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Cross-Border Insolvency Law in Hong Kong: Recognition of Foreign Schemes of Arrangement

Andrew Godwin* and Charles Zhen Qu**

Abstract

Hong Kong has no statutory cross-border insolvency regime. Hong Kong courts have to resort to common law principles in circumstances where they are requested to recognise foreign insolvency proceedings and grant assistance. The nature and scope of these principles have been the subject of extensive debate in common law jurisdictions. In *Re CW Advanced Technologies Ltd* [2018] HKCFI 1705, Harris J identified the uncertainties associated with the common law position in Hong Kong. These uncertainties include whether a Hong Kong court may recognise a Singapore moratorium granted to facilitate a scheme of arrangement and, if so, whether the court may grant recognition where Singapore (i.e., the foreign jurisdiction) is not the country of incorporation. Harris J also noted the “urgent need to enact a statutory cross-border insolvency regime.” This article examines the scope of the common law powers in Hong Kong and seeks to clarify the possibility for members within a corporate group located outside Singapore, where the holding company has its centre of main interests in Singapore or is otherwise eligible to use the Singapore scheme regime, to obtain recognition and assistance in Hong Kong.

1. Introduction

Despite its regional and global importance as a finance centre, Hong Kong does not have a statutory framework for cross-border insolvency. Unlike other jurisdictions in the region,¹ Hong Kong has not adopted legislation along the lines of the UNCITRAL Model Law on Cross-Border Insolvency. Nor does Hong Kong have any legislation governing court assistance in respect of foreign insolvency proceedings along the lines of section 426 of the Insolvency Act 1986 (UK) or section 581 of the Corporations Act 2001 (Australia). The absence of such legislation means that courts have to resort to common law principles in circumstances where they are requested to recognise and assist foreign insolvency proceedings.

Ongoing uncertainties as to the nature and extent of the common law principles have increasingly led to calls for a statutory framework to be introduced. A prominent advocate for

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¹ The jurisdictions in the Asia Pacific region that have adopted the UNCITRAL Model Law on Cross-Border Insolvency are (in the order in which the Model Law was adopted): Japan (2000), South Korea (2006), New Zealand (2006), Australia (2008), The Philippines (2010), Vanuatu (2013), Singapore (2017) and Myanmar (2020). Some jurisdictions in the Asia Pacific, including Australia, New Zealand, Vanuatu and The Philippines, have adopted the Model Law with relatively little divergence from its text. Japan and South Korea, on the other hand, have diverged significantly from the original text.

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reform in this regard is the Honourable Justice Jonathan Harris, a judge in the Court of First Instance of the High Court of the Hong Kong SAR, who is reported to have stated that:

“[i]t would be better if we had a statutory framework which was crafted to meet the needs of companies, particularly transnational companies that need to restructure sizable amounts of debt.”²

This sentiment was repeated by Justice Harris in his judgment in *Re CW Advanced Technologies Ltd* [2018] HKCFI 1705 (“*CW Advanced Technologies*”), in which his Lordship asked a series of questions and concluded with the following statement:

“From the perspective of Hong Kong policy-makers, this case underscores again the urgent need to enact a statutory cross-border insolvency regime.”³

The absence of legislation addressing cross-border insolvency has led to an inference that courts should take a restrictive view toward judicial assistance under the common law principles. In the case of *Joint Official Liquidators of A Co v B* [2014],⁴ which concerned a letter of request addressed to the Hong Kong courts from a Cayman Islands court seeking, inter alia, recognition of the Caymanian liquidators and requesting the respondents to produce certain documents, Harris J acknowledged the:

“expansive view of the extent to which established common law principles require the court to recognise foreign liquidators.”⁵

However, Harris J also suggested that Hong Kong’s inadequate statutory framework for addressing cross-border insolvency:

“would... invite the argument that the failure to make such an obvious amendment indicated that Hong Kong’s courts should take a more restrictive view of the extent to which they should assist foreign liquidators from other common law jurisdictions.”⁶

The absence of a purpose-made corporate rescue mechanism in Hong Kong is also problematic for cross-border insolvency in terms of the nature of the relief or assistance that Hong Kong courts may grant in circumstances where a decision has been made to recognise foreign insolvency proceedings. Hong Kong has no purpose-made corporate rescue mechanism, such as administration in England and Wales, Chapter 11 in the United States, judicial management in Singapore and voluntary administration in Australia.⁷ The only formal mechanisms for debt

² Cynthia Claytor, “Face to Face with Justice Jonathan Harris Court of First Instance of the High Court, Hong Kong SAR” (*Hong Kong Lawyer*, May 2017 Cover Story), available at: <<http://www.hk-lawyer.org/content/face-face-justice-jonathan-harris-court-first-instance-high-court-hong-kong-sar>>.

³ *CW Advanced Technologies*, paragraph 35. This statement was recently noted by the Hong Kong Department of Justice in a discussion paper prepared for the Legislative Council Panel on Administration of Justice and Legal Services entitled “Proposed Framework for Co-operation with the Mainland in Corporate Insolvency Matters” (June 2020, CB(4)715/19-20(04)). For an analysis of the position between Hong Kong and mainland China, see Emily Lee, “Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters between Hong Kong and Mainland China” (2015) 63(2) *American Journal of Comparative Law* 439.

⁴ [2014] 4 HKLRD 374.

⁵ *Ibid.*, [17].

⁶ *Ibid.*, [11].

⁷ Reform to introduce a purpose-made corporate rescue mechanism has long been proposed. This first occurred in 1996, when a corporate rescue procedure known as ‘provisional supervision’ was recommended by the Law Reform Commission. In the latest development, it was reported in March 2020 that the Financial Services and the Treasury Bureau intended to begin consultations on a new corporate rescue bill with a view to putting a draft bill to the Legislative Council in October 2020. See Enoch Yiu, “Hong Kong resurrects Chapter 11-style corporate rescue bill after a 24-year hiatus as Singapore powers ahead with reforms” (*South China Morning Post*, 12 March

restructuring are provisional liquidation and a scheme of arrangement. A provisional liquidator, whose appointment triggers a stay of proceedings,⁸ can be given powers to explore a corporate restructuring.⁹

However, the grounds on which provisional liquidators may be appointed are limited to the circumstances in which a court is satisfied that it is likely that a winding-up order will be made and there is either a need to preserve assets or a need for an independent investigation. This is because of the wording of the relevant provision, section 192 of the Companies Ordinance (Cap 32), which has generated a significant degree of debate in both judicial and academic circles.¹⁰ A scheme of arrangement also has limitations in terms of corporate restructuring as no moratorium on creditor actions is available prior to the date on which a scheme becomes effective. The limitations concerning the existing debt restructuring mechanisms in Hong Kong, particularly provisional liquidation, have given rise to a practice of appointing provisional liquidators in the place of the company's incorporation and applying for a letter of recognition in Hong Kong.¹¹

The lack of a statutory framework for cross-border insolvency underscores the importance of exploring and clarifying the applicable common law principles. This article seeks to contribute in this regard by exploring answers to three questions that Harris J raised in *CW Advanced Technologies*:

- (i) Is a Singapore moratorium that is intended to facilitate a scheme of arrangement in Singapore eligible for recognition in Hong Kong? A related question in this regard is whether a Singapore moratorium is a 'collective insolvency proceeding' for common-law recognition purposes?
- (ii) Can a Hong Kong court recognise a foreign collective insolvency proceeding where the foreign jurisdiction is not the country of incorporation?
- (iii) If a Singapore moratorium is eligible for recognition, can the court grant assistance by way of appointing provisional liquidators?

