

Cross-border Investigations and Comity: A Toolkit for Insolvency Practitioners and Restructuring Advisors

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Acknowledgment

INSOL International is pleased to publish this new technical paper, "Cross-border Investigations and Comity: A Tool Kit for Insolvency Practitioners and Restructuring Advisors", written by a team from Kroll comprised of Colin Wilson, Mitchell Mansfield, Michael Chan, Ivan Chong and David Prager.

The paper provides a comprehensive analysis of the underlying legal framework and the statutory and common law powers in the British Virgin Islands, the Cayman Islands, Hong Kong, Singapore and the United States available to insolvency practitioners and restructuring advisors for the purpose of pursuing investigations and maximising the value of assets available for distribution to creditors.

It is now commonplace to see business conducted via complex corporate group structures – typically with entities and assets located in different offshore jurisdictions. This paper therefore provides a timely analysis of the cross-border recognition and cooperation challenges faced by practitioners and advisors in pursuing their investigations. The complexity of the task faced by practitioners is enhanced due to the different legal approaches taken by offshore jurisdictions to investigatory powers, and the various stages of adoption and implementation of the UNCITRAL Model Law on Cross-Border Insolvency and related judicial cooperation protocols.

INSOL International thanks the authors for their time and expertise in writing this paper, and for coordinating across a number of jurisdictions to enhance the analysis provided in a manner that will be of great interest to our global membership.

February 2023

Cross-border Investigations and Comity: A Tool Kit for Insolvency Practitioners and Restructuring Advisors

By Colin Wilson, Mitchell Mansfield, Michael Chan, Ivan Chong and David Prager (all of Kroll) – BVI, Cayman Islands, Hong Kong, Singapore and United States

1. Introduction

The investigations carried out by insolvency practitioners and restructuring advisors (together referred to in this paper as IPs) involve identifying and taking control of entities and establishing the circumstances surrounding the failure of a business. This will maximise recoveries for stakeholders. IPs rely on various statutory and common law powers to facilitate these investigations, both in the local jurisdiction and internationally – including, where adopted in some form, the UNCITRAL Model Law on Cross-Border Insolvency (Model Law).

IPs typically have broad investigative powers, including (often subject to court approval) the ability to publicly examine both past and present officers of a company and to seek the delivery of books and records from service providers and other relevant parties, such as auditors, custodians, banks and agents. The range and versatility of these investigative powers vary from one jurisdiction to another.

Companies incorporated in offshore jurisdictions are often used in group structures, in which the offshore company functions as the holding company. In such circumstances, only limited information may be held in the offshore jurisdiction of the holding company, with the majority of the books and records held in another jurisdiction, requiring the IP to seek information in those foreign jurisdictions.

IPs may encounter difficulties pursuing their investigative powers where business functions are spread across different jurisdictions and a foreign IP's powers in the local jurisdiction are limited or curtailed. This can affect which parties are obliged to provide books, records and information, as well as the types of books, records and information to be made available. In certain jurisdictions, parties may refuse to comply with orders from foreign jurisdictions and insist that the IP obtains a winding up or other order in the local jurisdiction compelling compliance with the IP's requests. This is often costly, but many jurisdictions are developing practical jurisprudence to deal with this.

This paper provides a summary of the legal framework, statutory and common law powers available and limitations faced by IPs in the British Virgin Islands, Cayman Islands, Hong Kong, Singapore and the United States, to collect information and books and records, including the types of information and books and records available, and the ability of IPs to examine relevant parties.

An analysis is provided of each jurisdiction's willingness to assist a foreign officeholder, including whether formal recognition of the officeholder is first required and whether the jurisdiction will apply an officeholder's local powers and / or those powers available in the foreign jurisdiction (which may not be available in the local jurisdiction).

The involvement of each jurisdiction's courts in the Judicial Insolvency Network (JIN) and, where applicable, the implementation of relevant JIN protocols, is also discussed. JIN, formed in October 2016, is a network of insolvency judges from across the world.¹ At its initial meeting, JIN developed Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (JIN Guidelines). The JIN Guidelines address key aspects of, and the modalities for, communication and cooperation among courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings.

2. British Virgin Islands (BVI)

The BVI is consistently ranked as one of the most important offshore financial jurisdictions in the world. The BVI Financial Services Commission reports that, as at 30 June 2022, there were approximately 370,150 active BVI companies.² The BVI's reputation as an offshore jurisdiction continues to be strong, backed by the demand for BVI entities in international centres such as Hong Kong and Eastern Europe.

The BVI offers tax-neutral and modern, flexible corporate legislation that ensures corporate activity is productive, cost-effective and efficient. Consequently, BVI companies frequently form part of multi-national corporate structures and are also widely used in international markets as listing vehicles – appearing on major stock exchanges including London, New York and Hong Kong.

The use of BVI companies in multi-jurisdictional corporate structures means that the insolvency of a BVI incorporated entity will frequently involve cross-border considerations and the appointment of an IP to deal with the affairs of the company, both in the BVI and in other jurisdictions where the majority of the business functions occur.

The statutory powers granted to a liquidator of a BVI incorporated company are set out in the BVI Insolvency Act 2003 (BVI Act), supplemented by the BVI Insolvency Rules 2005, and are afforded to both court-appointed liquidators and those appointed by a qualifying resolution of a company's members.

2.1 Investigative / discovery powers available to local IPs

A BVI liquidator appointed to a BVI incorporated company under the BVI Act is both an officer of the court and an agent of the company.³

It is possible to wind up a foreign company in the BVI court (and appoint BVI liquidators), although this requires the foreign company to have a sufficient connection with the BVI.

¹ Currently, JIN comprises the following countries / jurisdictions: The United States Bankruptcy Court for the District of Delaware, The Supreme Court of Singapore, The United States Bankruptcy Court for the Southern District of New York, The Supreme Court of Bermuda, The Chancery Division of England & Wales, The Eastern Caribbean Supreme Court, The Supreme Court of New South Wales, The United States Bankruptcy Court for the Southern District of Florida, The Seoul Bankruptcy Court, The Grand Court of the Cayman Islands, The United States Bankruptcy Court for the Southern District of Texas, The Commercial List of Users' Committee of the Superior Court of Justice --- Ontario (Commercial List), The District Court Midden-Nederland (the Netherlands), The Federal Court of Australia, The Supreme Court of British Columbia and Brazil.

² BVI FSC Statistical Bulletin Q2 2022.

³ BVI Act, s 184

A foreign company will be deemed to have a sufficient connection if:

- it has or appears to have assets in the BVI;
- it is carrying (or has carried) on business in the BVI; or
- there is a reasonable prospect that the appointment of a liquidator will benefit the creditors of the company.⁴

The most likely ground for winding up a foreign company in the BVI is that it has or had assets located in the BVI, which are usually shares in other BVI companies.

2.1.1 Statutory powers

Pursuant to section 175 of the BVI Act, upon appointment, a liquidator has custody and control of all a company's assets, books and records and can immediately commence investigations into reconstructing the affairs of the company. The information and documentation available to IPs appointed to BVI companies varies and, often, the material readily available to a newly appointed liquidator will be scarce in both quantity and substance.

The starting point for a liquidator's investigations will generally include contacting the company's Registered Agent (RA) and requesting that it provides all of the company's statutory books and records in its possession. All companies incorporated in the BVI must have a RA which will provide the company with a registered office in the BVI. The RA is usually obliged to hold (as a minimum) copies of a company's memorandum and articles, register of members, register of directors, and any other statutory documents which have been filed with the Registrar of Corporate Affairs.⁵

A BVI company must also keep records and underlying documentation sufficient to show and explain the company's transactions dating back for a period of at least five years and that, at any time, enable the financial position of the company to be determined with reasonable accuracy. Although these records are not required to be held at the office of the RA, the RA is required to maintain a record of the name of a person and the physical address of the place at which the records and underlying documentation are kept.⁶ Most BVI companies are not required to be audited nor to file accounts and, therefore, this type of financial information is often not readily available within the BVI.

It is common for a BVI company to appoint corporate directors and / or nominee shareholders, which can be one of the many legitimate benefits of utilising a BVI company. This can, however, add complexity to a liquidator's work and investigations as the information disclosed on the company registers may not enable the liquidator to identify the "controlling minds" of a company and other pertinent information.

The liquidator has the power, granted under section 282 of the BVI Act, to obtain information from a broad range of parties concerning the promotion, formation,

⁴ *Idem*, s 163(2)(c)

⁵ BVI Companies Act 2004, s 96.

⁶ *Idem*, s 98.

business, dealings, accounts, assets, liabilities and / or affairs of the company. The persons that can be required to provide the information, books and records include current or former officers, members, accountants, auditors of the company, and any persons involved in the promotion or formation of the company.

The liquidator also has the power under section 283 of the BVI Act to require any persons who fall within section 282 of the BVI Act to attend a private examination conducted by either the officeholder or a legal practitioner.

Where any person has in their possession any books or records to which the company appears to be entitled or information concerning the company or a connected company, and this is not delivered voluntarily, the liquidator may apply *ex parte* under section 284 of the BVI Act for an order that the persons appear before the BVI court for a private or public examination. The order may also require the person concerned to produce, at the examination, any books, records or other documents in his / her possession or control that relate to the company or a connected company.

2.1.2 Common law request for assistance

While the aforementioned statutory powers will assist a liquidator seeking information from relevant persons located in the BVI, often some or all of the relevant parties are located in other jurisdictions. If assistance is not voluntarily forthcoming from these parties, the liquidator will require assistance from the other jurisdiction by reference to common law principles. That assistance may be sought via an application by the liquidator to the BVI court to issue a letter of request to the foreign jurisdiction's court requesting recognition of the appointment and appropriate assistance within the foreign jurisdiction.

2.1.3 Norwich Pharmacal relief

Norwich Pharmacal orders are a key investigatory tool in the BVI for obtaining information from third parties. This relief must be sought in support of substantive proceedings and is named after the order first granted in the English decision of *Norwich Pharmacal Co v Customs and Excise Commissioners*.⁷ There are three principal requirements that need to be satisfied for a BVI court to order Norwich Pharmacal relief:

- the applicant must show a *prima facie* or arguable case of wrongdoing against the person whose information is sought;
- the party possessing the information must have been involved in the wrongdoing - innocently or otherwise; and
- the discovery application must be necessary, just and convenient.⁸

The BVI court will generally consider a number of factors to determine whether the discovery application is necessary, just and convenient, including (but not limited to): the potential advantage to the applicant versus the potential harm to the respondent; the

⁷ [1974] AC 133.

⁸ *Al-Rushaid Petroleum Investment Company et al v TSJ Engineering Consulting Company Limited* BVIHC (Com) 2010/37.

effect on the liquidator's investigations of the court's refusal to make an order; and whether there are any other more straightforward or available means of finding out the information requested.⁹

Even if those three requirements are satisfied, the court has a residual discretion as to whether it is appropriate to make an order in all the circumstances.

In BVI proceedings, the respondent to a Norwich Pharmacal application is often the RA of a BVI company.¹⁰ As noted in section 2.1.1 above, the RA is likely to hold documents which will be of assistance to a liquidator seeking to establish the "controlling minds" of the company and the individuals responsible for the wrongdoing or those responsible for efforts to evade enforcement. Such documents held by the registered agent may include the register of members, the register of directors, and the "file opening" or due diligence documents which may disclose the ultimate beneficial owner of the BVI company.

