Client Memorandum

TRAVERS THORP ALBERGA
ATTORNEYS-AT-LAW

In the matter of CS Asia Opportunities Master Fund* FSD 34 OF 2022 – *judgment delivered 29 April 2022

Conclusion

In ***In the matter of CS Asia Opportunities Master Fund*** FSD 34 of 2022 (DDJ), Travers Thorp Alberga[1] successfully represented CS Asia Opportunities Master Fund (the "Fund"). The Fund was the respondent to a winding up petition issued pursuant to section 92(d) of the *Companies Act* (2022 Revision) on the basis of an unsatisfied statutory demand served on the Fund by Altair Asia Investments Limited (in Official Liquidation) ("Altair" or the "Petitioner") represented by Ogier instructed by the Joint Official Liquidators, Mr. Simon Conway, Mr. Man Chun So and Mr. Peter Greaves of PwC. Mr. Justice David Doyle, sitting as a judge of the Financial Services Division of the Grand Court of the Cayman Islands, dismissed the petition and refused to wind up the Fund.

Facts

The Petitioner caused a statutory demand to be served on the Fund for HK$73,004,750.21, which the Petitioner asserted was due to it under the terms of a complex financing transaction. When the statutory demand was not satisfied, the JOLs of Altair issued a winding up petition pursuant to section 92(d) of the *Companies Act (2022 Revision)* which provides that a Cayman Islands company may be wound up by order of the Court if "the company is unable to pay its debts".

The Petition debt was said to arise out of (i) the terms of two separate prime brokerage agreements to which Altair and the Fund were each a party with a London prime brokerage company called Global Prime Partners Limited ("GPP" or the "Prime Broker") and (ii) guarantees and cross-guarantees which Altair and the Fund had each given to GPP, as prime broker. After Altair was placed into liquidation in separate proceedings, the Prime Broker asserted a right (under the terms of a contractual agreement which Altair, the Prime Broker and the Fund had entitled "Guarantee") over what it (the Prime Broker) said were Altair's assets to satisfy what the Prime Broker said was a liability of the Fund to the Prime Broker. The Prime Broker then satisfied what it said was the Fund's liability to it (the Prime Broker) from Altair's assets held

[1] Neil McLarnon of Travers Thorp Alberga appeared before the Financial Services Division of the Grand Court. Neil practises insolvency law before the courts of the Cayman Islands and the British Virgin Islands and recently appeared in *IS Investment Fund Segregated Portfolio Company v Fair Cheerful Ltd* BVIHC (COM) 2020/0034, https://www.eccourts.org/is-investment-fund-segregated-portfolio-company-v-fair-cheerful-ltd/, another insolvency case in which Travers Thorp Alberga successfully represented the respondent to winding up proceedings and which helped change legal practice in the British Virgin Islands to require the service of statutory demands before commencing winding up proceedings.

with it. The JOLs of Altair then called on the Fund to pay Altair the HK$73,004,750.21 which they said had been taken from Altair's prime brokerage account by GPP in satisfaction of the Fund's asserted liabilities to GPP.

The Court dismissed the Petition, accepting the legal arguments made on behalf of the Fund. First, the Court was not satisfied that the amount claimed by the Petitioner was a "debt" within the meaning of the *Companies Act (2022 Revision)* or that the Petitioner had adequately demonstrated in its evidence the existence of the debt. Second, the Court was not satisfied that the Affidavit of Mr. Conway, as JOL of Altair, verifying the Petition complied with Order 3 rule 3 of the *Companies Winding Up Rules 2018*, which requires the verifying affidavit to be sworn by a person who "has been concerned in and has personal knowledge of the matters giving rise to the petition". Third, the Petitioner had not mentioned in its Petition or verifying affidavit that the terms of the Guarantee and the Prime Brokerage Agreements all contained exclusive jurisdiction clauses giving the courts of England and Wales exclusive jurisdiction over any dispute or claims arising out of them. The Fund had commenced proceedings in England against the Primer Broker for negative declaratory relief that it had/has no liability to the Prime Broker as alleged by the Prime Broker and the Petitioner or at all, the Court was satisfied that those proceedings were genuine and should first be determined in England and Wales in accordance with the contractual jurisdiction clauses and constituted a genuine dispute on substantial grounds, which made it inappropriate for the Cayman Court to grant a winding up order over the Fund.

<u>Lessons to take away from this judgment</u>

The judgment is an important reminder of the need for companies and their legal advisers to be cautious before engaging insolvency processes in relation to complex commercial disputes. It is always necessary first to address and examine the fundamentals:

(i) Is the liability in question a "debt"? If it is not a debt, a statutory demand and winding up petition under section 92(d) are inappropriate and the client should examine other means of proceeding, including proceeding by way of Writ.

(ii) Can admissible evidence in the form of an affidavit from someone who has been concerned in and had personal knowledge giving rise to the petition be obtained? If not, then a statutory demand and winding up petition under section 92(d) are likely to be inappropriate and the client should examine other means of proceeding.

(iii) Are there contractual clauses giving courts in another forum jurisdiction to determine disputes between the parties? If so, the client should first examine whether or not the Court is likely to uphold and enforce such agreements before commencing legal processes before a non-contractual forum.

This client memorandum is intended to provide only general information for the clients and professional contacts of Travers Thorp Alberga. It does not purport to be comprehensive or to render legal advice. Please do not hesitate to contact Travers Thorp Alberga (nmclarnon@traversthorpalberga.com) at any time if you have any specific questions or would like more detail on any of the points made in this memorandum.