with insights

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Contents

Foreword

The global pandemic and ongoing geopolitical uncertainties have reshaped many aspects of our lives. It has affected the way we interact with friends and family, our work patterns and economic activities.

Given the fast-evolving situation, all of us need to be resilient in coping with these circumstances, flexible in adapting to the new normal and prepared in capturing new opportunities brought about by the situation.

In Asia, we have seen an increased risk of disputes between parties and have strengthened and expanded our service offerings to best safeguard and protect your interest around the world. We welcomed litigation and white-collar crime partner Chenthil Kumarasingam in Singapore and international arbitration partner Sherlin Tung in Hong Kong. We are also pleased to be recognised for our strong expertise in resolving complex commercial disputes in the 13th edition of the Global Arbitration Review (GAR) list of top 100 firms in arbitration.

At the same time, we have also observed an accelerated adoption and shift towards technology and innovation during these challenging times. Consequently, investments in technology and innovative companies are gaining momentum. As such, the arrival of technology and intellectual property partner Jonathan Kok in Singapore was timely. Jonathan and his team are now part of our Withers tech practice in Asia, representing technology businesses, venture capital investors and founders of innovative companies.

During such times of crisis, safe-haven markets like Japan has also seen increased investments from global investors into Japanese real estate. Some market watchers expect investors to deploy sizable chunks of the US$40 billion of capital earmarked for the Asia Pacific into the country. To support this growth, we welcomed new real estate and finance partner Toshihiko Tsuchiya and his team, which positions Withers as one of the three largest real estate practices in Japan amongst international law firms.

In the fifth edition of With… Insights, we share our insights to help you build and protect your vision of success for yourself and your family. We will discuss issues that matter to your personal and family life such as international will planning, the effects of economic uncertainty on divorce settlements, attacks on trusts and investments into residential properties. We will also cover commercial topics, including how to unlock economic synergies in branded residences, intellectual property consideration when acquiring businesses and the ideal location to resolve your disputes.

We hope that you will have a good read and we wish you a brilliant rest of the year ahead!

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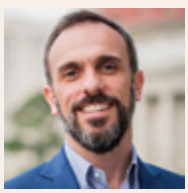

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In the spotlight




From left: Chenthil Kumarasingam, Jonathan Kok, Sherlin Tung, Toshihiko Tsuchiya

Boosting our capabilities in practice areas and markets

In Singapore, the arrival of litigation and white-collar crime partner Chenthil Kumarasingam and his team further strengthens our commercial and civil litigation, arbitration and mediation practice in Asia. Chenthil's experience includes advising on cross border investment and joint venture disputes, company and shareholder disputes, banking and securities claims, insolvency, commercial fraud, professional disciplinary matters and white-collar cases.

The entrance of technology and intellectual property partner Jonathan Kok and his team in Singapore provides strong leadership and growth for Withers Tech in Asia, a comprehensive legal offering designed to meet the unique needs of tech entrepreneurs, investors and high-growth technology companies across different industries globally. Jonathan has over two decades of experience advising clients on the registration, protection and commercialisation of their technology assets for business growth and expansion.

In Hong Kong, we have expanded our global international dispute resolution capabilities with the hiring of international arbitration partner, Sherlin Tung. With over a decade of experience, Sherlin possesses a rare and unique background in that she has experience in roles from all perspectives of international arbitration. On top of private practice, Sherlin has worked with a leading arbitrator, leading arbitral institution, and in-house with a publicly listed international conglomerate where she focused on international disputes.

In Tokyo, the addition of real estate partner Toshihiko Tsuchiya and his team effectively boosts us as one of the largest real estate practices amongst international law firms in Japan. Dual-qualified in both Japan and New York, Toshi is able to provide substantial international expertise and will add to the high calibre of expertise offered by our real estate and investment funds practices.

To serve you better, we are also pleased to announce that we have moved into our brand new and larger office in Hong Kong. We are on the 30th floor of the United Centre, effective 20 July. Our new, centrally positioned location features a client area with a 360-degree spectacular view of Hong Kong, conference rooms with the latest technological features.

With over 16,000 square feet, our new office space will better accommodate the growth of all our teams and enable us to hire additional talent to continue to provide exceptional services to our clients.

Spearheading discussions on family and wealth matters

Earlier this year, we hosted two successful family wealth conferences in Hong Kong and Singapore. The flagship conference in Hong Kong discussed how to weatherproof family trusts to withstand challenging times and examined preservation of family companies, attracting over 200 attendees. In Singapore, over 400 attendees discussed how to unite families by confronting issues and conflicts together and deep dived into managing challenges and conflicts with trustees, beneficiaries, heirs, spouses and others.

Adapting to a new normal with you

As the COVID-19 pandemic evolved and impacted the way businesses operated globally, we continue to provide you with much needed thought leadership via a stream of webinars to ensure that you receive steady updates on current issues and regulations. Our website features a dedicated resource that is continually updated to offer insights into how you and your business can be better placed in the recovery phase of the COVID-19 pandemic.

In such difficult times, we are mindful of the need to give back. For instance, our hotels and hospitality team in Singapore is helping the Singapore Cocktail Bar Association to build a charitable trust that will support food and beverage professionals in need in this challenging period.

