

OBTAINING RECOGNITION OF FOREIGN INSOLVENCY ORDERS IN THE PEOPLE’S REPUBLIC OF CHINA

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Cross-border insolvency practitioners will inevitably deal with companies or assets within a group that are registered or situated in the People’s Republic of China (“PRC”). This may present some difficulties if one is unfamiliar with the process and procedure under PRC law. This article will help briefly sketch out the PRC recognition process to cross-border insolvency practitioners.

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I. Introduction

1 This article aims to shed light on the recent case of *Fujian Huadong Shipyard Co Ltd v Ocean Tankers (Pte) Ltd, Xihe Holdings Pte Ltd*¹ (the “Xihe Judgment”), and why it matters in the context of recognition of foreign insolvency judgments in the People’s Republic of China (“PRC”).

1 [2022] 4 CMCLR 14.

II. Recognition and enforcement of foreign insolvency proceedings under PRC law

2 It is widely known that the PRC has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”). Recognition and enforcement of foreign insolvency proceedings under PRC law is instead governed by Art 5 of the PRC 2006 Enterprise Bankruptcy Law (“EBL”), which provides that a Chinese court can recognise a foreign insolvency judgment if the following conditions are fulfilled:

- (a) the foreign jurisdiction has an international agreement with the PRC; or
- (b) there is reciprocity between the foreign jurisdiction and the PRC.

3 Recognition is subject to the following conditions:²

- (a) Recognition would not violate the basic principles of PRC law.
- (b) Recognition would not violate State sovereignty, security or public interest.
- (c) Recognition would not undermine the interests of PRC creditors.

4 Article 5 of the EBL was successfully invoked in the Xihe Judgment, which we now turn to.

III. Xihe Judgment: Xiamen Maritime Court granted recognition of the Singapore judicial management proceedings

A. Background

5 In the Xihe Judgment, the Xiamen Maritime Court of the PRC (“Xiamen Maritime Court”) recognised the appointment of

2 Enterprise Bankruptcy Law of the People’s Republic of China (effective 1 June 2007) Art 5.

the judicial managers of two related Singapore companies, Xihe Holdings (Pte) Ltd (“Xihe Holdings”) and Xin Bo Shipping (Pte) Ltd (“Xin Bo”).

6 Xihe Holdings and its subsidiaries were the ship-owning arm of a shipping business owned by Mr Lim Oon Kuin, with the other arms being Ocean Tankers (Pte) Ltd (“OTPL”) (a ship-chartering and ship management company) and Hin Leong Trading (Pte) Ltd (an oil trading company). One of Xihe Holdings’ subsidiaries was Xin Bo which owned the vessel *Ocean Stellar*. The *Ocean Stellar* was bareboat chartered to OTPL at all material times.

7 Xihe Holdings was placed into interim judicial management on 17 August 2020, and into judicial management on 14 November 2020, in both instances by way of an order of court.

8 Xin Bo was placed into judicial management on 19 March 2021 by way of a resolution of creditors under s 94 of the Insolvency, Restructuring and Dissolution Act 2018³ (“IRDA”).

9 Due to the financial troubles of OTPL, Xihe Holdings and Xin Bo, the *Ocean Stellar* was the subject of various legal disputes in the PRC. One of the issues that arose in the PRC litigation proceedings was whether the Xiamen Maritime Court should recognise the appointment of judicial managers over Xihe Holdings and Xin Bo. This had a bearing on the issue of who had the necessary authority to give instructions and engage lawyers for the purposes of the Xiamen proceedings.

10 The Xiamen Maritime Court granted recognition of the judicial management of Xihe Holdings and Xin Bo. The Xiamen Maritime Court’s analysis differed between Xihe Holdings and Xin Bo, as the former was placed into judicial management via an order of the Singapore court, while the latter was placed into judicial management by way of a resolution of creditors.

3 2020 Rev Ed.

B. Recognition of Xihe Holdings judicial management proceedings

11 For Xihe Holdings, the key issue was whether to recognise the order of court appointing the judicial managers. The Xiamen Maritime Court applied the test of reciprocity under Art 5 of the EBL, and considered that the test was satisfied based on the following:

(a) For cross-border commercial judgments, there were various instances in which the Singapore courts had recognised judgments made by the PRC courts and *vice versa*. For example, in *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd*⁴ (“*Giant Light Metal*”), the High Court of Singapore recognised and enforced a judgment of the Suzhou Intermediate People’s Court. On 9 December 2016, the Nanjing Intermediate People’s Court in *Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd*⁵ (“*Kolmar*”) recognised and enforced a civil judgment made by the High Court of Singapore.

