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HCA 778/2021, HCA 798/2021, HCA 1418/2021,
HCA 1442/2021 and HCMP 1831/2021
(HEARD TOGETHER)
[2021] HKCFI 3817

HCA 778/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 778 OF 2021**

BETWEEN

NUOXI CAPITAL LIMITED (諾熙資本有限公司) Plaintiff
(IN LIQUIDATION IN THE BRITISH VIRGIN ISLANDS)

and

PEKING UNIVERSITY FOUNDER GROUP Defendant
COMPANY LIMITED (北大方正集團有限公司)

AND

HCA 798/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 798 OF 2021**

BETWEEN

FOUNDER INFORMATION (HONG KONG) LIMITED Plaintiff
(香港方正資訊有限公司) (IN LIQUIDATION)

and

PEKING UNIVERSITY FOUNDER GROUP Defendant
COMPANY LIMITED (北大方正集團有限公司)

AND

HCA 1418/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1418 OF 2021**

BETWEEN

HONGKONG JHC CO., LIMITED (香港京慧誠有限公司) Plaintiff
(IN LIQUIDATION)

and

PEKING UNIVERSITY FOUNDER GROUP Defendant
COMPANY LIMITED (北大方正集團有限公司)

AND

HCA 1442/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1442 OF 2021**

BETWEEN

KUNZHI LIMITED (坤智有限公司) Plaintiff
(IN LIQUIDATION IN THE BRITISH VIRGIN ISLANDS)

and

PEKING UNIVERSITY FOUNDER GROUP Defendant
COMPANY LIMITED (北大方正集團有限公司)

AND

HCMP 1831/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1831 OF 2021**

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IN THE MATTER OF Peking
University Founder Group Company
Limited (北大方正集团有限公司)
(in Restructuring in the Mainland of
the People’s Republic of China)

and

IN THE MATTER OF the inherent
jurisdiction of the Court

BY

ZHENG ZHIBIN (郑志斌) Applicants
ZHANG TING (张婷)
(MEMBERS OF THE PEKING UNIVERSITY FOUNDER
GROUP LIQUIDATION GROUP, ADMINISTRATOR OF
PEKING UNIVERSITY FOUNDER GROUP COMPANY
LIMITED (北大方正集团有限公司)
(IN RESTRUCTURING IN THE MAINLAND OF
THE PEOPLE’S REPUBLIC OF CHINA))

(HEARD TOGETHER)

Before: Hon Harris J in Chambers
Dates of Hearing: 29 – 30 November 2021
Date of Decision: 17 December 2021

DECISION

The Applications

1. A number of applications are made in these four actions¹. The Plaintiffs seek case management directions for an expedited trial of all four actions, which I understand it to be common ground involve identical legal and factual issues. The Defendant has issued a summons seeking principally a stay of the actions in order that the disputes between the Parties are resolved in reorganisation proceedings taking place before the Beijing No.1 Intermediate People’s Court (“**Beijing Court**”). In addition, the Administrator of the Defendant (explained in [7]²) issued an originating summons shortly before the hearing in which the Defendant seeks an order for recognition and assistance of the reorganisation proceedings in Beijing and stay of the actions.

2. The applications give rise to issues of some importance. The actions concern the enforceability of what are known as Keepwell Deeds, given by the Defendant in respect of a number of its subsidiaries. Keepwell Deeds have become an increasingly common feature of the financing arrangements entered into by Mainland³ business groups and foreign lenders. In the present case the Keepwell Deeds relate to US\$1.7 billion of debt. The Keepwell Deeds are governed by English law and contain Hong Kong exclusive jurisdiction clauses. The applications brought by the Defendant are the first of their sort in Hong Kong and give rise to issues concerning the interplay between the exercise of a party’s contractual

¹ The Plaintiffs in HCA 778, 798, 1418 and 1442/2021 were represented by Mr Patrick Fung SC and Mr Look Chan Ho. The Defendant in those four High Court Actions, who are the Applicants in HCMP 1831/2021 were represented by Mr José-Antonio Maurellet SC and Mr Tom Ng.

² References to [7] are to paragraphs in this Decision.

³ The People’s Republic of China excluding the Hong Kong and Macau Special Administrative Regions and Taiwan.

rights and the impact of insolvency proceedings once a debtor has become insolvent and become subject to a formal insolvency process.

Background

3. The Defendant in the four actions, Peking University Founder Group Company Limited, is incorporated in the Mainland (“**Company**”). It is the holding company for a commercial group, whose activities stretch across a wide range of businesses the nature of which are not relevant for present purposes (“**PU Group**”). It is majority owned by Peking University Asset Management Co Limited (“**PUAM**”). PUAM is wholly owned by Peking University, which is ultimately controlled by the Ministry of Education. PUAM is, therefore, a State-owned enterprise.

4. In 2017 and 2018 respectively two members of the PU Group issued bonds. Nuoxi Capital Limited (“**Nuoxi**”, the Plaintiff in HCA 778/2021) issued US\$900 million in aggregate principal of bonds constituted by trust deeds dated 20 April 2017 and 24 January 2018. The trustee was the Bank of New York Mellon, London Branch. Nuoxi is incorporated in the British Virgin Islands (“**BVI**”). It is a wholly owned subsidiary of Hong Kong JHC Co Limited (“**HKJHC**”, the Plaintiff in HCA 1418/2021), which guaranteed Nuoxi’s obligations under the Nuoxi bonds. HKJHC is a member of the PU Group. It is incorporated in Hong Kong. It was wound up in Hong Kong on 13 January 2021. Nuoxi is in liquidation in the BVI. On 24 February 2021, I made an order recognising the BVI liquidators⁴.

⁴ [2021] HKCFI 572; [2021] HKCLC 205.

5. Kunzhi Limited (“**Kunzhi**”, the Plaintiff in HCA 1442/2021) issued US\$800 million in aggregate principal of bonds (I shall refer to the Nuoxi bonds and Kunzhi bonds collectively as the “**Bonds**”) constituted by trusts deeds dated 17 April 2018 and 21 May 2018. The trustee was also the Bank of New York Mellon, London Branch (“**Trustee**”). Kunzhi is incorporated in the BVI. It is a wholly owned subsidiary of Founder Information (Hong Kong) Limited (“**FIHK**”, the Plaintiff in HCA 798/2021). FIHK is incorporated in Hong Kong. It was wound up in Hong Kong on 1 February 2021⁵. Kunzhi is in liquidation in the BVI. On 5 July 2021, I made an order recognising the BVI liquidators of Kunzhi.

6. Nuoxi and Kunzhi have defaulted on their payment obligations under their respective bonds. The guarantees given by HKJHC and FIHK have been called. The guarantees have not been honoured. The Company had entered into two Keepwell Deeds in relation to the Nuoxi bonds with Nuoxi, HKJHC and the trustee dated 20 April 2017 (“**1st Nuoxi Keepwell Deed**”) and 24 January 2018 (“**2nd Nuoxi Keepwell Deed**”) respectively. The Company has also entered into two Keepwell Deeds in relation to the Kunzhi bonds with Kunzhi, FIHK and the Trustee dated 17 April 2018 (“**1st Kunzhi Keepwell Deed**”) and 21 May 2018 (“**2nd Kunzhi Keepwell Deed**”) respectively. The material terms of all four Keepwell Deeds are identical. I shall refer to them collectively as the “**Keepwell Deeds**”. They required the Company to cause each of Nuoxi, Kunzhi, HKJHC and FIHK (1) to have a consolidated net worth of at least US\$1 at all times and (2) to have sufficient liquidity to ensure timely payment by each of Nuoxi, Kunzhi, HKJHC and FIHK of any amounts payable under the Bonds. Nuoxi and Kunzhi defaulted on their obligations

⁵ [2021] HKCFI 311; [2021] HKCLC 145.

A under the Bonds. The Plaintiffs contend that as a consequence the
B Company defaulted on its obligations under the Keepwell Deeds. The
C Plaintiffs have submitted claims to the Administrator (explained in the next
D paragraph) of the Company based on the Company’s breach of the
E Keepwell Deeds. Other than in respect of HKJHC’s claim the
Administrator has rejected the Plaintiff’s claims without giving any reason.

F 7. The failure of Nuoxi and Kunzhi to honour their payment
G obligations arose from the deteriorating financial state of the PU Group.
H On 19 February 2020 the Beijing Court issued an order on the application
I of the Bank of Beijing Co., Ltd that the Company commence
J reorganisation pursuant to the Enterprise Bankruptcy Law (“**EBL**”). The
K letter of request from the Beijing Court in support of the Administrator’s
L application for recognition and assistance appends a copy of its decision
M of 19 February 2020 appointing, what the Decision refers to as a
N liquidation group to supervise the reorganisation and carry out the
O functions described in the Decision (“**Administrator**”) ⁶ . The
P Administrator comprises of a panel of 12 members. Two are partners in
Q Beijing Dentons Law Office. The positions of the other 10 members have
R been redacted. I asked at the hearing why I had not been provided with
S this information, which has been provided in previous cases, most
relevantly *Re HNA Group Co., Limited*⁷. I was told that the other members
had requested the Beijing Court that their positions be kept confidential. I
was subsequently told what their positions are (which is fairly
conventional for a reorganisation of the size), but was requested to keep
the information confidential. This I will do. However, I would have

T ⁶ I have appended to this decision translations of both the letter of request and the decision. I have
U directed the Parties to produce an agreed translation of this Decision, which will be approved by the
Court translators in order to make this Decision more accessible to the Beijing Court.

V ⁷ [2021] HKCFI 2897.

A expected it to have been appreciated by the Company's lawyers, and for it
B to have been explained to the members of the Administrator, that it was
C inappropriate to ask the Hong Kong court to recognise the Administrator,
D whilst withholding relevant information about the identity of the
E Administrator. This is not something I would expect to be repeated in
F future applications for recognition by administrators of Mainland
G companies unless there is very good reasons, which would need to be
H explained in evidence made by the relevant members of the Administrator.

8. On 21 February 2020 the Beijing Court issued an
H announcement directing creditors of the Company to submit their claims
I to the Administrator of the Company.

9. On 4 February 2021, Nuoxi submitted a claim in the
J Company's reorganisation for RMB6.3 billion in respect of the 1st Nuoxi
K Keepwell Deed and the 2nd Nuoxi Keepwell Deed. On 26 May 2021,
L Nuoxi found out that its claims had been rejected, because it was not on
M the Company's creditors' list. On 7 June 2021, Nuoxi lodged an objection
N to the Administrator in accordance with the EBL.

10. On 29 January 2021, Kunzhi submitted a claim in the
O Defendant's Reorganisation in the sum of approximately RMB5.7 billion
P in respect of the 1st Kunzhi Keepwell Deed and 2nd Kunzhi Keepwell Deed.
Q On 26 May 2021, Kunzhi found out that its claims had been rejected, also
R because it was not on the Company's creditors' list. On 7 June 2021,
S Kunzhi lodged an objection to the Administrator in accordance with the
T EBL.

11. On 9 April 2021, FIHK submitted a claim in the Defendant's Reorganisation in the sum of approximately RMB5.7 billion in respect of the 1st Kunzhi Keepwell Deed and 2nd Kunzhi Keepwell Deed. On 26 May 2021, FIHK found out that its claims had been rejected because it was not on the Company's creditors' list. On 7 June 2021, FIHK lodged an objection to the Administrator in accordance with the EBL.

12. On 20 November 2020, HKJHC submitted a claim in the Defendant's Reorganisation in the sum of approximately RMB6.3 billion in respect of the 1st Nuoxi Keepwell Deed and 2nd Nuoxi Keepwell Deed. The Administrator has not adjudicated on the claim. Should the Administrator overrule the objections lodged by Nuoxi, Kunzhi and FIHK, they will have 15 days to appeal to the Beijing Court. As I have already mentioned the Administrator has not informed the Plaintiffs of the reasons for rejecting the claims.