Testament of our legal services

We continue to be recognised for our market leading expertise in serving private clients by the Chambers High Net Worth Guide 2020 with Band 1 rankings in the areas of Private Wealth Law (Domestic Firms) in Singapore and Private Wealth Law (International Firms) in China.

In The Legal 500 Asia Pacific 2020 rankings, we were recognised in 11 separate practice areas across Asia, with 36 lawyers noted by name. Notably, we achieved Tier 1 rankings for Tax and Trusts in Hong Kong and Private Wealth and Tax in Singapore.

At the WealthBriefingAsia Awards 2020, our Private Client and Tax team in Asia achieved three wins including Best Estate Planning Team in the Private client categories (Greater China); and Best Family Wealth Advisory Offering and Excellence in Servicing North American Clients in the Special wealth management categories (South East Asia). This is our third consecutive win for Best Estate Planning Team of the Year since 2018. Our wins demonstrate our ability to consistently provide exceptional client services to not only our Asian clients but those that are based overseas.

Our Hong Kong and Singapore practices received top accolades in the Benchmark Litigation Asia-Pacific 2020 rankings. Our Hong Kong practice was ranked Tier 1 in the area of family and matrimonial while our Singapore practice was recognised as a recommended firm in the areas of white collar crime and private client.

Withers has been ranked for the sixth consecutive year as top divorce law firm by Doyle's Guide Leading Family and Divorce Law Firms – Hong Kong 2020. We were also recognised as a leading law firm for employment and labour by Doyle's Guide for Leading Employment and Labour Law Firms – Singapore 2020; and for technology, media and telecommunications by Doyle's Guide for Leading Technology, Media and Telecommunications Law Firms – Singapore 2020.

Building your vision of success

We can help you, your family or family office to plan ahead for success. Our objective is to help you to secure the future of your family and the future of your business. We have deep expertise advising on all legal needs of families and their family offices, including family governance, maximisation of a family's philanthropic goals, family office establishment, tax optimisation and capital deployment - including M&A, JVs, buyouts, IPOs, property and land investments, financing and intellectual property protection.

Ensuring your Will is airtight beyond borders

Building and protecting your vision of success extends beyond your generation. Most people are familiar with the importance of having a Will. But families are becoming increasingly international, and when taking into consideration foreign citizenship and investments, one sole Will drafted by lawyers in their country of residence is often no longer enough.

When might a simple Will be deficient?

- You have assets in different countries
- You have multiple residencies, citizenships, or domiciles
- You married abroad
- You wish to leave assets to family or friends overseas

Common problems and potential solutions

Estate tax

Mrs Tan and her entire family are residents in Singapore. She owns one property in the US and one property in the Philippines. She decides to leave the properties to her children under her Will. Upon her death, the US and the Philippines would both impose estate tax. Her children would be responsible for paying this tax and may need to sell the properties to do so. This could have been avoided had she left her US property in a special type of trust for the benefit of her husband and children, and her property in the Philippines in a trust for the benefit of her grandchildren.

Income tax

Mr Wong lives in Hong Kong and owns assets solely in Hong Kong. He executes a Hong Kong Will leaving his assets to his only son. However, his son has lived in the UK for 15 years and as such he is 'deemed domiciled' there. Upon inheriting Mr Wong's assets, Mr Wong's son will be subject to UK income tax on all new Hong Kong investment income, including the underlying income of any companies he inherits, at a rate of up to 45%.

Through careful trust planning within Mr Wong's original Will, this investment income could have remained tax-free.

Forced heirship rules

Mr and Mrs Lee live in Hong Kong and own properties in France and Italy. They execute a Hong Kong Will in relation to their worldwide assets, leaving their entire estate to each other. However, France and Italy both have forced heirship regimes, which prevent owners from freely disposing of their property. Mr and Mrs Lee's children may therefore claim a share of the properties. This could easily have been prevented by Mr and Mrs Lee had they specifically worded their Wills to enable their Chinese (Hong Kong) nationality to govern succession.

Matrimonial property regimes

Despite now living in Singapore, Mr and Mrs Chaya were married in Thailand. They do not have children and agreed to leave the wealth they created throughout their marriage to their respective families. However, Thailand has a matrimonial property regime, under which the wealth accrued during their marriage

may be treated as being owned by them jointly. This could take precedence over their Wills, such that their wealth is passed to each other and then solely to the family of the second to die, instead of being divided equally as they intended. Pre or post nuptial agreements in conjunction with carefully constructed Wills could potentially mitigate this.

Local Will and foreign assets

Mrs Zhang executes a Hong Kong Will. She owns assets in Hong Kong and the PRC. Although Mrs Zhang's Will is valid in Hong Kong, there is a risk that it may not be recognised in the PRC. Mrs Zhang's PRC assets will therefore not be distributed in accordance with her wishes, but instead follow the intestacy rules of the PRC: half of Mrs Zhang's matrimonial property will be distributed to her husband, while her remaining estate will be distributed to her husband, parents, and children in equal shares. In hindsight, Mrs Zhang should have made a separate PRC Will.