(b) In the specific context of cross-border insolvency proceedings, the Xiamen Maritime Court referred to an order by Vinodh Coomaraswamy J, recognising the ruling of the Nanjing Intermediate People’s Court in the bankruptcy proceeding (2016)01 Po No 8.

12 The Xiamen Maritime Court then went on to hold that recognising the order of court appointing the Xihe Holdings judicial managers would not violate the basic principles of the laws of the PRC, nor would it jeopardise the PRC’s sovereignty and security or public interests. There was also no evidence to show that the recognition would undermine the legitimate rights and interests of the creditors within the PRC territory. Thus, there was no obstacle to recognising the appointment of the Xihe Holdings judicial managers.

4 [2014] 2 SLR 545.

5 (2016) Su 01 Xie Wai Ren No 3.

C. Recognition of Xin Bo judicial management proceedings

13 As Xin Bo had entered judicial management by way of a resolution of creditors under s 94 of the IRDA, the Xiamen Maritime Court applied a different test under Art 14 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships, which provides that:⁶

Laws of the registration place shall apply to the capacity for civil rights, capacity for civil conduct, organisational structure, shareholders' rights and obligations and other matters of a legal person and the branch offices thereof.

14 The Xiamen Maritime Court went on to hold that accordingly, "the identity of Xin Bo's judicial manager should apply the laws of the corporate registration place, ie the laws of Singapore",⁷ and proceeded to recognise the Xin Bo judicial managers.

D. Recognition of appointment of PRC lawyers by Xihe Holdings and Xin Bo

15 The Xiamen Maritime Court then went on to consider and hold that, as Xihe Holdings and Xin Bo were Singapore companies, whether their judicial managers had the right to represent the companies in PRC litigation proceedings or entrust agents, ie, lawyers to act on the companies' behalf, was a matter to be decided in accordance with the laws of Singapore.

16 Here, the Xiamen Maritime Court relied on the following:

(a) ss 99(2) and 99(3) of the IRDA, which provide that during the period in which a company is in judicial management, all powers conferred on the directors of the company must be exercised by the judicial manager, and that the judicial manager has such powers as may

6 Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (effective 4 January 2011) Art 14 para 1.

7 *Fujian Huadong Shipyard Co Ltd v Ocean Tankers (Pte) Ltd, Xihe Holdings Pte Ltd* [2022] 4 CMCLR 14 at [9(1)].

be necessary for the management of the affairs, business and property of the company; and

(b) a prior decision by the Supreme People's Court of the PRC in *In re Sino-Environmental Technology Group v Thumb Environmental Technology Group*,⁸ confirming that the judicial manager and liquidator of the involved Singapore company in question had the right to represent the company in litigation or entrust agents to participate in the litigation.

IV. Observations on the application of the test for recognition under PRC law

A. The reciprocity requirement

17 In the Xihe Judgment, the Xiamen Maritime Court relied on actual reciprocity, *ie*, that the Singapore court has recognised PRC court orders in other cases. It is noteworthy that the Xiamen Maritime Court specifically considered whether the Singapore court had recognised an insolvency judgment or order of a PRC court, in considering whether there was actual reciprocity. In other words, when considering actual reciprocity, the PRC courts may require evidence of a prior recognition of a PRC court order of the same subject matter or area of law.

18 In any case, it appears that the reciprocity requirement may have been relaxed somewhat. In the case of *In re DAR*⁹ (“DAR Judgment”), which was decided after the Xihe Judgment, the Beijing First Intermediate People's Court (“Beijing Court”) was presented with the issue of whether to recognise the appointment of a bankruptcy administrator by the German courts.

19 The Beijing Court ruled in favour of recognition and reasoned that (a) under s 343 of the German Insolvency Code,¹⁰ foreign bankruptcy proceedings (which would include PRC

8 (2014) Min Si Zhong Zi No 20.

9 (2022) Jing 01 Po Shen No 786.