A recent decision in the BVI, *K&S v Z&Z*, represents the first written judgment affirming the availability of Norwich Pharmacal relief in the BVI following decisions in the United Kingdom suggesting the presence of a statutory regime to obtain evidence precludes the use of this type of relief. In his judgement, Wallbank J relied on the BVI Supreme Court Act which "empowers the court to grant injunctions in all cases in which it appears to the court or judge to be just or convenient."¹¹

2.2 Recognition and assistance granted to foreign officeholders

Part XIX of the BVI Act both sets out the statutory framework governing the BVI court's powers to make orders in aid of foreign insolvency proceedings and preserves the common law power to provide aid in relation to foreign proceedings.

Although the BVI Act contains additional wording in Part XVIII adopting the Model Law for giving and seeking assistance in insolvency proceedings, those particular provisions have not yet been brought into force and it is not known if or when they will come into force.

Part XIX of the BVI Act allows the BVI court to provide assistance to a foreign representative but does not allow for general recognition of the foreign proceedings. The powers of the BVI court to assist a foreign representative under Part XIX are, however, broad, and include the power to make orders:

- to facilitate, approve or implement arrangements that will result in the coordination of a BVI insolvency proceeding with a foreign proceeding;
- to authorise the examination by the foreign representative of the debtor or other persons;
- for the delivery up of any property of the debtor; and

⁹ *UVW v XYZ BVIHC(COM)* 108 of 2016.

¹⁰ *In JSC BTA Bank v Fidelity Corporate Services Limited and others* HCVAP 2010/025.

¹¹ (BVIHC 0016 of 2020).

- for the granting of such relief as the BVI court considers appropriate to ensure the economic and expeditious administration of the foreign proceeding.

The ambit of assistance under Part XIX of the BVI Act is restricted to certain specified jurisdictions, which include Australia, Canada, Finland, Japan, Jersey, the United Kingdom, the United States, New Zealand and Hong Kong (as a relevant foreign region).

Part XIX was considered in the BVI court in the case of *Re C (A Bankrupt)*,¹² which involved Hong Kong trustees applying for recognition at common law or, alternatively, to be granted an order in aid of foreign proceedings under Part XIX of the BVI Act. In this case, the BVI court granted the order under Part XIX of the BVI Act. In *obiter* comments, the court also remarked that there was a power available at common law to recognise the Hong Kong representatives, but the assistance is only available to foreign representatives from designated relevant countries as defined under the BVI Act.

It should be noted, however, that following the Privy Council's decision in *Re Singularis Holdings Limited v PricewaterhouseCoopers (Re Singularis)*,¹³ which found that common law powers survive the introduction of similar statutory provisions, the BVI court may take the view that it has wider common law powers to assist foreign representatives from non-designated countries. Although *Re Singularis* is a Bermudan decision, and therefore not binding on the BVI court, it may be influential on the BVI court's future approach to foreign assistance.

2.4 JIN Guidelines

The BVI courts have adopted the JIN Guidelines, and while not mandatory, they are designed to enhance communication between the courts, insolvency representatives and other parties, reflecting the view of the importance of coordination and cooperation in cross-border insolvency matters. The goal of the JIN Guidelines is to preserve value and reduce legal costs in cross-border engagements.

3. Cayman Islands

During the 1960s, when many other Caribbean nations were pursuing independence, the Cayman Islands elected to remain an overseas territory of the United Kingdom. The Cayman Islands is classified as an autonomous British Overseas Territory with its legal system derived from the English common law system, in that it is primarily based on the doctrine of precedent.

The Cayman Islands' importance in the global financial system creates responsibilities for international cooperation in the sharing of information. Subsidiary companies of multinational corporations commonly choose to incorporate in the Cayman Islands to benefit from its tax-neutral status. The primary business activities of these subsidiaries are not usually located in the Cayman Islands and IPs appointed to such companies often find that most of the books, records and related parties of a company in liquidation are located outside of the jurisdiction. The need to investigate the affairs of a company arises most frequently in provisional and / or official liquidation, where, because of the

¹² (BVIHC 0080 of 2013).

¹³ [2014] UKPC 36.

involuntary nature of the winding up, there is more likely to be a lack of cooperation from former management or service providers.

Due to the global nature of the operations of Cayman Islands domiciled entities, IPs will often require recognition by, and assistance from, foreign courts in order to carry out their duty to investigate the financial affairs of the entity to which they have been appointed.

The legislation governing insolvency law and procedure is mainly contained in the Cayman Islands Companies Law (2018 Revision) (Companies Law) and the Companies Winding Up Rules 2018 (CWR). Decisions of the Grand Court of the Cayman Islands may be appealed to the Cayman Islands Court of Appeal and further appeals may be made to the United Kingdom Privy Council, whose decisions are binding on the Cayman courts. Further, while not technically binding, in the absence of precedent relating to their own jurisdiction, Cayman courts tend to be persuaded by decisions made in higher ranking United Kingdom courts as well.

3.1 Investigative / discovery powers available to local IPs

The investigative and discovery powers granted to court-appointed liquidators of a Cayman Islands entity are set out in sections 103 and 138 of the Companies Law. While these sections are applicable in the case of a winding up by the court, they may also be applied to a voluntary liquidation, where an application is made by a voluntary liquidator or contributory to exercise:

“all or any of the powers which the court might exercise if the company were being wound up under the supervision of the court”.¹⁴

3.1.1 Section 103 of the Companies Law

Pursuant to section 103, any “relevant person” has a duty to cooperate with the official liquidator, who may apply to the Cayman court for such a person to be examined or ordered to deliver up any property or documents belonging to the company.

“Relevant person” is defined in section 103(1) as any person who, whether resident in the Cayman Islands or elsewhere:

- has made or concurred with the statement of affairs;
- is or has been a director or officer of the company;
- is or was a professional service provider to the company;
- has acted as a controller, advisor or liquidator of the company or receiver or manager of its property; or
- not being a person falling within the first three alternatives above, is or has been concerned or has taken part in the promotion or management of the company.¹⁵

¹⁴ Companies Law, s 129 (1).

¹⁵ *Idem*, s 103 (1).

The Cayman court has sought to clarify the definition of a “relevant person” and “professional service provider” in the context of section 103. In the case of *Re ICP Strategic Income Fund Limited (In Liquidation) & ICP Strategic Credit Income Master Fund Ltd (In Liquidation)*,¹⁶ the court held that “section 103 defines ‘relevant persons’ by reference to their role in the company’s affairs”.

Further, an official liquidator is unable to use section 103 in respect of a former auditor, as auditors are not considered to fall within the definition of professional service provider, as set out in section 89 of the Companies Law, as “a person who contracts to provide general or administrative services on an annual or continuing basis”.

The court took a similar approach in the case brought by the official liquidators in *Re China Milk Products Group Limited (In Liquidation)*,¹⁷ finding that section 103 “rests upon the notion that those whose relationship with the company puts them in the position of being what I would characterise as insiders”.

In *In Re Primeo Fund (In Official Liquidation)*,¹⁸ the Cayman court reiterated that a “relevant person” does not include outsiders whose only relationship with the company was that they had been in business with it or contracted to provide goods or services – for example, lawyers and external auditors.

The process by which an oral examination is to be conducted, if requested and granted, is set out in the CWR. The examinee shall answer all the questions put to him / her (subject to any claim of self-incrimination or legal professional privilege) which are within his / her knowledge or means of knowledge regarding any matter within the scope of the order, and may be compelled to give the names and addresses of all persons who reasonably might be expected to have knowledge.¹⁹ The examinee may object to certain questions but must articulate the grounds for doing so. The official liquidator may apply to the Cayman court to compel the examinee to answer the question.²⁰ If the Cayman court disagrees with the objection, it has the right to order a further examination, which the examinee must pay for.²¹

The Cayman court has jurisdiction to make a section 103 order against a relevant person resident outside the Cayman Islands and to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction under section 103(7) of the Companies Law. Upon recognition of a letter of request by a foreign court, the Cayman official liquidator can secure the books and records located or examine a relevant person domiciled in the foreign jurisdiction.

In *Re Primeo Fund (In Official Liquidation)*, however, the Court of Appeal criticised the decision of the Grand Court that compelled the official liquidators to issue a letter of request for the purpose of obtaining discovery in Cayman litigation from a third party

¹⁶ Cause No. FSD 82 of 2010 and FSD 269 of 2010, per Jones J (3 February 2012).

¹⁷ Grand Court, FSD 83/2011 (unreported 20 May 2015).

¹⁸ CICA 8 of 2016 (unreported 18 November 2016).

¹⁹ CWR, R O.7, r.3(11).

²⁰ *Idem*, R O.7, r.3(12).

²¹ *Idem*, R O.7, r.3(13).

situated out of the jurisdiction on the request of the defendants to that litigation.²² In this case, the defendants were effectively seeking third party discovery via the official liquidators' statutory powers of investigation. The official liquidators had argued that sections 103 and 138 (described further below) could not be used in this way and that the documents requested had not been required for the liquidation. The Court of Appeal held that the Grand Court should not have interfered in the official liquidators' decision not to pursue the letter of request, unless they had "done something so utterly unreasonable and absurd that no reasonable man would have done it".

3.1.2 Section 138 of the Companies Law

Section 138 allows the official liquidator to apply to the Cayman court for an order requiring any person who has in his or her possession any property or documents to which the company appears to be entitled to transfer or deliver the property or documents to the liquidator.

Unlike section 103, this section could apply to a company's former auditor, as there is no restriction on the type of person against whom an order may be made provided that the documents are in their possession. However, there are restrictions on the types of documents that may be requested.

In the case of *Re China Milk Products Group Limited (In Liquidation)*, it was held that the exercise of this power is only permissible where there is a "proprietary or contractual entitlement" to the documents.²³

In this case, the court held that an auditor's working papers were the property of the auditor and not that of the company in liquidation. However, the information on which the audit working papers was based (information extracted from the company's own books and records) could be obtained from the auditors and it was ordered that the Cayman court "would have jurisdiction to make an order under section 138, albeit limited to documents containing information belonging to China Milk."

The Cayman courts have not provided any further clarification on this point, but the limitations placed on a Cayman Islands liquidator have been considered when seeking the production of documents in other jurisdictions.

In *Re Singularis*, the Privy Council expressed doubt about whether "information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property."²⁴

The uncertainty of the Cayman courts' approach to section 138 was further considered by the United States Bankruptcy Court for the Southern District of New York in *Re Platinum Partners Value Arbitrage Fund L.P. et al*²⁵ (see further in section 6.2.1 below), on the motion of the liquidators as foreign representatives of PPVA for an order compelling its

²² *Primeo Fund (in Official Liquidation)* CICA 8 of 2016 (unreported 18 November 2016).

²³ *China Milk Products Group (in liquidation)* (Grand Court, FSD 83/2011 (unreported 20 May 2015))

²⁴ *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] JCPC 36

²⁵ Chapter 15 Case No 16-12925 (SCC).

auditors Cohn Reznick LLP (Cohn Reznick) to comply with a subpoena for production of documents.

