

July 29, 2021

On 20 July 2021, the Hong Kong Court of First Instance granted an application by Hong Kong liquidators to issue a letter of request for assistance to the Shenzhen Intermediate People's Court. This was the first application made under the new cross-border cooperation mechanism, which we reported in a previous note ([click here](#)).

Background

The case concerns Samson Paper Company Limited ("**Samson**"), a Hong Kong company. It is part of a corporate group headed by a Bermuda company listed in Hong Kong, for which the Bermuda court appointed two provisional liquidators on a soft-touch basis. The appointment was recognised by the Hong Kong court. Subsequently, Samson's holding company resolved to wind up Samson on the grounds of insolvency. It appointed the said provisional liquidators as Samson's liquidators.

The liquidators have formed the view that they need to obtain recognition and assistance in order to deal with Samson's substantial assets in Mainland China, which are principally located in Shenzhen. These include Samson's wholly-own subsidiaries, receivables and an apartment.

Harris J was satisfied that it is desirable that the liquidators' appointment be recognised and assistance provided in Shenzhen by the Shenzhen court, so that they can collect the assets within the Shenzhen court's jurisdiction.

First criterion: The Company's centre of main interests (COMI)

With reference to Article 4 of the SPC's opinion under the mechanism, the learned Judge considered that the mechanism shall apply where "the centre of main interests of the debtor (i.e. the company) shall have been in the Hong Kong Special Administrative Region continuously for at least 6 months." "Centre of main interests" is defined under the SPC's opinion as "generally (meaning) the place of incorporation of the (company)", and other factors including "the place of principal office, the principal place of business, the place of principal assets etc." of the company shall be taken into account.

Applying these to this case, Samson is incorporated in Hong Kong. As it has always been run out of Hong Kong, the Judge considered that Samson's centre of main interests has been in Hong Kong.

Second criterion: Common law principles on

granting a letter of request

Applying common law principles, the Judge said the Court has inherent jurisdiction to grant a letter of request permitting Hong Kong liquidators to seek recognition and assistance in another jurisdiction. In considering that, the Court has to consider which jurisdiction is the most appropriate or convenient forum for the determination of the issue in question applying generally applicable jurisdictional principles.

The Judge determined that it would be consistent with these principles to grant a letter of request in this case. The liquidators were seeking assistance in their conventional powers to gather in the company's assets. In order to carry out this function, they have an express statutory power in Hong Kong to commence legal proceedings to recover assets and this includes commencing proceedings outside Hong Kong.

Procedure for recognition

The Judge then turned to consider the application procedure, under Article 6 of the SPC's opinion, which requires the submission of the following materials:

1. an application;
2. a letter of request issued by the Hong Kong High Court;
3. the relevant documents on the commencement of the Hong Kong insolvency proceedings and in relation to the appointment of the Hong Kong liquidator;
4. materials showing that the company's centre of main interests is in Hong Kong, and if any such materials were issued outside the Mainland, they shall be certified in accordance with PRC law;
5. a copy of the judgment in respect of which the application for recognition and assistance is made;
6. a copy of the identity document of the Hong Kong liquidator, and if such identity document was issued outside the Mainland, it shall be certified in accordance with PRC law; and
7. evidence showing that the company's principal assets in the Mainland are in a pilot area, or that it has a place of business or a representative office in a pilot area.

Liquidators' functions and powers

The Judge went further and summarised the liquidators' powers and functions under Hong Kong law, for the benefit of the Judge of the Shenzhen court who will deal with the liquidators' application for recognition and assistance. These powers (in particular under section 251 of Cap. 32) include to:

1. take into their custody, or under their control, all the property and things in action to which the company is or appears to be entitled;
2. sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;
3. do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the company's seal; and
4. do all other things as may be necessary for winding up the affairs of the company and distributing its assets.

The Judge commented that it is desirable that the liquidators are able to exercise the same functions and powers in Shenzhen as in Hong Kong, to the extent this is allowed by PRC law.

Finally, the Judge ordered that a letter of request in the form appended to the Judgment in simplified Chinese be

issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of Samson's liquidation and its liquidators.

Commentary

The Samson case is significant in the development of cross-border cooperation on corporate insolvency. It is the first case in which the Hong Kong court has considered a liquidator's application, after the cooperation mechanism came into effect in May 2021. Prior to that, a liquidator appointed by the Hong Kong High Court has never been formally recognised by a Mainland Court (see **Re CEFC Shanghai International Group Ltd**).

The Court took a positive approach in setting out the criteria for the application, outlining the application procedure and documents required, and informing the Mainland court of the functions and powers of a Hong Kong liquidator under Hong Kong law. It is to be hoped that the Mainland Court will reciprocate this approach by similarly allowing recognition and assistance, in the spirit of the cooperation mechanism.

The implementation of the mechanism will foster Hong Kong's position as a leading financial centre. Hong Kong is the only jurisdiction outside the Mainland to have established a cooperation mechanism for mutual recognition of and assistance in insolvency proceedings with the Mainland. This unique advantage will enable Hong Kong to retain its status as a global dispute resolution centre and debt restructuring hub.

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