Comity, cooperation and conflict in cross-border insolvency: an offshore perspective on modified universalism

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Although the principle was only named in the early 2000s, modified universalism has been the "golden thread" [1] running through cross-border insolvency law since the 18th century. The doctrine and its rationale were described by Lord Sumption in *Singularis* [2] in the following terms:

> "It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global business it is in the interests of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally."

The UNCITRAL Model Law on Cross-Border Insolvency provides a tried and tested framework for cross-border cooperation and assistance that is founded on the principles of modified universalism. However, in jurisdictions where the Model Law has not been adopted, including many offshore jurisdictions, it is critical to ensure that the common law principles of modified universalism retain their primacy and potency, [3] and are not inadvertently eroded to the detriment of stakeholders.

Recent authorities from the Grand Court of the Cayman Islands (**Cayman Islands Court**) and the High Court of the Hong Kong Special Administrative Court (**Hong Kong Court**) highlight the importance of the principles of modified universalism to cross-border cooperation, and the risks of conflict that can arise.

Modified universalism in action

The Hong Kong Court and the Cayman Islands Court have extensive experience of cross-border cooperation and the application of the principles of modified universalism as described in *Singularis*, owing to the significant number of Cayman Islands exempted companies listed on the Hong Kong Stock Exchange (**HKEX**). At the end of 2021, 56.86% of the 2,219 companies listed on Main Board of the HKEX [4] were incorporated in the Cayman Islands.

The frequently-adopted corporate structure, which features a holding company incorporated in the Cayman Islands, corporate headquarters in Hong Kong, and operating vehicle(s) in mainland China, gives rise to a need for jurisdictions to have particular regard to the principles underpinning modified universalism. Lord Hoffman's "golden thread" can be traced through a line of authorities dealing with the interplay between creditors' winding-up petitions and restructuring plans filed across multiple jurisdictions.

Identifying the primary insolvency jurisdiction

It is well established that, under the doctrine of modified universalism, the primary insolvency proceedings will ordinarily be those in the place of incorporation of the company.

Thus, the winding up or restructuring of Cayman Islands incorporated companies should, in the ordinary course, be supervised by the Cayman Islands Court. This is appropriate as the Cayman Islands is "an advanced and reputable international financial centre, and a jurisdiction dealing frequently with international disputes involving Cayman companies" [5] and shareholders in and creditors of a Cayman Islands company may have a "reasonable expectation that the [Cayman Courts] are competent and able to resolve any dispute that may arise in an efficient and just manner". [6]

The Honourable Mr Justice Harris of the Hong Kong Court has recognised and adopted this approach in numerous cases, citing in *China Huiyuan Juice Group Limited* [7] the Court of Final Appeal's earlier decision in *Kam Leung Sui Kwan v Kam Kwan Lai*, [8] in which Chief Justice Ma and Lord Millett NPJ observed that: "the most appropriate jurisdiction in which to wind up a company is the jurisdiction where it is incorporated … there must be good reason to exercise abnormal jurisdiction even though it is one which statute has expressly conferred on the court."

The appropriate course is not, however, always clear where winding up proceedings are commenced first in time, or only commenced, in the foreign jurisdiction.

Recognising foreign insolvency appointments

The Hong Kong Court may exercise its winding up jurisdiction over a foreign-incorporated company where "three core requirements" are satisfied: [9]

i. there is a sufficient connection with Hong Kong

ii. there is a reasonable possibility of benefit to the Petitioner from a winding up order in Hong Kong; and

iii. the Court must have jurisdiction over one or more persons in the distribution of the Company's assets

Even where there are no winding up proceedings on foot in the country of the company's incorporation, the Hong Kong Court may dismiss a winding up petition which does not satisfy these requirements. [10]

Assuming, however, that these three core requirements have been met and the Hong Kong Court exercises jurisdiction over a Cayman Islands-incorporated Company, the Cayman Court also has jurisdiction (though more limited) to recognise those foreign liquidator appointments. This jurisdiction has historically been exercised having regard to, among other things:

i. whether parallel proceedings will serve to incur additional costs and delay

ii. the breadth of powers available in each jurisdiction (noting in particular that the Hong Kong Court does not currently have jurisdiction equivalent to the Cayman Islands Court to appoint light touch provisional liquidators for the sole purpose of pursuing a restructuring [11])

iii. whether the petitioner in the foreign jurisdiction is seeking a winding up order or to avoid the need for a winding up; and

iv. the locus of the company's business [12]

This demonstrates the pragmatic and cooperative approach that has been adopted by the Hong Kong Court and the Cayman Islands Court to the question of making and recognising appointments over foreign-incorporated companies.

