ARTICLE

Cross-Border Restructuring: Hong Kong Developments

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1. Introduction

Although general insolvency law reform was begun in Hong Kong in the early 1990s,[1] progress in relation to corporate restructuring has been very slow (whilst progress in relation to cross-border matters has been virtually non-existent). In 2000 there was an attempt to introduce a statutory corporate rescue mechanism to be known as 'provisional supervision'.[2] Provisional supervision was to a large extent modelled on the Australian and Canadian domestic régimes. The 2000 Bill failed to get enacted, as did a revised version in 2001.[3] (Although, at the time of writing, there are some signs that provisional supervision may again be stirring.[4]) In any event, at present, Hong Kong's corporate insolvency and restructuring régime is based on the somewhat dated Companies Ordinance (hereinafter 'CO').[5]

The CO makes limited provision for insolvent restructuring in general[6] and has even less to say about cross-border insolvency. Inevitably, therefore, *cross-border restructuring* receives little or no direct attention in the CO. Nor is this likely to change at any time in the near future.[7] Nevertheless, there are a few specific sections in the CO which, particularly in the light of recent cases,[8] may come into play in the context of a cross-border restructuring. The most obvious is s.193 of the CO which provides for the appointment of provisional liquidators. It will also be noted that the Hong Kong courts have not infrequently been asked to sanction schemes of arrangement between an insolvent company, its shareholders and the creditors.[9] Moreover, in addition to a handful of statutory provisions, Hong Kong, as a former British colony, has received a body of common law precedents which covers a range of issues that may arise in an insolvency – including a restructuring – with international elements. It is perhaps not unreasonable to describe this rather loose assortment of statutory and common law rules as a 'framework' applicable to cross-border restructurings.[10]

In a cross-border restructuring this legal framework, firstly, forms part of the background against which negotiations between the various parties take place. Legal rules may often only come to the fore when consensus cannot be reached and one side or the other loses patience. This is not to say, however, that the legal framework is unimportant: the fact that, for example, the rights of secured creditors are 'entrenched' in Hong Kong law or that, in the absence of a formal insolvency proceeding,[11] any creditor can employ the court's enforcement mechanisms, has an important bearing upon the strategies available to

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1 See, generally, Smart and Booth, 'Reforming Corporate Rescue Procedures in Hong Kong' (2001) 1 *Journal of Corporate Law Studies* 485.

2 Companies (Amendment) Bill 2000.

3 Companies (Corporate Rescue) Bill 2001.

4 A Consultation Paper addressing the major log jam obstructing the passage of the 2001 Bill (available through the Legislative Council website: <http://www.legco.gov.hk/english/index.htm>) was issued in September 2003.

5 It remains to be seen whether 'provisional supervision', as proposed in the Companies (Corporate Rescue) Bill 2001, will ever be enacted in Hong Kong.

6 This would of course change if provisional supervision were to be introduced in the future.

7 The proposed provisional supervision reforms scarcely touch upon any cross-border matters.

8 See, in particular, *Re Jinro (H.K.) International Ltd*, discussed below.

9 CO, s. 166, which closely resembles s. 425 of the Companies Act 1985.

10 However, the operation of this framework in relation to any restructuring with international elements is quite unlike that which one finds when dealing with, for example, a simple bankruptcy or company winding up. In a bankruptcy case the legislation lays down detailed rules as to how the bankruptcy must be conducted by the office-holder. The same, of course, is true in relation to the winding up of an insolvent company. But when it comes to cross-border restructuring, the law in Hong Kong (both statutory and common law) does not try to tell the insolvency practitioner how to run the restructuring, or, at present, even what the objectives of any restructuring should be.

