HCCW 224/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) NO 224 OF 2013

IN THE MATTER OF INSIGMA TECHNOLOGY CO LTD

and

IN THE MATTER OF SECTION 327 OF THE COMPANIES (WINDING UP AND MISCELLANEOUS PROVISIONS) ORDINANCE, CAP. 32 OF THE LAWS OF HONG KONG SPECIAL ADMINISTRATIVE REGION

Before: Hon Harris J in Court

Dates of Hearing: 17 - 18 September 2014

Date of Decision: 26 September 2014

Date of Reasons for Decision: 15 October 2014

REASONS FOR DECISION

Introduction

1. On 5 August 2013 Alstom Technology Limited ("**Alstom**"), which is incorporated in Switzerland, issued a petition, which was amended on 12 August 2014, to wind up Insigma Technology Co Ltd ("**Company**") on the grounds of insolvency[1]. In order to prove insolvency Alstom relies on a statutory demand served on the Company's solicitors in Hong Kong on 20 March 2013. The debt arises from a partial arbitration award and a final arbitration award obtained in Singapore on 14 April 2010 and 12 July 2010 respectively for damages for breach of a licence agreement dated 8 December 2004 granted by Alstom to the Company, which allowed the Company to exploit certain of Alstom's intellectual property rights. The principal amount due under the awards is HK$261,454,755.21. On 15 August 2012 Au J made an order that the awards could be enforced as a judgment in Hong Kong. An application to set aside that order was not pursued. It has not been argued before me that the debt is not payable.

2. The Company is incorporated in the People's Republic of China ("**Mainland**") and listed on the Shanghai Stock Exchange. It has never been registered under Part XI of the Companies Ordinance, Cap. 32. It is not suggested that it has ever had an established place of business in Hong Kong.

3. The reason the petition to wind up the Company has been issued in Hong Kong is as follows. The Company took an initial objection to the jurisdiction of the arbitral tribunal in Singapore. This was rejected

[1] Alstom was represented by Roxanne Ismail SC and the Company was represented by Ronny Tong SC and Adrian Lai.

by the arbitration tribunal. The decision was challenged unsuccessfully in the Singapore High Court and the Singapore Court of Appeal. Despite this, and the recognition of the subsequent awards in Hong Kong and England, an attempt to have the awards recognised and enforced in the Hangzhou Intermediate People's Court of Zhejiang Province was unsuccessful with the result that the debt is not recognised in the Mainland. The Company has a 95% interest in a Hong Kong incorporated company, Innovation (Hong Kong) International Investment Limited ("**Innovation**"), which according to evidence filed in enforcement proceedings here by the Company in November 2012, had a value of RMB 77,775,353.30. Alstom has obtained a garnishee order over the shares which was made absolute on 25 January 2013. No attempt have been made to sell the shares in Innovation. It is not, however, suggested that the proceeds of sale would settle anything other than a modest proportion of the debt.

4. Section 327(3)(b) and (c) of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, provides that the Court may wind up an unregistered company if it is unable to pay its debts or the Court is satisfied that it is just and equitable to do so. Subsection (4) provides that an unregistered company is deemed to be unable to pay its debts if it has been served with a statutory demand and has neglected to pay it within 3 weeks of service. It is not in dispute that a statutory demand was served and, therefore, the deeming provision is engaged.

5. The reasons for issuing the Petition in Hong Kong are set out in paragraphs 22A and 23 of the Amended Petition:

> "22A. Upon the winding-up of the Company and the resultant appointment of provisional liquidators and liquidators (together **"Liquidators"**) in Hong Kong, there is a reasonable possibility of benefit to the Petitioner in that the Liquidators can investigate the affairs of the Company and/or seek assistance to identify, take control of and recover assets of the Company located in Hong Kong and in other jurisdictions, including in particular the People's Republic of China and the United States, details of which are set out at paragraphs 24 to 43 of Lin 3 and paragraphs 30 to 41 of Lin 5.
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> 23. Further, in circumstances where the Petitioner has obtained the Enforcement Order and the Charging Order but the Awards remain unpaid, it is just and equitable that the Company be wound-up in Hong Kong."

