

HCMP 2227/2021 & HCCW 81/2021  
(HEARD TOGETHER)  
[2022] HKCFI 1686

HCMP 2227/2021

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
MISCELLANEOUS PROCEEDINGS NO 2227 OF 2021**

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IN THE MATTER of Rare Earth  
Magnesium Technology Group  
Holdings Limited 稀鎂科技集  
團控有限公司 (Provisional  
Liquidators Appointed) (For  
Restructuring Purposes Only)

and

IN THE MATTER of Sections  
670, 671, 673, and 674 of the  
Companies Ordinance (Cap 622)

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AND

HCCW 81/2021

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
COMPANIES WINDING-UP PROCEEDINGS NO 81 OF 2021**

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IN THE MATTER of the  
Companies (Winding Up and  
Miscellaneous Provisions)  
Ordinance (Chapter 32)

and

IN THE MATTER of Rare Earth  
Magnesium Technology Group  
Holdings Limited 稀鎂科技集  
團控有限公司 (Provisional  
Liquidators Appointed) (For  
Restructuring Purposes Only)

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(HEARD TOGETHER)

Before: Hon Harris J in Court

Date of Hearing: 27 May 2022

Date of Decision: 27 May 2022

Date of Reasons for Decision: 6 June 2022

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REASONS FOR DECISION

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***Introduction***

1. I have before me:

(1) the Company's Petition seeking the Court's:

(a) sanction under *section 673* of the *Companies Ordinance* (Cap. 622) ("**Ordinance**") of a scheme of arrangement between the Company and its Scheme Creditors; and

(b) approval of certain amendments to the Scheme providing for improved recovery for the Scheme Creditors.

(2) The Petition issued by AI Global Investment SPC on 22 February 2021 to wind up the Company ("**Winding-Up Petition**"), which the Company asks me to dismiss and order that the costs are paid by the Petitioner. I deal with this in [44].

A 2. On 12 January 2022 I made an order for the Company to  
B convene a meeting of its creditors to consider a proposed scheme of  
C arrangement restructuring its debt (“**Convening Order**”). After an  
D adjournment, the Scheme Meeting was duly convened on 1 March 2022.  
E At the Scheme Meeting the resolution was carried by a majority in number  
F of the Scheme Creditors present and voting, in person or by proxy, holding  
79.06% of the Claims voted. Specifically, 9 out of the 10 Scheme Creditors  
voted for the Scheme.

G 3. The Scheme seeks to restructure the Company’s indebtedness  
H in order to return the Company to a solvent going concern. A successful  
I restructuring would give the Scheme Creditors a much higher recovery  
J (estimated to be 100% of the principal under the Scheme’s Term Extension  
K Option). Absent restructuring, the Company would be liquidated and the  
Scheme Creditors’ estimated recovery would be approximately 8.5% to  
L 23.1%.

M 4. The background to the Company and the need for the Scheme  
N are in brief as follows. The Company is a Bermuda-incorporated entity  
O and its shares have been listed on the Main Board of The Stock Exchange  
P of Hong Kong Limited (“**SEHK**”) since 28 January 1993. The Company  
Q is an investment holding company. The Company’s subsidiaries are  
R principally located in Hong Kong, Mainland China, and the British Virgin  
S Islands. The Company is also part of a wider group (“**Group**”) ultimately  
held by Century Sunshine Group Holdings Limited (“**Century Sunshine**”)  
which is an exempted company incorporated in the Cayman Islands and  
listed in Hong Kong (Stock Code: 509).

T 5. The Group’s key businesses consist of the development and  
U production of green fertilisers, including ecological fertilisers, functional  
V

fertilisers and general fertilisers; a with the primary production bases in the Jiangsu Province and Jiangxi Province; and the production of magnesium in the Jilin Province and Xinjiang Uyghur Autonomous Region.

6. The Company is the key operator of the magnesium alloy production business segment of the Group and indirectly owns the relevant production bases in the Mainland. Despite enjoying strong growth and profitability in the past, the Group's financial position deteriorated in 2020 due to COVID-19. The Company is at least cashflow insolvent. The Company's management accounts as of 31 December 2021 stated that the Company had net assets of HK\$1,138,523,000 and net current liabilities of HK\$613,477,000.

