DEACONS
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Newsletter

Litigation & Dispute Resolution

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What's inside?

Increasing Use of Technology in Courts

Joseph Kwan and Michelle Li

In the latter half of 2022, the Judiciary launched a three-month public consultation on the draft Courts (Remote Hearing) Bill (Bill). The consultation document can be found here and the main features of the Bill are set out below. The public consultation ended in September 2022 and the consultation outcome can be expected soon.

Should the Bill be passed, remote hearings will become more prevalent across all levels of courts and tribunals. It will be of increasing importance for legal practitioners to ensure that they are equipped with the knowhow and technological support necessary for the effective conduct of remote hearings.

At Deacons, our litigation and dispute resolution team is experienced and well-equipped to conduct hearings remotely and we stand ready to assist clients in handling court proceedings in accordance with the latest practice and trends.

Commentary on the Bill

The Bill is a welcome change and the increased use of remote hearings forms part of the Judiciary's ongoing initiatives to make better use of technology in conducting court business. The fast-changing public health situation since 2020 has highlighted that remote hearings are a useful tool for the Judiciary to carry on the administration of justice, with minimal disruption and delay, especially in circumstances where physical hearings are either undesirable or impossible.

At the moment, remote hearings are mostly held on an ad-hoc basis, without the benefit of guidance from any overarching statutory provision or standard directions. The Bill introduces a clear legal basis for the Judiciary to order remote hearings where appropriate and gives court users clear guidance on various practical matters, including swearing of oaths and transmitting and signing of documents remotely.

It is hoped that such initiative to make better use of technology will be further strengthened by other initiatives, such as encouraging litigants to go paperless and allowing the signing and filing of court documents electronically. This will benefit litigants, who may expect greater cost-efficiency in court proceedings.

It is vital for the Hong Kong Judiciary to meet the rising expectations of court users for enhanced convenience and efficiency in court proceedings. In Singapore, litigation has gone largely "paperless", with the introduction of eLitigation, which is an integrated online platform for filing and service of court documents, electronic access to court documents, scheduling hearing dates and management of case files through email and SMS reminders. There have also been initiatives to hold virtual sessions (including via use of Zoom) since 2020.

Main features of the Bill

- The Bill applies to all levels of courts and tribunals, except hearings before the Juvenile Court and criminal trials.
- The default mode of hearings will still be physical hearings, but the Court may direct remote hearings where it is fair and just to do so, having regard to 16 factors listed in the Bill (e.g. the nature, complexity and urgency of the proceedings, the nature of evidence, the parties' views and the ability to engage with and follow the proceedings remotely, and a catch all factor of "any other relevant considerations").
- Sets out details of the scope of a remote hearing order to be made by the Court. See Part 2 of the Bill.
- Deals with the operation of remote hearings, such as consequences of failing to attend a remote hearing, how to administer oaths, transmit and sign documents and present objects remotely. See Part 3 of the Bill.
- Sets out provisions on ensuring public access to the remote hearing. Generally, remote hearings which are open to the public, will be broadcasted at the Judiciary's premises. See Part 4 of the Bill.
- Sets out the related offences and penalties, such as the offences of recording and publishing hearings. See Part 5 of the Bill.

To accompany the draft Bill, there are also draft Practice Directions and Operational Guidelines, setting out various practical administrative and operational details for conducting remote hearings.

The Importance of Inclusion of Terms to Limit Bank's Duty of Care

Peter So and Mandy Pang

The Court of Appeal's decision in *Shine Grace Investment Ltd v Citibank, N.A. and Anor* [2022] HKCA 1341 is welcome news for banks and illustrates the importance of inclusion of terms to limit the bank's duties in banking agreements. The Court of Appeal held that the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (SFC Code) is not meant to govern the contractual relationship of licensed or registered persons and their customers, unless parties expressly incorporate the same into a contract. Further, where parties have agreed on their respective rights and duties by way of contract, this will generally preclude a wider duty of care from being imposed on banks.

