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UPDATE

Changgang Dunxin Enterprise Company Limited – common law recognition of foreign liquidators in the Cayman Islands

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In a judgment handed down recently, The Honourable Justice Mangatal (**Mangatal J**) granted common law recognition to joint provisional liquidators appointed in Hong Kong (the **HK JPLs**) to act in the name and on behalf of Changgang Dunxin Enterprise Company Limited, a Cayman Islands exempted limited company registered in Hong Kong (the **Company**), for the purpose of making an application to wind it up in the Cayman Islands and to seek their own appointment, together with a further insolvency practitioner based in the Cayman Islands, as joint provisional liquidators in the Cayman Islands (the **Cayman JPLs**).

The need for the application arose as a result of a lacuna in Hong Kong law, which does not permit the appointment of JPLs for the purposes of implementing a restructuring. Cayman Islands law does provide for that and grants JPLs broad powers to restructure a company through a scheme of arrangement.

The decision, whilst unusual, is sensible and pragmatic. It allows the difficulties caused by the commencement of insolvency proceedings in Hong Kong, rather than in the Cayman Islands as the place of incorporation, to be overcome. This should facilitate a restructuring which is in the best interests of the Company and its stakeholders. It also ensures that the interests of stakeholders in the Company, who would have had a legitimate expectation that it would be wound up pursuant to Cayman Islands law, are protected.

Background

The Company is incorporated in the Cayman Islands but registered in Hong Kong. It is listed on The Hong Kong Stock Exchange (the **SEHK**) although trading of its shares was suspended on 20 January 2016. A dispute between the directors, including as to the validity of certain appointments, led to competing announcements being made through the SEHK and the Board being unable to speak with one voice or act collectively in the best interests of the Company.

On 31 May 2017 a winding up petition was presented in the High Court of the Hong Kong Special Administrative Region Court (the **HK Court**) by a creditor. Although the HK JPLs were appointed by the HK Court, as a matter of Hong Kong law provisional liquidators could not be appointed purely for the purpose of restructuring the Company and there was uncertainty as to whether they had any powers to pursue a restructuring in Hong Kong. The HK JPLs had determined that the Company was hopelessly insolvent and concluded that the best way to deliver value to stakeholders was through a restructuring.

To address these difficulties, the HK JPLs decided to seek their appointment as Cayman JPLs by the Grand Court of the Cayman Islands (the **Cayman Court**) to enable them to exercise the broader restructuring powers available under the laws of the Cayman Islands. This course of action, which was sanctioned by the HK Court, foreshadowed the following steps:

- an application for common law recognition of the HK JPLs' powers as foreign liquidators to act in the name and on behalf of the Company for the limited purpose of making an application to wind it up in the Cayman Islands and to be appointed as Cayman JPLs;

- following recognition being granted in the Cayman Islands, the presentation of a winding up petition in the Cayman Islands and the issue of an application for the appointment of the HK JPLs as Cayman JPLs;
- following their appointment as Cayman JPLs, an application to the HK Court for recognition of their powers as Cayman JPLs in Hong Kong and to discharge them as HK JPLs; and
- following recognition being granted of the Cayman JPLs in Hong Kong, the preparation and promotion of parallel schemes of arrangement by the Cayman JPLs in the Cayman Islands and Hong Kong.

However, the law was not clear as to whether common law recognition could be used to permit foreign insolvency representatives (i.e. appointed somewhere other than the place of incorporation of the company) to present a petition to wind up a company in its place of incorporation and seek their own appointment as provisional liquidators.

Decision

Mangatal J held that it was appropriate to grant the HK JPLs recognition to act in the name and on behalf of the Company for these purposes.

The judgment relied upon a number of recent authorities in various jurisdictions confirming the power to make recognition orders under the common law in respect of foreign liquidators appointed under the law of the principal place of business rather than the place of incorporation.

