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GLOBAL BRANDS – HONG KONG MOVES TOWARDS A COMI BASED APPROACH FOR RECOGNISING FOREIGN INSOLVENCY PROCEEDINGS

William Barnes and Eleanor Morgan
Mourant
BVI

"[W]here the offshore-appointed liquidator requires more extensive assistance from the High Court of Hong Kong… the location of the COMI is likely to be fundamental to the [recognition] application"

In the recent case of *Provisional Liquidator of Global Brands Group Holding Ltd v Computershare Hong Kong Trustees Ltd* [2022] HKCFI 1789, the High Court of Hong Kong developed its common law principles in respect of recognising and assisting foreign insolvencies.

In future, and subject to two notable exceptions, the "*centre of main interests*" ("COMI") of the company – as opposed to its place of incorporation – is likely to be the yardstick for judicial recognition and assistance to insolvency proceedings commenced in a different jurisdiction.

This article examines the facts and legal principles underpinning the judgment, as well as its practical implications, before reflecting on the related US Bankruptcy Court decision in *In re Modern Land (China) Co., Ltd*. Case No. 22-10707 (MG) where the offshore jurisdiction of incorporation was also found to be the company's COMI.

Background to the *Global Brands* decision

The Global Brands group engaged in the design, development, marketing and sale of branded apparel, footwear and fashion accessories in North America and Europe. Sitting at the top of the group's structure was a Hong Kong-listed holding company incorporated in Bermuda - Global Brands Group Holding Limited.

The company suffered financial difficulties as a consequence of the COVID-19 pandemic and, on 10 September 2021, appointed a "*light touch*" provisional liquidator. Attempts to restructure the business were unsuccessful and a winding up order was obtained from the Bermudian court on 5 November 2021.

The provisional liquidator subsequently made an application to the High Court of Hong Kong for an order granting recognition and assistance so that it could take control of the company's assets in Hong Kong.

The orthodox common law position concerning recognition and assistance in Hong Kong

Mr Justice Harris noted that, at the time of his judgment, the Hong Kong common law only recognises a foreign insolvency process if it is initiated in the company's place of incorporation.

However, such a test can produce unsatisfactory results. A well-known and common commercial practice for business groups operating in Hong Kong and mainland China is to incorporate offshore holding companies and intermediate subsidiaries into their group structures. Harris J observed that "*treating the place of incorporation in such circumstances as being the natural home … of the company for the purpose of determining which jurisdiction is the appropriate place for the seat of a principal liquidation is highly artificial*" (emphasis added).

Moving towards a COMI test

Harris J took the view that the Hong Kong common law principles for recognising and assisting a foreign insolvency procedure should be aligned with the concept of modified universalism i.e. that cross-border insolvencies are managed as a single estate which receives world-wide recognition. Often the COMI of the company will be the most appropriate forum for the insolvency proceedings, according to Harris J, rather than the place of incorporation which could be an accident of many factors and often far removed from the actual place of business. A COMI-based approach would, in his Lordship's view, better reflect "*the circumstances in which transnational insolvencies arise in Hong Kong and the development of the principle in comparable jurisdictions*".

In ascertaining the COMI, the following criteria are likely to be relevant (to be assessed as at the date of the application):

- the location of the directors and board meetings;
- the location of the company's principal officers, operations, assets, bank accounts, books and records; and
- the location in which the restructuring activities took place.

Mr Justice Harris concluded that, subject to two exceptions, the High Court of Hong Kong should in future decline to recognise a foreign insolvency process unless the foreign liquidation is taking place in the jurisdiction of the company's COMI.

The two exceptions to this rule are:

1. If the assistance requested from the court is limited to an order that confirms the liquidator's status and rights arising out of his appointment in the place of

incorporation (so-called "*managerial assistance*"). This type of order is justified under established principles of private international law and can be contrasted with cases where the insolvency practitioner requires assistance from the court in identifying and/or locating company assets.

