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Newsletter

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What's inside?

Hong Kong to introduce Corporate Rescue Bill in early 2021

Richard Hudson and Adeline Ng

At present, Hong Kong does not have any statutory corporate rescue regime. A financially distressed company may try to rescue its business by entering into (i) private debt restructuring agreement(s) with its major creditors; or (ii) a scheme of arrangement under the Companies Ordinance (Cap. 622), which allows for a compromise between the company and its shareholders and creditors. However, these two options are far from ideal, as they do not provide for any moratorium for the company against actions by creditors, who may still bring proceedings against the company or seek to wind it up, thereby jeopardising the effectiveness of any corporate rescue / restructuring plan. This deficiency in Hong Kong's corporate rescue regime has been demonstrated during the COVID-19 pandemic. Businesses face immense financial challenges, yet lack the breathing space and measures to facilitate attempts to survive as going concerns.

The Hong Kong Government has recently announced its plan to introduce the Companies (Corporate Rescue) Bill (Bill) into the Legislative Council in early 2021. The Bill aims to introduce a statutory corporate rescue procedure and insolvent trading provisions into Hong Kong law. This article provides an overview of the major legislative proposals in the Bill.

Provisional Supervision

The Bill introduces a new corporate rescue mechanism whereby a company (or the liquidator / provisional liquidator of the company if it has already entered into liquidation or is subject to winding-up proceedings) which is insolvent or will likely become insolvent, may initiate Provisional Supervision through the appointment of a provisional supervisor (PS).

To strike a balance between protecting the interests of any major secured creditor (MSC) of a company and to ensure the efficacy of Provisional Supervision, it is proposed under the Bill that:

1. A written notice of intention to appoint a PS should be given to the MSC of the company;
2. The MSC has a right to object to the appointment within a specified time; and
3. In the absence of any objection from the MSC, Provisional Supervision may be initiated.

If there is more than one MSC, the procedure must be gone through with each of them. There are protections for MSCs throughout the Provisional Supervision process – for example, their security rights are preserved (albeit subject to the moratorium).

During the Provisional Supervision period, the PS (who must be either a certified public accountant or a solicitor) will take control of the company, consider the options for rescuing the company and prepare proposals for a voluntary arrangement (VA) for consideration and decision at a final creditors' meeting. To enable the PS to perform such functions, it is proposed under the Bill that the PS should be empowered to investigate the company's business, affairs and financial circumstances as soon as possible after appointment in order to assess the company's financial position. Meanwhile, to maintain the confidence of third parties trading with a company in Provisional Supervision, the Bill proposes that subject to certain exceptions, the PS will be personally liable for the following categories of contracts:

1. Any contract entered into by the PS in the performance of his / her function as PS; and
2. Any pre-appointment contract adopted by the PS in writing within 16 business days from the date of appointment as PS.

The proposed period of Provisional Supervision is 45 business days, which may be extended up to 6 months with the consent given at a creditors' meeting. An application can be made to the court if a time extension beyond 6 months is required. The Bill further proposes the following defined timeline to facilitate speedy determination of the way forward for the company:

1. The PS must summon the first creditors' meeting to be held within 10 business days from the date of commencement of Provisional Supervision;
2. During the first creditors' meeting, the creditors may determine, amongst other matters, whether the appointed PS should be removed, and if so, who is to be appointed in their place; and
3. Prior to the end of the Provisional Supervision period, a final creditors' meeting be held to determine the way forward for the company.

Under the Bill, the PS is required to make recommendations on the following alternative outcomes for consideration and decision at the final creditors' meeting, i.e. whether:

1. The company should enter into a VA;
2. The company should be wound up; or
3. The Provisional Supervision should end.

At the final creditors' meeting, if the VA is approved by the creditors, they must also appoint a supervisor of the VA (Supervisor), who must be either a certified public accountant or a solicitor. The PS will become the Supervisor unless another person is appointed by the creditors.

Generally, the VA will be binding on the following persons:

1. A creditor of the company in respect of (i) a specified claim against the company which arises on or before the commencement of Provisional Supervision; and (ii) a claim for phased payments (see "Protection of Employees' Entitlements" below);
2. The company;
3. The Supervisor; and
4. The members and officers of the company.

Statutory Moratorium

A prominent feature of Provisional Supervision under the Bill is the imposition of a statutory moratorium preventing civil proceedings and actions being brought against the company and its property. A statutory moratorium has a two-fold effect:

1. To suspend the rights of creditors; and
2. To preserve the company's property to allow it to continue trading as a going concern and to enable the PS to formulate a rescue plan for the company.