Background

Shine Grace Investment Ltd (Shine Grace), a company which was owned, controlled and operated by Mrs Anita Chan Lai Ling (Mrs Chan), brought an action against Citibank, NA (Citibank) and one of Citibank's relationship managers, Ms Mak. Shine Grace claimed that Citbank had mis-sold nine equity accumulator contracts to Shine Grace (Disputed Accumulator Contracts) in October 2007 (Main Action). Shine Grace did not meet Citibank's margin calls and claimed that the Disputed Accumulator Contracts were invalid and unenforceable.

Meanwhile, Shine Grace's two guarantors, Shinning International Holdings Limited (SIH) and Bonds & Sons International Limited (BSI), brought two actions to challenge the transfer of funds by Citibank from the accounts of Shinning and BSI to meet the outstanding liability of Shine Grace. These companies claimed that Shine Grace had no liability under the Disputed Accumulator Contracts, on the same grounds put forward by Shine Grace.

The Court of First Instance dismissed all three actions. In the Main Action, the Court of First Instance found that Citibank did not owe to Shine Grace the alleged duty to advise; even if Citibank owed a duty to advise Shine Grace on the risks of its investments, Citibank did not breach the alleged duties; and the alleged breaches did not cause Shine Grace to suffer any loss.

Shine Grace, SIH and BSI subsequently appealed to the Court of Appeal and their appeals were eventually dismissed by the Court of Appeal.

The key points in the Court of Appeal's decision are set out below.

Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (SFC Code) does not govern the contractual relationship of licensed persons and their customers

As to the issue of whether Citibank owed a duty to advise Shine Grace on the risks of its investments in the Disputed Accumulator Contracts by reason of express incorporation of relevant provisions in the SFC Code, the Court of Appeal confirmed the view of Deputy Judge Pow, SC in *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd* that the SFC Code was primarily promulgated for the purpose of determining whether a person is a fit and proper person to be or to remain as a licensed or registered person under the Securities and Futures Ordinance (Cap 571), and not meant to be a code or guideline to govern the contractual relationship of a licensed or registered person and his customers.

That said, it is possible for a code or guideline promulgated by a regulatory body to be incorporated into a contract. However, there must be explicit language to show that this was the intention of the parties. This is especially the case where detailed provisions have already been made governing their relationship, rights and obligations.

The Court of Appeal therefore took the view that Citibank did not owe a duty to advise Shine Grace on the risks of its investments in the Disputed Accumulator Contracts because the relevant provisions in the SFC Code were not incorporated into the contract as terms.

Banks are not normally under a duty to advise customers

Regarding the issue whether Citibank owed a duty of care to Citibank at common law, the Court of Appeal confirmed that the undisputed starting point is that bankers are not normally under a duty to advise customers on the prudence of their investments or warn them of the risks involved.

Ultimately, the scope of a bank's duties is fact-sensitive. The terms of the contract between the parties would be one of the crucial objective evidence which the court would consider. Where the parties have agreed on their respective rights and duties by way of contract, this will normally preclude any wider duties from arising at common law, and especially so if the relevant duty has been expressly precluded by contract.

The Court of Appeal upheld the Court of First Instance's finding that the duties claimed by Shine Grace were inconsistent with the contractual provisions and must have been negatived by the disclaimer of responsibility and that there was no duty for Citibank to advise Shine Grace on the suitability and risks of the accumulator contracts, despite the fact that recommendations or suggestions might have been made to Shine Grace in the course of their relationship.

Banks under no duty to advise

Shine Grace complained that Citibank failed to advise or warn Mrs Chan of the total maximum exposure of the Disputed Accumulator Contracts against the cash resources available to Shine Grace, which rendered the Disputed Accumulator Contracts unsuitable for Shine Grace.