11 See *SK Global*, below

both debtors and creditors in a restructuring.[12] To take just one example, it has often been pointed out in relation to domestic restructuring that, at least until Hong Kong enacts a modern statutory corporate rescue régime, hold-out creditors will be able to cause maximum disruption. The same is also true in respect of a cross-border restructuring.[13]

It is, of course, well-known that non-statutory guidelines have been promulgated in many jurisdictions – including Hong Kong[14] – in order to 'flesh out' the rather bare bones of the relevant legal rules applicable in relation to corporate restructuring. Although such non-statutory guidelines doubtless work well in many instances, they are not without their limitations, as revealed in Hong Kong in 2003 in the *SK Global* case (discussed below).

2. The effects of a foreign restructuring in Hong Kong

Although a wide variety of issues may arise where there are, or may be, restructuring proceedings on foot outside Hong Kong, the most practical questions will likely relate to the impact of that restructuring upon assets and creditors in Hong Kong.[15]

A. Recognition of a foreign restructuring

As Hong Kong has no statutory or treaty provisions concerning recognition of foreign insolvencies, the Hong Kong courts must look to the common law cases in order to ascertain the bases upon which recognition may be accorded to a foreign restructuring.[16] There is no doubt that a restructuring conducted in the place of incorporation may be entitled to recognition in Hong Kong. But it would not be correct to assume that the law of the place of incorporation is the only reference point. As is well-known, the country of incorporation may be a tax haven and may have only a meagre connection to the actual business operations and management of the company. There is no reason to think that the Hong Kong courts would deny recognition to a restructuring conducted in accordance with the law of the country where the company carried on its main business.[17] In addition, recognition is available where the company has initiated, or submitted to, the foreign restructuring process. The clearest example giving lie to the supposed rule that recognition is limited to the place of incorporation is the celebrated *Maxwell* case from the early 1990s. MCC, it will be recalled, had filed a Chapter 11 petition in New York the day before it presented a petition for administration in England (under Part II of the Insolvency Act 1986). The important point is that MCC was incorporated in England. Nevertheless, it was expressly confirmed in the English Court of Appeal that recognition of the US proceedings was appropriate.[18]

B. Consequences of recognition

The fact that the Hong Kong court may recognize a foreign restructuring does not mean that all the provisions of the foreign law will be given effect in Hong Kong. For example, there is a clear body of authority establishing that the existence of an automatic stay under the foreign law will have no direct effect in Hong Kong.[19] Similarly, as recently shown in the *Jinro* case,[20] the fact that there is an on-going process abroad does not prevent the Hong Kong court from exercising its own insolvency jurisdiction – e.g. by appointing provisional liquidators. (Indeed, in some instances a foreign corporation may actively seek the intervention of the Hong Kong court.)[21]

In *Re Jinro (H.K.) International Ltd*[22] the petitioners (Goldman Sachs) had originally sought to have the company wound up but, at a late stage, applied for the

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12 See, generally, Segal, 'Corporate Recovery and Rescue – Mastering the Key Strategies Necessary for Successful Cross Border Workouts: Part 1' [2000] *Insolvency Intelligence* 17 at 18–19.

13 See the discussion of *SK Global*, below.

14 Namely, the HKAB/HKMA *Guidelines on the Hong Kong Approach to Corporate Difficulties* (1999) (hereafter 'the *Guidelines*'): see, generally, Smart, Briscoe and Booth, *Hong Kong Corporate Insolvency Manual* (2002) pp. 140–141 for an overview.

15 Of course, where a foreign company has a subsidiary in Hong Kong, an office-holder appointed in a foreign insolvency proceeding may be in a position to direct or replace the directors of the Hong Kong company and thereby get control over the Hong Kong subsidiary.

16 See, generally, Fletcher, *Insolvency in Private International Law; National and International Approaches* (1999) pp. 168 *et seq* and Smart, *Cross Border Insolvency* (2nd ed., 1998) chapter 6.

17 See Smart, supra, n. 16, at p. 175.

18 See *Barclays Bank plc v Homan* [1993] BCLC 680 at 706.

19 See, e.g. *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112.

20 *Re Jinro (HK) International Ltd*, below n. 22.

21 See, e.g., *Re Irish Shipping Ltd* [1985] HKLR 437 where an Irish liquidator sought the appointment of an ancillary liquidator in Hong Kong to protect assets there.