With a moratorium in place,

1. No resolution can be passed for a company to be wound up voluntarily;
2. No application to the court can be made for the compulsory winding-up of a company;
3. All winding-up proceedings commenced before Provisional Supervision has begun will be suspended;
4. No court proceedings (except for criminal proceedings) against a company or its property can be commenced or continued with, except with the consent of the PS or leave of the court; and
5. No enforcement process in relation to a company's property can be commenced or continued with, except with leave of the court.

The Bill, however, provides for certain exemptions from the moratorium during Provisional Supervision on public policy or public interest grounds (for instance, protection of employees' entitlements – see below).

Protection of Employees' Entitlements

In previous rounds of public consultations, the labour sector opined that the Provisional Supervision regime should have adequate protection to ensure that employers do not evade their obligations to pay employees' entitlements; on the other hand, there were concerns that imposing too onerous requirements on financially distressed companies to safeguard employees' interests would undermine the attractiveness of Provisional Supervision.

Under the Bill, it is proposed that employees' outstanding entitlements owed by a company as at the commencement of Provisional Supervision be paid in accordance with the following phased payment scheme.

Phase 1

- Type(s) of payment covered: Arrears of wages due before commencement of Provisional Supervision
- Amount to be paid: Calculated with reference to the relevant cap under the Protection of Wages on Insolvency Fund (PWIF)
- Time of payment: Within 30 days after commencement of Provisional Supervision

Phase 2

- Type(s) of payment covered: Outstanding wages in lieu of notice of termination, severance payments etc. for employees whose employment had been terminated before commencement of Provisional Supervision
- Amount to be paid: Calculated with reference to the relevant PWIF caps
- Time of payment: Within 45 days after a VA has been approved (or if the period of Provisional Supervision is extended, within 45 days from the date of approval of the first extension)

Phase 3

- Type(s) of payment covered: Any other pre-commencement entitlements (e.g. outstanding MPF contributions, wages, wages in lieu of notice, severance payments)
- Amount to be paid: In full
- Time of payment: Within 12 months after a VA is approved

Where a company in Provisional Supervision fails to make a phased payment, the employee concerned will no longer be bound by the statutory moratorium and may petition to wind up the company.

Applicability to Registered Non-Hong Kong Companies (RNHKCs)

It is proposed under the Bill that the Provisional Supervision will be applicable to local companies and RNHKCs. To ensure a level playing field, RNHKCs will generally be required to satisfy the same set of conditions for commencing Provisional Supervision as local companies. RNHKCs will further be required to obtain leave of the court before commencing Provisional Supervision in Hong Kong.

Insolvent Trading Provisions

The Bill also introduces another concept which has been the object of legislation in other common law countries – insolvent trading. Under the Bill, a director (who includes a shadow director) of a company is responsible for insolvent trading of the company if the company owes a debt whilst it is insolvent (or becomes insolvent as a result of incurring this debt, or other debts at the same time) and if the director at the material time knew or ought to have known that the company:

1. was insolvent at the time when the debt was incurred; or

2. would become insolvent by incurring the debt; or
3. would become insolvent by incurring at the time when the debt concerned is incurred, other debts including the debt concerned.

If the company goes into insolvent liquidation, the court may, on application by the liquidator, declare that a director of the company responsible for insolvent trading is liable to make such contribution to the company's assets that the court considers appropriate.

The Bill proposes some statutory defences to provide recourse to directors to avoid being caught inadvertently. These defences include:

1. The director had taken all reasonable steps to prevent the company from incurring the debt concerned; or
2. When the debt was incurred,

    a. the director believed in good faith that the debt was incurred by the company for the purposes of returning the company to solvency within a reasonable period; and
    b. there were reasonable grounds for having such belief.

This legislation, if enacted, is likely to have an impact on the way directors approach trading when their companies are in difficulty, as personal liability could result from any bad decision.

Conclusion

The Government's announcement of its plan to introduce the Bill in early 2021 is welcome news for the business and legal sectors (although the insolvent trading provisions will likely not be welcomed by directors). The Bill, if passed, will be a significant step forward in the legislative development of the corporate insolvency regime in Hong Kong. The introduction of a statutory corporate rescue mechanism and insolvency trading provisions will bring Hong Kong on par with other common law countries. Provisional Supervision has been the subject of possible legislation for over 2 decades (one of the authors recalls attending lectures concerning the topic in 1999) and it is to be hoped that legislation in this area will finally be enacted this year.