Probate delays

Mr Chan has many assets in countries throughout Asia and the BVI. He executes a single Hong Kong Will in relation to his worldwide estate. Upon Mr Chan's death, his Will must be submitted to probate at each of the probate registries and/ or courts in each different country where he holds assets, sometimes sequentially rather than simultaneously. If assets are held in civil law jurisdictions, the local succession procedures may involve using public notaries or other local experts. All of this can take years, during which Mr Chan's family may not have any access to the assets. This can cause untold difficulties at an already stressful time. This process could have been expedited by selecting key assets and executing separate local Wills in those jurisdictions, or by consolidating certain assets within holding structures in particular jurisdictions.

Capacity issues

Mrs Ng executes a Will which covers her worldwide assets. Unfortunately, Mrs Ng loses mental capacity prior to her death. As the provisions of Mrs Ng's Will only take effect on her death, many jurisdictions prevent anyone from making any decisions on her behalf in relation to her assets whilst she is alive but incapacitated without the intervention of the courts. This could have been avoided had Mrs Ng appointed one or more persons under lasting powers of attorney (or, in some jurisdictions, enduring powers of attorney) who could manage her affairs in key jurisdictions where she holds assets in the event of a loss of mental capacity.

Next steps

Without skilful and deliberate planning, a Will could be invalid or inefficient in a multitude of circumstances. It is therefore essential to draw up a Will that takes into consideration international legal complexities and possible extenuating circumstances.

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Crème de la crème: Good class bungalows - What potential buyers need to know

What are Good Class Bungalows?

Landed residential properties are coveted in land-scarce Singapore due to its limited supply and the prestige associated with owning or living in one. Among such properties, Good Class Bungalows ("GCBs") are the most exclusive and costly, in part due to the planning constraints imposed by the Urban Redevelopment Authority ("URA").

For a landed residential property to be classed as a GCB, it must demonstrate the following attributes:

(i) have a land area of at least 1,400 sqm;

(ii) be located in one of the 39 GCB areas gazetted by the URA;

(iii) the land must consist of a minimum plot width of 18.5 m and minimum plot depth of 30 m; and

(iv) the footprint of the bungalow and coverage of all building features must not exceed 40% of the land plot.

Due to height restrictions, GCBs are also generally built up to two storeys only.

It is estimated that there are currently about 2,800 GCBs in Singapore only. Most of them are freehold properties, making them attractive for legacy planning.

Who is eligible to buy?

Only Singapore citizens or Singapore entities are allowed to purchase a GCB.

In particular, permitted entities include private limited companies with directors and shareholders who are all Singapore citizens, or a trust with trustees and beneficiaries who are all Singapore citizens.

A foreign individual or entity will not be permitted to buy a GCB. However, it is possible for a foreign individual or entity to rent one.

A foreign individual or entity may consider acquiring other types of landed residential property instead. Approval from the Land Dealings Approval Unit of the Singapore Land Authority ("SLA") will still be required prior to the purchase.

What should I take note of when buying a GCB?

Below are two important points that potential buyers should take note of.

State and condition of the property:
If the buyer's intention is to tear down and redevelop the existing bungalow, the buyer could agree for the property to be sold on an "as-is, where-is" condition at the date of completion i.e. in the state and condition on the date of completion.

The buyer may also decide to subdivide the plot of land into smaller plots and sell them on the resale market, subject to approvals being obtained from the relevant authorities.

However, if the buyer intends to undertake minimal construction work or requires certainty as to the condition of the property on handover of the keys and access, then the sale contract should specify that the seller is to deliver the property in the same state and condition as it was at the date of the contract, save for fair wear and tear. There should also be express warranties to ensure that no unauthorised additions or alterations have been carried out on the property.

Escape clauses

Legal requisitions are often conducted by the buyer's lawyers in the acquisition of real estate properties.

The buyer should consult his lawyers to assess whether the property is subject to road or drainage reserves, which could result in affected portions of the land being set aside or surrendered, or approval being required from the Land Transport Authority ("LTA") or the Public Utilities Board ("PUB") prior to the commencement of any redevelopment work.

Any unsatisfactory legal requisition replies may affect the value of the property. It is therefore highly important that the sale contract includes provisions which entitle the buyer to withdraw from the transaction in the event of any unsatisfactory legal requisition.

How do I ensure that my privacy is protected?

Once a sale contract is formed with the seller, it is usual practice for the buyer's lawyers to lodge a caveat against the property with the SLA.

A caveat will contain publicly available information, such as:

(i) the address of the property;

(ii) the identities of the buyer and seller; and

(iii) the purchase price and date of contract.

Even if a caveat is not lodged, the name of the buyer and the purchase price will become publicly available information after the acquisition is completed.

Privacy is a common concern, especially for buyers of GCBs.

They are often public figures who would like to avoid unwanted attention.

To acquire property discreetly, we advise potential buyers to establish an effective property holding structure, which can protect the privacy of the buyer and possibly achieve stamp duty savings.

For example, if a buyer intends to purchase the property either for their child, who may still be a minor, or with a company, he may consider doing so through a trust arrangement. In such cases, the parent or the entity will retain legal ownership of the property as a trustee, while the child or appointed beneficiary becomes entitled to its beneficial interests.

All paths lead to Rome; when looking to acquire a GCB, each buyer's needs and objectives can be met with the right solutions.

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Divorce in the age of political unrest, economic uncertainty and beyond

With political and social unrest culminating in economic uncertainty that was then exacerbated by the trade war between China and the US, 2019 was undeniably a challenging year for Hong Kong. It is the city's resilience that propels it forward in recovery from the devastating and unprecedented effects of the Covid-19 pandemic.

