

UPDATE

# Great (Restructuring) Expectations: Where to next for Asia

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It has been an interesting year-to-date in the Asia Pacific<sup>1</sup> Region, particularly in the Mainland<sup>2</sup> and Hong Kong<sup>3</sup> as the Region has pivoted from COVID-zero to reopening its borders to the world. Given the number of larger scale Mainland property-related restructurings that were promulgated during the pandemic it is fair to say that at least amongst some in the profession, there were great (restructuring) expectations of 2023. This next wave of restructurings has not yet eventuated. Why?

## Asia restructuring considerations & observations

A very positive and relatively recent development in cross-border cooperation has been the mutual recognition and assistance regime recorded between the Mainland and Hong Kong<sup>4</sup> which provides a procedure for the mutual recognition of insolvency process and office holders (the **Cooperation Regime**). Shanghai, Shenzhen and Xiamen have been piloting the Cooperation Regime, which in effect allows a Hong Kong insolvency practitioner to apply to the pilot cities' courts for recognition and assistance. The arrangements are reciprocal for Mainland insolvency appointment-takers and since its implementation, the Cooperation Regime has been utilised not just in the pilot cities but also further afield.<sup>5</sup> The coordinated administration of insolvencies across these two legal systems is a significant and welcomed development, particularly in structures which also touch on stakeholder interests outside of the Mainland and Hong Kong.<sup>6</sup> In offshore jurisdictions, cross-border proceedings and restructurings frequently have a connection to Hong Kong and/or the Mainland such that it is trite to say that international comity is and remains front of mind.<sup>7</sup>

In furtherance of cross-border comity and cooperation, the Cayman Islands restructuring officer regime was introduced in the third quarter of 2022,<sup>8</sup> providing a debtor with the ability to petition for the appointment of restructuring officers where it is likely to be unable to pay its debts and intends to present a

<sup>1</sup> The Asia Pacific is a wide diaspora and the authors' observations are limited to the Mainland, Hong Kong and where relevant, the jurisdictions in which they practice.

<sup>2</sup> The People's Republic of China excluding the Hong Kong and Macau Special Administrative Regions and Taiwan.

<sup>3</sup> A Special Administrative Region of the People's Republic of China.

<sup>4</sup> On 14 May 2021, the Supreme People's Court of the People's Republic of China and the Government of the Hong Kong Special Administrative Region signed the 'Record of Meeting on Mutual Recognition of and assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region'.

<sup>5</sup> See *Re HNA Group Co Limited* [2021] HKCFI 2897 (16 September 2021, Harris J) where the Hong Kong Court of First Instance recognized for the first-time reorganization proceedings commenced under the *Enterprise Bankruptcy Law* of the People's Republic of China and administered by Hainan court appointed administrators. More recently in *Re Guangdong Overseas Construction Corporation* [2023] HKCFI 1230 (17 May 2023, Linda Chan J) the Hong Kong Court of First Instance again provided recognition and assistance to a Guangzhou court appointed administrator.

<sup>6</sup> See *In the Matter of Trinity International Brands Limited* [2023] HKCFI 1581 (13 June 2023, Linda Chan J) in which the Hong Kong Court of First Instance issued a letter of request to the Shanghai court inviting it to recognise and assist Hong Kong liquidators to take control of this global group's Mainland operations. The Hong Kong company's indirect parent is Bermuda-incorporated and was itself wound up in Bermuda in August 2021.

<sup>7</sup> See for example *In the Matter of GTI Holdings Limited* (unreported; FSD 108 of 2019 (DDJ), Grand Court of the Cayman Islands, Financial Services Division, 15 March 2022, Doyle J) at [74].

