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Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Cases between the HKSAR and Macao SAR

Joseph Kwan and Matthew Tam

An official channel has been established between Hong Kong and Macao, with effect from 1 August 2020, whereby the Courts of Hong Kong and Macao may entrust each other with the service of judicial documents in civil and commercial proceedings. The Rules of High Court and Rules of District Court have been amended to give effect to the Arrangement.

The key provisions to note in relation to the Arrangement include:

1. **Scope of civil and commercial cases:** The Arrangement applies to civil and commercial cases, including claims within the jurisdiction of the Labour Tribunal in Hong Kong and civil labour cases in Macao.

2. **Type of judicial documents (Hong Kong):** For Hong Kong, judicial documents that may be served in Macao under the Arrangement include, but are not limited to, duplicate copies of originating process and notice of appeal, summons, pleading, affidavit, judgment, decision, ruling, notice, court order and certificate of service.

3. **Type of judicial documents (Macao):** For Macao, judicial documents that may be served in Hong Kong under the Arrangement include, but are not limited to, duplicate copies of originating process, answer, counterclaim and notice of motion of appeal, statement, defence, declaration of objections, statement of objections, application, withdrawal of action, admission of claim, settlement, inventory of property, list of property, proposal for settlement, creditor agreement, summons, notice, judge's instructions, court order, court's leave, judgment, ruling of full bench and certificate of service.

4. **Authorities handling requests:** In Hong Kong, requests for service are made to the High Court and executed by the Court of First Instance. In Macao, such requests are made to Macau's Court of Final Appeal.

5. **Letter of request:** When requesting service, the requesting party must produce a letter of request in Chinese affixed with its official seal and setting out (i) the title of the requesting party, (ii) the name or title and detailed address of the party to be served; (iii) the nature of the case involved, (iv) the types of judicial documents

attached to it and (v) any particular method of service required or matters requiring special attention. If the judicial documents attached are not in Chinese, they must be accompanied by a Chinese translation.

6. **Method of service:** The court of the requested party will receive and effect service in accordance with the law of its jurisdiction, and may carry out the particular method of service required by the requesting party, provided that it is not considered to be in breach of the law of the jurisdiction of the requested party.

7. **Timely execution and certificate of service:** The court of the requested party must endeavour to complete the requested matter within two months from the date of receipt of the letter of request. After effecting service, it must issue a certificate of service affixed with its official seal specifying the method, place and date of service, and identity of the person who accepted service. If service cannot be effected, the reason for non-service or reason and date of refusal (if applicable) must be stated.

8. **Immunity from liability over contents:** The requested party will have no legal responsibility for the contents of, and any consequences arising from, the judicial documents requested to be served.

9. **Expenses of service:** The requesting party is not required to pay for the expenses of service incurred by the requested party, except expenses for the particular method of service required in the letter of request.

Prior to the Arrangement, litigants in Hong Kong wishing to serve judicial documents in Macao had to arrange service through private channels, for example, by engaging lawyers in Macao to effect service. This was considered unsatisfactory, as such service could be subject to legal challenge before the court. The Arrangement is welcomed, as it should provide a much more certain and efficient mode of service of judicial documents between Hong Kong and Macao.

Section 30A(6) of the Bankruptcy Ordinance (Cap.6): Care to be exercised by creditors when making objections to automatic discharge from bankruptcy

Cathy Wu

In the recent case of *Re Shum Tung Lam formerly known as Shum Wan Man* [2020] HKCFI 1720, the Court of First Instance was asked to clarify the requirements under section 30A(6) of the Bankruptcy Ordinance (Cap. 6) (BO) which governs objections made by creditors or trustees to the automatic discharge of a bankrupt from bankruptcy. The case acts as a useful reminder to creditors and trustees to act prudently if they wish to object to a bankrupt's automatic discharge from bankruptcy to avoid such applications being dismissed by the Court for being made out of time or on the basis of irregularities found in the application itself.

Background

Shum was a first time bankrupt and was adjudged bankrupt on 15 July 2015. According to sections 30A(1) and 2(a) of the BO, Shum would be discharged from bankruptcy automatically on 15 July 2019.

On 9 July 2019, 6 days before Shum's automatic discharge, one of Shum's creditors (Applicant) issued a summons to object to the automatic discharge (Objection Summons). The Court made an interim order suspending the running of the relevant period, pending determination of the Objection Summons.

On 10 October 2019, one day before the hearing of the Objection Summons, the Applicant took out another summons to amend the Objection Summons (Amendment Summons). On 14 January 2020, the Applicant took out a further summons seeking a time extension for the Applicant to make the objection application by the Objection Summons (Time Summons).

