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Re China Lumena New Materials Corp [2018] HKCFI 276 – Hong Kong Court clarifies Powers of Foreign Insolvency Officeholders

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Earlier this month, the Hong Kong Companies Judge Hon Harris J. handed down Reasons for Decision in *Re China Lumena New Materials Corp* (the "Company") which usefully clarifies (and reaffirms) the Hong Kong Court's view on powers of foreign insolvency officeholders.

Briefly on facts: the Company was incorporated in the Cayman Islands. The Cayman Court ordered the provisional liquidation of the Company in 2015. The provisional liquidators appointed by the Cayman Court encountered difficulties in taking control of the Company's bank accounts in Hong Kong because some banks require to see a Hong Kong Court order before they are prepared to comply with the provisional liquidators' request for a transfer of the Company's credit balances.

Citing his Judgment in *Bay Capital Asia Fund, LP -v- DBS* ("Bay Capital"), the Learned Judge confirmed that, the ability of foreign insolvency officeholders appointed by the Court in the country of incorporation of the company to obtain documents relating to the Company's bank account in Hong Kong is generally not dependent on getting a prior Hong Kong Court order:

"[I]if a bank receives a request from liquidators of a company which has an account with them, once it is satisfied, which should be straightforward, that the liquidators have been properly appointed by the court of the place of the company's incorporation they will hand over documents to which the directors of the company would have been entitled."

In *Bay Capital*, Harris J. explained that if the foreign insolvency officeholders would like to deal with assets located in Hong Kong (as opposed to merely obtain documents/information), they should apply a prior Hong Kong order authorising the transfer of such assets.

The provisional liquidators in this case argued that on the basis that they are entitled to information from the banks without a Hong Kong order (akin to the information right enjoyed by directors of the Company), it logically follows that the Cayman appointed provisional liquidators could also request the Hong Kong banks to transfer the credit balances without a Hong Kong order.

The Learned Judge considered that *"this would be going too far"* and would go even further than international insolvency standards envisaged in Article 21 of the UNCITRAL Model Law on Cross-Border Insolvency.

In order to strike a balance between the foreign insolvency officeholders' need for convenience and the local court supervision which may be expected by the creditors, Harris J. maintained his view that foreign insolvency officeholders appointed by the place of incorporation are entitled to information without a prior Hong Kong recognition order; but that it would be appropriate to seek a Hong Kong recognition order in order to take possession of or deal with the assets in Hong Kong. The Learned Judge particularly reminded the practitioners about the standard practice for applying recognition orders and such orders may be granted very quickly, pursuant to the standard practice.

This decision is of significance to Hong Kong insolvency law practitioners and in-house lawyers particularly those working for financial institutions. It used to be a standard local practice to require seeing a "local order" before acting on any request from foreign insolvency officeholders. Based on the Court's repeated emphasis in this case and *Bay Capital*, it would be incorrect

for practitioners to insist on seeing a "local order" before complying an information request from a foreign insolvency officeholders (appointed by country of incorporation) in respect of the affairs and assets of the company. If such incorrect approach is adopted in the future, it is likely to attract judicial criticisms and may lead to penalty in terms of costs. This clarified view by the Hong Kong Court reinforces the modern notion of cross-border insolvency cooperation between international courts and should certainly be welcomed.

More significantly, Hong Kong practitioners should be mindful that the country of incorporation is the natural jurisdiction to commence insolvency proceedings. Commencing insolvency proceedings in the place of incorporation would ensure that, if the court so orders, the liquidation or provisional liquidation status is globally applicable. We have seen a number of cases whereby insolvency officeholders appointed in Hong Kong over offshore companies were unable to carry out their work effectively in the absence of parallel proceedings in the place of incorporation. In light of the Hong Kong Court's expressed readiness in providing assistance to offshore insolvency proceedings, there appears to be no reason for practitioners and their clients to be concerned about the foreign liquidators' ability to perform their duties in Hong Kong in an efficient manner.

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