13. As Nuoxi, Kunzhi, FIHK and HKJHC (together the "**Plaintiffs**") claim that the Company has breached its obligations under the Keepwell Deeds, they commenced the present four writ actions against the Company. The Plaintiffs have sought expedition of the trials because they are concerned that the Administrator will not set aside funds to pay the Plaintiffs' claims if they are admitted in the reorganisation. The Company issued in each of the actions a summons seeking a stay of the actions pursuant to the Rules of High Court O12 r8. In particular, the summonses seek a stay pending determination of the application anticipated by the Administrator for recognition and assistance of the reorganisation proceedings in the Mainland. The application for recognition and assistance issued on 18 November 2021 in which a stay of the actions is sought has in practice subsumed the earlier summonses. The

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initial summonses for a stay summarise the grounds on which a stay is said to be justified: **First**, the Plaintiffs have elected to proceed in the Mainland and submitted to the jurisdiction of the courts in the Mainland and in respect of the same cause of action to which the actions relate. **Secondly**, there is great uncertainty as to whether any judgment obtained in the actions will be recognised or enforced in the Mainland and this is a strong reason for the Hong Kong courts to decline jurisdiction. **Thirdly**, the actions should be stayed in view of the principle of modified universalism. **Fourthly**, the Mainland courts are distinctly more appropriate in view of the process in the Mainland and the issues to be determined in the actions and, considering the best interests and convenience of the parties to the proceedings and the witnesses in the proceedings, the proceedings should be conducted in the Mainland.

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14. The originating summons seeking an order for recognition and assistance is supported by a letter of request from the Beijing Court dated 5 November 2021. I have appended an English translation of the Letter of Request to this Decision. For the most part what is sought is conventional. In addition to recognising the reorganisation and the Administrator, the following powers by way of assistance are sought in [2] of the originating summons:

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- (1) To request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency;
 - (2) To locate, protect, secure and take into their possession and control all assets and property within the jurisdiction of this Court to which the Company is or appears to be entitled;

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(3) To locate, protect, secure, and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of this Court and to investigate the assets and affairs of the Company and the circumstances which gave rise to its insolvency. The books, records and documents of the Company include:

- (i) emails exchanged and other correspondence between the Company and its auditors, and the Company and other third parties; and
- (ii) documents and information provided by the Company to its auditors and provided by the auditors to the Company in relation to the audit work;

(4) To take all necessary steps to prevent any disposal of the Company's assets and, in particular, to secure any credit balances in any bank accounts in the name or under the control of the Company within this jurisdiction;

(5) To operate and open or close any bank accounts in the name and on behalf of the Company for the purpose of collecting the assets and paying the costs and expenses of the Administrator;

(6) To retain and employ barristers, solicitors or attorneys, accountants and/or such other agents or professional persons as the Administrator considers appropriate for the purpose of advising or assisting in the execution of their powers and duties under this Order; and

(7) So far as may be necessary to supplement and to effect the powers set out herein, to bring legal proceedings and make all such applications to this Court, whether in their own names or in the name of the Company or the Administrator, on behalf

of and for the benefit of the Company, including any applications for:

- (i) orders for disclosure, the production of documents and/or examination of third parties which may be made by the Administrator to facilitate the Administrator's investigations into the assets and affairs of the Company and the circumstances which gave rise to its insolvency; and/or
- (ii) ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced.

15. I have granted these powers in the case of three previous applications for recognition and assistance of Mainland insolvency proceedings⁸. Paragraph 4 of the originating summons is controversial. It seeks a stay of the actions. There was a period during, which an automatic stay, which could be challenged, was included in the standard form of order for recognition and assistance. I concluded that this was inappropriate in *Re FDG Electric Vehicles Ltd*⁹ and since that time the standard order requires a separate application for a stay if one is required. The dispute in the present case concerns whether or not a stay of the actions should be granted.

The Keepwell Deeds and the Claims

16. The Plaintiffs argue that if the Keepwell Deeds had been complied with Nuoxi and Kunzhi would have been able to comply with their payments obligations. The loss caused by the Company's failure to

⁸ *Re CEFC Shanghai International Group Limited* [2020] HKCFI 167; [2020] 1 HKLRD 676; [2020] HKCLC 1; *Re The Liquidator of Shenzhen Everich Supply Chain Co. Ltd.* [2020] HKCFI 965; *HNA Group, supra*.

⁹ [2020] 5 HKLRD 701; [2020] HKCFI 2931.

provide sufficient finance to permit to Nuoxi and Kunzhi to pay what is due under the Bonds is the amount that the bondholders should have received. This totals RMB12 billion.

17. The provisions of the Keepwell Deeds, which are relevant to the present applications, are contained in clauses 2.2, 15.1 and 15.2. Clause 15.1 provides that the Keepwell Deeds are governed by and construed in accordance with English Law. Clause 15.2 is the jurisdiction clause and is in the following terms:

“15.2 Jurisdiction

(a) The courts of Hong Kong are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed and accordingly any legal action or proceedings arising out of or in connection with this Deed (**Proceedings**) may be brought in such courts. All of the parties to this Deed irrevocably submit to the jurisdiction of such courts and waives any objection to Proceedings in such courts whether on the ground of venue or on the ground that the Proceedings have been brought in an inconvenient forum.”

18. Clause 2.2 provides:

“2.2 Regulatory Approvals

Notwithstanding anything contained in this Deed, if, and to the extent that the Company is required to obtain necessary approvals, consents, licences, orders, permits and any other authorisations from the relevant Approval Authorities (the **Relevant Approvals**) in order to comply with its obligations under this Deed, the performance of such obligation shall always be qualified by, and subject to, the Company having obtained such Relevant Approvals. In this regard, the Company undertakes to use its best efforts to obtain such Relevant Approvals within the time stipulated by the relevant Approval Authorities, if applicable.”

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19. As I have already mentioned the Administrator did not inform the Plaintiffs why their claims had been rejected. Reasons why it is suggested the Plaintiffs do not have a good claim under the Keepwell Deeds first appear in a report by Zhang Xin dated 11 November 2021 (in other words just over two weeks before the hearing) in which he suggests that the Company could not have complied with clause 2.2. Mr Zhang is a lawyer qualified in both the Mainland and England. He specialises in banking and finance, capital markets and international transactions. He says that between 2011 and 2021 he has advised on 31 transactions, which have involved Keepwell Deeds. This serves to illustrate how widely Keepwell Deeds have been used, although Mr Zhang says that their use has declined since January 2017 when the State Administration of Foreign Exchange (“SAFE”) lifted the limitation on repatriating the bond proceeds raised overseas by Mainland companies, which had necessitated the use of foreign subsidiaries and a security structure, which included Mainland parent companies issuing what became known as Keepwell Deeds. The Nuoxi and the Kunzhi Keepwell Deeds were signed after January 2017.

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20. Mr Zhang explains the approvals required to be obtained in the Mainland in respect of cross-border security for foreign debt. It is not necessary for the purposes of the present applications to consider this in detail, but in order to understand the grounds on which the Company says a stay is justified, an understanding of what is said by the Administrator to be the regulatory problems that the Keepwell Deeds faced is required.

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21. Mr Zhang says that his personal view is that the Company entering the Keepwell Deeds did not violate any Mainland law or regulation and they did not require registration. However, Mr Zhang says

A in [25] of his report “*the relevant Chinese Governmental Approvals would*
B *be required when the Keepwell Provider performs the obligations*
C *thereunder as and when an event triggering such obligations occurs.*
D *From this angle, receiving all relevant Chinese Governmental Approvals*
E *is an inherent and fundamental pre-condition for Keepwell Provider’s*
F *performance of its obligations under the Keepwell Structure when such*
G *obligations are triggered.”* Mr Zhang goes onto explain that the Company
H would need to obtain a number of approvals and these, he says, are not
I easy to obtain. Mr Zhang says that for approval purposes any remittance
J by the Company overseas pursuant to its obligations would be
K characterised as either overseas investment or overseas lending. They
L would be subject of the *Guidelines for Capital Account Foreign Exchange*
M *Business*, which would have to be strictly complied with before SAFE
N would approve the foreign exchange transactions. In short, Mr Zhang
O suggests that the necessary approvals could not have been obtained once
P the Company became insolvent either in respect of the Keepwell Deeds or
Q the associated Deeds of Equity Interest Purchase Undertaking. What
R approvals, consents, licences, orders, permits and other authorisations (to
S use the language of clause 2.2) might be required is a matter of Mainland
T law and regulation.

22. Although, it is not stated in Mr Zhang’s report or the
affirmation evidence filed by Zhang Ting, who is one of the Administrator,
whether or not the Company has ever tried to obtain what it understands to
be the relevant approvals, it seems implicit in the evidence that it did not.
What approvals were required may be a matter of Mainland law, but
whether the failure to seek or to obtain what was necessary was a breach
of the Keepwell Deeds for which the Plaintiffs are entitled to be
compensated is a matter of English law. The assumption inherent in

Mr Zhang's report, namely, that if he is correct that clause 2.2 will not have been breached if after the Company went into reorganisation on 19 February 2020 the necessary approvals could not have been obtained, is overly simplistic. As was argued by the Plaintiffs the determination of whether or not the Company breached the Keepwell Deeds and what loss was caused by such breaches as the court finds proved, goes beyond Mr Zhang Xin's limited analysis. The Plaintiffs identify the following as issues that are matters of English law and may require determination.

- (1) The proper scope of Clause 4.1.
- (2) The ways in which the obligations in Clause 4.1 can be performed, in particular whether performance can be in the form of admitting a proof of debt.
- (3) The proper scope of Clause 2.2, in particular:
 - (a) the meaning of "if, and to the extent that the Company is required to obtain [the Relevant Approvals]";
 - (b) the meaning of "qualified by, and subject to";
 - (c) the meaning of "best efforts".
- (4) The interaction between Clause 2.2 and proof of debt.
- (5) The interaction between Clause 2.2 and Clause 4.1.
- (6) The payment obligations (if any) of the Defendant towards the Plaintiffs on the true construction of the Keepwell Deeds and in the events which have happened.

23. It would not be helpful for me to comment on the issues that might arise in any depth, but to take one example, it is not clear that the obligations under clause 4.1 are effected by Mr Zhang Xin's analysis. Clause 4.1 of the Keepwell Deeds provides:

“4. MAINTENANCE OF CONSOLIDATED NET WORTH; LIQUIDITY

4.1 The Company undertakes that it shall cause:

- (i) each of the Issuer and the Guarantor to have a Consolidated Net Worth of at least US\$1.00 at all times;
- (ii) each of the Issuer and the Guarantor to have sufficient liquidity to ensure timely payment by each of the Issuer and the Guarantor of any amounts payable under or in respect of the Bonds and the Guarantee in accordance with the terms and conditions of the Bonds and/or the Trust Deed and otherwise under the Trust Deed and the Agency Agreement; and
- (iii) the Guarantor to have an aggregate Total Equity of at least HK\$9,980,000 at all times.

If the Issuer or the Guarantor at any time determines that it will have insufficient liquidity to meet its payment obligations as they fall due, then the Issuer and/or the Guarantor shall promptly notify the Company of the shortfall and the Company will make available to the Issuer or the Guarantor, before the due date of the relevant payment obligations, funds sufficient to enable the Issuer or the Guarantor (as the case may be) to pay such payment obligations in full as they fall due. The Issuer or the Guarantor shall use any funds made available to it by the Company in accordance with this Deed solely for the payment when due of such payment obligations under the Bonds, the Guarantee or the Trust Deed (as the case may be).”

24. It would seem arguable at least that the first part of clause 4.1 imposed on the Company from the date of execution of the Keepwell Deeds an obligation to provide funds to Nuoxi and Kunzhi. If, as may be the case, it was the Company’s failure to do so between April 2017 and April 2018 when the 1st Nuoxi Keepwell Deed and the 1st Kunzhi Keepwell Deed respectively were signed and February 2020, when the Beijing Bank applied for the Company to be put into reorganisation, then the Plaintiffs may have a claim to which Mr Zhang’s qualifications are not relevant. What this serves to demonstrate is that there are potentially complicated

questions of English law, which will be central to the determination of the claim. Another example is what “best efforts” means, which given that the Company’s evidence to date suggests that nothing was done, takes on an obvious significance. The questions of construction of the Keepwell Deeds, which are matters of English law, may be rather more difficult to decide than understanding what approvals Mainland law and regulation required.

The Company’s Argument

25. The Company argues that notwithstanding the exclusive jurisdiction clause, which includes a waiver of the right to object to jurisdiction on forum grounds, the court should stay these proceedings, because the determination of claims against the Company in the reorganisation has to take place before the Beijing Court. It also suggests that the Beijing Court is at least as well placed to determine the important issues that arise as the Hong Kong court. As I have already explained, shortly before the hearing of this matter the Administrator issued an originating summons seeking an order of recognition and assistance. The principal assistance sought is a stay. It will be appreciated that the Defendant in the actions and the Applicant for recognition and assistance are different. The legal character of the Administrator and the Administrator’s relationship to the Company has not been explored before me. It is not, however, in dispute that the Administrator is as a matter of Mainland law the lawful agent of the Company. Except when distinguishing between the summons to stay issued in the actions and the originating summons, any distinction between the Company and the Administrator is immaterial.

