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CHANCE

CONTENTIOUS COMMENTARY

HONG KONG

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Tourguides in trouble

Travel agency loses first decision under new competition law

The case of *Loyal Profit International Development v Travel Industry Council of Hong Kong* [2017] HKEC 836 brought the first substantive judgment on Hong Kong's new Competition Ordinance. The dispute arose over a scheme designed to protect tour group shoppers from the PRC who are often taken to certain shops by tour guides, generating high rates of commission for the tour guides but complaints from the shoppers themselves. The scheme established a list of quality-approved shops to which travel agents should direct tour groups and provided for shoppers to be given a refund if requested within six months of purchase. The plaintiff said the scheme ran contrary to the defendant's memorandum and articles and was anti-competitive.

Harris J described the competition law complaint as spurious, saying the import of the plaintiff's argument was that *"it should be free to engage tourist guides who only earn commission and allow them to take groups to any shops they want regardless of whether in practice this involves tour groups being exploited."* It was for the Competition Commission, not private parties, to being a complaint of infringement of competition rules to the Competition Tribunal for adjudication. Harris J dismissed the originating summons and ordered the plaintiff to pay the defendant's costs.

Criminal intent

No civil claim based on breach of criminal statute

The plaintiffs in *Chan Shu Chun v Dr Kung Yan Sum* [2017] HKEC 999 brought an action claiming HK$50,000,000 against parties including a firm of solicitors in Hong Kong. The plaintiffs' claim against the solicitors included breach of duty of care on the basis that the solicitors owed the plaintiffs a duty of care to comply with the obligation to make disclosure to the relevant authorities under the Organised and Serious Crimes Ordinance (Cap. 455) (OSCO). The plaintiffs claimed the solicitors had dealt with misappropriated monies and were consequently obliged to disclose their knowledge to an authorised officer.

In a lengthy judgment, Deputy Judge Marlene Ng noted that OSCO was silent as to whether breach of its provisions would give rise to a civil cause of action. Having considered the minutes of the debate around OSCO in the Legislative Council, she said it was *"plain and obvious the LegCo did not intend any private right of action in damages for mere breach of statutory duty laid down in sections 25 and 25A of OSCO"* and that no cause of action for breach of statutory duty arose. There were also no unusual or exceptional circumstances present to give rise to a duty of care at common law. As such, the plaintiffs' pleaded claim against the solicitors was found to be frivolous or vexatious and/or an abuse of process. The claims were struck out and the plaintiffs ordered to pay the solicitors' costs.

Want of authority

No grounds for wasted costs order against solicitor

The test for making a wasted costs order against a solicitor who acted without authority was considered by Queeny Au-Yeung J in *Qiyang Ltd v Mei Li New Energy Ltd* [2017] HKEC 805. In such circumstances, the Court has power to order the solicitor to personally bear costs thrown away under two types of jurisdiction: (i) the inherent jurisdiction of the Court, under which the solicitor is required to bear costs because of their breach of warranty of authority; or (ii) according to statutory jurisdiction under section 52A of the High Court Ordinance (Cap 4) and RHC O.62, r 8 and 8A, and where the Court finds the solicitor has acted *"improperly or unreasonably"*.

Citing previous authority, the Court found the jurisdiction, which is summary in nature, has to be *"exercised with care and only in clear cases where the need for an order is reasonably obvious"*. Error of judgment, failure to apply any judgment at all to a case which renders a weak case hopeless or even negligence is not sufficient. There was a "*distinction between solicitors presenting a hopeless case and lending assistance to proceedings which are an abuse of the court."* The distinction was sometimes fine. If there was a doubt, the solicitor was entitled to the benefit of it. Solicitors should be allowed to do what is best for their client without fear of being visited with a wasted costs order. The Court declined to make such an order.

Watch woes

Liquidator stuck with costs after inaction

In the voluntary winding-up of *Leco Watch Case Manufactory Ltd* [2017] 2 HKLRD 388, the Court of Appeal considered whether an appeal brought by the liquidator (over a rejection of a proof of debt) should be dismissed for want of prosecution and, if so, whether the liquidator should be personally liable for costs. The liquidator failed to comply with directions to prepare an appeal bundle and to fix a date for the hearing. The liquidator also failed to attend the hearing. Under r.24 of the Proof of Debts Rules, Cap. 6E, a liquidator should not be made personally liable for any costs in such circumstances unless it is proven that they acted *mala fide* or with gross negligence.

