

## A landmark case in cross border liquidation and restructuring

### 1. Case background

Recently, a Bermuda incorporated company (the "**Company**") listed on the Main Board of the Stock Exchange of Hong Kong Limited ("**HKEx**"), has resumed securities trading following a nearly 2-year suspension. It is a new landmark case in both cross-border liquidation and restructuring.

Upon the suspension of trading, the repayment obligations of certain indebtedness of the Company and its subsidiaries ("**Group**") have been accelerated by creditors and such acceleration had sparked the Group's significant cash flow crisis. Hence, the Group went through a restructuring (the "**Restructuring**") and the securities trading of the Company on the HKEx was resumed in January 2022.

The following takeaways of the landmark case are remarkable:-

- (i) The first resumption of trading case in the HKEx which involved a light-touch provisional liquidation order of an offshore court recognized by the Hong Kong court (the "**HK Court**");
- (ii) The second provisional liquidation case achieving resumption under the New Delisting Regime introduced by the HKEx; and
- (iii) It is led to the first liquidation case in which the appointment of provisional liquidators of the HK Court and the provisional liquidators' exercise of powers in the Mainland China are recognized by the Mainland China Court under the new mutual recognition framework.

### 2. Offshore light-touch provisional liquidation order recognized by HK Court

The Company took out an application in the Bermuda Court for light-touch provisional liquidation for the purpose of Restructuring. A light-touch provisional liquidation regime gives a company considerable time to implement a restructuring which may convert the company back into solvency while facilitating the company to carry on business for the benefit of stakeholders. The light-touch regime does not exist in Hong Kong.

Thereafter, the Bermuda Court approved the application and appointed the Joint Provisional Liquidators ("**JPLs**") with the power to act jointly and severally essentially for the purpose of the Restructuring (the "**Bermuda Court Order**").



Following the application of the JPLs, the HK Court made a recognition order to recognize the Bermuda Court Order and the JPLs' appointment as provisional liquidators to carry out the affairs and financial matters in Hong Kong. Additionally, the HK Court made an order that no action or proceeding should be commenced against the Company or its assets or affairs, or its property within the jurisdiction of the HK Court, in so far as the Company remains in provisional liquidation in Bermuda, unless with the leave of the HK Court.

This is the first case where a company resumes securities trading as a result of the recognition of an offshore light-touch provisional liquidation order by the HK Court on the HKEx under the operation of both onshore and offshore court-approved insolvency and restructuring frameworks.

### 3. New De-listing Regime

A new De-listing Regime (the "**New De-listing Regime**") was rolled out by the HKEx effective from 1 August 2018 which allows the HKEx to de-list issuers whose trading has been suspended for a prescribed period of 18 months (or 12 months in relation to GEM board issuers) (the "**Prescribed Period**"). The New De-listing Regime primarily aims to maintain a fair, orderly and informed financial market, by de-listing issuers that no longer meet the continuing listing criteria, thereby deterring issuers from committing material breaches of the Rules Governing The Listing of Securities on the Stock Exchange of Hong Kong Limited (the "**Listing Rules**") and incentivizing suspended issuers to act promptly towards resumption (when necessary).

The Prescribed Period is the maximum period for suspended issuers to remedy issues and resume trading and it would not normally be extended, the expiration of which would mean that the HKEx may decide whether or not and when to delist an issuer in accordance with Rule 6.01A of the Listing Rules, by means of a hearing to review the matter pursuant to Rule 2B.09 of the Listing Rules. Further, the HKEx shall have the discretion, pursuant to Rule 6.10 of the Listing Rules, to impose a specific remedial period (which is shorter than the Prescribed Period) for issuers whose shares are suspended from trading, to remedy the relevant underlying issues. The discretion will be exercised taking into account the specific facts and circumstances of individual cases (e.g. insufficient public float, insufficient operations and assets or no longer suitable for listing).

In exceptional circumstances, the issuer may even be delisted immediately by the HKEx where the matters triggering the application of a delisting are fundamental to the general principles for listing and beyond remedy (e.g. where an issuer is no longer suitable for listing following a court's findings that its management and controlling shareholder(s) had operated a fraudulent scheme to overstate its business and profits).

It is worth highlighting that the New De-listing Regime should be read in conjunction with the Listing Rule 13.50A, which states that the HKEx can suspend the trading of shares of a listed company whose auditor has issued or has indicated that it will issue, a disclaimer or adverse opinion on the issuer's financial statements when it publishes its preliminary annual results.



It is likely that the HKEx may set a much higher threshold for suspended issuers to resume trading in the resumption guidance to be issued to the suspended issuers (“**Resumption Guideline**”) and the HKEx has well made its position clear that the New De-listing Regime is neither made for the purpose of promoting, nor facilitating, the resumption of trading.