As Hong Kong deliberates its next steps forward, so does its people - in particular, its family units.

Division within families as a result of diverging political views is a significant cause for divorce or marital tension, and the adverse economic impact caused by previous political conflict in Hong Kong in addition to the effects of the pandemic will almost certainly affect the division of assets in a divorce. In addition, anxiety over economic uncertainty is proving to have a lasting effect on all families in the city. Trends suggest that economic factors will particularly affect high-net-worth (HNW) couples whose assets are investment-heavy.

For such families, severe economic downturn will result in a large dent in the family pot. Many businesses (including family-run entities) are currently suffering, with valuations from the early months of the previous year seeing a drastic change this year. As a result, the capital value of marital assets will have decreased, as would the dividends from family-run companies and rental income from property portfolios.

Making a clean break

This could dramatically alter a divorcing couple's financial settlement, as the available assets may not be sufficient for the couple to achieve a 'clean break'. A clean-break settlement implies that both parties involved in the divorce have no financial ties to each other once the court order is implemented. This is something that the courts and most divorcing couples prefer, as it allows both parties to move forward financially independent of one another.

There is no obligation for the Hong Kong courts to enact a clean break; however, where substantial funds are available, it will ensure that both parties exit their marriage with sufficient financial security for the future. The court will assess all assets and income owned by the couple in any location, either solely or jointly.

This can cause difficulty when dealing with HNW individuals residing in Hong Kong, as they typically own assets all over the world.

In order to achieve a clean break, there needs to be an assessment of what the financially weaker party requires on a monthly basis. This is a capitalised sum, which is assessed into a lump-sum payment. In most cases, the outcome is considered reasonable; however, occasionally it results in one party receiving a cash lump sum and the other obtaining illiquid assets. Given the state of flux of the current economic environment, this can lead to an unfair situation and disappointment among one or both parties.

This situation often occurred in Hong Kong during and following the financial crisis of 2008. The court cannot vary the amount of a lump sum; only the terms of the payment can be modified. Therefore, it is unable to change orders that have been previously made, even in the event that one party is left with investments that have decreased significantly in value. The parties may have previously agreed to divide the marital pot equally; however, by the time the assets are divided, one party ends up receiving considerably more.

Is monthly maintenance appropriate in uncertain times?

In divorce settlements where there is uncertainty around the viability of capital assets, parties involved are increasingly eager to craft settlements which include a form of monthly maintenance payments, occasionally in addition to a more modest lump sum. The amount of a monthly maintenance payment can be varied if there is a change in circumstance for either party, such as the loss of employment or dividends. This accounts for external events and allows for some flexibility in the settlement arrangement. In addition, a joint-lives maintenance agreement or a fixed term is possible, depending on what may be appropriate in the circumstances.

In conclusion, during times of financial uncertainty, careful consideration is required when balancing liquid and illiquid assets during divorce settlement proceedings. It might also be more appropriate to adopt monthly maintenance payments rather than settling with a clean break during this period. There might also be some HNW couples who are choosing to put their divorce on hold until the global economy and local market environment at home regains a certain degree of stability.

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Trusts - security, conspiracy, and vigilance

Trusts have long been adopted by high-net-worth individuals in Hong Kong as a tool for estate planning, tax planning, and asset protection. The benefits of trusts, which are widely recognised, include continuity, flexibility, and confidentiality. Trusts are typically set up to protect assets from creditors' claims; to prevent assets from falling within the matrimonial pot in the event of a divorce; and to avoid the probate process in the event of a death.

A fundamental feature of a trust is the separation of legal and beneficial ownership of assets. The settlor - the person putting assets into a trust - passes legal ownership of his/her assets to a third party known as the trustee. The trustee is responsible for holding the trust assets for the beneficiaries of the trust. The terms of the arrangement are documented in a trust deed.

In conventional trusts, the trustee generally has a high degree of control over the trust assets, while the settlor is left with no rights after contributing the assets. However, in practice, many settlors are uncomfortable with the idea of handing over

complete control of their assets to a third party. Therefore, settlors often reserve certain rights and powers to themselves in the trust deed, such as the power to remove the trustee and appoint a new one.

There are many ways in which a trust can be attacked, while the extent of the attack depends on the relationship of the attacker to the trust parties and the powers reserved by the settlor.

Potential attackers typically include disgruntled beneficiaries, heirs, family members or divorcing spouses.

Lines of attack often involve challenging the validity of the trust or setting aside transfers into a trust intending to defeat claims.

In the case of Tam Mei Kam v HSBC International Trustee Ltd & others, the mother of Anita Mui, a famous celebrity in Hong Kong, challenged the validity of her Will and a trust set up by Anita shortly before her death. Madam Tam could not accept that Anita had left her entire estate to the Trust and that HSBC, as trustee of the Trust, was requested by Anita to: (1) distribute all shares in two private companies, each holding a real estate property, to fashion designer Eddie Lau; (2) set aside a sum of HK$1,700,000 to finance the education of her nephews and nieces; and (3) hold the balance of the trust fund for the purpose of paying HK$70,000 per month to Madam Tam during her lifetime, with the remaining balance to be distributed to New Horizon Buddhist Association Limited after Madam Tam's lifetime.