The Court of Appeal dismissed the appeal. The liquidator had been given ample opportunity to proceed with the appeal or explain his defaults. He clearly had no interest in the appeal and no intention to proceed with it. Whilst there was no basis for finding that he had acted with *mala fide* or gross negligence in bringing the appeal in the first place, his irresponsible conduct in failing to notify the Court and the applicant of his decision not to proceed and to have the appeal dismissed by consent amounted to gross negligence. The liquidator was therefore personally liable for the costs attributable to his gross negligence for the period of his inaction.

Forest of dreams

Third parties cited for contempt in Sino Forest saga

The first defendant in *Cosimo Borrelli v Allen Tak Yuen Chan* [2017] HKEC 973 was being sued by the plaintiff in Canada for breaches of fiduciary, equitable and statutory duties in respect of his role as the former Chief Executive Officer of Sino Forest Corporation. An existing Hong Kong *Mareva* injunction granted in aid of foreign proceedings prohibited D1 from disposing of his assets located in Hong Kong up to the value of HK$2.5 billion. The plaintiff claimed D2 - D4 had made substantial transfers to third parties that were traceable to funds they received from D1. The plaintiff claimed that D2 – D4 (who were not bound by the injunction) breached the order by knowingly dissipating the assets. The plaintiff took out contempt proceedings against the defendants.

David Lok J considered the relevant legal principles relating to liability for contempt against non-parties for breach of an injunction. Non-parties may only be liable for contempt if they either knowingly aid and abet a breach of an injunction by the defendant; or interfere with the administration of justice by doing something (with knowledge of the order) which disables the Court from conducting the case in the manner intended. Allegations to the effect that D2 – D4 had breached the Mareva order should be avoided. The basis for liability was that they had interfered with the administration of justice. The plaintiff was directed to submit a revised draft of the contempt summons citing the correct principle.

Wrong call

No action possible against Court of Final Appeal and its judges

Bringing an action against the Court of Final Appeal itself may be considered ambitious, if not a little foolhardy, but such was the case in *Chong Yu On v Hong Kong Court of Final Appeal* [2017] HKEC 804. The plaintiff commenced the action by a writ of summons against the CFA, the Registrar of the CFA and three Permanent Judges. He claimed that they had failed to arrange a Chinese Permanent Judge to deal with his case, discriminated against the statutory status of the Chinese language in Hong Kong and discriminated against him, a litigant in person, by depriving him of his legal right to apply to appeal to the CFA.

Registrar KW Lung sitting in the Court of First Instance noted that one of the underlying objectives of the Rules of the High Court was to ensure that the resources of the Court are distributed fairly. Whilst the Court had discretion to strike out this kind of claim, the Court should give the plaintiff a chance to explain why it should not exercise the discretion. The plaintiff appeared in person at the hearing.

The CFA was not a legal entity and so could not be a defendant. According to an earlier decision in *Choi Ping Wing v Chief Executive of HKSAR* [2006] 1 HKLRD 666, the plaintiff could not in fact claim against the Registrar of the CFA or the Permanent Judges. The causes of action put forward by the plaintiff could not be accepted at all in law, nor could they be amended. The Court struck out the writ of summons and said there should be no order as to costs.

