**Re: China Lumena New Materials Corp. ("Company")**

# OPINION

## A. Introduction and background

1. Those instructing act for Linktopz Entertainment Ltd, which I understand is a member of the Target Group (defined below).

2. I have been provided with the following 3 documents:

   2.1 A restructuring framework agreement dated 23.9.2016 and as amended on 26.11.2018 ("**Agreement**")[1] entered into between a group of investors ("**Investors**"),[2] the Company and the provisional liquidators of the Company. Pursuant to the Agreement, the Investors seek to acquire a controlling stake in the Company as part of a reverse takeover, and for the Target Group (as defined in Agreement cl.1.1) to become part of the Company's assets.

   2.2 The submissions dated 8.2.2019 made to the Stock Exchange of Hong Kong Ltd ("**HKEx**") by Kingsway Capital Limited ("**Kingsway**"), the sole sponsor of the holding company of the Target Group ("**Submissions**"). The Submissions address various inquiries raised by HKEx in respect of the new listing

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1 The Agreement was first signed on 23.9.2016 but has since been amended by various amendment letters. I have been provided with the amended letter dated 26.11.2018 which purports to set out the Agreement (as amended) in full (§3).

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application by the Company. For present purposes, the material part is p.9 of Submissions, which addresses the litigation risks that would arise if the Target Group proceeds with an IPO rather than through the reverse takeover pursuant to the Agreement. In particular, Kingsway submitted that:

(i) if the Investors were to unilaterally terminate the Agreement, the provisional liquidators of the Company would reserve their right to claim against the Investors;

(ii) if the Investors decide to wait for the Agreement to lapse, the inaction may be viewed as an anticipatory breach of the Agreement, which may also give rise to a claim by the Company/provisional liquidators;

(iii) such litigation risks may affect the viability of a new listing application and cause delay, and hence proceeding with an IPO afresh entails certain risks for the Target Group and the Investors.

2.3 HKEx's further comments on a draft circular of the company given on 26.2.2019. For present purposes, the material paragraph is §1(a)(ii) on p.1 of the document, where HKEx referred to the Sponsor's submissions set out in §2.2 above, and requested a copy of a legal opinion which supported those submissions.

3. I am asked to provide the said legal opinion that is required by HKEx.[3] Specifically, I am asked to elaborate on the litigation risk (if any) that may arise in the 2 scenarios put forward in the Submissions, namely:

3.1 the Investors unilaterally terminate the Agreement before the Long Stop Date, which is 30.4.2019 under the Agreement cl.1.1 (subject to further agreement in writing); and

3.2 the Investors allow the Agreement to lapse through inaction – I am asked in particular to consider if this would amount to an anticipatory breach.

4. In my view, it is possible for a breach of contract claim to be brought against the Investors in these 2 scenarios.

5. My opinion is based on the 3 documents set out above and also the information in an email from those instructing dated 7.3.2019 (as amended by a further email dated 13.3.2019).

6. The governing law of the Agreement is Hong Kong law: see Agreement cl.17.1.[4]

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3 Agreement cl.17.3 provides that any dispute between the parties should be settled by arbitration, hence any "litigation" is likely to take place by way of arbitration rather than before the Hong Kong Courts.

4 See also §4 of the amendment letter dated 26.11.2018.

## B. The Agreement and the relevant clauses

7. Agreement cl.4 governs the parties' respective obligations to complete. However, it is important to first consider Agreement cl.3 which deals with the conditions precedent of completion.

8. Completion is conditional on each of the conditions set out in cl.3.1 being satisfied on or before the Long Stop Date. Those conditions are:

> "
> ...
>
> (a) the Creditors Scheme becoming effective and being implemented in accordance with their terms;
>
> (b) all of the required corporate approvals or authorisations (including but not limited to those set out below) having been duly passed at the duty convened extraordinary general meeting(s) of the Company in accordance with the Listing Rules, the Takeovers Code and any other applicable law and regulations, and not having been revoked or vitiated:
>
> (i) the Capital Reorganisation;
> (ii) this Agreement and the Transactions;
> (iii) the Open Offer;
> (iv) the Share Offer;
> (v) the Creditors Schemes;
> (vi) the Whitewash Waiver; and
> (vii) any other necessary decisions to carry out transactions made under this Agreement.
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> (c) the Whitewash Waiver having been granted by the Executive and such Whitewash Waiver not having been subsequently revoked or withdrawn;
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> (d) the listing of and permission to deal in all of the Adjusted Ordinary Shares of the Company,

including the Adjusted Ordinary Shares to be issued to the Investors by way of Consideration Shares, the Adjusted Ordinary Shares to be issued under the Open Offer, the Adjusted Ordinary Shares to be issued under the Share Offer, having been granted by Listing Committee of the Stock Exchange (either unconditionally or subject to conditions) and such permission not having been subsequently revoked or withdrawn;