Hong Kong Court laid down principles for service out of examination orders on officers of corporate judgment debtors

Peter So and Victor Wong

In *Changfeng Shipping Holdings Limited v Sinoriches Enterprises Co., Limited* HCCT 59/2019; [2020] HKCFI 2703, the Hong Kong Court of First Instance laid down the principles applicable to service out of the jurisdiction of examination orders on officers of corporate judgment debtors pursuant to Order 48 rule 1 and Order 11 rule 9(4) of the Rules of the High Court (Cap. 4A) (RHC).

This case illustrates that Hong Kong courts have jurisdiction to issue examination orders against officers of corporate judgment debtors out of the jurisdiction, if satisfied that the officers had knowledge of the corporate judgment debtor's finances and they were closely connected to the substantive claim from which the judgment arose.

Background

On 31 October 2019, the Applicant obtained leave under Order 73 rule 10(1) of the RHC to enforce a London arbitral award against the Respondent as a court judgment.

On 9 March 2020, the Applicant made an *ex parte* application for leave to examine the two directors of the Respondent, a Hong Kong company, pursuant to Order 48 rule 1 of the RHC and for leave to serve the examination order out of the jurisdiction, pursuant to Order 11 rule 9(4) of the RHC.

On 14 August 2020, a master granted the examination order but refused leave to serve the order out of the jurisdiction (Order). Following the decision of the Singapore Court of Appeal in *Burgundy Global Exploration Corp* v *Transocean Offshore International Ventures Ltd* [2014] SGCA 24, the master was not satisfied that the Applicant had shown a close connection between the directors and the Applicant's substantive claim.

On 1 December 2020, Deputy High Court Judge To allowed the Applicant's appeal against the Order.

Extra-territorial effect of Order 48 rule 1

The Judge considered that the underlying purpose of Order 48 rule 1 was to enable judgment creditors to obtain information about a judgment debtor's finances. Such purpose could only be served against a corporate judgment debtor by extending the application of such rule to its officers within as well as outside the jurisdiction. The underlying purpose of the rule and Hong Kong's background as an international commercial centre, where officers of foreign or international corporations may reside outside Hong Kong, are strong enough to displace the presumption against extra-territoriality. Accordingly, the Court has jurisdiction to issue examination orders against officers of a corporate debtor who reside outside Hong Kong.

Leave for service out of examination order

The Court clarified that leave to serve the order out on a judgment debtor already subject to the jurisdiction (such as a personal debtor within jurisdiction who has subsequently left jurisdiction) would not be required. Leave is required for service out on officers of a corporate judgment debtor since they are not parties to the proceedings and they have not submitted themselves to the jurisdiction.

Principles applicable to service out of examination order on officers of corporate debtors

The Court confirmed that the decision of the House of Lords in *Masri v Consolidated Contractors International Company SAL and others* [2009] UKHL 43 had no bearing on the present case, since the scheme for examination orders and service out of the jurisdiction in the United Kingdom is different from that in Hong Kong.

On the other hand, the Court indicated that *Burgundy Global* was a persuasive authority, since the statutory regime in Singapore in relation to examination orders and service out is very similar to that in Hong Kong. The relevant principles in *Burgundy Global* were summarised by the Court as follows: (i) the fundamental question is whether the foreign officer is so closely connected to the substantive claim that the Singapore court is justified in taking jurisdiction over him; (ii) there should be no strict or exhaustive rules as to when leave should be granted, but the officer's knowledge of the finances of the judgment debtor would be the basic threshold; and (iii) leave should be granted sparingly.

While the Court agreed with the Singapore Court of Appeal in *Burgundy Global* that the officer's knowledge of the finances of the judgment debtor should be the prerequisite for invoking the Court's jurisdiction, as to the close connection test, the Court preferred to formulate the test along the lines of the dicta in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer (No 2)* [2000] 1 WLR 603 instead. Furthermore, the Court refused to accept that the discretion should be sparingly exercised. The Judge commented that Hong Kong courts should adopt a pragmatic, instead of an unnecessarily restrictive approach, given the internationalisation of commercial activities in the jurisdiction.

