

## Hong Kong Court of Appeal clarifies the proper test for U.S. letters of request

25 September 2020

The Hong Kong Court of Appeal has dismissed an appeal from a Court of First Instance (CFI) judgment setting aside an oral examination order granted pursuant to letters of request issued by the United States District Court, Western District of Washington at Seattle (the federal court).

In *Re Evidence Ordinance (Cap 8) of the Laws of Hong Kong* [2020] HKCA 766, the Court of Appeal found that notwithstanding that the purpose of the examination was to obtain information from a non-party witness by way of post judgment discovery in aid of execution (a procedure that is provided for in the U.S. Federal Rules of Civil Procedure), the court was precluded by section 76(3) of the Evidence Ordinance (Cap. 8) from acceding to the request. The court found that the purpose of the examination was for investigation as opposed to the obtaining of evidence for use in the federal court in the determination of any live issues.

The decision clarifies that the construction of Section 76(3) is a matter to be tested by Hong Kong law instead of the laws of the requesting court. The fact that a procedure is permissible under the laws of the requesting court is not determinative as to whether an examination order will necessarily be granted by the Hong Kong courts as per a foreign letter of request.

### **Request for assistance**

The applicants obtained judgment in the federal court in the sum of around US\$100 million against two companies. Subsequently, the applicants obtained an order from the King County Superior Court, State of Washington (the state court) for their appointment as collection agent in respect of receivables owing to PSI, one of the judgment debtors, including monies owed by SSG Capital Partners I, LP (SSG Capital), based in the Cayman Islands and Value Team Corporation (VTC), based in the British Virgin Islands, to PSI (the receivables).

In its letters of request, the federal court stated that the applicants had discovered the existence of three directors of SSG Capital and VTC who resided and/or transacted business in Hong Kong and who had personal knowledge regarding the receivables. The federal court therefore requested an order in the Hong Kong court to compel these witnesses to appear in their personal capacities in Hong Kong to provide testimony regarding the receivables, in part satisfaction of the U.S. judgment.

## **The appeal**

Counsel for the applicants submitted that the CFI judge erred in setting aside the examination order granted originally. The CFI judge had ruled that the applicant's expert evidence on U.S. law was inadmissible as it was not obtained for the purposes of live civil proceedings and that the proposed examination was nothing more than a fishing exercise.

The applicants argued that they were in fact seeking discovery in the existing live federal court proceedings, post-judgment, in aid of execution, given that they were entitled under the U.S. court rules to obtain information that could assist in the collection of monies in satisfaction of the judgment debt. Since the letters of request were issued under the U.S. procedure, they fell within the execution process in the proceedings in the federal court and therefore would not fall foul of Section 76(3).

The Court of Appeal upheld the CFI judge's decision that the proposed examination order amounted to an impermissible fishing exercise, noting that such objection would be engaged whether or not the request for the examination order is made pre-trial or post-judgment, so long as the request is not for use in determining any live issues before the requesting court.

## **A matter of Hong Kong law**

The Court of Appeal rejected the applicants' argument that whether the application is a fishing exercise is a matter for the federal court explaining that

*whilst Hong Kong courts must give due weight to the assessment of the requesting court on the question of necessity and relevance to the trial of the evidence to be procured, ultimately whether the request falls foul of Section 76(3) on account of fishing must be a matter for the judge in Hong Kong*

by reference to Hong Kong laws instead of U.S. laws.

Noting that there are "*substantial differences in the permissible scope of discovery*" between U.S. and Hong Kong law, and that the course adopted by applicants was permissible as part of a discovery process in aid of execution under the Federal Rules of Civil Procedure, the Court of Appeal said that under Hong Kong law, there is simply no procedure for a non-party witness to obtain evidence by way of post-judgment discovery in aid of execution under Hong Kong law. Neither is there a procedure for pre-garnishee proceedings discovery against either the garnishee or third-party witnesses.

## **The Court of Appeal's finding**

On the facts of the present case, the Court of Appeal found that nothing in the letters of request, nor the applicants' filings in support of the application for the letters of request and the present proceedings, suggested that the collection process would engage any process of determination by the federal court in which the evidence requested would be relevant or necessary.

On the contrary, the Court of Appeal considered that the applicants had yet to determine if they could issue garnishee proceedings against SSG Capital and VTC and if so in which jurisdiction.

The Court of Appeal also found that the collection orders granted by the state court merely authorized the applicants to step into the shoes of PSI, and thus the issue of liabilities of SSG Capital and VTC to PSI would have to be determined by another court with jurisdiction to do so. As such, the applicants could not say if the receivables were in fact due from SSG Capital and VTC to PSI in light of disputes between the parties. Therefore, the Court of Appeal was of the firm view

that there were no live issues in any court process in the federal court in which the evidence requested could be said to be relevant and necessary.

### Implications

The decision clarifies that the construction of Section 76(3) is a matter to be tested by Hong Kong law instead of U.S. laws and that the fact that a procedure is permissible under U.S. laws is not determinative as to whether an examination order will necessarily be granted by the Hong Kong courts following receipt of a U.S. letter of request.

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