# Practising modified universalism in the Cayman Islands

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**Introduction**

The Cayman Islands and Hong Kong courts have both provided useful directions in recent months as to the manner in which the courts in the respective jurisdictions will manage cross-border applications to restructure Cayman Islands companies, consistent with the principles of international comity and modified universalism.

**Starting point for the Court**

Where proceedings have been issued in more than one common law jurisdiction but an appointment has yet to be made, the starting point for the Court in applying the principles of modified universalism should be to consider which jurisdiction is the more appropriate to assume the role of primary insolvency proceeding. The recent authorities in both Hong Kong and the Cayman Islands confirm that, consistent with longstanding authority, this will ordinarily be assumed to be the place of incorporation of the company, being the place that its investors, service providers and creditors would typically associate with, among other things, the company's registered office and the law governing the duties of its board of directors and its Articles of Association.

The rationale for this approach is that shareholders in and creditors of Cayman Islands companies may have a "*reasonable expectation that the courts here are competent and able to resolve any complex dispute that may arise in an efficient and just manner*". [1] The Cayman Islands are also an advanced and reputable international financial centre which frequently deals with international disputes involving Cayman Islands companies [2] so there can be no suggestion that the Cayman Court is not competent to deal with insolvency and restructuring applications and disputes if and when they arise.

There is also well established jurisdiction in Hong Kong to recognise and assist foreign officeholders appointed in the country of incorporation of the company. The Hong Kong Court

has recently recognised Cayman appointed restructuring provisional liquidators in, inter alia, *China Oil Gangran Energy Group Holdings Limited (in Provisional Liquidation)* [2020] HKCFI 825 and *Moody Technology Holdings Limited (in Provisional Liquidation)* [2020] 4 HKC 78, although it has made clear in a judgment citing the Cayman decision in Sun Cheong that the mere appointment of provisional liquidators in the Cayman Islands does not, without more, automatically operate to stay ongoing winding up proceedings in Hong Kong (see *Re FDG Electric Vehicles Limited* [2020] HKCFI 2931).

**Recognition of foreign officeholders appointed to Cayman companies**

There are also instances in which a foreign court will assume the role of primary insolvency proceeding and the Grand Court may be minded to recognise foreign office holders appointed to a Cayman Islands domiciled company.

Where the Court is asked to recognise office holders appointed to a Cayman domiciled company by a foreign court, it should have regard to the following considerations, summarised by Smellie CJ In *Sun Cheong Creative Development Holdings Limited* (Unreported, 20 October 2020, Smellie CJ):

1. Whether parallel proceedings would only serve to incur additional costs and unnecessary delay. [3]
2. Whether reputational, regulatory or policy reasons militate in favour of a Cayman Islands proceeding.
3. The breadth of powers available in each jurisdiction – of particular relevance in the context of restructuring is whether soft touch provisional liquidation is available under the foreign law. [4]
4. Whether comparable relief has been sought in the foreign jurisdiction.
5. Whether the foreign petitioner is seeking to wind up the Company or avoid the need for a winding up. [5]
6. The locus of the Company's business.

The Chief Justice noted in *Sun Cheong* that one of the key questions for the Court is the purpose of the appointment in question. Where the purpose is to facilitate a restructuring or otherwise avoid the need to wind up the company the Grand Court may be more willing to grant recognition as being in the best interests of the company's stakeholders. If, however, the foreign office holders are seeking an immediate winding up which may jeopardise a potential Cayman restructuring, the Court will be slower to grant recognition.

**Sun Cheong Creative Development Holdings Limited**

*Sun Cheong* concerned an ex parte application under section 104(3) of the Companies Act (2020 Revision) for the appointment of joint provisional liquidators to Sun Cheong Creative Development Holdings Limited (the **Company**) for the purposes of presenting a compromise or arrangement to creditors. [6]

The Company was involved in the design, manufacture and sale of plastic household products and had historically been profitable, returning annual dividends to its shareholders, approximately 30% of whom were members of the public who subscribed for shares through the Hong Kong Stock Exchange. However, the Company's financial health deteriorated as a result of a confluence of events in 2019 and 2020 which included unforeseen premises relocations, the US-China trade war (and its consequential impact on the availability of credit and exchange rates) and the COVID-19 pandemic. As a result, the Company was indebted in the amount of HK $168 million to numerous bank creditors, two of whom had presented petitions in Hong Kong to wind up the Company in insolvency (the **HK Petitions**).

The Company had, however, formulated a restructuring plan and engaged in negotiations with a potential white knight investor, whose independent financial advisors (and the proposed joint provisional liquidators) had: (i) confirmed that the proposed restructuring was realistic and commercially viable, and (ii) initiated discussions with other creditors in respect of the terms of the proposed restructuring. When the Company's application came before the Chief Justice, a winding up order was expected to be made imminently (two business days later) pursuant to one of the HK Petitions and the Grand Court was asked to appoint joint provisional liquidators in the Cayman Islands on an urgent basis and notwithstanding the extant HK Petitions. If granted, the orders sought would have the effect of conferring primacy on the Cayman winding up proceedings.

Accordingly, in circumstances where (i) the application before the Grand Court in Sun Cheong sought to effect a restructuring of the Company's assets and liabilities for the benefit of its stakeholders while the relief sought in the HK Petitions was an immediate winding up order, and (ii) the fact of the Company's registration in Hong Kong as a registered foreign company and listing on the Hong Kong Stock Exchange was not, by itself, sufficient to enable the Hong Kong court to claim jurisdiction over the insolvency proceedings, the Court acceded to the request for the appointment of joint provisional liquidators.

**Conclusion**

The Grand Court will, in appropriate circumstances, recognise and grant assistance to liquidators of Cayman Islands incorporated companies appointed by the Courts of another country, consistent with the well-established principles of comity and international cooperation.

The Chief Justice's decision in *Sun Cheong* provides helpful guidance as to the circumstances in which such recognition is likely to be granted and the circumstances in which shareholders,

creditors and directors of Cayman companies can reasonably expect the Cayman Islands to assert primacy in the insolvency of a Cayman Islands company, notwithstanding extant winding up proceedings in foreign jurisdictions.

*Ogier acted successfully for the liquidators of Agrotech and the company/JPLs in Sun Cheong.*

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[1] KTH Capital Management Limited v China One Financial Limited & Others [2004-5] CILR 213.

[2] Daiwa Capital Markets Europe Limited v Mr Maan Abdul Wahed Al Sanea (Unreported, 19 August 2019).

[3] China Agrotech Holdings Limited (in Liquidation) [2017] (2) CILR 526 per Segal J .

[4] Changgang Dunxin Enterprise Company Limited, Unreported, 1 March 2018, Mangatal J.

[5] In re Dickson Group Holdings Ltd 2888 BDA LR 34.

[6] Amendments have been proposed to the regime under section 104(3) of the Companies Act to provide for the appointment of a restructuring officer in lieu of a provisional liquidator, although it is anticipated that the existing case law will remain relevant. For details of the proposed amendments, see our article: Cayman Islands publishes reforms to restructuring regime.

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