



# Challenging a BVI liquidation: a briefing note on China Minsheng judgment

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The BVI Commercial Court recently addressed four points of general application to consider when appointing a liquidator, following an application (the "**Application**") made by China Minsheng Banking Corporation Limited., Hong Kong Branch (the "**Bank**") to appoint a liquidator over Tai Feng Investments Limited (the "**Company**"), a BVI company operating out of Hong Kong.

Webster J's judgment (i) addressed a challenge to service of a statutory demand (the "**Demand**"), (ii) applied the statutory presumption of insolvency following a failure to satisfy or set aside the Demand (iii) considered an assertion of an oral agreement discharging the debt and (iv) reviewed the Court's discretion to grant an adjournment of an application to appoint a liquidator.

## Service

The Court rejected a challenge to a common method of service in the BVI, and confirmed that hand-delivery of a statutory demand to the registered office of the company (in this case, the office of its registered agent), acknowledged by a representative of the company's registered agent on behalf of the company, is compliant with rule 26(2)(a)(ii) of the Insolvency Rules 2005. The Court held that any subsequent delay between service being effected, and the registered agent notifying its underlying client is "a matter between the Company and the registered agent". Any such delay would only be relevant to the Court's discretion as to whether to appoint a liquidator under section 167 of the Insolvency Act 2003 (the "**Act**").

## Presumption of insolvency

The Company asserted that the value of its assets exceeded the amount of the debt owed and, as such, was solvent. Therefore, a liquidator should not be appointed on the ground of insolvency brought about by a failure to satisfy or set aside the Demand. The Court reiterated that, in the circumstances, the burden of proving solvency was "squarely on the Company", and held that this burden had not been

met on the facts of the case. The Court noted also that the Company had not provided any evidence of its liabilities, "which makes the evidence of the value of the assets even less reliable".

Importantly, the Court also held that, even if one assumes that a company is solvent on a balance sheet test: "if it refuses to pay a debt that is not disputed on substantial grounds it is still insolvent within the meaning of Section 8(1)(c)(ii) of the Act. Section 8(1)(c)(ii) provides that a company is insolvent if it is proved to the satisfaction of the Court that it is unable to pay its debts as they fall due. An application to appoint liquidators of a solvent company can succeed if the company is unable or refuses to pay its debts as they fall due".

## **Contemporaneous documents**

In contesting the Application, the Company alleged that, pursuant to a purported oral agreement reached in or about June 2018, the Company and one of the guarantors of the Loan had been absolved of all repayment liabilities. The Bank denied the existence of any such agreement and argued that, in a heavily-documented commercial lending relationship, none of the contemporaneous documentation was consistent with the oral agreement alleged by the Company, and a partial settlement payment made in 2019 indicated that all parties continued to treat the Company as the primary debtor with full responsibility for repayment.

The Court held that "[I]t is very easy for a debtor, when faced with an application to appoint liquidators, to say that the debt on which the application is based is disputed on substantial grounds because there is an oral agreement disputing the debt. Each case must be decided on its own facts, but where such an allegation is made, especially when there is written evidence to the contrary, the debtor faces an uphill task to satisfy the Court that there is a genuine or substantial dispute regarding the repayment of the debt". The Court therefore held that the Company failed to discharge the burden on it to satisfy the Court that there was a genuine or substantial dispute as to its repayment obligations.

## **Adjournment**

The Company also sought an adjournment of the application under section 167 of the Act, pursuant to the general discretionary powers of the Court. The Court denied the Company's request, holding that (i) the Company had received "ample time" to prepare its evidence (ii) the general "lack of cogency of the Company's evidence", and (iii) the requirements of the Act to deal with applications "expeditiously".

## **Conclusion**

All of the issues addressed in this case commonly arise in BVI liquidations and therefore the Court's review of them is of general application. The Court has additionally provided further reassurance that the BVI is a creditor friendly jurisdiction.

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