10 Insolvency Code of 5 October 1994 (Federal Law Gazette I, p 2866), as last amended by Art 2 of the Act of 7 May 2021 (Federal Law Gazette I p 850).

bankruptcy proceedings) are entitled to be recognised; and (b) there is no evidence that the German courts have previously refused to recognise any Chinese bankruptcy proceedings or judgment.

20 The significance of this decision is that proof of a prior actual recognition of a PRC judgment or order in the relevant foreign jurisdiction appears to be no longer required. This has been referred to by some commentators as “*de jure* reciprocity”, which provides that reciprocity is established if, according to the law of the country where the foreign judgment is rendered, a PRC judgment may, under the similar circumstances, be recognised and enforced by the courts of that foreign country.¹¹

21 This is clearly a lower standard than actual reciprocity as it only requires the applicant to show that hypothetically, a PRC judgment may be recognised and enforced by the courts of that foreign country.

22 In the DAR Judgment, s 343 of the German Insolvency Code stipulated that the commencement of foreign insolvency proceedings should be recognised. Accordingly, PRC bankruptcy proceedings were entitled to be recognised in Germany, thus fulfilling the test of *de jure* reciprocity. Further, as there was no evidence that Germany had previously refused to recognise any PRC bankruptcy proceedings or judgment, this fulfilled the test of presumptive reciprocity, *ie*, that reciprocity is presumed provided there is no precedent of refusal.

11 Guodong Du & Meng Yu, “How Chinese Courts Determine the De Facto Reciprocity in Recognizing Foreign Judgments”, *China Justice Observer* (16 July 2019) <<https://www.chinajusticeobserver.com/a/how-chinese-courts-determine-the-de-facto-reciprocity>> (accessed 1 April 2024), referencing an article published by Song Jianli J on the Judicial Interpretation of the Recognition and Enforcement of Foreign Judgments prepared by the Supreme People’s Court of the PRC (which sets out *de facto* reciprocity, *de jure* reciprocity and presumptive reciprocity). See also Guodong Du & Meng Yu, “Hope in Sight: Recognition and Enforcement of Foreign Judgments in China Is No Longer a Dream”, *China Justice Observer* (22 November 2018) <<https://www.chinajusticeobserver.com/insights/hope-in-sight-recognition-and-enforcement-of-foreign-judgments-in-china-is-no-longer-a-dream.html>> (accessed 1 April 2024).

23 Overall, it appears that the requirement for reciprocity would not be difficult to meet, particularly for the recognition of Singapore judgments, as actual reciprocity has been established. As a practical matter, for applications to the PRC courts for recognition of foreign insolvency judgments, it may be helpful to include an independent expert foreign law opinion setting out the process and likelihood of that foreign court recognising a PRC judgment when making such applications.

B. *A different test for recognition of out-of-court appointments of insolvency officeholders*

24 In the Xihe Judgment, the Xiamen Maritime Court applied a different test for the recognition of the Xihe Holdings judicial managers (appointed by way of an order of court) and the Xin Bo judicial managers (who were appointed by way of a creditors' resolution).

25 As regards Xihe Holdings, the Xiamen Maritime Court applied the test of reciprocity examined above in considering whether to grant recognition of the order of court. In contrast, as regards Xin Bo, the Xiamen Maritime Court appeared to essentially accept that Xin Bo's judicial management status was a matter of Singapore law, as Xin Bo was a company incorporated under Singapore law.

26 Based on the Xihe Judgment, it appears that the method of recognition of an insolvency process may differ depending on whether the commencement mode is a voluntary process, or a court-ordered process. It remains to be further considered by the PRC courts in future cases whether there is indeed a difference between the test used to determine whether to recognise a foreign judgment and the test used to determine whether to recognise a state of affairs under foreign law, and the circumstances in which each test will apply.

V. Conclusion

27 Given the increasingly cross-border nature of insolvencies, the Xihe Judgment and the DAR Judgment are welcome indications

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of the willingness and receptiveness of PRC courts in recognising foreign insolvency judgments. However, practitioners should be mindful of the distinction in the applicable standards between in-court and out-of-court insolvency processes and take into account these differences if it is contemplated that the overall restructuring plan requires recognition of orders or appointments in the PRC.