The Court of Appeal found that Mrs Chan knew well her financial commitments and had her own team of staff to monitor her investments and provide daily and regular reports to her. In the circumstances, Citibank was under no duty to advise her whether Shine Grace had adequate financial resources as she was in a far better position to assess this risk.

Adequate disclosure of risks

Another of Shine Grace's complaints was that Citibank failed to provide a full, fair, reasonable, accurate and honest depiction of the risks involved, including the "black box" nature of "mark to market" calculations, and that Citibank had positively misled Mrs Chan into the Disputed Accumulator Contracts in volunteering information and explanations of the accumulator contracts (including the Disputed Accumulator Contracts).

The Court of Appeal held that the Tailored Investment Proposal (TIP) relating to each accumulator contract, including the Disputed Accumulator Contracts, which were sent to Shine Grace after each accumulator contract trade, stated that changes to any of the listed factors could result in significant adverse impact on the "mark to market" values. The Court of Appeal took the view that the relevant TIPs were not inadequate, unbalanced or misleading in any way.

Causation

The Court of First Instance concluded on the available evidence (including, numerous audio recordings) that Mrs Chan would have entered into the Disputed Accumulator Contracts regardless. Shine Grace challenged the findings of fact and the inferences drawn by the Court of First Instance. The Court of Appeal held that Shine Grace was not able to identify any palpable error of the Court of First Instance that was sufficiently material for the Court of Appeal to intervene and that the trial judge's findings of primary fact should not be disturbed unless shown that he was plainly wrong.

Commentary

While banks are required to consider a customer's financial background, investment appetite and investment experience when recommending suitable products to customers pursuant to the SFC Code of Conduct, such regulatory duties were rarely, if at all, incorporated into the banking agreement as terms.

The Court of Appeal has again confirmed that the parties' relationship was governed by the terms of the contract. It is therefore important to define the relationship in banking agreements. In preparing banking agreements, banks should consider whether:

- to expressly exclude the incorporation of the SFC Code
- to include an appropriate disclaimer of responsibilities to limit their duty of care
- the risks of the relevant product have been adequately set out in the banking agreement

Banks should also keep documentation and contemporaneous records of their communications and dealings with customers (such as audio recordings), which would serve as important evidence for the court when considering the scope of duties of banks and whether banks have breached those duties.

The newly enacted regime for reciprocal enforcement of judgments in Mainland and Hong Kong

Joseph Kwan and Andy Lam

The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill was passed by the Legislative Council on 26 October 2022 and an Ordinance with that name will come into effect on a date to be announced. This is an important step towards the implementation of the arrangement on reciprocal recognition and enforcement of judgments in civil and commercial matters by the Courts in the Mainland and in Hong Kong (REJ Arrangement).

Once the REJ Arrangement is in force, parties will be able to benefit in the following aspects:

- Hong Kong becomes the only place with such a wide scope of matters covered. Before the REJ Arrangement, the local regime is rather restrictive, as it covers only monetary judgments (where parties have also agreed to designate the Mainland court with exclusive jurisdiction) and certain matrimonial and family cases. On the other hand, the REJ Arrangement canvasses a judgment in civil or commercial matters, which perhaps most notably, includes specified intellectual property right cases (e.g. copyright, trademarks and patents), as well as certain non-monetary relief.

- A cost-efficient mechanism on reciprocal enforcement is now in place. The Ordinance sets out the legal framework in a streamlined and straightforward manner, from the registration of the Mainland judgment to the setting aside application if the registration is challenged. Parties will soon be able to avoid the inconvenience of starting the action afresh and adducing foreign law expert evidence in Hong Kong, or re-litigating before the Mainland court, as they do for now. This is attributable to the new regime which ensures certainty and clarity.

- Hong Kong has the advantage of a common law system, with a strong heritage and excellent reputation on the one hand, and deepening economic and business ties with the Mainland on the other. The pro-enforcement regime provides confidence to conduct business in the Mainland and Hong Kong. It will also encourage foreign parties who are used to the common law system, to choose Hong Kong as the venue for dispute resolution.

