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Newsletter

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What's inside?

Court of Final Appeal clarifies effect of Exclusive Jurisdiction Clauses on insolvency proceedings

Richard Hudson

The decision of the Court of Final Appeal in *Re Guy Kwok-Hung Lam* [2023] HKCFA 9, brings welcome clarity to an issue that has been in the balance in Hong Kong insolvency proceedings for some time: can a bankruptcy or winding-up petition be brought in relation to a debt that arises out of a contract that contains an exclusive jurisdiction clause in favour of a jurisdiction other than Hong Kong?

The Petitioner had presented a bankruptcy petition against the Debtor in respect of a debt of some US$41 million owed pursuant to a credit agreement which provides that the parties submitted to the exclusive jurisdiction of the Courts of the Southern District of New York for the purpose of all proceedings arising out of the agreement. The Debtor was made bankrupt in the Court of First Instance, with the Court holding that the Debtor had failed to demonstrate a bona fide dispute on substantial grounds in respect of the debt, and that an exclusive jurisdiction clause did not per se prevent the Court from considering whether the creditor had standing to present the petition. Until the Debtor could show a bona fide dispute on substantial grounds, there was no proper basis to contend that there was a dispute that must be litigated in the agreed Court.

The Court of Appeal judgment provided a comprehensive analysis of differing approaches taken on the issue by a number of Courts over a number of years, and concluded that where the debt on which a petition is based is subject to an exclusive jurisdiction clause, the same approach should be applied in winding up and bankruptcy petitions as ordinary actions, with the law requiring that parties abide by their contracts. The Court (by a majority) rejected the proposition that an exclusive jurisdiction clause should be treated simply as a factor to be taken into account, which was likely to give rise to conflicting approaches and uncertainty. In allowing the appeal and dismissing the petition, the Court held that where the debt on which the petition was based was disputed and there was an exclusive jurisdiction clause, the petition should not be allowed to proceed, in the absence of strong reasons, pending the determination of the dispute in the agreed forum. An example of a strong reason was where the debtor was hopelessly insolvent apart from the disputed debt, or other creditors were seeking a bankruptcy or winding up where the debts were not disputed. The Court of Appeal also rejected the idea, which had been advanced in other judgments on the topic, that dismissing a petition in such circumstances would be an alleged curtailment of creditor rights.

The Petitioner appealed to the Court of Final Appeal, which was tasked with determining the answer to the following question:

"Where:

(a) parties to an agreement have agreed to submit to the exclusive jurisdiction of a specified foreign court for the purposes of all legal proceedings arising out of or relating to their agreement or the transactions contemplated thereby,

(b) one of the parties has petitioned in Hong Kong for the bankruptcy of another party on the basis of a debt arising under the agreement; and

(c) the debt is disputed by the latter party, what is the proper approach of the Hong Kong court to the petition? In particular, should the petition ordinarily be stayed or dismissed pending the determination of the dispute in the foreign court unless there are strong reasons to the contrary (on the footing that the petitioner may not seek to demonstrate such strong reasons by showing that there is no bona fide dispute of the debt on substantial grounds)?"

The Court of Final Appeal held that the jurisdiction of the Court of First Instance in bankruptcy matters could not be contracted out of: parties could agree not to invoke the Court's jurisdiction, and refer a dispute to a foreign court, but that did not affect the Hong Kong Court's jurisdiction. It informed the Court's discretion to decline to exercise jurisdiction.

The Court noted that it was common ground that, absent an exclusive jurisdiction or arbitration clause, a petitioner will be entitled to a bankruptcy or winding up order, if there is no bona fide dispute about the debt on substantial grounds, describing this as the "Established Approach". It was held that the Established Approach is not appropriate where an exclusive jurisdiction clause is involved: absent countervailing factors like the risk of an insolvency affecting third parties or a dispute that borders on the frivolous or abuse of process, the petitioner and debtor should be held to their contract. On that basis, the decision of the majority of the Court of Appeal was upheld and the petition was dismissed.