7. The Company's principal indebtedness arises from unsecured interest-bearing bonds issued by the Company, which are governed by Hong Kong law. As of 31 December 2021, the Company's total indebtedness was approximately HK\$852,533,000 owed to 10 Scheme Creditors. The Company is likely to go into liquidation unless its current indebtedness can be restructured. On 22 February 2021, a creditor (AI Global Investment SPC) presented a winding-up petition against the Company in Hong Kong ("**Petition**"). The Petition hearing has been adjourned to 27 May 2022 so that the Court may consider both the Scheme's progress and the Petition together.

8. Before the Petition was issued, the Company sought the appointment of soft-touch provisional liquidators ("**PLs**") in Bermuda:

- (1) On 3 July 2020, the Company filed a winding-up petition in Bermuda against itself.

(2) On 16 July 2020, the Bermuda court appointed the PLs to assist in and facilitate the Company's debt restructuring.

9. On 25 August 2020, I recognised the PLs in Hong Kong: *Re Rare Earth Magnesium Technology Group Holdings Ltd*<sup>1</sup>.

10. To avoid liquidation and to return the Company to a solvent going concern, the Company (with the PLs' assistance) has been pursuing a debt restructuring leading to the Scheme. The Scheme seeks to discharge the Company's unsecured indebtedness, which would also entail releasing the Scheme Creditors' right to enforce guarantees granted by Century Sunshine (Clauses 1 and 2 of the Scheme). In return, the Scheme Creditors will be given a choice to choose either the Term Extension Option, the Convertible Bonds Swap Option, or a combination of both (Clause 7 of the Scheme).

11. Under the Term Extension Option, the Scheme Creditors' Claim repayment deadline will be extended for five years, during which the Scheme Creditors will be entitled to receive the Term Extension Interest, Interim Payments, and the Final Payment; and where applicable the Early Repayment and Term Extension Potential Extra Payment (Clauses 7.2 to 7.10 of the Scheme).

12. Under the Convertible Bonds Swap Option, the Scheme Creditors' Claim will be converted into Convertible Bonds which will mature in five years. The Convertible Bonds do not carry any interest and may be converted into the Conversion Shares during the conversion period. Unless previously redeemed or converted, the Company shall redeem the

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<sup>1</sup> [2020] HKCFI 2260; [2020] HKCLC 1295.

Convertible Bonds on the maturity date at the redemption amount which shall be equal to 100% of the outstanding principal amount (Clause 7.14 of the Scheme).

13. To give additional comfort to the Scheme Creditors who choose the Term Extension Option, the following are offered to those Scheme Creditors:

(1) Century Sunshine is pursuing its own debt restructuring via the Century Sunshine Proposed Scheme. If there are surplus assets resulting from the Century Sunshine Proposed Scheme, the surplus assets are intended to be transferred to the Scheme Company for distribution to the Option A Creditors (Clause 7.11 of the Scheme).

(2) Century Sunshine will provide a corporate guarantee to the Scheme Company to guarantee the punctual payment of the Interim Payment(s) (if payable) and the Final Payment (Clause 7.12 of the Scheme).

(3) The Company's various subsidiaries will provide security interests and corporate guarantees to the Scheme Company to secure the Final Payment (Clause 7.13 of the Scheme).

14. In addition, the Scheme Creditors who have executed the Consenting Agreement will be given a consent fee in cash amounting to 3% of the principal amount of the debt owed by the Company to the Scheme Creditors (Clause 9 of the Scheme).

15. The Scheme Creditors' recovery under the Term Extension Option is estimated to be 100% of the principal, whereas in a liquidation the Scheme Creditors' recovery is estimated to be approximately 8.5% to 23.1%.

