5 Impactful R&I Cases from 2024

Following on from our article last year summarising the key Restructuring and Insolvency cases of 2023, 2024 was another busy year for developments in the industry in Hong Kong.

The Court of Final Appeal ("**CFA**") handed down a landmark decision in China Life Trustees v China Energy Reserve clarifying the test to establish a *Quistclose* trust in the context of monies paid for restructuring purposes. The Court of Appeal ("**CA**") also clarified the applicability of the "*Guy Lam approach*" in cases involving arbitration clauses and in a companies winding up context.

Additionally, although the case itself did not involve novel legal principles, China Evergrande Group was wound up in January creating very likely the largest ever liquidation in Hong Kong.

The 5 impactful insolvency cases (sorted chronologically) handed down in 2024 as chosen by the Restructuring and Insolvency team at Tanner De Witt are:

Case Name	(1) Re Simplicity & Vogue Retailing (HK) Co Ltd; and (2) Re Shandong Chenming Paper Holdings Ltd
Citation	(1) [2024] HKCA 299, [2024] 2 HKLRD 1064; and (2) [2024] HKCA 352, [2024] 2 HKLRD 1040
Date	23 April 2024 (judgments handed down together)
Coram	(1) CA (Kwan VP (giving the unanimous judgment), Barma JA and G Lam JA); and (2) CA (Kwan VP, Barma JA and G Lam JA (giving the unanimous judgment))
Summary	These decisions were handed down simultaneously and both concerned the applicability of the *Guy Lam* approach (see our article last year) in winding up cases involving arbitration agreements. In both cases, the debtors argued that winding up petitions should be stayed/dismissed based on the existence of arbitration agreements. The debtors contended that the *Guy Lam* approach regarding exclusive jurisdiction clauses in bankruptcy proceedings should equally apply to arbitration agreements in winding-up proceedings. A distinct feature in Re Shandong Chenming was that it concerned whether the *Guy Lam* approach would apply to a debtor's cross-claim which was based on a contract subject to an arbitration agreement. The CA held in both cases that the *Guy Lam* approach is applicable in the context of arbitration agreements and also in situations where the arbitration agreement relates to a debtor's cross-claim. Importantly, the CA emphasised that the *Guy Lam* approach still involves the exercise of discretion and that the court would take a "*multi-factorial*" approach in dealing with each case. In doing so, the CA rejected one of the appellant's arguments that the *Guy Lam* approach is limited to the question of *locus*. However, it is clear that exclusive jurisdiction clauses and arbitration agreements will be given considerable weight when the court is asked to exercise its insolvency jurisdiction. As to relevant factors in the "*multi-factorial*" approach, the court will take into account the "*Lasmos requirements*" (including whether the debtor had taken steps to arbitrate), merits of the defence raised, timing of raising the defence (especially as regards cross-claims), and the presence (or absence) of support from other creditors.
Impact	The CA confirmed that the *Guy Lam* approach does not put a hard stop to petitions where arbitration or exclusive jurisdiction clauses are at play. Practitioners will play a key role in developing the "*multi-factorial*" approach particularly as regards the weight to be placed on merits of the dispute raised.

Case Name	(1) Angela Barkhouse, the Official Liquidator of Bridge Global Absolute Return Fund SPC (In Official Liquidation) v Leading Securities Company Ltd and Others; and (2) The Joint Liquidators of Bull's-Eye Ltd (in liquidation) v Changjiang Securities Brokerage (HK) Ltd and Others
Citation	(1) [2024] HKCFI 1160; and (2) [2024] HKCFI 3000, [2024] 5 HKLRD 371
Date	(1) 26 April 2024; and (2) 23 October 2024
Coram	(1) Linda Chan J; and (2) DHCJ Le Pichon
Summary	Both cases concerned foreign officeholders seeking recognition and assistance in Hong Kong. Bridge Global was one of the vehicles used by the 1MDB fraudsters to perpetrate a fraud where Malaysian public funds of US$7.65 billion were misappropriated. Its liquidator (Angela Barkhouse of Kroll) found that several service providers in Hong Kong had been involved in the process and thus sought documents and information from those parties. The liquidator was able to obtain relevant documents and information from some third parties voluntarily but not from others despite repeated requests. Following the guidance of Re Up Energy and Re Global Brands, the liquidator then commenced proceedings by naming those non-responsive parties as defendants. The court accepted that the company's COMI was likely Hong Kong and thus granted an order to recognise and assist the liquidator. In doing so, the court made an order for the production of documents within the body of the order. In terms of the scope of disclosure, the court accepted that the principles set out by the CFA in Re Kong Wah were equally applicable in this scenario. This case led to the making of a "*one stop*" order dealing with both recognition/assistance and production of documents which has been adopted in subsequent cases (see Robert Scott Woods v ICBC below). Bull's-Eye Limited is a company incorporated and subsequently wound up in the BVI. It held a substantial amount of securities and cash with 9 securities companies in Hong Kong. The liquidators (Michael Chan and Colin Wilson of Kroll) required assistance from the Hong Kong court to take control of those assets. Given the shift to the COMI test after Re Global Brands, there was a challenge to persuade the court to grant recognition and assistance notwithstanding the presence of the 9 securities accounts in Hong Kong. In this regard, the liquidators successfully relied on those passages in Re Global Brands whereby the court confirmed that the COMI requirement is not necessarily required where the assistance sought was incidental to the liquidators' authority to represent the company and was needed as a matter of practicality.
Impact	Both decisions demonstrate the Hong Kong court's readiness to assist foreign officeholders notwithstanding the challenges perceived by some to be the case after Re Global Brands. Bridge Global also highlights the court's flexible approach in providing practical solutions for foreign officeholders.

