

Insights

HONG KONG COURT CONFIRMED EXAMINATION ORDERS CAN BE SERVED ON OFFICERS OF CORPORATE JUDGMENT DEBTORS OUT OF JURISDICTION

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When seeking to enforce a judgment against a company, one part of the enforcement process is to compel the officers of the company to submit to formal questioning about the financial affairs of the company. But what to do if the company officers are located overseas?

The Hong Kong Court of First Instance considered this issue in the recent case of *Changfeng Shipping Holdings Ltd v. Sinoriches Enterprises Co., Ltd* (HCCT 59/2019, [2020] HKCFI 2703, 1 December 2020).

In *Changfeng*, the HK Court confirmed that the court has jurisdiction to order the service of an examination order on officers of a corporate judgment debtor out of jurisdiction, when there is a close connection between the officer's conduct in relation to the action from which the judgment debt arose and the subject matter of that action, and where it would be unjust not to exercise the jurisdiction.

Brief facts

The Applicant and Respondent were parties to a charterparty for the hire of a vessel. Disputes arose between the parties and these were referred to arbitration in London. The arbitrator issued an award in favour of the Applicant for over US\$1 million plus interest and costs.

On 31 October 2019, the Applicant obtained leave under order 73 rule 10(1) of the Rules of High Court (Cap. 4A) to enforce the arbitral award against the Respondent as a judgment of the Hong Kong court. The Applicant served the enforcement order and, subsequently, also served a statutory demand on the Respondent. However, the Respondent ignored the arbitral proceedings, did not satisfy the arbitral award or the statutory demand, and did not take any part in the Hong Kong enforcement proceedings.

The two natural person directors of the Respondent appeared to be residents in Dalian in Mainland China. On 9 March 2020, the Applicant made an *ex parte* application for (a) leave to examine the

two natural person directors of the Respondent pursuant to order 48 rule 1 and (b) leave to serve the examination order on the two directors out of Hong Kong, pursuant to order 11 rule 9(4).

On 14 August 2020, a Court Master (a) granted the examination order but (b) refused leave to serve the examination order out of the jurisdiction.

On 1 December 2020, Deputy High Court Judge To allowed the Applicant's appeal against the order of the Master.

Issues

The issues raised in the appeal were:-

1. whether the court has jurisdiction to make examination orders under order 48 rule 1 against an officer of a corporate judgment debtor who is resident outside Hong Kong and is not a party to the action from which the debt arose; and
2. if the court does have such jurisdiction, how the discretion as to whether to grant leave to serve such an order out of the jurisdiction under order 11 rule 9(4) is to be exercised.

Issue 1: The court's jurisdiction to issue an examination order

Order 48 rule 1 provides expressly that an examination order may be served on officers of a corporate debtor who are not parties to the action from which the judgment debt arose.

Whether order 48 rule 1 has extra-territorial effect (i.e. whether the court has jurisdiction over officers of a judgment debtor resident abroad) is a matter of construction of the rule.

It is trite that there is a presumption against extra-territoriality, in statutory interpretation. However, in the court's views, the following considerations were sufficiently strong to displace the presumption against extra-territoriality:-

- There is nothing in the wording of the rule to suggest that the rule is applicable only to officers of the judgment debtor within the jurisdiction.
- Section 19 of the Interpretation and General Clauses Ordinance (Cap. 1) provides that "*[a]n Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit*".
- The underlying purpose of the rule is to enable judgment creditors to obtain information about a judgment debtor's finances and assets which could be made available to satisfy the underlying judgment. This purpose only can be satisfied if the rule applies to officers of the judgment debtor wherever they may be, both within and outside the jurisdiction.

- With Hong Kong's prime position as an international commercial centre, many foreign or international corporations are carrying on business in Hong Kong with officers resident abroad.

As a result, the court found that it did have jurisdiction to issue an examination order against officers of a corporate debtor who are resident inside as well as outside Hong Kong.

Issue 2: Service of examination orders

Order 11 rule 9(4) provides that service out of jurisdiction of any summons is permissible only with leave of the court. (There are some limited types of proceedings in which the writ, originating summons, motion or petition may be served out of the jurisdiction without leave, but that was not the situation here.)

The court noted that the statutory regime in Singapore in relation to debtor examination orders and service out of the jurisdiction is very similar to that in Hong Kong.

