公报文章

Provisional Liquidators, the Automatic Stay, and the Hong Kong Court

临时清盘人、自动中止与香港法庭

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This article considers the approach taken by the Cayman Court when faced with an application by a company to appoint 'soft touch' provisional liquidators and obtain the benefit of the statutory moratorium when proceedings are extant in another jurisdiction, and a recent decision of the Hong Kong Court providing an indication of how such an application for recognition of the appointment and stay will be dealt with in Hong Kong.

本文探讨的内容是，在面临一家公司申请任命“轻触式”临时清盘人，而该公司在别的司法管辖区身陷诉讼但因此可获得法定暂停令的益处时，开曼法庭采用的方法，以及香港法庭最近做出的一项裁决，由此看出这种任命认可和中止的申请在香港将如何处理。

Section 97(1) of the Companies Act provides:

"When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."

《公司法》第 97(1) 条规定：

“在发出清盘令或任命临时清盘人之后，除非获得法庭许可并受法庭所施加的条款规限，否则不得对公司提起或启动任何诉讼、法律行动或其他法律程序，包括刑事诉讼。”

The statutory moratorium that arises as a consequence of it means that the appointment of a 'soft touch' provisional liquidator has long since been an attractive option available to Cayman Islands' companies that find themselves in financial distress[1]. The appointment of a 'soft touch' provisional liquidator would result in a debtor company benefiting from the moratorium imposed by the Companies Act and provide it with much needed breathing space to enable it to attempt to restructure its debts by way of scheme of arrangement or otherwise.

由此而产生的法定暂停意味着，长期以来，对于发现自己陷入财务困境的开曼群岛公司来说，任命“轻触式”临时清盘人是一个颇具吸引力的选项[1]。任命“轻触式”临时清盘人会使债务人公司受益于《公司法》规定的暂停执行条款，为其提供急需的喘息空间，使其能够试图通过重组安排计划的方式或其他方案来重组其债务。

An application to appoint 'soft touch' provisional liquidators in the Cayman Islands is often in response to insolvency proceedings commenced against a debtor company in another jurisdiction. This creates two immediate questions for the Cayman Court: firstly, should the Cayman Court appoint provisional liquidators over a Cayman Islands' company even if proceedings

在开曼群岛申请任命“轻触式”临时清盘人通常是为了应付在别的司法管辖区对债务人公司发起的破产诉讼。这就直接给开曼法庭带来了两个问题：第一，即使在别的司法管辖区存有诉讼，开曼法庭是否应为开曼群岛公司任命临时清盘人； 第二，任命的临时清盘人和随之而来的暂停令是否会在治外法权地得到认可。

[1] Such an application was first discussed in In the Matter of Fruit of the Loom (Unreported, 26 September 2000)
此等申请在 In the Matter of Fruit of the Loom（有关鲜果布衣的问题）中首次讨论过（未报道，2000 年 9 月 26 日）

are extant in another jurisdiction; and, secondly, would the provisional liquidators and the accompanying moratorium be recognised extra-territorially.

The answer to the first question was answered with a resounding 'yes' by the Chief Justice in *Sun Cheong Creative Development Holdings Limited*[2]. The answer to the second, so it had been thought, was that the provisional liquidator would be recognised (and the stay enforced) following the receipt by that foreign tribunal of a Letter of Request from the Cayman Court. In Hong Kong, this traditional understanding has been challenged in recent case law.

Sun Cheong Creative Development Holdings Limited

In *Sun Cheong*, the Chief Justice was faced with a common scenario. Sun Cheong Creative Development Holdings Limited ("Sun Cheong") was a company incorporated in the Cayman Islands, registered in Hong Kong and listed on the HKSE.

Sun Cheong was said to have been profitable historically but had found itself in financial difficulty due to what the Chief Justice described as '*an unfortunate confluence of events in 2019 and 2020*'. These events resulted in Sun Cheong being indebted to 11 different bank creditors in the sum total of HK$168m.

A number of the creditor banks had taken steps in Hong Kong to recover amounts due and owing including the presentation of two separate winding up petitions. In the application before the Cayman Court Sun Cheong acknowledged that it was unable to satisfy these debts and sought the appointment of provisional liquidators to benefit from the statutory moratorium and to give it breathing space to present a compromise to its creditors.