Disgruntled by the contents of Anita's Will and the trust arrangement, Madam Tam argued that Anita lacked the mental capacity to know and approve of the contents of the Will and the trust documents. After considering all evidence, the Court concluded that Anita had the testamentary capacity to make the Will, the mental capacity to settle the Trust, and that both the Will and trust deed were duly executed.

Given the wide range of arguments potential attackers may make to undermine the integrity of a trust, careful planning and drafting are crucial during the establishment of any trust.

Trust advisors must understand the circumstances of individual settlors thoroughly and carefully consider the likely sources of attack.

A well-designed structure not only achieves the objectives and purposes of a trust, but also goes a long way in saving the time, money, and energy required to defend a trust from attack.

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Protecting your vision of success

At times, navigating stormy waters whilst protecting yourself, your reputation and your family assets can seem overwhelming. Withers has leading litigators and regulatory specialists in the major global business hubs who will fiercely guard your interests. Together, we can help you deal with challenges you may face, be that as an individual, a family or in a business dispute. In any crisis, seeking advice from people with expertise early on can often shape the outcome.

Why Hong Kong is the ideal place to resolve your commercial disputes

As one of the leading commercial hubs for international business transactions, Hong Kong also prides itself as a prime location for dispute resolution not only in the Asia Pacific, but also worldwide. With an established and trustworthy English-Chinese bilingual legal system, Hong Kong is an ideal hub to resolve international disputes for foreign parties conducting business in, or with parties based, in Hong Kong. Hong Kong also acts as a bridge for cross-border disputes involving Mainland Chinese parties given its geographic and economic proximity to Mainland China.

This article touches on two key points of a dispute (commencement and enforcement) in showing why Hong Kong is the ideal place to resolve commercial disputes.

Commencing Proceedings in Hong Kong

Litigation

In Hong Kong, the principle of "One Country, Two Systems" is enshrined in the Basic Law. As such, Hong Kong maintained its common law system after the handover of its sovereignty to China and is the only Chinese city with a common law jurisdiction. This provides international parties with the familiarity of a legal system but also reassurance of how Hong Kong's judiciary operates.

A party wishing to commence litigation in Hong Kong has to first identify the appropriate court. This would be based on the nature and amount of the claim. For commercial disputes, it would often be the District Court or the Court of First Instance of the High Court in which a party would commence an action.

Apart from a nominal filing fee for registering the "originating process" (setting out details of the claims and the amount of compensation being sought) with the court, the benefit for a litigant in Hong Kong is that no upfront court fees are required. This is in contrast to some other jurisdictions, where courts would require payment of courts fees based on a percentage of the total amount of the claim.

Arbitration

As a leading seat of arbitration, Hong Kong is home to a number of the world's top arbitral institutions, first-rate arbitrators, and foremost arbitration practitioners, making it an ideal place to commence arbitration proceedings.

For parties who wish to commence an arbitration to resolve disputes, there must be consent to arbitrate. In this respect, a party needs to show that a valid arbitration agreement exists. While an arbitration agreement is normally incorporated as an arbitration clause in a main contract, it is not the only means. As an arbitration friendly jurisdiction, Hong Kong law sets out a broad definition of what constitutes a valid arbitration agreement.

The details of how to commence an arbitration will depend on the wording of the arbitration agreement. An arbitration agreement generally provides for a number of procedural guidelines, including the applicable arbitral rules. Such rules should set out how a party commences arbitration and provide for the costs of an arbitration.

Enforcement of Court Judgments and Arbitral Awards

Ease in commencing proceedings is one important factor as to why Hong Kong is an ideal place for resolving commercial disputes. However, once a party has a positive judgment or award on hand, it needs to be able to collect on it. Failure of a party to honour a monetary judgment or arbitral award in Hong Kong is not the end game. A party may still enforce such judgment or award overseas where assets of the losing party exists. As briefly summerised below, Hong Kong is also a preferred jurisdiction for issuing and enforcing court judgments and arbitral awards.

Enforcement of Court Judgments

Hong Kong has reciprocal agreements for the recognition and enforcement of court judgments with 15 countries under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Chapter 319 of the Laws of Hong Kong). This means that a Hong Kong monetary judgment can be registered, then recognised and directly enforceable in the designated jurisdictions according to their respective statutes.

A party may still enforce a Hong Kong judgment overseas with relative ease outside of the 15 reciprocal jurisdictions. A party would need to bring new court proceedings (in the relevant jurisdiction) to obtain a fresh judgment from the foreign court for the recognition and enforcement of the Hong Kong judgment in that particular jurisdiction. As a common law jurisdiction, Hong Kong judgments are given preferential treatments by other common law jurisdictions worldwide. A party simply needs to show, subject to the relevant laws and procedural rules, that the Hong Kong judgment is a money judgment for a definite sum, is final and conclusive as to the underlying disputes between the

parties, and not subject to further appeals in Hong Kong.

Such enforcement mechanism is also possible in non-common law jurisdictions and the above options also apply to enforcement of foreign judgments in Hong Kong.

