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# HONG KONG CIVIL PROCEDURE NEWS

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## Articles

Hong Kong High Court Invokes *Chabra* Jurisdiction to Freeze Assets of a Defendant's Solvent Wholly-Owned Subsidiaries

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**SWEET & MAXWELL**

## ■ Hong Kong High Court Invokes *Chabra* Jurisdiction to Freeze Assets of a Defendant's Solvent Wholly-Owned Subsidiaries

A *Mareva* injunction is one of the most powerful forms of interim relief available in civil litigation. Claimants often use it to restrain dissipation of a defendant's assets while an underlying claim or application to enforce a judgment is pending. Under certain circumstances, such an injunction may extend to cover assets owned by or held in the name of third parties. This is known as the *Chabra* jurisdiction. Examples where the *Chabra* jurisdiction may be exercised include injunctions against third parties holding assets of the defendant as nominees or trustees.

In *苏州太合汇投资管理有限公司 v 霍尔果斯市摩伽互联娱乐有限公司* [2022] HKCFI 3657, the Hong Kong High Court held that the *Chabra* jurisdiction to grant a post-judgment *Mareva* injunction against a third party, including a non-cause-of-action defendant ("NCAD"), may extend to solvent wholly-owned subsidiaries of a defendant, or a cause-of-action defendant ("CAD"). The Court held that the application of the *Chabra* jurisdiction in that case was not an impermissible expansion of the *Chabra* jurisdiction. This decision is useful and provides a basis for plaintiffs and judgment creditors who may wish to freeze assets held at the subsidiary level of the CAD, especially when the CAD is merely a holding company.

### Background

The Plaintiff ("P") obtained a PRC judgment against the Defendant ("D") for RMB194,444.667.77 ("Judgment Sum"). Pursuant to the PRC judgment, D acknowledged its liability to P and agreed to repay the Judgment Sum to P within two weeks.

Despite having sufficient funds, D did not repay the Judgment Sum. P commenced the enforcement process in the PRC, but D did not comply with the enforcement notice and various orders issued by the PRC court.

P registered the PRC judgment in Hong Kong with the aim of enforcing the PRC judgment in Hong Kong. In aid of enforcing the PRC judgment, the Hong Kong Court granted a post-judgment *ex parte Mareva* injunction against D, restraining D from disposing of or dealing with its assets in Hong Kong up to the value of HK\$222,799,944.24.

D and its wholly-owned subsidiary, MMOGA, complained to P that MMOGA's account was wrongfully frozen as a result of the *Mareva* injunction against D being served on MMOGA's bank. Subsequently, P obtained an *ex parte* post-judgment *Mareva* injunction against MMOGA ("Post-Judgment Injunction") pursuant to the Court's *Chabra* jurisdiction. The *Chabra* injunction was granted on the bases that (a) MMOGA's assets are liable to enforcement of the PRC judgment by P

against D, and (b) there was a real risk of dissipation of assets on MMOGA's part.

By summons, P sought to continue the Post-Judgment Injunction against MMOGA.

### Scope of the *Chabra* jurisdiction

Citing the leading English judgment in *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 422 (Comm), the Court noted that the *Chabra* jurisdiction may be exercised when there is a good arguable case that assets in the name of a NCAD would be amenable to execution of a judgment obtained against a CAD. This rule is not limited to cases where the NCAD holds assets belonging to the CAD. The Court referred to *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, which provides that the *Chabra* jurisdiction may be exercised against NCAD third parties if:

- the third party holds, is using, has exercised or is exercising, a power of disposition over, or is otherwise in possession of, assets of the judgment debtor; or
- some process, ultimately enforceable by the courts, is or may be available to a judgment creditor as a consequence of a judgment against the actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.

When considering the second limb, the Court pictured the scenario that enforcement of the PRC judgment could lead to liquidation of D. A liquidator could then pursue claims against third parties, including procuring MMOGA to declare dividends (as MMOGA had undistributed profits far exceeding the Judgment Sum) or passing a resolution to wind up MMOGA and make distribution to D, its contributory. Alternatively, a receiver may be appointed to exercise such powers or rights exercisable by D for the purpose of recouping assets which could be used to satisfy judgment.

D argued that there is a limit to the second limb in *Cardile*—that (i) there must be some claims, causes of action or obligations on the part of the third party to disgorge its assets or otherwise contribute to the funds or property of the judgment debtor, and (ii) it is not permissible that such claims, causes of action or obligations only arise as a result of liquidation, receivership or bankruptcy (which seems to be the case in the above scenario). The liquidation, bankruptcy, receivership or otherwise referred to in the second limb are only mechanisms through which such claims, causes of action or obligations can be enforced. D sought to persuade the Court against expanding the *Chabra* jurisdiction and instead consider protecting the assets of innocent third parties.