The Court also commented that it was always possible for the Petitioner to sue in New York and seek summary judgment. Whilst there might be some effect on timing of Hong Kong bankruptcy proceedings, the absence of other creditors suggested that the public interest was unlikely to be adversely affected by such a delay.

The judgment of the Court of Final Appeal brings certainty (or perhaps near certainty, as there is no exhaustive definition from the Court or the Court of Appeal as to "strong reasons" or countervailing factors" which would allow a petition to succeed) to what in the author's experience is a fairly common scenario – a creditor has a debt arising out of a contract with an exclusive jurisdiction clause, sees there is no defence to their claim, but would rather not incur the cost of obtaining judgment in that exclusive jurisdiction before commencing insolvency proceedings. Now the road ahead is clear – bring the claim in the Courts with jurisdiction first, lest your petition be dismissed in Hong Kong. The analogy with the treatment of exclusive jurisdiction clauses in a forum non conveniens situation, i.e. they are paramount (with limited exceptions) rather than one of a number of factors to consider when deciding jurisdiction, shows admirable consistency.

Perhaps the most effective step that parties who are commonly creditors in such situations would be to refine the jurisdiction clauses in their standard form contracts to allow themselves more flexibility in relation to the jurisdictions in which they are allowed to proceed: perhaps exclusive jurisdiction clauses should take a back seat.

The Court of Appeal restores the once overthrown "Letters of No Consent" Regime

Peter So and Victor Wong

A year ago, we reported that the "Letters of No Consent" Regime (LNC regime) was held unconstitutional by the Court of First Instance in *Tam Sze Leung & Ors v Commissioner of Police* [2021] HKCFI 3118. The applicants sought to challenge, by way of judicial review, the decision of the Commissioner of Police (Commissioner) to issue and maintain "letters of no consent" (LNC) in respect of their bank accounts under the Organized and Serious Crimes Ordinance, Cap.455 (OSCO). In his judgment handed down on 30 December 2021 and decision dated 23 March 2022 (CFI decision), Coleman J declared that the LNC regime was *ultra vires* sections 25 and 25A of OSCO, not prescribed by law and disproportionate. The case background and details of Coleman J's reasoning were covered in our previous article.

Upon the Commissioner's appeal, the CFI decision was overturned by the Court of Appeal (CA), which held that the LNC regime is constitutional: see *Tam Sze Leung & Ors v Commissioner of Police* CACV 152/2022 [2023] HKCA 537 (Cheung, Yuen, G Lam JJA).

No Consent Regime "as operated by the Commissioner"

The CA criticised the judge's use of the phrase No Consent Regime as operated by the Commissioner as being unclear, which phrase has not been defined by the judge.

In *Interush Ltd v Commissioner of Police* [2019] HKCA 70, the CA already held that ss.25 and 25A of OSCO are constitutional. The CA said that to say that the "No Consent Regime as operated by the Commissioner" is systematically unlawful or unconstitutional leaves one in doubt as to what precisely is held by the judge as being unlawful when the statutory provisions remain intact. *Interush* remains binding on the CA unless it is decided that the decision was plainly wrong.

Ground: *Ultra vires*

The CA laid down the correct legal analysis in respect of sections 25 and 25A of OSCO. G Lam JA opined that "*in a case such as the present, the account is "frozen" not because there is any enforceable order made by the police (like a Mareva injunction granted by a civil court) that blocks the account, but because the bank has chosen, whether or not permissibly under the banking contract, not to comply with its customer's instruction, no doubt due to its concern about criminal liability under section 25(1) [of OSCO] for dealing with property that represents proceeds of crime. The withholding of consent no more "freezes" an account than the giving of consent compels the bank to release money. The police have no power to require the bank to do anything. What the police are empowered by the statute to do is to give consent, as an authorised officer, for an act in contravention of section 25(1), i.e. a dealing with the property. Coupled with prior disclosure under section 25A(1) [of OSCO], such consent immunises the bank from criminal liability under section 25(1).*"

The above analysis i.e. that it was the bank's decision to freeze, was previously endorsed by the CA in *Interush*. This is the crux of the CA's reasoning. The police did not have power under s.25A of OSCO to require the bank to freeze the account. The decision to freeze the account rests solely with the bank, for fear of infringing s.25 of OSCO if the bank knows or has reasonable grounds to believe that the funds in the account represent the proceeds of crime.

