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The belle époque of common law universalism is not over — in fact, it is about to begin

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(November 8, 2021) - Harneys' Ian Mann discusses international insolvency law, specifically examining a common law option as an alternative to the Singapore Model Law.

Given the increasingly international nature of insolvency law, navigating the questions (coined "threading the needle") over the extent to which foreign insolvency proceedings/judgments should be recognised and/or given effect in jurisdictions outside those in which they are being mainly conducted can prove challenging.

The UNCITRAL Model Law on Cross Border Insolvency 1997 (*Model Law*), for those jurisdictions that have signed-up, makes it compulsory to give recognition and assistance to a foreign insolvency process based in the Centre of Main Interest (*COMI*) of the debtor; and allows for "discretionary" assistance to be given to "non-main" centres of interest.

In either case, there is a strong normative framework for, in essence, "being helpful." Justice Aedit Abdullah put it well when he held that:

"Finally, I bear in mind the preamble to the Singapore Model Law, emphasising cooperation and efficiency between the courts of states involved in cross-border insolvency, and Art 8 of the Singapore Model Law, which requires regard to be paid to the Singapore Model Law's international origin and the promotion of uniformity in its application." [1]

After all, it is intellectually without doubt that the most efficient recovery for creditors is in theory by a unitary Court dealing with the assets of the debtor universally — saving costs of multiple layers of professionals. [2]

It is increasingly the view of insolvency judges that there is an element of "good citizenry" in recognising foreign insolvency processes. Practical and parochial realties of the sovereignty of nation states sometimes, of course, justifiably impedes this lofty paradigm.

For those jurisdictions that have not signed up to the Model Law, remarkably innovative and ingenious ways have been found to "be helpful" using the old common law power to recognise foreign insolvency processes, largely achieving the same result as the Model Law.

The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element. *In re African Farms Ltd* [1906] TS 373, a Transvaal case where Sir James Rose Innes recognised an English winding-up by ordering what amounted to an ancillary liquidation in the

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This formerly obscure 1906 case was cited with approval by the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers* (Bermuda) [2014] UKPC 3 whereby common law universalism was resuscitated — following some admitted seatbacks and trimming in *Rubin v Eurofinance SA* [2012] UKSC 46.

As a regional centre for restructuring, the case law that has developed in the Hong Kong court using common law assistance, is modern, practical and cutting edge. [4]

However, sensationalists and doomsters cite the recent Hong Kong cases of *Lamtex* [2021] HKCFI 622, *Ping An* [2021] HKCFI 651, *China Bozza* [2021] HKCFI 1235 and *Victory City* [2021] HKCFI 1370 as indicia of the death knell of the belle époque of common law universalism, and the commencement of a retreat into a less enlightened and more insular era. Such an analysis is wrong and ignores the complexity, context and nuance of this line of cases.

In fact, these cases concerned abusive applications for what were in truth nothing more than application for stays of existing Hong Kong winding-up proceedings. Last minute, insincere applications for "recognition of a foreign light touch PL" were dressed up as an excuse to delay the inevitable winding-up proceeding in Hong Kong.

The cases had a number of ubiquitous discerning features, including:

(1) defensive applications by the companies in their Offshore jurisdictions, *only after* steps towards winding-up were taken by their creditors (three petitions and one statutory demand);

(2) the offshore applications were made on little or no notice to the creditors in question;

(3) there was little evidence of the viability of any restructuring, or that substantive efforts had been made towards one, including any meaningful engagement with creditors.

As Mr. Justice Harris put it in *Bozza* (at paragraph 25):

"Practitioners should be alive to the need for evidence to be filed that provides an informed and candid description of a company's financial position and what is envisaged to be the most likely solution to its problems … Simply referring to a possible "debt restructuring" and treating the expression as a kind of magical incantation, the recitation of which will conjure up an adjournment of the petition is as inadequate as it is facile."