22 Unreported, CWU No. 1352 of 2001, 9 July 2003 (Kwan J).

appointment of provisional liquidators. One concern of the petitioners was that the making of a winding-up order might result in the automatic termination of certain valuable distribution agreements in which the company and various associated companies were interested. The petitioners hoped that the appointment of provisional liquidators would 'allow for an independent investigation and review of the commercial options for restructuring of the Company, which, if feasible, is likely to enhance the return to creditors.'[23] The company's parent ('Jinro Korea') was also insolvent and a 'receiver' had recently been appointed by the Seoul District Court after Jinro Korea had defaulted under an earlier court sanctioned composition plan.[24] The Korean receiver objected to the appointment of provisional liquidators largely on the basis that such an appointment might obstruct his efforts to restructure the larger Jinro group[25] and was not necessary in light of the receiver's duty to treat all creditors equally and fairly. Kwan J noted that since mid-2002 the court in Hong Kong had in a number of cases[26] appointed provisional liquidators to seek to facilitate a corporate rescue plan and improve the return for creditors. Kwan J opined that provisional liquidators appointed in Hong Kong would be expected to co-operate fully with the Korean receiver in exploring any possibility of a group wide restructuring;[27] and that the protection of the interests of the creditors of the company required the appointment of provisional liquidators in the present circumstances.[28]

The main consequence of recognition is that, in an appropriate case, creditors will not be permitted subsequently to grab assets in an attempt to jump the queue or otherwise undermine the foreign insolvency proceedings.[29] However, recognition of a foreign proceeding does not necessarily result in the Hong Kong court giving effect to the final foreign rescue plan. There is a long line of authority, particularly in the English courts,[30] which holds that the discharge of a debt is governed by its proper law – i.e. the law which governs the agreement under which the debt was incurred.[31] For example, a company may be incorporated and carry on its main business in Japan and a rescue plan may be duly approved by the statutorily required percentage of creditors in Japan. That rescue plan may require all unsecured creditors to take a 60% haircut in return for some equity in the company. If Creditor X's debt is governed by Japanese law, the Hong Kong court will treat the plan as binding on Creditor X and not allow that creditor subsequently to sue the company in Hong Kong or attach its assets there. But if the debt owing to Creditor Y is governed by Hong Kong law (or indeed New York law or French law for that matter), the Hong Kong court will not give affect to the Japanese discharge. Traditionally, only the proper law is relevant in this situation. What this means in practice is that if there are debts governed by Hong Kong law, it will be prudent to investigate the option of proposing a parallel scheme of arrangement in Hong Kong. This may also be the case in other jurisdictions in which the company has, or may in future have, assets.[32]

C. Requirements for recognition

A foreign corporation or foreign insolvency office-holder seeking recognition in Hong Kong must be in a position to establish a number of requirements in addition to the basis of recognition, discussed above.

The foreign restructuring must be extraterritorial, in that it must be shown to extend not just to the company's assets in the foreign country but also beyond and, in particular, to assets in Hong Kong.

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23 Judgment, para 9.

24 Judgment, para 20: 'It should … be noted that the reorganization order applies only to Jinro Korea and not to its subsidiaries … although it is possible for the receiver to exercise the rights of Jinro Korea as shareholder of its subsidiaries and replace or change the board of directors of its subsidiaries in accordance with the applicable corporate law and rules of the relevant jurisdiction.'

25 In particular, by preventing the receiver from being able to exercise control over Jinro Korea's subsidiary in Hong Kong.

26 In particular *Re Keview Technology (BVI) Ltd* [2002] 2 HKLRD 290, *Re Luen Cheong Tai International Holdings Ltd* [2002] 3 HKLRD 610 and *Re Fujian Group Ltd* [2003] 1 HKC 659.

27 Judgment, para 32.

28 Judgment, para 34. Kwan J was concerned that, to the extent that the interests of the creditors of Jinro Korea and the company might diverge, the Korean receiver would not be in a position properly to protect the creditors of the Hong Kong company.