As the power for an authorised officer, i.e. the police, to give consent under section 25A(2)(a) necessarily implies a power to withhold or refuse consent, it is not *ultra vires* for them to inform a bank under the LNC regime.

Ground: Not prescribed by law

Contrary to the judge's conclusion, the CA found that there is no uncertainty or vagueness in section 25(1) which prohibits dealing with property in specified circumstances. Further, there are remedies in private law for any infringement of property or contractual rights that may have occurred. There are also sufficient constraints to guard against arbitrary or capricious refusal.

Ground: Not proportional

The CA was not satisfied that the decision in *Interush* was plainly wrong. Accordingly, *Interush* remains good law and it is difficult to see how it can be distinguished in this case. As it has been held in *Interush* that sections 25 and 25A of OSCO and the LNC regime are not systemically unconstitutional, G Lam JA opined that the judge should not have entertained the systemic challenge in the first place.

Implications

The CA judgment not only removes the uncertainty left by the CFI decision as to whether banks and financial institutions are able to freeze the funds in dispute upon receipt of a LNC, but also helpfully clarifies the legal position as to the operation of the LNC regime. It is now apparent that a LNC does not amount to any enforceable order whatsoever. Banks and financial institutions are obliged to exercise their independent judgment and determine whether or not they pay out funds to a customer or to his order when instructed by the customer to do so taking into account the potential criminal liability under section 25(1) of OSCO.

Furthermore, banks and financial institutions should review terms and conditions with their customers and ensure there are express terms entitling them to "block" or suspend accounts of their customers held with them for compliance with the law and particularly section 25(1) of OSCO. In the absence of such express terms, banks and financial institutions may only rely on implied terms.

A glimpse of defamation damages in Hong Kong

Carmen Ng

Defamation damages are fact-sensitive, i.e. the appropriate quantum turns on the facts of each case. But, we can get a glimpse of how defamation damages work from a recent judgment of the District Court as follows.

The Judgment. On 18 April 2023, Deputy District Judge Kenneth K. H. Lee (Judge) handed down a judgment in *Chan Shung Fai v Chan Kam Wah* [2023] HKDC 499, being an assessment of damages caused to a son by a father's publication of five sets of defamatory statements.

The Parties. The son is the plaintiff, an investment banker and entrepreneur. The father is the defendant. They both stood for the 2019 Village Representative Election for Ping Yeung Village (Election).

The Offending Publications. The five publications complained of comprise: (i) an announcement by the father to break ties with the son, published on the entire front page of Oriental Daily News; and (ii) four videos of the father speaking about the son, published on the websites of HK01, Oriental Daily News and Apply Daily and YouTube respectively.

Legal Principles on Damages. *General damages* are awarded to compensate damage to reputation (depending on the gravity of the libel and the extent of the publication) and injury to feelings and to vindicate reputation.

Aggravated damages are to compensate for additional injury caused by the defendant's unreasonable conduct: a kind of conduct that rubs salt into the wound.

Special damages are awarded to compensate any pecuniary loss suffered, such as loss of employment or business.

Exemplary damages are awarded if the defendant has been oppressive or has deliberately committed a tort with the intention of gaining some calculated advantage.

Separate or Global Award. The Judge adopted a separate assessment approach (as opposed to a global approach), as the nature, medium, extent and seriousness of the five publications were very different.

