STEPHENSON HARWOOD
罗 夏 信 律 师 事 务 所

Commercial Litigation Newsletter – August 2021

Cover story

This marks the first issue of Stephenson Harwood's Commercial Litigation Newsletter. By our newsletter we hope to give you updates on interesting cases and news on various areas of commercial litigation. Before that, let's first introduce our practice and our team.

The Stephenson Harwood commercial litigation team have extensive experience in wide areas of commercial disputes, including but not limited to:

Banking and finance disputes: We have wide experience in acting for banks and other financial institutions in all types of disputes affecting this area of business activity.

Company disputes: We regularly advise PRC and overseas clients on various company related disputes including shareholders disputes, director duties, contractual matters, etc.

Employment disputes: We regularly act for employers and employees where disputes have arisen in relation to employment contracts or from dismissal or redundancy.

Fraud and asset tracing: We have extensive experience of investigating international frauds and of using the courts in Hong Kong, mainland China and abroad to attach and recover proceeds.

Arbitration: Many commercial contracts provide for disputes to be resolved not in the courts but by a specialist arbitration panel. Where consideration is being given to the inclusion of such clauses in commercial contracts early expert advice is vital, as tactical considerations of arbitration venue, choice of arbitrator and choice of arbitration rules are of great importance. We have substantial experience representing and advising clients in relation to arbitrations in Hong Kong, mainland China and elsewhere.

Wealth disputes: In the unfortunate event that disputes arise, we can act on behalf of our clients in multi-jurisdictional disputes that involve estates, trusts, families and family business arrangements, fiduciary duties, properties, shareholdings, business partnerships, joint ventures and conflicts between investors. Increasingly we advise in relation to mental capacity and undue influence issues in disputes.

Some of our representative cases included:

Estate of Nina Wang: Acting for the administrators of the Estate of Nina Wang, Asia's richest woman in the dispute over entitlement to her estate (reported to be worth in excess of US$10 billion).

Over 2,000 employees and minority shareholders of China Shanshui Investment Company Limited ("CSI"): Advising over 2,000 employees and minority shareholders of CSI on the complex dispute relating to the shares in CSI valued over HKD5,000 million and the power struggle in China Shanshui Cement Group Limited, a company listed in the Hong Kong Stock Exchanges.

Television Broadcasts Limited ("TVB"): Acted for TVB in its application for an urgent injunction to restrain persons from unlawfully and wilfully damaging its properties and injuring its employees.

China Tailong Green Power Group Limited ("China Tailong"): Acting for China Tailong and other shareholders in their dispute with Zhaoheng Hydropower (Hong Kong) Limited and others, involving a claim amount of over RMB 3,684 million.

Société Générale: Acting for the bank in respect of massive cross border, sophisticated and long running trade credit fraud against over 10 defendants.

Financial institution: Acting for a financial institution to resist a claim for the return of a sum of over HKD150 million on the basis of an injunction imposed by the Taiwanese Court.

Rabobank: Acted for the bank in respect of a letter of credit dispute and in enforcement of various securities.

Our team members

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Senior Associate

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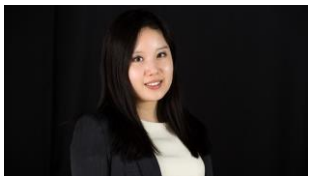
Senior Associate



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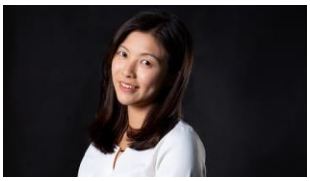

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Full Implementation – Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region

On 18 May 2021, the Supreme People's Court of the People's Republic of China (the "**SPC**") issued a notice, announcing that the Supplemental Arrangement of the SPC for the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the "**Supplemental Arrangement**") was fully implemented in both jurisdictions.

The Supplemental Arrangement

The Supplemental Arrangement was adopted by the Judicial Committee of the SPC on 9 November 2020 to amend and supplement the existing Arrangement of the SPC for the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the "**Arrangement**"), which came into force on 1 February 2000. Articles 1 and 4 of the Supplemental Arrangement could be implemented within Hong Kong's existing legislative framework and thus came into effect on 27 November 2020 upon signing of the Supplemental Arrangement by the Secretary for Justice, Ms Teresa Cheng, SC, and Vice-president of the SPC, Mr Yang Wanming.

Articles 2 and 3 of the Supplemental Arrangement came into force on 19 May 2021 after the Legislative Council of Hong Kong resolved to make necessary amendments to the Arbitration Ordinance (Cap. 609) on 17 March 2021 in order to implement the Supplemental Arrangement. Article 2 re-defines the scope of application of the Arrangement by removing the restriction that a Mainland arbitral award has to be issued by one of the recognised arbitral institutions prescribed by the Legislative Affairs Office of the State Council. The purpose of Article 2 is to expand the scope of arbitral awards under the Arrangement and align the position with international approach under the New York Convention, i.e. focusing on the seat of arbitration. Article 3 allows simultaneous enforcement proceedings in both jurisdictions provided that the total amount of property enforced by the courts in the two jurisdictions shall not exceed the amount determined in the arbitral award. It further provides that at the request of the other court, the courts in the two jurisdictions shall exchange information on the enforcement of an arbitral award.