<sup>8</sup> See ss.91A – 91J inclusive of the *Companies Act (2023 Revision)* of the Cayman Islands (the **CCA**); effective date 31 August 2022.

compromise or arrangement to creditors. The restructuring officer's duties and powers will be limited to those set out in the appointment order. Unlike its predecessor,<sup>9</sup> this new regime continues to offer the debtor with the protection of an automatic stay on proceedings but without the perceived downsides of provisional liquidation. Since its implementation, the new regime has been engaged on several occasions,<sup>10</sup> with one restructuring plan reported as having recently completed in conjunction with Chapter 11 proceedings in the United States.<sup>11</sup> The new regime provides for even greater flexibility and efficiency in effecting multi-jurisdictional restructurings to the benefit of both debtors and creditors; practitioners are buoyed by its uptake. Closer to home though, it remains to be seen if courts in the Region will be prepared to recognise and assist Cayman court appointed restructuring officers, particularly in those jurisdictions that do not have an equivalent debtor in possession statutory regime.

There are, however, a few reasons for the caution that exists in the market and which may go some way to explaining why the Region has not yet seen a significant increase in restructuring activity. First and foremost, there remain both practical and legal hurdles to enforcement against Mainland assets. Practically, absent some form of cooperation from a debtor and 'boots on the ground', the (structurally) further away from the assets a stakeholder's interests are, the more difficult it is to secure and monetize those assets to return value to them. Legally, there remains a tension between the jurisdictions that are often utilised in corporate structures involving Asia-based operating companies<sup>12</sup> insofar as the application of modified universalism is concerned. This is being played out in real time as the holders of Tsinghua Unigroup Co. Limited's (Tsinghua) keepwell-backed notes<sup>13</sup> now consider enforcement of the Hong Kong money judgment<sup>14</sup> in the substantial sum of US\$483,843,533<sup>15</sup> against it. Tsinghua and its group companies have undergone reorganisation proceedings in the Mainland under the *Enterprise Bankruptcy Law* of the People's Republic of China and the trustee's attempts to now either have its proof of debt admitted in the Mainland bankruptcy proceedings,<sup>16</sup> or to enforce the judgment directly against Tsinghua's post-reorganisation assets, will be closely monitored. It will also be interesting to see how the appellants in the *Peking University Founder Group Limited* proceedings<sup>17</sup> fare in the appeals recently filed.<sup>18</sup>

### **What sectors are we looking at / working in?**

In the past 18 months, many in the market have been involved in providing advice on the recovery of debts associated with defaults which have arisen in connection with several well-known property developers. Although a number of these restructurings are ongoing and certain Mainland developers have been wound-up in Hong Kong,<sup>19</sup> it seems likely that the apex of distressed activity has now passed (although the impact of the undoubtedly weakened sector is likely to be felt for many years). This is borne out by industry reporting which confirms that in comparison to 2022, year-to-date, there have been far fewer 'new' first-time defaulters. The explanation for this is likely to be multifaceted. Chinese regulators are considering new measures to boost the Mainland property market which is presumably giving creditors cause to pause on calling any defaults and/or taking any potential enforcement action and adopt more of a

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<sup>9</sup> 'Light touch' provisional liquidation has been historically used by the Cayman Islands courts to facilitate restructurings following the presentation of a winding-up petition pursuant to s.104 of the CCA and is still the mechanism through which restructurings are facilitated in the BVI.

<sup>10</sup> In respect of Oriente Group Limited, Carbon Holdings Limited, Rockley Photonics Holdings Limited and Differ Group Auto (the petition in respect of Differ Group Auto was withdrawn on an investor stepping forward to facilitate a restructuring).

<sup>11</sup> Rockley Photonics Holdings Limited (Restructuring Officers Appointed).

<sup>12</sup> Being an offshore (BVI, Bermuda or Cayman Islands) incorporated holding company with either an Asia or US-exchange listing above a structure of offshore and onshore (Asia incorporated) subsidiaries holding Mainland incorporated special purpose vehicles.

<sup>13</sup> The notes were issued by Unigroup International Holdings Limited, a company incorporated in the BVI and guaranteed by Tsinghua Unigroup International Co Limited, another BVI company. Tsinghua Unigroup Co. Limited is a Mainland company and the indirect 100% owner of the guarantor.

