Cayman court grants recognition and assistance to foreign liquidators appointed over a Cayman compan

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The decision of the Grand Court of the Cayman Islands ('the Cayman Court') to grant common law recognition and assistance to liquidators appointed by the High Court of Hong Kong ('the Hong Kong Court') over an exempted Cayman Islands incorporated company – without parallel insolvency proceedings in Cayman – is likely to be welcomed widely by insolvency practitioners and lawyers involved in cross-border restructuring and insolvency in common law jurisdictions.

Mr Justice Segal's judgment in *In the matter of China Agrotech Holdings Ltd* (FSD 157 of 2017 (NSJ)) shows that there is scope for the Cayman Court to exercise its common law power to provide effective judicial assistance to foreign liquidators – even within the limits imposed by the majority judgments in *Singularis* and *Rubin*.

The written ruling was made on an *ex parte* application before the Cayman Court and granted recognition and assistance to liquidators appointed by the Hong Kong Court, *inter alia*, to present a scheme of arrangement under s 86 of the Companies Law (as revised) ('the Law') on behalf of the Company.

To the author's knowledge, the decision is the first time since 2010 (*In the Matter of Fu Ji Food and Catering Services Holdings Ltd* (FSD Cause No. 222 of 2010): a summary of the facts and the decision is provided in the Chief Justice's article published in the *Beijing Law Review*, 2011, 2, 145-154) that the Cayman Court has considered the existence and scope of its jurisdiction to recognise and assist foreign liquidators of a Cayman incorporated company in circumstances where there are no parallel insolvency proceedings in Cayman.

Overview of the decision

Following a review of leading texts and key authorities since 2010, including *Cambridge Gas v Navigator* (2007 1 AC 508, Privy Council, on appeal from the High Court of Justice of the Isle of

Man), *Rubin v Eurofinance* ([2013] 1 AC 236, UK Supreme Court), and *Singularis Holdings Ltd v PwC* ([2014] UKPC 36, Privy Council, on appeal from the Court of Appeal of Bermuda), the Hon Justice Segal considered that:

- the non-statutory power of the Cayman Court to recognise and assist may arise and apply in a case where a foreign liquidator has been court-appointed in a place other than the country of the company's incorporation
- the power could be exercised even when the rules of private international law do not apply to require recognition of the foreign liquidator's powers or status
- the conditions for the exercise of the power may, in principle, be satisfied where:
    - the relief that the liquidators need and should be granted is an order authorising them to make an application to present a scheme of arrangement under s 86(1) of the Companies Law (as revised) and to consent to the proposed scheme on the company's behalf
    - the liquidators simply wish to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process
    - the evidence establishes that there will not be, or it is unlikely that there will be, a winding up in the country of incorporation
    - no issue arises of competing claims by creditors which would result in different levels of recovery depending on whether the liquidators are granted the recognition and assistance sought
    - the company has substantial connections with the court which made the winding up order and appointed the liquidators
    - there is no need for or reason why creditors or members would benefit by a winding up in, or from a provisional liquidator being appointed in, the country of incorporation
    - there are no local reputational, regulatory and policy reasons requiring a local proceeding

In principle, submission by a company to a foreign court can be a sufficient and separate basis for recognition of the foreign liquidator's powers to act for the company.

Background

The company

China Agrotech Holdings Ltd ('the Company') was incorporated in the Cayman Islands as an exempted company in September 1999. The Company is an investment holding company which

has been engaged principally in businesses related to fertilizers and agricultural chemicals. It has substantial connections with Hong Kong, having been: (i) registered under Part XI of the former Hong Kong Companies Ordinance (Cap. 32) since November 1999; (ii) administered from Hong Kong (with all the directors having addresses in Hong Kong or the PRC); and (iii) listed on the Main Board of the Hong Kong Stock Exchange (HKSE) since 2002 (although its shares were suspended from trading on the HKSE on 18 September 2014). Almost all of the Company's shareholders are located in Hong Kong and over 75% of proofs of debts received by the Liquidators were filed by persons located in Hong Kong or the PRC.

Hong Kong court proceedings

On 11 November 2014, a creditor's winding up petition was presented against the Company on the ground that the Company was insolvent and unable to pay its debts. A winding up order was made by the High Court of Hong Kong ('the Hong Kong Court') on 9 February 2015 (Hong Kong Winding Up Order). Stephen Liu Yiu Keung and David Yen Chin Wai ('the Liquidators') were appointed by Order of the Hong Kong Court on 17 August 2015.

The Liquidators have been exploring restructuring options. To resume trading in the shares of the Company on the Main Board of the HKSE, the Company was required to submit a viable resumption proposal to the HKSE. Accordingly, on 24 August 2016 a resumption proposal was submitted to the HKSE (Resumption Proposal). The Resumption Proposal involves a reverse takeover of a new business, with a view to the Company resuming its listing if the Resumption Proposal is approved by the HKSE. Completion of the Resumption Proposal is subject to, *inter alia*, a scheme of arrangement being approved both by the Hong Kong Court and the Cayman Court.

On 19 July 2017, following an application of the Liquidators, Mr Justice Harris, sitting in the Hong Kong Court issued a letter of request to the Cayman Court (Letter of Request) seeking that the Liquidators be treated 'in all respects in the same manner as if they had been appointed as joint and several provisional liquidators', including having the authority to present a scheme of arrangement on behalf of the Company (as a means by which the Resumption Proposal is to be effected). The Letter of Request also sought the assistance that no action or proceeding should be proceeded with or commenced against the Company within the Cayman Islands except with leave of the Cayman Court.

Cayman Court proceedings

On 1 August 2017, the Liquidators applied to the Cayman Court for recognition and assistance in similar terms to the Letter of Request.