Enforcement of arbitral awards

With respect to arbitration awards, Hong Kong is very arbitration friendly and the courts have rarely refused to recognise or enforce an arbitral award (whether it is made in or outside of Hong Kong).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is a key instrument in international arbitration. As of June 2020, 164 countries have agreed to recognise and enforce arbitration awards made in other signatory countries subject to limited conditions. The New York Convention applies to Hong Kong by virtue of China's extension of its application to Hong Kong. Therefore, so long as certain conditions are met, Hong Kong will enforce arbitral awards as if they were local Hong Kong court judgments.

The grounds for refusing enforcement of an arbitral award in Hong Kong (and other New York Convention countries) are very limited. These grounds mainly relate to procedural fairness, jurisdictional issues, and issues of public policy. Unlike the appeals system in national courts, substantive issues such as questions of facts and law determined in an award cannot be challenged or used as grounds for refusing enforcement.

Even in the unlikely event an arbitral award made in Hong Kong needs to be enforced in a non-New York Convention jurisdiction, enforcement may still be possible.

Reciprocity with Mainland China

Given Hong Kong's status as a separate jurisdiction from Mainland China, Hong Kong judgments and arbitral awards are separate and distinct from those in Mainland China. While they are not considered "international" for purposes of enforcement, Hong Kong judgments and arbitration awards have reciprocity in Mainland China through specific arrangements.

The implementation of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region means 90% of civil and commercial judgments will be mutually recognised and enforced between Mainland China and Hong Kong. Whereas the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administration Region allows for enforcement of arbitral awards between Mainland China and Hong Kong.

Conclusion

Hong Kong offers parties a transparent and user friendly platform. Its recognised judicial system and reciprocity with Mainland China further strengthen its position worldwide as the ideal place for parties to resolve disputes particularly in light of the increase in cross-border relations between the East and West.

For further information on how Withers can help ensure the inclusion of a proper dispute resolution mechanism in cross-border transactions and/or resolution of international commercial disputes, please do not hesitate to contact us.

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Making money, doing good: How family offices marry asset management and philanthropy

While previously intimidating to many, the acronym ESG - Environmental, Social, and Governance - stands for a lofty vision that appeals to asset owners, managers and investors alike. It cuts across environmental causes, such as climate change, to social agendas aimed at promoting workforce diversity and the eradication of racial discrimination, and finally arrives at board governance practices, as well as disclosure and reporting standards. That sustainable investing is now mainstream is no longer a controversial statement; the 50th World Economic Forum, held in January 2020, cited climate-linked environmental issues as projected to have substantial global economic impact over the next 10 years.

How does private wealth fit into this discussion?

Impact investing serves to "bridge the gap between philanthropy and asset management," MAS deputy director Jacqueline Loh points out in her keynote speech at the AVPN Virtual Conference 2020. The Monetary Authority of Singapore recently observed that foundations, trusts and family offices are well-placed to drive positive societal change through their investments and business operations. Our firm's experience in helping Asian clients set up their family foundation or family philanthropic trusts has demonstrated that [ESG in] philanthropy is a growing consideration. This development was also cited in the 2019 Global Family Office Report prepared by UBS and Campden Research. More than 25% of family foundations surveyed are actively engaged in sustainable investing, with climate change, clean water and global health issues their predominant concerns.

Family offices (FO) tend to be smaller than global institutional funds but private capital has more than sufficient clout to make a difference. In addition, FOs are more agile and move at a quicker pace, as they are not saddled with multi-layered decision-making and protocols inevitable in institutional managers.

Our experience also reveals that many FOs do not have a set of strictly defined key performance indicators for ESG investments. Instead, it is often a set of unspoken and evolving common philanthropic values prevalent within the family that drives their impact investment.

Whilst there is no standard blueprint for impact investing, we have found the following guidelines, laid out in the 2014's World Economic Forum (WEF) Report, "Impact Investing: A Primer for Family Offices", to be particularly useful:

a) Vision-Casting
Determining and agreeing on what the family's core values, long-term goals, and legacy are, so that investment strategies are clearly articulated, aligned and implemented. This may be more difficult to achieve if there are diverging preferences and goals.

b) Developing appropriate guidelines
There is no "one-size-fits-all" formula to the adoption of ESG strategies. Family offices need to consider which sustainable investing approach best aligns with their investment philosophy and ascertain how best to integrate ESG factors into their financial analysis matrix. One possible method is the conventional negative (or exclusionary) screening approach, which filters out companies operating in "undesirable" sectors and/or expressly includes ESG criteria to achieve maximum risk-adjusted returns. Family offices need to focus solely on material ESG factors that impact financial performance; it is neither possible nor necessary to cover all aspects of ESG.

c) Re-thinking and Upskilling
A mindset shift, ensuring that provision of relevant resources, and hiring or re-training where necessary introduces, integrates, and ingrains ESG practices into the FO's processes. This could be tweaking a dedicated function, or conducting a re-scoping of existing investment workflows with the support of external advisors. The team then works to overlay the FO's asset management and philanthropic activities with ESG considerations, possibly working alongside or under the purview of a sustainability committee. Financial and social performance must be monitored, valued and regularly communicated to stakeholders. Regardless of individual circumstances, cultural transformation is the ultimate goal. Rather than acting as a means to an end, ESG should inform the FO's approach holistically.

d) Impact assessment
The main challenge to impact investing has been in the determination of the metrics of "success". Returns must clearly exceed previous financial performance but setting clear expectations at the outset and how they are measured will avoid subsequent ambiguities and potential disagreements. Working with knowledge partners and expert advisors are crucial to conducting accurate and meaningful impact assessments.