Section 104(3) of the Companies Act provides that the Cayman Court may appoint joint provisional liquidators following the presentation of a winding up petition if that company is, or is likely to become insolvent and intends to present a compromise or arrangement to its creditors.

The Cayman Court has long since shown a willingness to promote a restructuring culture in the jurisdiction and afford a debtor company an opportunity to avail itself of the statutory moratorium in an attempt to restructure its debts as an alternative to entering into official liquidation. Of course when dealing with companies whose affairs largely take place in other jurisdictions (and particularly if enforcement proceedings are extant), the issue of judicial comity comes to the fore.

Faced with this consideration, the Chief Justice found that:

"All other things being equal, this will generally be assumed to be the place of incorporation of the

对于第一个问题的回答，首席大法官在 *Sun Cheong Creative Development Holdings Limited*[2] 一案中给出了响亮的"是"。对于第二个问题的回答，人们曾一直认为，在该外国法庭收到开曼法庭的请求信后，临时清盘人会得到认可（并执行中止）。在香港，这种传统的理解在最近的判例法中受到了挑战。

Sun Cheong Creative Development Holdings Limited

在 *Sun Cheong* 一案中，首席大法官遇到了一个常见的情景。 Sun Cheong Creative Development Holdings Limited（简称"Sun Cheong"）是一家在开曼群岛成立的公司，在香港注册并在香港联合交易所上市。

据说 Sun Cheong 过去一直是盈利的，但由于如首席大法官所述的"*2019 年和 2020 年不幸的事件交汇在一起*"而陷入了财务困境。这些事件导致 Sun Cheong 欠下 11 个不同的银行债权人、总额为 1.68 亿港币的债务。

一些债权人银行已在香港采取法律措施以追回到期的和所欠的款项，其中包括提交了两份单独的清盘呈请。在提交给开曼法庭的申请中，Sun Cheong 承认其无法偿还这些债务，并寻求任命临时清盘人以从法定暂停令中受益，为其提供喘息的空间，使其向债权人提出折衷方案。

《公司法》第 104(3) 条规定，开曼法庭可以在公司提交清盘呈请后任命共同临时清盘人，前提条件是该公司已经或可能破产，并有意向其债权人提出折衷方案或安排计划。

开曼法庭长期以来一直显示了其促进辖区重组文化的意愿，为债务人公司提供一个机会，使其利用法定暂停令，力图重组其债务，以替代正式清盘。当然，如果当事公司的事务主要发生在其他司法管辖区（尤其是在存有执行程序的情况下），则司法礼让问题就会凸显出来。

鉴于这种考虑，首席大法官认为：

"在所有其他条件相同的情况下，这通常被认为是公司成立

[2] Unreported (20 October 2020)
未报道（2020 年 10 月 20 日）

company, being the place that its investors, service providers and trade creditors would typically associate with, among other things, the company's registered office and the law governing the duties of its board of directors and its Articles of Association."

的地点，是其投资者、服务提供商和贸易债权人通常会与公司的注册办事处和规范其董事会职责和公司章程的法律等相关联的地方。"

The Chief Justice was emboldened in concluding this due to the fact that the Cayman Islands is an 'advanced and reputable international financial centre', and, importantly noted long established jurisprudence in Hong Kong recognising foreign insolvency officeholders appointed in the country of incorporation[3].

首席大法官之所以大胆地得出了此结论，是因为开曼群岛是一个"先进且声誉良好的国际金融中心"，并指出了很重要的一点，即香港悠久的法理认可在公司成立国任命的外国破产官员[3]。

It was however accepted that there were circumstances in which the Cayman Court would recognise foreign insolvency practitioners that had been appointed over a Cayman Islands domiciled company by a foreign court. In particular, recognition may be given to a foreign office holder when his or her appointment was to facilitate a restructuring, whereas the Cayman Court may be less willing to do so if the purpose of the appointment was solely to wind up that entity.

不过，人们认为，在某些情况下，开曼法庭会认可外国法庭为位于开曼群岛的公司任命的外国破产执行人。特别是，如果外国官员的任命是为了促进重组，则可能会得到认可，而如果任命的目的仅仅是为了清算该实体，则开曼法庭可能不太愿意认可。

Sun Cheong restates what had generally been accepted as the position in the Cayman Islands: unless there was good reason to the contrary, the jurisdiction of incorporation was the most appropriate venue to conduct its restructuring, with recognition being afforded to the local practitioner overseas to assist that restructuring and implement a stay of proceedings wherever necessary.

