MAPLES GROUP

UPDATE

Officeholder Independence in Cayman Islands Debt Restructurings

In appointing restructuring provisional liquidators ("RPLs") to the Cayman Islands incorporated company, Sun Cheong Creative Development Holdings Limited ("SC"), the Grand Court (the "Court") has followed the developing trend of applying, where appropriate and possible, a commercial and pragmatic overlay to the question of officeholder independence. Further, by opting in favour of Cayman Islands restructuring proceedings over a Hong Kong liquidation, the Cayman Islands Court has emphasised:

(a) that as a general rule, the place of incorporation of a company will be the most appropriate forum for insolvency / restructuring proceedings; and
(b) its company rescue first policy.

Officeholder Independence

A feature of some applications to appoint provisional liquidators / official liquidators is disagreement surrounding the identity of the proposed officeholders. A common argument being that where the nominated officeholders (or their firm) have previously provided financial advice to the company (or worked with the company), individuals from that firm are not properly independent and so should not be appointed. The perceived lack of independence argument. The Court has held, in a number of prior cases, that there must be the appearance of complete impartiality – see for example, *Hadar Fund Ltd* and *In the Matter of Alpha Re Limited (in voluntary liquidation)*. This means that where the company's nominees have provided prior advice to the company regarding contingency planning / consensual solutions to financial difficulties, there is a risk that the Court will refuse to appoint those individuals and instead appoint officeholders nominated by a creditor(s).

While not pushing back on the above case law, the Court in *In the matter of Sun Cheong Creative Development Holdings Limited*, held that where the nominated officeholders had been engaged by a white knight investor to prepare a report for the benefit of that investor and certain bank lenders, this did not impair the appearance of independence. While the nominated officeholders had knowledge of SC's affairs and had, with the white knight investor worked with SC, there was no evidence to show that they were not independent. While it was recognised that a conflict could arise in the future if, for example, there were potential claims of SC identified against the white knight investor – this could be solved at the time the conflict arose by appointing a conflict liquidator.

Further and importantly, the Court endorsed the comments of Parker J in *CW Group*[1] where it was held that "*it makes sense to appoint as a provisional liquidator a firm which is already in possession of a great deal of information with which to carry on acting in the interests of efficiency and economy,*" and emphasised that "*once appointed the joint provisions liquidators would act as officers of the court and in the best interests of*

[1] https://maples.com/Knowledge-Centre/Industry-Updates/2018/08/Officeholder-Independence-in-Cayman-Islands-Debt-Restructurings

the company's creditors and stakeholders, irrespective of who sought the appointment." While the question of whether nominated officeholders are independent will always turn on the facts, the subsequent endorsement by the Court of the line taken in *CW Group* is a further step towards the Court, where appropriate and possible, taking a commercial and pragmatic approach to such questions of independence.

Forum for Restructuring / Insolvency Proceedings and Rescue First

The Court ordered the appointment of RPLs notwithstanding that a winding up petition had earlier been presented to the Hong Kong Court. There was a conflict between the applications before the two courts. The application before the Court being one to appoint RPLs to implement a scheme of arrangement (the scheme would, utilising the investment from the white knight, provide a cash distribution to creditors and compromise those debts; putting the company back on a more even financial keel). The application before the Hong Kong Court being to liquidate.

It was held that the Court should assess which jurisdiction is the more appropriate to assume the role of primary insolvency proceedings. As a general rule this will be assumed to be the place of incorporation of the company, being the place that its investors, service providers and trade creditors would typically associate with, among other things, the company's registered office and the law governing the duties of its board of directors and its Articles. Therefore, in respect of a Cayman Islands incorporated company, the starting point would be for the company to be wound up or reorganised under the supervision of the Court; unless there were compelling reasons to justify the displacement of the Cayman Islands as a primary jurisdiction – for example significant and substantial connections with a foreign jurisdiction.

Where there are competing applications, of the above nature, between the Court and a foreign court it was held that "*it is not the practice of this Court to defer automatically to winding up proceedings begun in a foreign jurisdiction simply because a petition was presented there first in time. Instead this Court will consider, on the case by case basis, whether it is satisfied that there is a genuine intention on the part of the company to present a plan of reorganisation in the Cayman Islands and the merits of the proposal for carrying out such a plan for the benefit of the company's shareholders and creditors worldwide.*"

The Court again emphasised the rescue first policy of the Court holding that the proposed restructuring should be given a chance over those creditors wishes who sought instead to wind SC up. *Sun Cheong* therefore sits in a line of recent case law where a restructuring has been given a chance to breathe over some (albeit normally minority) creditor wishes to liquidate. See for example *ACL Asean*, *Grand TG Gold* and *CW Group*.

Further Assistance

If you would like further information, please liaise with your usual Maples Group contact or any of the persons listed below.

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