The significance of exploring answers to the above questions is that they help to clarify the possibility for a company that is incorporated outside Singapore but has its centre of main interests in Singapore (or is otherwise eligible to use the Singapore scheme regime) to take advantage of Singapore's scheme of arrangement and obtain recognition and assistance in Hong Kong. The question of whether courts are prepared to recognise a foreign liquidation or scheme of arrangement – and, if so, the consequence of recognition – is important as a result of the long-standing rule under English law that a company's debt can only be discharged or compromised under the law that constitutes the proper law of the debt in question.¹² This rule has been affirmed in Hong Kong.¹³ Unless the creditor of a debt governed by Hong Kong law

2020), available at: <<https://www.scmp.com/business/banking-finance/article/3074733/hong-kong-resurrects-chapter-11-style-corporate-rescue>>.

⁸ Cap 32, section 193.

⁹ See the decision of Harris J in *Re China Solar Energy Holdings* [2018] HKCFI 555.

¹⁰ The debate arises out of a string of cases commencing with the judgment of the Court of Appeal in *Re Legend International Limited* [2006] 2 HKLRD 192. For an analysis of the debate surrounding the legal position under this provision and how it should be interpreted, see Charles Zhen Qu, "The Court's Power to Appoint Provisional Liquidators to Carry Out Rescue Roles: Rethinking Legend" (2019) 28 *International Insolvency Review* 86-102.

¹¹ See further below in Parts 4 and 5 below. This extends to the appointment of 'soft-touch' provisional liquidators as confirmed in the recent decision in *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187. For an explanation of 'soft-touch' provisional liquidation in this decision, see [13]-[15], [38] and [39].

¹² This rule was established in *Anthony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 and was recently applied in *Gunel Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWCA Civ 2802. For commentary, see Ian Fletcher, *The Law of Insolvency* (5th edn) (Sweet & Maxwell, 2017), [30-061].

¹³ See *Hong Kong Institute of Education v Aoki Corporation* [2004] 2 HKC 397; *Re LDK Solar Co Ltd* [2015] 1 HKLRD 458.

submits to a foreign insolvency proceeding such as a scheme of arrangement, a parallel scheme of arrangement in Hong Kong is likely to be necessary to discharge or compromise the debt owing to the relevant creditor.

The analysis also suggests ways in which the common law powers in Hong Kong might continue to develop, particularly in the absence of a statutory framework for cross-border insolvency. The need for Hong Kong to strengthen its corporate rescue framework and to introduce a statutory framework for cross-border insolvency is likely to become even more pressing in the wake of the COVID-19 pandemic and the likely increase in cross-border restructuring, both regionally and globally.

This article proceeds as follows: Part 2 outlines the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”) for the purpose of comparing the approach under the Model Law and identifying ways in which it might inform the development of the common law in Hong Kong. Part 3 provides an overview of the origins of the common law powers to recognise and grant assistance to foreign insolvency proceedings and how they have developed in common law jurisdictions generally. Part 4 considers the common law powers as they have been specifically defined and applied in Hong Kong to date. Part 5 examines the case of *CW Advanced Technologies* and the three questions posed above. Part 6 concludes.

2. The UNCITRAL Model Law on Cross-Border Insolvency

The Model Law provides a template for enacting states to adopt for the purpose of establishing procedures for courts to grant recognition and assistance to foreign insolvency proceedings.¹⁴ As noted by the UNCITRAL website, the Model Law:

“focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.”¹⁵

The access provisions give a foreign insolvency representative a right of access to the receiving court (i.e., the court in the enacting State from which recognition and relief is sought). The recognition provisions enable the receiving court to recognise a foreign insolvency proceeding as either a ‘foreign main proceeding’¹⁶ or a ‘foreign non-main proceeding’. The relief provisions specify the different forms of relief that are available to assist a foreign insolvency proceeding, foremost of which is the automatic stay on actions against the debtor and its assets upon recognition of a ‘foreign main proceeding’.¹⁷ Finally, the cooperation provisions permit cooperation and direct communication between the receiving court and foreign courts or foreign insolvency representatives, and also establish the coordination that is required for the management of concurrent proceedings, the aim of which is to:

“foster decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.”¹⁸

¹⁴ For a discussion about the adoption of the UNCITRAL Model Law and how it has been adapted by jurisdictions in the Asia Pacific region, see Andrew Godwin, “Convergence, Divergence and Diversity in Financial Law – The Experience of the UNCITRAL Model Law on Cross-Border Insolvency”, in Gary Low (ed), *Convergence and Divergence of Private Law in Asia* (Cambridge University Press, 2021) (forthcoming).

¹⁵ See: <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>.

¹⁶ Under Article 2(b), Model Law, a ‘foreign main proceeding’ is defined as ‘a foreign proceeding taking place in the State where the debtor has the centre of its main interests’. The concept of the centre of main interests is explored in Part 5 below.

¹⁷ Article 20(1), Model Law.

¹⁸ See: <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>.

The Model Law is accompanied by a Guide to Enactment and Interpretation (the ‘UNCITRAL Guide’). The UNCITRAL Guide:

“is directed primarily to executive branches of Governments and legislators preparing the necessary enacting legislation, but it also provides useful insights for those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics.”¹⁹

At the UNCITRAL 11th Multinational Judicial Colloquium, held in March 2015 in San Francisco, it was agreed that:

“among the key benefits provided by the Model Law were streamlined, simple procedures, the provision of automatic relief that helped to move proceedings along and preservation of the powers and integrity of ancillary jurisdictions. The Model Law is simply expressed, well understood, easily learned and retained; it can be applied consistently with appropriate discretions; provides a well-understood framework for foreign parties and reduces the need for foreign representatives to have to seek advice on domestic law.”²⁰

As of the date of writing, legislation based on the Model Law has been adopted in 48 states in a total of 51 jurisdictions.²¹ One notable exception in the Asia Pacific region is Hong Kong. This is anomalous given Hong Kong’s status as a financial centre.

3. Overview of Common Law Powers

The assistance that may be provided by a local court to either a foreign insolvency representative or a foreign court is a critical aspect of any cross-border insolvency regime.²² Jurisdictions sometimes provide multiple gateways to facilitate assistance in cross-border insolvency matters. These gateways include the inherent powers of the courts under the common law, a statutory framework based on the Model Law and statutory provisions such as section 426 of the Insolvency Law Act 1986 (UK).²³

The last two decades have seen significant differences of opinion on the nature, extent and proper application of the inherent power of common law courts to provide assistance in insolvency proceedings. Following Lord Hoffmann’s comments concerning modified universalism in *Re HIH Casualty and General Insurance Ltd* (“HIH”),²⁴ the courts have consistently differed on the limits of the inherent power. Recent cases decided by the Privy Council and the Supreme Court of the United Kingdom have seen a refinement of the power

¹⁹ UNCITRAL, Model Law on Cross-Border Insolvency: Guide to Enactment and Interpretation, available at: <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>.

²⁰ UNCITRAL, 11th Multinational Judicial Colloquium (21-22 March 2015, San Francisco), available at: <www.uncitral.org/pdf/english/news/EleventhJC.pdf>, paragraph 33.