29 See, e.g., *Modern Terminals (Berth 5) Ltd v States SS Co* [1979] HKLR 512, *Chapman v Travelstead* [1998] 1024 FCA (15 August 1998). But the position is different where there is a prior (incomplete) execution or attachment: see *Galbraith v Grimshaw* [1910] AC 508.

30 See Smart, supra, n. 16 at p. 258. For a recent example before the Privy Council, see *Wight v Eckhardt Marine GmbH* [2003] 3 WLR 414.

31 Note also Segal, supra, n. 12 at p. 29.

32 In contrast, where the Hong Kong court approves a Hong Kong scheme of arrangement it regards the scheme as binding all creditors regardless of the governing law of their debts: *New Zealand Loan and Mercantile Agency Co Ltd v Morrison* [1898] AC 349. This would not, however, necessarily prevent an unhappy creditor whose debt was governed by Singaporean law from subsequently attaching assets in Singapore. Again, multiple schemes may have to be put in place.

The reason for this requirement is simple. Recognition is accorded to a foreign restructuring in order to protect that process and prevent it being undermined by, for example, local attachments in Hong Kong. If the foreign proceeding is purely territorial – so that it does not seek to apply to assets in Hong Kong – there is nothing to protect in Hong Kong. As Nick Segal has recently commented in the context of cross-border workouts:[33]

> 'Consideration also needs to be given to whether the proceeding pursuant to which the [restructuring] plan is approved is regarded by its home jurisdiction as having extraterritorial or only territorial effect. For example, the Korean statute governing corporate reorganization proceedings there specifically states that the proceeding does not apply to assets abroad.'

One important example in recent years is the *GITIC* case[34] in which the court in Hong Kong ruled, in the context of an insolvent liquidation, that Mainland PRC bankruptcy law was extraterritorial (at least in that particular situation).

The foreign restructuring must also be 'fair' – in the sense that it does not discriminate (in theory or in practice) against creditors in Hong Kong or elsewhere. Again in the *GITIC* case the Hong Kong court was at pains to point out that the Liquidation Committee on the Mainland PRC did not discriminate against non-Mainland PRC creditors.

In addition, having regard to the recent decision in *SK Global*,[35] it must now be stressed that there must be a foreign *proceeding*, in the sense of something in the nature of a formal proceeding or procedure, rather than merely an informal workout proposal. By analogy to foreign liquidations, it can be stated with some certainty that one is not here limited to a formal, in the sense of court-initiated or court-based, restructuring. Under common law rules the courts can recognize a foreign liquidator appointed without any court intervention abroad, e.g. in a shareholder-initiated liquidation such as a members' voluntary liquidation (MVL) or a creditors' voluntary liquidation (CVL).[36] But such a procedure is statute-based (and binding on all relevant parties) rather than purely informal like a workout.

3. Crédit Lyonnais v SK Global Hong Kong Ltd

A. The facts[37]

The defendant, SK Global Hong Kong Ltd ('SKGHK') was a Hong Kong company and part of a group of companies the parent of which was a Korean corporation, SK Global Ltd ('SKG'). The group was in serious financial difficulties and 'restructuring proceedings' involving SKG had started in Korea in March 2003. Shortly thereafter the foreign creditors of SKG had set up a steering committee with Standard Chartered Bank as the lead bank. The restructuring contemplated in Korea would also cover SKGHK, not least because the Korean and foreign creditors of the parent were also creditors of SKGHK. (Although in the Court of First Instance the term 'restructuring proceedings' was used, in fact these were apparently not formal proceedings but rather restructuring proposals, or even negotiations towards the formulation of restructuring proposals.)[38] Various investigations as to feasibility were underway in Korea and it was apparently the case that all the creditors, except Crédit Lyonnais, were prepared to hold off pending the outcome of the restructuring proposals. Or, at least, to hold off for a certain time. For its part Crédit Lyonnais was not prepared to wait. Crédit Lyonnais obtained summary judgment in the Hong Kong courts against SKGHK on 19 May 2003 for a sum in excess of US$8 million and thereupon the question of execution was referred to a judge.