16. The Company does not need any parallel scheme of arrangement in any jurisdiction.

***Relevant Principles***

17. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently restated in *Re China Singyes Solar Technologies Holdings Ltd*<sup>2</sup>. The Court considers in particular the following:

- (1) whether the scheme is for a permissible purpose;
- (2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;
- (3) whether the meeting was duly convened in accordance with the Court's directions;
- (4) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;
- (5) whether the necessary statutory majorities have been obtained;
- (6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and
- (7) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

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<sup>2</sup> [2020] HKCFI 467; [2020] HKCLC 379 at [7].

18. As in *Singyes*, the Scheme is a genuine debt restructuring of a distressed company. It is also a permissible purpose to compromise via the Scheme guarantees granted by Century Sunshine (see *Re Century Sun International Ltd*<sup>3</sup>).

19. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised as follows:

- (1) The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned.
- (2) The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration.
- (3) The third principle is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, with the result that the test for classes becomes an instrument of oppression by a minority.
- (4) The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried

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<sup>3</sup> [2021] HKCFI 2928; [2021] HKCLC 1477 at [15]–[17].

out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.

- (5) In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.

*See Re China Oil Gangran Energy Group Holdings Ltd*<sup>4</sup>.

20. The Scheme Creditors correctly voted as a single class for these reasons:

- (1) The appropriate comparator here is an insolvent liquidation because, absent the Scheme, an insolvent liquidation of the Company would be an unavoidable outcome.
- (2) The Scheme Claims are the Company's general unsecured debts.
- (3) All Scheme Creditors are given the same options for distribution under the Scheme.

21. The Convening Order has been complied with. This is explained by Mr Chi in his 2<sup>nd</sup> affirmation which confirms the circulation of the notice of the Scheme Meeting, Explanatory Statement and Scheme. The advertisement of the Scheme Meeting was duly placed in The Standard and Sing Tao Daily on 18 January 2022.

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<sup>4</sup> [2021] HKCFI 1592; [2021] HKCLC 911 at [15]-[16].

22. During the Scheme Meeting held on 15 February 2022, the Chairman adjourned the Scheme Meeting to 1 March 2022 in view of the impending amendments to the Scheme resulting from negotiations with a major Scheme Creditor. This was permissible. The Chairperson could validly adjourn the Scheme Meeting to allow the Scheme Creditors sufficient opportunity to consider proposed amendments to the Scheme (see *Re Peninsula and Oriental Steam Navigation Company*<sup>5</sup>; *aff'd The Peninsular and Oriental Steam Navigation Company v Eller and Co*<sup>6</sup>; *Re CIL Holdings Ltd*<sup>7</sup>).

23. On 23 February 2022, the Company circulated the revised Scheme to all Scheme Creditors. The adjourned Scheme Meeting on 1 March 2022 duly voted in favour of the Scheme. The requirements under *section 674(1)(b)* of the *Ordinance* that the Scheme be approved by a majority in number representing at least 75% in value of the Scheme Creditors present and voting in person or by proxy have been satisfied.

24. To satisfy the requirements of *section 671(3)* of the *Ordinance*, an explanatory statement must be sufficiently informative:

“A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. Necessarily, the duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. A company is required to provide specific financial information to support its predicted outcomes, and I would normally expect it to have its views independently

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<sup>5</sup> [2006] EWHC 389 (Ch) at [34], [49], [54]–[55] (Warren J).

<sup>6</sup> [2006] EWCA Civ 432.

<sup>7</sup> (Unrep., HCMP 2799/2002, 2 April 2003) at [8]–[12] and [18] (Kwan J).

verified by an insolvency practitioner or other suitable professionals.”<sup>8</sup>

The Explanatory Statement satisfies these requirements.

25. The Court is slow to differ from the majority views, as it normally acts on the principle that businessmen are much better judges of what is to their commercial advantage than the court could be: *Re Allied Properties (HK) Ltd*<sup>9</sup>. The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Creditors’ Claims will be discharged and in return they will be entitled to be given a cash distribution, convertible bonds or a combination of both under the terms of the Scheme. The Scheme consideration provides the Scheme Creditors with a much better return than in an insolvent liquidation of the Company. Therefore, in respect of the Scheme Creditors, the Scheme is one that an intelligent and honest person acting in accordance with his interests as a member of the class within which he voted might reasonably approve.