The Court helpfully summarised the applicable principles under Order 11 rule 9(4) as follows:

(1) The officer's knowledge of the finances of the corporate debtor is a prerequisite, rather than part of the close connection test;

(2) The discretion may be exercised only if there is a close connection between the officer's conduct in relation to the action from which the judgment debt arose and the subject matter of that action which makes it unjust not to exercise the jurisdiction;

(3) A close connection is created if the officer's conduct is such as to make it unjust not to lift the corporate veil of the judgment debtor or not to bypass the principle of corporate personality and to allow the corporate debtor to withhold information about its finances so as to frustrate the execution of the judgment debt;

(4) *Prima facie,* a close connection is created by the conduct of the sole or substantial shareholder; the sole director or officer who is the alter ego or controlling mind of the corporate debtor or has instituted, controlled or financed the litigation. Officers who have played a key role in the events giving rise to the judgment creditor's successful claim should be required to provide such information;

(5) Fault, negligence or blameworthiness are not at all relevant. If there are such features in the conduct of the officer, it is all the more appropriate for the discretion to be exercised;

(6) The burden of proof of close connection and knowledge is on the applicant. In the majority of cases, proof has to be by inference. The court has to draw inferences with a sense of realism appropriate to the circumstances;

(7) The discretion to order service out should be exercised with extreme caution, but there should be no bias against service out; and

(8) The application for leave to serve out consists of a two stage process:

a. The burden on the applicant at the *ex parte* stage is only to make out a good arguable case on jurisdiction. The applicant need not make out a "cast iron" case. Subject to the need for caution in the exercise of this long arm jurisdiction, the Court will take a broad brush approach and will almost always grant leave to serve out, unless there is a serious or obvious flaw in the application.

b. When the service is challenged at the *inter parte* stage, the Court will re-consider the matter afresh and weigh the evidence of both parties. If not satisfied that the officer has knowledge of the finances of the judgment debtor and that the close connection test is met, the *ex parte* leave will be set aside.

Application

On the facts, the Court did not find any serious or obvious flaw in the application. Adopting a broad brush approach, the Court was satisfied that the prerequisite knowledge of the Respondent's finances and close connection of the directors' conduct with the claim from which the judgment debt arose were proved. Having warned itself of the need for caution, the Court was satisfied that leave to serve out should be granted. Accordingly, the Applicant's appeal was allowed.

Takeaway

This is an important decision setting out the principles applicable to serving an examination order out of the jurisdiction on officers of a corporate judgment debtor. It is worth mentioning, that the Court did not accept that the discretion should be exercised sparingly and indicated that there should be no bias against service out. Accordingly, officers of a company with knowledge of the finances of the corporate debtor who are closely connected to the substantive claim are unlikely to avoid an examination order pursuant to Order 48 rule 1 of the RHC simply by residing out of the jurisdiction.

Proprietary relief not to be taken for granted in cyber fraud cases: Hong Kong Court rules on the need for Plaintiff to show ownership of the property

Cathy Wu

In recent years, it seems that plaintiffs in cyber fraud cases are used to the Court rubber-stamping their applications for default judgment seeking declaratory relief. However, the Court in *Milestone Electric Inc v. Meihoukang Trading Co Limited* [2020] HKCFI 2542 finally sets the position straight. Mr Recorder Eugene Fung SC sets out the applicable tracing principles for obtaining proprietary relief. This article discusses the practical implications for practitioners acting for victims in proprietary claims in cyber fraud cases, going forward.

Background

The Plaintiff in *Milestone Electric Inc v. Meihoukang Trading Co Limited* was a victim of an email fraud and had remitted a total of US$850,000 in three payments on three separate days to the Defendant's account.

The Plaintiff issued proceedings and also subsequently obtained an injunction against the Defendant. The Plaintiff claimed in its Statement of Claim the usual relief claimed by victims of cyber fraud i.e. (1) a sum of US$850,000 (or its Hong Kong dollar equivalent) as money had and received by the Defendant and (2) a declaration that the Defendant holds US$850,000 (or its Hong Kong dollar equivalent) or all such assets derived from the sum or any part thereof which rightfully belong to the Plaintiff on constructive or resulting trust for the Plaintiff.

After the Defendant failed to acknowledge service of the Writ or to file its defence, the Plaintiff applied for default judgment. In the Plaintiff's evidence in support of its application for default judgment, it was mentioned that the Plaintiff's solicitors had received a letter from the Defendant's bank that part of the money transferred by the Plaintiff had been debited from the Defendant's account and that the Plaintiff's solicitors were told by the Hong Kong Police that only a sum of around US$244,000 remained in the Defendant's bank account.