Cohn Reznick asserted that the official liquidators would not have been permitted to obtain Cohn Reznick's working papers under Cayman law. However, in its April 2018 decision, the United States Bankruptcy Court stated that "because the Cayman courts have not clearly defined what portions of audit work papers constitute a debtor's property, any assertion that audit working papers are the sole property of an auditor under Cayman law and cannot be produced to a company's liquidator for that reason is simply unsupported."²⁶

When considering the application of section 138, the Cayman courts have also had regard to the purpose for which an official liquidator is attempting to obtain documents. In *Re Primeo Fund (In Official Liquidation)*,²⁷ the Cayman court drew the distinction between the statutory role of a liquidator and that of "the ordinary civil litigant".²⁸ It was held the official liquidators may not collect documents under section 138 from any person if their purpose in doing so is to use those documents in litigation or arbitration against another person (not just the person from whom documents are collected). In other words, official liquidators are not permitted to provide themselves with a strategic advantage in litigation by using their statutory powers under section 138.²⁹

3.2 Recognition and assistance granted to foreign officeholders

The Cayman Islands has not adopted the Model Law. However, cross-border cooperation is facilitated by the Companies Law, the CWR and the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 (FBPR).

The statutory framework allowing a foreign representative to seek the assistance of the Cayman court is set out in Part XVII (International Co-operation) of the Companies Law (2018 Revision).

A foreign representative (defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding) may apply under section 241 of the Companies Law (2018 Revision) for the Cayman court to make orders ancillary to a foreign bankruptcy proceeding. This includes an order pursuant to section 241(1)(a) for the recognition of the foreign representative by the Cayman court as having the right to act in the Cayman Islands on behalf of, or in the name of, the debtor.

Under section 241, the foreign representative may also apply, *inter alia*, for an order requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative. However, the statute limits the persons against whom an order may be made to the debtor itself and "relevant persons" as defined in section 103 of the Companies Law. This means that the foreign practitioner has no additional powers to that of the local Cayman liquidator regardless of any powers the foreign representative may have in their own jurisdiction.

²⁶ *Idem*.¹⁶

²⁷ CICA 8 of 2016 (unreported 18 November 2016).

²⁸ *Primeo Fund (in Official Liquidation)* CICA 8 of 2016 (unreported 18 November 2016), [46].

²⁹ *Idem*, [47]-[48].

The FBPR prescribes the process which a foreign representative must follow when examining a “relevant person” pursuant to section 103 of the Companies Law. The guidelines closely mirror those for a Cayman liquidator.

Just as the Cayman court may issue a letter of request to foreign courts on the application of a local liquidator under section 103(7) of the Companies Law, foreign courts may also request the assistance of the Cayman courts under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 by issuing a letter of request. Order 70 of the Grand Court Rules governs the procedure under which a letter of request is given effect and provides that such an application may be made *ex parte* and must be supported by an affidavit exhibiting the letter of request. On receipt of the letter of request, the Cayman court may make an order, *inter alia*, for the examination of parties to be called to produce information and the production of documents.

In addition to the statutory provisions under Cayman law, the Cayman court also has jurisdiction to recognise foreign court-appointed liquidators under common law.

This common law power was considered by the Privy Council in the case of *Re Singularis* (referred to above).³⁰ This case related to a claim brought by Cayman liquidators in Bermuda to obtain documents from the company’s auditor under Bermuda law. The case went through the Court of Appeal in Bermuda and up to the Privy Council, where it was confirmed that the Cayman liquidators were not entitled to retrieve audit work papers held in Bermuda as the Cayman liquidators would not have been able to retrieve the work papers under the laws by which they were appointed.

Although the Privy Council decision is not binding upon it, the Cayman Court has since considered the case in its own decision in *Re China Agrotech Holdings Ltd*, acknowledging *Re Singularis* as “authoritative” and limiting the common law power of the Cayman Court to recognise foreign court-appointed liquidators.³¹

3.3 JIN Guidelines

The Cayman Islands adopted the use of the JIN Guidelines in cross-border insolvency and restructuring cases on 30 July 2018. Officeholders appointed in the Cayman Islands may incorporate some or all of the JIN Guidelines with suitable modifications either through an international protocol approved by the Grand Court, or by an order of the Grand Court.

The purpose the guidelines is to facilitate the orderly administration, coordination and communication of insolvency and restructuring proceedings in multiple jurisdictions with a view to maximising value, preserving assets and ensuring fairness for creditor classes.

4. Hong Kong

The Hong Kong Special Administrative Region of the People’s Republic of China (Hong Kong) is currently identified as the freest economy in the world.³² As one of the world’s leading international financial centres, it is supported by its regulatory efficiency,

³⁰ *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] JCPC 36.

³¹ *China Agrotech Holdings Limited* FSD 157 of 2017 (unreported 19 September 2017).

³² Heritage Foundation 2019 Index of Economic Freedom.

openness to global commerce and ideal location in the heart of the Asia-Pacific region.

The “Basic Law” stipulates the basic policies of China and provides the constitutional basis of the laws of Hong Kong, which includes the underlying principle of “One Country, Two Systems”. Under this regime, Hong Kong has its own legal system distinct from the laws of the People’s Republic of China (PRC). Article 84 of the Basic Law provides that Hong Kong courts may refer to case precedents from other countries under common law jurisdictions. This is just one of the practical applications of the Basic Law that allows Hong Kong to continue with a high degree of autonomy.³³

Hong Kong businesses commonly use offshore jurisdictions, such as the Cayman Islands and the BVI, as jurisdictions to incorporate holding companies within large corporate structures. These holding companies will often hold shares in subsidiary companies located in Hong Kong or PRC, where the majority of the company’s books and records will generally also be located. The IP appointed over the holding entity then has the task of reconstructing the affairs of the failed company, and this will often involve the need for recognition and assistance between the jurisdictions.

Hong Kong’s insolvency regime is largely based on statutory legislation from the United Kingdom. Hong Kong has yet to introduce the Model Law into domestic legislation. Cross-border insolvency cases are therefore still conducted under the principles of modified universalism. The Hong Kong courts have continually shown their willingness to provide appropriate assistance to IPs from other jurisdictions in aid of their domestic insolvency proceedings.

4.1 Investigative / discovery powers available to local IPs

The statutory powers granted to a local Hong Kong IP are contained in the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance (Cap 32) (Companies Ordinance) (CWUMPO) and the Companies (Winding Up) Rules (Cap 32H).

In Hong Kong, a liquidator is typically appointed to take control of the company’s assets, books and records and to deal with its affairs and wind it down in accordance with the statutory procedures. A wide range of statutory powers are available to the liquidator, including the realisation of assets, distribution to creditors and shareholders in accordance with their statutory priority, and investigating the affairs of the company prior to its winding up.

One of the primary tasks of the liquidator is to ascertain, locate and secure books and records and other accounting information and documents belonging to the company, either physical records or electronic records. Directors, the company secretary and other officers of the company have the statutory duties to hand over all such books and records in their possession to the liquidator and provide the necessary cooperation and assistance. Directors are also required to complete a statement of affairs outlining the assets and liabilities of the company.

³³ Department of Justice, The Government of the Hong Kong Special Administrative Region.
<https://www.basiclaw.gov.hk/text/en/basiclawtext/chapter1.html>

A company's officeholders and service providers (including accountants, bankers and lawyers) are usually the primary source of information and documents of the company and will typically provide assistance to the liquidator on a voluntary basis, including production of the requested documents and other relevant information relating to the company.

Where voluntary assistance is not forthcoming, a liquidator has broad inquisitorial powers to obtain an order from the Hong Kong court that officeholders and service providers that may have knowledge of the company's affairs or may be in possession of information and documents in relation to company are to be examined on oath at court and to produce such information and documents.

The historical section 221(2) of the CWUMPO provided a powerful tool for the liquidator to compel the following parties to be examined in private under oath:

- any officer of the company or person known or suspected to have in his / her possession any property of the company or supposed to be indebted to the company; and
- any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.

The powers under the former section 221(2) of the CWUMPO were extensive. In the case of *China Medical Technologies Inc v Chan Kwan Yan et al*,³⁴ the Hong Kong court ordered respondents that were not officers of China Medical Technologies (CMED) to be examined by the liquidators on the basis that there was a significant fraudulent scheme perpetrated on CMED and the magnitude of these respondents' *prima facie* wrongs done to CMED were significant. As a result, the court ordered these respondents to produce all documents in their custody or power that related to CMED and to be examined orally on oath before a master of the High Court concerning the promotion, formation, trade, dealings, affairs or property of CMED.

While section 221(2) private examinations were a useful tool, the further or other use of the transcripts and notes of the examination have been vigorously opposed (by the examinee) and appealed all the way to the Hong Kong Court of Final Appeal in various cases. Typical arguments raised by the examinee have included:

- section 221(2) private examinations compel answers from the examinee and thus abrogate the rule against self-incrimination (being the protection of a person not to be compelled to testify against himself / herself); and
- oral evidence is obtained by oppression and there is insufficient safeguard for the examinee if the transcripts of the examination are being used in legal proceedings against the relevant examinee.

The Hong Kong court's position is that where an examinee is prosecuted and the prosecutor seeks to make direct use of his or her transcripts, it would be for the criminal court to rule on whether that is to be permitted. There is a chance that any admission

³⁴ [2015] HKEC 224.

made by the examinee would be involuntary and therefore inadmissible. However, in *David John Kennedy v Kelly Cheng and Another*,³⁵ the Court of Final Appeal in Hong Kong directed that a liquidator who reports wrongdoing to the police may provide the authorities with the transcripts of section 221(2) private examinations and does not need the court's leave to do so, on the basis that a liquidator's functions include serving the wider public interest by investigating wrongdoing and reporting the same to the authorities so as to enable them to take appropriate action.

The previous position of the Hong Kong court was that the ambit of section 221(3) of the CWUMPO governing the production of documents is significantly narrower than the scope of section 221(2) in relation to an oral examination and the two powers are not coextensive. Section 221(3) gave the court powers to require a person to produce documentation "relating to the company", while section 221(2) stated that the court may summon and examine a person on "the promotion, formation, trade, dealings, affairs or property of the company". However, this position was overturned by the Court of Appeal in *The Joint & Several Liquidators of China Medical Technologies, Inc v Tsang Tak Yung Samson* in 2018³⁶ on the basis that the purpose of section 221 was to permit a liquidator to carry out their important functions – in particular, to ascertain, locate and secure assets and investigate the company's affairs. Therefore, there should be no discernible difference in the power of examination and production – both are directed at assisting liquidators and should have the same scope.

The above position is consistent with the amendments to the CWUMPO in 2016. Sections 286B and 286C of CWUMPO have now replaced the old section 221. The wording of the two sections has been revised in a similar manner and reflects the intention that it is within the court's power to order the examination of individuals and the production of documentation relating to the promotion, formation, trade, dealings, affairs or property of the company where a provisional liquidator is appointed, a winding up order is being made or when voluntary winding up has commenced.

In accordance with the amendments to the CWUMPO, the powers of the liquidator were expanded and the section 286B powers to order the provision of information now allow a liquidator to compel a wide range of service providers engaged by the company, including, *inter alia*, the bankers, valuers, legal advisors and auditors of the company. For example, Justice Harris made an order in *The Joint & Several Liquidators of China Medical Technologies, Inc v KPMG (a firm) and Others*³⁷ allowing the following categories of documents be provided by the former auditor of a company in accordance with the liquidators' requests:

- all working papers produced by the former auditor in connection with all audits of the company's financial statements;
- documents in the audit permanent file, audit and interim working files, audit planning documentation, site attendance notes, written correspondence and communications associated with the audits;
- internal audit manuals;

³⁵ (2012) 15 HKCFAR 657.