26. The Company accepts that the court will enforce the exclusive jurisdiction clause unless it can demonstrate strong reasons for not doing so¹⁰. As Lord Bingham states in *Donohue v Armco Inc*¹¹ the right of a party to have any dispute determined before the agreed court is an important and substantial one and not a formal or technical right. The position was put thus by Ma CJHC (as he then was) in *Noble Power Investments Ltd v Nissei Stomach Tokyo Co. Ltd*¹²:

“[S]trong reasons must be shown by the party sued if he wishes to challenge the appropriateness of Hong Kong jurisdiction.

The extent of the burden can be put in several ways but the following provides a ready guide: strong or overwhelming reasons or exceptional circumstances must be shown, such as the existence of factors not contemplated by the parties at the time the relevant agreement was made. It perhaps matters not exactly which term is preferred, but the main point to bear in mind is that strong reasons must be demonstrated to the court before it allows the parties to be freed from their contractual bargain.”

27. The Company advances two grounds, which it argues weigh sufficiently strongly in favour of staying the proceedings in Hong Kong and requiring the Plaintiffs to litigate their claims before the Beijing Court, to justify ordering a stay. **First**, it says that having submitted formal claims in the reorganisation it has foregone the right to insist on the dispute being determined other than in accordance with the reorganisation process. **Secondly**, it argues that any decision of this court will not be recognised by the Beijing Court and it is, therefore, pointless to permit the actions to proceed and will serve no purpose other than to create delay and possibly conflicting decisions. It further argues that the Beijing Court is better

¹⁰ *Donohue v Armco Inc* [2002] CLC 440, [24]; *Crociani v Crociani* [2014] UKPC 40, Lord Neuberger [33]–[34].

¹¹ *Ibid.*, [29].

¹² [2008] 5 HKLRD 631, [35]–[36].

placed to determine the dispute given the nature of the issues. I deal first with submission to the jurisdiction of the Beijing Court.

Submission to the Mainland jurisdiction by filing a proof of debt

28. *Rubin v Eurofinance SA*¹³ concerned whether the nature of insolvency proceedings resulted in a qualification to the established rules for determining whether a foreign court has jurisdiction to give a judgment *in personam* capable of enforcement or recognition in the United Kingdom. The Court concluded that it did not. The established circumstances in which a foreign judgment is enforceable include the person against whom a judgment is given being the claimant, voluntary submission to the jurisdiction by appearing in the foreign proceedings and an express agreement to submit to the foreign jurisdiction; as is the case if a contract, which gives rise to a dispute contains a jurisdiction clause¹⁴. This serves to illustrate the importance of including jurisdiction clauses in contracts. That having been said *Rubin v Eurofinance* was relied on by the Company to demonstrate that submission of a proof in a foreign insolvency constitutes submission to the foreign jurisdiction and its insolvency process. The relevant facts are contained in [158] of Lord Collins judgment:

“More relevant is the fact that from August 1999 the syndicate submitted proofs of debt (in relation to unsettled claims and outstanding premiums for the 1997, 1998, and 1999 years of account, and not to the reinsurance contracts which are the subject of these proceedings) and attended and participated in creditors’ meetings. In particular at an adjourned meeting of creditors on 16 September 2009 the syndicate had given a proxy for that meeting to the chairman, and submitted a proof of debt and proxy form for that meeting. The syndicate voted at a meeting of creditors in favour of a scheme of arrangement. The liquidator has admitted claims by the syndicate for the sterling

¹³ [2013] 1 AC 236.

¹⁴ *Ibid* holding (1) and Lord Collins [7] referring to the established principles as “the Dicey Rule”.

equivalent of more than £650,000, although the liquidator is retaining the dividend in partial settlement of the costs incurred in these proceedings.”

29. In [167] Lord Collins concludes that the liquidators having chosen to submit to New Cap’s Australian insolvency proceedings, should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of the proceedings. In [165] Lord Collins summarises the position in English law and refers to the decision of Bacon CJ in *Ex p Robertsons; In re Morton*¹⁵. As I will return to this decision later in [35] it is helpful to quote the paragraph in full.

“165. In English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. *In Ex p Robertson; In re Morton* (1875) LR 20 Eq 733 trustees were appointed over the property of bankrupt potato merchants in a liquidation by arrangement. A Scots merchant received payment of £120 after the liquidation petition was presented, and proved for a balance of £247 and received a dividend of what is now 20p in the pound. The trustees served a notice of motion, seeking repayment of the £120 paid out of the insolvent estate, out of the jurisdiction. The respondent objected to the jurisdiction of the English court on the ground that he was a domiciled Scotsman. On appeal from the county court, Bacon CJ held that the court had jurisdiction. He said, at pp 737–738:

‘what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it—that the bankrupt’s estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt’s estate ... can there be any doubt that the appellant in this case has agreed that, as far as he is concerned ... the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit ... [The appellant] is

¹⁵ (1875) LR 20 EQ 733.

as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England.”

30. The Company argues that submission occurs on filing of a formal claim. It is not necessary for it to be adjudicated before submission is taken to occur with the consequence, the Company argues, that from then on the claimant must pursue its claim in the foreign insolvency process and before the relevant foreign court; although three of the present claims have been adjudicated at least in the sense that they have been rejected by the Administrator. The Company relied on the Privy Council’s decision in *Stichting Shell Pensionenfonds v Kryz*¹⁶ to support this argument. I accept that it is apparent from [31] of the decision that that submission to the foreign jurisdiction occurs on filing of a formal claim. As Lord Sumption and Lord Toulson giving the judgment of the Board explain: “*It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in beginning an ordinary action whether it ultimately succeeds.*” However, as the Privy Council go on to explain it is not a necessary consequence of submission that a creditor foregoes such right as he might otherwise have to prosecute claims in another jurisdiction. As their Lordships state in [39]–[40]:

“39. The Board concludes that where a creditor or member who is amenable to the personal jurisdiction of the court begins or continues foreign proceedings which will interfere with the statutory trusts over the assets of a company in insolvent liquidation, in principle an injunction will be available to restrain their prosecution irrespective of the nationality or residence of the creditor in question.

40. The Board would accept that as a general rule, there can be no objection in principle to a creditor invoking the purely adjudicatory jurisdiction of a foreign court, provided that it is an appropriate jurisdiction and that litigation there is not vexatious

¹⁶ [2014] UKPC 41; [2015] AC 616.

or oppressive to the liquidators or other interested parties. But it is in principle inimical to the proper winding up process for a creditor to seek or enforce an order from a foreign court which will result in his enjoying prior access to any part of the insolvent estate. In *Kemsley v Barclays Bank plc* [2013] BPIR 839, para 41 Roth J observed that where the foreign litigant undertakes to bring any assets realised in the foreign proceedings into the bankruptcy so that no advantage would be obtained over other creditors, the basis on which an anti-suit injunction might otherwise be justified will not apply. The Board wishes to record its endorsement of that approach.”

31. As this passage makes clear **submission of a claim in foreign insolvency proceedings does not create an absolute bar to a creditor seeking adjudication of the claim in another jurisdiction**, which the creditor may take the view is more appropriate for its resolution. **This is consistent with the well-established English position that a liquidation stay has no extra-territorial effect**¹⁷. What the creditor cannot do is to attempt to use proceedings outside the foreign insolvency jurisdiction to achieve a result, which is inconsistent with that mandated by the foreign insolvency regime: at its most basic to try and obtain more than he would obtain if he proves in the insolvency proceedings.

32. The Company has cited two short 19th century decisions, which suggest that proving in foreign insolvency proceedings acts as a discharge of the debt in England. The first *Glass v Keogh*¹⁸ is entirely consistent with *Stichting Shell*, Stawell CJ holding that “*Obtaining payment by means of insolvency, on the contrary, is clogged with the condition, that if the insolvent makes a full disclosure and surrender of his assets, he is discharged from debts provable against his estate. The present plaintiff invoked the assistance of the laws of another country in order to sequestrate the Defendant’s estate. He was the petitioning creditor. He*

¹⁷ *Tchenguiz v Grant Thornton UK LLP* [2017] EWCA Civ 83; [2018] QB 695, Briggs LJ [69].

¹⁸ (1867) 4 WW & A'B (L) 189.

proved his debt, received dividends, and retained his securities.” As *Stichting Shell* makes clear once a creditor submits to a foreign insolvency process he cannot seek to improve on the amount he receives by way of dividend in the insolvency by taking separate proceedings in another jurisdiction.

33. The Court of Appeal in *Seligman v Huth*¹⁹ found that a defendant could not rely on a counterclaim by way of defence against the plaintiff, whose claim arose from an assignment from an assignee, who was in bankruptcy in the US. The defendant had proved in the US bankruptcy and received a dividend. It does not seem to me that this provides any relevant qualification to the principle that emerges in [39]–[40] of *Stichting Shell*.

34. The distinction between a creditor seeking adjudication of a dispute in the sense referred to in [40] of *Stichting Shell* and a creditor seeking to recover in a debtor’s foreign insolvency is considered further by the Federal Court of Australia in *Akers as a joint foreign representative of Saad Investments Company Limited v Deputy Commissioner of Taxation*²⁰. This concerned an appeal by the joint foreign representatives of Saad Investments Company Limited, which was in liquidation in the Cayman Islands. The central issue in the appeal was the treatment of a claim by the Deputy Commissioner of Taxation (“DCT”) that Saad was liable to Australian tax and penalties. Saad was not a registered foreign company, did not carry on business in Australia, and it was common ground that it could not be wound up by an Australian court. The appeal raised questions concerning the construction and interpretation of the

¹⁹ 1st instance decision on an O14 application (1875) 60 LT Jo 122; Court of Appeal (1877) 37 LT 488.

²⁰ [2014] FCAFC 57.

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UNCITRAL Model Law on Cross-Border Insolvency, which was made part of Australian law by the *Cross-Border Insolvency Act 2008*. The particular question that is relevant was an argument by the foreign representatives (Saad’s liquidators) that the lodgement of a proof in the Cayman Islands liquidation by the DCT constituted submission to the jurisdiction and by that fact alone should have led to the court declining the DCT’s application to modify the orders that would have seen funds transferred to the Cayman Islands. The relevant facts were these. Subsequent to the lodgement of a proof the Australian court made an order recognising the Cayman Islands proceedings as foreign main proceedings under *Article 17* of the *Model Law* and ordering, amongst other things, that the administration and distribution of all the defendant’s assets located in Australia be trusted to the plaintiffs, in their capacities as joint foreign representatives of the defendant. Two years later the solicitor for Saad’s liquidators gave the DCT notice of their intention to remit Australian assets of the company to the Cayman Islands. The DCT applied for modification of the recognition and assistance orders with a view to preventing this.

35. In his judgment Allsop CJ considers *Rubin v Eurofinance* in some detail quoting [165]–[167] and then finds as follows:

“165. Neither *Ex parte Robertson* nor *Rubin* is determinative of the question before the Court here—whether the DCT had disentitled himself or herself from seeking the Modification Orders. The ‘compact’ referred to by Bacon CJ in *Ex parte Robertson* is one that authorises the liquidator and the supervising court to act. I am prepared to accept that formal submission of a proof of debt to the insolvency administration will generally be adequate to support a conclusion that the court supervising the administration thereafter has jurisdiction to make orders in matters connected with the administration against the creditor who has proved. Such a conclusion does not, however, answer the question whether, as a matter of law and discretion, a court should not make orders under Art 20.3 and 22.3 to protect local creditors in circumstances where the local creditor has lodged a proof of debt in the foreign main

proceeding. There is no evident principle that, by the minimum act of submission to the foreign court supervising the foreign main proceeding, such as by the submission of a proof of debt, exclusive jurisdiction is placed in the hands of that court in respect of all possible issues concerning the insolvency, or that the local creditor becomes disentitled to make an application of the kind with which the Court is concerned. The Model Law assumes complementary authority of the local court and the court supervising the foreign main proceeding. No provision of the Model Law denies that complementary authority by reason only of lodgement of a proof in the Cayman Islands.

166. Thus, for somewhat different reasons from those of the primary judge, I would reject the submission that by lodgement of proof in the Cayman Islands, the DCT became disentitled to the Modification Orders.