Sun Cheong 一案再次表明了开曼群岛普遍接受的立场：除非有充分的相反理由，否则公司设立地的司法管辖区是进行重组的最合适的地点，同时认可海外本地执行人，使其协助重组，并在必要时中止诉讼。

FDG Electric Vehicles Limited

FDG Electric Vehicles Limited

A significant proportion of companies that have sought the protective wrapper of provisional liquidation are incorporated in the Cayman Islands and carrying out business in Hong Kong or the PRC. More than 50% of the companies listed in the Hong Kong Stock Exchange ("HKSE") are incorporated in the Cayman Islands. The ability of such a company to utilise the Cayman Islands 'soft touch' provisional liquidation regime is of critical importance given no such equivalent process in Hong Kong.

很大一部分寻求临时清盘保护机制的公司在开曼群岛成立，但是在香港或中国大陆开展业务。在香港联合交易所上市的公司中，有 50% 以上的公司在开曼群岛成立。这样的公司利用开曼群岛"轻触式"临时清盘制度的能力至关重要，因为香港没有类似的程序。

Historically Cayman Islands provisional liquidators had been welcomed in Hong Kong and throughout 2020 Cayman Islands provisional liquidators were recognised (as, importantly, was the automatic stay) with some regularity.

历史上，开曼群岛的临时清盘人在香港一直广受欢迎，并且在整个 2020 年，开曼群岛的临时清盘人（同样重要的还有自动中止）得到了一定程度的认可。

In *Re Moody Technology Holdings Ltd*[4] Deputy Judge William Wong stated the position as he understood it:

在 *Re Moody Technology Holdings Ltd*[4] 一案中，暂委法官 William Wong 阐明了他所理解的立场：

"…it is not in my opinion inconsistent with Hong Kong law for restructuring powers to be granted by way of assistance to a provisional liquidator appointed over a

"……我认为，由某家外国公司成立地的法庭为其任命临时清盘人，以协助的方式授予重组权力，而该成立地又允许"轻触式"临时清盘，这与香港法律并不抵触，这样的权力

[3] Citing the decisions of the Hong Kong Court in China Oil Gangran Energy Group Holdings Limited (in Provisional Liquidation) [2020] HKCFI 825 and Moody Technology Holdings Limited (in Provisional Liquidation) [2020] 4 HKC 78.
引用香港法院对中油港燃能源集团控股有限公司（处于临时清算状态）的裁决［2020 年］HKCFI 825 和满地科技股份有限公司（处于临时清算状态）［2020 年］4 HKC 78。

[4] [2020] 2 HKLRD 187
[2020 年] 2 HKLRD 187

foreign company by the court of its place of incorporation, in which a soft-touch provisional liquidation is permissible, as such powers can be granted, albeit in the more limited circumstances discussed in China Solar, to a Hong Kong provisional liquidation."

是可以授予香港临时清盘的（尽管这是在 China Solar 一案中讨论的更有限的情况下）。"

As part and parcel of this recognition process, it was thought that the recognition of provisional liquidators in an offshore jurisdiction would result in an automatic stay of proceedings in Hong Kong. Indeed, in Sun Cheong the Chief Justice stated this in terms. A 'standard' recognition order made by the Hong Kong Court would often contained a paragraph in the terms of the following:

作为这一认可过程的重要组成部分，大家认为，对离岸司法管辖区临时清盘人的认可会导致诉讼在香港自动中止。确实，在 Sun Cheong 一案中，首席大法官用术语说明了这一点。香港法庭做出的"标准"认可令通常包含一个用以下词语表达的段落：

"For so long as the Company remains in liquidation in [relevant jurisdiction], no action or proceedings shall be proceeded with or commenced against the Company or its assets or affairs, or their property within the jurisdiction of this Honourable Court, except with leave of this Honourable Court and subject to such terms as this Honourable Court may impose."

"只要公司在[相关司法管辖区]仍处于清盘状态，就不得对公司或其资产或事务或其在本法庭管辖范围内的财产采取法律行动或提起诉讼，除非获得本法庭许可并受本法庭可能施加的条款规限。"

This was of course seen as desirable to a debtor company subject to proceedings in Hong Kong.