³⁶ [2018] 2 HKLRD 1202.

³⁷ [2017] HKEC 894.

- engagement letters between the company and the former auditor;
- all draft and final audited financial statements and interim reviews of the company;
- all documents provided by the company to the former auditor;
- statutory records and corporation files;
- accounting records, including vouchers, ledgers and trial balance; and
- bank statements.

However, Harris J refused to order the production of time entries of the audit staff on the basis that these time entries contain immaterial information and no record of detailed activities.

Given the amendments to the CWUOP and the case law established since 2016, a liquidator in Hong Kong now has more clarity and sometimes faces less resistance in collecting documents relating to the company's affairs. For example, the liquidators of CMED successfully compelled the banker of CMED to produce certain banking documents sought in their applications in *The Joint & Several Liquidators of China Medical Technologies, Inc. v The Bank of China (Hong Kong) Limited and others*.³⁸ These documents included:

- all account opening and closing documents and operating mandates in relation to those accounts associated with misappropriation of funds from the company (Subject Accounts);
- all account statements and bank vouchers, forms, instructions, transaction advice, cheques and correspondence created by the bank in respect of the Subject Accounts; and
- transaction documents that specified by the liquidators.

The court will strike a balance between the liquidator's reasonable requirements and the need to avoid making an order that is unreasonable, unnecessary or oppressive to the party from whom the documents or information is sought. For example, seeking orders for private documents unrelated to the company or its affairs would not be granted by the Hong Kong court. A liquidator is also required to demonstrate to the court that, prior to making the application, he / she has at least attempted to enlist the voluntary assistance of the parties who have refused to assist the liquidators with their investigations.

4.2 Recognition and assistance granted to foreign officeholders

Hong Kong has not adopted the Model Law in its domestic legislation at present, and there is no statutory framework for the recognition of a foreign liquidator which would enable the Hong Kong Court to assist a liquidator in cross-border insolvency cases. The approach taken by the Hong Kong courts to cross-border insolvency has, however, been

³⁸ [2015] HKEC 224.

pragmatic. There is increasing acknowledgement of the need for courts from different jurisdictions to assist one another where possible and to address the common law recognition of foreign liquidators.

A common scenario faced by a foreign liquidator is where a company's Hong Kong based service providers, in particular, the bankers and / or auditors of the company, refuse to produce documents and information sought on the basis that the authority and jurisdiction of the foreign court's appointment orders and / or the effectiveness of the foreign court's appointments is not enforceable under Hong Kong law.

As Hong Kong is not a signatory to the Model Law, the ability of a foreign liquidator to obtain the information and documentation critical to their investigations rests on two alternate routes:

- the commencement of ancillary winding up proceedings of a foreign company; or
- an application to the Hong Kong court for recognition and assistance under the common law.³⁹

4.2.1 Winding up unregistered companies in Hong Kong

Hong Kong courts have a discretionary jurisdiction to wind up unregistered companies, including a company incorporated overseas. This power is set out in section 327 of the CWUMPO.

In the decision of *Re China Huiyuan Juice Group Limited*,⁴⁰ Harris J stated that the most appropriate jurisdiction to wind up a company is the jurisdiction where it is incorporated unless good reason for doing otherwise can be demonstrated. Harris J also stated that the Hong Kong court has developed the "three core requirements" to assess whether there is a good reason to make a winding up order.

In the decision of *Re Inigma Technology Co Ltd*,⁴¹ Harris J stated that the following general principles (including the three core requirements) are used to determine whether or not the Hong Kong court should exercise the power given by section 327 of CWUMPO to wind up both solvent and insolvent companies incorporated in another jurisdiction:

1. The power conferred by [section 327 of CWUMPO] is discretionary.
2. The following three core requirements must be satisfied before the court would be justified in exercising its discretion:
 - (a) there is sufficient connection with Hong Kong to justify setting in motion the Hong Kong insolvency regime, which prima facie requires a liquidator to liquidate a company's assets wherever they are located and similarly invites proofs of debt from creditors both in Hong Kong and overseas;

³⁹ Companies Ordinance, s 327.

⁴⁰ [2020] HKCFI 2940.

⁴¹ [2014] HCCW 224/2013.

- (b) there is a reasonable possibility of a winding up order benefiting those applying for it; and
 - (c) there must be a person subject to the court's jurisdiction (other than by being the petitioner or a creditor who will become subject to the court's jurisdiction if it submits a proof of debt) and having a material economic interest in the winding up.
3. There may be cases in which the connection between a company's affairs and Hong Kong is sufficiently strong and the benefit of a winding up sufficiently substantial to justify a winding up order even if the third core requirement is not satisfied.

The above principles have been considered and used widely by the Hong Kong court. The case law in Hong Kong, therefore, provides clarification on the above principles particularly the second core requirement. Set out below is a summary of the recent key remarks made by the Hong Kong court in respect of the second core requirement:

Case	Remarks
<i>Shandong Chenming Paper Holdings Ltd v Arjowiggins HHK 2 Limited</i> ⁴²	<p>The second core requirement was satisfied because there was a real and substantial benefit to Arjowiggins HHK 2 Limited in making the winding up order: to put pressure on Shandong Chenming Paper Holdings Ltd to make payment.</p> <p>Harris J also stated that the second core requirement was always essential and moderation of the second core requirement is not permitted.</p>
<i>China Huiyuan Juice Group Limited</i> ⁴³	<p>In order to satisfy the second core requirement, Harris J considered that it is not necessary for a petitioner to identify with great precision what the benefit will be or quantify with exactness the value of the benefit, as long as the benefit can be said to be a real possibility rather than a merely theoretical one.</p>
<i>Grand Peace Group Holdings Limited</i> ⁴⁴	<p>Harris J considered that appointing liquidators in Hong Kong over companies incorporated in the BVI provides no benefit for controlling the PRC subsidiaries because a Mainland court would only recognise a foreign liquidator of a company appointed by the courts of the company's place of incorporation. Harris J therefore refused to exercise the discretionary jurisdiction to wind up an offshore holding company due to difficulties in the recognition of Hong Kong liquidators in the BVI.</p> <p>The applicants argued that this difficulty could be circumvented by the fact that the majority of the directors of the company were in Hong Kong and the court could compel</p>

⁴² [2020] HKEC 2290.

⁴³ [2020] HKCFI 2940.

⁴⁴ [2021] HKCFI 2361.

Case	Remarks
	<p>the directors to execute the necessary documents to enable the liquidators to take control of the BVI subsidiaries (Relevant Documents). However, the court dismissed the above argument for the following reasons:</p> <ul style="list-style-type: none"> ▪ under BVI private international law, only a liquidator appointed by a court of the place of incorporation would be recognised and assisted. BVI authorities might refuse to recognise the Relevant Documents if they became aware that the Relevant Documents were executed under the compulsion of orders from the Hong Kong court; ▪ the Bermuda, Cayman Islands and BVI case law suggests that BVI courts would not recognise liquidators appointed in Hong Kong over a company incorporated in Bermuda or the Cayman Islands; and ▪ once liquidators are appointed, directors' powers cease. The directors of the company could not have executed the documents to empower the liquidators to manage the affairs of the BVI subsidiaries. <p>However, Harris J considered that if the applicants' purpose of seeking an appointment of liquidators in Hong Kong had been to further make an application under the cooperation agreement by the Secretary for Justice and the Supreme People's Court for mutual recognition of insolvency processes on 14 May 2021 (Cooperation Agreement) to realise any value in the Mainland subsidiaries, then there might have been an argument that the second core requirement was satisfied.</p>
<i>Up Energy Development Group Limited</i> ⁴⁵	<p>Harris J held that a winding up petition against a company should be made with the court in the company's place of incorporation unless the creditor can demonstrate that a liquidator appointed in Hong Kong will probably be able to obtain control of the Mainland subsidiaries.</p> <p>Harris J said that a creditor is unlikely to be able to show this unless:</p> <ul style="list-style-type: none"> ▪ the intermediate offshore subsidiary's centre of main interests (COMI) is in Hong Kong and thus recognition in the Mainland is possible under the Cooperation Agreement; and ▪ a liquidator appointed over the holding company can petition to wind up an offshore subsidiary in Hong Kong as

⁴⁵ [2021] HKCFI 2595.



Case	Remarks
	<p>a creditor.</p> <p>Unless this can be demonstrated fairly easily, a creditor should be advised that a petition should be issued in the place of incorporation because this is more straightforward and effective.</p>
<i>Re Victor River Ltd</i> ⁴⁶	<p>The court agreed that a winding up order provided a real possibility of benefit for the petitioner. For example, in this case:</p> <ul style="list-style-type: none">▪ the appointed liquidators could help investigate the financial position of the company and ascertain other assets that could be realised;▪ the liquidators could exercise the company's rights to protect or maximise the value of the company's only known assets, such as enquiring into the restructuring of another company in which the company was a substantial shareholder; and▪ the liquidators could be in a better position to identify any potential buyers for the assets of the company.
<i>Shandong Chenming Paper Holdings Limited v Arjowiggins HKK 2 Limited</i> ⁴⁷	<p>The Court of Final Appeal confirmed that commercial pressure to achieve the repayment of an undisputed debt is a relevant benefit for the purpose of the second core requirement.</p>

In summary, the court will likely accept the following as appropriate "benefits" in order to satisfy the second core requirement:

- the winding up petition creating pressure on management of the company to make repayments to creditors;
- the liquidators' power to investigate under sections 286A, 286B and 286C of the CWUMPO where such powers are not available in the company's place of incorporation;
- the intention to seek recognition of Hong Kong appointed liquidators of the foreign company in the PRC to control PRC subsidiaries of the foreign company under the Cooperation Agreement;
- liquidators appointed in Hong Kong being able to investigate the financial position of the company and ascertain other assets that could be realised for the benefit of creditors; and

⁴⁶ [2021] HKCFI 886.

⁴⁷ [2022] HKCFA 11.

- liquidators being in a better position to sell the company's assets or to identify potential buyers.

As mentioned above, Harris J stated that the most appropriate jurisdiction to wind up a company is the jurisdiction of its incorporation. The courts have offered further clarifying remarks on this concept as follows:

Case	Remarks
<i>Lamtex Holdings Limited</i> ⁴⁸	<p>A company's COMI in the context of assessing the primacy of competing insolvency proceedings is likely to have a significant impact where many Hong Kong and Mainland Chinese corporate groups are structured under a Hong Kong listed offshore holding company with little connection to the businesses of the group.</p> <p>Harris J proposed the following framework to address questions of primacy with respect to insolvency proceedings opened in different jurisdictions:</p> <ol style="list-style-type: none"> 1. The place of incorporation should be the jurisdiction in which a company is liquidated. 2. If the COMI is elsewhere, the court should consider: <ul style="list-style-type: none"> (a) whether the group structure requires the place of incorporation to be the primary jurisdiction in order to effectively liquidate or restructure the group; (b) the extent to which giving primacy to the place of incorporation is artificial having regard to the strength of other COMI connecting factors; and (c) the views of creditors. <p>The above framework suggests that appropriate weight should be given to the location of a company's COMI and that the views of creditors would be a major consideration.</p>
<i>Up Energy Development Group Limited</i> ⁴⁹	<p>Linda Chan J held that it would be unrealistic or artificial to suggest that the Hong Kong Companies Court should ignore all the affairs carried out by a company in Hong Kong, leaving the control and supervision over the winding up to the court of the place of incorporation without any Hong Kong investigations. This is particularly so where the company was incorporated in offshore jurisdictions like the BVI, Cayman Islands and Bermuda – which do not require the company to carry on any business or meaningful activity in the place of incorporation other than appointing agents to deal with the corporate filings and</p>

⁴⁸ [2021] HKCFI 622.

