

HONG KONG / JUDGMENT

RE HVB CAPITAL ASIA LTD

COURT

Court of First Instance

DECIDED

16 February 2007

CASE / FILE NUMBER

HCMP107/2007

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bjbj HCMP 107/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 107 OF 2007

IN THE MATTER of HVB CAPITAL ASIA LIMITED and IN THE MATTER of the Companies
Ordinance, Chapter 32 of the Laws of Hong Kong

Before: Hon Kwan J in Court Date of Hearing: 15 February 2007 Date of Judgment: 15 February
2007 Date of Handing Down of Reasons for Judgment: 16 February 2007

REASONS FOR JUDGMENT

This is a petition presented by HVB Capital Asia Limited (the Company) for confirmation of a reduction of its share capital, under section 59(1) of the Companies Ordinance, Cap. 32. The Company was incorporated on 15 April 1987 under its former name. An application was made by the Company for confirmation of the reduction of its share capital in December 2001 and an order confirming the reduction was made on 27 June 2002. The share capital was reduced from DM 15,000,000 and JPY 15,000,000,000 to JPY 15,000,000,000. The present share capital of the Company is JPY 15,000,000,000, divided into 300,000 ordinary shares of JPY 50,000 each, all of which are fully paid up or credited as fully paid up. From 19 December 2000 to 21 September 2006, the 300,000 issued shares were held by Bayerische Hypo-und Vereinsbank Aktiengesellschaft () and Abraxas Limited as to 299,999 shares and one share respectively. Since 22 September 2006, all 300,000 shares have been held by HVB. HVB is a company incorporated in Germany. It is the intermediate holding company of the Company and carries on the business of financial services. HVB is in turn owned by an Italian company, UniCredit Italiano SpA (UniCredit). HVB and the Company are members of a group of companies of which UniCredit is the ultimate holding company. The Company was originally incorporated to carry on business in

securities and finance through its branch office in Japan, including dealing, brokerage and underwriting of securities. The Company does not carry on business in Hong Kong. For the past four to five years, the Company has focused on advisory business for structured finance, acting as intermediary in relation to bonds issued in Europe at its branch office in Tokyo, in return for commission income. Since 1998, the Company has ceased to carry on any brokerage business and since 2002 it has ceased to carry on any bond dealing business for any customers and the only proprietary trading in debt securities is carried on by the Company in its own right. There is provision in the articles of association for the reduction of the share capital by special resolution in any manner allowed by law. By a special resolution in writing signed by HVB as the sole shareholder of the Company and passed on 22 December 2006 pursuant to section 116B of Cap. 32 and article 70 of the articles of association, it was resolved that the capital of the Company be reduced from JPY 15,000,000,000 divided into 300,000 shares of JPY 50,000 each to JPY 6,500,000,000 divided into 130,000 shares of JPY 50,000 each, and that such reduction be effected by returning paid-up capital to the full extent of JPY 50,000 per share on the 170,000 shares out of the 300,000 shares in issue by cancelling such shares. As the Company has ceased to carry on brokerage and bond dealing business for customers, its turnover has been maintained at a low level. Since 2003, less than 10% of its paid-up capital has been deployed in its business. The directors considered the sum of JPY 8,500,000,000 proposed to be repaid to HVB is in excess of the wants of the Company and cannot any longer be usefully employed in its business. The amount of capital proposed to be reduced will be returned to HVB so that it can be put to a more efficient use. As the Company carries on all its financial advisory and securities business in Japan, it has to comply with various regulatory and capital requirements. It has to maintain an amount of segregated deposit equivalent to the amount of investors cash held by the Company in a trust account kept in a designated account with a bank in Japan. Compliance with this rule is monitored by the Japan Dealers Association. The Company has deposited approximately JPY 700,000,000 with Mizuho Trust Bank as segregated deposits, even though the Company has not for more than one year held any cash belonging to investors. Under article 28 of the Securities and Exchange Law of Japan, only a corporation which has a registration with the Prime Minister of Japan may engage in securities business. Under article 29 of the same law, a corporation may only engage in the business of underwriting of securities after obtaining the authorisation from the Prime Minister. The Prime Minister will only register or approve a corporation to carry on securities business and underwriting in securities if its paid-up capital is larger than the amount prescribed by the Cabinet Order as follows: in respect of a corporation engaging in securities business, JPY 50 million; and in respect of a corporation engaging in underwriting of securities, JPY 3 billion. As the Company may in future engage in securities underwriting business, it is required to maintain at least JPY 3,000,000,000 as its paid-up capital. Further, under article 51 of the Securities and Exchange Law, any corporation engaging in stocks, options and foreign futures markets trading and brokerage business relating to futures securities contracts has to maintain a statutory reserve, which amount is determined in accordance with a formula stipulated in article 35, for compensation of any possible security brokerage claims and losses and is not distributable. Since 1993, the statutory reserve of the Company has been maintained at JPY 1,599,363. This shows that the Company has not engaged in any transaction which required it to