²¹ See: <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>. There are some interesting statistics that relate to the adoption of the Model Law: in between 1997, when the Model Law was issued, and 2008, the onset of the Global Financial Crisis, only 15 jurisdictions had adopted the Model Law; since the Global Financial Crisis, 32 jurisdictions have adopted the Model Law. Accordingly, the second decade of the Model Law has seen a two-fold increase in the number of jurisdictions adopting the Model Law.

²² For a detailed examination of the common law powers to recognise and assist foreign insolvency proceedings, see Andrew Godwin, Timothy Howse and Ian Ramsay, “The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity” (2017) 26 *International Insolvency Review* 5–39, from which some of the text in this Part 3 is drawn.

²³ This section establishes a procedure, amongst other things, for providing court assistance to insolvency proceedings in England’s former colonies such as Australia.

²⁴ *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. See further below.

but have also caused considerable confusion and raised additional questions about the scope and continuing utility of the power.²⁵

Since the 1764 case of *Solomons v Ross*,²⁶ in which English courts were:

“prepared to recognise the extra-territorial effects of a foreign bankruptcy in England, so as to require creditors based in England to prove in the foreign bankruptcy”,²⁷

the ‘comity of nations’²⁸ has been recognised as a doctrinal basis for the common law powers to recognise and grant assistance to foreign insolvency proceedings.²⁹

Similarly in Hong Kong, the absence of a statutory framework has meant that courts have recognised and granted assistance to foreign insolvency proceedings on the basis of comity. In *Re Irish Shipping Ltd* [1985] HKLR 437, Jones J noted that:

“[a]nother factor that I have taken into account in exercising my discretion is the comity of nations whereby it is desirable that the court should assist the liquidator in another jurisdiction to carry out his duties unless good reasons to the contrary have been put forward and I find none in this case.”³⁰

Despite the early focus on comity, the doctrinal basis for the common law powers is not always synonymous with the often-vague dictates of comity.³¹ The powers have also been motivated by other imperatives, including the theory of modified universalism and considerations concerning the fundamental nature of insolvency proceedings.³² The development of the powers has also been accompanied by the ‘doctrine of ancillary liquidation’, which is applicable where a local court determines that it is the ‘ancillary’ jurisdiction for the purposes of an insolvency, and a foreign court is the appropriate forum to conduct the principal proceedings.³³

²⁵ Godwin *et al.* (above note 22), 6.

²⁶ (1764) 1 HBI 131.

²⁷ Michael Crystal, “The Golden Thread: Universalism and Assistance in International Insolvency” (2011) *Jersey Law Review*, [13], available at:

<http://www.jerseylaw.je/Publications/JerseyLawReview/feb11/JLR1102_Crystal.aspx#_ftn6>.

²⁸ The Encyclopaedic Australian Legal Dictionary defines ‘comity’ as a ‘concept according to which the courts of one state respect the rules, customs and laws of another state, whether by acts of restraint... or by acts of cooperation’ (LexisNexis, Encyclopaedic Australian Legal Dictionary, Comity).

²⁹ Most transnational bankruptcies in the United States were historically based on the judicial concept of comity, which has been described by David Farmer, “Chapter 15 Ancillary and Other Cross-Border Insolvency Cases” (2015) 19 *Hawaii Bar Journal* 14, 16–7, as: “the deference of one nation to the legislative, executive and judicial acts of another – not as an obligation, but as a courtesy serving international duty and convenience.” This was similarly the position in Canada for recognising foreign judgments: see Scott Bomhof and Adam Slavens, “Shifting Gears in Cross-Border Insolvencies: From Comity to COMI” (2008) 24 *Banking and Finance Law Review* 31. See also *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*, 389 B.R. 325 (2007) 332.

³⁰ *Re Irish Shipping Ltd* [1985] HKLR 437, 445.

³¹ Godwin *et al.* (above note 22), 9.

³² *Idem.*

³³ In relation to this doctrine, Smart has noted that: “[t]he most obvious and immediate purpose of an ancillary winding up is to secure assets within the jurisdiction of the... court and to prevent ‘two “full” liquidations... [that] may well result in not only increased costs but also disparity between the creditors in each country.’ Philip Smart, “International Insolvency: Ancillary Winding up and the Foreign Corporation” (1990) 39 *International and Comparative Law Quarterly* 827, 828.

In recent times, the theory of modified universalism has largely shaped the doctrinal basis for the powers as reflected in the leading cases of *HIH*,³⁴ *Cambridge Gas*,³⁵ *Rubin*³⁶ and *Singularis*.³⁷ The universal nature of bankruptcy proceedings was articulated by Lord Hoffmann in *Cambridge Gas* as follows:

“The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.”³⁸

The doctrine of ‘universalism’ – or ‘modified universalism’ as it has come to be regarded in its more limited form – is the principle that insolvency proceedings should be dealt with under a single, unified system, with appropriate safeguards to avoid manifestly unfair outcomes. ‘Modified universalism’ is widely recognised and is ‘strongly embodied’ in the Model Law.³⁹ The scope of the principle itself is:

“controversial and has been the subject of judicial disagreement at the highest level.”⁴⁰

The primacy of modified universalism in England was famously proclaimed by Lord Hoffmann in *HIH*:

“The primary rule of private international law... applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.”⁴¹

Lord Hoffmann qualified this ‘rule’ by explaining that it is:

“very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds...[I]t is an aspiration.”⁴²

In *Rubin*, Lord Collins quipped that universalism is “a trend, but only a trend”.⁴³ Even Lord Sumption in *Singularis*, who wished to confine many aspects of the inherent power, did not question the principle of modified universalism.⁴⁴

³⁴ Above note 24.

³⁵ *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508; [2006] BCC 962 (‘*Cambridge Gas*’).

³⁶ *Rubin v Eurofinance SA* [2013] 1 AC 236 (‘*Rubin*’).

³⁷ *Singularis Holdings Limited (Appellant) v PricewaterhouseCoopers (Respondent)* [2014] UKPC 36. See Godwin *et al.* (above note 22), 11.

³⁸ [2006] BCC 962, [16].

³⁹ Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (3rd edn) (LexisNexis Butterworths, 2015), 533, citing *Akers v Deputy Commissioner of Taxation* (2014) 311 ALR 167; [2014] FCAFC 57, [28]; *Re HIH Insurance Ltd* [2008] 1 WLR 852, 856–7.

⁴⁰ Tom Smith QC, “Recognition of Foreign Corporate Insolvency Proceedings at Common Law”, in Richard Sheldon QC (ed), *Cross-Border Insolvency* (4th edn) (Bloomsbury Professional, 2015), 6.44.

⁴¹ *Re HIH Casual and General Insurance Ltd* [2008] 1 WLR 852, [30].

⁴² *Ibid.*, [7].

⁴³ *Rubin v Eurofinance SA* [2013] 1 AC 236, [16].

⁴⁴ *Singularis Holdings Limited (Appellant) v PricewaterhouseCoopers (Respondent)* [2014] UKPC 36, [17]. For a more detailed discussion, see Godwin *et al.* (above note 22), 14–15.