⁴⁹ [2022] HKCFI 1329.

Case	Remarks
	<p>maintaining the registers of members, directors and charges.</p> <p>Accordingly, it was held that the mere fact a foreign company is wound up by the court of the place of incorporation does not obviate the need for a winding up order against the company in other jurisdictions. To the extent there are assets within the domestic jurisdiction (which would normally be sufficient to satisfy the second core requirement and possibly the first core requirement), those assets will be taken and dealt with by the liquidators appointed in that jurisdiction and the liquidation will be carried on as an ancillary liquidation.</p>
<i>Global Brands Group Holding Limited</i> ⁵⁰	<p>Harris J considered that “the criteria for recognition should in future primarily be determined by the location of a company’s COMI ... The connection between such companies and the place of their incorporation is entirely formal. It is rare for such companies to conduct any business in the jurisdiction, and I imagine commonly no director or employee ever visits them... Treating the place of incorporation in such circumstances as being the natural home or commercially most relevant jurisdiction of the company for the purpose of determining which jurisdiction is the appropriate place for the seat of a principal liquidation is highly artificial.”</p> <p>Harris J explained that if a company’s COMI is in Hong Kong, there would not normally be any difficulty in a petitioner demonstrating that the court can properly exercise its discretion to wind up a foreign incorporated company.</p>

4.2.2 Application for recognition and assistance

In addition to a winding up petition in Hong Kong, foreign liquidators can apply for assistance at common law by obtaining a letter of request from the courts of the company’s place of incorporation and then applying for a recognition order in Hong Kong.

Over the past few years, the Hong Kong court has been developing a series of decisions, using common law principles, to recognise and assist foreign liquidators and provisional liquidators. An application for recognition at common law is a straightforward method for a foreign IP to seek recognition in Hong Kong as it can save some costs.

In granting an order of recognition and assistance, the courts usually look at a number of factors, including whether the liquidator is properly appointed in the place of the company’s incorporation, whether the letter of request is from a jurisdiction with a similar insolvency law regime and whether the order sought is available under Hong Kong law. The Hong Kong court has developed a standard practice for this type of application in *Re*

⁵⁰ [2022] HKCFI 1789.

*Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd*⁵¹ which streamlines the process.

In determining whether to recognise foreign insolvency proceedings and provide assistance to foreign officeholders, the Hong Kong court will recognise foreign insolvency proceedings which are:

- collective in nature; and
- opened in the company's country of incorporation.

The vast majority of recognition orders have been made where the applicant was a liquidator or provisional liquidator from a common law jurisdiction (including BVI, the Cayman Islands and Bermuda). However, in *Re Kaoru Takamatsu*,⁵² the Hong Kong court recognised a Japanese winding up proceeding and granted assistance to a bankruptcy trustee appointed by the Japanese court.

Further, in *Re CEFC Shanghai International Group Limited*,⁵³ the Hong Kong court granted the recognition and assistance sought by a bankruptcy administrator appointed by the Shanghai No 3 Intermediate People's Court in the bankruptcy reorganisation of CEFC Shanghai International Group Limited. In particular, the recognition order imposed a stay on proceedings against CEFC Shanghai International Group Limited as if the company were in liquidation in Hong Kong.

The powers given to the foreign liquidator will be limited both to the extent of the law of the country in which the company was incorporated and to the laws of Hong Kong. Depending on the jurisdiction, the powers granted may be less extensive than those that would be available to a liquidator appointed by the Hong Kong court. This is significant. Section 286B of the Companies Ordinance allows a liquidator to obtain audit working papers from a company's auditors, but there is no such statutory power available, for example under Cayman Islands' insolvency law.

A request for assistance may be refused on the basis that there is no equivalent statutory, common law or equitable power available in Hong Kong law, such as a request made under a foreign jurisdiction's administration regime.

Further, as concluded by Harris J in *Re Global Brands Group Holding Limited*,⁵⁴ if the foreign liquidation is not taking place in the jurisdiction of the company's COMI at the time the application for recognition is made, recognition and assistance by the Hong Kong courts should be declined unless the application falls within one of the following categories:

- it is limited to recognition of a liquidator's authority, if appointed in the place of incorporation, to represent a company and orders that are an incident of that authority, which might be described as managerial assistance; or

⁵¹ HCMP 3560/2016 (date of decision 17 January 2017).

⁵² [2019] HKCFI 802 (date of decision 25 March 2019).

⁵³ [2020] HKCFI 167 (date of decision 13 January 2020).

⁵⁴ [2022] HKCFI 1789 (date of decision 23 June 2022).

- it is to provide recognition and limited and carefully prescribed assistance which does not fall within the first category required by a liquidator appointed in the place of incorporation as a matter of practicality.

In the case of liquidators appointed in jurisdictions with similar insolvency regimes, the assistance may extend to granting orders that give the foreign insolvency officeholders substantially similar powers to liquidators in Hong Kong. In the *Takamatsu* case,⁵⁵ in respect of the right to apply to the court for disclosure orders and ancillary relief, Harris J emphasised that this right was a right to apply only. The foreign officeholder must show that a similar right is available in the jurisdiction in which they have been appointed.

Common law assistance in Hong Kong is not restricted to liquidators that are appointed by court orders. In a landmark case, *Re Supreme Tycoon*,⁵⁶ foreign liquidators appointed in the BVI by members' resolution in a voluntary winding up sought and obtained a letter of request from the BVI Supreme Court requesting recognition of their appointment for the purpose of obtaining books and records in Hong Kong. In this case, the Hong Kong court granted the order and specifically declined to follow the *Singularis* case, where the Privy Council had suggested that the common law power to recognise and assist foreign liquidators would not extend to voluntary liquidators. While this landmark decision widened the scope of recognition and assistance to liquidators in a creditors' voluntary liquidation, the Hong Kong court confirmed that such recognition and assistance is limited to collective insolvency proceedings initiated for the benefit of creditors, which extends to a members' insolvent liquidation, but that this would not apply to a solvent voluntary appointment which is more akin to a private arrangement.

Under current Hong Kong law, provisional liquidators cannot be appointed for the sole purpose for debt restructuring. As stated in *Re Legend International Resorts Ltd*⁵⁷ and further clarified in *Re China Solar Energy Holdings Ltd*,⁵⁸ the statutory power to appoint provisional liquidators under section 193 of the CWUMPO may not be exercised for the sole purpose of restructuring a company's debt.

In recent years, however, the Hong Kong court has granted recognition and assistance sought by foreign soft-touch provisional liquidators who were appointed solely for a debt restructuring purpose – that is, the relevant company remained under the day-to-day control of the directors and management but was protected against actions by individual creditors for the purpose of restructuring its debts, and to otherwise achieve a better outcome for creditors than would be achieved by an outright liquidation.

Since 2019, a number of decisions have been made by the Hong Kong court clarifying the requirements and considerations in providing recognition and assistance to foreign soft-touch provisional liquidators, which are summarised below:

Case	Remarks
<i>Re Hsin Chong Group</i>	Although it is not permissible to appoint provisional liquidators in Hong Kong solely to restructure the debt of

⁵⁵ *Re Mr Kaoru Takamatsu* [2019] HKCFI 802.

⁵⁶ *Re The Joint Liquidators of Supreme Tycoon Limited (in liquidation in the British Virgin Islands)* (HCMP833/2017) [2018] HKCFI 277 (date of decision 8 February 2018).

⁵⁷ [2006] 2 HKLRD 192 (date of judgment 1 March 2006).

⁵⁸ [2018] HKCFI 555 (date of decision 20 March 2018).



Case	Remarks
<i>Holdings Ltd</i> ⁵⁹	<p>the company, it is permissible to appoint provisional liquidators for orthodox reasons (liquidation) and, after the provisional liquidators have familiarised themselves with the affairs of the company, for an interested party (commonly the provisional liquidators) to apply to the Hong Kong court if it is thought desirable for restructuring powers to be granted to the provisional liquidators.</p> <p>Soft-touch provisional liquidation may be recognised in Hong Kong even though there is no such type of provisional liquidation in Hong Kong.</p>
<i>Re Moody Technology Holdings Ltd</i> ⁶⁰	<p>Although Hong Kong courts may not appoint domestic soft-touch provisional liquidators, this fact cannot constitute a bar to recognising and assisting foreign soft-touch provisional liquidators.</p>
<i>Re China Oil Gangran Energy Group Holdings Ltd</i> ⁶¹	<p>The established practice of recognising foreign insolvency proceedings and granting a standard recognition order which stays proceedings against the debtor company has caused concern that a Hong Kong-based, offshore incorporated debtor subject to a Hong Kong winding up petition could outsmart creditors by simply getting an offshore soft-touch provisional liquidation order which will override Hong Kong winding up petitions.</p> <p>However, the recognition order granted in this case expressly said that it was “without prejudice to the pending winding up petition”, and accordingly the debtor companies’ ground of opposition to pending winding up petitions could not be the mere existence of foreign soft-touch provisional liquidation.</p>
<i>Re Lamtex Holdings Ltd</i> ⁶²	<p>The court will not deal with recognition and assistance sought by soft-touch provisional liquidators after a winding up petition has been presented in Hong Kong unless the agreement of a petitioner and supporting creditors has been obtained in advance.</p> <p>If the adjournment of an existing winding up petition is sought, a foreign debtor whose centre of main interests is in Hong Kong must satisfy the criteria by reference to which the Hong Kong court assesses applications on similar grounds by companies incorporated in Hong Kong. The fact that the debtor may have subsequently entered soft-</p>

⁵⁹ [2019] HKCFI 805.

⁶⁰ [2020] HKCFI 416.

⁶¹ [2020] HKCFI 825.

⁶² [2021] HKCFI 622.

Case	Remarks
	<p>touch provisional liquidation in its jurisdiction of incorporation will not assist the application.</p> <p>If the debtor fails to satisfy the criteria for adjourning the winding up petition, the Hong Kong court will not even recognise its offshore soft-touch provisional liquidation.</p>
<i>Re China Bozza Development Holdings Ltd</i> ⁶³	The Hong Kong court granted an order for recognition of the insolvency proceedings in the Cayman Islands, but refused to grant an order for assistance to the provisional liquidators because no consideration was provided by the debtor or its advisors as to whether it might be in the interests of its creditors for the debtor to be wound up.
<i>Re GTI Holdings Limited</i> ⁶⁴	<p>The Hong Kong court granted an order for recognition of the appointment of soft-touch joint provisional liquidators. However, a winding up order was subsequently made in Hong Kong which was not expected by the soft-touch provisional liquidators.</p> <p>As a consequence of the winding up order, the Hong Kong Official Receiver was appointed to act as provisional liquidator in Hong Kong. Meanwhile, the soft-touch provisional liquidators remained in place in the Cayman Islands with the primary objective of promoting a restructuring.</p>

The pragmatic approach to cross-border insolvency cases that has been adopted by the Hong Kong judiciary is evidence of the jurisdiction's willingness to be innovative and to provide assistance to liquidators from different common and civil law jurisdictions, thus allowing them to carry out their duties in a more efficient and cost-effective manner.