Jurisdiction or power issue

Mr Justice Segal's starting point was the majority speeches in *Singularis*, describing them as 'the most recent, detailed and significant analysis of the juridical nature and basis of the non-statutory jurisdiction to recognise and assist' foreign court appointed liquidators. Based on those speeches, and Lord Collins' judgment in *Rubin v Eurofinance*, Mr Justice Segal considered:

1. The court is to be treated as having a power to recognise and grant assistance to foreign proceedings and liquidators. If the circumstances justify its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its office holders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers

2. The court's power is a non-statutory jurisdiction which is based on and justified by the public interests as identified by Lord Sumption in *Singularis*. In deciding whether and how to exercise the power the court has regard to and applies the approach which has been labelled 'modified universalism'

3. Modified universalism' is not a rigid rule of law that independently generates rights and remedies; rather it is a convenient shorthand for the approach that the court takes when exercising the power which recognises both the purpose for which the power is to be exercised (to allow a foreign liquidator appointed by a competent court to conduct the liquidation across borders despite the territorial limitations to which his powers are otherwise subject) and also the applicable limitations which apply to the power or condition or qualify its exercise

4. Suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it)

5. The court must in each case start by considering the nature and form of relief sought by the foreign liquidator. The legal analysis varies depending on the nature of the relief sought

6. Where the foreign liquidator is appointed in the country of incorporation of the company concerned, the domestic private international law of the requested court will apply so that the liquidator is treated as being entitled to act for and on behalf of the company. However, when the foreign liquidator is not appointed in the country of incorporation, he cannot rely on this rule of private international law and instead must invoke the common law power in order to be permitted to act on behalf of the company

7. The limitations on the common law power – both as to scope and the circumstances in which it can be exercised – are those described by Lord Sumption at para 25 of his speech in *Singularis*

In the context of *China Agrotech*, Mr Justice Segal considered that:

1. Since the Liquidators were not appointed in the Company's place of incorporation, they

were not, as a matter of Cayman private international law, treated as being empowered to act on behalf of the Company

2. Under Cayman law, having regard to the Company's constitution and the Companies Law, the organs entitled to act on behalf of the Company are its directors and shareholders. The Hong Kong Winding Up Order did not, as a matter of Cayman law, prevent these corporate organs from having the authority to act for and bind the Company. The Hong Kong Winding Up Order is not, as an order of a foreign court, of itself binding or enforceable in Cayman

Exercise of Discretion Issue

The judge considered that the power to recognise and assist did arise and apply even where the foreign liquidator had been appointed in a place other than the country of incorporation, and that the power is capable of a wider application than the rules of private international law.

Mr Justice Segal found that in the present case the conditions for the exercise of the non-statutory power were, in principle, satisfied such that the Liquidators could be recognised and authorised to make an application under s 86(1) of the Companies Law and to consent to the proposed scheme on the Company's behalf, with a direction that any proceedings commenced or any winding up petition presented against the Company be assigned to Mr Justice Segal to ensure appropriate case management orders are made to stay or adjourn such proceedings pending completion of the scheme process.

In reaching the above conclusion, Mr Justice Segal relied on and followed the approach of Kawaley CJ in the Bermudian case of *In re Dickson Group Holdings Ltd* ([2008] SC (Bda) 37 Com (9 May 2008)) and the approach of Smellie CJ in the Cayman case of Fu Ji Foods (*In the Matter of Fu Ji Food and Catering Services Holdings Ltd, supra)*, subject to an updating of and adjustment to the analysis of the common law power to reflect the judgments in *Rubin* and *Singularis*. Both the In re Dickson and Fu Ji cases involved applications for recognition and assistance for liquidators appointed by the Hong Kong Court to present schemes of arrangement. Mr Justice Segal also confirmed that he agreed with the result, if not the reasoning, in *Re Opti-Medix Ltd (in liquidation)* ([2016] SGHC 108), a post-*Rubin* case, in which the High Court of Singapore recognised a Japanese liquidation of BVI companies.

Submission

Although not forming part of the ratio decidendi of his decision, Mr Justice Segal's judgment contains a helpful consideration of the proposition that submission by a company to the jurisdiction of the foreign court in which the winding up order is made and the foreign liquidator is appointed constitutes a separate ground
to justify the requested court recognising (and indeed requiring the requested court to recognise) the powers of the foreign liquidator to act on behalf of the company.

Albeit described as preliminary views reached in the context of an ex parte application with limited evidence and limited submissions on the issue, Mr Justice Segal considered that:

1. Submission could, in principle, be a sufficient and separate basis for recognition of the foreign liquidator's powers to act for the company. The Judge accepted the proposition that at least as regards the issue of whether anyone other than the foreign liquidators should be recognised and treated as having the right and power to act on behalf the company, there is no principled basis for distinguishing between the effect of submission by an individual and by a corporate debtor
2. The basis on which jurisdiction over an oversea company is taken is properly to be treated as statutory
3. Whether registration in the foreign jurisdiction – in this case, the Company registered under Part XI of the former Hong Kong Companies Ordinance (Cap 32) – gives rise to and is to be characterised as a submission to the foreign jurisdiction is in part a question of statutory construction and in part a question as to whether as a matter of Cayman law the effects of the foreign statute are to be treated as sufficient to amount to a submission. Mr Justice Segal's provisional view was that they are sufficient

Implications of the decision

Winding up a company in its place of incorporation will remain the default option for most stakeholders, not least because it brings with it the effect under the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets. But significantly, the China Agrotech decision shows that in the post-*Singularis* and *Rubin* world, winding up a company in a jurisdiction other than its place of incorporation, without any parallel insolvency process in that place, will not necessarily preclude effective cross border re-structuring solutions from being available to the foreign liquidators.

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