### ***Transnational Cases***

26. The business group of which the Company is an intermediate subsidiary carries on business in Jiangsu, Jiangxi and Jilin Provinces and the Xinjiang Uyghur Autonomous Region. The ultimate holding company is incorporated in the Cayman Islands and listed on the SEHK. The Company is incorporated in Bermuda. The debt to be compromised by the Scheme is very largely governed by Hong Kong law.

27. In transnational cases, the Court considers whether a scheme is effective in other foreign jurisdictions of practical importance because it

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<sup>8</sup> *Re Century Sun International Ltd, supra*, footnote 3 at [23].  
<sup>9</sup> [2020] HKCA 973; [2020] HKCLC 1549 at [37].

would not be a proper exercise of the discretion to sanction a scheme if it serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

- (1) Is a material amount of debt to be compromised by a scheme governed by the law of a jurisdiction other than Hong Kong?
- (2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?
- (3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued: *China Oil*<sup>10</sup>.

28. Although there is no parallel scheme or recognition application in any jurisdiction, the Scheme is expected to be internationally effective, in particular in Bermuda and Cayman Islands, because all the Claims are governed by Hong Kong law. As Miles J recently observed in, *Re PGS ASA*<sup>11</sup>, in an English law context:

“There is no requirement for a scheme to be effective in every jurisdiction worldwide, provided that it is likely to be effective in the key jurisdictions in which the company operates or has assets. Where the governing law of the debt affected by the scheme is English law, it is inherently likely that the scheme will be recognised abroad.”

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<sup>10</sup> *Supra*, footnote 4 at [21]–[23].

<sup>11</sup> [2021] EWHC 222 (Ch) at [29] (Miles J).

29. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme of arrangement will be recognised abroad is justified because the discharge occurs as a matter of substantive Hong Kong law. This is certainly to be expected of a jurisdiction, which applies, what is commonly known as, the Rule in *Gibbs*. The Rule in *Gibbs*<sup>12</sup> provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt. As far as I am aware, at the time of this decision *Gibbs* is followed in Bermuda, Cayman Islands and the other offshore jurisdictions. If a creditor submits to the jurisdiction of a foreign insolvency process he is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency process<sup>13</sup>. Consequently, a scheme sanctioned by the court of an offshore jurisdiction compromising debt governed by Hong Kong law will be treated in Hong Kong as binding on a creditor, who submitted to the foreign jurisdiction. It will not bind a creditor, who did not participate in the scheme proceedings or any associated insolvency process in the foreign jurisdiction.

30. Although not material in the present case, it is common for Mainland business groups listed in Hong Kong to raise US\$ denominated debt and for the relevant agreements to be governed by United States law. A technique was established in about 2016 to compromise such debt by introducing a scheme in Hong Kong that would be recognised in the United States<sup>14</sup>. This would not be inconsistent with the Rule in *Gibbs*. As I explain in *Winsway*<sup>15</sup>:

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<sup>12</sup> *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.

<sup>13</sup> *China Oil supra* [24] referring to *China Singyes supra* [18(2)].

<sup>14</sup> See in particular *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; [2016] HKEC 2495.

<sup>15</sup> *Ibid* [36].

“The second issue is answered by the Privy Council’s decision in *New Zealand Loan and Mercantile Agency Co v Morrison*<sup>16</sup>. The Privy Council held, applying *Gibbs*, that a scheme of arrangement sanctioned in England under the *Joint Stock Companies Arrangement Act 1870* did not prevent a claim being brought in Victoria in respect of a debt governed by the law of Victoria. It did, however, bind all creditors ‘*wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domicile, will be bound by the result.*’<sup>17</sup> The Scheme will, therefore, prevent action being taken within the jurisdiction of the Hong Kong courts regardless of the governing law of the debt. This is one of the principal reasons for introducing a scheme such as the present one. It will prevent action being taken in Hong Kong by a dissident creditor, which interferes with the Company’s listed status.”

