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The Pacific Andes saga: forum shopping, Chapter 11 and just and equitable winding up

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'Forum shopping' is the practice of choosing the most favourable jurisdiction in which a claim could be heard. It is often used as a pejorative, a form of jurisdictional gamesmanship, but, in principle, there is nothing wrong in seeking to have the case heard in the forum which is most favourable to the client. It can however lead to some fierce jurisdictional battles particularly in insolvency where the choice can be stark between debtor and creditor friendly procedures.

That is precisely the scenario with which the BVI Commercial Court has been wrestling over the past 10 months in a series of liquidations of subsidiaries of the troubled Pacific Andes Group. Is it best for a national court to decline to apply its own insolvency procedures in favour of another jurisdiction and if so in what circumstances?

To recap, Pacific Andes Resources Development Limited (Bermuda) (**PARD**) is a public company incorporated in Bermuda and listed on the Singapore Stock Exchange. Pacific Andes International Holdings Limited (**PAIH**) is also incorporated in Bermuda and listed on the Hong Kong Stock Exchange though trading in the shares is suspended.

At one stage the Pacific Andes Group was said to hold the 12th largest fishing fleet in the world. PARD together with its subsidiary, China Fisheries Group Limited and 14 other subsidiaries after several difficult years filed for Chapter 11 protection in July 2016. Substantial sums are involved not least the US\$650 million in unsecured loans to the Club Lenders. It is estimated that some US\$2.8 billion in value needs to be generated to repay the creditors and the equity holders.

The circumstances under which the Group filed for Chapter 11 are noteworthy. By filing for Chapter 11, the Pacific Andes Group, according to the Club Lenders, breached various undertakings and removed the Chief Restructuring Officer appointed by agreement between the Lenders and the Group. In an audacious move, the Group simultaneously filed for Chapter 11 protection in relation to 16 Group entities having deliberately concealed its intention from the Lenders and the Chief Restructuring Officer.

The Group had no trading connection with New York or the US generally. None of the Debtors were incorporated in the US and the

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only asset in New York was the lawyers' retainer for the obtaining of the relief itself. There was no other connection with the US save for the Group's desire to take advantage of the debtor friendly environment. A fundamental tenet of Chapter 11 is that the debtor remains in possession and the process therefore enables the debtor to retain management control while it formulates a plan for creditors. The Club Lenders had however lost all confidence in the ability of the Chapter 11 debtors to manage the business. Despite opposition from the Group, the Lenders succeeded in appointing a trustee in bankruptcy in the Chapter 11 proceedings.

In the meantime, one of the BVI entities, Pacific Andes Enterprises (BVI) Ltd, became the focus of an investigation in connection with allegations of trade finance fraud. The central allegation is that Pacific Andes Enterprises (BVI) Ltd falsified trading records in order to obtain trade finance. The BVI insolvency process does not involve the debtor remaining in possession. Instead, the BVI Insolvency Act provides for the appointment of liquidators if the creditor can demonstrate either that the company is (a) cash flow or (b) balance sheet insolvent or (c) that it is just and equitable to appoint a liquidator. The appointment of a liquidator is often but not necessarily the death knell of a company. The liquidator provides independent oversight and supervision of the company to obtain the best outcome for creditors which in some rare circumstances might include bringing the company back to financial health.

The Club Lenders were however faced with the difficulty that the filing of a Chapter 11 could be done electronically from anywhere in the world at the press of a button. The Club Lenders therefore decided to apply for the appointment of provisional liquidators before the hearing of the full petition in order to hold the ring. The appointment of provisional liquidators would prevent the filing of Chapter 11 and ensure that there was a level playing field at the time of the petition.

The tactic succeeded and provisional liquidators were appointed over Pacific Andes Enterprises (BVI) Ltd prior to the hearing of the petition. At the petition the Group strongly argued that a holistic restructuring was essential and that it was best for the restructuring to take place in the context of Chapter 11 rather than piecemeal under the supervision of a liquidator.

