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## Cross border recognition and assistance – guidance from recent Hong Kong Court judgment



### [Re: Guangdong Overseas Construction Corporation \(廣東海外建設總公司\) \(in liquidation\) \(date of decision: 17 May 2023\)](#)

#### Introduction

In this recent judgment handed down by The Honourable Madam Justice Linda Chan, the Court provided explanation on the practice for applications on cross border recognition and assistance by Mainland Administrators. The principle and practice explained in the judgment are consistent with a number of previous decisions on similar applications which hopefully would provide confidence to foreign insolvency practitioners especially Mainland Administrators.

#### Background

Guangdong Overseas Construction Corporation (廣東海外建設總公司) (the "Company") is a private company established in Mainland China. The Company failed to pay a judgment debt and the judgment creditor applied for a bankruptcy order against the Company. The Guangzhou Court appointed an Administrator over the Company on 24 April 2022 and made a bankruptcy order against the Company on insolvency grounds on 23 July 2022.

On 15 November 2022, the Guangzhou Court issued a letter of request to the Hong Kong Court requesting recognition and assistance. It has been identified that some issued shares of Hong Kong company are

registered in the Company's name. Thereafter, the Administrator made an application to the Hong Kong Court.

### The Court's decision

Madam Justice Linda Chan granted order for recognition and assistance because (i) the insolvency proceedings of the Company is a collective insolvency proceeding; (ii) the insolvency proceeding is conducted in Mainland China which is both the Company's place of incorporation and centre of main interest; (iii) the assistance sought is necessary for the administration of the Company and the Administrator's functions as the Company has valuable assets in Hong Kong; (iv) the order sought is consistent with the substantive law and public policy of the Court.

### Hong Kong Court's approach on applications outside the Cooperation Mechanism

On 14 May 2021, the Supreme People's Court of China and the Government of Hong Kong Special Administrative Region signed a cooperation mechanism providing for mutual recognition of insolvency processes and office holders in Mainland China and Hong Kong (the "Cooperative Mechanism")<sup>1</sup>. See our previous article [here](#). At present, the pilot Mainland cities under the Cooperative Mechanism are Shenzhen, Xiamen and Shanghai. The Department of Justice has issued "Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance – Practical Guide" ("Practical Guide") in connection with the Cooperative Mechanism.

While recognising that the application is not based on the Cooperative Mechanism, the Court considered it desirable for future applications to follow the Practical Guide even though the letter of request is issued by a Mainland Court not within the three pilot cities. The Court explained that the Practical Guide and the SPC Opinion provide the manner in which an application is to be made to the relevant court, but the jurisdiction is to be found in the existing laws.

The Court's consideration is consistent with two earlier judgments involving applications of Mainland Administrators not within the pilot cities after the Cooperative Mechanism has been implemented.<sup>2</sup>

The Court also commented that the terms of the order have to be formulated to suit the company in question. In the present case, as the asset seeking to take control by the office-holder has already been identified, details of the asset should be set out in the order.

### Criteria for recognition and assistance in Hong Kong

The Court confirmed that the jurisdiction for Hong Kong Court to recognise and assist office-holders appointed by a court of another jurisdiction is to be found in common law, and the approach as to the criteria for recognition and assistance to be satisfied are summarised as follows:

- (1) The power at common law to recognise and assist foreign office-holder does not depend on winding up proceedings having been commenced against the company in the assisting court, as the court is asked to recognise the office-holder appointed in the place of incorporation as the lawful agent in accordance with principle of private international law.

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<sup>1</sup> The framework of the Cooperative Mechanism is based on two documents, namely: (i) Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region and Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Court of the Mainland and the Hong Kong Special Administrative Region" and (ii) The Supreme People's Court's "Opinion on taking forward a pilot measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region" ("SPC Opinion").

<sup>2</sup> HNA Group Co., Ltd [2021] HKCFI 2897 (Hainan Higher People's Court) and Re Peking University Founder Group Company Limited [2021] HKCFI 3817 (Beijing Intermediate People's Court)

- (2) The applicant has to satisfy the court that:
- (a) the foreign insolvency proceedings are collective insolvency proceedings which include proceedings opened in a civil law jurisdiction;
  - (b) the foreign insolvency proceedings are conducted in the jurisdiction in which the company's centre of main interest is located; and
  - (c) the assistance is necessary for the administration of a foreign winding up or the performance of the office-holder's functions, and the order is consistent with the substantive law and public policy of the assisting court so it is not available for purposes which are properly the subject of other schemes.
- (3) As to the extent and terms of assistance to be provided to the office-holder, the authorities show that the court has granted assistance to a foreign office-holder (a) to take control of the assets of the company; (b) to stay the local proceedings against the assets of the company; and (c) to obtain and gather information and documents relating to the company from third parties.

The approach explained is consistent with the previous applications by Mainland Administrators (see for example our previous article [here](#)). Of importance is the criteria that the location of the company's centre of main interest will have to be considered as put forward in the judgment of Global Brands Group Holding Limited (in liquidation) [2022] HKCFI 1789 (see our previous article [here](#)).

### Commentary

The judgment reconfirmed that the common law allows the Court to recognise and assist office-holders appointed by a court of another jurisdiction.

The consistent approach on this application with similar applications in the past is welcoming.

To date, there have been three orders granted by the Hong Kong Court recognising and assisting Mainland Administrators since the implementation of the Cooperative Mechanism, and all of them are not within the three pilot cities. It is hoped that the Cooperative Mechanism can soon be extended to more cities in Mainland China.

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