

Hong Kong allows electronic service of statutory demand on individual debtors

Author: Edward LIU Lori Ng

Bankruptcy is probably the most severe outcome an individual debtor would be facing in civil proceedings. As a result, Hong Kong High Court has all along been adopting a careful and stringent approach to ensure the debtors are properly notified (or are given proper chance to be notified) of the statutory demand before a bankruptcy petition may be presented. As required under **Rule 46(2)** of the Bankruptcy Rules (Cap. 6A) (“Rule 46(2)”), the creditor shall do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention and, if practicable in the particular circumstances, to cause personal service of the demand to be effected. Therefore, the previous Practice Directions 3.1 (version 5) required the creditors to make at least two attempts to personally service of the statutory demand.

In recent years, the widespread adoption of electronic communication and the rapid growth of information technology system have led significant changes in how ordinary people communicate and conduct business. As a result, interested groups, including legal practitioners, financial institutions, money lenders, etc., have called for a review and update of traditional approach to account for these social phenomena. The New Practice Direction 3.1, which came into effect on 17 July 2023, is a response to these demands and expected to meet the expectations of the public.

Before the implementation of the new Practice Direction 3.1, the requirements for discharging the obligation under Rule 46(2) were similar to all the reasonable steps a creditor must take to satisfy the Court that an order for substituted service of a petitioner should be made. This included making at least 2 personal calls to all of the debtor's known addresses, with the second call being made by appointment by a letter, among other requirements (referred to as the “**Previous Requirement**”). As a result, if personal service of the statutory demand was deemed impracticable, the only option for creditor was to apply for leave for substituted service (for example, service by advertisement in newspaper to substitute personal service).

Obviously, the Previous Requirement created many setbacks for the creditors, for instance:

- a. The procedure was redundant as it requires the creditors to repeat the reasonable steps once when serving the statutory demand and once when serving the petition. There is no particular benefit to repeat the exact same steps twice.
- b. It was easier for the debtors to dodge the subsequent personal service. If a creditor was able to personally served a statutory demand on the debtor by surprise, the debtor will likely be evading the service of the petition by concealing his whereabouts. This should not be the legislative intention of Rule 46(2).
- c. It caused delays in the recovery process for creditors, particularly judgment creditors, and resulted in increased costs.

The new Practice Directions 3.1 aims to strike a better balance between the interests of creditors and debtors. To this end, paragraph 2.1 sets out the following guidelines for discharging creditors' obligation under Rule 46(2):

- a. If the debtor is represented by a solicitor, an attempt should be made to arrange an appointment for personal service through such solicitor. Rule 49(4) of the Bankruptcy Rules enables a solicitor to accept service of a statutory demand on behalf of his client; or
- b. **If the debtor has agreed with the creditor to use any electronic means (which include emails, WhatsApp, WeChat or other similar means of communications (“Electronic Means”)) to receive any documents relating to the debt the subject of the statutory demand, or the debtor has during the period of 12 months immediately preceding the date of the statutory demand used any of the Electronic Means to communicate with the creditor, and the creditor has sent the statutory demand to the debtor through the Electronic Means; or**
- c. The steps set out in paragraph 3.2 below (which was the steps for substituted service application).

Paragraph 2.1(b) of the new Practice Directions 3.1 introduces a brand-new method for serving the statutory demand, which gives creditors more flexibility by allowing them to use electronic means. The definition of electron means is broad and includes communications methods such as emails, WhatsApp, WeChat, and similar means. It should be noted that this option applies to agreements that did not previously include a provision of communication by electronic means. As long as the debtor has used any of the electronic means to communicate with the creditor during the 12 months immediately preceding the date of the statutory demand , the creditor can serve the statutory demand on the debtor through such electronic mean(s) without prior agreement.

Given that the new Practice Direction 3.1 only recently came into effect and its interpretations, effects and implications are yet to be fully observed, we recommend that commercial lenders take proactive measures to address this development. Specifically, we suggest that commercial lenders consider amending their standard facility agreements to include a clause that explicitly permits communication by electronic means in relation to the agreement. This clause should also require debtor to provide several electronic means for communication, such as email, WhatsApp, WeChat, or other similar means.

Our Dispute Resolution team in Hong Kong has extensive experience in assisting clients with debt recovery, and we can provide comprehensive legal support to help clients navigate the new Practice Direction 3.1. We can advise on the implications of the new practice direction, assist with drafting and negotiating agreements that comply with the new requirements, and provide guidance on how to effectively enforce statutory demands.

If any commercial lenders are interested in exploring this topic further or require legal assistance with debt recovery, please feel free to contact our Dispute Resolution team.

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