31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under *Chapter 15* and granting by the relevant Bankruptcy Court of ancillary relief which prohibited enforcement in the United States. As the offshore jurisdictions apply the Rule in *Gibbs*, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of *China Oil*<sup>18</sup>.

32. A scheme sanctioned in an offshore jurisdiction and recognised under *Chapter 15* in the United States will not be treated by a Hong Kong court as compromising US\$ debt. The Rule in *Gibbs* requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law<sup>19</sup>. In the insolvency context in the United States this is I understand is achieved under *Chapter 11* of

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<sup>16</sup> [1898] AC 349.

<sup>17</sup> Lord Davey pp357–8.

<sup>18</sup> *Supra*.

<sup>19</sup> *In re OJSC International Bank of Azerbaijan Bakhshiyeva v Sberbank of Russia* [2018] Bus LR 1270, 1308, [158(2)] (Hildyard J).

A *United States Bankruptcy Code*. This is explained by Glenn J (who dealt  
B with the *Chapter 15* application in *Winsway*<sup>20</sup>) in his judgment in  
C *In re Agrokor d.d.*<sup>21</sup>. In pages 184 to 185 Glenn J explains the position as  
D follows:

E “The Supreme Court concluded in *Tennessee Student Assistance*  
F *Corp. v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d  
G 764 (2004), that the discharge of debt in a U.S. bankruptcy  
H proceeding is proper because it is an *in rem* proceeding. A single  
I court should resolve all claims to property of the debtor, which  
J necessarily requires that the court resolve all creditor claims that  
K have been, or could have been, asserted, provided that the  
creditors have received the notice required by due process. Thus,  
in an *in rem* proceeding, personal jurisdiction over all creditors  
is not required; the court determines the creditors’ rights to  
receive distributions from all property of the debtor that is part  
of the estate. A creditor cannot ignore or avoid a Chapter 11 case  
and later sue to recover on its prepetition claim. Upon  
confirmation of a Chapter 11 plan, section 1141 (d)(1)(A)  
discharges the debtor from any debt that arose before the date of  
confirmation, whether or not the creditors filed a proof of claim  
or accepted the plan...”

L 33. As a matter of United States law a confirmed *Chapter 11* plan  
M operates to discharge the existing debt of a debtor and replace it with a right  
N to receive a distribution in accordance with the confirmed plan. This is  
O also the effect of a sanctioned scheme. Glenn J goes on at the end of the  
P paragraph I have quoted to refer to the same principles applying to  
Q recognition of a foreign insolvency process with the same consequences,  
R however, it is clear from reading the judgment as a whole that recognition  
S under *Chapter 15* does not operate as a discharge and that Glenn J  
T acknowledges this.

R 34. On page 185 Glenn J introduces an objection to recognition  
S based on the fact that some of the debt compromised by the arrangement  
T

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U <sup>20</sup> *Supra.*

V <sup>21</sup> 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

Glenn J was asked to recognise was governed by English law and the arrangement arose under Croatia’s *Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia*.

“From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement Agreement is appropriate within the territorial U.S.) arises because of the English courts’ enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law.<sup>22</sup> That would be unfortunate, indeed.”

35. The material distinction between *Chapter 11* and *Chapter 15* proceedings is explained on page 187:

“Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor’s property *that is located within the territorial jurisdiction of the United States*. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. *See, e.g., Atlas Shipping*, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor’s property located **in the United States. *Id.***” (emphasis added)

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<sup>22</sup> As Chief Justice Waite said in *Gebhard*, 109 U.S. at 539, 3 S.Ct. 363, “[u]nless all parties in interest, wherever they reside, can be bound” by the arrangement which is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.”

A 36. It is clear from this passage that recognition under *Chapter 15*  
B operates procedurally to prevent action by a creditor against a debtor's  
C property in the United States. Recognition does not appear as a matter of  
D United States' law to discharge the debt. Consistent with this at page 196  
E Glenn J states that it is appropriate to extend comity within the territorial  
F jurisdiction of the United States. Unlike a discharge under *Chapter 11*  
G which purports to have worldwide effect, recognition under *Chapter 15* is  
limited in territorial effect and I think it is reasonable to assume that the  
reason for this is that the procedure does not discharge the debt.