At first instance Chu J ordered a stay of execution.[39] Whilst accepting that the terms of any restructuring plan had not been finalized, Chu J noted that there was clear majority support in principle for a restructuring. Chu J also accepted that all creditors, including Crédit Lyonnais, would gain from a restructuring. Other creditors had indicated that if Crédit Lyonnais were permitted to proceed with execution, they would present a winding up petition and seek the appointment of provisional liquidators – thereby immediately staying all proceedings against the company's property. The judge was also influence by the terms of the HKAB/HKMA guidelines that required member banks to abide by any standstill, stating:[40]

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33 Supra, n. 12, at p. 29.

34 *CCIC Finance Ltd v Guangdong International Trust & Investment Corp* [2001] HKCFI 774 (31 July 2001) (HKLII).

35 Discussed in detail, below.

36 See Smart, supra, n. 16 at pp. 186-187.

37 See [2003] 3 HKC 569 (Chu J), reversed on appeal [2003] 4 HKC 104.

38 Evidence was presented (see Civil App No. 179 of 2003, para 10) to the effect that if negotiations broke down in Korea then it was likely that the domestic creditors would apply for Korean court reorganization.

39 Supra n. 37.

40 At para 25.

> 'No doubt the plaintiff [Crédit Lyonnais] is under no legal duty to forbear, but as a member of the banking community, it is expected to use its best endeavours to avoid obtaining a preferred position. Accordingly, while the other creditors cannot impose their wishes on the plaintiff, it is not unjust for the court to have regard to the fact that the defendant is contemplating a restructuring and that all other creditors have agreed to a standstill and also to note the probable consequences of the enforcement of the judgment herein on the restructuring process.'

All in all, Chu J was convinced that the 'balance of convenience'[41] lay in favour of a temporary stay (pending further developments in Korea).

The Court of Appeal unanimously allowed Crédit Lyonnais' appeal.[42] Ma CJHC emphasised that the interests of non-parties (namely SKGHK's other creditors or creditors of SKG, the parent) could not properly be taken into account in deciding whether to grant a stay of execution, except where either liquidation proceedings had already commenced by the time the court was called upon to make its decision or liquidation or a scheme of arrangement was 'imminent'.[43] In this regard, Ma CJHC relied upon the leading decision in *Roberts Petroleum Ltd v Bernard Kenny Ltd*.[44] Ma CJHC, in particular, rejected the submission that a 'reasonable prospect'[45] of concluding a scheme of arrangement was sufficient.[46]

> 'It is not up to the court to use its inherent jurisdiction to create a régime in which a judgment debtor or insolvent company is able to obtain a moratorium on its debts (or to put it more crudely, to give it some breathing space to allow it to negotiate with creditors). This is a matter for the legislature to contemplate and if seen fit, to legislate on.'

Rogers VP similarly rejected the approach of Chu J, categorizing it as 'too broad and generous'.[47] The court would only stay the enforcement of its own judgments where there was some 'abuse'.[48] The forbearance of other creditors, even coupled with the HKAB/HKMA guidelines, was not sufficient. Cheung JA reached a like conclusion.

However, although Crédit Lyonnais was ultimately successful in the courts, press reports tell us that, shortly after the Court of Appeal's decision, the company sought the appointment of provisional liquidators so as to obtain an automatic stay.[49]

B. Comment

The first point to note is that the case was not argued as a *cross-border* restructuring case – all the arguments presented and all the authorities cited were domestic ones.[50] Yet, in some ways, the closest situation that has arisen previously is the US/UK restructuring decision in *Felixstowe Dock and Railway Co v United States Lines*,[51] discussed further below.