Significance

The Supplemental Arrangement was made in accordance with the spirit of the New York Convention and further refines the Arrangement. With the full implementation of the Supplemental Arrangement, the mutual enforcement mechanism for arbitral awards between the two jurisdictions will be further optimized.

It is also hoped that the Supplemental Arrangement will be conducive to the development of Hong Kong's legal and dispute resolution services in the Greater Bay Area and the status of Hong Kong as an international legal hub for legal and dispute resolution services will be further enhanced.

Court Trial in the COVID era – Is evidence by way of Video Conference Facilities a readily available option?

Giving evidence in trial is stressful and travelling all the way from your hometown to a Hong Kong Court may elevate that stress level even more. Giving evidence *via* video conference facilities ("**VCF**") seems to be an obvious alternative, particularly because of COVID. However, as appear from recent Hong Kong cases, it seems that VCF remains an exceptional option.

In *Tsang Woon Ming v. Lai Ka Lim* [2020] HKCFI 891, the Court refused a VCF application made on the basis of the quarantine requirement as a result of COVID. In doing so, the Court explained its principles:

(1) The solemnity of court proceedings and its atmosphere is highly important in the taking of evidence and the starting point is that proceedings (in particular trial) should be conducted in court;

(2) Sound reason is required to justify a departure from the starting point and mere inconvenience would not suffice;

(3) The court may be more lenient in allowing evidence by VCF in respect of evidence which involves no serious issue of credibility or relatively unimportant evidence;

(4) Ultimately, it is a matter of court discretion to achieve a just result by taking into account all the material considerations (including witness' capability to attend court, any prejudice to the other party, any delay and practical considerations like the availability of the facilities).

The following table summarizes recent Hong Kong decisions on VCF applications:-

Case Reference	Reasons accepted by the Court	Reasons not accepted by the Court	Results
Taishin International Bank Co Ltd v QFI Ltd [2020] HKCFI 938	Ensure the safety of everyone participating in the trial Possibility to instruct a Mainland lawyer to observe the giving of evidence in PRC	Inconvenience caused by quarantine	Allowed
Au Yeung Pui Chun v. Cheng Wing Sang [2020] HKCFI 2101	Elderly age of the witnesses (68 and 56) and the risks arising from traveling very long distance from Switzerland in light of COVID	N/A	Allowed
Wah Lun International Development Ltd v Lau Chiu Shing [2020] HKCU 3625	N/A	Inconvenience caused by quarantine To and from Hong Kong and Singapore was not a long flight and precautions could be taken to minimize the health risk	Rejected
Standard Chartered Bank (Hong Kong) Ltd v Lau Lai Wendy & Anor [2021] HKCU 170 (which decision is further affirmed by the Court of Appeal in CAMP38/2021 [2021] HKCA 380)	N/A	Travelling to HK would cause health risk to the witness, residing in Beijing	Rejected on the basis that HK is relatively safe and that the application was taken out very late to achieve tactical movement

The above cases show that the Hong Kong Court will not readily grant a VCF application simply because of the difficulty and/or inconvenience in travelling caused by COVID. Parties are therefore advised to plan ahead of their travelling as far as possible, and if a VCF application is necessary, it should be made as soon as possible to prevent the application from being regarded as a strategic step and/or an excuse to avoid inconvenience.

Price to pay for backing out of accepted job offer?

So you have spent all the time and made all the effort in the hiring process to find the right candidate for a position. An offer was then made to this candidate who agreed to join on a certain date. You roll out the red carpet and wait for the candidate to arrive as scheduled. But oops…the candidate changes his mind and wants to back out before the agreed start date. Now what? Start the process all over again with no consequence to the candidate?

The Court of Appeal made clear in its recent judgment in *Law Ting Pong Secondary School v Chen Wai Wah* that the provision for payment in lieu of notice can be valid and enforceable even before the employment commencement date. This case serves as an important marker for employers – with clear and good drafting of employment contracts, employers are likely entitled to make a claim for payment in lieu of notice if a proposed employee rescinds a job offer before he starts work.

Factual Background

This dispute involved a teacher who revoked his employment contract just a few days before the start of the new school year.

In summary, on 17 July 2017, the school made an offer to the teacher and gave him 3 documents, namely (i) an Offer of Appointment, (ii) the Conditions of Service for teachers and (iii) a Letter of acceptance. The teacher was asked to sign the Conditions of Service and Letter of Acceptance to confirm his acceptance of the offer and he did so on the same day. In the Letter of Acceptance, it was stated that the teacher would accept the appointment "*in accordance with the attached Conditions of Service for Teachers…*" and "*the conditions of the new contract will come to immediate effect e.g. [he] need[s] to give three months' notice to terminate [his] employment with the school*".

The Conditions of Service however provided for a period of employment from 1 September 2017 to 31 August 2018 but made no reference to the Letter of Acceptance. The Conditions also provided that either party could terminate the employment by giving the other 3 months' notice in writing or by making payment in lieu of notice (the "**Termination Provision**").