For reasons further explained below, whilst the Court decided that it had jurisdiction to deal with the Objection Summons (i.e. Preliminary Issue) despite it being issued out of time, the Court found that the Objection Summons was defective in substance and refused to exercise its discretion in the Applicant's favour. The Court also dismissed the Amendment Summons and Time Summons.

The Court ordered that each party bear its own costs on the basis that Shum failed on the Preliminary Issue but partly succeeded in obtaining discharge of the interim order and the Applicant failed in all its applications.

Time limit for creditors to issue the Objection Summons

Section 30A(6) of the BO provides that:-

> "*Where the trustee or a creditor objects to the discharge of a bankrupt, he shall:*
>
> *(a) notify the court; and*
>
> *(b) in the case of a creditor, also notify the trustee,*
>
> *not less than 14 days before the end of the relevant period, stating the grounds of his objection and applying for an order under subsection (3).*"

The relevant period in this case is the period of four years beginning with the commencement of Shum's bankruptcy. Objections to Shum's automatic discharge from bankruptcy should therefore have been made on or before 1 July 2019.

Whilst the Applicant filed the prescribed Form 82 with the Court on 17 June 2019 giving notice of its intention to object to Shum's bankruptcy, the Applicant did not issue the Objection Summons until 9 July 2019.

The Court considered the wording of section 30A(6) of the BO and ruled that the draftsman's intention when drafting this section was that the 14 day period requirement should apply to both (a) notification of objection as well as (b) application for an order. This means that the Applicant was required under section 30A(6) to file Form 82 as well as issue its Objection Summons on or before 1 July 2019. Accordingly, the Court found that the Objection Summons was filed 8 days late.

Can the Court extend the time for issuance of the Objection Summons?

Shum contended that given that the Objection Summons was issued out of time, the Court did not have jurisdiction to extend the time for the Applicant to take out the Objection Summons.

The Court however invoked section 100(4) of the BO, which gives the Court discretionary power to extend the time for doing any act or thing which is limited by the BO and ruled that the Court did have jurisdiction to deal with the Objection Summons.

Irregularities in the Objection Summons

The Court however noted that different grounds of objections were stated in the Applicant's Form 82 and the Objection Summons.

The Court held that a bankrupt should not be caught by surprise in dealing with an objection against his discharge from bankruptcy and that it is only logical for the grounds stated in both the Form 82 notice and the Objection Summons to be the same, as section 30A(6) of the BO requires both steps to be undertaken at the same time.

Whilst Counsel for the Applicant tried to argue that section 124(1) of the BO provides that formal defects and irregularities may not invalidate proceedings, the Court ruled that relying on a different ground in the Objection Summons which was not referred to in the Form 82 notice was not a formal defect but a defect in substance.

The Court further went on to state that but for the interim order, Shum would have been discharged from bankruptcy on 15 July 2019. The Amendment Summons and Time Summons were not taken out until 10 October 2019 and 14 January 2020. An interim order was a measure to preserve the status quo pending determination of the issues, but not to allow more time for a party to decide how he may wish to formulate his case.

Amendment Summons

Absent any justification or explanation by the Applicant for issuing the Amendment Summons after a date when Shum should have been discharged from bankruptcy and noting that different grounds of objections were stated in the Applicant's Form 82 notice and the Objection Summons, the Court dismissed the Applicant's Amendment Summons.

Time Summons

Counsel for the Applicant attempted to rely on the fact that the Applicant was not informed by the Trustee until 20 June 2019 that the Trustee had decided not to object to the discharge of Shum from bankruptcy, and as such, the Applicant was left with less than one month to prepare its objection application.

The Court took the view that the Applicant and Trustee were relying on different grounds of objection and the Applicant would have to take out a separate objection application in any event. The Court also did not see why Shum should be held responsible for the Trustees' handling of the case and dismissed the Applicant's Time Summons.

Conclusion

This recent case sets out a useful checklist of the things which a creditor needs to bear in mind when making an application to object to the automatic discharge of a bankrupt under section 30A(6) of the BO, to avoid the application being dismissed by the Court on the basis of irregularities contained in the application. These matters include the following:-

1. The notice of intention to object and the application for objection both need to (a) be made not less than 14 days before the end of the relevant period and (b) rely on the same grounds of objection.

2. A creditor's right to object to the automatic discharge of the bankrupt is separate and independent from that of a trustee in bankruptcy. A creditor should not wait and rely on the trustee to make an application only to find him/herself with insufficient time to prepare an objection application in the event that the trustee decides not to make one. As shown in this case, this reason will not be entertained by the Court as a valid ground for granting a time extension for a creditor to put forward his/her objection application.