Determining the nature and extent of the common law power to recognise and grant assistance to foreign insolvency proceedings, however, has proven to be somewhat elusive. Given the existence of alternative gateways for recognition and assistance and the fact that the common law power has been rendered obsolete in jurisdictions such as the United States where the statutory framework under Chapter 15 is the exclusive gateway,⁴⁵ some have pointed to the decline of the common law power and the absence of examples of practitioners invoking the common law powers.⁴⁶ In this regard, it is worth noting the comments of Professor Ian Fletcher made in 2007, as cited in the Hong Kong case of *Joint Official Liquidators of A Co v B*:⁴⁷

“[C]ertain factors appear to militate against the English courts’ powers of assistance being more frequently invoked, even against a background of steady growth in the numbers of insolvencies with cross-border aspects. One reason is the relatively under-publicised state of the law, much of which is contained in reports of cases originally decided many years ago. Unfamiliarity with these Common Law precedents and with their significance from the standpoint of obtaining active assistance from the English courts is likely to be one reason for their underutilisation.”⁴⁸

Further, its incremental development in jurisdictions such as England and Wales has been stymied as a result of cases such as *Rubin*,⁴⁹ which has been criticised for its lack of clarity surrounding the boundaries of the inherent power.⁵⁰ As noted, however, by Lord Neuberger in *Singularis*:

“as with the Cheshire Cat, the principle’s deceptively benevolent smile still appears to linger.”⁵¹

In Hong Kong, the courts have had little choice but to resort to the common law for guidance on recognition and assistance. In this jurisdiction, commercial necessity has acted as a catalyst for judicial innovation,⁵² particularly on the part of Harris J, who has clarified the nature and extent of the common law power in a series of cases. The common law position in Hong Kong is outlined in Part 4 below.

4. The Common Law Position in Hong Kong

Pursuant to the common law, cases in Hong Kong have recognised foreign liquidators and granted assistance to them. The Hong Kong courts have also given effect to foreign moratoriums.⁵³ The general principles for the recognition of foreign insolvency proceedings were stated by Harris J in *Re Takamatsu*:⁵⁴

⁴⁵ See US House of Representatives, “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Report of the Committee on the Judiciary House of Representatives to accompany s 256 together with dissenting, additional dissenting and additional minority views” (109th Congress 1st Session, Report 109–31 Part 1, Union Calendar No 14, 8 April 2005), 110.

⁴⁶ See, for example, Hon Mr Justice Harris, “Understanding Cross-Border Insolvency in the Hong Kong Context” (2017) *Hong Kong Law Journal* 55, 60–61.

⁴⁷ [2014] HKEC 1244.

⁴⁸ Ian Fletcher, *Insolvency in Private International Law* (2nd edn) (OUP, 2007), paragraph 4.02. Also cited by Harris (above note 46), 61.

⁴⁹ Godwin *et al.* (above note 22), 31.

⁵⁰ *Idem.*

⁵¹ *Singularis* (above note 44), [157].

⁵² See Godwin *et al.* (above note 22), 33–34, for a discussion about the fundamental flexibility of the inherent power and its ability to adapt to different circumstances. This article cites the case of *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, where Millett LJ noted that commercial necessity has “encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention.”

⁵³ Harris (above note 46), 60.

⁵⁴ [2019] HKCFI 802; [2019] 5 HKC 505.

“The law is well-settled that the Hong Kong court will recognise foreign insolvency proceedings that comply with the following criteria:

- (1) the foreign insolvency proceedings are collective insolvency proceedings, such as a Cayman provisional liquidation (e.g., *Re Joint Provisional Liquidators of China Lumena New Materials Corp*⁵⁵);
- (2) the foreign insolvency proceedings are opened in the company’s country of incorporation (e.g., *Re Joint Liquidators of Supreme Tycoon Ltd*⁵⁶).”⁵⁷

Further, Harris J has recognised that:

“the rationale underlying the common law power of assistance is modified universalism.”⁵⁸

In *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277, Harris J outlined the nature of the assistance that follows from recognising a foreign liquidator as follows:

“In the conventional case, one would expect an insolvent company to be wound up in its place of incorporation and for its liquidators to consider whether or not it is necessary to seek recognition and potentially assistance from the court in Hong Kong. In the case of liquidators appointed in jurisdictions with similar insolvency regimes to Hong Kong, the assistance may extend to granting orders that give the foreign liquidators substantially similar powers to, for example, investigate the affairs of a company by examination and orders for the production of documents as a Hong Kong liquidator would have. Indeed, as recognised by the Privy Council, the common law power of assistance exists for the purpose of surmounting the practical problems posed for a worldwide winding-up of the company’s affairs by the territorial limits of the powers of each country’s court.”⁵⁹

The above principles have also been applied in the context of insolvency proceedings opened in a civil law jurisdiction.⁶⁰

As noted in Part 1 above, the limitations concerning the existing debt restructuring mechanisms in Hong Kong, particularly provisional liquidation, have given rise to the practice of appointing provisional liquidators in the place of the company’s incorporation and applying for a letter of recognition in Hong Kong. Harris J has been reported as stating that this practice:

“illustrates how you can use recognition and assistance techniques as an alternative to a domestic winding up to mitigate the effects of the *Legend* decision in an intended restructuring of a foreign company listed in Hong Kong... there are tools available within the common law that allow many of the issues that have historically been fudged, namely, jurisdiction and *Legend* to be avoided.”⁶¹

Harris J further outlined this practice in *Re Z-Obee Holdings Ltd* [2017] 10HKJC 299 (CFI) as follows:

“The limitations of our legislative framework and restrictions on the use of provisional liquidators in Hong Kong to restructure companies in financial distress, created a risk that the court might be constrained

⁵⁵ Unrep. [2018] HKCFI 276.

⁵⁶ [2018] 1 HKLRD 1120; [2018] HKCFI 277, [12].

⁵⁷ *Re Takamatsu* [2019] HKCFI 802, [5].

⁵⁸ *Joint Official Liquidators of A Company v B* [2014] 4 HKLRD 374, as cited in *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277, [12].

⁵⁹ *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277, [12], citing *Singularis* (above note 37) [25]. This passage was also cited in *Re Takamatsu* [2019] HKCFI 802, [6].

⁶⁰ *Re Takamatsu* [2019] HKCFI 802.

⁶¹ Claytor (above note 2). See also Harris (above note 46), 64-65, citing *BJB Career Education Co Ltd* [2017] 1 HKLRD 113 and *Re Pacific Andes Enterprises (BVI) Ltd* (HCMP 3560/2016, [2017] HKEC 146) (27 January 2017). For a recent Hong Kong decision in this regard, see *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187.

to wind up Z-Obee, precluding the proposed restructuring. In order to alleviate these concerns, Z-Obee acting by its board took steps to invoke the jurisdiction of its place of incorporation, Bermuda (where provisional liquidation may in appropriate circumstances be used to facilitate a restructuring), to cause provisional liquidators to be appointed in that jurisdiction. By the order of the Supreme Court of Bermuda dated 17 February 2017, Donald Edward Osborn, Yat Kit Jong and Man Chun So were appointed as the joint provisional liquidators of Z-Obee and are authorised to, inter alia, undertake the restructuring. The provisional liquidators applied for, and were granted by this Court on 17 March 2017, a letter of request for recognition of and assistance to them at common law.”⁶²

By the orders of the court dated 27 March 2017 and 29 March 2017 and both sealed on 11 April 2017, the court discharged Donald Edward Osborn, Yat Kit Jong and Man Chun So as provisional liquidators appointed by the court and granted their recognition as provisional liquidators appointed by the court in Bermuda.⁶³