The teacher backed out on 22 August 2017. He refused to make payment in lieu of notice on the ground that his employment had not come into effect. The school brought a claim against the teacher in the Labour Tribunal. The Labour Tribunal found for the school and awarded the school damages equivalent to three months' payment in lieu of notice. The teacher then appealed to the Court of First Instance and won. The school further appealed to the Court of Appeal. Details of the case and the lower courts' reasonings and comments are set out in our earlier updates (Hong Kong employment law update and Hong Kong employment law update: suspensions of staff).

The Court of Appeal's decision

The Court of Appeal allowed the school's appeal and ordered that the Labour Tribunal's decision be restored. In essence, the issues that the Court of Appeal had to consider were:

(1) whether the Letter of Acceptance formed part of the employment contract; and

(2) whether the Termination Provision was unenforceable as a penalty clause.

On issue (1) – Contractual Interpretation

The Court of Appeal disagreed with the Court of First Instance's interpretation and held that the

Termination Provision was legally binding, as the Letter of Acceptance formed part of the employment contract. Applying the reasonable man test, the employment was offered on the basis of all the three documents as a "package deal", and it must be clear to the teacher that once he signed the Letter of Acceptance the employment would come into effect immediately and he would have to give 3 months' notice or make payment in lieu of notice for terminating the employment, even before the commencement of his teaching duties on 1 September 2017.

Issue (2) – Rule against Penalties

The teacher tried to argue that the amount claimed by the school was extravagant and wholly disproportionate to the monetary loss that the school suffered, and the Termination Provision was penal with the aim to deter him from changing his mind before he was due to report to duty. The Court of Appeal rejected such arguments.

The Court of Appeal took the opportunity to review the legal principles on the doctrine of penalties and clarified that the modern test for penalty clauses as laid down in the English case of *Cavendish Square Holding BV v Makdessi* (the "**Modern Test**") is now part of Hong Kong law.

Under the Modern Test, a provision is a penal if it is a secondary obligation (i.e. an obligation triggered by a breach of contract) which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party. Primary obligation, on the other hand, does not fall within the ambit of penalty doctrine. This Modern Test replaces the traditional test laid down in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd.* which looked into whether the clause is a genuine pre-estimate of loss.

Applying the Modern Test, the Court of Appeal held that the Termination Provision was not an unenforceable penalty clause and helpfully made the following comments/holdings:

- The doctrine of penalties is not engaged as the obligation is a primary one. The payment of a sum in lieu of notice is a contractually agreed method of lawful termination of the employment contract, which is not in the nature of damages for breach of contract. The school's claim is therefore a claim for recovery of a contractual debt arising from a contractually agreed method of lawful termination.
- Even if the doctrine of penalties is engaged, the Termination Provision would not be unenforceable because the school had a legitimate interest in maintaining stable and steady workforce and Termination Provision is not out of all proportion to the school's interest in enforcing the employment contract.
- Generally, the law against penalties may not apply to payment in lieu of notice clauses in employment context, but this will depend on the drafting of the clause itself.

Key takeaways of the Court of Appeal's decisions

- Employment contract comes into existence as soon as it is accepted and it was enforceable immediately thereafter even though performance of duties is to commence on a future date.
- All the relevant circumstances and background facts must be considered when interpreting the terms in an employment contract.
- Appropriate and careful drafting may avoid the application of the rule against penalties but ultimately the Court will look at substance rather than mere form.
- The Modern Test for determining penalty clauses as laid down in *Cavendish* is now part of Hong Kong law. A clause may be enforceable even if it does not represent a genuine pre-estimate of loss.
- Subject to the actual drafting, it will be difficult to argue that a payment in lieu of notice clause in an unenforceable penalty clause in the future.

News update

Webinar

We will be hosting a webinar on commercial litigation issues in October 2021, with details to follow. Stay tuned and please feel free to contact us if you wish to receive invitation of the webinar.

Please also contact us if you would like to view our last commercial litigation webinar: "Exclusive or non-exclusive jurisdiction clause?"

Recent articles

Date	Author	Title
16 July	Ian Childs	Hong Kong employment law update
21 June	Emily Li	Is an exclusive jurisdiction clause conclusive? (English) 排他性管辖权条款是否一锤定音？ (Chinese)
28 May	Ian Childs	Hong Kong employment law update: suspensions of staff
24 May	Stephanie Poon and Karis Yip	A crucial step – mutual recognition and assistance to insolvency/ bankruptcy proceedings between Hong Kong and the mainland

Publications

Ivan Ng and Emily Li have authored the Hong Kong chapter in the latest edition of The Legal 500's Litigation Country Comparative Guide. Ivan and Emily answered a set of country-specific questions to provide an overview of litigation laws and regulations applicable in Hong Kong. Click here to read the chapter.

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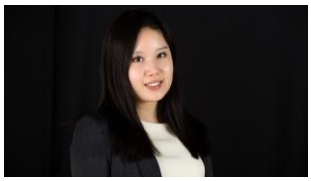

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