As a domestic case, it may be said that the issues in *SK Global* boiled down to whether or not: (i) the court was limited to considering the interests of non-parties, in particular the other creditors of SKGHK; and (ii) *Roberts Petroleum* was limited to situations where statutory insolvency procedures had been invoked or were imminent?

The Hong Kong Court of Appeal, reversing Chu J, took a restrictive approach.[52] However, it is interesting to observe how a court in England recently viewed these same questions. In *Society of Lloyd's v Cook*[53] Colman J expressly rejected the argument that execution should be allowed to proceed unless there were pre-existing insolvency proceedings (or some other analogous proceeding). Colman J stated:[54]

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41 See para 18.

42 Supra n. 37.

43 At para 8.

44 [1983] 2 AC 192, in which the House of Lords held against the creditor of an insolvent company which had already passed a resolution to go into voluntary liquidation.

45 At para 8.

46 At para 10.

47 At para 20.

48 At para 21. Breach of the HKAB/HKMA *Guidelines* would 'not come anywhere near to constituting such an abuse' (para 25).

49 See, e.g., J Moir and C Chan, 'SK Global HK acts to block debt order', *South China Morning Post* (*Business Post*), 18 July 2003 (internet edition).

50 This perhaps explains why the question of extraterritoriality of Korean restructuring law was not raised: see supra n. 33.

51 [1989] QB 360.

52 So too had, incidentally, a court in Singapore in *Arab Bank Ltd v Ng Soo Jin* [1988] 1 SLR 653; although it was otherwise in *Oranga Holdings Ltd v Duke* [1994] 3 NZLR 732 (New Zealand).

53 Queen's Bench Division (Commercial Court) 16 September 1999, available on Lexis and Westlaw.

54 Emphasis added.

> 'In my judgment, as a matter of principle, the absence of such proceedings should not be treated as an overriding consideration when the court exercises its equitable jurisdiction in deciding whether to make a garnishee order or a charging order in a case where the judgment debtor may, on the evidence, be insolvent. Having regard to the interests of other creditors is predicated by the *state of insolvency* and not by the pendency of formal proceedings arising from that insolvency. The exercise of the equitable jurisdiction must be sufficiently flexible to take into account the interests of such other creditors where there is evidence of insolvency, *even if, at that stage, there has been no formal action designed to protect the creditors*.'

His Lordship continued:[55]

> 'Accordingly, I do not consider the *Roberts Petroleum* case should be treated as laying down any principle which would in such a case close off consideration of the other debts of the judgment debtor or the interests of the other creditors.'

Although the facts in *Society of Lloyd's v Cook* involved personal insolvency, and not corporate restructuring, Colman J's comments are directly at odds with the approach taken in the Court of Appeal in *SK Global*.

Unfortunately, *SK Global* (both at first instance and on appeal) contains no reference to the judgment of Colman J. This is perhaps a consequence of the fact that *Society of Lloyd's v Cook* does not seem to have been widely reported in England. Of course, if the Court of Appeal had accepted that the discretion to stay execution allowed consideration of other creditors' interests and was not restricted to cases where winding up or analogous proceedings had already been commenced, the judges' comments about creating statutory rescue mechanisms would not have been made. If Colman J were correct, then no question of filling legislative lacunae would arise.

In addition, although there is a reported prior Hong Kong authority in this area, namely *Wardley Ltd v Aik San Realty Ltd*,[56] that was a case where there was 'no prospect of a true pari passu distribution taking place'[57] and so was readily distinguishable from *SK Global* (where it was expected that a comprehensive rescue plan would be achieved).

In summary, from a simply domestic point of view *SK Global* is rather disappointing. The Court of Appeal took a narrow approach to the exercise of its jurisdiction, yet *Society of Lloyd's v Cook* indicates that a more generous approach might well have been available. On the other hand, *Society of Lloyd's v Cook* is not the only case that might have influenced the outcome in the Hong Kong courts. In 1997 in *Rooke v HV Construction Ltd* Stock J[58] and subsequently the Hong Kong Court of Appeal[59] considered the insolvency/execution issue. All the judges in *Rooke v HV Construction Ltd*, approving *Wardley Ltd v Aik San Realty Ltd*, appeared to take a narrow approach. In *Rooke* it was argued by counsel for the insolvent company:[60]

> 'it is not a condition precedent to the defeat of the judgment creditors in these circumstances, that there should be a resolution passed or on the table, or that there should be in existence a winding-up order or a petition. It suffices that an equal distribution is the subject of active progress, *even of an informal kind*.'