H 37. There is a distinction between a court treating a compromise  
I as having the substantive legal effect of altering the legal rights of the  
J parties to an agreement (the issue with which *Gibbs* is concerned) and a  
K court within its jurisdiction recognising, pursuant to a process such as  
L *Chapter 15*, the purported legal consequence of a foreign insolvency  
M procedure. This is a distinction to which advisers need to be alert when  
N dealing with transnational restructuring. A scheme in an offshore  
O jurisdiction purporting to compromise debt governed by United States law  
P will not be effective in Hong Kong. Recognition of the scheme under  
Q *Chapter 15* does not constitute a compromise of debt governed by United  
R States law, which satisfies the Rule in *Gibbs*. The result is that if a  
S company has a creditor, which did not submit to the jurisdiction of the  
T offshore court the creditor will be able to present a petition in Hong Kong  
U to wind up the Company and if, for example, the creditor is a bond holder  
V whose debt is not disputed, obtain a winding up order unless the debt is  
settled. I note that there appears to be a surprisingly large number of  
Mainland business groups listed in Hong Kong, whose US\$ denominated  
debt has recently been subject to schemes only in offshore jurisdictions and

A recognition under *Chapter 15*<sup>23</sup>. It may be that all the creditors of these  
B companies, which hold debt of any material value have agreed to the terms  
C of the compromise, but if that is not the case such companies, and any that  
D might adopt a similar model in future, will be at risk of a petition being  
E presented against them in Hong Kong and being wound up here. An  
offshore scheme and *Chapter 15* recognition will not protect them.

### F *Modification of the Scheme*

G 38. The Company seeks to modify the Scheme terms slightly in  
H order to accommodate SEHK's comments on the structure of the Term  
I Extension Share Placement. The amendments are in summary as follows:

- J (1) Subject to complying with the public float requirement, the  
K Company will issue in one lot all shares under the Term  
L Extension Share Placement, instead of five instalments as  
M originally proposed.
- N (2) The Term Extension Interest payable to the Scheme Creditors  
will no longer be subject to any cap; the original proposal was  
a 5% cap.

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O <sup>23</sup> By way of example: Hilong Holding Limited (Stock Code 1623), GCL New Energy Holdings (Stock  
P Code: 451), MIE Holdings Corporation (Stock Code: 1555), Golden Wheel Tiandi Holdings  
Q Company Limited (Stock Code: 1232), Modern Land (China) Co., Limited (Stock Code: 1107) and  
R E-House (China) Enterprise Holdings Limited (Stock Code: 2048). In *Winsway* the scheme was  
S recognised because the Hong Kong proceedings to introduce a scheme were found by Glenn J to  
T constitute "*foreign non-main proceedings*" as defined in the **UNCITRAL Model Law** as  
U incorporated in *Chapter 15*, on the basis that the Company was listed on the SEHK: *supra* [37]. My  
understanding is that it was thought by *Winsway*'s legal advisers that the Company's COMI might  
be in the Mainland and, therefore, the proceedings in Hong Kong would not constitute "*foreign main  
proceedings*" and the *Chapter 15* application was framed accordingly. For obvious reasons it is  
unlikely that any of the Mainland companies to which I have referred have their COMI in an offshore  
jurisdiction or an establishment as defined in paragraph (f) of Article 2. Article 16 paragraph 3  
provides that "*In the absence of proof to the contrary, the debtor's registered office ..... is presumed  
to be the centre of the debtor's main interests*". I would have thought that it would be apparent from  
evidence filed in support of an application for recognition under *Chapter 15* explaining a scheme  
and its background that most, if not all, of these companies do not have their COMI in the place of  
incorporation. As I explain in [20] of my decision in *Li Yiqing v Lamtex Holdings Limited*  
[2021] HKCFI 622; [2021] HKCLC 329, referring to *Creative Finance Ltd* Case No. 14-10358  
(REG) 13 January 2016, my understanding is that offshore jurisdictions are not normally eligible for  
recognition under *Chapter 11*.

