MARCH 2015

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UPDATE

Winding-up foreign companies by foreign courts

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This update considers recent decisions of the English and Hong Kong courts as to whether a petition seeking the winding-up of a company should be brought in the place of the company's incorporation, or the jurisdiction in which it conducts its business.

Should a petition seeking the winding-up of a company be brought in the place of the company's incorporation, or the jurisdiction in which it conducts its business? Recent decisions of the English and Hong Kong courts have highlighted the importance of this question, and the need for those wishing to commence winding-up proceedings to give it careful consideration before doing so, regardless of the jurisdiction given to foreign courts under statute to wind up companies incorporated in different jurisdictions.

Given the number of BVI and Cayman incorporated entities doing business in other jurisdictions, it is very often companies incorporated in one of these jurisdictions which find themselves the subject of a petition seeking an order that it be wound up. A common defence to these types of proceedings is to argue that the petition should be brought in the place of the company's incorporation, not where it conducts business, and a petition brought in the latter should be dismissed regardless of the foreign court's jurisdiction.

In *Buccament Bay Limited and Harlequin Property (SVG) Limited* [2014 EWHC 3130 (Ch)] (**Buccament Bay**) and *Yung Kee Holdings Limited* [CACV 266/2012] (**Yung Kee**) the English and Hong Kong courts provide useful summaries of the factors to be taken into account by the court in considering whether to exercise its discretion to entertain winding-up petitions in respect of foreign companies. The decisions will be welcomed by offshore insolvency practitioners as, in both cases, the court declined to exercise its jurisdiction, holding that the country of incorporation was the better forum for any winding up.[1]

Facts

In Buccament Bay, the petitioners had invested in a development in St Vincent and the Grenadines (**SVG**) called the Buccament Bay Resort. The investors had each paid deposits of 30 per cent of the purchase prices of individual hotel rooms which were each sold as a freehold investment, subject to a management agreement. The investors had invested in Buccament Bay Limited (**BBL**) and Harlequin Property (SVG) Limited (**HP**), both of which were incorporated in SVG. Both BBL and HP were owned and controlled by Mr David Ames and formed part of a group of companies known as the Harlequin Group.

It was not disputed that the investors had not received title to their hotel rooms, and statutory demands had been served in respect of the debts. The SFO was said to be conducting an investigation into the affairs of various companies in the Harlequin Group, including BBL.

[1] The petitioner in Yung Kee has been given permission to appeal to the Final Court of Appeal in Hong Kong and the appeal will be heard on 7-8 October 2015. The Court of Appeal's judgment nevertheless remains useful guidance for practitioners.

Mr Ames was the sole director of both companies and lived in Essex. All payments were routed via another company in the Harlequin Group, in the UK. The petitioners petitioned to wind up BBL and HP in the English courts and, in a judgment dated 3 October 2014, N. Strauss QC sitting in the Chancery Division of the High Court, considered whether the court should exercise its jurisdiction to hear the winding-up petitions.

Yung Kee concerned Yung Kee Holdings Limited (Yung Kee Holdings) the ultimate holding company of a group of companies incorporated in the British Virgin Islands, which operate and control a well-known restaurant and other businesses in Hong Kong. The petitioner brought a petition for unfair prejudice seeking an order that the respondents buy his shareholding in Yung Kee Holdings or, in the alternative, asserted that it would be just and equitable to wind up Yung Kee Holdings. Before considering the claims, the judge first considered whether the court had jurisdiction to grant either or both of the reliefs sought.

For the purposes of this update, we will focus only on the findings relating to the petition for winding-up, although the court also found that it did not have jurisdiction in relation to the claim for unfair prejudice. The petitioner appealed those decisions.

Factors considered by the courts

Section 221(1) of the UK Insolvency Act 1986 provides that foreign unregistered companies may be wound up by the English court in accordance with the provisions of that Act. Similarly, section 327 of the Hong Kong Companies Ordinance, Cap 32 governs the winding-up of unregistered companies by the Hong Kong court, including unregistered foreign companies such as Yung Kee Holdings, and provides that 'the circumstances in which an unregistered company may be would up are as follows … (c) if the court is of the opinion that it is just and equitable that the company should be wound up.'