Cross-border cooperation and comity

The Hong Kong Court has, on numerous occasions, recognised Cayman-appointed insolvency practitioners for the purposes of facilitating a restructuring of an insolvent company's liabilities, notwithstanding the prior or concurrent presentation of a winding up petition in the Hong Kong Court. [13] However, such recognition is not automatic. Harris J has made clear that the appointment of provisional liquidators in the Cayman Islands does not as a matter of Hong Kong law have the effect of automatically staying winding up proceedings in Hong Kong in the absence of a stay application in those proceedings. [14]

The Hong Kong Court has been understandably concerned to ensure that the rights of creditors to a winding up order, partcularly those within their jurisdiction, are not abrogated in favour of

a restructuring plan presented to a foreign Court that has no realistic prospect of success. [15] In *China Bozza Development Holdings Limited*, [16] Harris J expressed concern that the process of applying for the appointment of provisional liquidators for restructuring purposes in the country of a company's incorporation after a petition had been presented in Hong Kong was "being abused to obtain a de facto moratorium of enforcement action by creditors in Hong Kong".

The Grand Court, for its part, has been cognisant of these concerns in recent years.

- In *Altair Asia Investments Limited*, [17] the Grand Court declined to make an immediate winding up order in respect of a Cayman Islands-incorporated company pending delivery of a judgment by Harris J in Hong Kong, noting: "Comity and cooperation is particularly important in the field of cross-border insolvency and it would not be appropriate for this court to proceed to a judgment on the disputed debt by determining the Petitioner before Mr Justice Harris has handed down judgment".
- In appointing provisional liquidators in the Cayman Islands in *Sun Cheong Creative Development Holdings Limited* [18] the Chief Justice of the Cayman Islands Court was cognisant of the impact that his appointment of provisional liquidators may have on prior winding up petitions presented in Hong Kong. Notwithstanding that there was no petitioner in the Cayman Islands seeking an immediate winding up order, the Chief Justice nevertheless had regard to the principles under Cayman Islands law on which a creditor's right to a winding up order ex debito justiciae might be displaced, noting that "The rights of the [Hong Kong] Petitioners are of course to be determined by the Hong Kong Court in accordance with Hong Kong law in relation to the HK Petitions. However, the foregoing principles reflect how their rights would be viewed had they petitioned in the Cayman Islands."
- In *Silver Base Group Holdings Limited*, the Honourable Mr Justice Doyle initially adjourned an application for the appointment of provisional liquidators where a winding up petition was on foot in Hong Kong on the basis that creditors ought to have been notified, and the Court pre-emptively expressed concerns about comity. [19] The learned Judge subsequently acceded to the adjourned application, having "full regard to the importance of the laws of the place of incorporation and the international recognition of light touch provisional liquidators appointed for restructuring purposes" while also carving out the Hong Kong winding up proceedings from the accompanying statutory moratorium. [20]

The approach adopted by Doyle J in *Silverbase* illustrates the cross-jurisdictional consideration and cooperation that has characterised interactions between the Hong Kong and Cayman Islands Courts in recent years: "The appointment will not stop the winding up proceedings in Hong Kong if the Hong Kong Court decides not to recognise the statutory moratorium in respect of any proceedings in Hong Kong. It will, of course, be entirely a matter for the Hong Kong Court as to what orders it makes in respect of any active proceedings before it involving the Company. Looking at the matter through the Cayman Islands' eyes, in the judgment of this

court, it would be sensible and appropriate for the Hong Kong Court to recognise and give assistance to the JPLs which this court appointed over a company incorporated under the laws of the Cayman Islands, I leave this matter however to the Hong Kong courts having endeavoured to deal with the concerns previously held by Harris J."

This demonstrates the importance of courts remaining alive to the need to balance cross-jurisdictional cooperation against the expectation of "mutual respect for the territorial integrity of each other's jurisdiction" [21] and provide a practical route forward for both jurisdictions consistent with the principles of comity.

Cross-border conflict

Practical difficulties may arise in insolvency proceedings where a foreign court seeks, for legitimate reasons, to protect the interests of domestic stakeholders, notwithstanding the primacy of the insolvent company's place of incorporation. This is demonstrated by recent decisions of the Hong Kong Court and the Cayman Islands Court in relation to GTI Holdings Limited, a Cayman Islands-incorporated company listed on the HKEX (GTI).