(e) the Resumption Proposal having been submitted to the Stock Exchange and the approval in-principle having been received from the Stock Exchange and such approval not having been subsequently revoked or withdrawn;

(f) the deemed new listing application of the Company having been submitted to the Stock Exchange and the approval for the listing application having been granted by the Listing Committee and such approval not having been subsequently revoked or withdrawn; and

(g) the Ordinary Shares or the Adjusted Ordinary Shares (as the case may be) of the Company remaining listed on the Main Board of the Stock Exchange."

9. That these conditions must be satisfied before there can be completion is reinforced by cll.3.2.2, 3.3 and 8.5, all of which provide that the Agreement shall terminate automatically on the "Long Stop Date" if the conditions precedent are not satisfied by then, unless otherwise agreed in writing.

10. Agreement cl.3.2 imposes various obligations on the parties to satisfy the condition precedents. In particular:

10.1 The Company shall use its reasonable endeavours to satisfy the condition precedents in cll.3.1(a), (b), (d), (e), and (g), and the Investors shall cooperate with the Company by providing to the Company upon reasonable request and such assistance as is reasonably required: cl.3.2.1.

10.2 Further, the Investors shall use its reasonable endeavours to ensure the satisfaction of the condition precedent in cll.3.1(c) and (f), and shall cooperate with the Company in doing so: cl.3.2.2.

11. Even if the conditions precedent are satisfied, this does not mean there would be completion. The Investors are not obliged to complete unless the Company complies in full with its obligations under cl.4 and Sch.4: Agreement cl.4.4.

12. Agreement cl.8 governs the circumstances under which the parties may terminate the Agreement:

12.1 Insofar as the Investors' right to unilaterally terminate the Agreement is concerned, this is set out in cl.8.1:

> "If, at any time before completion, any Government Authority issues, promulgates or enforces any law, regulation, rule, policy, order or notice that prohibits the completion of the Transactions; or the Government Authority provides amended opinions or additional conditions in relation to the Transactions which the Parties cannot accept, or the Parties cannot within 30 days or a reasonable period of time as agreed by the Parties to reach a written consent to amend or supplement this Agreement pursuant to the

aforementioned amended opinions or additional conditions raised by the Government Authority, the Investors may, by joint notice in writing to the Company elect to proceed to Completion or terminate this Agreement."

12.2 Agreement cl.8.4 provides that the Agreement may be terminated before completion upon mutual written consent of both the Company and the Investors, unless otherwise terminated in accordance with the terms of the Agreement.

13. Finally, Agreement cl.8.6.1 provides that upon termination, a party's accrued rights and obligations at the date of termination would not be affected. This obviously includes any accrued right to sue for damages.

## C. The law

14. Renunciation occurs where one of the parties evinces an intention not to go on with a contract: Anson's Law of Contract (30th edn) p.540.

15. If the renunciation occurs before the time fixed for performance, this amounts to an anticipatory breach. If the renunciation occurs during the performance of a contract, that would be an actual breach of contract. See Anson's pp.542-544.

16. In the latter case (renunciation during performance), the innocent party is forthwith entitled to be released from any further performance of its obligation, and to sue for damages: Anson's p.544.

17. In the former case (anticipatory breach), the innocent party has 2 options.

17.1 He can accept the anticipatory breach, in which case he is entitled to claim damages *at once*, before the time fixed for performance: Treitel: The Law of Contract (14th edn) §17-080.

17.2 Alternatively, he can try to keep the contract alive by continuing to press for performance, in which case the anticipatory breach will have the same effects as an actual breach if it persists until the time when performance is due. In other words, he can only sue when performance is due, and he runs the risk of losing the right to sue if the guilty party withdraws his repudiation before then. See Treitel §§17-078, 17-090, 17-092.

18. Whilst renunciation requires a clear and absolute refusal to perform, it needs not be express but can take the form of conduct. The test is "whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract": **Universal Cargo Carriers Corp v Citati** [1957] 2 QB 401, 436 (Lord Devlin).

19. Whether or not there is renunciation is highly fact sensitive, and all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker: **Eminence Property Developments Ltd v Heaney** [2011] 2 All ER (Comm) 223 §§62-63 (Etherton LJ).

