



Re Dai Guoliang 2019 HKCFI 597 - A Tool to Bear in Mind in the Asset Recovery Toolbox

Author:

Norman Hau, Partner

In the very recent Judgment dated 28 February 2019 by Deputy High Court Judge Maurellet SC in *Re Dai Guoliang* [2019] HKCFI 597 (“Re Dai Guoliang”), the Hong Kong Court considered how its discretion to make a bankruptcy order should be exercised with respect to a foreigner. The Judgment covers helpful analysis on the approach the Court ought to take, which is highly relevant to litigators in recovery strategy planning going forward.

Background

In April 2018, Sino Pacific Global Multi-Strategy Fund (the “Petitioner”) filed a bankruptcy petition (the “Petition”) against a gentleman named Mr. Dai Guoliang (the “Debtor”) based on a guarantee executed by the Debtor in its favour. The debt in question was in excess of HK\$10 million.

There is no dispute over the existence of the debt. The Debtor opposes the bankruptcy petition on jurisdictional grounds only, namely the Debtor asserted that none of the jurisdictional gateways have been established apart from the “Personal Presence Gateway” (defined below), and that the Court should as a matter of discretion dismiss or stay the petition by reason of the Debtor’s lack of sufficient connection with Hong Kong.

Section 4 of the Bankruptcy Ordinance (Cap. 6) provides that a bankruptcy petition shall not be presented to the court unless the debtor:

- a) is domiciled in Hong Kong (the “Domicile Gateway”);
- b) is personally present in Hong Kong on the day on which the petition is presented (the “Personal Presence Gateway”); or
- c) at any time in the period of 3 years ending with that day;
 - i. has been ordinarily resident, or has had a place of residence, in Hong Kong (the “Ordinary Residence Gateway”); or
 - ii. has carried on business in Hong Kong (the “Business Gateway”).

Arguments

The Petitioner argued that all of the jurisdictional gateways, namely the Domicile Gateway, the Personal Presence Gateway, the Ordinary Residence Gateway, and the Business Gateway, applied. The Debtor argued that only the Personal Presence Gateway applied and the Court should exercise its discretion to dismiss or stay the Petition because the Debtor did not have a sufficient connection with Hong Kong.

The Debtor further sought to persuade the Court to approach the exercise of discretion to bankrupt a foreigner albeit one who was in the jurisdiction on the day the Petition was served, on the same basis as winding up an overseas company under Section 327 of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)* by applying so called the “three core requirements”, namely:

- 1) there must be a sufficient connection between the company and 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.

Detailed discussions on the basis for winding up such overseas companies can be found in the Court of Final Appeal Judgment in *Kam Leung Sui Kwan -v- Kam Kwai Lai (2015) 18 HKCFAR501*.

Decision

Deputy High Court Judge Maurellet SC declined to adopt the winding up approach in personal bankruptcy cases because he did not consider the adoption necessary, practical or apposite. He agreed that in certain cases, the Personal Presence Gateway would seem an exorbitant basis for asserting jurisdiction, for example, over a foreigner who would be in Hong Kong only as a tourist. However, the Debtor, a Hong Kong identity card holder and the former director and substantial shareholder of a company listed on the Stock Exchange of Hong Kong and with offices in Hong Kong agreed to guarantee that company's debts, with the guarantee using Hong Kong law as the governing law and jurisdiction clause, had a sufficient connection with Hong Kong. As the connection between the Debtor and Hong Kong was not tenuous or fleeting, the Court made a bankruptcy order solely based on the Personal Presence Gateway and did not consider other gateways.

Relevance

The sensible approach adopted by the Hong Kong Court should be welcomed. In particular, it facilitates cross-border litigation strategies against foreign individuals having real commercial connections with Hong Kong.

We have seen an increasing trend of cross-border insolvency issues arising out of personal bankruptcy matters in Hong Kong. Foreign entrepreneurs are keen to raise funds through Hong Kong's world class capital market platform. Against this background, it would be reasonable that the Court takes a liberal approach when it comes to exercise of bankruptcy jurisdiction over these foreign individuals, for instance, in situations involving default of personal guarantee or even Judgment debts. We consider that the Hong Kong Court strikes the right balance in *Re Dai Guoliang*.

Relevantly, we have recently acted for Hong Kong bankruptcy trustees in successfully obtained orders from the BVI Court in aid of the Hong Kong bankruptcy proceedings under Part XIX of the *Insolvency Act, 2003*, particularly against registered agents of BVI companies (which are believed to form part of the bankruptcy estate) requiring the registered agents to produce the entirety of their files including information concerning beneficial ownership of the companies they possessed. As expected, such information turned out to be the "missing piece of the puzzle" in verifying the ownership between the bankrupt and the underlying assets. It is observed that the BVI Court (like the Cayman Islands and Bermuda) is ready to assist foreign insolvency representatives in discharging their duties to the relevant foreign courts.

Litigators should bear in mind the liberal approach adopted by the Hong Kong Court in *Re Dai Guoliang* and the general readiness of the offshore courts to assist foreign insolvency practitioners in formulating effective recovery strategies in default scenario against the ultimate beneficial owners/founders, notwithstanding it can be argued that they are domiciled and resident outside Hong Kong.

AUTHOR:

NORMAN HAU
PARTNER
norman.hau@conyersdill.com
+852 2842 9548

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For further information please contact: media@conyersdill.com