

Cross border insolvency – The three core requirements post Yung Kee

跨境破产法 – 镛记案后的三项核心要求



Introduction

In two recent judgments, the Companies Court and the Court of Appeal have considered the Court's power to wind up foreign companies in Hong Kong. These are the first two reported winding up cases considering the three core requirements¹ necessary to enliven Hong Kong insolvency jurisdiction following the Court of Final Appeal's judgment in the Yung Kee case². The cases concern foreign companies not honouring judgment debts and arbitral awards, and then challenging the jurisdiction of the Hong Kong Court to wind them up.

简介

在近期的两例判决中，公司法庭和上诉法庭审视了法庭对在港外国公司进行清盘的权力。这是在终审法庭就镛记案作出判决后，首两个考虑三项核心要求³的清盘案件判决，令香港破产法的发展更有趣味⁴。这些案件涉及外国公司没有履行判决债项和仲裁裁决，继而反对香港法庭具有把它们清盘之司法管辖权。

¹ As summarised by The Hon Kwan J (as she then was) in *Re Beauty China Holdings Ltd* [2009] 6 HKC 351 and approved in the Yung Kee case:

- (1) There had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;
- (2) There must be a reasonable possibility that the winding up order would 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.

² *Kam Leung Siu Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501

³ 由当时的关淑馨法官于妍华控股有限公司的案件[2009]6 HKC 31 中总结，并在镛记案件中获认可：

- (1) 与香港有充分联系，但并不必然需要在辖区内有资产；
- (2) 清盘令必须有合理的可能性有利于申请该令的债权人；以及
- (3) 法庭在分配公司资产过程中必须能够对一名或多名人士行使司法管辖权。

⁴ *甘琨胜遗产管理人 诉 甘琨礼* (2015) 18 HKCFAR 501

Penta Investment Advisers Limited v Allied Weli Development Limited - CACV 58 of 2016 (date of judgment 11 July 2017)

Background

Allied Weli Development Limited (“Allied Weli”) is a BVI company registered as a non-Hong Kong company in 2002 with its principal place of business in Hong Kong. Dispute arose out of a deed of guarantee (the “Deed”) entered into between Allied Weli and Penta Investment Advisers Limited (“Penta”). In 2014, Penta obtained a Hong Kong judgment against Allied Weli. Allied Weli’s appeal against the judgment to the Court of Appeal and its application for leave to appeal to the Court of Final Appeal were both dismissed. On 24 July 2015, Penta issued a statutory demand against Allied Weli which was not satisfied, followed by a winding up petition.

On 6 August 2015, Allied Weli changed its management and moved its place of registration from Hong Kong to the Marshall Islands. Thereafter, the management and business were said to be conducted from Taiwan and the Marshall Islands rather than Hong Kong. When the petition was heard by Harris J, the only defence raised was one of jurisdiction saying that Allied Weli no longer had any connection to Hong Kong. This was (not surprisingly) rejected out of hand by Harris J in his short judgment dated 22 February 2016. He held that Allied Weli should be wound up on insolvency grounds so that its affairs could be thoroughly investigated by liquidators appointed by the Court.

Penta Investment Advisers Limited 诉 Allied Weli Development Limited - CACV 58 of 2016 (判决日期 2017 年 7 月 11 日)

背景

Allied Weli Development Limited (下称“**Allied Weli**”)是一家 BVI (英属维尔京群岛) 公司，于 2002 年注册为一家非香港公司，主要营业地点位于香港。争议源于 **Allied Weli** 和 **Penta Investment Advisers Limited** (下称“**Penta**”) 之间订立的一份担保契约(下称“**契约**”)。2014 年，**Penta** 获得香港法庭宣告 **Allied Weli** 败诉之判决。**Allied Weli** 就该判决向上诉法庭提出之上诉，以及向终审法庭提出的上诉许可申请均被驳回。2015 年 7 月 24 日，**Penta** 向 **Allied Weli** 发出一份法定要求偿债书，有关偿债书未获履行，随后 **Penta** 提出了清盘呈请。

2015 年 8 月 6 日，**Allied Weli** 变更了其公司管理，并将注册地从香港迁移至马绍尔群岛。此后，公司管理和业务据称是在台湾和马绍尔群岛进行，而非在香港。当夏利士法官审理该呈请时，公司提出的唯一抗辩是司法管辖权，辩称 **Allied Weli** 不再与香港有任何联系。这个抗辩理由(不出所料)被夏利士法官果断地在 2016 年 2 月 22 日的简短判决中驳回。他裁定 **Allied Weli** 应当依据支不抵债的理由被清盘，以便由法庭指定的清盘人对其事务进行全面的调查。

The appeal

Allied Weli raised the following three grounds of appeal, all of which were rejected by the Court of Appeal:

- (1) Harris J relied on a historical rather than present connection to Hong Kong to establish a sufficient connection between the company and Hong Kong, and the need to investigate the company's affairs cannot be relied upon as the only ground for winding up;
- (2) Because the Hong Kong Court may render assistance to foreign liquidators, the discretion to wind up foreign companies should no longer be exercised; and
- (3) The winding up will bring no benefit to other creditors within the jurisdiction besides the petitioner.