At first instance Stock J rejected this contention, stating:[61]

> 'the affairs of the company have not reached that stage at which a statutory scheme is in place or imminent, such as would warrant this court's interference with the right of the judgment creditors to execution of the judgment debt in the way now sought. *I do not think the fact that other creditors have opted to take the route they have, by which they seek to avoid liquidation, and have to that end formed a committee and have agreed to hold their hands and see whether the company can extricate itself from its financial difficulties or at any rate improve its position to the benefit of the creditors by continuing to operate, suffices to warrant engaging this court's power to refuse the grant of an order absolute*.'

The relevance of this passage to the facts in *SK Global* needs little emphasis.

The approach of Stock J was accepted by the Court of Appeal. It is a little surprising that *Rooke* was not referred to in *SK Global*, not least because Rogers VP

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55 Ibid.

56 [1985] 2 HKC 695. Although *Wardley Ltd v Aik San Realty Ltd* applied *Roberts Petroleum*, surprisingly the earlier Hong Kong case was not referred to in the judgment of Chu J (although it was cited on appeal).

57 At 698.

58 Unreported, High Court Commercial List No. 74 of 1997, 6 November 1997.

59 [1998] 1 HKC 686.

60 Before Stock J (emphasis added).

61 Emphasis added.

was on the bench in both cases. If *Rooke* had been cited at first instance in *SK Global*, one wonders whether Chu J would have been quite so bold.

C. Imminent scheme of arrangement

On the face of it *SK Global* is somewhat anti rescue culture. The Court of Appeal taking the view that it was fatal to a stay of execution that 'neither a winding-up ... nor a scheme of arrangement is imminent'.[62] From this it would appear that if a scheme of arrangement were 'imminent' a different result might be possible. Accordingly, the question arises as to when a scheme of arrangement becomes 'imminent' for present purposes. One answer might be where a draft plan has already been finalised and, within a matter of days or at most a week or two, the court will be asked to call meetings pursuant to s.166, CO. Another answer might be that meetings must have already been called and will be held shortly. It is not clear from *SK Global* what sort of time scale one is dealing with.

However, it does seem that the Hong Kong courts might not follow some of the old English cases. In *Booth v Walkden Spinning and Manufacturing Co Ltd*[63] a creditor obtained judgment against the company on 14 April. A week before, on 7 April, a committee of creditors of the company had recommended pursuing a scheme of arrangement; and on 22 April the company applied to the court to order the calling of statutory meetings. On 26 April the court made an order for meetings to be held on 17 May. On 7 May the company sought a stay of execution on the judgment until after 17 May (when the meetings would have reached a decision). On 11 May the court refused the application for a stay of execution. Darling J noted that until the scheme was approved – which it might not – there was nothing in place to affect the rights of a judgment creditor.[64] His Lordship's view was that until the scheme was approved there was no analogy to the case where a company was in liquidation. Jelf J added:[65]

> 'It has been said by great judges in the past that a judgment creditor is prima facie entitled to obtain the fruits of his judgment by means of execution. It may be that, if he does so, hardship is caused to the other creditors of the judgment debtor, but first come first serve is one of the necessary axioms of this life of ours.'

The court saw no objection to Booth obtaining an advantage over the other creditors. As far as this commentator is aware *Booth v Walkden Spinning* has never been criticised in the English courts in the last almost 100 years. Nevertheless, hopefully, the courts in Hong Kong would nowadays disapprove of the sort of approach that was adopted in *Booth v Walkden Spinning*.