To facilitate applications for recognition and assistance, Harris J has developed a standard order:

“which the Court will normally be prepared to grant on receipt of a letter of request in support of an application for recognition and assistance.”⁶⁴

As explained by Harris J, the standard order:

“expressly empowers a foreign liquidator without further order of the court to take possession and control of the company’s property and investigate its affairs and to bring proceedings to facilitate these processes. The order provides for an automatic stay of the commencement or continuation of proceedings against the company or its assets in Hong Kong without the leave of the Court. This is intended to broadly replicate the impact of the making of a winding-up order in Hong Kong without the need for a petition and engagement of our entire insolvency regime, thereby saving time and costs.”⁶⁵

Despite the judicial innovation demonstrated by Harris J, his Lordship has recognised the need for Hong Kong courts, as previously noted, to take a:

“restrictive view of the extent to which they should assist foreign liquidators from other common law jurisdictions.”⁶⁶

This restrictive view is reflected in the extent of the common law power in Hong Kong to order the production of documents or examination. In *Joint Provisional Liquidators of BJB Career Education Company Limited (in provisional liquidation) v Xu Zhendong* [2016] HKCFI 1930, Harris J held that such an order could be made on the basis that:

“the common law power of assistance extends to ordering an oral examination if such a power (a) exists in the jurisdiction of liquidation and that is the jurisdiction of the place of incorporation and (b) the power exists in the assisting jurisdiction; as is the case in Hong Kong.”⁶⁷

⁶² *Re Z-Obee Holdings Ltd* [2017] 10HKJC 299 (CFI), [8].

⁶³ *Ibid.*, [9].

⁶⁴ Harris (above note 46), 63.

⁶⁵ *Idem.* For relevant cases, see *Joint and Several Liquidators of CEFC Shanghai International Group Ltd* [2020] HKCFI 167, [13]; *Shenzhen Everich Supply Chain Co, Ltd (in Liquidation in the Mainland of the People’s Republic of China)* [2020] HKCFI 965, [5].

⁶⁶ Godwin *et al.* (above note 22), 21, citing comments by Harris J in *Joint Official Liquidators of A Co v B*, which concerned a letter of request addressed to the Hong Kong courts from a Cayman Islands court seeking, inter alia, recognition of the Caymanian liquidators and requesting the respondents to produce certain documents.

⁶⁷ *Ibid.*, 22, citing *Joint Provisional Liquidators of BJB Career Education Company Limited (in provisional liquidation) v Xu Zhendong* [2016] HKCFI 1930, [7].

Harris J, however, has drawn the line at a request to exercise a power that was not available in Hong Kong.⁶⁸ In the Hong Kong case of *Joint Administrators of African Minerals Ltd v Madison Pacific Trust*,⁶⁹ Harris J considered that “[t]he order sought – restraining the sale of... charged shares to aid the administration in England” had no statutory, common law or equitable power equivalent in Hong Kong. Harris J described this as:

“an impermissible extension of the common law principle that requires the court to recognise foreign liquidators and assist them.”⁷⁰

He refused to recognise the foreign liquidator on this basis. A similar statement appeared in the Hong Kong case of *G Ltd* [2015] HKEC 2298:

“In the case of liquidators appointed in jurisdictions with similar insolvency regimes to Hong Kong assistance may extend to granting orders that give foreign liquidators substantially similar powers to, for example, investigate the affairs of a company by examination and orders for the production of documents as a domestic liquidator would have. Recently the Privy Council has in *Singularis Holdings Ltd v PricewaterhouseCoopers* confirmed this and explained comprehensively the applicable common law principles and the limitations on the power to extend assistance to foreign liquidators.”⁷¹

Similar to the approach in other common law jurisdictions such as England and Wales, the decisions in Hong Kong have to date emphasised the relevance and importance of the jurisdiction of incorporation in recognising foreign liquidators. Harris J has noted that the relevance of the jurisdiction of incorporation is based on the:

“established principles of private international law that (1) the domiciliary law of the place of incorporation of a company determines the validity of its formation and continued existence as a legal person; and (2) the authority of a liquidator appointed under the law of the place of incorporation is recognised in Hong Kong.”⁷²

The basis on which recognition of foreign liquidators has traditionally been limited to the jurisdiction of incorporation is considered further in Part 5 below.

5. CW Advanced Technologies and the Questions

In *CW Advanced Technologies*, a Hong Kong incorporated company, CW Advanced Technologies Ltd (the HK Company), was part of a corporate group that had its headquarters and principal place of business in Singapore. The holding company, CW Group Holdings Ltd (CWG), was incorporated in the Cayman Islands, managed from Singapore and listed on the Hong Kong Stock Exchange. CWG and the HK Company received statutory demands from Bank of China (Hong Kong) Ltd (BOC). The HK Company accepted that the corporate group was unable to pay its debts and was insolvent on a cashflow test. The HK Company, CWG and two other companies in the group applied to the Singapore court under section 211B of the Singapore Companies Act for a six-month moratorium in order to facilitate a restructuring. The effect of the application for a moratorium in Singapore was that an automatic moratorium came into effect for a period of 30 days after the filing or the date on which the application was decided by the Singapore court (whichever was earlier).⁷³

⁶⁸ Ibid., 23.

⁶⁹ [2015] HKEC 641.

⁷⁰ Idem.

⁷¹ *G Ltd* [2015] HKEC 2298, [5].

⁷² Harris (above note 46), 56.

⁷³ See sections 211B(8) and (13), Singapore Companies Act.

Initially, the HK Company presented a winding-up petition in Hong Kong and applied for the appointment of provisional liquidators. Subsequently, as a result of the filing of a petition for the winding-up of CWG and a summons for the appointment of provisional liquidators of CWG in the Cayman Islands, the HK Company informed the HK court that it would withdraw its application for the appointment of provisional liquidators in Hong Kong. As Harris J noted, it appeared that CWG's advisors had assumed that the group's restructuring purposed could be managed effectively through the Singapore moratorium and scheme of arrangement, with recognition and assistance given by other jurisdictions in which the group members were located.⁷⁴ The following day, however, BOC applied to the HK court for the appointment of provisional liquidators in respect of the HK Company, arguing that the provisional liquidators were:

“urgently needed to investigate into the HK Company's affairs, prevent the dissipation of the HK Company's assets, and preserve the HK Company's books and records.”⁷⁵

As the criteria for the appointment of provisional liquidators were not in dispute, the HK court appointed provisional liquidators in respect of the HK Company.⁷⁶

The Singapore-based restructuring efforts did not progress as planned and the HK court never received a letter of request to recognise and assist the Singapore moratorium in Hong Kong.⁷⁷ Accordingly, the HK court did not have to determine whether the Singapore moratorium should be recognised and, if so, what form of assistance should be granted. However, Harris J raised three relevant questions in this regard; namely:

- (i) Is a Singapore moratorium that is intended to facilitate a scheme of arrangement in Singapore eligible for recognition in Hong Kong? A related question in this regard is whether a Singapore moratorium is a ‘collective insolvency proceeding’ for common-law recognition purposes?
- (ii) Can a Hong Kong court recognise a foreign collective insolvency proceeding where the foreign jurisdiction is not the country of incorporation?
- (iii) If a Singapore moratorium is eligible for recognition, can the court grant assistance by way of appointing provisional liquidators?⁷⁸

Each of these questions is considered in turn below.