Whilst the Court granted the Plaintiff default judgment for monetary relief with interest and costs, Mr Recorder Eugene Fung SC reserved his decision on the Plaintiff's claim for a declaration that there be a constructive trust and eventually refused to grant the Plaintiff this relief after considering the position.

The proper test for declaration of constructive trust

It is not the normal practice of the court to make a declaration without a trial, particularly where the declaration is that the defendant in default of defence has acted fraudulently. This is, however, only a rule of practice and can be departed from when the plaintiff has a genuine need for the declaratory relief and justice would not be done if such relief were denied. Mr Recorder Eugene Fung SC then qualified this by adding that where declaratory relief is sought, the court will scrutinise the application for default carefully, and will not hastily grant the relief sought.

In determining the Plaintiff's application for default judgment, Mr Recorder Eugene Fung SC ruled that in order to obtain proprietary relief in relation to the US$850,000 transferred to the Defendant or assets derived from it, the Plaintiff must establish that the assets claimed can be identified by the tracing process as representing the original trust property. In particular, he cited *Federal Republic of Brazil v Durant International Corpn* [2016] AC 297, Lord Toulson at §17:

> "*The doctrine of tracing involves rules by which to determine whether one form of property interest is properly to be regarded as substituted for another. It is therefore necessary to begin with the original property interest and study what has become of it. If it has ceased to exist, it cannot metamorphose into a later property interest. Ex nihilo nihil fit: nothing comes from nothing.*"

The Court's decision

In coming to his decision, Mr Recorder Eugene Fung SC noted that given that over US$600,000 of the US$850,000 had already been withdrawn from the Defendant's account, it was no longer possible for the Plaintiff to assert its rights in the US$850,000. He went on to say that whether or not the Plaintiff can assert its rights in the remaining credit balance in the Defendant's account is not something that the Court is currently in a position to determine. The question depends on a number of considerations including (but not limited to) whether or not there has been any mixing of money in the Defendant's account, and whether the intermediate balance has fallen to or below zero. Mr Recorder Eugene Fung SC noted that none of this had been pleaded by the Plaintiff in its Statement of Claim. As a result, he declined to make a declaration that the Defendant holds US$850,000 on a constructive trust for the Plaintiff.

Implications

The decision in *Milestone Electric Inc v. Meihoukang Trading Co Limited* sends a message to practitioners who act for victims to cyber fraud cases that they should no longer expect the court to simply rubber-stamp uncontested applications for default judgment seeking declaratory relief.

In fact, unless the plaintiff can show in these cases that the remaining balance in the relevant bank account is traceable from the original monies sent by the victim and/or an identifiable part of it, whilst the court may still grant the plaintiff default judgment for monetary relief with interest and costs, the court will now no longer be prepared to grant declaratory relief for claims of proprietary interest. It may be that practitioners need to go the extra step of applying for bankers books records for their client in order to show the court evidence that their client's funds are traceable, in order to successfully obtain the declaratory relief that they wish to preserve their client's position.

Recent Developments in Cross-border Insolvency Law

Richard Hudson and Judy Wu

Two recent decisions of the Honourable Mr Justice Harris are helpful additions to the growing amount of case law in this jurisdiction dealing with cross-border insolvency issues and are worthy of examination.

Hong Kong Companies Court appoints provisional liquidators for the purpose of seeking recognition in Mainland for the first time

Having granted an order recognising corporate insolvency proceedings from Mainland China for the first time in *Joint and Several Liquidators of CEFC Shanghai International Group Limited* [2020] HKCFI 167, Harris J's decision *Re Ando Credit Limited* [2020] HKCFI 2775 in October 2020 considered the opposite situation. Whilst the basic principles relating to recognising foreign insolvency proceedings are now well settled in Hong Kong, *Re Ando Credit Limited* was the first application before the Hong Kong Companies Court where the appointment of provisional liquidators was sought for the purpose of seeking recognition in the Mainland.

