Introduction

Under the Bankruptcy Ordinance ("BO"), there are two main avenues of discharge of a bankruptcy. Firstly, the bankrupt can automatically be discharged after four years in cases where he has not previously been adjudged bankrupt (five years if he has previously been adjudged bankrupt). Secondly, the bankrupt may apply for an early discharge notwithstanding the fact that the required period of bankruptcy has not ended (ss.30A and 30B of BO). This newsletter explores whether a discharge of a Hong Kong bankruptcy can operate to discharge a debt owed by the bankrupt in the PRC.

Effect of a discharge

Where a bankrupt is discharged, the discharge releases him from all bankruptcy debts, which refers to (1) any debt or liability to which he is subject at the commencement of the bankruptcy; and (2) any debt or liability to which he may become subject after the commencement of the bankruptcy, including after his discharge from bankruptcy, by reason of any obligation incurred before the commencement of the bankruptcy (s.32(2) of BO). However, the discharge does not release the bankrupt from other bankruptcy debts that are not provable in his bankruptcy.

The principle in Gibbs and its criticisms

There is no case authority as to whether a discharge order under the Hong Kong courts has the effect to discharge a foreign debt. Under common law, a foreign insolvency proceeding does not discharge or compromise a debt unless it is discharged under the law governing the debt (Antony Gibbs and sons v La Societe Industrielle et Commerciale des metaux (1890) 25 QBD 399) (the “Gibbs Rule”). In other words, discharge of a debt under the insolvency law of a foreign country is only treated as discharge in England if it is a discharge under the law applicable to the contract. Although the case had been decided long ago, its principle is still considered valid and binding. Drawing an analogy to the Gibbs Rule in respect of enforcement of a foreign judgment, it is likely that a discharge of bankruptcy order by the Hong Kong courts does not also discharge a debt in foreign countries, including the PRC.

However, the Gibbs Rule is subject to heavy criticisms over the years, such as in the UK case Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch) and the Singapore case Pacific Andes Resources Development Ltd [2016] SGHC 210. In gist, commentators
perceive that insolvency law should have an overriding effect and receive cross-border recognition.

In *Pacific Andes Resources Development Ltd*, the Singapore Court doubted the reasoning behind the *Gibbs* Rule since it hinges on the contractual terms and autonomy between the parties but fails to recognise that the statutory insolvency regime only comes into play to determine a creditor’s entitlement when the debtor company becomes insolvent. Also, it was considered that that the *Gibbs* Rule is not in line with the general modern approach of the courts which recognise that the administration of an insolvent company is to be implemented by a primary court applying a single bankruptcy law. Therefore, it was held that if the Court has subject matter jurisdiction and there exists asset in or sufficient nexus to jurisdiction that warrants the exercise of jurisdiction, debts which are not governed by Singapore law may be legitimately compromised by a scheme of arrangement in Singapore.

**The Hong Kong approach**

In Hong Kong, the court had raised criticisms concerning the scope and utility of the *Gibbs* Rule in *Hong Kong Institute of Education v Aoki Group (No 2)* [2004] 2 HKLRD 760. The case involves a contractual dispute between the Hong Kong Institute of Education (“HKIE”) and a Japanese company Aoki. HKIE sought to enter judgment against Aoki in terms of an arbitral award granted in Hong Kong, while Aoki challenged the application and argued that the award if enforced would be repugnant to its rehabilitation plan that was in force in Japan. Reyes J applied a two-stage approach, by allowing the judgment to be entered in HKIE’s favour under the terms of the arbitral award, but ordering that conditions should be imposed on the enforcement of the judgment in order to give due recognition to the ongoing Japanese restructuring. This approach is consistent with the need for comity in foreign insolvency, and recognises that the court has discretion to refuse execution of a local judgment if a foreign discharge would have consequences on a debtor’s assets in Hong Kong. Harris J commented that the case had managed the impact of *Gibbs* and prevented it from being used to allow a local creditor to obtain an advantage over international creditors, by ordering a stay of the enforcement of a local judgment.

The applicability of the *Gibbs* Rule in Hong Kong can be reflected in the recent CFI case *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165, in which Harris J himself applied the *Gibbs* Rule and held that it is an established principle of Hong Kong law that a debt can only be compromised under the law governing the debt. The court therefore sanctioned a scheme of arrangements which involves a substantial proportion of the debt to be governed by Hong Kong law. Since Hong Kong courts continue to follow the *Gibbs* Rule in insolvency cases, it is likely that the same applies to personal bankruptcy cases.
Whether PRC courts recognise the discharge order in Hong Kong

There is no existing Mainland law providing for recognition of Hong Kong liquidators and assistance to Hong Kong insolvency proceedings. In a consultation paper issued in July 2018, the Department of Justice raised the proposal to enter into a separate bilateral arrangement with the Mainland for mutual recognition of and assistance in cross-boundary corporate insolvency and personal bankruptcy matters.

Thus, even where Hong Kong courts grant a discharge order that has the effect to discharge a debt in the PRC, it is uncertain whether PRC courts will recognise and enforce the discharge order. Since PRC does not have the concept of personal bankruptcy, it depends on the decision of the PRC courts on a case-by-case basis whether to accept and enforce such order. Generally, there is a trend that PRC courts are gradually more willing to recognise a bankruptcy order of Hong Kong courts, provided that the judgment is final and conclusive and does not violate the basic morals and principles of PRC laws.

Conclusion

This issue remains to be adjudicated in Hong Kong. The conclusion shall depend on how Hong Kong courts interpret and apply the Gibbs Rule and whether PRC courts will enforce the judgment of Hong Kong courts. We therefore await the issue to be brought to the determination of the courts in Hong Kong in the near future.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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