5.1. Is a Singapore moratorium that is intended to facilitate a scheme of arrangement in Singapore eligible for recognition in Hong Kong?

As previously noted, a question that is related to this question is whether a Singapore moratorium is a ‘collective insolvency proceeding’ for common-law recognition purposes. Before considering this question, it is useful to note the nature of a ‘Singapore moratorium’.

Section 211B of the Singapore Companies Act introduces what has been described as an ‘enhanced moratorium’ provision as follows:

⁷⁴ *Re CW Advanced Technologies Ltd* [2018] 3 HKLRD 552, [29].

⁷⁵ *Ibid.*, [22].

⁷⁶ *Ibid.*, [25]. The HK Companies Ordinance (Cap 32) provides in section 192 as follows: “For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators, provisionally or otherwise, in accordance with sections 193 and 194.”

⁷⁷ *Ibid.*, [30].

⁷⁸ *Ibid.*, [30]–[33].

“Where a company proposes, or intends to propose, a compromise or an arrangement between the company and its creditors or any class of those creditors, the Court may, on the application of the company, make one or more of the following orders, each of which is in force for such period as the Court thinks fit:

- (a) an order restraining the passing of a resolution for the winding up of the company;
- (b) an order restraining the appointment of a receiver or manager over any property or undertaking of the company;
- (c) an order restraining the commencement or continuation of any proceedings (other than proceedings under this section or section 210, 211D, 211G, 211H or 212) against the company, except with the leave of the Court and subject to such terms as the Court imposes;
- (d) an order restraining the commencement, continuation or levying of any execution, distress or other legal process against any property of the company, except with the leave of the Court and subject to such terms as the Court imposes;
- (e) an order restraining the taking of any step to enforce any security over any property of the company, or to repossess any goods held by the company under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, except with the leave of the Court and subject to such terms as the Court imposes;
- (f) an order restraining the enforcement of any right of re-entry or forfeiture under any lease in respect of any premises occupied by the company (including any enforcement pursuant to section 18 or 18A of the Conveyancing and Law of Property Act (Cap. 61)), except with the leave of the Court and subject to such terms as the Court imposes.”

Upon an application under section 211B, an automatic moratorium comes into effect for the period starting on the date on which the application is made and ending on the earlier of the following:

- (a) a date that is 30 days after the date on which the application is made; and
- (b) the date on which the application is decided by the Court.⁷⁹

Although HK decisions have identified examples of ‘collective insolvency proceedings’ and alluded to their elements,⁸⁰ they have not provided a clear definition of this concept. Decisions in other common law jurisdictions do not appear to have identified a generally accepted definition of ‘collective insolvency proceedings’ either. A common law definition of an ‘insolvency proceeding’ has been suggested by Tom Smith QC as follows:

“It is suggested that...an *insolvency* proceeding will be a *collective process*, undertaken on behalf of creditors, often (but not necessarily) involving the appointment of an office-holder and usually taking place under the *supervision of a court*.”⁸¹

This definition of an ‘insolvency proceedings’ is consistent with the definition of a ‘foreign proceeding’ in Article 2(a) of the Model Law, except that the Model Law makes explicit reference to administrative proceedings in addition to judicial proceedings. By way of comparison, the definitions of a ‘foreign proceeding’, a ‘foreign main proceeding’ and a ‘foreign non-main proceeding’ in Article 2 of the Model Law are as follows:

“(a) “Foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets

⁷⁹ Section 211B(13), Singapore Companies Act definition of “automatic moratorium period”.

⁸⁰ In *Joint and Several Liquidators of CEFC Shanghai International Group Ltd* [2020] HKCFI 167, which involved insolvency proceedings in mainland China, Harris J alluded to the elements of a ‘collective insolvency proceeding’, stating that: “[t]he Company’s Mainland liquidation is undoubtedly a collective insolvency proceeding. This is demonstrated by the fact that the liquidation proceeding encompasses all of the debtor’s assets (Article 30 of the EBL). Indeed, the Administrators made this recognition application, supported by the Shanghai Court’s letter of request, to maintain the principle of collectivity and the principle of *pari passu* distribution. Therefore, recognising the Company’s Mainland liquidation is consistent with the Court’s existing practice.”

⁸¹ Smith (above note 40), 254.

and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) “Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;...”

A Working Group of UNCITRAL has noted ‘the widely held view’ that a ‘foreign proceeding’ should mainly have three characteristics:

“it should be an insolvency proceeding in the broad sense, so as to cover both liquidation and reorganization proceedings; it should be a collective proceeding, in the sense that representation of the mass of creditors would be involved; and it should be a proceeding that was somehow officially sanctioned, whether by a court or an administrative authority.”⁸²

Importantly, the UNCITRAL Guide provides that:

“[w]here a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress.”⁸³

Under this test, a scheme of arrangement in Singapore would be a proceeding pursuant to a law relating to insolvency so long as the debtor was insolvent or financially distressed. In the context of the Singapore provisions, the ‘law’ referred to in Article 2(a) of the Model Law would be the provisions concerning schemes of arrangement.

In relation to whether a Singapore scheme of arrangement would be a ‘collective proceeding’ as defined in Article 2(a) of the Model Law, the Working Group referred to above suggests that a collective proceeding involves the representation of the mass of creditors of the debtor.⁸⁴ Insofar as the manager of a creditors’ scheme of arrangement in Singapore represent the mass of creditors of the debtor, it should therefore be a collective proceeding for the purposes of the Model Law.

The third element under the definition of a ‘foreign proceeding’ in the Model Law is that the proceeding is subject to control or supervision by a foreign court. In relation to a scheme of arrangement, the company’s affairs is certainly under the supervision of the court as evidenced by the need for the court’s approval to convene scheme meetings and the need for the court’s

⁸² The Report of the Working Group, the 18th Session, [96], available at: <<https://undocs.org/en/A/CN.9/419>>. See also https://uncitral.un.org/en/working_groups/5/insolvency_law.

⁸³ The 2013 UNCITRAL Guide, [48], available at: <<https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> states as follows: “Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define the term “insolvency”. However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law...covers proceedings concerning different types of debtors and, among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor as a commercial entity. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2 subparagraph (a) are not insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress.”

⁸⁴ Note also the statement of Markell J in *Re Betcorp Ltd* (2009) 400 BR 266, 281: “A collective proceeding is one that considers the rights and obligations of all creditors.”

sanction of the proposed scheme.⁸⁵ Insofar as the debtor's assets are redeployed under the scheme for the purposes of obtaining a release and maximising the returns for creditors, the requirement that the scheme be sanctioned by the court means that the court has control or supervision with regard to the company's assets.

It is useful to note that a Singapore moratorium was recognised in the UK in the recent case of *Re H & C S Holdings Pte Limited*, which involved an application to the Singapore High Court for a six-month moratorium under section 211B of the Singapore Companies Act to facilitate a scheme of arrangement.⁸⁶ This decision was the first time a court outside Singapore had recognised the enhanced moratorium in relation to a scheme of arrangement and has been described as:

“an important acknowledgment of the doctrine of universalism of restructuring and insolvency under the UNCITRAL Model Law.”⁸⁷

On the basis of the above, there is nothing to suggest that a Singapore moratorium that is intended to facilitate a scheme of arrangement in Singapore would not be eligible for recognition in Hong Kong. In *CW Advanced Technologies*, Harris J cited authorities in favour of treating a scheme of arrangement as a collective insolvency proceeding for common-law recognition purpose, including US authorities in the context of Chapter 15 of the US Bankruptcy Code,⁸⁸ and ‘conflicting comparative authorities’.⁸⁹ It is relevant to note, however, that the conflicting authorities were in respect of the EU regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in which a different test is applied.⁹⁰

5.2. Can a Hong Kong court recognise a foreign collective insolvency proceeding where the foreign jurisdiction is not the country of incorporation?