6. It will immediately be appreciated that it is highly unusual to seek to wind up an active listed company in a jurisdiction other than that in which it is incorporated or listed. The import of the relevant principles of private international law is that the existence or dissolution of a foreign corporation is generally to be determined in accordance with the law of its place of incorporation and by that place's courts and that this Court will not exercise its *prima facie* jurisdiction to wind up a foreign company unless a sufficient connection with Hong Kong is shown to justify engaging Hong Kong's insolvency regime over a company which is *prima facie* beyond the limits of territoriality[2]. Alstom is, therefore, asking this Court to exercise a jurisdiction, which the relevant principles establish is to be used only in limited circumstances, to intrude into a matter which would normally be the preserve of the courts of its place of incorporation. The peculiarity of what is sought is brought into even sharper focus by virtue of the place of incorporation being the Mainland and the consequence of this Court acceding to Alstom's Petition being the

[2] *The Conflict of Laws*, Dicey, Morris & Collins, 15 ed, Rule 174; *Re Yung Kee Holdings Limited* [2014] 2 HKC 556 (CA) §41 & 42

purported imposition of Hong Kong insolvency regime on a company incorporated in another part of the People's Republic of China in circumstances in which the Mainland Court will not order a liquidation. Clearly it would need exceptional facts before it could be appropriate for this Court to make such an order. Those facts would, I anticipate, almost certainly include the Company having a significant presence and creditors in Hong Kong so that what was sought bore the characteristics of a domestic liquidation and, viewed commercially and from a Hong Kong perspective, involved in substance a liquidation of a Hong Kong business venture.

7. In a series of cases during the last 2 years this Court and the Court of Appeal have considered in depth the criteria by reference to which the Court should determine whether or not to exercise the power given by section 327 to wind up both solvent and insolvent companies incorporated in another jurisdiction[3]. The following general principles emerge from those judgments and are not in dispute in the present case:

(1) The power conferred by section 327 is discretionary.

(2) The following three core requirements must be satisfied before the Court would be justified in exercising its discretion:

(a) There is sufficient connection with Hong Kong to justify setting in motion the Hong Kong insolvency regime, which *prima facie* requires a liquidator to

[3] Solvent companies in respect of which there is a shareholders' dispute: *Re Gottinghen Trading Limited* [2012] 3 HKLRD 453 (CFI); *Re Yung Kee Holdings Ltd* [2012] 6 HKC 246 (CFI); *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 (CA); insolvent companies: *Re Pioneer Iron and Steel Group Company Ltd* HCCW 322/2010 unreported judgment 6/3/2013; *Re China Medical Technologies Inc* [2014] 2 HKRLD 997.

liquidate a company's assets wherever they are located and similarly invite proofs of debt from creditors both in Hong Kong and overseas.

(b) There is a reasonable possibility of a winding-up order benefiting those applying for it.

(c) There must be a person subject to the Court's jurisdiction (other than by being the petitioner or a creditor who will become subject to the Court's jurisdiction if he submits a proof of debt) and having a material economic interest in a winding up.

(3) There may be cases in which the connection between a company's affairs and Hong Kong is sufficiently strong and the benefit of a winding up sufficiently substantial to justify a winding-up order even if the third core requirement is not satisfied.

First core requirement: Substantial Connection

8. It is helpful to start this section of the judgment by considering in more detail how the Court goes about considering whether or not the matters relied on by a petitioner are sufficiently substantial to satisfy the third core requirement. In *China Medical Technologies Inc.*[4] I explain the following in paragraph 60:

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[4] ibid

> "60. In considering the substance of the connection with Hong Kong and whether or not it is sufficient to justify making a winding-up order it is important to have regard to what is being sought and its consequences. As I have explained, a winding-up order engaged the whole of the winding-up regime. The regime is designed for the liquidation of Hong Kong companies, whose assets and creditors are largely located here. It is extended to an unregistered company in a case in which there is justification for subjecting it to that regime and the formulation of the three core requirements reflects this. The Company's emphasis on the desirability of making a winding-up order in order to allow the Provisional Liquidators to apply for a section 221 order against Mr. Tsang demonstrates the weakness of the Petition. The court should not make a winding-up order simply to allow foreign liquidators to avail themselves of the section 221 process. The court should only make a winding-up order where the reasons for liquidating an unregistered company in Hong Kong are more extensive."

