CLIENTALERT

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Recognition of foreign "soft-touch" provisional liquidators: Re-affirming the Hong Kong Court's approach to cross-border insolvency

Re Joint Provisional Liquidators of Moody Technology Holdings Ltd [2020] HKCFI 416

The Hong Kong Court has explained why there is no inconsistency between: (a) its domestic insolvency law which does not permit the appointment of provisional liquidators purely for the purposes of restructuring the company; and (b) common law recognition of foreign "soft-touch" provisional liquidators.

What is a soft-touch provisional liquidator?

The "Soft-touch" or "light-touch" appointment of provisional liquidators usually involves a stay of proceedings against the company (i.e. so actions cannot be taken by individual creditors) and the appointment of provisional liquidators with limited powers to enable the company to undertake a business restructuring. The company remains under the day to day control of the directors and the provisional liquidators are given limited powers necessary to effect a restructuring (and to monitor the management while the restructuring takes place). The purpose is to give the company the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation.

Hong Kong domestic insolvency vs cross-border insolvency

Hong Kong domestic insolvency law does not permit soft-touch provisional liquidation due to the Court of Appeal Decision in *Re Legend International Resorts* [2006] 2 HKLRD 192. In *Legend*, the Court of Appeal held that the "*primary purpose of appointing provisional liquidators must always be the purposes of the winding-up. Restructuring a company is an alternative to a winding-up.*"

However, there are a number of subsequent cases decided by Justice Harris in the context of cross-border insolvency where foreign provisional liquidators appointed for the sole purpose of restructuring the foreign company have been recognised in Hong Kong.[1] There have been some concerns as to whether these decisions simply circumvent and bypass the restrictions on provisional liquidator's powers under Hong Kong domestic insolvency law.

In *Moody Technology*, the Hong Kong Court took the opportunity to clarify the scope of *Legend* and explain the Hong Kong foreign recognition regime.

Background to *Moody Technology*

On 24 October 2019[2], the Bermuda Court appointed provisional liquidators to Moody Technology Holdings Limited, a company registered in Bermuda and listed in Hong Kong, on a soft-touch basis for restructuring proposes. The provisional liquidators then applied to Hong Kong Court for recognition and assistance in Hong Kong.

Decision and Reasoning

Deputy High Court Judge William Wong SC (**DHCJ Wong**) granted the standard recognition order and reaffirmed that recognizing and assisting foreign soft-touch provisional liquidators are fully consistent with Hong Kong domestic insolvency law. The Court provided the following reasoning:

1. The fact that the appointment of soft-touch provisional liquidators is not permissible under Hong Kong's domestic insolvency law does not bar the Hong Kong Courts from recognizing and assisting foreign soft-touch provisional liquidators. This is because foreign provisional liquidators recognized in Hong Kong will not be acting as, acting in the capacity of, or having the status of provisional

[1] In the case of *Z-Obee* provisional liquidators appointed in Bermuda for the sole purpose of restructuring were recognised in Hong Kong. For more details have a read of our Insight.
[2] https://www1.hkexnews.hk/listedco/listconews/sehk/2019/1025/2019102500644.pdf

liquidators appointed by Hong Kong Courts. DHCJ Wong cited the English Court of Appeal decision in *Candey Ltd v Crumpler* [2020] EWCA Civ 26 in support of his reasoning.

- *Candey* is authority for the position that foreign officeholders will not be acting as, acting in the capacity of, or having the status of officeholders appointed by local Courts in a domestic insolvency.[3]

2. By applying the principle of "universalism"[4], DHCJ Wong approved the proposition that "recognition may be given even though there does not exist under local insolvency law procedure equivalent to the foreign insolvency proceeding".

   - DHCJ Wong noted that by adding an eligibility criterion that there must be complete identity between Hong Kong insolvency law and foreign insolvency law in order for a foreign insolvency proceeding to be recognized in Hong Kong would undermine the "universalism" principle. Therefore, the principle of "universalism" mandates the Hong Kong Court to recognize foreign soft-touch provisional liquidators.

3. Refusing to recognize foreign soft-touch provisional liquidation on the basis that Hong Kong law does not have soft-touch provisional liquidation will create discriminatory consequences. This is because provisional liquidators often have the same need to investigate the debtor's affairs, whether or not they were appointed on a soft-touch basis. If the Hong Kong Courts refuse the assist foreign provisional liquidators simply on the basis that they were appointed on a soft-touch basis, it would constitute an unwarranted discrimination.

4. The recognition of foreign provisional liquidators is merely recognizing the provisional liquidators' status as agents of the company and giving effect to their management and governance powers under the law of the company's incorporation. In fact, this can be seen as a result of applying orthodox principles of private international law. Hence, there is no conceptual or legal inconsistency.

Takeaway point

Moody Technology has swiped away all the concerns that foreign insolvency practitioners may have when seeking a standard recognition order in light of the peculiarity brought by *Legend*. It further strengthens the recognition regime developed by Justice Harris.

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[3] Stephenson Harwood acted for the BVI liquidators in their successful appeal to the English Court of Appeal in *Candey*.
[4] This principle suggests that there should be a unitary insolvency proceeding in an insolvent entity's "home" jurisdiction that applies universally to all the insolvent's assets and which receives worldwide recognition.