4.3 JIN Guidelines

The Hong Kong court has not yet adopted the JIN Guidelines, nor did it consider or discuss the Guidelines in detail in recent cross-border liquidation cases. In fact, the Hong Kong court has reinforced the importance of offshore companies being bound by the Hong Kong statutory insolvency regime and has made decisions in recent cross-border liquidation cases which were quite different to those made by courts in the place of incorporation. This can be viewed as a different approach to the JIN Guidelines.

5. Singapore

Historically, Singapore's insolvency law and practice derived from English law, and therefore has much in common with the regimes in similar common law countries such as the United Kingdom, Australia and Hong Kong. For local and foreign IPs, the primary relevant legislation in Singapore includes the Companies Act (Chapter 50) (Companies

⁶³ [2021] HKCFI 1235.

⁶⁴ [2021] HKCFI 3647.

Act), the Companies (Winding Up) Rules (CWU Rules) and the Bankruptcy (Amendment) Act 2015 (Act 21 of 2015).

In recent years, Singapore has launched a series of substantive reforms to its insolvency and restructuring laws to strengthen its handling of cross-border insolvencies.

In May 2017, a number of amendments to the Companies Act were brought into force, effecting, *inter alia*, increased access for foreign companies to the debt restructuring regime in Singapore, enhanced moratoria for companies pursuing a scheme of arrangement or undergoing judicial management, super-priority ranking for rescue financing, and the adoption of the Model Law (with some modifications) as set out in the Tenth Schedule of the Companies Act (Singapore Model Law).

Singapore's new Insolvency, Restructuring and Dissolution Bill (Omnibus Bill) was also introduced in the Parliament on 10 September 2018 and passed the same year to consolidate laws relating to insolvency and debt restructuring for both corporations and individuals into a single piece of legislation: the Insolvency, Restructuring and Dissolution Act 2018 (IRDA).

With the commencement of IRDA from 30 July 2020, the Bankruptcy Act has been repealed and relevant provisions in the Companies Act have been deleted.

5.1 Investigative / discovery powers available to local IPs

The statutory investigative and discovery powers afforded to a Singapore liquidator or provisional liquidator are contained in sections 234 and 244 of the IRDA (previously provided for under sections 285 and 286 of the Companies Act). These provisions allow a liquidator to obtain information in relation to an insolvent company's affairs and deal with the court's powers to examine on oath those persons who have relevant knowledge in respect of the business, assets and affairs of the company.

The Singapore court, upon application, empowers IPs to obtain relevant documentation in respect of a company being wound up. The court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator immediately or within such time as the court directs any money, property, books and papers in their hands to which the company is *prima facie* entitled.

The procedural rules relating to the liquidator's statutory powers of investigation and discovery are found in the CWU Rules.⁶⁵

A company's officeholders and service providers (including auditors, bankers and lawyers) are the primary source of documents and information relating to the company. The voluntary provision of documentation and information is not always forthcoming. Typical examples include situations where:

- a bank relies on section 47 of the Banking Act, which deals with banking secrecy and

⁶⁵ CWU Rules, s 41 (preparation of the statement of affairs); CWU Rules, s 49 (application for examination under the Companies Act, s 285); CWU Rules, s 50 (application for public examination under the Companies Act, s 286); and Companies Act, s 313(5) (delivery of property to liquidator).

a bank's statutory duty of confidentiality to its customers; and / or

- resistance or non-cooperation of related parties, perhaps implicated in the failure of the company or suspected of having engaged in fraud, negligence or mismanagement.

Where parties refuse to produce the documents and information, the liquidators are able to apply to the Singapore court pursuant to the above referenced sections of the IRDA.

Similar to Hong Kong, the Singapore court will typically grant orders to compel officers or relevant parties to produce information, books and records sought by Singapore liquidators. However, the liquidators are (usually) required to establish that they have attempted to voluntarily enlist the assistance of the relevant person(s) and that the relevant person(s) have refused to assist the liquidators.

In a landmark 2015 ruling, the court granted an application by the liquidators of *Celestial Nutrifoods Ltd (Celestial)* under section 285 of the Companies Act, to obtain documents in the custody, power or control of the company's auditors, PricewaterhouseCoopers LLP, which related to the insolvent company's trade dealings, affairs and property. This decision was upheld in the Court of Appeal.⁶⁶

The Court of Appeal's judgment reiterated the principles that govern the exercise of the court's power to grant orders under section 285 and the judgment also provided guidance on the corresponding procedures that should be adopted as follows:

- section 285 of the Companies Act should not be interpreted in a restrictive manner and can be used to assist a liquidator in gathering information, including information that the company may not have been aware of prior to insolvency, that would assist a liquidator in discharging his / her duties; and
- the following two-stage test is applied to decide whether to grant an application under section 285 of the Companies Act:
 - the liquidator must show a reasonable basis for the belief that the relevant person can assist in obtaining relevant information and / or documents, which are reasonably (although not absolutely) required. As observed by the court in *Re W&P Piling Pte Ltd v Chew Yin What*, the use of words such as "suspected" and "capable of giving information" signifies that the hurdle to be crossed by the liquidator is not high, and there is a general predisposition to favour the liquidator's views;⁶⁷ and
 - upon satisfaction of the first stage, the court will then seek to balance conflicting interests and make sure any disclosure ordered is not unreasonable, unnecessary or oppressive to the parties concerned.

The above landmark ruling was recently given extraterritorial effect when the Singapore

⁶⁶ *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd* (in compulsory liquidation) [2015] SGCA 20.

⁶⁷ *Liquidator of W&P Piling Pte Ltd v Chew Yin What and others* [2004] 3 SLR(R) 164.

court ruled that in the case of *Xu Wei Dong vs Midas Holdings Ltd*:⁶⁸

- the wording of section 285 of the Companies Act, its objective and the application of local case law all point to the provision having extraterritorial effect;
- while section 285 is silent on the applicable geographical scope, it is “couched in sufficiently wide terms to cover a person or entity based in a foreign jurisdiction”. Further, it is “doubtful that in this day and age” that extra-territoriality must be stated expressly in all contexts, noting that “[t]he global nature of commerce, the presence of listed entities from overseas, and even data storage practices mean that information is often located elsewhere”; and
- limiting the operation of the section to material and persons within the territory will hamper the proper operation of liquidation, whereby a liquidator’s investigation into a company would be easily thwarted by the person removing himself / herself from the jurisdiction.

Pursuant to section 244 of the IRDA, a judicial manager, Official Receiver, liquidator, or a creditor or contributory of the company can apply to the court to summons a party and enquire into a company’s dealings.

5.2 Recognition and assistance granted to foreign officeholders

With the adoption of the Singapore Model Law in May 2017, there is now more transparency and certainty for foreign IPs seeking recognition and ancillary relief in Singapore through a streamlined and internationally accepted framework.

A foreign IP can apply to the Singapore court for recognition of foreign insolvency proceedings by providing a certified copy of the decision commencing the foreign insolvency proceedings, a certified copy of the decision appointing the foreign IP and a statement which discloses all known insolvency proceedings in respect of the debtor.

Recognition of foreign IPs will be granted on the basis that the debtor’s (and its related companies’) COMI is determined to be in that foreign place. The determining factors include places of business and incorporation, the location of substantial assets and the governing law of loans or other transactions.

The common law COMI test is not unfamiliar to the Singapore court. In fact, even before Singapore adopted the Model Law, the Singapore court, in the case of *Re Opti-Medix Ltd (in liquidation) and another matter (Opti-Medix)*,⁶⁹ recognised a foreign insolvency proceeding where the COMI for the companies concerned was determined to be in Japan, notwithstanding the fact that the place of incorporation of the companies was in the BVI.

The judge in *Re Opti-Medix* also emphasised:

“There has been a general movement away from the traditional, territorial

⁶⁸ [2022] SGHC 268.

⁶⁹ *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108.

focus on the interests of the local creditors, towards recognition that universal cooperation between jurisdictions is a necessary part of the contemporary world. Under a universalist approach, one court takes the lead while other courts assist in administering the liquidation”.

At the request of the foreign IP, the court may grant relief providing similar powers to those afforded to a Singapore liquidator, including the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s property, affairs, rights, obligations or liabilities pursuant to article 21.1(d) of the Tenth Schedule of the Companies Act.

The Singapore court is, however, permitted to refuse recognition if this would be “contrary” to the public policy of Singapore. Under the Singapore Model Law, the threshold for the Singapore court to deny recognition on this basis is lower than the Model Law. Specifically, the standard under the Model Law is “manifestly contrary” to public policy, while the Singapore Model Law omits the word “manifestly” and allows the Singapore court to invoke this exclusion on a lower standard.

In the first reported decision from the Singapore court on the recognition of foreign IPs under the Singapore Model Law, in *Re Zetta Jet*, the Singapore court relied on the public policy bar to grant limited recognition of Zetta Jet’s United States trustee.⁷⁰ The limited recognition ruling was on the basis that the United States proceedings were commenced in breach of a Singapore court injunction. However, in an effort to afford fairness to foreign IPs, the limited recognition granted to the United States trustee was for the purpose of allowing the trustee to apply to set aside or appeal the Singapore injunction.

In July 2018, the Singapore injunction was set aside by consent of the parties and the United States trustee applied for full recognition of the United States Chapter 7 proceedings and of the trustee as the foreign representative in Singapore.

Article 17(2) of the Singapore Model Law provides that the foreign proceeding must be recognised as a foreign main proceeding if it is taking place in the State where the debtor has its COMI.

The Singapore High Court held that COMI of the Zetta entities was the United States, and that their United States Chapter 7 proceedings should therefore be recognised as foreign main proceedings in Singapore.⁷¹ The presumption under article 16(3) of the Singapore Model Law that the place of the debtor company’s registered office is its COMI is only a starting point and can be displaced by the presence of other factors pointing towards some other location.

The key factors in this case – location from which control and direction was administered, location of creditors, and corporate representations to third parties – pointed to the United States as the COMI.

It is well established that the type of recognition granted by the recognising court under the Model Law will depend on whether the originating proceedings are “foreign main”

⁷⁰ *Re: Zetta Jet Pte Ltd and others* [2018] SGHC 16.

⁷¹ *Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53.

or “foreign non-main” proceedings, which in turn hinges on the COMI of the insolvent entity.

In the recent decision of *Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties) (Rooftop Group)*,⁷² Justice Abdullah affirmed the position in *Re Zetta Jet* with respect to determining a company’s COMI. The decision confirms that when there are insufficient factors present to tip the balance, the Model Law presumes that a company’s COMI is the country it was incorporated in. The Singapore High Court recognised the United States bankruptcy proceedings of Rooftop Group International Pte Ltd, a Singapore-incorporated company, with its business situated largely in the United States.

The court in this case found that the various factors advanced by the first applicant were insufficient to displace the presumption of the company’s COMI being in Singapore.

The court found that, as a consequence of Rooftop Group’s COMI being in Singapore, the United States proceedings were not foreign main proceedings. Nonetheless, the court ruled that recognition and assistance could be granted to the United States proceedings as foreign non-main proceedings within the scope of assistance under article 21 of the Model Law.⁷³

The Singapore court does not make a distinction between voluntary and compulsory liquidations when it considers whether to recognise and assist with a foreign insolvency proceeding, as observed in the (pre-Singapore Model law) case of *Re Gulf Pacific Shipping Ltd (in creditors’ voluntary liquidation) and others*.⁷⁴

In that case, Gulf Pacific, a Hong Kong incorporated and registered company, was put into creditors’ voluntary liquidation in Hong Kong.