Case Name	China Life Trustees Limited v China Energy Reserve and Chemicals Groups Overseas Company Limited & Anor
Citation	[2024] HKCFA 15, [2024] 27 HKCFAR 359
Date	14 June 2024
Coram	CFA (Chief Justice Cheung, Ribeiro PJ (giving judgment), Fok PJ, Lam PJ and Gummow NPJ (giving judgment))
Summary	The companies involved were within the same group and were issuers of 8 series of bonds. Certain bonds maturing in May 2018 were issued by **SPV2** and the group lacked funds to repay the outstanding principal plus interest in full. The group only managed to raise US$120m out of the US$350m required. The funds raised were then paid by the group's treasury company into an account maintained by another group company, **SPV1**. SPV1 was the issuer of other bonds, maturing in 2022. As insufficient funds were raised to pay the 2018 bonds, this triggered cross-defaults in all 8 series of bonds. The trustee of the 2022 bonds obtained judgment against SPV1 and a garnishee order nisi over the US$120m (namely, the funds that had been raised to pay the 2018 series and which had been paid into the SPV1 account). The trustee claimed that those funds beneficially belonged to SPV1 and thus the garnishee order should be made absolute in its favour, with the result that the US$120m could be used to satisfy claims under the 2022 bonds. SPV2 argued that the US$120m was subject to a *Quistclose* trust for the purpose of paying the 2018 bonds and since those bonds went into default and the money not used for that purpose, it should be returned to the treasury company. The Court of First Instance and the CA both rejected the *Quistclose* trust argument and held that the trustee was entitled to a garnishee order absolute over the US$120m. However, the CFA found in favour of the appellants and held that there was indeed a *Quistclose* trust. The CFA disagreed with the courts below in holding that it was a necessity for there to be an express stipulation that the funds were to be used for a specific purpose. It held that a *Quistclose* trust could arise where the evidence objectively points to this restrictive intention, whether expressly or by implication, and that it follows logically that the money is not intended to form part of the recipient's general assets to be at its free disposal.
Impact	Intra-group transactions commonly lack contemporaneous evidence expressing the nature/purpose of the transaction. This could make it difficult for outsiders, especially insolvency practitioners, to determine whether funds are subject to a *Quistclose* trust. Nevertheless, the CFA's decision is important in clarifying the position that it is not necessary for there to be an express restriction on the use of the funds.

Case Name	Re Mega Gold Holdings Limited; and Re Man Chun Sing Matthew (heard together)
Citation	[2024] HKCFI 2286, [2024] 4 HKLRD 583
Date	30 August 2024
Coram	Recorder Richard Khaw SC
Summary	Shortly after the *Guy Lam* approach was endorsed and clarified by the CA in Re Simplicity and Re Shandong Chenming (as discussed above), the UK Privy Council (on an appeal from the BVI) declined to adopt the same position in Re Sian Participation [2024] UKPC 16 (see our article). Instead, the Privy Council held that even where the parties are bound by an arbitration agreement or an exclusive jurisdiction clause and the debt is disputed, the correct test for the court to apply is whether the debt is disputed on genuine and substantial grounds. The facts of this case are uncontroversial and involve the relevant debtors (the company as primary obligor and the individual as guarantor) relying on an arbitration agreement to oppose the petitions. This decision is important in addressing the impact of Re Sian Participation in light of Re Guy Lam and Re Simplicity / Re Shandong Chenming. The court confirmed that as a matter of *stare decisis*, the *Guy Lam* approach should continue to be followed in Hong Kong and thus the "*multi-factorial*" approach discussed in the summary of Re Simplicity and Re Shandong Chenming remains the relevant test. Applying that approach, the court held that the debtors' dispute "*necessitated a careful examination of all relevant oral and documentary evidence*" and therefore stayed the petitions.
Impact	This decision importantly confirmed that the law as stated in Re Sian Participation is not the position in Hong Kong given the CFA authority in *Re Guy Lam* (as subsequently clarified by Re Simplicity and Re Shandong Chenming).