Baffling motives

Harsh words for petitioner trying to stop company restructuring

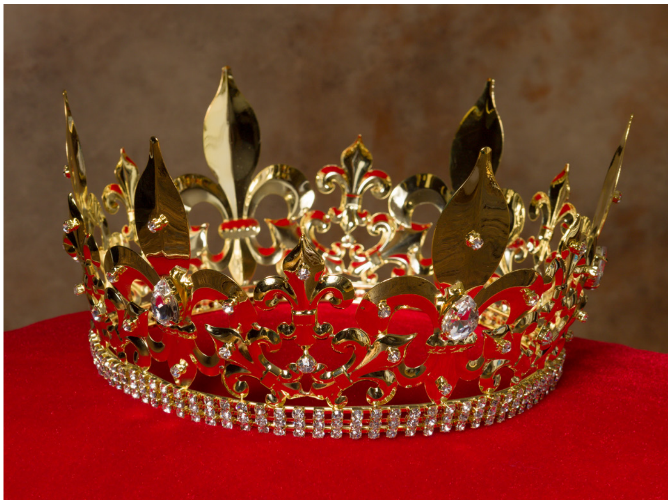
The provisional liquidators of *China Solar Energy Holdings Ltd* [2017] HKEC 796 made an urgent application before Anthony Chan J in the face of an attempt by the petitioner to frustrate a proposed restructuring of the company that was in a poor financial state. The petitioner was one of the potential investors who had engaged in discussions with the provisional liquidators to rescue the company. The provisional liquidators said their proposal was the company's last and only chance to salvage value in its listing status, its only valuable asset.

The Court said the motives of the petitioner were baffling. It appeared that the Court's process was being used for some ulterior purpose. Litigation should not be treated as a game by resourceful parties. Tactical moves had no place in court, especially when third party interests were involved.
The petitioner was sailing very close to an abuse of process.
The Court was satisfied the provisional liquidators had the power to enter into the restructuring arrangements.
The petitioner's reliance on the Court of Appeal decision *Re Legend Int'l Resorts Ltd* [2006] 2 HKLRD 192 was misplaced. *Re Legend* did not prohibit provisional liquidators from pursuing restructuring in the best interests of the Company and its creditors. Rather, it stood for the narrower proposition that provisional liquidators should not be appointed solely for enabling corporate rescue. The Court granted the relief sought by the provisional liquidators.

Who wears the crown...

Court rejects attempt to frustrate enforcement of arbitral award

In *TNB Fuel Services SDN BHD v China National Coal Group Corporation* [2017] HKEC 1184, Mimmie Chan J sitting in the Court of First Instance dismissed the respondent's argument that, as a PRC state-owned enterprise, its assets in Hong Kong enjoyed protection from the courts by way of "*crown immunity*". The applicant, a Malaysian electric utility company, had been granted an interim charging order over two million shares held by the respondent in Hong Kong to satisfy an arbitral award in excess of US$5.2 million.



Crown immunity – a leftover from colonial days – grants immunity to property belonging to the sovereign in Hong Kong courts. With the handover of Hong Kong in 1997, the role of the sovereign passed from the British Crown to the Central People's Government (CPG).

The Court found there was no evidence the CPG had authorised the respondent to assert crown immunity. The Court took into account a letter issued by the Hong Kong and Macao Affairs Office of the State Council submitted in the proceedings which stated that Chinese state-owned enterprises were independent legal entities that independently assumed legal liabilities and that the respondent is not considered as part of the CPG. Similar views have been previously expressed by other agencies of the PRC government.

Bearing in mind the nature and degree of control which could be exercised by the relevant state body on behalf of the CPG over the respondent, the Court concluded the respondent was not entitled to invoke crown immunity and made the interim charging order permanent.

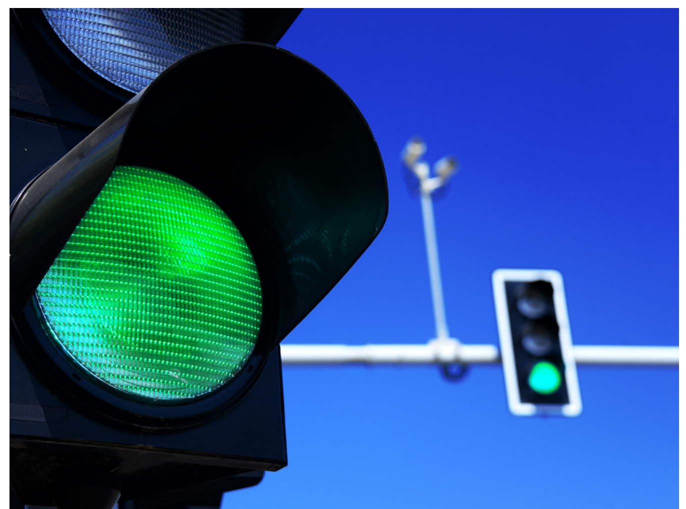
Green light

Go-ahead given for third party funders and IP in arbitration

Third party funders operating in Hong Kong are expecting to be busy after Hong Kong's Legislative Council (LegCo) passed a bill on 14 June 2017 allowing for third party funding in Hong Kong-seated arbitrations and for services provided in Hong Kong for arbitrations seated elsewhere. Third party funding involves the funding of a party's costs by an unrelated third party, in the expectation of financial return if the party is successful. The territory's strict rules against maintenance and champerty have prohibited third party funding except in very limited instances including insolvency.