167. For the above reasons, the appeal should be dismissed with costs.”

36. *Akers* was decided before *Stichting Shell* and is referred to in [30] of the judgment in which Lord Sumption and Lord Toulson are addressing whether lodging of a proof is sufficient to constitute submission, which the Federal Court had found it to be and with which the Privy Council agreed. *Stichting Shell* and *Akers* establish that there is no objection in principle to a creditor invoking a purely adjudicatory jurisdiction. The Plaintiffs referred me to a number of cases that illustrate this to be the case and show how the courts have coordinated the exercise of a contractual jurisdiction before one court and an insolvency jurisdiction exercised by another. The Lehman flip-clause litigation illustrates how this has been done by the English court exercising a contractual jurisdiction and the US Bankruptcy Court for the Southern District of New York²¹.

²¹ *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWHC 1912 (Ch); [2009] 2 BCLC 400; *aff'd* [2009] EWCA Civ 1160; [2010] Ch 347; *aff'd Belmont Park Investments v BNY Corporate Trustee Services* [2011] UKSC 38; [2012] 1 AC 383; *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd (No 2)* [2009] EWHC 2953 (Ch); [2010] 2 BCLC 237; *Lehman Brothers Special Financing Inc v BNY Corporate Trustee Services Limited* 422 BR 407 (Bankr SDNY 2010).

37. In essence, the flip-clause litigation arose out of Lehman's bond financing programme with the following key features:

- (1) An offshore special purpose vehicle ("**Issuer**") was formed to issue synthetic credit-linked notes to investors ("**Noteholders**").
- (2) The Noteholders' subscription money was used to purchase government bonds or other investments ("**Collateral**") which were then vested in a security trustee ("**Trustee**").
- (3) Lehman Brothers Special Financing Inc ("**LBSF**"), a Delaware-incorporated entity, entered into a credit default swap agreement ("**Swap Agreement**") with the Issuer under which LBSF would pay the Issuer the amounts due by the Issuer to the Noteholders in exchange for the payment by the Issuer to LBSF of sums equal to the interest received on the Collateral.
- (4) The amount by which the sum payable under the Swap Agreement by LBSF exceeded the yield on the Collateral represented, in effect, the premium for credit protection insurance provided by the Noteholders.
- (5) The Collateral was charged by the Issuer in favour of the Trustee to secure its obligations to LBSF under the Swap Agreement and to the Noteholders.
- (6) A trust deed between the Issuer and the Trustee ("**Trust Deed**") regulated the priorities between LBSF and the Noteholders with respect to the Collateral:
 - (i) If there was no event of default (which would include LBSF's insolvency), LBSF would have priority in relation to the Collateral.

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(ii) If there was an event of default, the priorities would flip such that the Noteholders would have priority over LBSF (“**Noteholder Priority**”).

(7) The Trust Deed was governed by English law and conferred non-exclusive jurisdiction on the English court.

38. The interaction between the English court’s contractual jurisdiction and the US bankruptcy court’s bankruptcy jurisdiction arose out of the following proceedings:

(1) As an event of default occurred after LBSF filed for *Chapter 11* protection, the Noteholders commenced proceedings in England against the Trustee seeking payment in accordance with the Noteholder Priority.

(2) LBSF then commenced proceedings in the US bankruptcy court seeking a declaration that the flip clause triggering the Noteholder Priority was an unenforceable *ipso facto* clause which violated the *US Bankruptcy Code*.

(3) In the meantime, LBSF applied to the English court to stay the English proceedings pending the resolution of the proceedings between LBSF and the Trustee in the US. The Noteholders objected to the stay application on the grounds that all the relevant transactions were governed by English law and thus the English court should not stay the proceedings.

39. The English court did not stay the proceedings and proceeded to determine the validity of the Noteholder Priority under English law. The English court and the US bankruptcy court agreed to coordinate their respective rulings in order to avoid conflict between decisions in the two jurisdictions in the following manner:

(1) “[T]he only rational outcome that makes good sense in a cross-border setting is for the United States bankruptcy court to be the principal, if not exclusive, decider of issues relating to US bankruptcy law; and similarly for the High Court in London to be the principal, if not exclusive, decider of issues of English law... [I]t would be very difficult for any rational or fair minded person to disagree with that proposition”²².

(2) “Following communications between the High Court in England and the Bankruptcy Court in New York, it was agreed that, in order to limit potential conflict between decisions in the two jurisdictions, relief would be limited to declaratory relief”²³.

(3) Accordingly, “the English court has confined itself to making a declaration that the relevant contractual provisions are ... ‘valid, effective and enforceable under English law as the proper law of such contracts so as to give effect to Noteholder Priority’”²⁴.

40. In *UBS A.G. v OMNI Holding A.G. (in liquidation)*²⁵ a syndicate of banks for which the claimant’s assignor, a Swiss corporation (“S.B.C.”), acted as agent lent money in December 1989 to a German company and a Jersey company on the security of certain share pledges, both loans being governed by English law and providing for English jurisdiction over any disputes that might arise. On the same date the defendant, the Jersey company and a Dutch company entered into an option agreement also governed by English law granting the Jersey

²² *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd (No 2)* [2009] EWHC 2953 (Ch); [2010] 2 BCLC 237 at [15] (Henderson J).

²³ *Belmont Park Investments v BNY Corporate Trustee Services* [2011] UKSC 38; [2012] 1 AC 383 at [33] (Lord Collins).

²⁴ *Supra*, fn. 22 at [50].

²⁵ [2000] 1 WLR 916 C–G.

A company an option to put certain assets on the Dutch company, or in
B default on the defendant, at an agreed price to be determined by a formula.
C By a deed of assignment also of the same date, the Jersey company
D assigned its rights and benefits under the option agreement to S.B.C. as
E trustee for the syndicate. S.B.C. gave notices under each loan agreement
F in March 1991 demanding repayment and exercising its put option. The
G following month the defendant, a Swiss company, petitioned the Swiss
H court for protection from its creditors and was granted an order for its
I interim protection and the appointment of provisional liquidators. S.B.C.
J filed a claim with those liquidators for damages equal to the agreed price.
K In June 1992 S.B.C. received the net proceeds from enforced sales of the
L pledged shares. The liquidators contended that S.B.C. had to give credit
M for the pledge proceeds for the purposes of its claim. The claimant as
N assignee of S.B.C. applied to the High Court for declarations as to the sum
O payable to it by the defendant under the option agreement and that such
P sum should not be reduced by the amounts received from the sales, and a
Q few days later issued proceedings in the Swiss court against the liquidators'
R formal rejection of its claim. The defendant applied for a stay of the High
S Court proceedings. Much of the argument concerned the application of
T the *Lugano Convention*. Rimer J found that the proceedings in London
U were within the *Lugano Convention* and that it followed that the
V application for a stay by OMNI should be dismissed. He went onto
consider how the court's discretion to stay should be exercised if he had
reached the alternative conclusion. OMNI had argued that it was the
subject of Swiss insolvency regime and all questions concerning the
winding up should be determined in Switzerland; a similar argument to

A that, which I face and which I address in more detail later in this decision.
B Rimer J says this²⁶:

C “ It appears to me, therefore, that not only have the parties
D expressly agreed that the English court should have jurisdiction
E to decide the question which UBS wants it to decide, it is likely
F to be of real benefit to the disposal of UBS’s appeal in Berne if
G it does decide it. In my view, once that position is arrived at all
H the other points advanced by Omni as supporting a stay fall
away as being of little weight. Most of them revolve around the
point that Omni is the subject of a Swiss insolvency regime and
that all questions concerning the winding up of Omni should be
determined in Switzerland. For the reasons given, and in the
particular circumstances of this case, I consider that the English
proceedings will be likely to serve a valuable function in aid of
the disposal of the Swiss proceedings.

I Mr. Davis also submitted that it was now too late in the
J day for UBS to have recourse to the English courts: he pointed
K out that its negotiations with the Omni liquidators have been
L going on in Switzerland since 1991. In my view, there is nothing
M in that. The negotiations have been lengthy but their outcome
N has been a decision in March 1999 which UBS regards as wrong
O as a matter of English law; and I can see no good reason why
P UBS should not now be entitled to ask an English court to
Q determine the point. Mr. Davis also made the point that the
Swiss appeal will be subject to a process which provides for an
accelerated hearing which should take place within six months,
or perhaps a little longer. I do not regard this as a material factor
either. The issue- raised by UBS's action is a short one, capable
of being disposed of within two days. If the Swiss proceedings
are proceeding on a fast track, then I consider that the right way
to deal with the English action is to direct its expedition, with a
view to a hearing and decision during the next sittings.

P Mr. Davis argued Omni’s case very carefully and
Q comprehensively. However, I am not satisfied that he has
identified grounds which have anything like the strength
necessary to justify a stay of UBS’s proceedings. I dismiss
Omni’s application.”

R 41. *Fondazione Enasarco v Lehman Brothers Finance SA*²⁷
S (“LBF”) concerned a dispute arising from the construction and
T interpretation of the International Swaps and Derivatives Association

U ²⁶ [2000] 1 WLR 926 A–E.

V ²⁷ [2014] 2 BCLC 662.

A (“ISDA”) 1992 Master Agreement, which governed a contentious derivative agreement entered into by Anthracite Rated Investments (Cayman) Ltd (“ARIC”) and LBF, with the aim of protecting the principal amount payable under secured Euro medium-term notes. The ISDA Master Agreement provided that the derivative agreement was governed by English law, that disputes relating to the agreement was subject to the jurisdiction of the English courts, and that English courts had exclusive jurisdiction as between courts bound by the Lugano Convention. LBF had been placed in liquidation in Switzerland by the Swiss Banking Commission shortly after Lehman collapsed. LBF’s liquidators obtained a High Court order declaring that the Swiss bankruptcy proceedings were the foreign main proceedings under the *Cross-Border Insolvency Regulations, 2006*. This had the effect of imposing an automatic stay of all proceedings in England against LBF. The Swiss liquidators rejected ARIC’s claims that arose as a result of the closing out of the derivative and instead claimed that ARIC owed LBF approximately US\$30 million under the derivative agreement. ARIC’S assignee (Enasarco) of the claims subsequently commenced proceedings in Switzerland challenging the rejection of the claim and, having obtained a consent order lifting the stay of the English proceedings, commenced a claim against LBF for payment of the closeout payment. LBF counterclaimed for the amount it considered to be payable to it. It also applied for a stay of Enasarco’s claim. It is the determination of that application that is relevant. The hearing was heard by Richards J, who had considerable experience of cross-border insolvency and dealt with much of the Lehman litigation. His assessment of LBF’s arguments in support of a discretionary stay are instructive particularly as similar arguments have been advanced before me on behalf of the Company:

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“54. In support of its application for a discretionary stay, LBF relied on a number of factors. First, it submitted that there is a real risk of irreconcilable judgments on the issue whether LBF is liable to Enasarco under the derivative agreement and on the closely related issue whether ARIC has any liability to LBF. Secondly, unless a stay is granted, the two sets of proceedings will continue in parallel, wasting costs and court resources in hearing the same dispute twice. The Swiss proceedings are further advanced than the English proceedings and there appears to be agreement between the Swiss lawyers that judgment could be achieved by early 2015 or, if (as would seem to me to be likely) the Swiss court requires expert assistance on the issues of English law, some time in mid-2015. The Swiss court is perfectly capable of assessing the position in English law by reference to legal materials and expert evidence. Thirdly, this is not a case where the party seeking a stay has commenced foreign proceedings in breach of an exclusive jurisdiction clause. In this case, it is Enasarco, not LBF, which has instituted the Swiss as well as the English proceedings.

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55. I do not consider that these amount to good or substantial grounds in favour of a stay in this case and I consider that there are strong grounds against the stay of the English proceedings.

56. First, the derivative agreement contains an exclusive jurisdiction clause, as regards states which are parties to the Lugano Convention, in favour of the English courts. The governing law of the contract is English law. The exclusive jurisdiction clause is itself ‘a powerful factor in support of refusal of a stay’ and the English court is ‘the natural court to consider the issues raised ... because they raise contractual questions governed by English law’: see [*Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG, The Alexandros T* [2013] UKSC 70, [2014] 1 All ER 590 at [95]–[96]]. There is the additional factor, noted by the Court of Appeal in [*AWB (Geneva) SA v North America Steamships Ltd* [2007] EWCA Civ 739, [2007] 2 Lloyd’s Rep 315], that the derivative agreement incorporates the standard terms of the ISDA Master Agreement which is widely used in all types of derivative transactions on the international markets and plays an important role in the efficient functioning of those markets.