While the Court agreed with D's caution as a matter of general principle, it noted that the *Chabra* jurisdiction has developed

as a matter of common law. Looking at the fundamental underlying rationale of the *Chabra* jurisdiction, the Court held that it should analyse and determine whether a good reason exists to suppose that the assets would be amenable to execution of a judgment against the CAD.

Applying the general principle, the Court found there to be prospective claims, causes of action or obligations in respect of which liquidation or receivership, as proper legal process, could lead to assets of MMOGA becoming amenable to an execution of the PRC judgment. The Court considered the findings to be a legitimate application, and not an impermissible expansion, of the second limb of the test.

The Court commented further that if it were wrong on its application of the second limb, the Court would be prepared to extend the principle further in order to achieve substantive justice. As a matter of principle, the Court saw no reason why liquidation or receivership through which the assets of a wholly-owned subsidiary of a defendant could be taken control by a receiver or liquidator appointed against the defendant cannot be regarded as some “process” under the second limb.

In any event, the Post-Judgment Injunction against D already affects MMOGA because MMOGA was restricted from diminishing the value of D’s shares. In view of the stance taken by MMOGA that it was not in any way affected by the Post-Judgment Injunction and therefore free to deal with its assets, the Court adopted a pragmatic and practical approach and held that there was a present need for the *Chabra* jurisdiction to be invoked against MMOGA.

### Risk of dissipation

The Court also held that it was just and convenient to grant the Post-Judgment Injunction, because there was a real risk of dissipation for MMOGA. In assessing the accounting evidence filed by MMOGA and D’s parent company, the Court did not see any conceivable reason why MMOGA’s cashflow activities and asset position could be larger than that of D’s parent company as a whole. MMOGA’s sudden and drastic increase of cash outflow after the grant of the PRC judgment also could not be explained by its operating activities. MMOGA’s explanation on its cash flow needs was also inconsistent with the documentary evidence. The accounting evidence hence suggested a high risk of dissipation of assets by MMOGA.

Further, the Court held that it could legitimately consider the conduct of the sole director of MMOGA, who was also a supervisor of D and was privy to and responsible for D’s affairs. D deliberately refused to satisfy any part of the PRC judgment despite its apparent ability to do so, and breached the orders made by the PRC courts. The sole director of MMOGA permitted D to conduct itself in a way that demonstrates a complete disregard of PRC law. In view of the fact that D holds 100% of MMOGA’s shares and, as such, exercises substantial control over its assets, D’s conduct to which

MMOGA’s director supervised gives rise to a real risk of dissipation for MMOGA.

### Takeaways

This case illustrates that a *Chabra* injunction may be obtained against a defendant’s wholly-owned solvent subsidiaries, on the basis of potential liquidation or receivership of the defendant, which could lead to assets of the subsidiaries being amenable to an execution of judgment.

This extension of the *Chabra* jurisdiction may be particularly helpful for plaintiffs if:

- a defendant, albeit with financial ability to satisfy a judgment, is determined not to satisfy the judgment debt and continues to operate an active business with assets via its wholly-owned subsidiaries; or
- a substantial part of the defendant’s assets is situated at the wholly-owned subsidiary level and they face a real risk of dissipation of assets by the wholly-owned subsidiaries.

In either case, a plaintiff may be able to obtain, in addition to a *Mareva* injunction against the defendant, a *Chabra* injunction against the defendant’s wholly-owned subsidiaries to prevent dissipation of assets.

Although strictly speaking, while this case deals with a post-judgment *Chabra* injunction, the same principles might also apply in a pre-judgment context. Parties seeking a pre-judgment *Mareva* injunction may therefore also wish to consider whether a *Chabra* injunction can and should be sought against the intended defendant’s subsidiaries.

Finally, it should be noted that the Court agreed with D that the existence of a wholly-owned subsidiary alone does not justify the grant of a *Chabra* jurisdiction. For example, if the wholly-owned subsidiary is insolvent or its assets are subject to encumbrances, it is not clear that the *Chabra* injunction would be readily available to a claimant without analysing the facts of the particular case. The present case contained no suggestion that MMOGA was insolvent or its assets were subject to encumbrances, and the Court found it appropriate to exercise the *Chabra* jurisdiction in the circumstances. Plaintiffs intending to avail themselves of the *Chabra* jurisdiction should carefully consider these issues when deciding whether to make a potential application.

### By Dominic Geiser and Truman Mak

*Dominic Geiser, Solicitor (HKSAR, England & Wales), Solicitor Advocate (HKSAR), LLB (Durham University)*

*Truman Mak, Solicitor (HKSAR), LLB, BCom (University of New South Wales)*

This post was prepared with the assistance of Chun Wai (Eunice) Chiu in the Hong Kong office of Latham & Watkins.