(3) The Company will have no liability for the Scheme Costs. All Scheme Costs will be settled solely from the Term Extension Share Placement Proceeds.

39. The Company seeks the Court’s permission to modify the Scheme terms to meet SEHK’s requirements. In this connection, the Company relies on Clause 119 of the Scheme:

“The Scheme Administrators may jointly consent for and on behalf of all concerned to any modification of or addition to the Scheme or to any condition the Court may see fit to approve or impose at any hearing of the Court to sanction or give directions in respect of the Scheme, whether in accordance with Section 670 of the Companies Ordinance or otherwise... If the Court approves a modification or addition to the Scheme without the need to convene a meeting of the Scheme Creditors to vote on the modification, such modification or addition shall be binding on the Company and the Scheme Creditors provided that no further obligations or liabilities should be imposed on the Company and that the Company should not be adversely affected by reason of such modification or addition.”

40. I permit the post-Scheme Meeting modifications. The proposed modifications seek only to improve the Scheme Creditors’ recovery and thus by definition would not prejudice any Scheme Creditors. Had the proposed modifications been before the Scheme Meeting, they would not have made any difference to the outcome of the Scheme Meeting. There is no question of the Court, by approving these modifications, “foisting” on the Scheme Creditors anything other than what they voted on at the Scheme Meeting. In these circumstance, allowing the proposed modifications would be entirely consistent with authority: *Re China Saite Group Co Ltd*<sup>24</sup>.

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<sup>24</sup> [2022] HKCFI 1128 at [8].

***Determination***

41. The Scheme is a legitimate debt restructuring scheme which has complied with all the statutory requirements and has received the requisite Scheme Creditors' support after exercising their independent business judgment and will achieve its intended purpose. I will, therefore, make an order sanctioning the Scheme in the form of the draft order submitted to Court, which is in conventional terms.

***Listing of Schemes, recognition applications and applications to appoint Provisional Liquidators***

42. Mr Look Chan Ho for the Company told me at the hearing that there appears some confusion among practitioners about the procedural and jurisdiction aspects of the current scheme practice. It will be helpful if I clarify this. As I thought had been brought to practitioners' attention, although Linda Chan J has taken over the role of Companies Judge, because of the amount of cases in the Companies List I will continue to deal with particular types of applications if my diary permits and in the first instance solicitors should approach my clerk for dates. If I am not able to deal with them I will liaise with Linda Chan J. The following matters should be referred to my Clerk in the first instance for dates and listing:

- (1) Schemes of arrangement and capital reductions;
- (2) applications to appoint provisional liquidators; and
- (3) applications for recognition and assistance of foreign provisional liquidators and liquidators.

43. I would also remind practitioners of my guidance in *Re Enice Holding Co Ltd*<sup>25</sup>:

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<sup>25</sup> [2018] HKCFI 1736; [2018] HKCLC 305 at [49].

“I would emphasise that the Companies Court expects solicitors to proceed as follows when acting for parties introducing schemes or capital reductions. As soon as they are instructed to proceed with a scheme or capital reduction they should approach the Companies Judge’s clerk to obtain dates, which it is reasonable to expect the company to meet. Counsel should be instructed who are available on the allocated dates and the Company should work towards those dates. The Companies Court should not be expected to fit in with the convenience of companies and solicitors should make this clear to those instructing them.”

*The Winding Up Petition*

44. The Company seeks an order dismissing the Winding-Up Petition. The Petitioner, who appeared today through Justin Ho did not object, but the Petitioner seeks its costs. Costs are controversial. As Recorder William Wong SC heard that substantive hearing of the Winding-Up Petition and will determine the costs of that hearing it seems to me that he should also deal with the other costs of the Petition, which I anticipate are small.

(Jonathan Harris)

Judge of the Court of First Instance  
High Court

Mr Look Chan Ho, instructed by Gall, for the company (in both actions)

Mr Justin Ho, instructed by DLA Piper Hong Kong, for AI Global  
Investment SPS (the creditor in HCMP 2227/2021 & the petitioner in  
HCCW 81/2021)

Attendance of the Official Receiver was excused (in HCCW 81/2021)