CW Advanced Technologies case highlights Hong Kong’s lack of statutory cross-border insolvency regime

Richard Hudson and Jean Lau

In the past couple of decades, jurisdictions all over the world have been required to grapple with problems arising out of corporate insolvencies with cross-border elements. Solving these problems has required considerable judicial flexibility and innovation, but judges in some jurisdictions have been helped by the enactment of legislation designed to deal with cross-border status. Most notably, 44 countries (46 jurisdictions) around the world, have adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997) and others have independently produced legislation to deal with such matters.

However, neither China nor Hong Kong have adopted the Model Law or enacted independent legislation. Therefore, when dealing with applications involving cross-border insolvency issues, the Hong Kong Court is handicapped by the fact that it does not have a cross-border insolvency regime, such as Chapter 15 under the US Bankruptcy Code. As a result, the Hong Kong Court has been forced to fall back on the common law. However, Courts have shown a welcome willingness to recognise and assist foreign liquidators to gain control of assets and to provide other assistance to carry out their functions (see, for example, The Joint Official Liquidators of Company A (2014) 4 HKLRD 374. Such applications are now fairly common.

However, there are limits to the Hong Kong Court’s ability to provide assistance to foreign office holders. For example, in Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd [2015] 4 HKC 215, Harris J commented that whilst the Hong Kong Court can take a generous view of its power to assist a foreign liquidation process by recognising liquidators appointed in a foreign jurisdiction, any order granted in favour of a foreign office holder is limited to the types of conventional orders available to a liquidator in Hong Kong under its insolvency regime, the common law and equitable principles.

The limits on the Hong Kong Court’s jurisdiction are readily apparent when matters concerning corporate rescue are considered by the Court. Hong Kong currently has no corporate rescue mechanism equivalent to Administration in England or Chapter 11 in the US. In Re China Solar Energy Holdings [2018] HKCFI 555, Harris J confirmed that the Court may only appoint provisional liquidators on conventional grounds, such as asset preservation and investigation, but not solely for the purpose of procuring corporate rescue. That said, in appropriate circumstances, the Court may extend the provisional liquidators’ powers to pursue a corporate restructuring exercise.
Against this background, it was an open question what might happen if the Hong Kong Court were to be confronted with foreign proceedings that purported to make an order imposing a moratorium over a Hong Kong company as part of a group restructuring. This issue has now been considered by the Hong Kong Court in the recent judgment of Harris J in Re CW Advanced Technologies Limited[2018] HKCFI 1705, 19 July 2018.

A Hong Kong company (the Company) presented a petition seeking its own winding up. The Company is part of a corporate group, the CW Group, with its headquarters and principal place of business in Singapore. The holding company of the CW Group is incorporated in the Cayman Islands, managed from Singapore, listed on the Hong Kong Stock Exchange, and is a registered non-Hong Kong company.

The CW Group and the Company encountered financial difficulties, with Bank of China (Hong Kong) Limited (BOC) their largest creditor. The CW Group’s management had taken steps to achieve a debt restructuring, and an application was made to the Singapore Court, utilising Singapore’s new restructuring provisions in the Singapore Companies Act, for a six-month moratorium in order to facilitate the restructuring (the Singapore Moratorium). The Company then applied for provisional liquidation in Hong Kong on the grounds of a winding up petition having been prevented by BOC (which would create commercial uncertainty) and to allow preservation of the Company’s assets and business. At a hearing of the Company’s application on 27 June 2018, Harris J raised questions about the relevance and impact of the Singapore Moratorium and adjourned the matter for argument.

Due to limited resources and other reasons, the Company then withdrew its application on 5 July 2018. Then BOC, having already sought to appoint provisional liquidators over the parent company in the Cayman Islands, took out an application to appoint provisional liquidators on 6 July 2018. At the hearing of this application, Harris J held that provisional liquidators should be appointed to the Company as (i) the Company was insolvent and its debt to BOC was undisputed and (ii) there was a need for an independent investigation into the Company’s affairs and to preserve assets. Harris J did not give the provisional liquidators a power to pursue debt restructuring, but said that they could apply for such powers if the circumstances warranted.