Apology. Shortly before the assessment hearing, the father filed a supplemental witness statement offering an apology for the publications. The Judge observed that the father was unable to give any satisfactory explanation as to why he had refused or failed to tender an apology to the son earlier, despite the three letters before action, Statement of Claim and witness statement from the son, and found that the belated apology was merely a tactical move to reduce damages and therefore should be disregarded.

Malice. The Judge found that the dominant motive of the publications was to damage the son's chances in the Election and therefore the father was actuated by malice.

Quantum. The son was awarded the sum of HK$1,070,000 in damages for the 5 defamatory publications by the father (as follows) with interest at judgment rate from the date of judgment until payment.

Publication	Damages	Findings
↑ *being a factor increasing the quantum of damages* ↓ *being a factor decreasing the quantum of damages*		
1st (public declaration)	$350,000 general	↓ It did not relate to any criminal offences or professionalism of the son. ↓ The father admitted liability at an early stage. ↑ It carried a more serious defamatory meaning that the son was unfilial, unworthy, useless, good for nothing and not as good as his father, etc. ↑ Publishing it on the entire front page of Oriental Daily New was a serious matter. ↑ The son was unfilial to the extent that triggered a severance of father and son relationship caused considerable damage to the son as a public figure in the New Territories. ↑ The father should be responsible for the republications as he must have intended or authorized the republications given the prominent publication (on the

		entire front page), the sensational words used and the parties were apparently well-known in the North District/Ta Kwu Ling.
	$100,000 aggravated	↑ The father's conduct was motivated by the Election. ↑ The father had failed to apologize.
2nd (video)	$200,000 general	↑ The meaning that the son had committed false imprisonment and other misdeeds which could have criminal consequences is seriously defamatory. ↑ It remained on the internet for nearly two years.
3rd (video)	$80,000 general	↑ The sting was about the son being unfilial. ↓ The damaged caused should be less substantial than the other videos.
4th (video)	$140,000 general	↑ It contains serious allegations such as "覺悟前非，做返個好人", "來欺負鄉民" and "將嗰啲壞事變本加厲". ↓ But, there was no specific allegation that the son had committed possible criminal offences. ↑ It remained on the internet for more than two years, whilst the number of hits was 2,345.
5th (video)	$100,000 general	↓ Although the defamatory words "冇果樣，講嗰樣" was also an attack on the son's personality, its damage was much lower than the 2nd and 4th publication. ↑ It remained on the internet for more than two years, whilst the number of hits was 2,833.
4 videos	$100,000 aggravated	↑ The father's conduct was motivated by the Election. ↑ The father had failed to apologize.

Costs. The father was also ordered to pay the son's costs of the assessment of damages, with certificate for Counsel, to be taxed if not agreed.

Conclusion. The moral of this story is that if an apology is to be made in defamation proceedings, it should be made at an early stage, since a belated apology may be disregarded and attract aggravated damages, as well as the claimant's costs, which may also be substantial.

Post-COVID-19 implications for foreign witnesses giving evidence outside Hong Kong

Cathy Wu

The COVID-19 pandemic had caused a surge of cases in the last two years where the Hong Kong Courts had been more prepared to give foreign witnesses the option of giving evidence outside of Hong Kong and to order remote hearings, as opposed to requiring personal attendance of witnesses to give evidence in Court. With the lifting of the Government restrictions on COVID-19, including the quarantine requirements, the Courts have now been less willing to accept COVID-19 as a reason for witnesses to avoid attending in person to give evidence. This article explains the Hong Kong Court's general stance on this issue and explores the options still available to foreign witnesses to give evidence outside of Hong Kong post COVID-19.

General Rule

The starting point taken by the Hong Kong Courts remains that witnesses should attend in person to give their evidence in Court. The underlying reason for this is that the Court sees the solemnity of Court proceedings and the atmosphere of the Court as important in contributing to the administration of justice. It is a matter of degree and a case management decision, which has to be made taking into account all the circumstances (*Delco Participation BV v HWH Holdings Ltd* [2021] HKCFI 249 at [7]).