57. Secondly, as noted by the Court of Appeal in *AWB v North America Steamships* when refusing a stay of English proceedings in favour of insolvency proceedings in Canada, and also by Rimer J in *UBS AG v Omni Holding A-G (in liq)* [2000] 2 BCLC 310 when refusing a stay of English proceedings in favour of insolvency proceedings in Switzerland, it is likely that the Swiss court will be greatly assisted by having the judgment of the English court on the rights and liabilities of the parties under the derivative agreement, given that it is governed by

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English law. It is of course possible that the Swiss court would come to a different determination of these issues, presumably on the basis of expert English law evidence, but that evidence itself would have to take account of the decision of the English courts and the risk of irreconcilable decisions appears to me to be more theoretical than real. Even if the Swiss court came to a conclusion contrary to that reached by the English court, its decision would have effect only within the insolvency proceedings in Switzerland and would create no res judicata as to the substantive rights of the parties. A decision in the Swiss proceedings would determine whether Enasarco can make any recovery from the available assets of LBF, but it would have no effect on the claim made by the liquidators of LBF against ARIC. If it wished to pursue such claim, LBF would need to bring proceedings against ARIC. Although, as Mr Nash submitted, the jurisdiction clause would not preclude LBF from commencing proceedings against ARIC in the Cayman Islands where it is incorporated, it appears to me unlikely that in reality the issue would be determined by any court other than the English court.

58. Thirdly, as to practical considerations relating to the two sets of proceedings, I am not impressed by the submission that the Swiss proceedings are sufficiently far advanced to make it a relevant factor in favour of granting a stay of the English proceedings. Any decision of the Swiss court is at least 12 months away and, more probably, at least 18 months away. I doubt whether there will be a significant difference in the time by which the two courts are likely to reach their respective decisions. Given that the issues are issues of English law, I would have thought it not improbable that the Swiss court would delay its decision until the English court had given judgment. There are other practical considerations. The relevant contractual documents are complex and stand to be construed in English as a matter of English law. For the Swiss court to reach a decision, these documents would require to be translated and then construed in a language which is not that of the contract. There may well be further extensive documentation, all of it in English, which will require translation.

...

60. Fifthly, there is, I consider, nothing in the suggestion that the English proceedings should be stayed because Enasarco has chosen to commence proceedings in Switzerland. In reality, Enasarco had no choice at all in the matter. Because the liquidators chose to deal with Enasarco's claims only in the Swiss insolvency proceedings and not through further proceedings in the English courts, Enasarco had no choice other than to issue its challenge to the schedule of claims within the prescribed period of 20 days if it wished to preserve its right (if

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established) to participate in the distribution of LBF's assets. The true analysis is that it was the liquidators' choice in this respect that forced Enasarco to issue the Swiss proceedings.

61. For these reasons, I am satisfied that a stay of the English proceedings should be refused, whether under art 28 of the Lugano Convention or under the court's case management powers."

42. In my view it is clear that the submission of the claims by the Plaintiffs in the reorganisation in Beijing, although constituting submissions to the jurisdiction for the Beijing Court for the purpose of proving in the reorganisation, does not bar the Plaintiffs from commencing the proceedings. Neither does it alone constitute strong grounds for refusing to enforce the exclusive jurisdiction clause. Something more is required.

43. It is the Company's case that there are good reasons for staying the actions and requiring the Plaintiffs to pursue their claims in Beijing. Those reasons are in two parts. **First**, that the Beijing Court has, as a matter of Mainland Law to determine the Plaintiffs' claims and may not recognise a Hong Kong judgment thus making the actions futile, wasteful and creating the risk of conflicting judgments. **Secondly**, that the Beijing Court is as well placed as the Hong Kong court to determine the claims.

The Operation of the Enterprise Bankruptcy Law

44. *Article 21* of the *EBL* provides that after the People's Court accepts an application for bankruptcy, a civil action against the debtor can only be filed with the People's Court. *Articles 44 to 58* of the *EBL* provide a procedure for the submission by creditors of claims, their adjudication in the first place by an administrator and in the event of their rejection a right

A for a creditor under *Article 58* to “file an action with the people’s court
B that has accepted the application for bankruptcy.” An action filed under
C *Article 58* would result in a hearing *de novo* of the creditor’s claim.
D It follows, so argues the Company, that following the acceptance by the
E Beijing Court of Beijing Bank’s application on 19 February 2020, only the
F Beijing Court can determine a civil claim against the Company by its
G creditors. In other words only the particular People’s Court, which accepts
H the application can determine such a civil claim. The jurisdiction
I conferred by *Article 21* of the *EBL* prevails over the jurisdiction
J established by the *Civil Procedure Law*²⁸, which I explain in [52]. It also
K follows, says the Company, that any decision by the Hong Kong court has
L no value, because the Beijing Court would have to determine the claim
M afresh before it could be admitted in the reorganisation. In support of this
N argument the Company has adduced the following evidence.
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L 45. Zhang Ting, a member of the Administrator, and a partner in
M Beijing Dentons, has filed affirmations in support of the Company’s
N application for a stay. In short, Ms Zhang suggests that any judgment of
O the Hong Kong court would not be enforceable in Beijing and the actions
P undermine the collective nature of the Company’s restructuring and would
Q undermine the principle of modified universalism, which Mr Zhang
R understands, correctly, applies in Hong Kong. Ms Zhang goes on to
S suggest that the continuation of the actions in Hong Kong will delay and
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²⁸ *China Development Bank v Shanxi Puda Coal Industry Co. et al*, Beijing Fourth Intermediate People’s Court civil ruling dated 23 July 2015 ((2015) Fourth Civil (Shang) Chuizi No. 232) 《北京市第四中级人民法院 (2015) 四中民 (商) 初字第 232 号民事裁定书》) is an example. The Beijing court declined to accept a lawsuit brought by the plaintiff because one of the defendants, Liansheng Investment Company, had commenced liquidation proceedings in Shanxi Province. The plaintiff was requested by the Beijing court to bring its lawsuit before the Luv Liang Intermediate People’s Court which had accepted the liquidation case of Liansheng in accordance with *Article 21* of the *EBL*.

disrupt the Company's restructuring. Ms Zhang also suggests that the Court in Beijing would have no difficulty in applying English law.

46. The points taken by Ms Zhang are developed and considered in more detail in an expert's report filed on behalf of the Company by Professor Shi Jingxia currently of Renmin University in the Mainland, who is well-known in the area of Mainland insolvency including cross-border insolvency²⁹. I had originally anticipated that the experts on Mainland law would be available for cross examination having mentioned it at an earlier case management conference. Unfortunately, the parties proceeded on the basis that this was not necessary probably because on substantive legal issues the experts are very largely in agreement. I had, however, identified various matters that I would have appreciated the opportunity to ask Professor Shi about. I did not, however, feel that this prevented me dealing with the applications. As I have previously mentioned to counsel in other cases, the common assumption that reports of Mainland law can be put before the court and the court left to determine which evidence it prefers without the opportunity to question the experts is often mistaken. Over and above the difficulty in determining matters which are important and disputed, it being common for the court to be faced with diametrically opposed views, often the opportunity to ask questions is helpful in getting a feel for the legal issues.

Recognising Mainland insolvency proceedings

47. Before considering Professor Shi's evidence in detail it will be helpful to summarise the nascent state of Mainland law concerning cross-border insolvency. As I explain in [26]–[35] of my decision in

²⁹ The Plaintiff's filed a report prepared by Professor Yun Zhao of Hong Kong University.

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*Re CEFC Shanghai International Group Ltd*³⁰ there has been no case of a Mainland court granting an order recognising a foreign insolvency process pursuant to *Article 5* of the *EBL*. I am confident that Professor Shi is familiar with my decision in *CEFC Shanghai*, which was the first application for recognition and assistance by a Mainland office holder in Hong Kong (and I understand Professor Shi had a significant role in drafting *Article 5*). She does not suggest in her Report that my understanding of the state of the Mainland law as described in my decision is incorrect. As at the time of writing there has been one application for recognition and assistance made by Hong Kong liquidators: *Re Samson Paper Co. Ltd*³¹. This is a straightforward application and the first to be made pursuant to the cooperation arrangement entered into on 14 May 2021 by the Hong Kong’s Secretary for Justice and the Supreme People’s Court. I explain the cooperation arrangement in more detail in [60]–[61]. I understand that the application was heard by the Shenzhen Intermediate People’s Court on 10 September 2021. A decision on that application is still awaited.

48. Professor Shi and Professor Zhao agree that assessed by reference to Mainland law the reorganisation is a collective insolvency process. This is relevant to the application for recognition and assistance. As I explain most recently in *Re HNA Group Co., Ltd*³² the Hong Kong court will only recognise a foreign insolvency process, which assessed by reference to Hong Kong legal principles is properly characterised as a collective insolvency process. HNA, which is another major Mainland reorganisation, had been placed in *Chapter 8 Reorganisation* pursuant to

³⁰ [2020] 1 HKLRD 676; [2020] HKCFI 167.

³¹ [2021] 3 HKLRD 727; [2021] HKCFI 2151.

³² [2021] HKCFI 2897.

A an order of the Hainan Province’s Higher People’s Court made in
B February 2021. The Administrator of HNA was still in the process of
C formulating a reorganisation at the time the application for recognition and
D assistance was made. I accepted for the reasons set out in my decision that
E HNA was in a collective insolvency process. The present case is different
F because on 28 June 2021 the Beijing Court approved the plan to reorganise
G the Company, which had been approved by creditors on 28 May 2021, and
H to quote from [11] of the letter of request, made a ruling to “*terminate the
reorganisation process*”. This invites the question: is the Company
still in a collective insolvency process?

I 49. There is very limited authority, which considers whether or
J not the implementation of a restructuring or a repayment process can
K properly be characterised as a collective insolvency process in the sense in
L which the term is explained in *HNA*³³. Some assistance can be obtained
M from case law on *Chapter 15* of the *United States Bankruptcy Code*. In
N *In re Oversight and Control Commission of Avanzit SA*³⁴ Judge Bernstein
considers how the term “reorganisation” is to be understood in the context
of the *UNCITRAL Model Law on Cross-Border Insolvency*:

O “The Model Law does not define ‘reorganization’, but under
P United States law, a bankruptcy reorganization commonly
Q means a financial restructuring ‘esp[ecially] in the repayment of
debts, under a plan created by a trustee and approved by a court.’
BLACK’S LAW DICTIONARY 1324 (8th ed. 2004). The
Bank’s argument focuses on the approval of the plan and the
discharge of the trustees, but ignores the repayment of debts, a
critical component of any reorganization.

R Avanzit will continue to make payments to its creditors under
S the Convenio during the next two years; if it fails, it faces
T liquidation in the Spanish Insolvency Court. Although the
Spanish Insolvency Court’s control and supervision was
reduced once the Convenio was approved, it did not surrender

³³ *Ibid.*

³⁴ 385 B.R. 525, 533-534.

all supervision and control. The Spanish Insolvency Court continues to oversee the payment of claims, and more generally, to settle any disagreement concerning the ‘interpretation, enforcement and/or performance of [the Convenio] between Avanzit ... and its creditors.’ (Convenio at Art. 12.) The closing order will not be issued until the payments are completed.”

50. The procedure for a reorganisation under the EBL is broadly similar to the arrangement that Judge Bernstein describes. The Judge accepted that the stage of Avanzit’s restructuring during which debts were to be paid in accordance with the restructuring plan approved by creditors under the supervision of Avanzit’s “Oversight Commission”, who it is explained in the judgment were appointed by the Spanish Insolvency Court, constituted part of a reorganisation process. Judge Bernstein accepted that the final stage of distribution in accordance with the approved plan formed part of the reorganisation process and, therefore, could properly be recognised under *Chapter 15. Chapter VIII, Section 3* of the *EBL* contains the Articles, which govern the implementation of a reorganisation plan. Although the evidence before me does not address directly what stage of the reorganisation process has reached in terms of the currently applicable section of the *EBL*, it seems fairly clear that it is either in the implementation stage or shortly will be.

51. It follows that the reorganisation process to which the Company is subject can properly be recognised by the Hong Kong court. In order to determine what assistance should be granted and, in particular, whether a stay should be granted requires an examination of the Mainland law concerning insolvency and recognition of foreign judgments, in particular dealing with the following matters:

- (1) The consequence of acceptance of an application for reorganisation [52]–[53].