The Hong Kong liquidators of Gulf Pacific sought copies of bank statements from ABN AMRO Bank NV Singapore Branch (ABN Bank) through which Gulf Pacific appeared to have held a bank account. ABN Bank requested the liquidators obtain a court order recognising their appointment and sanctioning their request. The liquidators subsequently applied to the Singapore High Court arguing that as recognition was sought by the liquidators appointed in the place of incorporation (Hong Kong), no question in relation to the identification of the common law COMI arose. The only issue that required some deliberation was whether recognition should be denied as the company was liquidated through a voluntary winding up. The applicants cited a number of decisions to support their application, including *Re Beluga*⁷⁵ and *Re Opti-Medix*.⁷⁶

The application for recognition was granted, the court noting that recognition was being sought because of the need for information about Gulf Pacific’s bank accounts with ABN Bank rather than to realise assets in Singapore. The court found that it did not adopt the

⁷² *Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)* [2019] SGHC 280.

⁷³ INSOL International News Update December 2019, Highlight Article, “Singapore’s Second Model Law Decision”, Debby Lim, Fellow, INSOL International.

⁷⁴ *Re Gulf Pacific Shipping Ltd (in creditors’ voluntary liquidation) and others* [2016] SGHC 287.

⁷⁵ *Beluga Chartering GmbH (in Liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815.

⁷⁶ *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] 4 SLR 312.

distinction between voluntary and compulsory liquidation, contrary to the findings in *Singularis* that common law powers of assistance to foreign liquidation did not extend to voluntary winding up. The court, in its findings, favoured:

“The internationalist approach, which views the orderly distribution of assets and resolution of affairs as the primary aim underlying cross-border insolvency proceedings. Consequently, there ought to be no distinction between a foreign voluntary liquidation and a foreign compulsory liquidation involving officers of a foreign court.”

Other options available to the foreign liquidators to obtain documents from Singapore based persons in Singapore include Norwich Pharmacal applications and pre-action discovery.

5.2.1 Norwich Pharmacal application

The Singapore Court allows for a Norwich Pharmacal application under order 24 rule 6(5) and order 26A rule 1(5) of the Rules of Court. In addition to the usual three requirements of a Norwich Pharmacal order (see section 2.1.3 above), there must be credible evidence that the application has a nexus to Singapore.

In *Re Intas Pharmaceuticals*,⁷⁷ the plaintiff, Intas Pharmaceuticals Limited (Intas), was an India incorporated company in the business of manufacturing, marketing and distributing pharmaceutical products. The defendant, DealStreetAsia Pte Ltd (DealStreetAsia), was a Singapore incorporated company which operated a financial news website.

The parties' dispute centered on an article published on the defendant's website on 21 December 2015. The article reported that a competitor of the plaintiff was in “early talks” to acquire the plaintiff's business.

Intas denied the contents of the article and, through its solicitors, wrote to the defendant seeking an explanation concerning the process and sources of the information. The parties could not come to an amicable agreement and legal proceedings ensued.

The Singapore court ruled against the plaintiff's application to compel the defendant to disclose the identity of the latter's sources on the grounds that: firstly, there was no evidence to suggest the potential defendants disclosed the information in Singapore; and secondly, there was insufficient evidence of a real possibility that the plaintiff would bring a claim against the potential defendants in Singapore.

5.2.2 Pre-action discovery

Order 24 rule 6 of the Rules of Court allows for a pre-action discovery application to be made before the commencement of proceedings. However, the Singapore court is cautious not to allow applications to turn into “fishing expeditions” or to be sought in order to develop or finesse the applicant's case.

⁷⁷ *Intas Pharmaceuticals Ltd v DealStreetAsia Pte Ltd* [2017] SGHC 74.

In *Re Chin Mun Fong*,⁷⁸ the plaintiff (Ms Chin) was a private banking client of Standard Chartered Bank (defendant). She opened an account with the defendant by signing an Account Opening Application Form that was subject to the Standard Chartered Private Bank General Terms and Conditions. Certain investments were made and Ms Chin alleged the defendant had breached its contractual obligations to her, and further that the defendant's failure to properly advise her was a breach of duty giving rise to a claim in the tort of negligence.

Ms Chin filed a pre-action discovery application for the voice logs which would enable her to evaluate whether she had a good cause of action (under contract and/or tort) against the defendant.

The defendant argued that the voice logs did not constrain Ms Chin from starting proceedings or making a claim. Further, the defendant stated that the documentary records it had already provided gave Ms Chin sufficient information to start proceedings and to make a claim. Therefore, the defendant claimed pre-action discovery should be refused.

The Court of Appeal found that Ms Chin had sufficient facts to formulate her case and allowing the discovery would only give Ms Chin the benefit of determining whether she was likely to succeed at trial. The Court of Appeal consequently dismissed the pre-action discovery application.

5.3 JIN Guidelines

On 1 February 2017, Singapore (with the United States Bankruptcy Court) adopted the JIN Guidelines, comprising judges from Australia, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, England and Wales, Singapore and the United States. The JIN Guidelines primarily aim to facilitate the preservation of value and the reduction of legal costs, and it sets out principles for communication, joint hearings and other means of coordination between courts in different jurisdictions.

6. United States of America

The United States is home to the largest single economy in the world and has a well-established and tested statutory framework: the United States Code, a consolidation and codification by subject matter of the general and permanent laws of the United States. Insolvency and court-supervised restructuring, known as bankruptcy in the United States, is covered in Title 11 of the United States Code, which is also known as the "Bankruptcy Code". A separate trial court judicial system for cases and proceedings under the Bankruptcy Code has been established, with each Federal Court District having its corresponding United States Bankruptcy Court. Appeals from each of the Bankruptcy Courts are first heard by the corresponding United States District Court, which otherwise is the trial court for most of the other federal proceedings.

The Bankruptcy Code is supplemented by the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules), in which the United States Supreme Court has established the rules and procedures governing cases and proceedings under the Bankruptcy Code before

⁷⁸ *Chin Mun Fong v Standard Chartered Bank* [2012] SGCA 38.

the Bankruptcy Courts. Most of the discovery rules under the Bankruptcy Code incorporate, by reference, the Federal Rules of Civil Procedure (Federal Rules), which govern litigation in the United States Federal District Court system.

The United States continuously focuses on its reputation for being a user-friendly jurisdiction for foreign companies and individuals, including persons such as IPs appointed by duly recognised orders from foreign courts. In 2005, the United States was one of the first jurisdictions to adopt a modified version of the Model Law by enacting Chapter 15 of the Bankruptcy Code. This instituted powerful court procedures for achieving United States recognition of non-United States proceedings and facilitated court-monitored fact-finding investigations in the United States by foreign IPs.

The decision regarding which of the 94 Federal Judicial Districts a foreign IP should file a Chapter 15 application in is typically determined by factors similar to those for establishing COMI under the Model Law. When making an application, therefore, a foreign IP may have some choice as to local jurisdiction and there are rules seeking to minimise systemic abuse. The Southern District of New York (Manhattan and White Plains) and the District of Delaware are two of the most popular venues for Chapter 15 filings, due to the well-established case law and procedures developed by these courts as, historically, two of the most significant venues for large corporate bankruptcy cases.

6.1 Investigative / discovery powers available to local IPs

The powers typically granted to foreign IPs under their home insolvency laws are essentially the same as those granted to: (i) trustees under the liquidation provisions of Chapter 7 of the Bankruptcy Code; or (ii) the company or a trustee operating under Chapter 11. While a trustee may be appointed to a company which has filed a petition under the reorganisation provisions of Chapter 11 of the Bankruptcy Code, the company reorganising under Chapter 11 usually retains such powers as a “debtor in possession” (DIP). Under Chapter 11, IP-like powers may also be exercised by the official unsecured creditors’ committees or court-appointed examiners.

6.1.1 Bankruptcy Rule 2004

Bankruptcy Rule 2004 provides for the broad examination of debtors and other interested parties availing themselves of the protection of the United States Bankruptcy Court system. This examination can be both through the examination of witnesses and the production of documents by witnesses. A broad scope of examination is often permitted, with courts stating that Bankruptcy Rule 2004 may be “legitimately compared to a fishing expedition.”⁷⁹ If necessary, a subpoena may be served on a witness under Bankruptcy Rule 9016 to compel the examination or the production of documentation required.

Section 542 of the Bankruptcy Code covers the turnover of property to the trustee or DIP. The section provides that, after notice and a hearing, the court may order an attorney, accountant or other person that holds recorded information, including books, documents, records and papers, relating to the debtor’s property or financial affairs, to turn over or disclose such recorded information to the trustee.

⁷⁹ See *In re Drexel Burnham Lambert Group*, 123 B.R. at 711.

Section 108 of the Bankruptcy Code gives the trustee or DIP two years from the petition date to commence an action under the Bankruptcy Code. Accordingly, an extension of this period by “tolling” agreements is commonly used to avoid the expiry of related non-bankruptcy statutes of limitation pending investigations, and to avoid the premature commencement of lawsuits before investigations can be completed.

6.1.2 Federal Rules

Ironically, the broad reach of Bankruptcy Rule 2004 is limited once litigation, either in the Bankruptcy Court or elsewhere, has commenced. At that point, discovery would be limited to the rules applicable to the litigation.

Once an adversary proceeding in front of the Bankruptcy Court has been commenced, the Bankruptcy Rules incorporate by reference, with some modifications, Federal Rules 26 to 37 governing “disclosure and discovery” matters such as interrogatories, motions or requests for the production of documents, requests for admission, and depositions. Unless otherwise limited by court order, parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defence and is proportional to the needs of the case.

An assessment of the level of disclosure and discovery is made considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.⁸⁰ Recognising that most records and communications today are in electronic format, the Federal Rules now contain guidance specific to the discovery of electronically stored information.⁸¹

The decision as to whether to pursue discovery or investigations against a third party, as opposed to a Bankruptcy Rule 2004 examination, is usually driven by the question of whether an adversary proceeding or contested matter has commenced. Once an adversary proceeding is commenced, a discovery exercise should be undertaken under the Federal Rules, not Bankruptcy Rule 2004, as was clarified in 2017 by United States Bankruptcy Judge Stuart Bernstein in the Southern District of New York, in the Chapter 11 case of *In Re: Sun Edison Inc. et al.*⁸²

6.2 Recognition and assistance granted to foreign officeholders

Foreign IPs have access to a number of investigative tools in the United States not available to them in their local jurisdictions. There are three primary ways in which foreign representatives can gain access to recognition and assistance through the United States Federal Court system to obtain information and other investigatory relief in insolvencies: Chapter 15, section 1782, and Chapter 7 or 11, as detailed below.

⁸⁰ FRCP, r 26.

⁸¹ K&L Gates, “E-Discovery Amendments to the Federal Rules of Civil Procedure Go into Effect Today”, 1 December 2006.

⁸² Case No. 16-10992 (SMB).

6.2.1 Bankruptcy Code Chapter 15

Chapter 15 may be commenced by the “foreign representative” of a foreign debtor (a person or body authorised in a foreign proceeding to administer the reorganisation or liquidation of the foreign debtor's assets or affairs, on an interim basis or otherwise). The United States courts have ruled that a person duly appointed by a board of a company seeking court approval for a scheme of arrangement qualifies to be considered a foreign representative, as are liquidators and administrators appointed by foreign courts in foreign corporate restructuring or insolvency proceedings.