Harris J opined that as Hong Kong has no statutory cross-border insolvency regime, there were many unresolved questions. It was unclear if the Singapore Moratorium is a collective insolvency proceeding for common law recognition purposes. There was conflicting authority on this point in other jurisdictions. Even if it was, there is no Hong Kong authority on whether the Court may recognise a foreign collective insolvency proceeding where the foreign jurisdiction is not the country of incorporation. Further, even assuming that the Singapore Moratorium is eligible for recognition, there is no Hong Kong authority on whether the Court may grant assistance by way of appointing provisional liquidators, though it may conceivably consider analogous authorities under the English Insolvency Act 1986.

Harris J noted that when the CW Group entities, including the Company, applied for the Singapore Moratorium, the purpose was to propose schemes of arrangement. Accordingly, the Company’s original application for provisional liquidation was in the context of ongoing plans for such schemes in jurisdictions were the CW Group companies were located. So the application was to assert and implement the Singapore restructuring efforts. When that application was withdrawn, the Company intended to rely on an application for provisional liquidation in Cayman: it was envisaged that Cayman provisional liquidators would take control of the Company and formulate a restructuring plan.

Harris J commented that it was likely envisaged that the restructuring could be managed through the Singapore Moratorium and a scheme of arrangement, with recognition and assistance given by other jurisdictions where the CW Group companies were located. Nevertheless, Harris J also pointed out that matters had not progressed as planned, for reasons that they may serve as lessons for practitioners in future:

(a) BOC, the largest creditor, was not consulted about the Singapore Moratorium. Hence BOC opposed the Company’s efforts to appoint provisional liquidators in Hong Kong;

(b) The Court was never asked to recognise and assist the Singapore Moratorium. There was no letter of request. BOC and the Official Receiver also argued it could not be recognised in Hong Kong. Harris J commented that if the Singapore Moratorium is involved in future, practitioners should consider if it is eligible for recognition, and whether provisional liquidators should be appointed by way of assistance.

Harris J commented that these questions were, however, for another day, as the Company’s restructuring could in any event now be achieved in a number of ways (for example, by the Provisional Liquidators seeking restructuring powers, followed by recognition of a Hong Kong scheme in Singapore). To conclude his judgment, Harris J remarked that this case highlights the need for careful cross-border planning before practitioners commence insolvency proceedings, and the urgent need for Hong Kong policymakers to enact a statutory cross-border insolvency regime.

Until Hong Kong enacts its own cross-border insolvency regime, as urged by Harris J, problems of this nature are likely to continue to arise. Although Harris J’s judgment is logical and clearly sets out the problems in this area,
sooner or later the Court will have to grapple with a recognition situation where provisional liquidators cannot be appointed for non-restructuring reasons. It is a pity that there is no legislation to assist the Court with this difficult task. Regrettably, it does not seem that such a regime will come into existence anytime soon, if at all.

The Prosecution does not have a right to reply where an unrepresented defendant gives evidence without calling any witness

Peter So and Rita Li

In the recent case of HKSAR v Leung Chun Kit Brandon, [2018] HKCFA 30, 4 July 2018, the Court of Final Appeal has clarified that the rule excluding the prosecution’s right of reply, where a defendant is unrepresented and who gives evidence himself but does not call any witness, applies to criminal trials in the Magistrates’ Court.

It is now clear that the same rule applies to criminal trials, irrespective of the level of the Court.

Background

The appellant was charged with an offence contrary to s.35J(5)(b) of the Personal Data Privacy Ordinance (Cap 486) in that he, being a data user, provided the personal data of an individual to a third party called Ms Tam for use in direct marketing without obtaining consent before doing so.

At the trial in 2015, the appellant was unrepresented. He testified on his own behalf and he did not call any witness. At the conclusion of all the evidence, counsel for the prosecution made closing submissions which covered legal and factual submissions in relation to the appellant and Ms Tam. The appellant raised the issue whether the prosecution was entitled to do so. The Magistrate ruled that the prosecution was entitled to do so. The appellant was convicted.

The appellant appealed against his conviction and his appeal was dismissed in 2017. The appellant then appealed to the Court of Final Appeal and the appeal was heard in June 2018.

Questions of Law

The questions of law at the final appeal were framed as follows:

“In the trial of a criminal case in the magistracy, where an unrepresented defendant, apart from giving evidence himself, has not called any witness (hereinafter referred to as “the specific circumstances”):

(a) Does the prosecution have the right to make a closing speech under section 19(2) of the Magistrates Ordinance (Cap 227)?
(b) Is R v Au-yeung Tat-shing and another ([1988] 1 HKLR 1) a correct interpretation of section 19(2) of the Magistracy Ordinance (Cap 227)?
(c) If the answer to both (a) and (b) are “yes”, then is the unrepresented defendant’s constitutional right to have a just and fair trial infringed by the prosecution’s right under section 19(2) of the Magistrates Ordinance to make a closing speech in “the specific circumstances”?
(d) If the answer to (c) is “yes”, is such infringement justified?”