9. A similar statement can be found in paragraph 30 of my judgment in *Pioneer Iron and Steel Group Company Limited* [5]:

> "…I accept that in considering whether or not to exercise its discretionary jurisdiction to wind up an unregistered company the Court should be satisfied that setting in motion this process is justified and that the consequences of making a winding-up order informs a consideration of whether or not sufficient connection with Hong Kong has been demonstrated."

10. In paragraph 52 of my judgment in *China Medical Technologies Inc.* I explain:

> "…Whether the connection is sufficiently strong will depend on both the nature of the individual matters relied on and also the significance of the company's Hong Kong connection to its activities viewed as a whole, in other words: the court will ask how does Hong Kong fit into the overall scheme of the company's activities viewed in their entirety. Matters constituting the Hong Kong connection may represent a significant part of one company's activities but similar matters

[5] ibid

> may form a small part of those of a larger, multinational company with offices and factories in many different jurisdictions. This in my view is relevant."

11. The matters relied on in the Amended Petition as satisfying the first core requirement are the Company's interest in Innovation and indirect interests in another Hong Kong private company, namely, Insigma M&E (Hong Kong) Limited ("**Insigma**"). Insigma is clearly not an asset of the Company in Hong Kong[6]. The connection is, therefore, limited to the Company's interest in Innovation. That interest has significant value and, viewed in isolation, might reasonably be suggested to constitute a substantial connection with Hong Kong. However, the Company carries on business largely in the Mainland where it is listed. According to its audited consolidated balance sheet for the year ending 31 December 2012 the Company has total assets of RMB4,872,020,731. It has short term borrowings of RMB 1,061,752,394.94. I have not been provided with the notes to the financial report, but there is nothing to suggest that the lenders where anything other than, as one would expect, Mainland banks. The Company's sales for 2012 totalled RMB 4,984,916,338.14. Presumably the very large majority of these sales took place in the Mainland where its business is largely conducted. Viewed in this context the interest in Innovation represents a very small part of the Company's assets and commercial affairs. It does not seem to me that the Company's interest in Innovation provides sufficient connection to justify an order that would engage the Hong Kong insolvency regime and require the liquidator to attempt to realise the Company's assets in the Mainland.

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[6] *Yung Kee* (CFI) §80; *Yung Kee* (CA) §58; *Pioneer Iron and Steel* §34.

12. This conclusion is sufficient to dispose of the Petition, but for the sake of completeness I will consider whether the other core requirements have been satisfied.

Second core requirement: Benefit to creditors

13. Alstom contends that the appointment of a liquidator will assist in ensuring that a proper valuation of the shares in Innovation can be produced and their full value realised. I accept that it maybe that a liquidator will be better able to take steps to realise the full value of the shares than Alstom can through enforcement of the charging order absolute; although that will to a large extent depend on the level of information that can be obtained from the Company in the Mainland, a subject I return to in later paragraphs. However, there is large degree of artificiality about this argument because it is clear that what Alstom has in mind is a realisation for its benefit; not the realisation of the assets of the Company in Hong Kong for the benefit of creditors as a whole. Alstom clearly wishes to use a winding-up order in Hong Kong to enforce the judgment it has to recover sums for itself. There would be little point in putting the Company into liquidation rather than enforcing the charging order if the latter was to result in a lower recovery for Alstom than enforcement of the charging order because the proceeds had to be shared with other creditors. I note that the Petition has no supporting creditors.

14. Two other benefits have been identified by Alstom. The first are steps that could be taken in the Mainland by a liquidator appointed in Hong Kong to, and I quote from Ms. Ismail's skeleton argument, "*consider further collection of assets and/or investigation of the Co's*

affairs outside HK, including in the Mainland and/or in the US. There is no dispute that there are substantial assets in the Mainland....". It will be recalled that the Court in Hangzhou has refused to enforce the award and that there is no dispute that Alstom cannot apply to wind up the Company in the Mainland. A considerable amount of expert evidence was filed by both parties concerning whether or not a liquidator appointed by this Court over the Company would be recognised in the Mainland. Dr Yin on behalf of Alstom suggested there was a reasonable possibility that it would and Professor Li on behalf of the Company suggests there is not. A considerable amount of the hearing concerned this issue and much of that time involved a determined and, in my view, convincing critique of Dr. Yin's arguments by Mr. Tong. I do not intend to spend much time on this issue as it seems to me that there is clearly no realistic possibility of a Mainland Court and regulators recognising a liquidator appointed by this Court and the contrary suggestion has an air of complete unreality about it. The principle reasons for reaching this conclusion can be summarised as follows:

(1) The rejection by the Hangzhou Court of Alstom's enforcement application and the acceptance by Alstom that it cannot apply to wind up the Company in the Mainland.