The commencement date of the REJ Arrangement is to be decided, upon the promulgation of a judicial interpretation by the Supreme People's Court in the Mainland and settling of the rules to provide for the relevant practice and procedures in Hong Kong.[1] We will let our clients know when the Ordinance becomes effective.

Last but not least, it is worth-mentioning that several amendments were later effected to the Bill (that we covered in our previous article) and are now incorporated in the Ordinance:

[1] https://www.doj.gov.hk/en/mainland_and_macao/RRECCJ.html

- The description of the insolvency and debt restructuring matters has been revised, so that the language in the Ordinance now aligns with that adopted in the existing cooperation mechanism (i.e. "Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region"). The overlapping matters are excluded from the Ordinance, but applicable under the cooperation mechanism.

- Regarding the application to set aside registration of a judgment, the drafting of the provision is now in clearer terms and clarifies that unless otherwise ordered by the Court of First Instance, the time limit for making a setting aside application is 14 days by default after the date on which a notice of registration is served.

These amendments again highlight the purpose of the Ordinance and the underlying REJ Arrangement, that together with other mutual legal assistance between the Mainland and Hong Kong, disputes with cross boundary elements can be dealt with in a more effective and efficient manner.

Series on Hong Kong /Mainland Cross-Boundary Marriages – Division of matrimonial assets

Sherlynn Chan and Rachael Leung

Deacons' Family Practice is at the forefront of handling issues related to cross-boundary marriages. In light of the new Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap.639), we have prepared a series of articles on Mainland/ Hong Kong cross-boundary matrimonial matters and have invited Mainland lawyers to share their views.

In this 3rd article, we discuss how the Hong Kong and the Mainland Courts divide matrimonial assets in divorce.

"My husband and I have been married for 10 years. He was seconded to the Mainland 2 years ago and recently admitted to an affair with a Mainland woman. He is seeking a divorce, but he said he would not pay me a cent. Can my husband just walk out of the marriage without paying me anything?"

No matter who commences divorce proceedings in Hong Kong, both parties to the marriage have the right to claim financial provision from each other, subject to the prevailing financial circumstances.

The Courts in Hong Kong have a wide discretion in deciding how the family assets should be divided. Under section 7 of the Matrimonial Proceedings and Property Ordinance (Cap.192) (MPPO), the Courts will consider the parties' conduct and all the circumstances of the case, including the following matters:-

1) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
2) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
3) the standard of living enjoyed by the family before the breakdown of the marriage;
4) the age of each party to the marriage and the duration of the marriage;
5) any physical or mental disability of either of the parties to the marriage;
6) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
7) the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(Section 7 Factors)

In the landmark case of *DD v LKW*, the Court of Final Appeal set out a 5-step approach on how to apply the Section 7 Factors. The first step is to ascertain the size of the matrimonial pot and the parties must provide full and frank disclosure of all their assets and liabilities through the Financial Statement known as "Form E".

The second step is for the Court to evaluate the needs of each party by assessing their "*financial needs, obligations and responsibilities*". The Court will also take into account the parties' standard of living, age and any disability.

In the third step, the Court will decide whether to apply the sharing principle in cases where the matrimonial pot is big enough, such that there are surplus assets after meeting the parties' needs.

Thereafter, the Court will decide whether there are good reasons to depart from the sharing principle. Factors which may justify a departure from equal sharing include the source of assets, duration of marriage, contribution and "gross and obvious" conduct.

In the last step, the Court will look at the overall case and decide on the outcome. If the Court decides not to apply the sharing principle, it must provide the reasons.