- A
- B (2) How the Administrator’s decision can be challenged [54].
- C (3) Determining foreign legal issues [55]–[56].
- D (4) Recognition and assistance between Hong Kong and the
Mainland of each other’s insolvency processes [57]–[61].
- E

Consequence of Acceptance of an Application for Reorganisation

F 52. I have introduced this subject in [44]. *Article 21*, which
G requires all claims commenced against a company, which is subject to
H bankruptcy proceedings to be commenced before the court that accepts the
I application for bankruptcy, is an exception to the general rule in *Article 34*
J of the *Civil Procedure Law of the PRC* (《中华人民共和国民事诉讼法》
K (2017 修正)), effective from 1 July 2017, which provides that parties
L to a dispute over a contract or any other right or interest in properties may,
M by a written agreement, choose to commence proceedings at the
N People’s Court at (a) the place of domicile of the defendant; (b) the place
O where the contract is performed or signed; (c) the place of domicile of the
P plaintiff; (d) the place where the subject matter is located; or (e) at any
Q other place actually connected to the dispute to have jurisdiction over the
R dispute. If one or more location among those mentioned in this Article is
S outside of the Mainland, the parties may choose a foreign court to exercise
T jurisdiction. In that case, the general rule is that the Mainland court should
U not accept the case. The Company accepts that the jurisdiction clause does
V not infringe Mainland law and, but for the reorganisation the Plaintiffs
could enforce their rights by action in Hong Kong. For completeness I
note that *Articles 33* and *266* of the *Civil Procedure Law* provide
exceptions to the general rule established by *Article 21* of the *EBL* for
dispute relating to matters such as real estate and disputes arising from
Sino-foreign joint ventures. These exceptions are not relevant.

53. Professor Shi explains that in her view *Article 21* reflects the decision by the Central People’s Government that there is to be a uniform and centralised bankruptcy jurisdiction exercised by one court and this prevails over jurisdiction clauses in contracts that specify that another court should determine disputes. *Article 21* does not distinguish between proceedings in the Mainland and overseas. Professor Shi says that as a matter of Mainland law a claim under a contract entered into with a foreign jurisdiction clause should also be litigated in the Mainland before the court dealing with the bankruptcy. This analysis does not distinguish between legal proceedings to establish contractual rights and proceedings to determine how much a creditor is entitled to prove for in a recognition. In other words the distinction drawn in the authorities I have discussed in [37]–[41]. The failure to recognise this distinction in my view lead Professor Shi to mischaracterise proceedings commenced in a court of a foreign jurisdiction specified in a jurisdiction clause after reorganisation proceedings have been commenced and *Article 21* is engaged. Professor Shi suggests this “*amounts to pursuing an individual repayment outside the collective bankruptcy/reorganisation process commenced by Beijing Court, which is directly against the collectivity of bankruptcy proceedings commenced by a PRC court where the centre of main interest (COMI) of the debtor is located.*” That might be the case if the Mainland company subject to bankruptcy proceedings has assets overseas and a foreign creditor is seeking to obtain a judgment in order to enforce against the foreign assets. This would be inconsistent notions of modified universalism which favour the pooling of all a company’s assets wherever located with a view to unsecured creditors being paid on a *pari passu* basis wherever the unsecured creditor might be located. That is not this case. It is not suggested by the Plaintiffs that they can obtain repayment other than in the reorganisation process in the Mainland. The Plaintiffs argue that a

judgment obtained by the Hong Kong court will be of value to them in advancing a claim in the reorganisation and, in particular, if necessary in proceedings commenced to challenge the decisions of the Administrator in the Beijing Court, which they accept by virtue of *Article 21* has the ultimate jurisdiction to determine for how much their claims should be admitted.

How the Administrator’s decision can be challenged

54. If the Plaintiffs wish to challenge the Administrator’s decision in the Mainland reorganisation they will have to do so pursuant to *Article 58* of the *EBL*, the final paragraph of which provides “*Where the debtor or creditor has objections to what is recorded in the form of claims, he may file an action with the people’s court that has accepted the application for bankruptcy.*” The action would be a hearing *de novo* of the disputed claim. In the present case the Parties’ choice of law would be applied in determining the claims under the Keepwell Deeds³⁵. As the parties chose English Law to govern the Keepwell Deeds (as opposed to English Law being applicable according to Mainland principles of conflict of laws) it would be the duty of the Parties to demonstrate what is the applicable foreign law. It is not clear from the experts’ reports how this would be done. I assume it would be done by producing reports from suitably qualified foreign lawyers. Precisely what the status of the reports would be and the extent to which the foreign lawyers can opine on the answer to questions, which require determination, as opposed to providing only evidence of the relevant foreign legal principles, leaving the Mainland court to decide how they apply, is not touched on by either expert³⁶.

³⁵ Article 3, *Law of the PRC on Choice of Law for Foreign-related Civil Relationships* (《中华人民共和国涉外民事关系法律适用法》).

³⁶ The distinction is explained in *Kwok Hiu Kwan v Johnny Chen* [2018] HKCFI 2112, [2018] HKEC 2649, [13]

Determining foreign legal issues

55. Mainland judges have often faced difficulties in determining disputes governed by foreign law, because of their lack of familiarity with foreign legal concepts. To address this difficulty the Supreme People's Court ("SPC") has established a procedure known in English as the "ascertainment of foreign law process" (外国法查明). The *Several Provisions of the SPC on Establishing China International Commercial Court* ("CICC") (《最高人民法院关于设立国际商事法庭若干问题的规定》) permits various methods to be used to answer foreign legal questions. Professor Shi states that these are applicable to the Beijing Court, although she does not cite any authority for this. The CCIC was established by the SPC and is supervised by the SPC's Fourth Civil Division. It currently has two courts: in Shenzhen and Xian. It is not clear to me why Professor Shi (who is on its expert's panel) assumes that its procedures for ascertaining foreign law apply to the Beijing Court. Professor Shi also refers to the SPC's *Notice of the SPC on Promulgations of the Minutes of the Second National Work Conference for Foreign-Related Commercial and Maritime Trials* (《最高人民法院第二次全国涉外商事海事审判工作会议纪要》). This is not the same as the procedures available at the CICC. The procedures contemplated in the Notice dealing with foreign related commercial and maritime trials focuses on the parties providing material and arguments which the Mainland court will then have to determine. The procedures available at the CICC divide into two parts. The first involves ascertainment by the CICC's International Commercial Expert Committee, which includes a number of retired foreign judges. The second is ascertainment by commercial organisations such as Benchmark, which as I understand it obtain opinions

from eminent foreign lawyers on questions of foreign law³⁷. I am not aware of either procedure yet being used by the CICC. Professor Shi refers to a number of decisions by courts other than the CICC, which required foreign law to be applied. I quote from [4.41] to [4.42] of Professor Shi's report:

“4.41 As a result of the above efforts, there have been many examples of recent cases in which the PRC courts have applied foreign laws. For example, one Court in Zhejiang did not ask the parties to ascertain Korean Law agreed upon by the parties in the contract. Instead, the Court undertakes the responsibility of ascertaining Korean Law and then applies Korean Law to hear the case.³⁸ More relevantly, there are also reported cases in which English law was applied. For example, in a series of disputes concerning Hanjin Shipping Co. Ltd., Tianjin Intermediate People's Court applied English law, the governing law of the contract, to determine the rights and obligations of parties to disputes in 2018. In these cases, according to the judgments, the plaintiff (the same one, Sea Co. Global Limited) authorized the PRC court to ascertain the applicable English law via the Centre for Ascertaining Foreign Law at China University of Politics and Law (CUPL). The Center issued a legal opinion on the relevant English Law in response to the request. The Court held that the legal opinion issued by the Centre serves as a legitimate channel to ascertain foreign law and thereby should be adopted.³⁹

4.42 Also in another earlier case, the SPC applied English law to determine the validity of a Letter of Guarantee (L/G). Although the judgement made by the SPC did not elaborate on the procedure of how foreign laws are considered and applied, SPC stated in its judgment that:

This case concerns the dispute involving a foreign-related guaranty contract. Based on the parties' choice, English law shall be governing law to resolve this

³⁷ Much of what Professor Shi says is taken from the CICC's website: www.cicc.court.gov.cn.

³⁸ Zhejiang Yueqing People's Court's civil judgment dated 10 April 2019 ((2017) Zhe 0382 Min Chu No. 1366) (浙江省乐清市人民法院 (2017) 浙 0382 民初 1366 号《民事判决书》).

³⁹ Tianjin Maritime Court's civil judgments dated 30 May 2018 ((2016) Jin 72 Min Chu No. 871, (2016) Jin 72 Min Chu No. 872, (2016) Jin 72 Min Chu No. 873, (2016) Jin 72 Min Chu No. 874, (2016) Jin 72 Min Chu No. 875, (2016) Jin 72 Min Chu No. 876) (天津海事法院 (2016) 津 72 民初 871 号, (2016) 津 72 民初 872 号, (2016) 津 72 民初 873 号, (2016) 津 72 民初 874 号, (2016) 津 72 民初 875 号, (2016) 津 72 民初 876 号《民事判决书》).

*dispute. In accordance with English law, a letter of guaranty shall satisfy several conditions to be legally valid, including written form, an agreement among three parties, and effective consideration, in addition to satisfying general conditions for a valid contract.*⁴⁰

56. Professor Shi concludes by suggesting that she does “*not see a problem for the Beijing Bankruptcy Tribunal to apply English Law to decide this case.*” I disagree. Professor Shi does not touch on the subject matter of the dispute, which is crucial when assessing what is the fairest and most efficient way of resolving it. As I explain in [22]–[24] the issues are potentially extensive and complicated. The Company agreed to have any disputes that were to arise under the Keepwell Deeds determined by a court able to apply English law. The common law courts have developed procedures and practices over time, which facilitate the determination of the kind of legal disputes that arise under the common law. This includes, for example, adversarial advocacy, which provide a dialectical process, which the common law finds the most effective technique for the determination of legal issues. The suggestion that the Beijing Court is as well placed to determine the potential issues in the present case as a Hong Kong court by accessing opinions (the scope and nature of which Professor Shi has not explained) *from experts is in my view unconvincing.*

Recognition of Hong Kong judgments in the Mainland

57. I think it is a fair summary of the experts’ views on the enforceability of any judgment that the Plaintiffs were to obtain in Hong Kong that it is unclear whether it would be recognised and enforced. The recognition and enforcement of such a Hong Kong judgment is currently subject to the *Arrangement of the SPC between the Mainland and*

⁴⁰ Supreme People’s Court civil ruling dated 21 December 2012 ((2012) Min Shen Zi No. 1548) (最高人民法院 (2012) 民申字第 1548 号《民事判决书》).

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Hong Kong SAR Concerning Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases under the Jurisdiction as Agreed to by the Parties Concerned (《最高人民法院关于内地与香港特别行政区法院相互认可和执行当事人协议管辖的民商事案件判决的安排》, “*2007 Arrangement*”)⁴¹, which became effective on 1 August 2008. An updated version of this Arrangement was issued on 18 January 2019 (*Arrangement for Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region* 《关于内地与香港特别行政区法院相互认可和执行民商事案件判决的安排》) but it has not come into effect yet. Under the 2007 Arrangement, the jurisdiction of the Hong Kong court to determine this case could be challenged in various circumstances. The third circumstance listed is that the court at the locality of enforcement has exclusive jurisdiction over the case according to the laws of the locality of enforcement. As I have explained, *Article 21* of the *EBL* requires that a civil action against the debtor brought after the debtor enters liquidation or reorganisation, shall be filed with the Beijing Court. The Beijing Court may take the view that recognition is inconsistent with its jurisdiction and that this falls within the third circumstance of *Article 9* of the *2007 Arrangement*.

58. The first point to note is that the letter of request does not say that the Beijing Court would not recognise a judgment of the Hong Kong

⁴¹ Arrangement between the Mainland and Hong Kong SAR Concerning Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases under the Jurisdiction as Agreed to by the Parties Concerned issued by the Supreme People’s Court of People’s Republic of China, Fa Shi [2008] No. 9, effective from August 1, 2008.

A court. What the letter of request does say in [19] and [20] of the preamble
B is this:

C “19. In accordance with the provisions of Article 21 of the
D Enterprise Bankruptcy Law, after a court accepts an application
E for bankruptcy, any civil action against the relevant company
F may only be brought in the court which accepts the bankruptcy
G application.....

H 20. To prevent the Five Companies from uncertainties and
I the burden of potentially continuous litigation, and to ensure
J orderly progress of the reorganisation of the Five Companies,
K the High Court should make it clear that the legal effect arising
L from the provisions of the Enterprise Bankruptcy Law as set out
M in paragraph 19 above shall extend to the jurisdiction of the
N Hong Kong Special Administrative Region.”