<sup>14</sup> *Citicorp International Limited v Tsinghua Unigroup Co. Limited* [2023] HKCFI 1572 (15 June 2023, Harris J).

<sup>15</sup> *Ibid*, [62]. The judgment sum is comprised of the principal amount, accrued interest and certain of the plaintiff trustee's costs.

<sup>16</sup> The Mainland bankruptcy administrator has adjudicated the proof of debt submitted by the trustee as 'pending'. This has effectively meant the trustee has no participation or voting rights at any creditors' meeting and no say in the substance of the Mainland restructuring process.

<sup>17</sup> Being Hong Kong Court of First Instance High Court Actions numbered 778/2021, 798/2021, 1418/2021 and 1142/2021 heard together; [2023] HKCFI 1350 (18 May 2023, Harris J).

<sup>18</sup> For those less familiar with the Region, these proceedings also involved English law governed keepwell deeds made by Mainland companies in respect of liabilities of subsidiaries under bonds issued by them and guaranteed by other subsidiaries to raise US\$ in the international debt market.

<sup>19</sup> Including China Properties Group Limited, Sinic Holdings (Group) Co Limited, Jiayuan International Group Limited and Yango Group Co Limited.

'wait and see' philosophy, in the hope that these stimulus measures serve to re-ignite the property sector in the Mainland. Regardless of the sector, there are also always opportunistic investors who may take a long-term view that the property sector will rebound and seek to make debt/equity injections into distressed situations which will also result in a reduction of apparent defaults.

### Concluding observations

What does the near future look like for the restructuring industry in Asia?

#### Real estate

In other parts of the Region, property sectors appear to remain susceptible to the economic headwinds impacting the Region. Increased interest rates, supply chain issues and general construction costs are all having an impact on vendors' ability to complete construction projects in a timely and cost-effective manner. It is well documented that the Vietnamese property market has succumbed to the same leverage issues which triggered the Mainland's property market decline, with reportedly more than 1,500 companies engaged in developing and selling properties suspending their operations in the first quarter of 2023. Whilst geopolitical factors are, at best, unpredictable, whether creditors or debtors alike will seek to benefit from 'lessons learned' from the Mainland's downturn over the past few years, remains to be seen.

#### Commodities

The fluctuation in commodities markets have resulted in an increase in trade finance defaults and perhaps most notably, the collapse of Hin Leong Trading.<sup>20</sup>

#### Travel

The travel restrictions imposed globally during the pandemic were undoubtedly felt most acutely by the airline industry. Whilst the past 12 months have seen the successful debt restructuring of several airlines in the Region, including Hong Kong Airlines and AirAsia, the continued fluctuations in the cost of fuel coupled with a general question-mark as to what travel (especially business travel) will look like in the post-pandemic world, present ongoing obstacles along the road to recovery. Investors, courts, and restructuring practitioners alike will be watching with interest to see if the industry in the Region can return to its pre-pandemic profitability levels.

#### Digital assets

Cryptocurrencies have not been immune to the effects of ongoing rising interest and inflation rates, making these 'riskier' investments less attractive to investors, resulting in ensuing volatility in the asset class. The Hong Kong court, in its recent *Gatecoin Limited (In Liquidation)* decision,<sup>21</sup> has confirmed, consistent with other common law jurisdictions,<sup>22</sup> that cryptocurrencies are property within the meaning of the Companies (Winding up and Miscellaneous Provisions) Ordinance, Cap 32 of Hong Kong. It is widely hoped that this decision demonstrates that the Hong Kong courts will, going forward, take a pragmatic approach to cryptocurrency and virtual asset matters, providing creditors and liquidators alike with cause to be optimistic in the event of further liquidations in this area.

The post-pandemic economic 'rebound' has not been as predictable as originally hoped and coupled with a variety of global macro and micro economic issues, the future of Asia's restructuring landscape is certainly one to keep a close eye on.

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<sup>20</sup> One of Asia's largest petroleum traders.

<sup>21</sup> [2023] HKCFI 914.

<sup>22</sup> *Ibid*, [50] – [59].

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