcy Law extends to foreign companies).
- If *Global Brands* is endorsed, can COMI be moved from Mainland China / HK, based on an offshore restructuring to the place of incorporation / Caribbean, and then recognised in HK? (perhaps aided by the new Cayman restructuring officer regime).
- If the answer is no, does it mean to restructure a Cayman / BVI / HK / Mainland China structure, that two parallel insolvency processes are needed: (i) Mainland China / HK; and (ii) Cayman / BVI?

So where to from here? The solutions will have to come from the Courts and the market. Not the legislature. We recently made enquiries with the HK government about the status of the Corporate Rescue Bill which was to be tabled before Legco early last year. It has been indefinitely shelved until "society" reaches consensus on the proposed legislative reform including insolvent trading. *Up Energy* is subject to appeal later next month, but it is uncertain whether the Court of Appeal will undertake a deep dive into R&A jurisprudence given the unique fact pattern of the case.

## Contact us



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