

Case Bulletin: 2020/04

Court Recognizes Foreign Appointed “Soft-Touch” Provisional Liquidators

*“The essence of a “soft touch” provisional liquidation is that a company remains under the day to day control of the directors, but is protected against actions by individual creditors. The purpose is to give the Group the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation.”*¹ Soft-touch provisional liquidation is commonplace in common law jurisdictions, such as England, Bermuda, the Cayman Islands and British Virgin Islands.

However, appointing provisional liquidators solely to facilitate a corporate rescue is at present impermissible in Hong Kong². The insolvency law in Hong Kong remains that liquidators are appointed for the purposes of the winding-up not avoiding it. So, when common law courts seek recognition of the appointment of provisional liquidators for restructuring purposes, can and should Hong Kong Courts assist?

In *Re Moody* [2020] HKCFI 416, the Judge provides us with an extensive analysis and a helpful answer in the affirmative.

I. Background

1. *Re Moody* concerns a company incorporated in the Cayman Islands, which changed its domicile to Bermuda. The Company is listed on the Hong Kong Stock Exchange.

¹ *Re Constellation Overseas Ltd* (5 February 2019) at §3 per Adderley J of the High Court of the British Virgin Islands

² *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192.

2. It presented a winding up petition against itself in a Bermuda Court and applied for the appointment of provisional liquidators for restructuring purposes.
3. The Bermuda Court sought assistance and recognition of the Hong Kong Court by a Letter of Request.

II. Key Points

1. The purpose of recognition is to enable foreign officeholder or creditors to avoid having to start parallel insolvency proceedings.
2. It is important to note that despite obtaining recognition and assistance from Hong Kong Courts, the foreign officeholders will not be acting as, acting in the capacity of, or having the status of officeholders appointed by Hong Kong Courts in a domestic insolvency.
3. The fact that Hong Kong Courts may not appoint domestic soft-touch provisional liquidators cannot constitute a bar to recognizing and assisting foreign soft-touch provisional liquidators.
4. Cross-border recognition does not require foreign insolvency law and local insolvency law to be identical twins.³

III. Findings

The Hong Kong Court confirms that recognizing and assisting foreign soft-touch provisional liquidators are fully consistent with universalism, Hong Kong private international law and cross-border insolvency policy. It goes as far as stating that failing to do so would create a discriminatory environment which would be unjust, unprincipled, and unsupported by authorities.

³ Please see our Case Bulletin: *“For the First Time, HK Court Recognizes and Assists Mainland Liquidation Proceedings”*

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For enquiries, please contact:

Dennis Fong & Co., Solicitors *(in Association with Llinks Law Offices)*

Adrian Lo

Partner

Tel: +852 2592 1978

Email: adrian.lo@llinkslaw.com.hk