(2) Article 3 of the Enterprise Bankruptcy Law which provides that a bankruptcy case shall fall within the jurisdiction of the people's court at the place where the debtor is domiciled, which in the present case is Hangzhou.

(3) The "*Reply of the Supreme People's Court to the Request for Instructions on Norstar Automobile Industrial Holding*

Limited's Application for Recognition of a Court Order of the Hong Kong Special Administrative Region dated September 28, 2011". This concerned an application for recognition of an order made by this Court in respect of a company incorporated in Hong Kong. The relevant part of the reply in translation reads:

> "This case concerns an application for recognition of a winding-up order issued by High Court of Hong Kong Special Administrative Region. According to Article 1 of *Arrangement of the Supreme People's Court between the Courts of the Mainland and the Hong Kong Special Administrative Region on Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases under the Jurisdiction as Agreed to by the Parties Concerned*, the winding-up order concerned in this case shall not be deemed as a mutual recognition and enforcement of judgment stipulated in such Arrangement, so the Arrangement shall not be applicable to this case. Article 265 of *Civil Procedure Law of the People's Republic of China* and the Article 5 of *Enterprise Bankruptcy Law of the People's Republic of China* are to regulate the recognition and enforcement of the judgments made by foreign courts and they are not applicable to this case too. Your reasons of applying the aforementioned legal provisions for recognizing the winding-up order are not agreed.
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> In a word, currently there is no legal basis for PRC courts to recognize any winding-up order issued by the High Court of the Hong Kong Special Administrative Region, so the winding-up order concerned in this case shall not be recognized."

I cannot see how if this is the view the Supreme People's Court took in respect of an order made in Hong Kong to wind up a company incorporated here it can sensibly be argued that there is a realistic possibility that a lower court in the Mainland will, as Dr Yin suggests, take the opposite view in respect of a company incorporated in the Mainland.

(4) The document dated 19 October 2012 issued by the Supreme People's Court entitled "*Summary of Minutes of the Symposium on the Trial of Cases concerning Bankruptcy Reorganisation of Listed Companies (No 261 [2012]) of the Supreme People's Court.*" Although this is dealing with reorganisations it indicates the extent to which a court will have regard to the views of the securities regulator in dealing with cases concerning the insolvency of listed companies. This suggests that in dealing with listed companies domestic commercial and economic considerations play an important role. It seems highly unlikely that in such an environment a foreign liquidator will get very far in liquidating a company incorporated and listed in the Mainland.

15. The second benefit is the prospect of a liquidator being in a better position to realise the Company's interests in subsidiaries in the United States. As a matter of fact the Company has no assets in the United States. The Company has two Mainland incorporated subsidiaries that have controlling interests in two United States' companies. I did not understand Alstom to argue that a liquidator could pierce the corporate veil. As a result a liquidator could not take any action in respect of the interests owned by the two Mainland subsidiaries. Innovation has a 2% interest in a company called Techbridge. As Alstom already has a charging order absolute over Innovation and thus indirectly the value represented by its interests in Techbridge I do not consider that appointing a liquidator to realise this interest is capable of constituting sufficient benefit to satisfy the second core requirement.

16. I would also observe at this juncture that, in so far as it has been suggested by Alstom, another benefit of a winding-up order would be a liquidator's ability to investigate the Company's activities here and in the United States with a view to finding other possible assets in those jurisdiction that are currently not known to Alstom, this is speculative and not capable of constituting a relevant benefit for the purposes of determining whether or not the second core requirement has been met.

17. In my view the second core requirement is not satisfied in the present case.

Third core requirement: a person subject to the court's jurisdiction other than by virtue of being the petitioner with sufficient economic interest in a winding up

18. Alstom's submission is very simple. In *China Medical* I said at paragraph 47 that a creditor cannot satisfy the third requirement simply by presenting a petition. The creditor must be subject to the Court's jurisdiction by virtue of doing something more such as obtaining the benefit of a judgment debt within the jurisdiction. I refer to *Stocznia Gdanska SA v Latreefers Inc* [7] in support of this view. Alstom argues that it satisfies this requirement by virtue of obtaining recognition of the arbitration award in Hong Kong, which as a result can be enforced as if it were a Hong Kong judgment.