In each case the jurisdiction is discretionary. The courts in both Buccament Bay and Yung Kee referred to the principles laid down by Knox J in *Re Real Estate Development*[2] (which have been approved by the English Court of Appeal[3] and previously applied in Hong Kong[4]), and are as follows:

- There must be a sufficient connection with the jurisdiction where the petition is being heard, but this does not necessarily have to consist in the presence of assets within the jurisdiction;
- There must be a reasonable possibility that the winding-up order would benefit those applying for it; and
- One or more persons interested in the distribution of the company's assets must be persons over whom the court is able to exercise jurisdiction.

On the facts in Buccament Bay, the court considered that the company's center of main interest was in SVG and, although there was a connection with England, SVG had a 'perfectly satisfactory winding-up process which is available to the petitioners and so there is no reasonable possibility of the petitioners deriving a benefit from a winding-up [in England and Wales].'

In Yung Kee, the Court of Appeal went on to explain that it considered the exercise of jurisdiction over a company which was not incorporated in Hong Kong to be prima facie exorbitant and so the purpose of the first condition was to ensure that the court would decline to exercise such exorbitant jurisdiction save where it is appropriate to do so. The court noted that there was a distinction between a creditor's winding-up on insolvency grounds (where the court might more readily accept jurisdiction) and a shareholders' petition seeking to wind up a solvent company on the just and equitable ground, where the requirements would be more stringent and it would have to be a 'very exceptional case' for the court to exercise jurisdiction. The rationale given by the court is that creditors 'might justifiably seek assistance from a local court to safeguard their legitimate interests within the jurisdiction' whereas shareholders in a foreign company 'have voluntarily adopted and approved the law of the state of incorporation as governing the company's legal status.'

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[2] [1991] BCLC 210.

[3] *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116.

[4] *Securities and Futures Commission v MKI Corp Ltd* [1995] 2 HKC 79; *Re Zhu Kuan Group Co Ltd*, HCCW 874/2003, 2 August 2004; and *Re Beauty China Holdings Ltd* [2009] 6 HKC 351.

The court considered how it should treat a holding company where the subsidiary companies actively traded in Hong Kong and held that the affairs of the subsidiaries are not the affairs of the holding company and the holding company had not established a place of business in Hong Kong. The court confirmed that although in the context of unfair prejudice claims there is authority to support the contention that the conduct of a wholly owned subsidiary might be regarded as a part of the affairs of the parent company in circumstances where de facto control is exercised, they did not consider it appropriate to apply those authorities in the 'very different context of a winding-up jurisdiction that is prima facie exorbitant'. The Court of Appeal confirmed, as a matter of fact, that Yung Kee Holdings was able to and did exercise control over the affairs of the group and all its indirectly held subsidiaries through resolutions passed at the shareholders' and board meetings of Yung Kee Holdings, but held that 'the mere presence of all shareholders and directors making internal administrative decisions in Hong Kong, such as changing the constitution of the board and declaring dividends, is not of itself sufficient to establish substantial connection between the company and Hong Kong', noting the distinction between the location of the controlling mind of an active trading company and a holding company which was a passive investor whose directors did not make business decisions.

Conclusion

These cases provide a useful reminder that creditors and aggrieved shareholders may not be able to wind up foreign companies in the court which they consider to be most 'convenient', but instead may be forced to look to the country of incorporation – regardless of the statutory regime which may, on its face, provide an avenue by which proceedings may otherwise be brought. Although the companies in question in the two cases set out above were very different in nature and the cases came before different courts, the result in each case was that the court was not satisfied that the necessary conditions had been met so as to allow a petition to be heard in the country where it was filed and, in each case, the court suggested that the country of incorporation was the appropriate forum.

In the case of Yung Kee, it is clear from the court's reasoning that the result would likely have been different if the petition had concerned one of the underlying companies which, although also incorporated in the BVI, actively traded in Hong Kong. Given the prevalence of group structures, however, shareholders and creditors will likely be interested to know that they may face difficulties in looking to use a winding-up petition at holdco level in order to give the liquidator effective control over the group. It is worth considering at the outset, therefore, whether those countries have sophisticated and creditor friendly regimes. Where it can be shown that a process is not satisfactory, this may, in and of itself, be sufficient to show that the petitioners will gain a benefit from a winding-up, but this will not assist a petitioner if the reasonable connection requirement is not satisfied.

Both cases serve to provide a reminder that, before embarking on proceedings of this type, a petitioner ought to carefully consider the jurisdiction in which they are to be brought as, regardless of the substantive merits the petition may have, a failure to give full and proper consideration to the question of jurisdiction may have a draconian effect.

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