In relation to this question, Harris J noted that there was no Hong Kong authority on whether the court could recognise a foreign collective insolvency proceeding where the foreign jurisdiction was not the country of incorporation.⁹¹ The term ‘country of incorporation’ refers to the country in which the debtor company is incorporated. As discussed below, one of the reasons for limiting recognition to the country of incorporation is the traditional primacy given to the laws of the jurisdiction of incorporation in determining who is entitled to act on behalf of the debtor company, such as a liquidator.

To date, with only a few exceptions, decisions in Hong Kong and elsewhere have adopted the general rule in respect of foreign liquidations that:

⁸⁵ See *Re Hawk Insurance Co Ltd* (2001) EWCA Civ 241.

⁸⁶ *Re H & C S Holdings Pte Limited* [2019] EWHC 1459 (Ch).

⁸⁷ Rajah & Tann Asia, “High Court in UK recognises Singapore’s new moratorium law for debt restructuring in landmark decision” (News, 1 April 2019), available at: <<https://www.rajahtannasia.com/news/news/high-court-in-uk-recognises-singapore-s-new-moratorium-law-for-debt-restructuring-in-landmark-decision>>.

⁸⁸ Chapter 15 of the US Bankruptcy adopts the Model Law.

⁸⁹ *Re CW Advanced Technologies Ltd* [2018] 3 HKLRD 552, [32].

⁹⁰ *Ibid.*, [32(a)(iv)]. Under Regulation (EU) No 1215/2012, the applicable test is: “bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.”

⁹¹ *Re CW Advanced Technologies Ltd* [2018] 3 HKLRD 552, [32(b)].

“the English court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation.”⁹²

As Lord Collins noted in *Rubin*:

“That is in contrast to the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) (“the EC Insolvency Regulation”) and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties). It is ultimately derived from the civil law concept of a trader’s domicile, and was adopted in substance in the draft EEC Convention of 1980 as a definition of the debtor’s centre of administration.”⁹³

Lord Collins also noted that:

“in the case of corporations, the English courts have exercised a winding up jurisdiction which is wider than that which at common law they have accorded to foreign courts.”⁹⁴

The general rule referred to above is embodied in Dicey Rule 179:

“Subject to the Insolvency Regulation, the authority of a liquidator appointed under the law of the place of incorporation is recognised in England.”⁹⁵

It appears that the main rationale underpinning this rule is that the law of the place of incorporation determines who is entitled to act on behalf of a company.⁹⁶ Dicey, however, states inconclusively that:

“Rule 179 should not...be construed, in the light of existing authorities, as stating the only circumstances in which an English court will recognise the authority of a liquidator appointed under foreign law.”⁹⁷

Further, Dicey notes that:

“it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of the place of incorporation of the company”⁹⁸

and

⁹² See the decision of Lord Collins in *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236, [13].

⁹³ *Idem* (citations excluded).

⁹⁴ *Idem*: “The court exercises jurisdiction to wind up a foreign company if there is a sufficient connection between the company and England, there are persons who would benefit from the making of a winding up order, and there are persons interested in the distribution of assets of the company who are persons over whom the court can exercise jurisdiction: see Dicey, 15th ed, para 30R-036.” See also [46]: “The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt’s domicile or the court to which the bankrupt submitted (Dicey, 15th ed, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation (Dicey, 15th ed, para 30R-100).”

⁹⁵ *Dicey, Morris and Collins on The Conflict of Laws* Vol 2 (15th edn) (Sweet & Maxwell, 2018), [30R-100].

⁹⁶ *Ibid.*, [30-102]. In this regard, it is useful to note the argument made by the respondents in *Rubin* that: “a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation”, the implication being that the person does not accept the insolvency legislation of other jurisdictions. See the decision of Lord Collins in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236, [116].

⁹⁷ *Ibid.*, [30-103].

⁹⁸ *Ibid.*, citing Philip Smart, *Cross-Border Insolvency* (2nd edn) (Butterworths, 1998), 167 (now Sheldon (ed) (above note 40)).

“[m]ore speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.”⁹⁹

A notable departure from the general rule is the decision of Aedit Abdullah JC in the Singapore case of *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108, which involved applications for the recognition of foreign insolvency proceedings in Japan in respect of companies incorporated in the British Virgin Islands. Noting that there had been no Singapore decision on the recognition of foreign liquidators from jurisdictions other than the place of incorporation, the court held that recognition of the foreign proceedings was justified on the basis that Japan:

“was where the bulk of the business and transactions of the Companies [had] occurred.”

Citing the remarks of Lord Collins in *Rubin* that courts should not recognise the centre of main interests and the country with which the judgment debtor had a sufficient or substantial connection as the competent jurisdiction as this had “all the hallmarks of legislation”, Aedit Abdullah JC stated that:

“the development of the common law should not be so constrained.”¹⁰⁰

In addition to the centre of main interests test, the Singapore court stated that the recognition of the foreign proceedings could also be justified on practical grounds:

“Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality.”¹⁰¹

Aedit Abdullah JC explained the benefits of considering the centre of main interests (COMI) as follows:

“A consequence of a greater sensitivity to Universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding-up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality. The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there.”¹⁰²

As noted above, Lord Collins in *Rubin* voiced a strong warning against adopting a rule based on COMI to identify courts of competent jurisdiction and suggested that this had “all the hallmarks of legislation”, which was:

“a matter for the legislature and not for judicial innovation.”¹⁰³

⁹⁹ Ibid, citing Smart (above note 98), 168–175.

¹⁰⁰ *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108, [20]–[21], where Aedit Abdullah JC cited the remarks of Lord Collins in *Rubin v Eurofinance SA* [2013] 1 AC 236, [129] and also the comments of Smith (above note 40), 6.80.

¹⁰¹ Ibid., [26].

¹⁰² Ibid., [18]. See also [19], where Aedit Abdullah JC further noted *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, [31], in which Lord Hoffman stated that the COMI test was a basis for the recognition at common law of foreign insolvency proceedings.

¹⁰³ *Rubin v Eurofinance SA* [2013] 1 AC 236, [129].

These remarks, however, were expressed in the context of a case involving the recognition and enforcement of insolvency judgments and were not in respect of the recognition of foreign liquidators.