O 59. Mr Maurellet accepted at the outset that [20] is wrong⁴². This
P is probably, I assume, the result of clumsy drafting rather than a belief that
Q the *EBL* has any effect in Hong Kong. I assume what it is intended to mean
R is that the Hong Kong court is requested to stay the proceedings with the
S consequence that the Plaintiffs would have to proceed in accordance with
T *Article 21* of the *EBL*. What it does, however, serve to illustrate is that the
U Beijing Court has probably not been properly appraised of the issues that
V the Company’s two applications before me give rise to in Hong Kong.

O 60. Professor Shi, straying into advocacy on behalf of the
P Company, suggests that for the Hong Kong court to refuse to stay the
Q actions would be inconsistent with steps taken between the Mainland and
R Hong Kong to promote cooperation between courts in handling
S insolvencies proceedings. Professor Shi says this in [4.50] of her Report:

T “Third, I believe that recognizing the HKSAR judgment would
S also be contrary to the cooperative spirit enshrined in the
T recently concluded Pilot Measures on Cross-Border Insolvency,
U which aims to promote an orderly and efficient insolvency

U ⁴² *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*,
V Articles 8 and 18.

regime, and the recognition and facilitation of Mainland insolvency proceedings by the HKSAR courts (and vice versa).⁴³ To some extent, the reorganization of PUFG in Beijing will be prejudiced or undermined when the Plaintiff elected to bring lawsuit in Hong Kong court pursuing its individual claim outside the Beijing proceeding. This is directly against the collectivity of Beijing proceeding commenced at the place of PUFG's COMI and centralized jurisdiction of Beijing Bankruptcy Tribunal. The lawsuit brought in another jurisdiction with multiple proceedings, the risk of inconsistent decisions, and a possible recognition and enforcement application put the restructuring proceeding into an uncertain status and affect the smooth progress in Beijing. This may result in actual unfairness (with different standards applied) or harm to other creditors of PUFG, as multiple proceedings often lead to low efficiency and high costs involved, potentially inconsistent decisions, and bondholders who are not bound by the haircut agreed in the creditors' meeting may try to enforce their claims elsewhere to the detriment of other creditors.”

61. The pilot measures to which Professor Shi refers apply between the Hong Kong High Court and the Intermediate People's courts in Shanghai, Shenzhen and Xian. They do not apply to the Beijing Court. The Hong Kong court has recognised and provided assistance in respect of three Mainland insolvencies proceedings⁴⁴. In the case of two of the proceedings recognition and assistance were sought before the arrangement to which Professor Shi refers was made on 14 May 2021. No Hong Kong insolvency proceedings have been recognised in the Mainland. As I have already noted the first application, which is made in accordance with the pilot measures, relates to *Samson Paper*⁴⁵ and has not yet been approved. I agree with Professor Shi that the Hong Kong court and the Mainland courts are attempting to cooperate in order to facilitate the

⁴³ On 14 May 2021, the SPC and the Government of the HKSAR reached a Record of Meeting on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong SAR. The SPC published the *Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the HKSAR* (《最高人民法院关于开展认可和协助香港特别行政区破产程序试点工作的意见》) effective from 14 May 2021.

⁴⁴ *Supra*, fn. 7.

⁴⁵ *Supra*, fn. 30.

efficient progress of insolvencies and reorganisations, which involve both the Mainland and Hong Kong. What this involves in practice I consider in the next section of this Decision.

Determination

62. The Plaintiffs accept that all they can obtain from the Hong Kong court is a declaration of their rights as a matter of English law as was done in *Perpetual Trustee (No. 2)*⁴⁶. They will not seek an order that the Company should pay them a sum of money. The Plaintiffs argue that obtaining an order from the Hong Kong court determining what as a matter of English law they are entitled to, if anything, will be of value in proving their claim before the Beijing Court. Professor Shi's evidence is directed to the question of whether or not any order of the Hong Kong court in the Actions would be enforceable in the Mainland. Professor Shi does not address the more general question of the evidential weight that might be given to such a judgment. The Company submitted that as any judgment would not be from an English court, the Beijing Court might not give it much weight. This seems to be an unattractive argument. Hong Kong common law of contract is the same as English law. The extent to which the common law of England and Hong Kong law are generally the same is demonstrated by section 12(2) of the *High Court Ordinance*, Cap. 4, which provides: "*the civil jurisdiction of the Court of First Instance shall consist of (a) original jurisdiction and authority of a like nature and extent as that held and exercised by the Chancery, Family and Queen's Bench Divisions of the High Court of Justice in England.....*". It would be extraordinary if the Beijing Court did not give weight to a decision of the High Court of Hong Kong on a contractual dispute under English law

⁴⁶ *Supra*, fn. 22 and 24.

determined pursuant to an exclusive jurisdiction clause. It would demonstrate a startling lack of comity.

63. As I explain in [26] the Plaintiffs' right to have their claims determined before the agreed court is an important and substantial one. The Hong Kong court will only deprive a party of this right if a compelling reason is demonstrated. It seems to me that the Plaintiffs are entitled to say, as they do, that they should be permitted to have their claim tried in Hong Kong and, if successful, obtain the benefit of a judgment that they can use to support the claim they will then make in the reorganisation. In my view the Company/Administrator has not demonstrated that the Beijing Court will give no weight to a judgment of the Hong Kong court in the actions. I understand that viewed from the perspective of the Administrator it would be more straightforward to have the Plaintiffs' claims dealt with entirely by the Beijing Court. This is not, in my opinion, a sufficiently strong reason to deprive the Plaintiffs of the right to have their claims dealt with before the contractually agreed court. Neither do I consider the "co-operative spirit enshrined in the" pilot measures, to which Professor Shi appealed, justifies doing so for reasons I develop in the next 5 paragraphs.

64. As I have already accepted, Professor Shi is correct that the pilot measure demonstrate an intention that the Hong Kong High Court and courts in the Mainland exercising a bankruptcy jurisdiction where appropriate cooperate and coordinate proceedings to facilitate the fair and efficient conduct of insolvency processes, which involve companies with assets and/or creditors on both sides of the internal border. As the preamble to the Record of the Meeting⁴⁷ expressly states, one of the

⁴⁷ *Supra*, fn. 43.

principle purposes of improving judicial cooperation in insolvency and reorganisation proceedings is to “*facilitate integrative economic development, improve business environment underpinned by the rule of law...*”. The SPC’s Opinion⁴⁸ to which Professor Shi refers is more comprehensive than the Record of Meeting. Article 25 of the Opinion states:

“二十五、 试点法院应当与香港特别行政区法院进行最大限度的沟通与合作。”

25. The courts in the pilot areas shall communicate and cooperate with the courts in the Hong Kong Special Administrative Region to the greatest extent possible.”

65. Cooperation requires at least some understanding of each court’s substantive law and procedure and the matters, which are likely to be of concern to them. The Mainland and Hong Kong have materially different legal systems and different economic models. **Conscious and sensitive cooperation and communication is necessary in order to minimise misunderstandings and facilitate effective assistance.** Initially this is likely to be a relatively slow and incremental process. An administrator seeking a letter of request from a Mainland court will need to be mindful of how the application will look to a Hong Kong court and the concerns the Hong Kong court may have. It does not seem to me that the Administrator has approached the application for recognition and assistance with these considerations in mind. There is nothing to suggest in the evidence filed by the Administrator in support of the application for recognition and assistance that the Beijing Court had explained to it the issues that the application would give rise to in Hong Kong. There is certainly nothing in the letter of the request, which acknowledges that the Hong Kong court

⁴⁸ *Supra*, fn. 43.

would have to resolve the conflict between the rights of the Plaintiffs to have a claim determined in accordance with the jurisdiction and governing law clauses in the Keepwell Deeds and the priority given to the Beijing Court by *Article 21* of the *EBL* in determining whether a claim should be admitted in the reorganisation. Instead we get what I have already described as the clumsy wording of [20] of the letter of request.

66. At the case management conference on 8 July 2021 in HCA 778/2021 and HCA 798/2021 I requested the Administrator to discuss with the Beijing Court the possibility of the two courts cooperating in order that the Hong Kong court could determine issues relating to the construction of the Keepwell Deeds. On 9 November 2021 I wrote to the Administrator’s solicitors in Hong Kong asking if this had been done as no reference to it had been made in the evidence filed by the Administrator in support of its application for recognition. In her 3rd affirmation Ms Zhang Ting purports to answer this question:

“14. I confirm that the Administrator has, in the course of carrying out its duty to make regular reports to the Beijing Court, provided regular updates to the Beijing Court on the status of HCA 778/2021, HCA 798/2021, HCA 1418/2021 and HCA 1442/2021, and also communicated with the Beijing Court on several occasions concerning, among other things, whether the substantive claims against PUFG under the Keepwell Deeds and EIPUs (the *Claims*) should be determined by the Hong Kong courts or the Beijing Court. I was involved in those communications, as part of the Administrator’s duties.

15. Following these communications, on 5 November 2021, the Beijing Court issued a letter of request to this Court. A copy of the letter of request and courtesy English translation is at pages 1 to 23 of ZT-3.”

67. I take it from the carefully chosen language that the Administrator did not inform the Beijing Court that the Hong Kong court

had suggested that consideration be given to the Hong Kong court deciding issues relating to construction of the Keepwell Deeds

68. If the SPC's direction that courts are to communicate and cooperate to the greatest extent possible is to be complied with it is necessary for administrators and their lawyers in the Mainland to ensure that the Mainland courts receive complete and balanced information. Cross-border insolvency and assistance of foreign proceedings does not involve a contest between courts. The courts aim to work together to implement fair and efficient insolvency processes whilst respecting the substantive law and procedure of each other's jurisdiction. I hope that this Decision assists the Beijing Court to understand that under Hong Kong law the application for a stay is not as straight forward as it may have been led to believe and, also to advance the communication and cooperation [25] of the SPC's Opinion encourages.

Order

69. I will make the following orders.

- (1) I will dismiss the Administrator's applications to stay the actions. I will make a costs order *nisi* that the Administrator pays the Plaintiffs' costs of the applications forthwith with a certificate for two counsel, such costs to be taxed if not agreed.
- (2) I will make an order recognising the reorganisation proceedings in Beijing and providing assistance in the terms of the originating summons subject to the amendments explained in the next sub-paragraph.
- (3) Paragraph 4 of the order includes an automatic stay of proceedings. This had been a paragraph routinely included in orders for recognition and assistance until my decision in *Re*

*FDG Electric Vehicles Ltd*⁴⁹ in which I explain why I consider that in future such an order should be replaced with a case management direction, which is set out in [7] of the decision, and provides that if a liquidator considers proceedings should be stayed an application should be made initially in writing to the judge specified in this paragraph of the order. As I have heard comprehensive argument on this issue I am satisfied that it is appropriate to order a general stay. However, I will include the following additional directions, which will replace [5] of the originating summons:

- “5. The stay directed in paragraph 4 of this Order shall not apply to HCA 778, 798 1428 and 1442 of 2021.
6. The Applicants shall provide to the Beijing No. 1 Intermediate People’s Court a copy of this order and the decision of the Honourable Mr. Justice Harris dated 17 December 2021 (“**Decision**”) by 5pm on 23 December 2021.
7. The Administrators shall provide to the Respondents a draft translation of the Decision and this order into simplified Chinese by 5pm on 7 January 2022 or such other date as the parties agree.
8. The Respondent shall send to the Clerk to the Honourable Mr. Justice Harris the draft translation with any proposed amendments by 5pm on 21 January 2022 or such other date as the parties agree for approval by the Court translators.
9. The Applicants have liberty to apply by summons by 5.00pm on 28 February 2022 or such other date as the parties agree for directions suggested by the Beijing No.1 Intermediate Court for the further conduct of HCA 778/2021, HCA 798/2021, HCA 1418/2021 and HCA 1442/2021.”

⁴⁹ *Supra*, fn. 9.

70. Although, I am not currently satisfied that this is a proper case in which to order a stay, it seems to me that it may be possible for the courts to agree the way in which the issues are to be determined, with the Hong Kong court dealing with issues of construction of the Keepwell Deeds. This is something that the Beijing Court may wish to consider further in the light of this decision.

