


One Step Further: Mutual Recognition of and Assistance to Insolvency Proceedings between Hong Kong and Mainland China

On May 14, 2021, the Secretary for Justice of Hong Kong and Vice-President of the Supreme People's Court (SPC) of China signed a [record of meeting](#) (the Record) concerning mutual recognition of and assistance to insolvency proceedings between the courts of Hong Kong and mainland China, with a view to enhance judicial cooperation between the two jurisdictions.

I. RECOGNITION OF AND ASSISTANCE TO MAINLAND INSOLVENCY PROCEEDINGS IN HONG KONG

The recognition of mainland Chinese insolvency proceedings in Hong Kong already existed before the Record. In 2020, the Court of First Instance in Hong Kong granted recognition of and assistance to administrators appointed for insolvency proceedings in mainland China in *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676 (Shanghai Huaxin case), based on the common law principles of recognizing foreign insolvency proceedings. The court's willingness to grant recognition and assistance to Mainland-appointed liquidators was later confirmed in *Re The Liquidator of Shenzhen Everich Supply Chain Co, Ltd (in liquidation in the People's Republic of China)* [2020] HKCFI 965 (Shenzhen Nianfu case).

Since this first step, made by a Hong Kong court in the above decisions to recognize insolvency proceedings in mainland China, there have been queries as to how Mainland courts approach the recognition of Hong Kong insolvency proceedings, given the close business connections between the two jurisdictions. The arrangement



provided by the Record has provided some answers by taking another step forward.

To facilitate the implementation of this new mechanism, Hong Kong issued a [practical guide](#) on the procedures for a Mainland administrator's application to the Hong Kong court for such recognition. Generally speaking, the procedural steps include (1) seeking a letter of request from the relevant Mainland court and (2) application to the Hong Kong court by way of an originating summons on an *ex parte* basis supported by affidavit/affirmation evidence.


II. RECOGNITION OF AND ASSISTANCE TO HONG KONG INSOLVENCY PROCEEDINGS IN MAINLAND CHINA

To bring more clarity and guidance regarding the arrangement under the Record in mainland China, the SPC issued an [opinion](#) setting forth the scope of the arrangement and key procedural issues, and designating Shanghai, Xiamen, and Shenzhen as the pilot areas for implementing the arrangement, with the following considerations:

- The three cities selected are the top three cities where Hong Kong debtors have their place of principal offices, their principal place of business, and their principal assets in Mainland China.
- Shanghai Third Intermediate People's Court and Shenzhen Intermediate People's Court obtained insolvency assistance from the Hong Kong court in 2019 and 2020—respectively, the Shanghai Huaxin case and the Shenzhen Nianfu case—whereby the courts have accumulated experience in dealing with those cases.

The opinion provides three types of Hong Kong insolvency proceedings covered by the arrangement (together, the Relevant Proceedings), including (1) compulsory winding-up, (2) creditors' voluntary winding-up, and (3) scheme of arrangement promoted by a liquidator or provisional liquidator and sanctioned by a Hong Kong court. Hong Kong administrators, including liquidators and provisional liquidators, who seek recognition and assistance in mainland China shall apply to the Intermediate People's Courts in one of the designated pilot areas.

The key criteria for being qualified, as the Relevant Proceedings covered under the arrangement, is that Hong Kong



shall be the center of main interests (COMI) of the debtor. According to the SPC's Opinion, COMI generally refers to the place of incorporation of the debtor, but other factors—such as the place of principal office, the principal place of business, and the place of principal assets of the debtor—shall also be considered when a designated Mainland court is called upon to rule on the issue. Notably, by adopting the COMI test, it is possible that, for instance, companies incorporated offshore—if they are listed on the Hong Kong Stock Exchange (HKEx)—may be caught under the arrangement if they have COMI in Hong Kong. In addition, for any applicable Relevant Proceedings, the COMI of the debtor must have been in Hong Kong continuously for at least six months at the time of the application for recognition and assistance. The six-month requirement avoids last-minute change of COMI for the purpose of cross-border insolvency recognition and assistance.

Apart from the COMI test, the SPC also sets forth the circumstances where the Mainland courts will not recognize or assist the Relevant Proceedings, including: (i) Article 2 of the Enterprise Bankruptcy Law of the PRC is not satisfied, (ii) the existence of fraud, (iii) unfair treatment of Mainland creditors, (iv) circumstances where recognition or assistance violates the basic principles of the Mainland laws or offends public order or good morals, as well as (v) other circumstances where the Mainland court considers that recognition should not be rendered. While the last two appear to give Mainland courts broad discretion to dismiss an application, whether these will give rise to real obstacles and the attitude of Mainland courts toward these elements will need to be evaluated in future cases.

Once the Relevant Proceedings are recognized by a designated Mainland court, any civil actions or arbitration proceedings shall be suspended pending the Hong Kong administrators taking over the debtor's property, and any payment of debts made by the debtor to selected creditors shall be invalid. According to the SPC opinion, assets of the debtor within mainland China shall first be applied to satisfy preferential claims under the corporate insolvency laws of mainland China. The remainder of the assets can then be distributed in accordance with the insolvency proceedings in Hong Kong, provided that creditors in the same class are treated equally.

THE TAKEAWAY:

The arrangement, which further strengthens cross-jurisdictional judicial cooperation between the Mainland and Hong Kong, is expected to afford better protection of the debtor's assets and the creditor's interests, especially in cases where the debtor spreads its operations and assets across both jurisdictions, such as companies listed on HKEx with management in Hong Kong and operations and assets in mainland China. While there have been precedents on recognition of Mainland insolvency proceedings in Hong Kong, it remains to be seen how Mainland courts will approach the principles in practice. Still, this is a welcome start that has been long-anticipated.

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