The Court of Final Appeal’s Decision

The rule limiting the prosecution’s right of reply in criminal trials in a case of an unrepresented defendant who has only given evidence himself but did not call any witness has been well-established in Hong Kong. Section 56 of the Criminal Procedure Ordinance (Cap 221) which is headed “Right of Reply” preserves this rule and provides as follows: “(1) The fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.”

In R v Au-yeung Tat-shing and another [1988] 1 HKLR 1, it was held by the Court of Appeal that section 19 of the Magistrates Ordinance (Cap 227) permits the prosecution to have a right of reply in the case of an unrepresented defendant because of the general terms in that section.
Section 19(2) of the Magistrates Ordinance (Cap 227) provides as follows:

“The magistrate, having heard what each party has to say and the witnesses and evidence so adduced, shall consider the whole matter and determine the same, and shall convict or make an order against the defendant or dismiss the complaint or information, as the case may be.” (Emphasis underlined)

The Court of Final Appeal looked at the history of the development of the rule in England. It is common ground that, generally, the rule excluding the prosecution’s right of reply in a criminal trial has been followed in Hong Kong where an unrepresented defendant, apart from giving evidence himself, has not called any witness, except, as mentioned above, in the decision of Au-yeung where it was held that section 19(2) gives each party the right to make a closing speech and such right was not limited to cases of represented defendants or to cases where an unrepresented defendant gives evidence himself and calls witnesses as to facts.

The Court of Final Appeal was of the view that the rule is well-established and one should be slow to interpret the imprecise wording in section 19 as constituting a fundamental change to the rule. There were also a series of hard-edged and unambiguous statutory provisions which specifically restricted the prosecution’s right of reply in the history of the rule, but there was no such specific terminology in section 19 doing so. More importantly, if the construction of section 19 in the decision of Au-yeung were correct, it would mean that the prosecution enjoyed a right of reply in the magistracy when such right was not available in the higher courts, notwithstanding the probability that more defendants are unrepresented in the magistracy. More specific wording would be required to achieve that effect.

The Court of Final Appeal concluded that section 19 does not address the rights of reply and does not confer a right of reply upon the prosecution in a case where a defendant is unrepresented and who only gives evidence himself but does not call any witness. The decision in Au-yeung is wrong. Accordingly, the answers to questions (a) and (b) above are “no”, and it was not necessary for the Court to consider questions (c) and (d).

Finally, in this case, although the appellant had succeeded in demonstrating a procedural error by the magistrate and the judge in holding that the prosecution enjoyed a right of reply, he had not shown that the error had affected the fairness of the process as a whole. The appeal was dismissed.

Enforcing Mainland judgments in Hong Kong

Peter So and Michelle Li

In agreements that select the PRC as the place for resolution of any disputes, it is common to see wording such as “parties should file a lawsuit at the people’s court which has jurisdiction” or “parties may file a lawsuit at the people’s court which has jurisdiction” (“應依法向有管轄的人民法院起訴” / “可以依法向有管轄的人民法院起訴”), without expressly specifying in such jurisdiction clauses whether the PRC courts are to have sole or exclusive jurisdiction (“唯—管轄權”).

In the event of a dispute arising in relation to such agreement and a Mainland judgment being obtained, whether or not the judgment can be enforced in Hong Kong depends (according to the requirements of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) (MJREO)) on whether the Mainland Court has exclusive jurisdiction. This is a matter of construction of the jurisdiction clause in the agreement.

The recent case of The Export-Import Bank of China v Taifeng Textile Group Company Limited & Anor (HCMP 3012 & 1684/2015; [2018] HKCFI 1840) provides useful guidance for parties seeking to enforce a Mainland judgment in Hong Kong under the MJREO. In particular, the Court clarified that it is not necessary for the word “exclusive” or the like to be used in the jurisdiction clause for it to constitute a “Choice of Mainland Court Agreement”, as long as such clause, when properly construed in accordance with the governing law of the contract, does confer exclusive jurisdiction on the Mainland Courts.