20. Although mere silence/inaction is generally insufficient, continued silence/inaction could amount to repudiation in some cases, e.g. where there was a duty to speak, or where the inaction was overlaid with a consistent course of conduct that speaks of "maintained recalcitrance". See **Stocznia Gdanska SA v Lativan Shipping Co)** [2003] 1 CLC 282 §§95-96 (Rix LJ) (renunciation before performance is due); and **Computer and Technologies Solutions Ltd v Man Wai Tung** (HCA 1763/2012, 30.4.2015) §23 (A Chan J) (renunciation during performance).

21. A related concept is disablement, where by the act or default of one party further commercial performance of the contract is made impossible, even though the party has not renounced the intention to fulfil the contract. Like renunciation, disablement may arise occur as a result of omission/inaction: Treitel §17-077.[5] Further, there can be disablement before performance is due (which would amount to an anticipatory breach), and disablement during performance (which would amount to an actual breach).

22. Finally, in assessing damages:

    22.1 Generally speaking, the date of assessment of damages is the time fixed for performance.

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5 For example, a contract may be made for the sale of goods for future delivery, to be manufactured by the seller, or to be acquired by him from a third party, and the seller may fail to take any steps to manufacture the goods or to acquire them from the supplier. That failure may be regarded as a disablement, and hence an anticipatory breach, because he will have failed to dos something that he was obliged by the contract to do in order to put himself into the position of being able to perform on the due date.

22.2 In the case of anticipatory breach, even if the innocent party accepts the breach so that he is entitled to sue *at once* (see §17 above), the date of assessment will still be the time fixed for performance but not the date time of repudiation. Therefore, damages will be based on forecasts, and events that will probably occur between the acceptance of the breach and the time fixed for performance would be taken into account: Treitel §20-078. In **The Mihalis Angelos** [1971] 1 QB 164, a charterer who committed an anticipatory breach by purporting to cancel before the agreed date for the ship to load at the designated port was said to be liable only for nominal damages, since it was clear at the time of cancellation that the ship could not possibly have reached the port by the specified date, so the charterer would have been entitled to cancel on the ship's late arrival had he not committed the anticipatory breach.

22.3 Further, if an event happened between the date of breach (or the date of acceptance of breach in the case of anticipatory breach) and the time fixed for performance, and would have affected the performance of the contract had it not been terminated, it would be taken into account in assessing damages: see Anson's p.566; Treitel §20-079. In **The Golden Victory** [2007] AC 353, the owners accepted the charterer's renunciation in 2001 when the charterparty was not due to end until 2005. In 2003, the Second Gulf War began, and the charterer argued that damages should not be awarded for the period beyond that date since it would have exercised its right to cancel under a War Clause. The House of Lords agreed and assessed damages taking into account the known outbreak of war.

## D. Renunciation of the Agreement

23. If the Investors "unliterally terminate" the Agreement, this presumably involves an express notice to the Company and the provisional liquidators that the Investors would no longer perform under the Agreement. This is likely to be regarded as a renunciation.

24. I have not been provided with information which suggests that the Investor would be entitled to terminate pursuant to cl.8.1 or that the Company/provisional liquidators would consent to a termination (pursuant to cl.8.4). Nor have I been provided with information which would validate the renunciation. On that premise, I proceed on the basis that the renunciation is without any lawful or valid ground.

25. Strictly speaking, there appears to be 2 renunciations.

    25.1 First, there is renunciation during performance, the relevant obligations being those under cl.3.2, which are obligations that the Investors are currently due to perform.

    25.2 Second, there is renunciation before performance is due, the relevant obligations being the contingent obligations to complete under cl.4. This would give rise to a claim based on anticipatory breach should the Company choose to accept the breach.

25.3 Suffice it to say, whilst the Company would be free to formulate the claim under either limb or to include both limbs, there could not be double recovery.

26. For completeness, in assessing damages, the Court would have to consider, *inter alia*, (i) whether even if the Investors had not renounced the Agreement, the conditions precedent under cl.3 would have been satisfied; and (ii) whether the Company/provisional liquidators would have been able to comply with the obligations under cl.4 and Sch.4 (otherwise the Investors would be under no obligation to complete: cl.4.4). See §22 above. These contingencies might have a significant impact on the damages that may be recovered.

27. In all, there is a litigation risk that the Investors would be sued for breach of contract in the event that they renounce the Agreement before the Long Stop Date.