In *Bozza*, the companies' directors appeared not to appreciate that, upon entering into the zone of insolvency, their fiduciary duties became owed to the companies' creditors. For example, in *Bozza*, Mr. Justice Harris observed with concern, a directors' resolution that referenced the offshore provisional liquidation (*PL*) application being in the interests "of the company and its shareholders as a whole", rather than the interests of creditors.

These cases do not detract from the amazing work of the judiciary of the Hong Kong and the offshore courts, and practitioners, to champion "being helpful" and "good citizenry" in the name of efficient

In fact, it is proof of proper safeguards and a maturity of the application of common law universalism. They further make no criticism of the phenomenal utility of the offshore PL in restructurings where the Hong Kong courts have a central role to play, perhaps because the debtor has its COMI in Hong Kong — although it has become common practice to refer to COMI, a Model Law term of art, in common law cases where no such term of art exists, it is rather incongruous, at best.

One fascinating result of these cases, however, is that the abuses of process by litigants before the Hong Kong court may well result in greater scrutiny of those litigants in seeking to appoint PLs offshore also.

It is worth noting that in the Cayman Islands at least, it is hoped that the light touch PL regime is about to be added to by the possible enactment of a company-led restructuring officer regime which will not require the filing of a winding-up petition.

Following this line of Hong Kong cases, in *In re Midway Resources International* (Unrep, Grand Court, 30 March 2021), Justice Segal of the Grand Court of the Cayman Islands, although not expressly referring to *Lamtex*, granted an application to appoint "light touch" restructuring PLs in order to assist with and facilitate restructuring negotiations, to give the company and the PLs the opportunity to stabilise the position, and to seek constructive discussions with the creditors and the funder — whose continued support was critical to the process.

Any court needs to weigh the viability of a restructuring proposal in order to justify appointing a restructuring PL, and then also has to consider whether, even if a restructuring appears viable, the management should have any part in it.

Creditor views will be of paramount importance. This is to avoid the issue identified in the recent Hong Kong judgment of *Lamtex* where Mr. Justice Harris wound-up a foreign Bermudian company, listed on the HKEX, that had already been placed into "light touch" provisional liquidation in Bermuda, by reason of a "scanty in the extreme" restructuring proposal used as a means to avoid a winding up.

In *Midway Resources International* it was held that (citing *In re Sun Cheong Creative Development Holdings Limited* (Unrep, Grand Court, 20 October 2020)) in light touch restructuring cases, it was appropriate for the court to rigorously scrutinise the restructuring proposal:

"[There] is a three-stage test…: (i) that the [PLs] should be satisfied that a refinancing and/or sale of the [company's business] as a going concern is likely to be more beneficial to the creditors that a liquidation realisation of the [company's] assets; (ii) that there is a real prospect of a refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; and (iii) that in the circumstances it is in the best interest of creditors to try to achieve such a refinancing and/or sale as a going concern."

And "[w]here the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted that it can appoint [PLs] for the purpose of preparing a report on the prospects of success of a restructuring plan."

and that the Restructuring Proposals are coherent and appear to offer (the) creditors an apparently attractive alternative to an insolvent liquidation of (the company)."

Whether *Midway* now goes too far in requiring a debtor to establish the viability of a restructuring at too early a stage remains to be seen. This Cayman Islands line of case law is not new, but it is a timely reminder to practitioners to be prepared for a tough ride before restructuring PLs will be appointed in the Cayman Islands. This may in fact put them in good stead for any further application for recognition of the PL in a court such as Hong Kong, and lead to better quality restructurings and a belle époque of recognition.

Notes

1 Para 38 of *Re Zetta Jet Pte Ltd* [2019] SGHC 53.

2 *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26.

3 *In re African Farms Ltd* [1906] TS 373, at 377.

4 *See A Co v B* [2014] 4 HKLRD 374; *Re Sinoking Holdings Limited* (HCMP 2080/2014); *Re Centaur Litigation SPC* (HCMP 3389/2015); *Bay Capital Asia Fund, LP* (HCMP 3104/2015).

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