CASE SUMMARY: Lamtex Holdings Ltd [2021] 2 HKLRD 177

Re Lamtex Holdings Ltd

(林達控股有限公司)

[2021] 2 HKLRD 177

(Court of First Instance)

(Companies (Winding-up) Proceedings No 263 of 2020)

Company law — winding-up — foreign company — application by foreign "soft-touch" provisional liquidators for recognition and assistance after petition presented in Hong Kong — different place of company's incorporation and centre of main interest — approach to primacy of jurisdiction — no credible plan for restructuring debt — adjournment of petition declined

Conflict of laws — corporations and corporate insolvency — cross-border insolvency — order for recognition and assistance — application by foreign "soft-touch" provisional liquidators — different place of company's incorporation and centre of main interest — approach to primacy of jurisdiction — development of principles

C was incorporated in Bermuda and listed on the Main Board of the Stock Exchange of Hong Kong Ltd. Prior to C becoming insolvent, it carried on businesses in the Mainland and Hong Kong.

In August 2020, L issued the present winding-up petition in Hong Kong against C on an undisputed debt owed by C under a series of bonds governed by Hong Kong law issued mainly to individuals' resident in the Mainland. Most of C's debt was held by the other bond holders who supported L's petition for an immediate winding up order and no creditors opposed L's application. In October 2020, C presented a winding-up petition in Bermuda. Upon C's application, "soft-touch" provisional liquidators (JPLs) were appointed in Bermuda for restructuring purposes. An application by the JPLs for their recognition and assistance in progressing a restructuring of C's debt in Hong Kong was granted in November 2020. At issue was whether the Court should make an immediate winding-up order or adjourn the Hong Kong petition, as sought by the JPLs, for the purpose of restructuring C's debt.

Held, declining to grant the adjournment sought by the JPLs and making a winding-up order, that:

(1) A winding up in a company's country of incorporation would as a matter of Hong Kong rules of private international law be given extra-territorial effect in Hong Kong. The effect extended to the distribution of a company's assets to its creditors. The place of incorporation should generally be the system of distribution and a winding up of a company's assets in Hong Kong was ancillary to it (*Re International Tin Council* [1987] Ch 419, *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 applied). (See paras.7, 9, 13.)

(2) It was desirable that the Hong Kong courts were able to deal with recognition and assistance using methods that were consistent with commercial practice in the HKSAR and the Mainland. It was a common feature of the corporate structure of Hong Kong and Mainland business groups that their holding companies were incorporated in an offshore jurisdiction with whom they had no connection other than registration. Accordingly, there was a need to reconsider the current position in Hong Kong where the court recognised

only insolvency practitioners appointed in the place of incorporation. The common law in this area was sufficiently flexible to develop so as to be consistent with commercial practice and there was nothing in principle preventing recognition of liquidators appointed in a company's centre of main interest (COMI) or a jurisdiction with which it had a sufficiently strong connection to justify recognition (*Re Opti-Medix Ltd* [2016] SGHC 108 applied; *Re Eurofood IFSC Ltd* [2006] Ch 508, *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd* 374 BR 122 (Bankr SDNY 2007), *Re Basis Yield Alpha Fund (Master)* 381 BR 37 (Bankr SDNY 2008), *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, *Re Creative Finance Ltd* 543 BR 498 (Bankr SDNY 2016) considered). (See paras.19, 22.)

(3) While the principles of modified universalism generally militated in favour of staying local (Hong Kong) proceedings in favour of foreign proceedings opened in the place of incorporation in order to preserve unitary global proceedings, this may not be so where the foreign proceedings were "soft-touch" provisional liquidation (*Re Sun Cheong Creative Development Holdings Ltd* (FSD 169/2020, Cayman Islands Grand Court, 20 October 2020) considered). (See para.28.)

(4) The following approach should be adopted in Hong Kong to determine disputes over which jurisdiction should be the primary one to conduct an insolvency process. Generally, the place of incorporation should be the jurisdiction in which a company should be liquidated. In practice, this meant it would be the system for distribution to creditors. However, if the COMI was elsewhere, regard was to be had to other factors: (i) was the company a holding company and, if so, did the group structure require the place of incorporation to be the primary jurisdiction in order effectively to liquidate or restructure the group; (ii) the extent to which giving primacy to the place of incorporation was artificial having regard to the strength of the COMI's connection with its location; and (iii) the views of creditors. Ultimately, this meant that which insolvency process should be given primacy would depend on the circumstances of the case and involve giving appropriate weight to the location of a company's COMI. (See paras.35–36.)

(5) C's COMI was located in Hong Kong. L and nearly all other creditors of C were Chinese nationals resident in the Mainland. No creditor had appeared to oppose the petition. C had not demonstrated a good reason to adjourn the petition. The information about the restructuring was scanty in the extreme. C did not have a credible plan to restructure its debt. It was considerably more likely that the application in Bermuda was an attempt to engineer a *de facto* moratorium, which could not be obtained under Hong Kong law, with a view to then searching for a solution to C's financial problems. Viewed from a Hong Kong perspective, this was a questionable use of "soft-touch" provisional liquidation and one which would encourage the court to view with care similar applications for recognition in the future. Going forward, unless the agreement of a petitioner and supporting creditors had been obtained in advance the court would not deal in writing with recognition and assistance applications made by "soft-touch" provisional liquidators after a winding up petition had been presented in Hong Kong (*Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255 applied). (See paras.39, 42.)

Applications

This was the petitioner's application (Li Yiqing (李益清)) to wind up the subject company and the foreign joint provisional liquidators' application for an adjournment of the petition for the purpose of restructuring the company's debt.