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What's good for the goose – Hong Kong Court revisits iconic insolvency decision

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In a recent judgment, the Hong Kong Court reiterated the principles outlined in *Kam Leung Sui Kwan v. Kam Kwan Lai* [2015] 18 HKCFAR 501 (Yung Kee), the case concerning the famous roast-goose restaurant in the heart of Hong Kong's Central district, when determining whether to exercise its discretion to wind up a foreign-incorporated company. In this case, the court also refused to grant a stay of the petition in favor of arbitration.

Florida escape

China City Construction (International) Co. Limited (China City) and Champ Prestige International Limited (Champ Prestige) entered into a joint venture, through the investment vehicle Dingway Investment Limited (the company).

The purpose of the joint venture was to develop land in Miami, Florida. China City and Champ Prestige had entered into various documents in relation to the land development project, including a sale and purchase agreement pursuant to which China City transferred 45 percent of the company's issued shares to Champ Prestige. The sale and purchase agreement contained a put option in favour of Champ Prestige, and also an arbitration clause which provided for any disputes to be resolved by the Hong Kong International Arbitration Centre.

In 2016, China City began to experience financial difficulty, with China Prestige subsequently exercising the put option. The parties then entered into a framework agreement in order to resolve the financial issues. It is worth noting that the framework agreement did not contain an arbitration clause.

Following the alleged failure of China City to meet its financing obligations under the various documents, Champ Prestige issued a petition for the winding up of the company, on the basis that the company was unable to progress its intended business purpose (i.e., the land development in Florida). China City applied to strike out the winding-up petition on the grounds that the company is a British Virgin Islands-incorporated entity and the petition failed to satisfy or properly plead the conditions necessary in order for the Hong Kong Court to exercise its discretion to wind up a foreign incorporated company.

Three principles

The three principles outlined in Yung Kee for the winding up of a foreign company in Hong Kong are (i) there must be a sufficient connection with Hong Kong, but not necessarily through the

presence of assets in the jurisdiction; (ii) a reasonable possibility that the winding-up order will benefit the applicants; and (iii) the court can exercise jurisdiction over one or more persons in the distribution of the company's assets, or alternatively that the dispute be referred to arbitration.

China City argued that the company is a foreign-incorporated entity with its main business and assets located in Florida and, as such, there is insufficient connection with Hong Kong. It was noted in Yung Kee that where there is a dispute between shareholders (as was the case here), the presence of the shareholders *"in the jurisdiction is highly relevant and will usually be the most important single factor*."

Therefore, applying the principles from Yung Kee in general and common sense terms, the court considered whether the management and ownership of the company had sufficient connection with Hong Kong. It was determined that the management and ownership were more closely connected with Hong Kong than the British Virgin Islands or United States.

The court outlined the following points as factors supporting this conclusion: (i) four of the five directors of the company are resident in Hong Kong; (ii) China City is a Hong Kong-incorporated company; (iii) Champ Prestige is owned by a Hong Kong-listed company; and (iv) the land development project in Miami was deemed dormant.

As such, the Hong Kong Court found that the requirements were met, a sufficient connection with Hong Kong had been established and that it had the requisite discretion to wind up the foreign incorporated company.

Application for stay

An application was also made for a stay to arbitration. When considering this application, the Honourable Mr. Justice Harris referred to his previous decision in *Re Quicksilver Glorious Sun JV* [2014] 4 HKLRD 759 in which the correct approach for determining such an application was outlined; one should first identify the substance of the dispute and then ask whether or not it is covered by an arbitration agreement.

A number of different complaints were raised by Champ Prestige, including China City's alleged breach of the various documents and the breakdown of the relationship between the parties. Some of these complaints were covered by the arbitration agreements, whilst others were not.

The court noted that in some instances it is appropriate to hive off part of a dispute and refer it to arbitration, whilst the remaining disputes are stayed. However, Judge Harris considered these complaints to form part of one continuing narrative and as such it would not be appropriate to refer some to arbitration and the application was refused.

In such circumstances, the court advised that in order to grant a stay of a petition where only some of the disputes are subject to an arbitration clause, it must be clear and obvious that such dispute(s) would be central and determinative of the factual issues raised by the petition.

This judgment demonstrates the pragmatic approach that the Hong Kong courts are continuing to take when it comes to winding up overseas entities. Provided that a sufficient connection with Hong Kong can be established, the courts will be willing to exercise their discretion to make a winding up order. This judgment has also confirmed the importance of the shareholders and their presence in the jurisdiction when attempting to prove the all-important connection with Hong Kong.

Authors

Jonathan Leitch
Partner, Hong Kong
T +852 2840 5990
jonathan.leitch@hoganlovells.com

Nigel Sharman
Knowledge Lawyer, Hong Kong
T +852 2840 5636
nigel.sharman@hoganlovells.com

Contacts

Chris Dobby
Partner, Hong Kong
T +852 2840 5629
chris.dobby@hoganlovells.com

Mark Lin
Partner, Hong Kong
T +852 2840 5091
mark.lin@hoganlovells.com

Antonia Croke
Partner, London
T +852 2840 5092
antonia.croke@hoganlovells.com

Jonathan Leitch
Partner, Hong Kong
T +852 2840 5990
jonthan.leitch@hoganlovells.com

Byron Phillips
Senior Associate, Hong Kong
T +852 2840 5960
byron.phillips@hoganlovells.com

Karen Chan
Senior Associate, Hong Kong
T +852 2219 0888
karen.chan@hoganlovells.com

Nigel Sharman
Knowledge Lawyer, Hong Kong
T +852 2840 5637
nigel.sharman@hoganlovells.com

www.hoganlovells.com

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