Factual background

The Export-Import Bank of China case concerns a PRC loan agreement. According to the loan agreement, The Export-Import Bank of China (Bank), a licensed bank in Mainland China, extended export credit of RMB100,000,000 to Taifeng Textile Group Company Limited (TTG), a company incorporated and carrying on business in Mainland China. The loan was guaranteed by Liu, a Mainland Chinese citizen.
TTG failed to repay the loan and the Bank commenced legal proceedings in the Beijing No 4 Intermediate People’s Court against TTG and Liu (Mainland Proceedings). Neither TTG nor Liu entered an appearance in the Mainland Proceedings and the Bank accordingly obtained judgment against both of them (Judgment).

The Bank then brought proceedings to enforce the Judgment in Hong Kong. It successfully obtained (1) a Mareva injunction in aid of the Mainland Proceedings against Liu over his assets in Hong Kong; and (2) a registration order against both TTG and Liu to register the Judgment as a judgment in the CFI of Hong Kong under the MJREO (Registration Order).

The present case concerned Liu’s applications to discharge the injunction and set aside the Registration Order. As regards the Registration Order, Liu’s challenge was premised on the following two grounds:

Ground 1: The jurisdiction clause under the guarantee did not expressly stipulate that the Beijing Court had sole jurisdiction over the dispute and therefore could not be considered as a “Choice of Mainland Court Agreement”, as required under s.5(2)(b) of the MJREO; and

Ground 2: The Bank failed to exhibit an Original Court Certificate as required under O.71A r.3(1)(a)(iii) of the Rules of the High Court to show that the Judgment was final and enforceable in the Mainland.

The Court rejected both of these grounds and dismissed Liu’s application to set aside the Registration Order.

**“Choice of Mainland Court Agreement” shall be construed in accordance with the governing law**

In respect of Ground 1, the Court considered the proper construction of the “Choice of Mainland Court Agreement”. The clause in question was worded “訴訟在北京有管轄的人民法院進行”. The Court accepted the Bank’s position and held that a jurisdiction clause may in substance and effect confer exclusive jurisdiction on the court nominated, irrespective of whether “exclusive” or like words are used. Further, the Court held that the requirement for a “Choice of Mainland Court Agreement” under s.5(2)(b) of the MJREO is fulfilled if the jurisdiction clause, when properly construed in accordance with the governing law of the contract (i.e. PRC law in this case), confers exclusive jurisdiction on the Mainland Court.

In addition to adducing PRC legal opinions in support of its position, the Bank also referred to the case of Bank of China Limited v Yang Fan (HCMP 1797/2015) to show the principles for construing such clause under Hong Kong law. In that case, the Court held that whether or not a jurisdiction clause (namely, “可以在有管轄的人民法院起訴”) confers exclusive jurisdiction is a matter of construction and interpreted the clause based on Hong Kong law (despite the governing law of the relevant contract being PRC law). In doing so, the Court examined the “factual matrix” of the case to ascertain the parties’ intention at the time the contract was made. The Court concluded that there was an exclusive jurisdiction clause, by relying on various factors linking the case to the PRC (e.g. both sides were PRC parties, the relevant agreements were executed in the PRC and were governed by PRC law and both the place of performance and breach was the PRC).

As can be seen from the above, the approach adopted by the Court in The Export-Import Bank of China is different, to the extent that it did not rely on Hong Kong law in interpreting the jurisdiction clause. The Court made it clear that whether the jurisdiction clause in question confers exclusive jurisdiction is a matter of construction under the governing law (i.e. PRC law). On that basis, the Court went on to consider the PRC legal opinions relied on by the Bank and noted that pursuant to PRC law, the jurisdiction clause under the guarantee did confer exclusive jurisdiction on the Mainland Court.

**Evidence to show enforceability of the judgment in Mainland**

As for Ground 2, the Court emphasized that the ultimate question is whether the Hong Kong Court is satisfied that the Mainland Judgment is enforceable in the Mainland. The Court took the view that the production of an Original Court Certificate (i.e. a certificate issued by the original Mainland Court certifying that the judgment is final and enforceable in the Mainland) is not the only permissible form of evidence in order to fulfill the requirement under s.5(2)(d) and that other forms of evidence may also be acceptable, as long as the Court is satisfied that the judgment in question can indeed be enforceable in the Mainland. However, the Court noted that it is nonetheless advisable for practitioners to obtain an Original Court Certificate and produce the same to prevent unnecessary argument.

