Insolvency & Restructuring

Recognition order granted to foreign insolvent liquidation commenced by a shareholders’ resolution

Introduction

In a recent decision handed down by the Hong Kong Court of First Instance, *Re The Joint Liquidators of Supreme Tycoon Limited (In Liquidation in the British Virgin Islands)* [2018] HKCU 492, the issue of whether a foreign insolvent liquidation commenced by a shareholders’ resolution is eligible for common law recognition and assistance was considered for the first time in Hong Kong.

Facts

Supreme Tycoon Limited (the “Company”) is a company incorporated in the British Virgin Islands (“BVI”). By a written shareholders’ resolution dated 6 September 2016, the Company was put into voluntary winding-up. The joint liquidators (“Liquidators”) of the Company would like to obtain information, books and records about the Company’s affairs from various third parties and there might also be assets in Hong Kong to recover. Hence, the Liquidators applied to the Court of First Instance for recognition and assistance. The letter of request was issued by the East Caribbean Supreme Court on 17 March 2017. The Liquidators argued that the Company’s liquidation in BVI is in all respects akin to a compulsory winding-up, although its entry route was via a shareholders’ resolution.

Judgment

After a careful consideration of the authorities as well as the rationale underlying the common law power of assistance, Harris J granted the recognition order sought. His Lordship also took the opportunity to explore the common law power of assistance in voluntary liquidation.

In the Privy Council decision, *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, the majority took the view, though in *obiter*, that the common law power to recognize and assist foreign liquidation does not extend to voluntary winding-up, which is essentially a private arrangement.

Early last year, the Singapore court in its decision *Re Gulf Pacific Shipping Ltd* [2016] SGHC 287 declined to follow the Privy Council’s dicta and recognized a Hong Kong creditors’ voluntary liquidation. The Singapore court adopted the view that as the foundational doctrine in the recognition of foreign insolvency proceedings is the promotion and facilitation of the orderly distribution of assets and the orderly resolution and dissolution of the affairs of
entities being wound up, no distinction should be drawn between voluntary and compulsory process, or between in court and out of court dissolution. For a detailed discussion of the Gulf case, please refer to our 2017 January issue of ONC Corporate Disputes and Insolvency Quarterly.

The common law power of assistance, Harris J explained, exists for the purpose of surmounting the practical problems posed for a worldwide winding-up of a company's affairs by the territorial limits of the powers of each country's court. The rationale underlying the common law power of assistance is modified universalism. Further, his Lordship considered that while there is no doubt a difference between compulsory and voluntary winding-up in terms of the level of court supervision, the difference is one of degree, not of kind. In voluntary winding up, the court is in the background to be referred to if the necessity should arise.

Harris J considered that the main issue for cross-border insolvency assistance is not whether the foreign insolvency officeholder is or is not an officer of the foreign court, but whether the foreign proceeding is collective in nature, in the sense that it is “a process of collective enforcement of debts for the benefit of the general body of creditors”. The mere fact of a foreign liquidation being a voluntary liquidation is no bar to the Hong Kong court recognizing and assisting that liquidation under the principle of modified universalism. However, if the foreign liquidation is a solvent liquidation, it would not fall within the principle of modified universalism. A foreign solvent liquidation is not a collective insolvency proceeding, and is more akin to the “private arrangement” the Privy Council was referring to.

The Company's liquidation in the BVI was held to be a collective insolvency proceeding. In conclusion, Harris J held that there is no bar to Hong Kong court recognising and assisting the Liquidators as joint liquidators of the Company, despite the fact that the Company's liquidation was commenced by a shareholders’ resolution.

Implications

In our 2016 October issue of Insolvency & Restructuring newsletter, we have explored the Hong Kong court’s willingness to grant orders recognising foreign liquidators’ appointment and powers under the insolvency regime. For more detailed discussion, please refer to The Court’s Willingness to Grant Foreign Liquidators Orders for Recognition and Assistance and Orders for Production of Documents.

The current case went further to clear the doubts about the exercise of common law power of recognition and assistance in foreign insolvent liquidation commenced voluntarily. Under the principle of modified universalism, the mere fact of a foreign liquidation being a voluntary liquidation should not prevent the Hong Kong courts from recognising and assisting that
foreign liquidation. However, insolvency practitioners should note that where the foreign liquidation is a solvent liquidation, it would not fall within the principle of modified universalism and thus recognition may not be granted in such case.