Exceptions to the General Rule - factors considered by the Court

Order 38 rule 3(1) of the Rules of the High Court (Cap. 4A) (RHC) provides that the Court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order. The more common method by which witnesses are allowed by the Court to give evidence outside Hong Kong is by giving it via video link.

A balancing test is to be applied to ensure that a just result is achieved for both parties. This test is conveniently summarised by the Court in *Tsang Woon Ming v Lai Ka Lim* [2020] HKCFI 891 at [9]:-

(1) The giving of evidence by video conferencing facilities (VCF) is an exception.

(2) The starting point is that proceedings are conducted in Court. This factor is more important when it comes to a trial;

(3) Sound reason is required to justify a departure from the starting point;

(4) The solemnity of Court proceedings and its atmosphere is highly important in the taking of evidence;

(5) The Court may be more disposed to exercise its discretion to allow evidence by VCF in respect of technical or purely factual evidence which involves no serious issue on credibility or relatively unimportant evidence;

(6) Where the credibility of the witness is seriously contested, it is important for the witness to be examined under the solemn atmosphere of the Court;

(7) Costs and convenience may be important considerations which the Court will have to weigh in the determination of the application; and

(8) Ultimately, it is a matter of judgment of the Court choosing the course best calculated to achieve a just result by taking into account all the material considerations, including whether the witness is capable of attending the proceedings, any prejudice to the other party, the Underlying Objectives under Order 1A rule 1 of the RHC, any delay to the proceedings and practical considerations like the availability of the facilities, as set out in Practice Direction 29 – which governs the rules on the use of the Technology Court in Hong Kong.

With the lifting of the Government restrictions on COVID-19, the Court has attached less weight on COVID-19 grounds such as quarantine requirements and entry restrictions when reviewing these applications (*Esports Business Development Limited v Wong Chun Yee Christopher* [2022] HKCFI 2627 at [7]-[11]).

Valid grounds allowed by the Hong Kong Courts in favour of evidence by video link

Serious health concerns:-

- In *Daimler AG v Leiduck (No 2)* [2013] 5 HKC 170, the Court of Appeal allowed the 1st Defendant to give evidence by video-link in trial because medical evidence clearly and unequivocally stated that it would be hazardous to the 1st Defendant's life and health to have to undertake his journey to Hong Kong.

- In *Lai Shui Yin v Administrators of the Estate of Leung Wai Kay* [2022] HKCFI 2643, the witness's need to take care of her husband as his primary carer and the health hazards of her travelling to Hong Kong were held to be valid reasons in favour of the witness giving evidence by video-link.

Financial and job difficulties:-

- In *Javier Jenevieve Asuncion v Gu Huai Yu & Anor* [2022] HKDC 1162, the Court granted leave for the evidence of three witnesses to be given by video-link after considering their personal, financial and job situations including factors such as (a) they did not have personal savings; (b) the possibility of them losing their job due to absence from work if they were to attend Hong Kong to give evidence and (c) although the applicant was legally aided, the costs of the three witnesses travelling to Hong Kong to give evidence would not be covered by Legal Aid.

Failure to obtain visa

- In *Tsang Woon Ming v Lai Ka Lim* [2020] HKCFI 891, leave was granted to a witness residing in the Mainland to give evidence by video-link on the grounds that (a) she was subject to travel restrictions as a Mainland resident and (b) she was unable to obtain a visa to come to Hong Kong and was ineligible to apply for the special visa allowing her to come to Hong Kong.

Technical evidence

- In *Raj Kumar Mahajan v HCL Technologies (Hong Kong Limited) & Anor* [2010] HKCU 2187 (unrep, 7 October 2010), the Court of Appeal mentioned in passing that it may be important and useful for a well-known and busy physician or surgeon in a foreign country to give his highly technical evidence by video-link because otherwise one will not have it at all.

Conclusion

Despite the incremental use of the Technology Court in Hong Kong, the norm and starting point remains that witnesses should attend in person in Hong Kong to give their evidence in Court.