In *GTI Holdings Limited*, [22] the Honourable Madam Justice Chan made a winding up order in respect of GTI notwithstanding that:

i. the Cayman Islands Court had appointed joint provisional liquidators for the purposes of pursuing a restructuring on 28 May 2020

ii. those JPLs had been recognised by the Hong Kong Court on 9 November 2020

iii. Harris J had ordered on 8 November 2021 that an application to convene a scheme meeting be listed on 29 March 2022; and

iv. the Hong Kong petitioner consented to the adjournment

Chan J expressed concern not only at the length of time it had taken for a restructuring plan and scheme of arrangement to be devised, but also at the feasability of the scheme of arrangement.

While the Honourable Judge was understandably concerned to protect domestic creditors, the making of the winding up order in Hong Kong resulted in:

a. concurrent appointments of the Hong Kong Official Receiver by order of the Hong Kong Court and the JPLs appointed by the Cayman Islands Court, giving rise to a risk of duplication and increased costs

b. uncertainty as to whether and how the proposed scheme of arrangement might still be convened (pursuant to prior orders of the Court); and

c. a winding up order that, unlike an order of the primary court, was subject to considerable difficulties in being recognised outside of the jurisdiction in which it was made, notwithstanding that the business in question operated globally [23]

A winding up order was subsequently made by the Cayman Islands Court on the basis that, among other things, "an order made by a court in the place of incorporation of the Company should be more effective internationally in accordance with well-established principles of private international law" [24] while the wish was expressed that the liquidators appointed over GTI by the Cayman Islands Court would also be appointed in Hong Kong.

Conclusion

GTI Holdings provides a timely reminder of the rationale for the doctrine of modified universalism: that the interests of creditors are invariably best served where courts, as far as possible, "cooperate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed under a single system of distribution". Even where courts seek, on justifiable grounds, to protect and preserve assets for the benefit of domestic creditors, the resulting conflict, uncertainty and duplication may ultimately jeopardise those same creditors' best interests. In cross-border insolvency cases it therefore remains "especially important to adopt a broad internationalist outlook", [25] which includes having regard to the primacy of the law of the place of the relevant company's incorporation, and pursuing a collaborative and cooperative approach to the supervision of cross-border insolvencies, for the ultimate benefit of all creditors of an insolvent estate.

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[1] Per Lord Hoffman in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 at [30]

[2] *Singularis Holdings Limited v PriceWaterhouseCoopers* [2014] UKPC 36 at [23]

[3] *In re HIH Casualty and General Insurance Ltd* at [7]: "Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, it is a potent one"

[4] The proportion is even higher among companies listed on the Growth Enterprise Market, where Cayman incorporated vehicles compromise 74.21% of participants. HKEX Fact Book 2021, page 33 and 174

[5] *Daiwa Capital Markets Europe Limited v Mr Maan Abdul Wahed Al Sanea* (Unreported, Smellie CJ, 19 August 2019)

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

[7] [2020] HKCFI 2940

[8] [FACV No 4 of 2015]

[9] *China Huiyuan Juice Group Limited* at [19]

[10] See for example, *China Creative Global Holdings Limited* [2021] HKCFI 2814 where the petition was dismissed on the basis that there was no benefit to the Petitioner from a winding up order in Hong Kong, its assets being held predominantly elsewhere

[11] *Moody Technology Holdings Limited* [2020] HKCFI 416 at [10]

[12] *Sun Cheong* at [54]

[13] See for example *Moody Technology Holdings Limited* (a Bermuda incorporated company) and *China Oil Gangran Energy Group Holdings Limited (in Provisional Liquidation)* [2020] HKCFI 825 (a Cayman Islands incorporated company)

[14] *FDG Electric Vehicles Limited* [2020] HKCFI 2931

[15] It should be noted that the Cayman Islands Court also seeks to safeguard creditors from restructuring efforts which have no prospect of success; see for example *Evergreen International Holdings Limited* (Unreported, Ramsay-Hale J, 11 January 2022) in which the Court found "no rational basis" for an adjournment of the petition

[16] [2021] HKCFI 1235

[17] (Unreported, Parker J, 16 March 2020)

[18] (Unreported, Smellie CJ, 20 October 2020)

[19] (Unreported, Doyle J, 22 November 2021)

[20] (Unreported, Doyle J, 8 December 2021)

[21] *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818 at 827 per Millett LJ

[22] [2021] HKCFI 3647

[23] As Millett LJ noted in *Re International Tin Council* [1987] 1 Ch 419 at 447: "although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation"

[24] Unreported, Doyle J, 15 March 2022 at [67]

[25] Per Doyle J in *GTI Holdings*

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