71. The Plaintiffs shall fix a 30 minutes case management conference in order that I can consider what further directions to make to progress the actions. I made no order on the summonses for expedited trials. I shall consider when trial dates should be fixed at the case management conference.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Patrick Fung SC and Mr Look Chan Ho, instructed by Addleshaw Goddard (Hong Kong) LLP, for the plaintiffs (in HCA 778 & 798 & 1418 & 1442/2021) and the respondent (in HCMP 1831/2021)

Mr José-Antonio Maurellet SC and Mr Tom Ng, instructed by Freshfields Bruckhaus Deringer, for the defendant (in HCA 778 & 798 & 1418 & 1442/2021) and the applicants (in HCMP 1831/2021)

Appendix I
Letter of Request

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WHEREAS:

1. This Court is a court exercising jurisdiction under the laws of the People’s Republic of China concerning domestic companies and bankruptcy, liquidation and reorganisation of companies.
2. Peking University Founder Group Company Limited, Founder Industry Holdings Co., Ltd., PKU Healthcare Industry Group Co., Ltd., Peking University Founder Information Industry Group Co., Ltd. and Peking University Resources (Holdings) Company Limited (the *Five Companies*) are all established under the laws of the Mainland of the People’s Republic of China, with their centre of main interest, principal place of business and principal assets located in the Mainland of China.
3. On 14 February 2020, this Court received the application from Bank of Beijing Co., Ltd. for the reorganisation of Peking University Founder Group Company Limited (*PUFG*) in accordance with Articles 2, 7 and 70 of the *Enterprise Bankruptcy Law of the People’s Republic of China (2007)* (the *Enterprise Bankruptcy Law*).
4. On 19 February 2020, this Court made a ruling to accept the application and issued a civil decision (*Decision I*, a copy of which is attached hereto and marked as “A”), appointing the PUFG liquidation group as the administrator of PUFG (the *Administrator*).
5. Based on Decision I, the Administrator is authorised and empowered to exercise all the rights specified in the Enterprise Bankruptcy Law and to perform the corresponding duties, including
 - (a) Taking over PUFG’s assets, company seals and books of accounts, documents and other materials;
 - (b) Investigating into PUFG’s financial position and preparing the reports on such financial position;

| | | |
|---|---|---|
| A | | A |
| B | (c) Determining the internal management and affairs of PUFG; | B |
| C | (d) Determining the daily expenses and other necessary expenses of PUFG; | C |
| D | (e) Determining the continuation or suspension of the business operation of PUFG prior to the holding of the first creditors' meeting; | D |
| E | | E |
| F | (f) Managing and disposing of PUFG's assets; | F |
| G | (g) Engaging in lawsuits, arbitration or other legal proceedings for and on behalf of PUFG; | G |
| H | (h) Calling for the convening of the creditors' meetings; and | H |
| I | (i) Other functions that this Court deems necessary to be performed by the Administrator. | I |
| J | | J |
| K | 6. On 17 July 2020, this Court received an application from the Administrator for substantive consolidation and reorganisation of the Five Companies. | K |
| L | | L |
| M | 7. On 31 July 2020, this Court made a ruling to allow the substantive consolidation and reorganisation of the Five Companies and issued a civil decision (<i>Decision II</i> , a copy of which is attached hereto and marked as "B"), appointing the Administrator as the administrator of the substantive consolidation and reorganisation of the Five Companies. | M |
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| Q | 8. Based on Decision II, the Administrator is authorized and empowered to exercise all the rights specified in the Enterprise Bankruptcy Law and to perform the corresponding duties, including: | Q |
| R | | R |
| S | (a) Taking over the assets, company seals and books of accounts, documents and other materials of the Five Companies; | S |
| T | (b) Investigating into the financial position and preparing the reports on such financial position of the Five Companies; | T |
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- (c) Determining the internal management and affairs of the Five Companies;
 - (d) Determining the daily expenses and other necessary expenses of the Five Companies;
 - (e) Determining the continuation or suspension of the business operation of the Five Companies before the first creditors' meeting is held;
 - (f) Managing and disposing of the assets of the Five Companies;
 - (g) Engaging in lawsuits, arbitration or other legal proceedings for and on behalf of the Five Companies;
 - (h) Calling for the convening of the creditors' meetings; and
 - (i) Other functions that this Court deems necessary to be performed by the Administrator.
9. On 28 May 2021, the creditors of the Five Companies approved the reorganisation plan (the *Plan*) of the Five Companies. The Plan involves dealing with the Five Companies' debts owed to domestic and overseas creditors, with an aggregate amount of RMB187.376 billion or approximately US\$29.0 billion. Among the unsecured domestic and overseas creditors present at the meeting, those holding an aggregate of 84.3% of the debt value voted in favour of the Plan.
10. On 31 May 2021, the Administrators applied to this Court for approval of the Plan.
11. On 28 June 2021, this Court made a ruling to approve the Plan and terminate the reorganisation process of the Five Companies. The term for the implementation and supervision of the Plan shall be 28 June 2021 to 28 June 2022. The Administrator shall be responsible for supervising the implementation of the Plan.

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12. On 29 January 2021, Nuoxi Capital Limited (*Nuoxi*) submitted the following claims to the Administrator:
- a. claims in an aggregate amount of RMB 2,132,123,569 under a Keepwell Deed signed on 20 April 2017 and a Deed of Equity Interest Purchase Undertaking signed on 20 April 2017; and
 - b. claims in an aggregate amount of RMB 4,215,694,789 under a Keepwell Deed signed on 24 January 2018 and a Deed of Equity Interest Purchase Undertaking signed on 21 January 2018.
13. On 9 April 2021, Founder Information (Hong Kong) Limited (*FIHK*) submitted the following claims to the Administrator:
- a. claims in an aggregate amount of RMB 3,505,417,404.02 under a Keepwell Deed signed on 17 April 2018 and a Deed of Equity Interest Purchase Undertaking signed on 17 April 2018; and
 - b. claims in an aggregate amount of RMB 2,203,434,904.02 under a Keepwell Deed signed on 21 May 2018 and a Deed of Equity Interest Purchase Undertaking signed on 21 May 2018.
14. On 19 May 2021, the Administrator informed Nuoxi that it had decided to reject its claims referred to in Paragraph 12 above because the Administrator considered that the claims lacked legal basis. On 21 May 2021, the Administrator informed FIHK that it had decided to reject the claims referred to in Paragraph 13 above because the Administrator considered that the claims lacked legal basis.
15. On May 20, 2021, Nuoxi filed a Civil Action No. 778 of 2021 (HCA 778/2021) against PUFG before the High Court of the Hong Kong Special Administrative Region (the *High Court*) in respect of the same claims referred to in Paragraph 12 above.

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16. On 24 May 2021, FIHK filed a Civil Action No. 798 of 2021 (HCA 798/2021) against PUFG before the High Court in respect of the same claims referred to in Paragraph 13 above.
17. In light of the above, in order to enable the Administrator to effectively deal with the affairs relating to the Five Companies and avoid seeking for recourse continuously from the High Court, the Administrator applies to the High Court to seek an order of recognition.
18. The effect of an order granting recognition will confirm that the Administrator has, and may exercise, the rights conferred to it under the Enterprise Bankruptcy Law and relevant judicial interpretations, and make available such rights to the Administrator under the laws of Hong Kong (to the extent permitted by the common law in Hong Kong), and make it possible to implement the Plan in the Hong Kong Special Administrative Region.
19. In accordance with the provisions of Article 21 of the Enterprise Bankruptcy Law, after a court accepts an application for bankruptcy, any civil action against the relevant company may only be brought in the court which accepts the bankruptcy application. Item 7 of Paragraph 1 of Article 25 provides that an administrator should perform the duty of participating in litigations, arbitrations or any other legal proceedings on behalf of the debtor. Paragraph 1 of Article 90 provides that from the day that the court rules to approve a reorganisation plan and within the term of supervision as prescribed by the reorganisation plan, the relevant bankruptcy administrator shall supervise the implementation of the reorganisation plan.
20. To prevent the Five Companies from uncertainties and the burden of potentially continuous litigation, and to ensure orderly progress of the reorganisation by the Five Companies, the High Court should make it

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clear that the legal effect arising from the provisions of the Enterprise Bankruptcy Law as set out in Paragraph 19 above shall extend to the jurisdiction of the Hong Kong Special Administrative Region.

21. In accordance with the Enterprise Bankruptcy Law and relevant judicial interpretations, this Court confirms that it is fair and proper to issue this Letter of Request so that the Administrator can perform its duties effectively.

This Court hereby requests the High Court to issue the following orders and directions in assistance to the reorganisation process of the Five Companies and the Administrator:

1. The appointment of Beijing Dentons Law Offices LLP (Address: 7th Floor, Building D, Parkview Green FangCaoDi, Chaoyang District, Beijing) as the authorised representative of the Administrator to act within the jurisdiction of the Hong Kong Special Administrative Region (with lawyers Zheng Zhibin and Zhang Ting as the persons in charge and have ultimate decision-making authority on the work of the Administrator) be recognised by the High Court.

2. The Administrator, to the fullest extent permitted by the laws of Hong Kong, shall have and may exercise the powers conferred on the Administrator as set out in relevant order and (as set out above) under the Enterprise Bankruptcy Law and related judicial interpretations, and may implement the Plan in the Hong Kong Special Administrative Region. In particular, and without prejudice to the generality of the foregoing, the Administrator may exercise the rights for following purposes:

Represent PUFG in HCA 778/2021, HCA 798/2021 and other proceedings against PUFG.

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3. For the avoidance of doubt, the Administrator is expressly authorised to seek any relief available under the laws of Hong Kong, even if the scope thereof may not be entirely consistent with the corresponding scope under the Enterprise Bankruptcy Law and related judicial interpretations.
4. Anything that is authorised or required to be done by the Administrator may be done by all or any one or more of the Administrator's authorised representatives;
5. Before the final termination of the bankruptcy procedures of the Five Companies in the Mainland of China (as confirmed by the written decision of this Court), no action or proceedings within the jurisdiction of the High Court shall be continued or commenced against the Five Companies except with the leave of the High Court and subject to the terms imposed by the High Court; and
6. The Administrator shall correspond with this Court (and report to this Court) as directed by the terms of any further order which may be issued by this Court or the High Court.

This Court confirms and guarantees that the above request is not restricted by the Enterprise Bankruptcy Law or the related judicial interpretations.

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Appendix II

Beijing No.1 Intermediate People's Court

Decision

(2020 Jing 01 Po No. 13

On 19 February 2020, this Court, upon the application of Bank of Beijing Co., Ltd., made a ruling to accept the case for the reorganisation of Peking University Founder Group Company Limited, and, in accordance with provisions of Article 13, paragraph 1 of Article 22 and paragraph 1 of Article 24 of the *Enterprise Bankruptcy Law of the People's Republic of China* and Articles 18 and 19 of the *Provisions of the Supreme People's Court on the Appointment of Administrator during the Trial of Enterprise Bankruptcy Cases*, appoint the liquidation group of Peking University Founder Group Company Limited as the administrator of the Peking University Founder Group Company Limited.

The liquidation group of Peking University Founder Group Company Limited comprises the following members:

| | |
|---------------|--|
| Guo Dayong | [REDACTED] |
| Meng Jun | [REDACTED] |
| Hua Chenggang | [REDACTED] |
| Lu jian | [REDACTED] |
| Zheng Zhibin | Senior partner of Beijing Dentons Law Office |
| Zhang Xiaolin | [REDACTED] |
| Shi Hongya | [REDACTED] |
| Hao Gang | [REDACTED] |
| He Tongbao | [REDACTED] |
| Lei Tong | [REDACTED] |
| Lu Qian | [REDACTED] |
| Zhang Ting | Senior partner of Beijing Dentons Law Office |

Among the above members, Guo Dayong acts as the head of the liquidation group, and Meng Jun, Hua Chenggang, Lu Jian and Zheng Zhibin act as deputy heads of the liquidation group.

The administrator shall fulfil its functions diligently and faithfully, carry out the duties of the administrator as stipulated in the *Enterprise Bankruptcy Law of the People's Republic of China*, report to the People's Court and be subject to the supervision of the creditors' meeting and the creditors' committee. The duties of the administrator are as follows:

- (1) Taking over the debtor's assets, company seals and books of accounts, documents and other materials;
- (2) Investigating into the debtor's financial position and preparing the reports on such financial position;
- (3) Determining the internal management and affairs of the debtor;
- (4) Determining the daily expenses and other necessary expenses of the debtor;
- (5) Determining the continuation or suspension of the business operation of the debtor prior to the holding of the first creditors' meeting;
- (6) Managing and disposing of the debtor's assets;
- (7) Engaging in lawsuits, arbitration or other legal proceedings for and on behalf of the debtor;
- (8) Calling for the convening of the creditors' meetings; and
- (9) Other functions that this Court deems necessary to be performed by the administrator.

19 February 2020