**Commentary**

It is now clear that in order to ascertain whether a particular jurisdiction clause confers exclusive jurisdiction, it is not necessary for such clause to expressly include words such as “exclusive” or “sole” or “唯一管轄權”, although it is preferable to have these words to prevent future arguments. The focus is on whether such clause, by proper construction under the governing law, confers exclusive jurisdiction.
The approach adopted by the Court in *The Export-Import Bank of China* should be the preferred one. The interpretation of the jurisdiction clause should be a matter of the contract’s proper law, i.e. the governing law. The Court was therefore right to base its views of whether the jurisdiction clause conferred exclusive jurisdiction, on the PRC legal opinion adduced.

In light of this decision, parties seeking to enforce a Mainland judgment in Hong Kong should be prepared to adduce PRC legal opinion to show that the relevant jurisdiction clause does confer exclusive jurisdiction on the Mainland Court, if words such as “sole”, “exclusive” or “唯一管轄權” are absent from the jurisdiction clause.

This decision reveals that the Court would prefer to construe the jurisdiction clause in a way that would facilitate the enforcement of the Mainland judgment in Hong Kong. As recognised by the Court, given the increasing volume of economic activity between Hong Kong and the Mainland, there is a need for reciprocal enforcement of Court judgments with the Mainland and the ultimate purpose of the MJREO is “to facilitate the recognisation and enforcement, by registration (as opposed to action) in Hong Kong, of monetary judgments given by courts in the Mainland”. This decision is to be welcomed.

Deacons wins Civil Litigation Law Firm of the Year 2018 at the Macallan Asian Legal Business Hong Kong Law Awards

We are delighted to announce that Deacons has won “Civil Litigation Law Firm of the Year 2018”, jointly with an international law firm, at the 17th Annual Macallan Asian Legal Business (ALB) Hong Kong Law Awards, held on 7 September 2018. The ALB Hong Kong Law Awards recognise the excellence and outstanding achievements of Hong Kong’s leading law firms and in-house legal teams, as well as the top deals and dealmakers of the past 12 months.

We believe this is genuine recognition of our work and position in the market as a leading litigation practice.

**Recent publications**

*Take care when drafting notices to terminate contracts!*

*Hong Kong Competition Commission brought its first legal action against individuals*

*China’s new powerful market regulator tackles the use of deceptive trademarks*

**Want to know more?**

<table>
<thead>
<tr>
<th>Joseph Kwan</th>
<th>Robert Clark</th>
<th>KK Cheung</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="mailto:joseph.kwan@deacons.com.hk">joseph.kwan@deacons.com.hk</a></td>
<td><a href="mailto:robert.clark@deacons.com.hk">robert.clark@deacons.com.hk</a></td>
<td><a href="mailto:K.K.Cheung@deacons.com.hk">K.K.Cheung@deacons.com.hk</a></td>
</tr>
<tr>
<td>+852 2825 9324</td>
<td>+852 2825 9268</td>
<td>+852 2825 9427</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Alex Lai</th>
<th>Richard Hudson</th>
<th>Peter So</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="mailto:alex.lai@deacons.com.hk">alex.lai@deacons.com.hk</a></td>
<td><a href="mailto:richard.hudson@deacons.com.hk">richard.hudson@deacons.com.hk</a></td>
<td><a href="mailto:peter.so@deacons.com.hk">peter.so@deacons.com.hk</a></td>
</tr>
<tr>
<td>+852 2825 9259</td>
<td>+852 2825 9680</td>
<td>+852 2825 9247</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Paul Kwan</th>
<th>Joseph Chung</th>
<th>Carmen Ng</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="mailto:paul.kwan@deacons.com.hk">paul.kwan@deacons.com.hk</a></td>
<td><a href="mailto:joseph.chung@deacons.com.hk">joseph.chung@deacons.com.hk</a></td>
<td><a href="mailto:carmen.ng@deacons.com.hk">carmen.ng@deacons.com.hk</a></td>
</tr>
<tr>
<td>+852 2826 5354</td>
<td>+852 2825 9647</td>
<td>+852 2825 9502</td>
</tr>
</tbody>
</table>

Whilst every effort has been made to ensure the accuracy of this publication, it is for general guidance only and should not be treated as a substitute for specific advice. If you would like advice on any of the issues raised, please speak to any of the contacts listed.