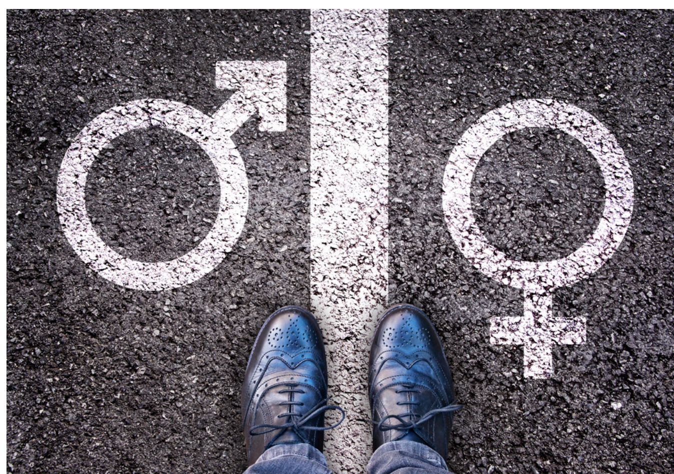
The new legislation makes clear that third party funding will also be permitted in related ancillary court proceedings under the Arbitration Ordinance, emergency arbitrations and mediations. According to the legislation, the funding and the funder's identity will need to be disclosed. There is no such requirement in respect of the funding agreement itself.

On the same day, LegCo also passed legislation making clear that disputes involving intellectual property rights (IPRs) are capable of settlement by arbitration and that it is not contrary to Hong Kong public policy to enforce the ensuing award. Taken together, these two developments bolster Hong Kong's position as a leading arbitral centre in the region, keeping it competitive with its neighbour Singapore.



To give or not to give?

Equal Opportunities Commission wins gratuity battle



The Equal Opportunities Commission (EOC) has successfully appealed against a decision of the Labour Tribunal requiring it to pay a former employee a gratuity of more than HK$867,000 following the expiry of the employee's contract.

In *Chok Kin Ming v Equal Opportunities Commission* [2017] 2 HKLRD 521, Godfrey Lam J held the Tribunal had erred in ruling that the gratuity – which was payable upon *"satisfactory completion"* of the term of employment – was automatically payable at the end of the term and that the EOC was unable take into account the employee's work performance. The employee, the EOC's Chief Equal Opportunities Officer, had lobbied churchgoers to object to the EOC's proposals to expand discrimination protection for same-sex couples.

The Court found the Tribunal had taken too narrow a view of the words "satisfactory completion" and that, by reference to other terms in the contract, payment was subject to the employer's discretion, which could take into account conflicts between his work and outside activities. The correct test was whether the employer's decision was irrational or perverse, such that no reasonable employer would have exercised the discretion in that manner.

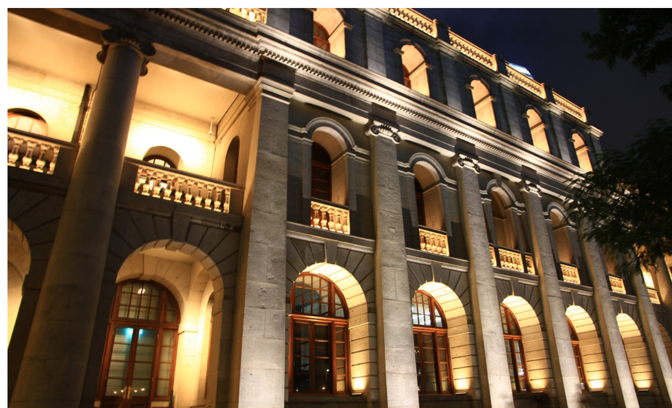
Although the case would seem to suggest that the employer has a wide discretion in withholding payment of gratuity, the courts will likely examine the exercise of discretion closely. Where the contract indicates that withholding a payment is to be dependent on certain conditions, the employer has an obligation to assess the payment based on those considerations and should not factor in irrelevancies.