对于在香港身陷诉讼的债务人公司来说，这当然是再好不过了。

Whilst there is no question as to whether a foreign officer will be recognised in the future, the decision of Justice Harris in *FDG Electric Vehicles Limited*[5] casts doubt as to whether the statutory moratorium imposed by section 97 of the Companies Act will have automatic effect in the future. Here Justice Harris was faced with an application by a foreign officer holder seeking recognition and considered that rather than ordering a general stay, it would be more appropriate for case management orders to be made on a case-by-case basis staying those particular proceedings if appropriate in all of the circumstances. Having reached that conclusion, he made an order in the following terms (and suggested that recognition orders made in due course would be made in the same terms):

虽然对于今后外国官员是否会得到认可这一点毫无疑问，但是 Harris 法官在 *FDG Electric Vehicles Limited*[5] 一案中的裁决让人对《公司法》第 97 条规定的法定暂停令是否会自动生效产生了怀疑。对于此案，Harris 法官面对的是外国官员寻求认可的申请，并对此加以考虑而非下达一个一般性中止令，而更适当的做法是，在个案基础上下达案件管理命令，在所有情况下中止那些特定诉讼（如果适当的话）。得出该结论后，他下达了以下命令（并建议适时以同样的词语下达认可令）：

"If the Provisional Liquidators wish to apply for a stay or other directions in respect of proceedings in the High Court of any sort as a consequence of the recognition of their appointment by this order such application shall be listed before the Honourable Mr. Justice Harris or such other judge as he shall direct. The Provisional Liquidators shall write to the clerk to the Honourable Mr. Justice Harris seeking case management directions for the determination of any application that they wish to make pursuant to this order."

"如果临时清盘人因本命令认可了其任命而欲申请中止或就高等法庭的任何诉讼程序提出其他措施，则该申请应在 Harris 法官先生或其指定的其他法官面前列出。临时清盘人应写信给尊敬的 Harris 法官先生的助理，寻求案件管理指示，以确定他们希望根据本命令提出的任何申请。"

Justice Harris consider the decision of the Privy Council in *Singularis*[6] noting that it envisaged a stay being granted in aid of a collective insolvency process. He concluded that the appointment of 'soft touch' provisional liquidators could not, as a matter of Hong Kong law,

Harris 法官考虑了枢密院在 *Singularis*[6] 一案中的裁决，指出其设想在集体破产诉讼中给予中止。他总结说，根据香港法律，"轻触式"临时清盘人的任命不能构成集体诉讼，并提出质疑（尽管未做出决定[7]），非集体诉讼的外国诉讼是否可

[5] [2020] HKCFI 2931
[2020 年] HKCFI 2931
[6] Singularis Holdings Ltd v PricewaterhouseCoopers [2015] AC 1675
Singularis Holdings Ltd v PricewaterhouseCoopers [2015] AC 1675 案

amount to a collective process and queried (though did not decide[7]) whether foreign proceedings that were not a collective proceeding could justify the imposition of a stay.

以作为实施中止的理由。

It remains to be seen how the Hong Kong Court will determine future applications seeking recognition particularly as it relates to any stay of proceedings, though for now it seems that the benefits to a Cayman Islands' incorporated debtor company of seeking the protective wrapper of an offshore provisional liquidator will outweigh the administrative burden of making an application for a stay in individual actions in Hong Kong.

尽管目前看来，在开曼群岛成立的债务人公司寻求离岸保护机制的好处似乎胜过在香港的单个诉讼中申请中止所造成的行政责任，但香港法庭如何裁决未来寻求认可的申请尤其是涉及任何中止诉讼的认可申请，仍有待观察。

The tension between the Courts in Cayman and Hong Kong may be expected to increase further as and when Cayman introduces its reforms to Part V of the Companies Act and introduces the concept of a 'Restructuring Officer'. Whilst a company that has appointed a Restructuring Officer will, as a matter of Cayman law, benefit from a statutory moratorium, in light of the decision in FDG, persuading the Hong Kong Court that this amounts to a collective proceeding may prove a difficult task.

开曼群岛法庭和香港法庭之间的紧张关系可能会因为并随着开曼群岛把改革内容引入《公司法》第五部分并推出"重组官"的概念而进一步加剧。根据开曼群岛法律，任命了重组官的公司将从法定暂停令中受益，但鉴于对 FDG 一案的裁决，说服香港法庭这会构成一项集体诉讼可能是一项艰巨的任务。

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[7] He was not required to do so as the applicant was content to adopt the case management approach.
他不必这样做，因为申请人觉得采用案例管理方法就可以了。

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