Eligibility as a foreign debtor (under any chapter of the Bankruptcy Code) is covered under section 109(a) of the Bankruptcy Code as follows:

“Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.”

Eligibility can be gained through demonstrating having a place of business or property in the United States, but this is not specifically defined or quantified and, as such, even a tenuous connection with tangible or intangible property may suffice.⁸³ For example, in the Chapter 15 case of *Re B.C.I. Finances Pty Ltd*,⁸⁴ Bankruptcy Judge Lane found that, among other things, the mere act of sending a USD \$1,250 retainer cheque to New York counsel was sufficient to establish jurisdiction.⁸⁵ In the matter of *Re Berau Capital Resources Pte Ltd*,⁸⁶ recognition was given because a foreign debtor's bond indenture specified New York law on USD denominated bonds, which the judge deemed sufficient “property in the US”.⁸⁷

Once eligibility is established and the foreign main proceeding recognised, Chapter 15 sets out a framework for cooperation between United States and foreign courts. Where there is more than one bankruptcy proceeding taking place simultaneously in the United States and foreign jurisdictions, the United States Bankruptcy Court will seek to coordinate and harmonise relief in tandem with the court governing the non-United States case. There are three key elements of this framework.

First, section 1521(a) of the Bankruptcy Code allows United States Bankruptcy Courts to issue subpoenas, orders to turn over assets and stays on pending actions with respect to the debtor and its United States located property, as well as compel the examination of witnesses, the delivery of information and any other orders deemed necessary. Interim relief may be available while eligibility is being determined if the petitioner can demonstrate that “relief is urgently needed.” Automatic relief is possible when the foreign proceeding is recognised as a foreign main proceeding. Otherwise, discretionary relief is possible.

⁸³ Weil Bankruptcy Blog, “Section 109(a) – Filing a Chapter 11 Case for a Foreign Business”, 8 June 2015.

⁸⁴ 83 BR 288 (Bankr SDNY 2018)

⁸⁵ Leslie A. Berkoff, New York Law Journal “Drawing the Borders on Chapter 15 Bankruptcy”, 21 September 2018.

⁸⁶ 540 B.R. 80 (Bankr. S.D.N.Y. 2015)

⁸⁷ http://www.nysb.uscourts.gov/sites/default/files/opinions/259411_34_opinion.pdf.

Second, once foreign main status is granted, the foreign debtor's representative will have virtually all the litigation powers of a Chapter 11 trustee or debtor in possession. All provisions of the Bankruptcy Code are available to the foreign representative except those concerning avoidance powers (for example, voiding pre-bankruptcy transactions and asset transfers).

Lastly, the two-year extension of time under section 108 of the Bankruptcy Code is also available to foreign representatives under section 103(a) of Chapter 15.⁸⁸

While relief under Chapter 15 harmonises United States discovery and investigation powers with the relevant local jurisdiction, a recent ruling *In re Platinum Partners Value Arbitrage Fund (International) Limited vs. Cohn Reznick*⁸⁹ clarified the extent to which harmonisation can occur.

In this case, the court-appointed joint official liquidators (JOLs) in the Cayman Islands liquidation of the Platinum Partners Value Arbitrage Fund (International) Limited (Platinum) obtained Chapter 15 foreign main proceeding status for the Cayman liquidation. The JOLs successfully argued that Platinum's ex-auditor, Cohn Reznick, must comply with the JOLs' subpoena to turn over certain documents withheld from the initial discovery request, even though equivalent powers of turnover may not have been readily available to the foreign representatives in their Cayman Islands home jurisdiction.

In its ruling, the judge explained that while the turnover of the requested material was not certain in the Cayman Islands, the United States court had the authority to grant a foreign representative the sort of power which would typically be obtainable by a trustee or debtor in possession in the United States Bankruptcy Court. The court also stated that Cayman courts take a permissive, and indeed, solicitous, view of a Cayman litigant's efforts to utilise United States discovery procedures when possible, so long as the litigant is not acting oppressively or abusing the process of the Cayman courts. Accordingly, courts in the United States routinely preside over Cayman-based Chapter 15 cases in which these courts have occasion to observe the active contributions of Cayman jurists and practitioners to the development of international insolvency law and practice and their dedication to principles of comity. Since Cayman law neither prohibits nor is hostile to the discovery which was being sought under United States law, the court decided that the principles of comity in the case decisively weighed in favour of granting the motion.⁹⁰

An ancillary Chapter 15 filing is usually less expensive than initiating a Chapter 11 bankruptcy case, since it is a more abbreviated process, and, in contrast to a Chapter 7 bankruptcy where a new trustee is appointed, Chapter 15 ensures the foreign IP's continued control over the discovery process. As a result, Chapter 15 has become an efficient tool for foreign companies and IPs seeking to conduct discovery and other fact-finding in the United States. In addition, Chapter 15 has proved to be particularly effective, as most Chapter 15-related requests are considered for approval by Bankruptcy Courts.⁹¹

⁸⁸ Fairfield Sentry Limited Case No. 10-13164 (BRL)

⁸⁹ No. 16-12925, 2018 WL 1864931 (Bankr. S.D.N.Y. Apr. 17, 2018)

⁹⁰ Memorandum Decision Case No. 16-12925 (SCC); and for Luxor (2009) CILR 553.

⁹¹ An Empirical Look at Chapter 15, Prof. Jay Westbrook.

6.2.2 **United States Code section 1782**

The United States codified its interpretation of the 1972 Hague Evidence Convention treaty as section 1782 of Title 28 of the United States Code (Judiciary and Judicial Procedure). This allows a foreign or international tribunal or other interested persons to seek evidence in the United States, and through the court compel testimony, production of documents and other matters.

Section 1782 can be a powerful tool in this regard, with the appellate court governing the Southern District of New York once explaining that “Congress purposefully engineered section 1782 as a one-way street. It grants wide assistance to others but demands nothing in return”.⁹²

A foreign or international proceeding before a tribunal does not need to have commenced, as litigation merely “within reasonable contemplation” is sufficient for a party to invoke section 1782. This process may be used in relation to any civil or criminal proceeding in a foreign or international tribunal (and certain arbitrations, depending on the circumstances). The applicable United States District Court will be where the desired evidence resides.

Consistent with United States practice in general, pre-trial discovery is allowed. In *Intel Corp. v. Advanced Micro Devices, Inc.*, the court determined it need not consider whether the evidence sought in discovery would be allowed in the forum country, such that foreign practitioners may indeed have greater discovery powers in the United States than they enjoy in their home jurisdiction.⁹³

6.2.3 **Bankruptcy Code Chapter 7 or Chapter 11**

A foreign company’s ability to directly file a Chapter 11 or Chapter 7 bankruptcy proceeding in the United States may allow the company, as a DIP, or a trustee on the company’s behalf, to exercise discovery and other restructuring powers not available to a foreign IP in its local jurisdiction.

Chapter 7, as the liquidation provision of the Bankruptcy Code, has a panel trustee appointed to administer the debtor’s estate. Accordingly, a foreign representative could not be appointed as trustee, and would therefore be required to cede control over the United States portion of a foreign case to the Chapter 7 trustee.

A Chapter 7 trustee supersedes the authority of any corporate board, as well as the foreign representative. However, Chapter 7 can be useful where a foreign representative does not want to expend significant resources addressing United States assets or investigating to find United States assets or claims and causes of action, as the costs of the Chapter 7 trustee are borne by the debtor’s bankruptcy estate. Since the debtor’s Chapter 7 estate is a separate entity, distinct from that under the foreign representative’s authority (the company itself), careful consideration must be taken with respect to assets jointly owned, held, claimed or controlled by multiple insolvency estates.

⁹² US Court of Appeals, Second Circuit IN RE_ the Application of EUROMEPA S.A. _ FindLaw

⁹³ <https://supreme.justia.com/cases/federal/us/542/241/>

In contrast, through a Chapter 11 filing, the board would retain control over the debtor entity, which, as a DIP, would then have all the powers (and obligations) of a trustee. Under Chapter 11, the Bankruptcy Code would effectuate an automatic global stay on all litigation respecting the company and any enforcement actions against its assets. However, there are some downsides to consider. Chapter 11 could prove to be considerably more complicated and expensive than filing (or maintaining) the restructuring or insolvency case in the foreign country and seeking ancillary access to the United States court system through Chapter 15.

While a United States Bankruptcy Court might be an effective forum to aid the foreign representative pursuing assets (including litigation claims) in the United States or against entities with connections to the United States, it may be much less effective where considerable assets (including litigation claim targets) are located in a foreign jurisdiction with minimal to no contacts to the United States. Also, depending on the circumstances, some foreign courts might not recognise the cross-border reach of the United States Bankruptcy Court.

Though Chapter 15 has become the preferred tool in cross-border insolvencies, section 1782 may still be a useful discovery tool where Chapter 15 is not possible, is undesirable (due to costs or the fact that other issues not related to discovery may be raised by objecting parties) or is declined for some reason. For example, in the *Bear Stearns* case, Chapter 15 was denied as both foreign main and foreign non-main proceedings, but section 1782 remained as a tool to the foreign representative to compel discovery.⁹⁴

COMI remains key to the eligibility of Chapter 15 for a foreign IP. While Chapter 15 does not define COMI, the United States has demonstrated increasing reluctance, such as *In Re SPhinX*, to accept just location of a company's registered office if no material substance exists. The concept of COMI may become even less transparent with the increasing importance of stateless electronic transactions like cryptocurrencies.⁹⁵

The Bankruptcy Court may also decline a Chapter 15 application where it decides it is not a convenient forum for the debtor's creditors and primary parties in interest or where the Court believes that the debtor's selection of jurisdiction is the result of improper forum shopping or is manifestly contrary to United States public policy. For example, in the recent *Bank of Anguilla* case, the United States Bankruptcy Court gave deference to administrative proceedings in Anguilla.⁹⁶ *In Re Toft* saw denial because the relief requested by the foreign court would not typically be granted under United States law or would in fact be in contravention of United States law.⁹⁷

While Chapter 15 specifically excludes the avoidance powers for preferential or fraudulent transfers, these powers are normally available to a Chapter 7 trustee or a DIP or trustee resulting from a Chapter 11 filing. Avoidance powers in various jurisdictions can vary greatly. Foreign representatives seeking to utilise United States avoidance powers are required to file a Chapter 11 petition on behalf of the debtor company. If the foreign representative seeks to use the avoidance powers available under its home laws, it can seek the United States Bankruptcy Court's application of that law through the Chapter 15 process.

⁹⁴ New York Law Journal: Volume 238-No.64.

⁹⁵ New York Law Journal: Volume 238-No.64.

⁹⁶ http://www.nysb.usCourts.gov/sites/default/files/opinions/271210_89_opinion.pdf.

⁹⁷ 453 B.R. 186 (Bankruptcy Court S.D.N.Y. 2011).

6.3 JIN Guidelines

On 1 February 2017 the U.S. Bankruptcy Court for the District of Delaware announced that it had formally implemented the JIN Guidelines. Since then, the Guidelines have been adopted in some form by the U.S. Bankruptcy Courts for the Southern District of New York (17 February 2017; General Order M-511) and the Southern District of Florida (1 February 2018; Administrative Order 2018-03).

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