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BVI liquidators appointed to one of the world's largest seafood companies

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BVI winding up proceedings – Pacific Andes

The BVI Commercial Court (the Honourable Justice Davis-White QC [Ag]) has recently ordered the appointment of liquidators over Pacific Andes Enterprises (BVI) Limited, Parkmond Group Limited, and PARD Trade Limited (the "Companies"), three BVI incorporated companies forming a key part of the China Fishery Group.

The applications were unsuccessfully contested on the principal ground that the appointment of liquidators would irretrievably damage the prospects of a wider, global restructuring of the Pacific Andes Group.

The BVI Court rejected that argument, and in his judgment dated 1 December 2016 Davis-White J provided a helpful analysis of the factors that a Court should take into account in determining whether to wind up a company at a contested hearing in these circumstances, and confirmed the primacy of the views of independent creditors.

Background

The China Fishery Group and certain other companies make up the Pacific Andes Group (the "Group"), whose activities include harvesting, sourcing, ocean logistics and transportation, food safety testing, processing, marketing and distribution of frozen fish products across a broad range of markets. The Group's holdings are substantial and include publicly listed companies on the main boards of the Singapore and Hong Kong Stock Exchanges. As has been widely reported, the Group has been under sustained financial pressure for some time, with a number of Group companies seeking Chapter 11 and Chapter 15 bankruptcy protection in the United States, and other insolvency proceedings occurring in numerous other jurisdictions including the Cayman Islands, Hong Kong, Peru and Singapore.

The winding up petitions

The applicant, Bank of America ("BANA"), sought the liquidation of the Companies on the principal ground that they were insolvent, having failed to discharge a debt of approximately US$15 million which had been outstanding to BANA since November 2015.

On the application of two other creditors of the Companies, Cooperative Rabobank U.A. Hong Kong Branch ("Rabobank") and Standard Chartered Bank (Hong Kong) Limited ("SCB"), joint provisional liquidators had already been appointed to the Companies in October 2016.

BANA's applications were supported by a number of other bank and trade creditors of the Companies including Rabobank and SCB. The Companies opposed the applications, seeking (in the first instance) an adjournment beyond the expiry of the exclusivity period for the debtors to present proposals for a plan of reorganisation under the Chapter 11 procedure in the United States. Notably, none of the Companies was itself a debtor in the Chapter 11.

The holding company of Pacific Andes, Richtown Development Limited ("Richtown") which was controlled by management of the Group, appeared as an opposing creditor. The value of Richtown's claim meant that in purely numerical terms a majority of creditors opposed the making of a winding up order. However Richtown simply adopted the arguments of the Companies in opposition to the winding up application. There was no evidence that Richtown had received or acted upon any independent professional advice. The Judge completely discounted Richtown's views on the basis that it is not an independent outsider, applying Lummus Agricultural Services Ltd [1999] BCC 953

Confidentiality clubs

As a preliminary matter, the Judge was required to consider some interesting arguments relating to the scope and need for confidentiality clubs in relation to evidence said to be commercially sensitive. The Companies sought to put before the Court certain written evidence regarding a proposed restructuring/reorganisation of the Group, which the Companies claimed was highly commercially sensitive. The Companies' position was that they were not prepared for BANA and the supporting creditors to see these documents, but that their BVI advocates (only) could do so, and only then on terms of confidentiality such that the advocates could not share the information with or even take instructions from their clients. BVI counsel for the various creditors declined to give the requested confidentiality undertakings. Then at the hearing, Counsel for the Companies submitted that the Judge alone should look at the confidential material, on the basis that it was unreasonable for the other parties not to have entered into a so-called "confidentiality club".

The Judge distinguished between the usual question of the appropriateness of confidentiality clubs during the interlocutory and compelled stage of disclosure, and these circumstances where one party wished voluntarily to deploy material at trial (or an equivalent hearing) but without the other parties having full access to that material. The Judge considered it inappropriate for him alone to consider the confidential material without them being made available to all of the creditors before him. Therefore, they were not put into evidence.

The legal tests: weighing up factors

In his detailed judgment on the winding up applications, the Judge analysed the relevant tests and considerations by reference to established authority. His conclusions can be summarised as follows:

- The potential challenges to a winding up order on the basis that a company cannot pay its debts as they fall due include (but are not limited to) the following: (i) if the application is an abuse on the grounds that it is brought for an illegitimate collateral purpose; (ii) if there is a bona fide and substantial dispute in relation to the debt (or part of it); or (iii) if there would be no benefit at all flowing from a winding up order. None of these arguments were made by the Companies.
- Absent any challenges of this nature, the Court has a discretion to adjourn the application for a short period on the basis that there are reasonable prospects of payment of the application debt in full within a reasonable period.
- Subject to this, as between a creditor and the company, the creditor is entitled to a winding up order as of right (ex debito justitiae).
- However, when there are opposing creditors, the Court will listen to their views because winding up proceedings are a class remedy. The Court is likely to go with the view of the majority, but it is not simply a question of taking a head or value count and one has to look at the circumstances of the case.
- To the extent that it is appropriate to look at the reasons for the creditors seeking a winding up, the extent to which they have a justified lack of confidence in management and in leaving management in control of a restructuring plan which may affect them as creditors, may become relevant.
- In a case such as this (i.e. where insolvency is established), the views of the Companies subject to the winding up petitions should have no real weight.

The Judge did not accept the argument that a short adjournment until the end of the Chapter 11 exclusivity period (in the first instance) was appropriate and would do no harm, whereas the making of winding up orders at this stage would seriously damage and possibly prevent the global restructuring. To the contrary, the Judge noted that the creditors had a perfectly reasonable commercial rationale for wanting the Companies to be put under the control of independent professionals who can investigate the position and come to a view as to what is in the best interests of all of the creditors. Further he noted that, on the evidence, the proposed global restructuring was wholly unclear, and it was therefore unclear whether or not the restructuring would or might benefit the creditors of the Companies (and their creditors) compared to the position on liquidation. Rather than derail the global restructuring, if any restructuring proposal is available and is likely to be beneficial then the liquidators could support it.

The Judge noted that, having discounted the interests of the connected party creditor Richtown, the majority of the creditors supported the winding up order. He held that the commercial judgment of the majority should be respected. Although it did not form the basis of his decision, the Judge also determined that the evidence supported the finding that the creditors had justification for losing confidence in the management of the Group, and that the creditors therefore had good, positive reasons for wanting the Companies to be placed into the hands of independent insolvency practitioners.

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Conclusion

This decision helpfully demonstrates the approach taken by the BVI Commercial Court in weighing up the interests of different parties in the context of a winding up application brought in circumstances where there is a wider restructuring on foot in other jurisdictions. Amongst other matters the judgment highlights: (i) the role of Court appointed liquidators of BVI companies as independent professionals experienced in engaging in global restructuring processes; (ii) the primacy that will generally be given to the views of independent creditors; and (ii) the limited weight that will generally be given to the views of related, non-independent group companies.

Carey Olsen appeared for the successful applicant, BANA.

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