The Asian Venture Philanthropy Network ("**AVPN**") published a useful guide in May 2016 (A Guide to Effective Impact Assessment). It explores various frameworks and templates for impact assessment, the motivations for impact assessment and how impact assessment frameworks are set up. Key takeaways laid out in the Guide include:

- Identifying the recipient of and motivation for the impact assessment reports. Is the recipient internal (e.g. senior management) or external (e.g. potential funders)? Is the assessment motivated by reporting needs, branding considerations, fundraising efforts, or mainly for internal consumption (e.g. performance and risk management)?

- Clearly state the social goals to be impacted, obtain data from all relevant stakeholders and ensure that outcomes are measurable.

- Both qualitative and quantitative indicators contribute to conveying impact but a business's stage of development will influence the robustness of data collection. Paper data collection will give way to technology-based data collection.

- It is important to understand that data collected needs to be interpreted appropriately.

- Depending on your motivations, existing templates for both standardised and customised indicators in the areas of due diligence, performance management and risk management are available. Examples of the former include the Impact Reporting and Investment Standards and the Global Reporting Initiative. Customised indicators fall into two main categories, quantitative or qualitative.

- Ensure that the results of your impact assessment comply with reporting guidelines and, wherever possible, is presented in the most suitable format for its audience. There are significant examples to demonstrate the branding and marketing value of such reports.

Evaluating the portfolio on a regular basis will allow the family office to adjust and re-define their investment strategies and goals. As the WEF Report observed, "for the strategy to be sustainable, the family must be clear on return expectations, as well as short-term and long-term capital needs". Guided by generational values and the desire for both economic and social return, FOs can play a catalytic role in acting as the "*bridge between philanthropy and asset management*". Perhaps a pot of gold awaits all who cross that bridge.

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Unlocking the synergies of branded residences

Branded residences are urban apartments and resort villas which are conceived, designed, and sold to individual buyers under a hotel brand. These projects are typically next door to a branded hotel or resort development in a premium location run by the same operator.

Benefits of branded residences projects

The benefits private investors are seeking from branded residences differ depending on their motivation. If the investor aims to acquire a residence purely as an investment, a mixed-use project consisting of a hotel and branded residences has various advantages:

1) With the hotel operator almost certainly offering a rental programme in this scenario, the branded residences can be used to generate income. Through the rental pool, the unit becomes part of the hotel inventory and is managed by the hotel operator in the same way that it manages the hotel rooms. The rental programme can be structured with a fixed rent, variable rent (based on the gross revenue or net operating profit), or a combination of both. The ultimate rental pool structure will depend heavily on market fundamentals and the developer's overall offering. Destinations which combine both business and leisure tourism in particular can drive strong rental demand through branded residences.

2) The operator can maintain the residences year-round (in return for maintenance charges), which saves hassle for individual owners and ensures that the residence is ready for use at any time.

3) To enhance the appeal of the rental pool structure, some developers may offer guaranteed returns to investors, usually limited to a ramp-up stabilisation period with a transition to pure profit sharing (either on gross operating revenue, net operating profit level, or a combination of both) once the project enters stabilised trading performance.

4) The investors are usually entitled to use their unit on a free-of-charge or heavily discounted basis up to, for example, 2-4 weeks per year, whilst the property is generating revenue in the remaining months.

5) If investors follow a "buy-to-sell" strategy, the branded residences also have an edge where the profile (and usually location) of the project generates a resale premium over and above the market price of unbranded peers in the same location. These investors will target such projects off plan and look to drive a premium on a resale once construction is completed.

As illustrated above, the greatest synergy can be expected in projects where the branded residences are constructed as part of a bigger mixed-use development alongside a hotel and incorporated into a rental pool structure.

Rental pool arrangements

The rental pool structure can be optional or mandatory. In many cases, the developer will need to offer a mandatory rental pool due to arrangements with a selected hotel operator. Under an optional rental pool scheme, a unit buyer/owner is free to choose whether to keep the unit for personal use or place it in the hotel inventory (subject to furnishing in accordance with the operator's brand standards). However, the operator may seek the right to reject the placement of units into the rental pool if it estimates that the existing hotel inventory will not be utilised in full.

The terms and conditions of the rental pool scheme are set out in a Rental Pool Agreement attached to the Unit SPA. For a "mandatory" rental pool, the Rental Pool Agreement is either executed simultaneously with the Unit SPA, or where the local law requires. Instead of the Rental Pool Agreement, the unit buyers and developer may be required to enter into an "agreement to lease" first (as a preliminary binding agreement, in force during the project construction), to be replaced with a definitive Rental Pool Agreement (to be attached to the "agreement to lease" as a schedule) upon completion of construction.

To appreciate the risk and reward profile, unit buyers should be mindful of and carefully consider the following terms in the Rental Pool Agreement:

- the term of the contract and the unit owner's right to prematurely terminate thereof;
- budgeting, reporting, and fees due to the developer and operator;
- profit sharing mechanism (either on gross operating revenue or net operating profit level or a combination of both) if any;
- events of default and remedies available to the developer in case of breach of contract by the unit owner;
- working capital top-up obligations;
- capex requirements; and
- insurance requirements.