Appeals upon appeals

The Court of Final Appeal weighs in on constitutional question

In *Incorporated Owners of Po Hang Building v Sam Woo Marine Works Ltd* [2017] HKEC 1096, the Court of Final Appeal was asked to determine whether a provision of the District Court Ordinance (DCO) that prohibits further appeals from a decision of the Court of Appeal to refuse leave to appeal, is unconstitutional in that it conflicts with Hong Kong's Basic Law, Article 82 of which vests the power of final adjudication in the CFA. In a unanimous judgment given by Ribeiro PJ, the CFA held that the relevant sections of the DCO were plainly intended to enable the Court of Appeal to filter out unnecessary, unmeritorious or frivolous would-be appeals.

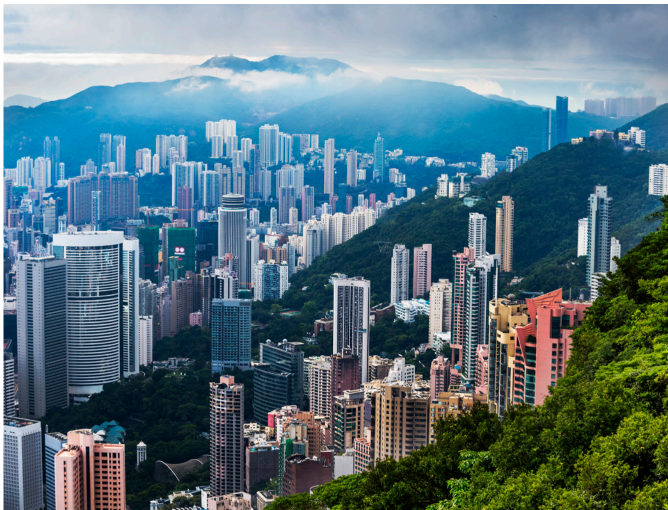
Having the Court of Appeal screen out cases which had no reasonable prospects of success on appeal promoted the proper and efficient use of judicial resources and avoided oppressive and unproductive appeals. The CFA was critical of the appellant's Counsel, for making *"the extravagant submission that the Court of Final Appeal, by its Appeal Committee, was bound to vet for itself every application for leave to appeal, including applications originating in decisions of tribunals like the Small Claims Tribunal."*



In confirming the constitutionality of the relevant provision in the DCO, the CFA concluded that the restrictions in question did not go beyond what was reasonably necessary for the achievement of the legitimate aims identified, namely *"promoting the proper use of judicial resources, the proper role of the Court of Final Appeal and economic proportionality in litigation".*

Liquidators' lament

Court criticises liquidators for inaction and unnecessary proceedings



In *Fortune King Trading Ltd* [2017] HKEC 1018, Recorder Linda Chan SC criticised liquidators for failing to investigate competing claims over the sale proceeds of a luxury property. The property was purchased by the company in 2007 and sold five years later for a 50% profit. In 2011, the company's ultimate shareholder, Mr Luu, was made bankrupt and trustees appointed to his estate. In 2012, liquidators were appointed after a lender successfully petitioned to have the company wound up. The liquidators applied to court to determine whether the balance of the sale proceeds was owned legally and beneficially by the company (as argued by the lender) or whether it was held by the company on trust for the trustees.

The Court said it was clear that the liquidators had conducted no meaningful investigation as to the merits of the competing claims. All they had done was to write to the parties seeking information, taking no follow-up action when they received no response. Instead, they relied on the lack of information as an excuse for not making a decision, even failing to attend the substantive court hearing by *"dressing it up as a costs saving approach."* This was despite the fact they had obtained a pre-emptive costs order meant to cover their fees and costs.

In rejecting the trustee's arguments, the Court noted the matter should never have got to court had the liquidators done their job. The Court said the liquidators could not recover their costs from the company's assets, whilst allowing 50% of the costs of the lender to be paid out of the company's assets (rather than by the trustees) on the basis of the evidence provided to the Court by the trustees that should, in the Court's view, have been provided by the liquidators.