maintain a higher level of statutory reserve. After the proposed reduction of capital, the paid-up capital will remain at JPY 6,500,000,000, which is more than the paid-up capital of JPY 3,000,000,000 required by the Cabinet Order. The financial position of the Company appears to be sound. According to the audited accounts for the year ended 31 December 2005, the net current assets amounted to JPY 13,183,748,000 and net assets amounted to JPY 14,501,523,000. All the assets were unencumbered. The net profit for the year after tax was JPY 1,228,955,000. The financial position of the Company improved further in 2006, as can be seen from the management accounts made up to 30 November 2006. The net profit after tax for the first eleven months in 2006 amounted to JPY 2,209,678,000. The net current assets and net assets amounted to JPY 15,640,138,000 and JPY 16,711,200,000 respectively. As before, all the assets are unencumbered. Of the current assets, cash and due from banks, segregated deposits, trading accounts (asset) and trading accounts (asset forward contract unrealised profit) in the aggregate sum of JPY 43,189,068,000 could be realised by the Company within a short period. The first two items can be realised immediately, trading accounts (assets) can be realised within one to three months, and trading accounts (asset forward contract unrealised profit) up to two months. Trading accounts (asset), which amounted to JPY 40,026,888,000, are asset-backed securities and corporate bonds in or outside Japan, with Standard & Poor's and Moody's rating of BBB or above. These securities and bonds have maturity periods ranging from one to three months and can be sold by the Company at market rates. As for the trading accounts (asset forward contract unrealised profit) in the sum of JPY 1,515,636,000, they are foreign currency contracts which have matured and can be realised at market rates. The profit has not been realised. As at 30 November 2006, the Company was indebted to creditors in the aggregate sum of JPY 28,402,877,000. Among the liabilities, JPY 26,800,000,000 was owed to HVB as short term loans advanced to the Company from time to time. These loans are unsecured and are repayable on demand. For these loans, HVB has on 9 January 2007 given its consent in writing to postpone its debt in the sum of JPY 20,800,000,000 to the debts owed by the Company to non-consenting creditors. Whilst the reserve for retirement allowance in the aggregate sum of JPY 292,168,153 is to be met by the Company's capital, since March 2005, the Company appointed Nippon Life Insurance Company, an independent trustee, to administer and invest retirement funds. The amount of pension premiums paid to Nippon Life Insurance Company in 2005 is JPY 15,498,708, which is available to the Company to make any necessary pension payments. The trading accounts (liability) of JPY 1,000,000,000 represented the amount payable on the settlement date for the purchase of asset-backed securities. The actual settlement date was 6 December 2006 and this amount was settled on that day. In the view of the assets which are available to the Company within a very short time (JPY 43,189,068,000), there would appear to be more than sufficient assets to repay the debts of non-consenting creditors as and when they fall due (JPY 7,602,877,000, of which JPY 6,000,000,000 was owed to HVB) and the amount of capital proposed to be returned in the reduction of capital (JPY 8,500,000,000). At the hearing of the summons for directions on 30 January 2007, a direction was made to dispense with the settlement of a list of creditors under section 59(2). The direction given for the advertisement of a notice of the presentation of the petition has been complied with. The proposed reduction was approved by HVB, the sole shareholder of the Company. I am satisfied that the reduction is for a discernable purpose and that the interests of creditors are

safeguarded. I have therefore confirmed the reduction of capital as per the draft order and approved the minute of reduction. (S Kwan) Judge of the Court of First Instance High Court Miss Linda Chan, instructed by Johnson Stokes & Master, for the Petitioner PAGE 1udk 1udk F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V i\$&`G hccw (for Susan Kwan only).dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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