The Courts in the Mainland approach the issue of asset division differently and Ms Liu Yang, senior partner of Unitop Law Firm and family specialist in Guangzhou, China has the following to say:-

"To facilitate the understanding of the Mainland's legal position under the matrimonial property regime, we will introduce the legal concepts using the following keywords*:*

1. "Community property regime" vs. "Separate property regime"

"Community property regime": Where the parties have not agreed in writing how to divide their pre-marital assets and assets acquired during the marriage, all property acquired during the marriage (be it by one party or both parties jointly) will be considered to be jointly owned by the couple.

"Separate property regime": Pursuant to Article 1065 of the Civil Code, where a couple signed a nuptial agreement to set out in writing the division of their pre-marital assets and assets acquired during the marriage, the agreement will be legally binding. The length of marriage and divorce will have no effect on the ownership of the relevant assets.

2. "Proportion of asset division"

Generally speaking, where a couple signed a nuptial agreement to confirm their intention to follow the "separate property regime", the Courts will give heavy weight and priority to the said agreement in deciding how to divide the family assets.

In the absence of any nuptial agreement, in principle, property acquired by the parties during the marriage (be it by one party or both parties jointly) will be considered to be jointly owned by the couple and shall be equally shared by them. However, where the fault of one party led to the breakdown of the marriage, depending on the facts of the case, the Courts may be more generous towards the no-fault party when dividing the family assets to ensure he/she will be sufficiently provided for. Otherwise, not only would it be difficult to penalize the party at fault and compensate the no-fault party, it would also encourage the party at fault to continue with his/ her wrongful behaviour.

3. "Serious wrongdoing committed during the marriage"

What amounts to "serious wrongdoing committed during the marriage" and how will that affect the distribution of assets in divorce?

Pursuant to Article 1087 of the Civil Code and with reference to the following comment made by the Intermediate People's Court of Guangzhou:-

> *"When applying the principle of compensation and deciding on the ratio of distribution, the Court shall focus on the following factors: 1) extent of the wrongdoing committed, 2) the need to maintain any child(ren) and 3) the value of the assets to be distributed. While it is easy to understand the first two factors, for the third factor, it means that when the value of assets to be distributed are relatively high, there should not be a significant departure from equal sharing. The Court should properly consider each factor and the overall picture in order to come up with a precise judgment."*

4. "Divorce compensation"

"Divorce compensation" refers to the compensation paid by one spouse, whose fault/wrongdoing led to the breakdown of the marriage, to the no-fault spouse. "Divorce damages" includes compensation for physical damage and psychological damage.

Pursuant to Article 1091 of the Civil Code, the no-fault party is entitled to claim compensation from the spouse at fault if the divorce is caused by one of the following reasons:-

- *(I) bigamy;*
- *(II) cohabitation of a married person with any third party;*
- *(III) domestic violence;*

(IV) maltreatment or desertion of any family member; or
(V) any other major wrongdoing.

Given that the degree of damage suffered by the spouse is different in each case, the Courts have great discretion in determining the amount of compensation. For general reference, the amount of damages awarded in practice ranges from around RMB 20,000 to RMB 100,000.

To summarize, as provided in Article 1043 of the Civil Code:-

> *'Family shall establish good family values, promote family virtues and place close attention to cultural and ethical advancement in families. Husband and wife shall be faithful to respect and care for each other. Family members shall respect the elderly, take care of children, and maintain equal, harmonious and civilized marriage and family relations.'*

When handling the division of property, in addition to considering the nature and source of wealth, the Court, whether by way of adjudication or mediation, will also need to take into account good family values, public order and good morals in order to make the most appropriate decision."

In the next article in the series, we explain the relief available in Hong Kong and the Mainland when a spouse is found to have dissipated/ be planning to dissipate assets to prevent the other spouse from getting his/her fair share of the settlement.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters involving cross-boundary elements. Please reach out to us if you would like to know more.

Series on Hong Kong /Mainland Cross-Boundary Marriages – Asset dissipation

Sherlynn Chan and Rachael Leung

Deacons' Family Practice is at the forefront of handling issues related to cross-boundary marriages. In light of the new Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap.639), we have prepared a series of articles on Mainland/ Hong Kong cross-boundary matrimonial matters and have invited Mainland lawyers to share their views.