Health concerns arising from COVID-19 are now generally not acceptable to the Court, given the lift of the Government restrictions in relation to COVID-19.

Applicants applying to the Court for leave to give evidence by video link should be prepared to accept that unless there are special circumstances such as those mentioned above, the Court is unlikely to grant such an application because the Court sees the solemnity of Court proceedings and the atmosphere of the Court as important in contributing to the administration of justice.

An overview of the new Anti-Doxxing Regime

Michelle Wan

Anti-doxxing law was introduced in Hong Kong when the Personal Data (Privacy) (Amendment) Ordinance 2021 (PCPO) came into effect on 8 October 2021. We discussed the new investigatory powers of the Privacy Commissioner for Personal Data (the PCPD) in our previous article.

The Office of the PCPD has recently reported on its work in 2022 (PCPD Report). On 8 March 2023, it was reported that an offender was convicted of 14 charges of the new doxxing offence upon her guilty plea and sentenced to two months imprisonment, suspended for two years. This is the second case prosecuted by the PCPD since the new anti-doxxing regime took effect.

With the increasing reports of arrests and convictions under the anti-doxxing law, we take this opportunity to review how the law is enforced.

In the PCPD Report released on 9 February 2023, it was reported that until 31 December 2022, the PCPD had handled a total of 2,128 doxxing cases and initiated 114 criminal investigations. 32 cases were referred to the Police for further follow-up action.

As to arrest operations, the PCPD had by 31 December 2022, mounted a total of 12 arrest operations, including one in 2021 and 11 in 2022 (with one arrest made as a joint operation with the Police). A total of 12 suspects were arrested. The nature of disputes leading to the doxxing acts were monetary disputes (50%), work disputes (25%) and relationship disputes (17%). The means used by the doxxers were social media platforms and instant messaging apps (92%), as well as posters (8%).

As at 31 December 2022, five of the arrested persons had been charged. Two of them were convicted, with one sentenced. That was the first conviction under the anti-doxxing law when the offender pleaded guilty to seven counts of disclosing personal data without consent and sentenced to 8 months' imprisonment on 6 October 2022. It is noteworthy that the offender was convicted less than four months after he was arrested in June 2022.

The public therefore should be reminded that doxxing is a serious offence and an offender can be liable on conviction to a fine of up to $1,000,000 and imprisonment for 5 years. We recap on the important features of the law below.

Pursuant to section 64(3A) of the PCPO, a person commits an offence if the person discloses any personal data of a data subject without the relevant consent of the data subject:

(a) with an intent to cause any specified harm to the data subject or any family member of the data subject; or
(b) being reckless as to whether any specified harm would be, or would likely be, caused to the data subject or any family member of the data subject.

According to section 64(6) of the PDPO, specified harm in relation to a person means:

(a) harassment, molestation, pestering, threat or intimidation to the person;
(b) bodily harm or psychological harm to the person;
(c) harm causing the person reasonably to be concerned for the person's safety or well-being; or
(d) damage to the property of the person.

The Privacy Commissioner is given broad investigation powers under the new regime. It is empowered to conduct criminal investigations into doxxing-related offences and institute prosecutions, and has the authority to access electronic devices without a warrant under "urgent circumstances", while a warrant is still required for entering and searching premises.

Apart from criminal investigations and prosecutions, the anti-doxxing law confers statutory powers on the Privacy Commissioner to serve cessation notices, to demand the removal of doxxing messages. Between October 2021 and 31 December 2022, it is reported that the PCPD issued a total of 1,500 cessation notices to 26 online platforms, requesting removal of 17,703 doxxing messages, with a compliance rate of over 90%.

The multiple arrests have sent a clear message to the public that the anti-doxxing law is being robustly enforced in Hong Kong. The new power given to the Privacy Commissioner and the streamlined process also effectively expedites enforcement actions against doxxing cases, resulting in speedy convictions.

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