Court of Appeal reaffirms three core requirements to wind up foreign company

Vivien Wong

Under section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), the Court can exercise its discretion to wind up a foreign-incorporated company. A recent case reaffirms the three core requirements necessary to enable the court to exercise that discretion.

The Court of Final Appeal confirmed in *Kam Leung Siu Kwan v Kam Kwan Lai (2015) 18 HKCFAR 501* (*Kam v Kam*) that there are three "core requirements" which must be satisfied before the Court will exercise its statutory jurisdiction to wind-up a foreign-incorporated company, namely:-

1. there has to be a sufficient connection with Hong Kong, but this does not necessarily have to consist of the presence of assets within the jurisdiction;

2. there must be a reasonable possibility that the winding-up order will benefit those applying for it; and

3. the court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

Previously, we reported on the Court of First Instance judgment in *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd* (HCMP 3060/2016) in which the Court gave an extensive analysis on what constitutes a sufficient benefit under the second core requirement.

The Court of First Instance decision was appealed and here, we look at the judgment recently handed down by the Court of Appeal.

Court of First Instance decision

At first instance, the Court took the view that the leverage created by the prospect of a winding-up petition or the appointment of a liquidator and the steps that a liquidator may take to recover assets would constitute reasonable prospects of benefit for the petitioner, i.e. Arjowiggins in this case, such as to satisfy the second core requirement.

The Court went on to hold that even if the leverage did not constitute a reasonable prospect of benefit to Arjowiggins arising from the making of a winding-up order, the second core requirement could be moderated, i.e. dispensed with, where justified by the circumstances of the case and that the present case was one in which moderation would have been justified.

On such basis, the Court dismissed Shandong Chenming's application for a declaration that Arjowiggins would not be able to satisfy the three core requirements for the Court to exercise its jurisdiction to wind up Shandong Chenming.

Court of Appeal decision (CACV 158/2017)

Shandong Chenming contended that the judge at first instance had been wrong to conclude that the leverage created by the prospect of a winding-up petition could satisfy the second core requirement and also wrong to conclude that the second core requirement was capable of moderation, and in any event, the present circumstances did not call for moderation.

Could the second core requirement be moderated?

The Court of Appeal revisited the propositions in the Court of Final Appeal decision in *Kam v Kam* and Court of Appeal decision, *Re China Medical Technologies* [2018] HKCA 111, and confirmed that whilst the third core requirement might sometimes be dispensed with in appropriate circumstances, the second core requirement was always essential.

The Court considered that in the enquiry as to whether the second core requirement was met, there is some flexibility as to the nature or extent of the likely benefit to the petitioner as long as the benefit can be said to be a real possibility, rather than a merely theoretical one.

In light of its conclusion, there was no need for the Court to decide whether the present case was an appropriate case to moderate the second core requirement.

Was the leverage created by the prospect of a winding-up order sufficient to satisfy the second core requirement?

The Court of Appeal went on to conclude that the judge at first instance had not erred in deciding that the leverage created by the prospect of a winding-up order was sufficient to satisfy the second core requirement.

There was no evidence to support Shandong Chenming's contention that Arjowiggins did not intend to seek the making of a winding-up order and was merely attempting to put pressure on Shandong Chengming to pay the arbitral award.

The Court of Appeal disagreed with Shandong Chenming's suggestion that it might be improper to exert pressure to pay by presenting a winding-up petition. It is only improper to seek to use a winding-up petition to pressure a company into payment of a *disputed* debt, the Court said. Where the debt is undisputed or indisputable, as in this case, the petitioner is entitled to present a winding-up petition *ex debito justitiae* and thus cannot be said to be acting improperly.

The Court also rejected Shandong Chenming's argument that the benefit available to a petitioner has to be one that also benefits all other creditors, as that proposition contradicts case authorities.

The Court of Appeal therefore concluded that there was a real possibility of benefit to Arjowiggins in the making of a winding-up order against Shandong Chenming and the appeal was dismissed.

Comment

This judgment reaffirms the three core requirements approved in *Kam v Kam* for the Hong Kong Courts to exercise their jurisdiction to wind up a foreign company under s.327 of Cap.32. It also clarifies that the second core requirement is an essential requirement, which cannot be moderated or dispensed with, whereas the third core requirement can be dispensed with in appropriate circumstances.

Further, the Court of Appeal confirmed that the leverage arising from *the prospect of* a winding-up order being made, is sufficient to satisfy the second core requirement. It further confirmed that it is not improper for a creditor to use the winding-up mechanism to exert pressure on a debtor for payment, so long as the debt is undisputed or indisputable.

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