2. If the location of the COMI is unclear but the liquidator was appointed in the place of incorporation and it is necessary for practical reasons to grant recognition and assistance.

In the *Global Brands* case, the provisional liquidator accepted that the COMI was probably Hong Kong but, despite this, Harris J granted an order which directed the Hong Kong asset holders to release the assets to the provisional liquidator on the basis that such an order fell within the "*managerial assistance*" exception or, alternatively, was necessary on practical grounds.

Takeaways

Although largely obiter, Mr Justice Harris' comments on utilising a COMI-based approach are likely to be followed by the High Court of Hong Kong in future recognition and assistance proceedings. Such an approach aligns the Hong Kong common law with the UNCITRAL Model Law on Cross-Border Insolvency (which has been adopted by comparable jurisdictions such as Singapore and the United States) by using the COMI concept to determine whether, and to what extent, the court should recognise and assist insolvency proceedings commenced in a different jurisdiction.

The impact of the COMI concept on liquidators appointed in offshore jurisdictions of incorporation will depend on the nature and degree of assistance required from the High Court of Hong Kong. If the offshore-appointed liquidator has identified and located the assets in Hong Kong (as was the case in *Global Brands*) then it may be that an order from the court confirming his authority to take possession of the assets will be sufficient – in which event, the COMI test can be sidestepped as the "*managerial assistance*" exception is likely to apply.

However, in circumstances where the offshore-appointed liquidator requires more extensive assistance from the High Court of Hong Kong, for example broader powers of the type granted to liquidators under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, then the location of the COMI is likely to be fundamental to the application. An offshore-appointed liquidator will, in all probability, need to persuade the court that the COMI is also offshore; it is unlikely to be enough to simply rely upon his appointment in the place of incorporation as a means of obtaining the desired assistance.

The *Global Brands* judgment also confirms that, generally speaking, "*light touch*" provisional liquidators appointed by offshore jurisdictions will not be recognised in Hong Kong. Mr Justice Harris referred to the "*light touch*" procedure as being a "*debtor in possession model*" which Hong Kong has consciously chosen to avoid.

An offshore COMI is a possibility – the *Modern Land* case

The US Bankruptcy Judge Martin Glenn, whose earlier analysis on identifying a company's COMI in *In re Ocean Rig UDW Inc* 570 B.R. 687 was cited with approval by the High Court of Hong Kong in *Global Brands*, handed down his judgment in *Modern Land* in the US Bankruptcy Court on 18 July 2022. The *Modern Land* decision demonstrates the possibility that the COMI of a company, in certain circumstances, can be the offshore jurisdiction of incorporation, notwithstanding the fact that the company's operations and underlying assets are located onshore.

In *Modern Land*, the US Bankruptcy Court granted recognition and enforced a scheme of arrangement sanctioned by the Grand Court of the Cayman Islands, the debtor's place of incorporation, that modified New York law-governed debt. It did so on the basis that the COMI of the company is the Cayman Islands.

This finding is notable because the company did not engage in the local economy (indeed, it was an exempted Cayman company, meaning it was prohibited from trading in the Cayman Islands) and yet the US Bankruptcy Court still found the COMI of the company to be the Cayman Islands.

The three key factors behind this finding are:

- the company describes itself as Cayman-incorporated in press releases and in official memoranda and maintains its registered office and statutory registers in the Cayman Islands;
- at the time that the petition was presented, the company's primary business concerned restructuring-related activities, which took place in the Cayman Islands; and
- the scheme in question enjoyed the support of creditors representing approximately 95% of the value of the Existing Notes.

Not all offshore restructuring activities will share the same circumstances as *Modern Land*, and so the decision is somewhat fact-specific. Nonetheless, offshore-appointed liquidators and their advisers should be alive to the possibility that a company's offshore place of incorporation could also be its COMI; in which event, a broader range of assistance may be available from the High Court of Hong Kong.