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Winding up an unregistered company in Hong Kong
(在香港把非注册公司清盘)

In Hong Kong, many people use offshore companies (海外公司) to operate their businesses without registering these companies in Hong Kong under Part XI of the Companies Ordinance (公司条例) (Cap. 32) (“CO”). For the purposes of this newsletter, we shall refer to this type of company as an “**unregistered offshore company**”.

It is therefore important for directors and creditors to be aware that an unregistered offshore company is not immune from the jurisdiction of Hong Kong courts to grant a winding up order against such a company by the powers conferred under section 327 of the CO.

Re Beauty China Holdings Limited [2009] 6 HKC 351 (“*Beauty China Holdings Ltd*”) is a recent High Court decision which provides us with a reminder of the well established requirements that the courts shall be satisfied with before exercising its discretion under section 327 of the CO to wind up an unregistered offshore company.

This newsletter provides a summary of the findings of the Court of First Instance in *Beauty China Holdings Ltd*.

Beauty China Holdings Ltd (案件)

***Background* 背景**

Re Beauty China Holdings Ltd was a creditor’s petition to wind up Beauty China Holdings Limited (“**the Company**”) brought by a syndicated group of lenders, including, among others, the Industrial and Commercial Bank of China (Asia) Limited (“**ICBC Asia**”).

The Company was an unregistered offshore company incorporated in the Cayman Islands. ICBC Asia was appointed as the successor agent of a term loan facility (“**Loan Agreement**”) in the sum of HK\$135 million.

The Company opposed the petition. One of the grounds for the opposition was that the Hong Kong court should decline to exercise its winding up jurisdiction against an unregistered offshore company.

The 3 core requirements (对在港海外公司清盘之三项法律要求)

The 3 core requirements that the Court shall be satisfied with in making a winding up order against an unregistered offshore company were: -

- (i) there had to be ***sufficient connection with Hong Kong*** (和香港之足够关连), but this did not necessarily have to consist in the presence of assets within the jurisdiction;
- (ii) there must be a ***reasonable possibility that the winding up order would benefit*** (法院清盘令对申请者有实际得益的合理可能性) those applying for it; and
- (iii) the court must be ***able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets*** (有权分配公司资产之受益人为香港法院可管辖之人仕).

There was no dispute that requirement (iii) was satisfied. The Court went on to examine requirements (i) and (ii).

Sufficient connection with Hong Kong (和香港之足够关连)

The Court held that core requirement (i) was satisfied. The Court found that :-

- The Company had an office in Hong Kong and carried on business at such office.
- The Loan Agreement was prepared by solicitors in Hong Kong.
- The Loan Agreement provided that the governing law of the Loan Agreement was Hong Kong law, and that the parties agreed that any legal proceedings arising out of or relating to the Loan Agreement might be brought in the Courts of Hong Kong, and that they irrevocably submitted to the non-exclusive jurisdiction of the Hong Kong courts.
- The Loan Agreement was not the only transaction that the Company transacted in Hong Kong.
- The loan was advanced to a Hong Kong bank account at the Company's direction.
- One of the major creditors was in Hong Kong.
- The Company had two wholly owned subsidiaries incorporated in Hong Kong, and the registered offices of these subsidiaries were located in Hong Kong.
- No other jurisdiction had more substantial and clearer connection with the Company.

Reasonable possibility of benefit if the Company is wound up (法院清盘令对申请者有实际得益的合理可能性)

The Court held that core requirement (ii) was also satisfied. The Court found that :-

- The Company was not virtually worthless. The Court looked at the paid up share capital of the wholly owned subsidiary of Colour Zone HK, the Company's indirect wholly owned subsidiary ("**Colour Zone HK**"), and the current assets, cash and cash equivalents of Colour Zone HK. The Court found that there were some prospects of recovery of money by the Company as a creditor of Colour HK even though the liabilities of Colour Zone HK exceeded its assets.
- The Company had a significant subsidiary in Zhuhai which had a registered capital of HK\$70 million. The Court found that there was proximity of Hong Kong to Zhuhai City.

The Court finally held it was appropriate in the circumstances to grant a winding up order for the Company.

Of course, the grant of a winding up order against an unregistered offshore company will depend on the facts of every case. However, directors and creditors should certainly bear in mind these 3 core requirements when commencing or defending winding up proceedings against an unregistered offshore company in Hong Kong.

Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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