That submission was wholly rejected by the BVI Commercial Court judge. Apart from the fact that the companies were BVI entities regulated by BVI Company law and therefore it was appropriate for the BVI Courts to have jurisdiction over the companies, the appointment of a liquidator was not inconsistent with the Chapter 11 process. An independent officer of the court was not prevented from engaging in the Chapter 11 process if there was a holistic restructuring on the table which would result in value for the creditors. Indeed, since the appointment of liquidators over the various BVI entities, the liquidators FTI Consulting has kept a line of communication open with the Chapter 11 Trustee as noted in his latest report in April 2017.

Just as the newly adopted JIN Guidelines seek to set out a flexible procedure to assist cross border insolvency, the pragmatic approach of the BVI Commercial Court ensured that the rights of creditors were protected while recognising that international co-operation might be necessary and appropriate under the right circumstances. The form of order which was granted by the BVI Court permitted the liquidators to enter into international protocols to enable them to liaise with foreign insolvency officers subject to the Court's approval.

There have been two common themes running through the several Pacific Andes Group company liquidations which have been granted in the BVI namely (a) the Group's argument that the better outcome for all creditors would be a holistic restructuring plan and that the BVI Commercial Court should await the outcome of that

restructuring under Chapter 11 and (b) a lack of documentation to provide credible support that the companies were solvent.

As to the first theme, the BVI Commercial Court has consistently held that it is a matter for the BVI Court as the place of incorporation to regulate those companies which are insolvent or otherwise should be regulated by a court appointed officer while recognising that the court appointed liquidator should have the power to liaise with foreign insolvency proceedings if appropriate.

As to the second theme, this was particularly apparent in the application to appoint liquidators over one of the subsidiaries of PAIH, Richtown Development Limited in June 2017. This was described by the Group as a treasury company. In similar fashion to Pacific Andes Enterprises (BVI) Ltd, provisional liquidators were appointed in order to prevent the company filing for Chapter 11. The petition itself was brought by a related creditor company in liquidation. The application for the appointment of a liquidator was made on three grounds, namely that (1) Richtown was cash flow insolvent (2) balance sheet insolvent and (3) that the circumstances, once properly taken in account, were such as to justify a winding up on just and equitable grounds.

Mr Justice Kaye QC held on 2 June 2017 that the application succeeded on all three grounds. His findings in relation to just and equitable winding up are of particular note.

A winding up petition on just and equitable grounds is a rare event but as Farara J (ag) noted in *Wang Zhongyong and Union Zone Management Limited* (BVIHCMAP 2013 no. 0024), it is “impossible to conceive of the plethora of circumstances and most undesirable to limit the categories” of claims where just and equitable winding up might be appropriate.

The reasons why it was just and equitable to wind the company up as found by Mr Justice Kaye QC were that there was a justifiable lack of confidence in the conduct and management of the company’s affairs. The judge found that the directors were under a duty pursuant to section 98 of the Business Companies Act 2004 to maintain records sufficient to show and explain the company’s transactions and which will at any time enable the financial position of the company to be determined with reasonable accuracy.

Instead the judge found that there was no explanation of the multiplicity of transactions and that the failure to maintain the documents so as to give rise to an allegation of fraud was serious misconduct on the part of the directors as to give rise to the just and equitable basis. The judge emphasised that he was not making a finding of fraud on the part of the company but in circumstances where the allegation of fraud had been circulating for some time, it was incumbent on the directors to make sure that they had sufficiently accurate records to provide to the court.

Insofar as forum shopping is concerned therefore, to paraphrase Lord Denning, the BVI is a good place to shop in. The pragmatic approach of the BVI Commercial Court ensures that to the extent a BVI company is affected by a Chapter 11 restructuring, the court appointed liquidator has the power to liaise and agree protocols if the plan is likely to achieve value for the creditors. On the other hand, it demonstrates that the BVI Commercial Court will not merely delegate its supervisory powers. The power of the provisional liquidator to ensure a level playing field and prevent a company entering into Chapter 11 is a useful protective power in the appropriate circumstances. Finally, the BVI Commercial Court has demonstrated that it will not shy away from placing a

company into liquidation on just and equitable grounds if it is appropriate to do so including a new category namely where there has been a failure on the part of a director to maintain proper records.

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