Case Name	Robert Scott Woods v Industrial and Commercial Bank of China (Asia) Limited
Citation	[2024] HKCFI 3311, [2024] 5 HKLRD 788
Date	18 November 2024
Coram	Linda Chan J
Summary	Judgment in the amount of HK$664,900,126.57 plus interest was made against Phillip Kingston in Australia. The judgment debtor was subsequently adjudged bankrupt in Australia. The Australian bankruptcy trustee found that the bankrupt held bank accounts with the Industrial and Commercial Bank of China (Asia) Limited ("**ICBC**") in Hong Kong, which accounts had been used for substantial transactions. ICBC informed the trustee that it could not comply with the request for documents without a Hong Kong court order. The trustee then commenced proceedings to seek recognition and assistance in Hong Kong against ICBC. ICBC adopted a neutral position. The court confirmed that it has power under the common law to recognise and give effect to foreign bankruptcy proceedings. To do so, it would apply established principles set out in recent cases such as Re Guangdong Overseas Construction Corporation and Re Bridge Global (see above). The only difference in a bankruptcy context is that instead of COMI considerations (which would of course not apply to an individual), the applicant will have to establish that the debtor is domiciled in the jurisdiction of the foreign bankruptcy proceedings or has submitted to that jurisdiction. The court granted a recognition order on the basis that the Australian bankruptcy proceedings are collective insolvency proceedings, the bankrupt was domiciled in Australia, the assistance was necessary for the administration of the trustee's function and the order sought is consistent with the insolvency laws of Australia.
Impact	This is the first case dealing with recognition and assistance in favour of a foreign bankruptcy trustee since the handing down of Re Global Brands and Re Up Energy. The court helpfully clarified that the entrenched principles are applicable in this context. It also adopted the "*one stop*" approach in Re Bridge Global where specific disclosure orders were included in the recognition order for immediate enforcement.

In addition to the cases summarised above, honourable mentions go to:

(1) Re China Evergrande Group [2024] HKCFI 363, [2024] 1 HKLRD 1128;
(2) Nuoxi Capital Limited (in liquidation in the British Virgin Islands) v Peking University Founder Group Company Limited [2022] HKCA 1514, [2022] 5 HKLRD 837;
(3) Re aCommerce Group Limited [2024] HKCFI 2216;
(4) Re Jiayuan International Group Limited (in liquidation) [2024] HKCFI 1113; and
(5) Summit Prestige Enterprises Ltd v Peak No.1 Holdings [2024] HKCFI 999.

In Re China Evergrande Group, Linda Chan J wound up the largest property developer operating in Mainland China which company was thought by some to be "*too big to fail*". It stands to be the largest liquidation in Hong Kong with the group's total debt estimated to be US$300 billion.

The appeal against the decision in the Nuoxi Capital Limited trial was heard which reaffirmed that Keepwell Deeds are enforceable. This decision is being further appealed to the CFA.

In Re aCommerce Group Limited, the court refused to sanction a scheme of arrangement because of class issues arising from different creditors having different entitlements to interest and for lack of full and complete explanations in the explanatory statement.

In the Re Jiayuan matter, the court applied the rationale in Re Leading Holdings (see our article) in holding that ultimate beneficial holders of bonds cannot vote in a creditors' meeting.

In the Re Summit Prestige case (a continuation of the ongoing China Properties Group Limited saga), in light of the former director's conduct obstructing the liquidators' efforts in taking control of various Hong Kong subsidiaries which were held through intermediate BVI subsidiaries, the court directly appointed the liquidators as provisional liquidators of the Hong Kong subsidiaries. As a matter of BVI law, the BVI court would only grant recognition and assistance to liquidators appointed in the place of incorporation of the relevant company (China Properties Group Limited was incorporated in Cayman). This created an authority gap in the BVI which prevented the liquidators from directly taking control of the BVI intermediate subsidiaries in order to get control, in turn, of the Hong Kong subsidiaries.

As foreshadowed above, there will undoubtedly be further important developments in Restructuring and Insolvency law and practice in 2025 and the team at Tanner De Witt will continue to monitor those developments closely.

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