In this 4th article, we discuss how the Hong Kong and Mainland Courts handle the issue of asset dissipation made prior to or during the divorce proceedings.

"*I recently filed for divorce and during the financial disclosure process, I discovered that my wife had made substantial bank transfers to her parents who reside in the Mainland. I also found out that she has put her Hong Kong and Mainland properties up for sale. What can I do?*"

In Hong Kong, when one discovers that his/her spouse is planning to dissipate assets (e.g. selling properties or transferring money to third parties, such as parents and siblings), then he/she can apply for an injunction under Section 17 of the Matrimonial Proceedings and Property Ordinance (Cap.192).

If the spouse has already sold an asset to a third party, one can still apply to set the transaction aside, such that the net sale proceeds will be included in the matrimonial pot for calculation.

As the applicant, one will need to prove that his/her spouse made the disposition with the intention of defeating his/her claim for financial provision. If the disposition was made within 3 years of the application, such intention is presumed, unless the spouse proves the contrary. However, if the disposition was made more than 3 years before the application, the burden will then be on the applicant to prove that his/her spouse had the said intention.

It is common for parties to seek assistance from experts, such as forensic accountants and even private investigators, to gather the relevant evidence.

Regarding the unilateral sale of Hong Kong properties without one's knowledge or consent, one can register a *lis pendens* with the Land Registry against the relevant properties to put third parties on notice of one's claim as a divorcing spouse.

For similar situations in the Mainland, we caught up with Ms Tan Fang, family specialist and principal partner of Family & Family Law Firm in Shanghai, who has the following to say:-

"*In the Mainland, when one discovers that his/her spouse is planning to dissipate assets during the divorce proceedings, he/she can apply for a Property Preservation Order to freeze his/her spouse's bank savings, stocks or funds accounts, or to distrain the properties registered in the spouse's name and prevent the spouse from trading the relevant properties. In the event that assets have already been dissipated, one can request the Court to add back the relevant assets to the couple's community property pot for division. Pursuant to Article 1092 of the Civil Code, the aggrieved party can request the Court to order a smaller or even no share of their community property to his/her spouse.*

Depending on the situation, the Court will approach the dissipation in different ways:-

1) *If the spouse transferred an asset to a third party in good faith at reasonable market price, the aggrieved party will not be able to make a claim on the transferred asset but only on the sale proceeds;*
2) *If the spouse did not transfer the asset to a third party in good faith, the aggrieved party will be entitled to seek recovery of the relevant asset and request that the same be divided as part of the community property pot;*
3) *If the spouse transferred a substantial amount of assets to a third party, the aggrieved party can demand his/her spouse to account for the transfer and provide an explanation. If the spouse is unable to provide any reasonable explanation, the aggrieved party can either seek to add back the relevant assets to the community property pot for division, or file a separate claim against the third-party recipient.*

In practice, all matters related to the dissipation of assets, including investigation, discovery, preservation orders application, invalidation of transfer or revocation of gifts, and other relevant legal proceedings are handled by lawyers.

Meanwhile, formal registration is required for the transfer of ownership of immovable properties. For the transfer of properties jointly owned by a married couple, the relevant government body usually requires both parties to be present at the time of registration of the transfer. For a property jointly owned by a couple, but registered only in the sole name of one party, the other party may apply to the relevant government body to register his/her objection to put potential purchasers on notice. Where necessary, an aggrieved spouse may apply to the Court for a declaration that a property registered in the sole name of his/her spouse is in fact community property jointly owned by the parties, and for his/her name to be added to the legal title of the property."

In the next part of the series, we will look into how disputes involving third party interests in properties are resolved during divorce proceedings in Hong Kong and the Mainland respectively.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters involving cross-boundary elements. Please reach out to us if you would like to know more.

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