Sufficient connection

The Court of Appeal held that once a sufficient connection to Hong Kong is established, local jurisdiction is established even after the "original" connecting factors cease to exist⁵. The Court of Appeal found that there was a sufficient connection between Allied Weli and Hong Kong because:

- (1) Allied Weli had its principal place of business in Hong Kong until its recent move to the Marshall Islands. Also, its past directors and company secretary were based and resided in Hong Kong.
- (2) Allied Weli's ultimate parent company is a listed company in Hong Kong, principally engaged in the Hong Kong financial services sector.
- (3) Allied Weli has more than 20 wholly-owned subsidiaries which are either incorporated in Hong Kong or have their principal place of operation in Hong Kong. Officers of these subsidiaries also reside in Hong Kong.
- (4) The Deed underpinning the subject debt is governed by Hong Kong law and provides for the non-exclusive jurisdiction of the Hong Kong Courts.

⁵ Agreeing with the decision of Nourse J in *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43

上诉

Allied Weli 提出以下三大上诉理由，均被上诉法庭驳回：

- (1) 夏利士法官在确立公司和香港之间存在充分联系时依据了历史性而非当前与香港的联系，而且调查公司事务的需要性不得作为把公司清盘的唯一理由；
- (2) 由于香港法庭可以向外国清盘人提供协助，故此不应行使清盘外国公司的酌情权；以及
- (3) 除了呈请人外，把公司清盘不会对辖区内其他债权人带来任何好处。

充分联系

上诉法庭裁定，一旦确立公司与香港存在充分的联系，及后即使“原有”联系因素消失，本地的司法管辖权仍可确立⁶。上诉法庭裁定 Allied Weli 和香港之间存在充分的联系，理由如下：

- (1) Allied Weli 的主要营业地点位于香港，直至近期才迁移至马绍尔群岛。同样，其过去的董事和公司秘书均在香港工作及居住。
- (2) Allied Weli 的最终母公司是一家香港上市公司，主要从事香港金融服务领域。
- (3) Allied Weli 拥有 20 多家全资子公司，这些子公司不是在香港成立，就是以香港作为主要营业地点。这些子公司的管理人员皆居住于香港。
- (4) 引起有关债务的契约受香港法管限，契约同时规定香港法庭有非专属司法管辖权。

⁶ 同意 Nourse 法官在 *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43 的裁决

- (5) The Deed was executed and the company seal affixed in Hong Kong by Allied Weli's managing director.

Other grounds

The Court of Appeal also found that:

- (1) There was clearly a proper basis to investigate the affairs of Allied Weli given that it went from having net assets of HK\$800 million in 2009 until an alleged net liability position of HK\$ 900,000 in 2014.
- (2) Jurisprudence on the assistance afforded to foreign liquidators by the Hong Kong Court do not support the contention that Hong Kong should only assume a secondary role of assisting in a foreign liquidation. If this view were to be adopted, it would undermine the statutory scheme to wind up foreign companies in Hong Kong.
- (3) There is no authority that more than one local creditor is needed; just one will suffice.

The Court of Appeal dismissed the appeal with costs against Allied Weli on an indemnity basis. The Court also ordered that Allied Weli and its solicitors to disclose the identity of the funder of the appeal, and the funder be joined in the proceedings for the purpose of costs.

- (5) 契约是由 Allied Weli 的董事总经理在香港签订，并加盖公章。

其他理由

上诉法庭亦裁定：

- (1) Allied Weli 从 2009 年拥有 8 亿港币的净资产，到 2014 年净负债据称达到 900,000 港币，这些显然是调查 Allied Weli 公司事务的适当依据。
- (2) 香港法庭向外国清盘人提供协助的法理学并不支持香港在协助外国清盘过程中仅可担任次级角色的观点。倘若采纳这一观点，则会破坏在香港清盘外国公司的法定体系。
- (3) 并没有典据支持需要一个以上的当地债权人；有一个债权人就已足够。

上诉法庭驳回了上诉，并判由 Allied Weli 按弥偿基准承担诉讼费用。法庭亦判令，Allied Weli 及其律师需披露向上诉方提供资金者的身份，并要求该方就诉讼费用加入诉讼程序。

Shandong Chenming Paper Holdings Limited v Arjowiggins HKK 2 Limited – HCMP 3060 of 2016 (date of judgment 7 July 2017)

Background

Shandong Chenming Paper Holdings Limited (“Shandong Chenming”) is a PRC company listed in both Shenzhen and Hong Kong, but has no assets and/or business in Hong Kong. A statutory demand was served on Shandong Chenming by its creditor Arjowiggins HKK 2 Limited (“Arjowiggins”) based on an arbitral award which the Court had granted leave to be enforced in Hong Kong. Shandong Chenming then sought an order from the Court declaring that the three core requirements were not satisfied. The declaration, if granted, would effectively restrain Arjowiggins from issuing a winding up petition against Shandong Chenming in Hong Kong.