19. Mr. Tong argued that this is too simplistic. In *Latreefers* the contracts which gave rise to the debts relied on by the Petitioner had been

[7] [2001] 2 BCLC 116

made in England and had English governing law clauses. The disputes in relation to those contracts had been litigated in lengthy and complex litigation in London. The Petitioner, so argued Mr. Tong, had submitted in a substantial way to the jurisdiction of the English courts. It did not follow automatically, he argued, that in every case in which a petitioner obtained a judgment in Hong Kong in respect of his debt the third core requirement is satisfied.

20. I think there is force in Mr. Tong's submission. A foreign party who commences litigation before the Hong Kong courts and obtains judgment will normally satisfy the third core requirement. However, in my view it would be artificial to treat a petitioner as satisfying the third core requirement simply be registering an arbitration award. In my view the nature of Alstom's submission to the jurisdiction of Hong Kong is too tenuous to satisfy the third core requirement having regard to the fact what is sought is an order that will engage the entire Hong Kong insolvency regime, the main purpose of which is to cause assets of insolvent companies in Hong Kong to be realised for the benefit of creditors in Hong Kong.

Conclusion

21. It follows from what I have said that I will dismiss the Petition. I would add this general comment. It is quite understandable that Alstom feels a deep sense of grievance that the Company will not honour the arbitration award and that the Hangzhou Court has refused to enforce it for reasons which have been rejected in Singapore and are easily criticised.

No such problems have arisen in Hong Kong where the award was readily registered.

22. However, what Alstom seeks to do is to obtain a winding up order in Hong Kong over an active company incorporated and listed in another jurisdiction. There are no creditors domiciled or resident in Hong Kong. The Company has, relative to its activities generally, little connection with Hong Kong and neither does Alstom. The application does not seem to be a genuine attempt to engage the Hong Kong insolvency regime for the protection of the Company's creditors. It seems to be a means to put pressure on the Company. Sir Richard Scott VC in *Banco Nacional de Cuba v Cosmos Trading Corp* [8] makes a number of observations which have sufficient application to the present case to be worth repeating:

> "In my opinion, the courts of this country should hesitate very long before subjecting foreign companies with no assets here to the winding-up procedures of this country. Of course if a foreign company does have assets in this country, the assets may need to be distributed among creditors, and a winding-up order here, sometimes ancillary to a principal winding up in the place of incorporation of the foreign company, may be necessary. But a winding-up order here, while the foreign company continues to trade in its country of incorporation and elsewhere in the world, is in my view thoroughly undesirable. I would not say a winding-up order in those circumstances could never be right, but I do say that exceptional circumstances and exceptional justification would be necessary. After all, if we presume to make a winding-up order in respect of a foreign company which is continuing to trade in its place of incorporation and elsewhere in the world, where will our winding-up order be recognised? What effect will it have? These questions are difficult to answer and, absent some international convention regarding the winding up of foreign companies, I think no satisfactory answer can be given.

[8] [2000] 1 BCLC 813 at 819g- I and 821a-b.

> ….
>
> It follows, in my view, that the only benefit for BNC creditors that could be derived from a winding up of BNC would be the public relations benefit of obtaining an order for payment by BCC of a sum of money. I can see no practicable means by which such an order could be enforced against BCC. The public relations benefit of that order is, in my judgment, much too light in the balance to outweigh the substantial reasons why the courts of this country should not make winding-up orders against foreign companies with no assets here and with no trading connection with this country and even more so foreign companies which are continuing to trade.
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> In my judgment, for the reasons I have given, the winding-up petition is bound to fail. In my view Neuberger J came to the right conclusion and I would dismiss this appeal."

23. It is incumbent on those advising prospective petitioners to assess sensibly whether or not they have before them a case which justifies inviting this Court to wind up a company incorporated in another jurisdiction. The present Petition was, putting it charitably, speculative and but for the Company's failure to honour the arbitration awards I would have ordered that the costs be paid on an indemnity basis, as it is I order that the Petitioner pays them on a party and party basis.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Ms Roxanne Ismail SC, instructed by Hogan Lovells, for the petitioner

Mr Ronny Tong SC and Mr Adrian Lai, instructed by Alvan Liu & Partners, for the respondent