## E. Allowing the Agreement to lapse through inaction

28. The first question is whether the inaction would be regarded as a renunciation or disablement: see §§18-21 above.

29. Whether or not inaction may amount to renunciation is fact sensitive: §19 above. I am not privy to all the relevant circumstances (e.g. I have no instructions on the course of dealing between the parties, so as to assess whether inaction at this stage can be said to be silence overlaid with a consistent course of conduct that speaks of "maintained recalcitrance"). However, what may be said is that given the Investors' obligations to provide assistance as is reasonably required (cl.3.2.1)

and to use reasonable endeavours to ensure satisfaction of the conditions precedent (cl.3.2.2), if the Company/provisional liquidators had requested the Investors' assistance/performance under these terms but those requests have been repeatedly ignored, it is possible for a case on renunciation to be made good.

30. Again, it appears to me that if renunciation may be established by virtue of inaction in this instance, there are potentially 2 renunciations. First, there is renunciation during performance, the relevant "performance" being the obligations under cl.3.2. Second, there is renunciation before performance is due, the relevant obligation being the contingent obligations to complete under cl.4. Alternatively, the inaction may be regarded as a disablement, viz by virtue of the inaction, the Investors are preventing the satisfaction of the conditions precedent and consequently the obligations to complete under cl.4 from arising.

31. For present purposes, it seems immaterial whether the breach is anticipatory or actual.[6] The pertinent question is whether there would be a risk of litigation if the Investors resort to inaction until the Long Stop Date. Whilst the fact-sensitive nature of this potential claim and the materials at the present stage do not necessarily allow all of its aspects to be fully explored, the risk that such a claim would be brought cannot be precluded.

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6 This would not appear to matter even for quantum. If the breach is actual, in assessing damages, the court asks what would have happened had there been no breach – this would probably require a consideration of the factors set out in §27.1. If the breach is anticipatory, even if the Company/provisional liquidators brings a claim for damages forthwith by accepting the breach, the court would still have to consider the events occurring between date of acceptance and the completion date (assuming this is the relevant performance due), which again are likely to involve the factors set out in §27.1.

## F. Assumptions and Qualifications

32. For the avoidance of doubt, I have assumed without further enquiry:

32.1 the documents provided to me are complete and up-to-date;

32.2 all the factual representations contained in the instructions and the papers attached thereto are true, accurate and complete; and

32.3 none of the views expressed herein would be affected by the law of any jurisdiction outside Hong Kong.

33. Further, this Opinion is subject to the following qualifications:

33.1 All the views expressed herein are based on the laws of Hong Kong in force as at the date hereof and currently applied by the Hong Kong courts. I have made no investigation into, and I have rendered no opinion (whether express or implied) on, the laws of any jurisdiction other than Hong Kong.

33.2 This Opinion is prepared on the basis that there has been no change in any of the facts stated or assumed above.

33.3 I shall have no obligation to notify any of the readers of this Opinion of any change in Hong Kong laws or its application after the date hereof.

33.4 Insofar as any views expressed herein may express or be regarded as expressing an opinion as to future events or matters, such views are based solely on existing law in force as at the date hereof and existing facts and documents of which I have knowledge.

33.5 This Opinion is strictly limited to matters addressed herein and does not extend and should not be construed as extending by implication to any other matter.

34. I will be pleased to be of further assistance if required.

## G. Postscript

35. A version of this Opinion containing the above paragraphs was signed and produced on 20.3.2019.

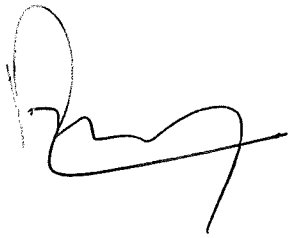
36. On 20.11.2019, I have been provided with a revised version of the Agreement as amended on 31.10.2019 ("**Revised Agreement**"). I have been asked to update or revise the above analysis insofar as necessary.

37. I am given to understand that there have been 2 primary changes in the Revised Agreement (as compared to the version dated 26.11.2018). They relate to (i) the Long Stop Date, which is now stipulated to be 31.1.2020 under cl.1.1 as opposed to 30.4.2019 (subject to further agreement in writing), and (ii) the structure of the Share Offer, which is less relevant for present purposes.

38. I have reviewed the relevant clauses in the Revised Agreement. The clauses in the Agreement to which I have referred in my analysis above appear to have remained materially the same in the Revised Agreement.

39. In the circumstances, no change is required to my analysis above, save that all references to "Long Stop Date" should now be read as referring to 31.1.2020 as opposed to 30.4.2019.

22 November 2019



Danny Tang

Temple Chambers