With respect to the Resumption Guidance, HKEx may require the suspended issuers to:

- (i) carry out an independent investigation in relation to identified issues and take appropriate remedial actions;
- (ii) demonstrate its compliance with the Listing Rules specified by the HKEx; and
- (iii) commence independent internal control review to ensure that robust internal control systems are in place to meet the obligations imposed under the Listing Rules.

The landmark case is the second case in which an issuer successfully resumed trading under the New De-listing Regime.



#### **4. Liquidation under the new mutual recognition framework**

A new mutual recognition framework was originated from a “Record of Meeting of the Supreme People’s Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region” (“**Record of Meeting**”). Subsequently, the Supreme People’s Court of Mainland China issued the “Supreme People’s Court’s Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region” (the “**Supreme People’s Court’s Opinion**”) to further set out the details of the implementation of the new mutual recognition framework.

In general, the Record of Meeting provides a framework for Hong Kong liquidators or provisional liquidators to apply to the Intermediate People’s Courts in Shanghai, Xiamen or Shenzhen (the “**Intermediate People’s Court**”) for the purpose of recognition and assistance with respect to Hong Kong related insolvency proceedings commenced in accordance with the Companies (Winding Up and Miscellaneous Provisions) Ordinance and the Companies Ordinance, which include compulsory winding up, creditors’ voluntary winding up and scheme of arrangement promoted by a liquidator or provisional liquidator and sanctioned by the HK Court in accordance with section 673 of the Companies Ordinance (Cap.622 of the laws of Hong Kong) (“**HK Insolvency Proceedings**”). Reciprocally, the Record of Meeting also allows the Mainland China bankruptcy administrators to apply to the HK Court for the recognition of bankruptcy liquidation, reorganisation and compromise proceedings under the Enterprise Bankruptcy Law of the People’s Republic of China, recognition of his office as an administrator, and grant of assistance for discharge of his duties as an administrator.

In the landmark case, the Company was put into creditors' voluntary liquidation in Hong Kong in about August 2020. However, upon the application of the JPLs, the HK Court granted an order and issued a letter of request regarding recognition and assistance to one of the Intermediate People's Court in about July 2021, seeking for the consent to recognize the appointment of the JPLs and allow the JPLs to exercise their powers in the Mainland China. The Intermediate People's Court had approved and acceded to the request for the purpose of recognizing the insolvency proceedings of the Hong Kong Special Administrative Region ("**HKSAR**") and the role of the appointed liquidators of the HKSAR for the first time. It is notable that the landmark case is the first case of Hong Kong liquidation and the appointment of the joint provisional liquidators of the HK Court recognized by the Intermediate People's Court under the new mutual recognition framework.

As a general practice, from the time of receipt of the application and until it is decided upon, the Intermediate People's Court shall deal with any application from a Hong Kong liquidator for preservation measures in accordance with the relevant provisions of the laws in Mainland China.

As per the Supreme People's Court's Opinion, once the Intermediate People's Court determines to recognize the HK Insolvency Proceedings (the "**Recognition**"), it shall at the same time decide upon the application to recognize the status of the appointed liquidator in Hong Kong, and announce its decision within five days. Upon the Recognition, the following events shall take place respectively:-

- (i) Payment of debts made by the debtor to individual creditors to be invalid;
- (ii) Any civil action or arbitration involving the debtor that has started but has not yet been concluded shall be suspended provided that such action or arbitration can proceed after the appointed liquidator in Hong Kong takes over the debtor's property; and
- (iii) The measures for preserving the property of the debtor shall be lifted and the procedure for execution shall be suspended.



After the Intermediate People's Court recognizes the HK Insolvency Proceedings, it may, upon the application, decide to allow Hong Kong liquidators to exercise the following powers in the Mainland China:

- (i) taking over the property, seals, account books, documents and other data of the debtor;
- (ii) investigating into the financial position of the debtor and preparing a report on such position;
- (iii) deciding on the matters of the debtor's internal management;

- (iv) deciding on day-to-day expenses and other necessary expenditures before the holding of the first creditors' meeting, deciding whether to continue or suspend the business of the debtor;
- (v) managing and disposing of the debtor's property;
- (vi) participating in legal actions, arbitrations or any other legal proceedings on behalf of the debtor;
- (vii) accepting declaration of claims by creditors in the Mainland China and examining them; and
- (viii) exercising such other powers that the Intermediate People's Court considers that he/they may be so allowed.

By virtue of the mutual recognition framework, the efficiency of liquidators in exercising their power could be enhanced for the purpose of realizing or preserving a company's assets and protecting the rights and interests of creditors.

This explanatory note is not, and should not, be regarded as legal advice.

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