In *Re Opti-Medix Ltd*, Aedit Abdullah JC cited Tom Smith QC's comments that:

"Lord Collins in *Rubin* may well have overstated the extent to which the existing common law authorities given an exclusive role to the place of incorporation in determining whether foreign insolvency proceedings should be recognised"

and that:

"it was 'difficult to see why the common law could not develop a broader test based on the concept of "centre of main interest" as envisaged by Lord Hoffmann in *HIH*.'"¹⁰⁴

Aedit Abdullah JC agreed with the approach of Lord Hoffmann in *HIH*, under which the COMI test was accepted as a basis for the recognition at common law of foreign insolvency proceedings:

"In some cases there may be some doubt about how to determine the appropriate jurisdiction which should be regarded as the seat of the principal liquidation. I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the "centre of a debtor's main interests" as a test, with a presumption that it is the place where the registered office is situated: see article 3(1). That may be more appropriate."¹⁰⁵

It is noteworthy that for the purposes of the Model Law, the issue of whether a foreign liquidator is appointed in the COMI is only relevant in determining whether the foreign proceeding should be recognised as a 'foreign main proceeding'. An affirmative answer would trigger the automatic stay. The issue does not otherwise affect the power of a court to recognise and grant assistance to the foreign liquidator. The court may provide assistance even where the proceeding is a foreign non-main proceeding.¹⁰⁶ Arguably, such an approach is likely to be consistent with the needs of contemporary cross-border insolvency law – a consideration that has recently been acknowledged by Harris J:¹⁰⁷

"Given that Dicey Rule 179 and the English authorities are not binding on courts in Hong Kong (although they should be treated as being of persuasive effect), it is submitted that courts in Hong Kong should consider recognising a foreign collective insolvency proceeding where the foreign jurisdiction is not the country of incorporation and that this approach would accord with international practice as reflected in the Model Law. It is further submitted that if such an approach were considered to be inconsistent with the position as determined by Hong Kong authority to date, it would nonetheless be a permissible extension of the common law power, as recognised by Aedit Abdullah JC in *Re Opti-Medix Ltd*."

5.3. If a Singapore moratorium is eligible for recognition, can the court grant assistance by way of appointing provisional liquidators?

¹⁰⁴ *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108, [21], citing Smith (above note 40), 6.80.

¹⁰⁵ *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, [31].

¹⁰⁶ For an example in Singapore, see *Re Zetta Jet Pte Ltd (No. 2)* [2019] SGHC.

¹⁰⁷ See *Joint and Several Liquidators of CEFC Shanghai International Group Ltd* [2020] HKCFI 167, [19] and [21], where Harris J acknowledged this consideration when rejecting a principle that had been established in the old case of *Galbraith v Grimshaw* [1910] AC 508.

Like the second question, the third question raised by Harris J is not subject to any Hong Kong authority.¹⁰⁸ Under the law as stated in cases such as *Singularis*, the answer is likely to depend on whether such an appointment would be within the powers of the HK court under its own domestic law as the power to assist could not be exercised unless the type of assistance would be available both locally and in the foreign jurisdiction.¹⁰⁹ In the words of Lord Sumption in *Singularis*, the power of assistance is:

“[not] available to enable [the court] to do something which they could not do even under the law by which they were appointed.”¹¹⁰

Moreover, in the words of Lord Collins in *Singularis*, the power:

“does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply.”¹¹¹

It has been suggested by Richard Sheldon QC that the result in *Singularis* means that:

“common law assistance may be given, but only to provide relief which is available both in the officeholder’s own (foreign) jurisdiction and under the domestic common law of the country in which he seeks assistance.”¹¹²

The answer to the third question is therefore likely to depend on the powers of a Hong Kong court to appoint provisional liquidators. As a result of a *dictum* by Rogers VP of the Court of Appeal in *Legend*, courts in Hong Kong have interpreted section 192 of the Companies Ordinance (Cap 32) as limiting the appointment of provisional liquidators to the circumstances in which a court is satisfied that it is likely that a winding-up order will be made and there is either a need to preserve assets or a need for an independent investigation. On the basis of this interpretation, the scope to appoint provisional liquidators in Hong Kong to facilitate a Singapore moratorium would appear to be limited. Cases since *Legend*, however, have sought to confine the *dictum* in this regard. In addition, an argument has been made for revisiting the dictum and clarifying the interpretation of section 192 on the basis that the phrase ‘for the purpose of conducting the proceedings in winding up of a company’ does not necessarily mean that the result of appointing provisional liquidators must be a winding up of the company and also on the basis that there is no rule of law prohibiting a court from appointing provisional liquidators where the petition is unlikely to lead to a winding up of the company.¹¹³

To some extent, this question has become less problematic as a result of the possibility for Hong Kong courts to recognise provisional liquidators appointed in other jurisdictions, as previously noted.¹¹⁴ Significantly, the recent case of *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187 involved the recognition of ‘soft-touch’ liquidators appointed in Bermuda and confirmed that recognition did not require that soft-touch liquidation be capable of being opened in Hong

¹⁰⁸ *Re CW Advanced Technologies Ltd* [2018] 3 HKLRD 552, 563.

¹⁰⁹ See *Singularis* (above note 37).

¹¹⁰ *Ibid.*, [25].

¹¹¹ *Ibid.*, [38].

¹¹² Sheldon (above note 40), 1.5.

¹¹³ For details of this argument, see Qu (above note 10).

¹¹⁴ See the text accompanying note 64 in Part 4 above.

Kong.¹¹⁵ The decision further confirmed that the fact that Hong Kong courts could not appoint provisional liquidators solely for the purpose of enabling a corporate rescue was not a bar to recognising and assisting foreign soft-touch provisional liquidators.¹¹⁶ The decision also confirmed, however, that foreign provisional liquidators recognised in Hong Kong do not act in the capacity of, and do not have all the powers available to, provisional liquidators appointed in Hong Kong.¹¹⁷

In conclusion, the Hong Kong courts should have power to grant assistance by appointing a provisional liquidator if the criteria for such an appointment under Hong Kong law are satisfied.¹¹⁸ Once a case for an appointment is made out, the provisional liquidator may be granted the power to pursue a restructuring.¹¹⁹

6. Conclusion

The three questions raised by Harris J in *Re CW Advanced Technologies* are important in Hong Kong, particularly given the absence of a statutory framework for cross-border insolvency and also the absence of a formal corporate rescue mechanism. This article has analysed the common law powers to recognise and grant assistance to foreign insolvency proceedings and argued that there is scope for the common law in Hong Kong to develop incrementally to provide solutions to the first two questions at least. These solutions would involve adopting a common law test for determining ‘collective insolvency proceedings’ and adopting the test of the centre of main interests along similar lines to the Model Law. Such a development, it is argued, would be consistent with commercial necessity and the needs of contemporary cross-border insolvency law. There is also scope to revisit the *dictum* of the Court of Appeal in *Legend* and to clarify the interpretation of section 192 of the Companies Ordinance (Cap 32) in respect of the circumstances in which a court may appoint provisional liquidators.

Of course, the questions may become moot if Hong Kong adopts a statutory corporate rescue mechanism or goes one step further and adopts the Model Law.

¹¹⁵ *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, [31]. See also [32], where Deputy Judge William Wong SC stated that: “[t]o add an eligibility criterion that there must be complete identity between Hong Kong insolvency law and foreign insolvency law would be to undermine the universalism rationale.”

¹¹⁶ *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, [12], citing Harris J in *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* [2019] HKCFI 805, [2019] HKEC 945, [9].

¹¹⁷ *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, [19] and [26].

¹¹⁸ For the criteria, see *Re CW Advanced Technologies Ltd* [2018] 3 HKLRD 552, 563, paragraph 25. These criteria were satisfied in that case.

¹¹⁹ Harris J acknowledged the possibility of extending the powers of a provisional liquidator to facilitate a restructuring in *Re CW Advanced Technologies Ltd* [2018] 3 HKLRD 552, 563, paragraph 33(a).