Too good to be true

Employee's bonus struck down on appeal

The respondent employee in *胡潔敏 v 龍威集團控股有限公司* [2017] CHKEC 592 was employed by the appellant company as a senior compliance manager specifically to help the company with its Initial Public Offering (IPO). On 19 October 2015, five months after starting work, an addendum was added to her employment contract. The addendum provided that the employee would be given a cash bonus of HK$350,000 under two conditions: (i) if the IPO plan ceased or (ii) she resigned before 31 December 2016. The employee left the company two months after the addendum was added and initiated her claim in the Labour Tribunal for payment of the bonus. The Tribunal allowed the claim, holding the addendum was valid. The company appealed against the Tribunal's decision.

Queeny Au-Yeung J allowed the appeal on the ground that the addendum was unenforceable for lack of consideration. It was entered into after the employee started work and merely included two conditions for granting the cash bonus without other changes to the terms of her employment contract. The employee's assistance with the listing could not serve as legal consideration as it was already part of her contractual duties. The Court also accepted the Tribunal's finding that the company was coerced into signing the agreement noting there had been an "intimate" relationship between the director and the employee.

In most bonus agreements, the employee is rewarded for their hard work. Here, the structure of the agreement seemed to encourage the employee to do a bad job or to quit the company. Whilst this decision is fact-specific, employers should be sure to draft carefully the terms and conditions applying to bonuses to ensure the objectives of introducing a bonus into the employment arrangements are achieved.

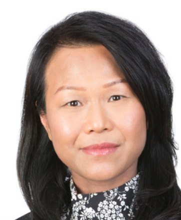
CLIFFORD CHANCE

CONTACTS

Elaine Chen
Partner
Hong Kong
T: +852 2825 8956
E: elaine.chen@ cliffordchance.com

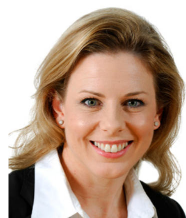
Brian Gilchrist
Partner
Hong Kong
T: +852 2825 8878
E: brian.gilchrist@ cliffordchance.com

Cameron Hassall
Partner
Hong Kong
T: +852 2825 8902
E: cameron.hassall@ cliffordchance.com

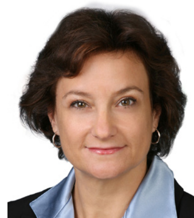


Ling Ho
Partner
Hong Kong
T: +852 2826 3479
E: ling.ho@ cliffordchance.com

Edward Johnson
Partner
Hong Kong
T: +852 2826 3427
E: edward.johnson@ cliffordchance.com

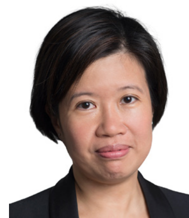


Donna Wacker
Partner
Hong Kong
T: +852 2826 3478
E: donna.wacker@ cliffordchance.com

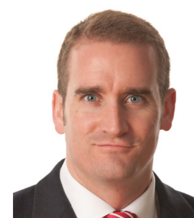


Wendy Wysong
Partner
Hong Kong/ Washington
T: +852 2826 3460
E: wendy.wysong@ cliffordchance.com

Romesh Weeramantry
Foreign Legal Consultant
Hong Kong
T: +852 2825 8938
E: romesh.weeramantry@ cliffordchance.com



Anita Lam
Consultant, HK Head of Employment
Hong Kong
T: +852 2825 8952
E: anita.lam@ cliffordchance.com



Richard Sharpe
Consultant
Hong Kong
T: +852 2826 2427
E: richard.sharpe@ cliffordchance.com

Lei Shi
Consultant
Hong Kong
T: +852 2826 3547
E: lei.shi@ cliffordchance.com

Thomas Walsh
Consultant
Hong Kong
T: +852 2825 8052
E: thomas.walsh@ cliffordchance.com

Alex Wong
Consultant
Hong Kong
T: +852 2826 3456
E: alex.wong@ cliffordchance.com

William Wong
Consultant
Hong Kong
T: +852 2826 3588
E: william.wong@ cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

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