The Singapore Court of Appeal decision in *Burgundy Global Exploration Corp v Transocean Offshore Int'l Ventures Ltd* [2014] SGCA 24 is a decision about service of an examination order out of the jurisdiction under a similar regime from the highest court in Singapore.

The court in *Changfeng* regarded *Burgundy Global* as a persuasive authority.

The court provided a helpful summary of the applicable legal principles under Order 11 rule 9(4):-

1. The officer's knowledge of the finances of the corporate debtor is a prerequisite for leave to serve out under Order 11 rule 9.
2. The discretion to order service out may be exercised if there is a close connection between the officer's conduct in relation to the action from which the judgment debt arose and the subject matter of that action, which makes it unjust not to exercise the jurisdiction.

The court formulated the close connection test along the lines of the dicta in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer (No 2)* [2000] 1 WLR 603. A close connection is created if the officer's conduct is such as to make it unjust not to lift the corporate veil of the judgment debtor or not to bypass the principle of corporate personality and to allow the corporate debtor to withhold information about its finances so as to frustrate the execution of the judgment debt. *Prima facie*, a close connection is created by the conduct of the sole or substantial shareholder; the sole director or officer who is the alter ego or controlling mind of the corporate debtor or has instituted, controlled or financed the litigation; and officers who have played a key role in the events giving rise to the judgment creditor's successful claim should be required to provide such information.

3. Fault, negligence or blameworthiness are not at all relevant. If there are such features in the conduct of the officer, it is all the more appropriate for the discretion to be exercised.

4. The burden of proof of close connection and knowledge is on the person seeking to examine the officer. As the existence or otherwise of a close connection and knowledge are matters solely within the knowledge of the corporate debtor, direct evidence and documentary evidence may not be available to the judgment creditor. In the majority of cases, proof has to be by inference. The court has to draw inferences with a sense of realism appropriate to the circumstances.
5. The discretion to order service out should be exercised with extreme caution but there should be no bias against service out.
6. The application for leave to serve out consists of a two stage process.
 - (a) The burden on the applicant at the *ex parte* stage is only to make out a good arguable case on jurisdiction. The applicant needs not make out a “cast iron” case. Subject to the need for caution in the exercise of this long arm jurisdiction, the court will take a broad brush approach and almost always will grant leave to serve out unless there is a serious or obvious flaw in the application.
 - (b) If the service is challenged at the *inter parte* stage, the court will re-consider the matter afresh and weigh the evidence of both parties. If not satisfied that the officer has knowledge of the finances of the judgment debtor and that the close connection test is met, the *ex parte* leave will be set aside.

The court in *Changfeng* differed from the cautious approach of the Singapore Court of Appeal in *Burgundy Global* that the discretion should be exercised sparingly. The court was of the view that an unnecessarily restrictive approach would serve only and unhelpfully to frustrate the reasonable expectation of the international commercial communities towards Hong Kong as an international commercial centre and would damage Hong Kong’s image. As such, the court should adopt a pragmatic approach in the exercise of the discretion.

The result of the Application in Changfeng

The judgment debtor / Respondent was a three-person company with only HK\$10,000 authorised capital with two natural person directors, but carrying on a very substantial business. The court drew an inference that the directors constituted the controlling mind of the Respondent and were the financial backers of the Respondent, and therefore they had knowledge of the Respondent’s finances.

Upon examination of the evidence, the court noted that one of the natural person directors were closely involved in both the charterparty and the Respondent’s finances. The court noted that the second natural person director was discharging the function of the Respondent at the Respondent’s operation address in Hong Kong. Although the evidence of involvement of the second director seemed “very flimsy”, the court said it did not matter because of the inference drawn.

The court could not find any serious or obvious flaw in the Applicant's *ex parte* application. Taking a broad brush approach, the court was satisfied that the prerequisite knowledge of the Respondent's finances and close connection of their conduct with the underlying judgment debt had been established against both directors of the Respondent. The court granted leave to serve the examination orders on the two directors out of jurisdiction.

BCLP comments

Courts in Hong Kong have a strong track record of enforcing arbitral awards. The *Changfeng case* affirmed this pro-enforcement approach by confirming that an examination order against officers of a corporate judgment debtor can be served out of jurisdiction in appropriate cases. The summary of legal principles applicable to the service of an examination order out of the jurisdiction provides clear guidance to similar cases in the future. Officers of a corporate judgment debtor are on notice that they cannot escape from involvement in the enforcement of an arbitral award simply by fleeing the jurisdiction.

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