Ando Credit Limited is a company incorporated in Hong Kong with substantial receivables located on the Mainland. In making his order, the Judge did not go into the nature of the underlying debt owed by the company or the background to the application, but noted that there has not yet been a case in which a Mainland court has granted formal recognition of a foreign liquidator. However, the Judge also commented that it is anticipated that a protocol will be entered into between Hong Kong and the Supreme People's Court which will provide for such mutual recognition in the near future. Annexed to the judgment was an article written by three judges in the Shenzhen Bankruptcy Court which discussed three cases in which the Hong Kong Courts had recognised and assisted Mainland insolvency proceedings (the *Guangxin*, *Huaxin* and *Nianfu* cases) and, talked about Mainland Courts recognising Hong Kong insolvency proceedings in the future, and stated that such recognition should be possible. The making of this order is a welcome development, as it will hopefully assist Hong Kong office holders with the sometimes difficult and complex exercise of recovering assets in the Mainland, although it of course remains to be seen whether the Mainland courts will actually be prepared to grant formal recognition and give assistance generally.

Power of foreign provisional liquidators and staying proceedings in Hong Kong in aid of foreign liquidations

Over recent years, the Hong Kong Companies Court has made a number of orders giving recognition and assistance to liquidators of companies incorporated in overseas jurisdictions to allow them to perform various tasks in Hong Kong or to take control of assets situated here. The recent case of *Re FDG Electric Vehicles Limited [2020] HKCFI 2931* saw consideration of limits to the Court's jurisdiction in this area.

FDG Electric Vehicles Limited, a Bermuda-incorporated company, was placed in provisional liquidation in Bermuda. The provisional liquidators (PLs) applied to the Hong Kong Court for an order of recognition and assistance. A subsidiary of the company opposed the PL's application. The Honourable Mr Justice Harris clarified the following two issues in his judgment:-

(a) Foreign provisional liquidators have power to take control of subsidiaries incorporated in Hong Kong, but not subsidiaries incorporated in other jurisdictions; and

(b) The standard recognition orders granted by the Hong Kong Court do not purport to impose a stay of proceedings. Foreign provisional liquidators must make a specific application to stay proceedings if appropriate.

Regarding the first issue, the Judge stated that it would be impermissible judicial overreach to empower a foreign liquidator to take control of the company's assets in another jurisdiction. The Judge explained that in doing so, two conflict of law rules would be overlooked. First, property and contractual claims to shares in a company is determined by the *lex situs*. Second, whether foreign liquidators are agents of the debtor company is governed by the law of a company's incorporation.

Regarding the second issue of stay of proceedings, the Judge quoted the following paragraph which is contained in recognition orders that have recently been granted:

> *"For so long as the Company remains in liquidation in [relevant jurisdiction], no action or proceedings shall be proceeded with or commenced against the Company or its assets or affairs, or their property within the jurisdiction of this Honourable Court, except with the leave of this Honourable Court and subject to such terms as this Honourable Court may impose".*

The Judge held that this paragraph was only intended to be in the nature of a case management provision, and not a stay provision. The Judge also noted that this paragraph gives rise to two issues. First, if there are already proceedings on foot in Hong Kong, one would expect an application for a stay to be made in those proceedings. Second, whether or not it is appropriate to grant a stay in respect of unidentified prospective proceedings about which, necessarily, nothing is known. Therefore, the Court would grant a stay of proceedings only if appropriate, and modified the terms of the standard order as follows:

> *"If the Provisional Liquidators wish to apply for a stay or other directions in respect of proceedings in the High Court of any sort as a consequence of the recognition of their appointment by this order such application shall be listed before the Honourable Mr. Justice Harris or such other judge as he shall direct. The Provisional Liquidators shall write to the clerk to the Honourable Mr. Justice Harris seeking case management directions for the determination of any application that they wish to make pursuant to this order".*

The Judge also noted that it may not be appropriate to grant a stay in the context of recognition of a provisional liquidator appointed in respect of a foreign "soft touch" provisional liquidation for the purposes of restructuring, as that is arguably not a collective insolvency process which is usually required for a stay to be granted, but made no ruling on the point as it was not necessary in the present case.

The Judge also held that in deciding whether a stay of proceedings would be granted, the Court would look at whether the rule from the decision in *Antony Gibbs & Sons v Societe Industrielle et Commerciale Des Metaux* (1890) 25 QBD

399 was violated. The rule in *Gibbs* states that the discharge of liabilities under a contract is governed by the law of the contract, which means that a stay should not be granted in respect of an action to establish a right to payment under a contract governed by Hong Kong law in aid of foreign insolvency proceedings.

The Judge's decision on both of the issues in FDG are welcome, but it remains to be seen how an application for a stay in the context of a "soft touch" provisional liquidation will be treated.

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Noteworthy Developments in Competition Law 2020

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