D. The cross-border perspective

SK Global was not argued as a cross-border case. Nevertheless, where there are assets in Hong Kong and a foreign restructuring is in progress abroad, creditors will be prevented from attaching those assets if it is established:

(i) that there are foreign proceedings (not merely negotiations);
(ii) that those proceedings are entitled to recognition in Hong Kong; and
(iii) that the proceedings extend to Hong Kong assets, i.e. are extraterritorial.

However, a foreign insolvency does not trigger a moratorium in the sense of a stay of proceedings, although individual attachments put into effect after the commencement of the foreign proceedings are prohibited.[66]

But even these three requirements may be slightly flexible. In *Felixstowe Dock and Railway Co v United States Lines*[67] the defendant had gone into Chapter 11 reorganization in the US. Under US law there was a worldwide stay. The plaintiffs, who were English and European trade creditors, had commenced actions in England and obtained Mareva injunctions restraining the defendant from removing its English assets from the jurisdiction. The notable thing about *Felixstowe Dock* is that Hirst J ruled that the US proceedings were discriminatory and would *not* be given effect in England – so that the Marevas were not discharged. This ruling has been heavily criticized and may have been based on a misunderstanding of the Chapter 11 reorganization plan in that particular case.[68]

Nevertheless, even though the US Chapter 11 was denied recognition in England, Hirst J stated that he

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62 Supra, n. 37 at para 9, per Ma CJHC.

63 [1909] 2 KB 368.

64 At 372.

65 *Ibid.*

66 Supra, n. 29.

67 [1989] QB 360.

68 Normally there is no such problem with the recognition of a US Chapter 11 reorganization.

would not allow the plaintiffs to grab the assets in England:[69]

> 'If the Mareva injunctions continue, the money will stay in London in the safe hands of Citibank. Moreover it is well established that, in the case of an insolvent respondent, the court will not permit the equitable remedy of a garnishee order to be used to enable a judgment creditor to gain priority over other creditors: see *Rainbow v Moorgate Properties Ltd* [1975] 1 WLR 788, 793, per Buckley LJ.'

Hirst J decided that it was better to require that there be a winding up in England, than allow individual plaintiffs to seize assets.

The difference between *Felixstowe Docks* and *SK Global* is, of course, that in the earlier case there was a formal restructuring procedure going on abroad. Nevertheless, that formal restructuring procedure was not recognised by Hirst J, who still saw fit to regulate the English court's procedure to prevent individual judgment creditors from gaining a priority. It is, this commentator would suggest, a short step to applying the same approach to a situation (as in *SK Global*) where recognition is not available because of a lack of a *formal* restructuring procedure in the first place.[70] As *Felixstowe Docks* was not raised in *SK Global*, it will be interesting to see if such an argument may prevail in a suitable case in the future.[71]

4. Conclusion

The development of a rescue culture does not occur overnight. Certain events, such as the enactment of legislation creating a new statutory corporate rescue régime, may provide significant impetus to such development. The fact that Hong Kong, despite going through several years of recession following the onset of the Asian financial crisis, has no modern corporate rescue legislation has undoubtedly held matters back. On a more positive note, the Hong Kong courts have, when it comes to domestic restructuring, recently shown a certain willingness to get creative – or at least to embrace the creativity of Hong Kong's insolvency practitioners. For, since mid-2002, there has been a number of cases where provisional liquidators have been appointed with the specific objective of considering the feasibility of restructuring the company concerned.[72] A rescue culture is gaining ground in the Hong Kong courts in relation to domestic restructurings, and one may suggest that this offers some hope of a similar flexibility of approach in cross-border cases in the future.

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Notes

69 [1989] QB 360 at 386.

70 Of course, if sufficient evidence had been presented in Hong Kong to establish that there was a formal restructuring process on foot in Korea, different considerations would have applied..

71 In other words, a case where (i), above, is missing but (ii) and (iii) are made out.

72 See *Re Jinro (H.K.) International Ltd*, supra n.22, and the cases cited supra at n. 26.