Importantly, the HK JPLs' application did not engage the restrictions imposed by the decisions in *Rubin*[1] and *Singularis*[2]. In *Rubin*, the Supreme Court of the United Kingdom held that the respondent, who had secured judgment against the appellants in US Chapter 11 proceedings, could not enforce it in England because the appellants had not submitted to the jurisdiction of the US courts, which was a requirement under the traditional common law rule for the recognition and enforcement of foreign judgments. The Supreme Court refused to permit a separate rule for insolvency proceedings which was broader than the traditional rule. In *Singularis*, the Privy Council held that liquidators appointed in the Cayman Islands (the place of incorporation) could not be treated as if they had been appointed in Bermuda, where the relevant statutory power was broader. The Supreme Court of Bermuda could only provide assistance if the Cayman Court could make the equivalent order; there was no 'as if' application to the common law power of assistance.

By contrast, the HK JPLs were seeking to bring the proceedings back to the place of incorporation and to be appointed as Cayman JPLs. They were not seeking 'as if' recognition. The restrictions set out in *Rubin* and *Singularis* were not, therefore, applicable to their application.

The most recent relevant decision is *China Agrotech*[3], in which The Honourable Justice Segal (Segal J) held that while he could not make an order which treated Hong Kong liquidators of a Cayman Islands company in all respects as if they had been appointed as liquidators in the Cayman Islands (due to the above restrictions), he could permit them recognition in order to apply in the name of and on behalf of the company for the specific purpose of promoting a scheme of arrangement. He was also concerned to ensure that there was no prejudice in allowing the scheme of arrangement to be promoted by foreign representatives rather than liquidators in the Cayman Islands.

Mangatal J had regard to the facts, including that:

- the petitioning creditor in Hong Kong (and other creditors holding around 25% of the total debt) had confirmed their support for the proposed approach and did not intend to bring insolvency proceedings against the Company in the Cayman Islands;
- the HK JPLs were also unaware of any other creditor or member who intended to bring such proceedings; and
- the Board had not objected to the HK JPLs' appointment in Hong Kong nor their approach.

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[1] *Rubin v Eurofinance SA* [2012] UKSC 46

[2] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKSC 36

[3] *In the Matter of China Agrotech Holdings Limited* FSD 157 of 2017 (unreported, 19 September 2017)

Mangatal J acknowledged that, as in *China Agrotech*, the Cayman Court was in substance dealing with a governance question, namely whether to permit the HK JPLs to act on behalf of the Company in presenting a winding up petition in the Cayman Islands and seeking their own appointment as Cayman JPLs.

Mangatal J concluded that it was appropriate to grant the HK JPLs' recognition to act in the name and on behalf of the Company for these purposes. There was no competition between the place of incorporation and the foreign jurisdiction because the foreign representatives wanted to bring the focus of the provisional liquidation back to the place of incorporation. As well as having that aim, the foreign representatives were proceeding with the support of the HK Court. The centre of main interests of the Company appeared to be in Hong Kong, and it was in the interests of comity for the Cayman Court to recognise the HK JPLs, who had been appointed by a court in a jurisdiction with which the Company had substantial ties.

The application carried greater safeguards for the Company's stakeholders than in *China Agrotech* because it sought to bring the winding up and restructuring proceedings back to the place of incorporation, where they would be subject to the supervision and procedure of the Cayman Court.

In addition, no policy considerations arose as to the decision to initially institute the proceedings in Hong Kong rather than the place of incorporation and whether it was a means of avoiding the provisions of Cayman Islands law, and in particular the restrictions placed on the ability of the Board to present a winding up petition. Given that their appointment in Hong Kong was brought by creditor's petition, there was no need to consider the authority of the Board to act.

As a matter of procedure, adopting a similar approach to that of Segal J in *China Agrotech*, Mangatal J insisted that, before judgment was handed down, notice should be given to all of the directors, shareholders and creditors of the relief sought in the application to give them an opportunity to object and apply to reopen the issue should they wish to do so.

Comment

It is clear that Mangatal J's view was that it would have been preferable for the proceedings to have been commenced in the Cayman Islands. She was particularly concerned to ensure that they were not commenced in Hong Kong before being brought back to the Cayman Islands as a means of circumventing Cayman Islands law.

Ultimately, Mangatal J adopted a sensible and pragmatic solution which will provide for the proceedings to be moved back to the Cayman Islands. Those advising creditors in foreign jurisdictions should note, however, that the process would have been quicker and less costly if the proceedings had been commenced in the Cayman Islands at the outset.

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