As shown by its financial statements, Shandong Chenming was solvent with substantial assets and business in the PRC. It did not dispute that the arbitral award was payable, and only contended that the second limb of the three core requirements was not satisfied (namely that Arjowiggins would benefit from a winding up order in Hong Kong). It argued that a Hong Kong liquidator would achieve nothing of value in the PRC and that a winding up order in Hong Kong would be a futile exercise. As a result it said, the proper course for Arjowiggins would be to enforce the arbitral award in the PRC.

Benefits from a winding up order?

Benefits to a creditor are generally connected with the realization of assets for the benefit of creditors or the broader purpose of investigating the cause of the company’s liquidation. Upon considering the listed shares, the company structure and the articles of association of Shandong Chenming, Harris J concluded that the value of its listing status in Hong Kong was incapable of providing any material benefit to its creditors. Nevertheless, Harris J found that Arjowiggins would still benefit from a winding up order because of the following:

山东晨鸣纸业集团股份有限公司 诉 Arjowiggins HKK 2 Limited – HCMP 3060 of 2016 (判决日期 2017 年 7 月 7 日)

背景

山东晨鸣纸业集团股份有限公司（下称“山东晨鸣”）是一家中国公司，分别在深圳和香港上市，在香港并无资产及/或业务。债权人 Arjowiggins HKK 2 Limited（下称“Arjowiggins”）依据一项获法庭批准在香港执行的仲裁裁决向山东晨鸣发出了法定要求偿债书。山东晨鸣随后要求法庭作出声明，宣告三项核心要求未能符合。该声明（若法院同意出具）将有效地限制 Arjowiggins 在香港向山东晨鸣提出清盘呈请。

正如其财务报表所显示，山东晨鸣在中国内地拥有大量资产和业务，具有偿付能力。山东晨鸣并未就应否支付仲裁裁决提出异议，其唯一的主张是三项核心要求中的第二条未能符合（即 Arjowiggins 能从香港颁布之清盘令中获益）。山东晨鸣辩称，香港清盘人在中国内地将一无所获，在香港的清盘令将会是徒劳无功的。因此其认为，对于 Arjowiggins 而言适当之行动仍是在中国内地执行仲裁裁决。

清盘令的益处？

对债权人的益处通常与变现资产令债权人获益或是从更广义而言，为了调查公司清盘的事由相关。在考虑山东晨鸣的上市股份、公司架构和组织章程后，夏利士法官认为其作为香港上市公司地位的价值无法向其债权人提供任何实质益处。然而，夏利士法官裁定，Arjowiggins 仍可从清盘令中获益，理由如下：

Benefits in a broad sense

1. The management of Shandong Chenming would be expected to pay the arbitral award given the immediate and severe consequence of a winding up order. Examples of Arjowiggin’s leverage include:
 - a. control of Shandong Chenming in Hong Kong shifting to directors appointed by the liquidators;
 - b. share transfers from the date of the presentation of winding up petition being made void unless otherwise ordered by the Court; and
 - c. the status of Shandong Chenming as a Hong Kong listed company being jeopardised.

Public interest as an alternative ground

2. Shandong Chenming’s refusal to honour the arbitral award showed its disregard for the integrity of Hong Kong’s legal system and contempt for the Court of Hong Kong.
3. Harris J considered that there is a clear public interest that Shandong Chenming’s conduct be called into question; with a clear message to other foreign companies being communicated that they cannot take the benefit of Hong Kong’s financial system without also accepting the responsibility of complying with Hong Kong law.

Harris J ordered that Shandong Chenming’s application be dismissed with costs to be assessed on an indemnity basis.

Conclusion

The two decisions illustrate:

1. Jurisprudence on the three core requirements for winding up foreign companies will continue to develop post Yung Kee.
2. Benefit(s) to be obtained from a winding up order against a foreign company will be interpreted broadly; with public interest considerations to be taken into account.
3. The Hong Kong Court will not tolerate foreign companies seeking to evade payment of a judgment debt and/or arbitral award.

广义而言的益处

1. 鉴于清盘令的即时严重后果，山东晨鸣的管理层预期将会支付仲裁裁决。**Arjowiggins** 足以影响形势的优势包括以下例子：
 - a. 山东晨鸣在香港的控制权将转移至清盘人委任的董事；
 - b. 自提出清盘呈请之日起的股份转让失去效力，除非法庭另行作出判令；以及
 - c. 山东晨鸣作为香港上市公司的地位将受到动摇。

公众利益作为另一理由

2. 山东晨鸣拒绝履行仲裁裁决，显示其漠视香港法律体系的稳健完整性及蔑视香港法庭。
3. 夏利士法官认为，质疑山东晨鸣的作为明显是合乎公众利益的；同时向其他外国公司发出明确的信息，就是它们不能够从香港金融体系中获益，而不同时接受遵守香港法定的责任。

夏利士法官判令，山东晨鸣的申请被驳回，诉讼费用待以弥偿基准评定。

结论

这两个判决表明：

1. 清盘外国公司的三项核心要求的法理学在镛记案后将持续发展。
2. 法庭对于向外国公司发出清盘令从而获得的益处将予以广义的诠释，而公众利益因素亦会考虑在内。
3. 香港法庭不会容忍外国公司试图逃避支付判决债项及/或仲裁裁决。

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