Where foreign investors are prevented from acquiring an ownership title, the developer may offer long-term lease arrangements instead, in which case the Rental Pool Agreement becomes a sub-lease agreement by nature.

In certain markets, rental pool arrangements are regarded as a collective investment scheme/ syndication regime/managed investment scheme (or similar local equivalent). In these circumstances, developers may need to structure the project in a way that the funds generated by an individual unit and related operating and non-operating expenses are accounted separately (i.e. without pooling with other unit owners). Unit owners joining the rental pool arrangement would need to accept the risk that the rental profit of their particular unit may not be the same as that of other units in the same development due to a number of individual factors, such as view, type of room, number of bedrooms etc.

With regards to operating expenses of the projects, all expenses will first be centrally incurred by the hotel with a charge-back mechanism applicable to all units placed in the rental programme. The allocation formula would need to account for the duration of the accommodation period if any was taken by the unit owner, as well as the season in which such accommodation entitlement was used by the unit owner. The hotel may also charge back a share of capex expenses and FF&E spending incurred for public areas in the hotel to which guests of the units in the rental programme have access.

In summary, the branded residences model may not be the easiest to embrace. However, if structured properly, these projects can create ample synergies and opportunities for all stakeholders involved.

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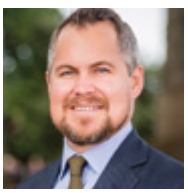

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Offshore structure with online operations in Hong Kong in the digital age – walking a thin line?

Investors often set up their investment structure in offshore jurisdictions such as the British Virgin Islands and Cayman Islands. Whether they are limited partnerships or companies with different share classes, these structures rely heavily on Hong Kong-based affiliates for support in management and investment decision-making, among other key business functions.

This trend is particularly noticeable in relation to cryptocurrency and other virtual assets, robo-trading, online assets evaluation/screening and other digital-oriented investment businesses.

Typically, the offshore entity carries on business by way of a fully automated system, while its Hong Kong affiliate provides technical support, such as upkeep and adjustment of its proprietary software, and is remunerated on a cost-plus basis.

The key SFC licensing and Hong Kong profits tax and transfer pricing implications regarding these offshore and onshore operations are highlighted below.

SFC Licensing

The licensing regime under the Securities and Future Ordinance (Cap. 571) is activity-based. A company that carries on a "regulated activity" in Hong Kong, regardless of whether it is incorporated in Hong Kong or elsewhere, has to obtain a license from the Securities and Futures Commission ("SFC") unless an exemption applies.

An offshore entity without operations in Hong Kong will not be treated as carrying on regulated activities in Hong Kong so long as (i) it does not hold itself as carrying on regulated activities in Hong Kong or (ii) its services are not actively marketed to the public in Hong Kong.

With regards to software/online platforms, SFC takes the view that it will not regulate platforms that only provide general advice on asset allocation among different asset classes without providing advice concerning specific investment products. However, when business activities involve providing order execution services and/or financial advice via an online environment using algorithms and other technology tools, it will likely attract licensing and regulation under Type 1 "dealing in securities" and Type 4 "advising on securities" regulated activities. Type 9 "asset management" may also be relevant if the automated platform is given full discretion in terms of investment decision-making.

Several licensing exemptions are available. For example, the offshore entity is exempt from licensing if the trading order execution is carried out by another person who is licensed for Type 1 activities. Another relevant exemption would be the provision of advisory services on an intragroup basis. So for instance, advising on securities, being a Type 4 regulated activity, is exempt from licensing so long as the advice is provided to its 100%-parent, subsidiaries or fellow subsidiaries. This intragroup exemption is particularly relevant to single-shareholder family offices.

HK Tax Issues

Where an offshore entity and a Hong Kong entity are under common control, or where one is wholly-owned or controlled by the other, the remuneration received by the Hong Kong entity in return for the services it renders to the offshore entity will be subject to transfer pricing considerations. As such, where a Hong Kong entity provides services or technical support to the affiliated offshore entity, the local entity's remuneration will have to be made on an "arm's length" basis, such that its profits are not artificially depressed to lower its tax burden in Hong Kong. This will prevent the entity from falling foul of the transfer pricing requirements of Hong Kong.

In respect of the trading profits of the offshore entity itself, Hong Kong applies the territoriality principle of taxation: only profits arising in or derived from Hong Kong from a trade, profession or business carried on in Hong Kong are subject to profits tax. Accordingly, while the Hong Kong entity's service fees are subject to profits tax (being sourced from activities rendered in Hong Kong), the trading or investment profits may or may not be subject to profits tax depending on the application of the territoriality "source" test. Whether certain profits or gains in a particular case are chargeable to profits tax has to be considered on the basis of its individual facts and circumstances. The existing laws concerning profits tax are equally applicable to transactions involving virtual assets, including the general exemption of capital gains from taxation.

Following recent legislative amendments, privately-offered onshore and offshore investment funds operating in Hong Kong can enjoy profits tax exemption for their

transactions in qualifying assets, provided they meet certain criteria. However, it appears that digital assets, which are not considered “securities”, may not be treated as qualifying assets. Therefore, relevant crypto funds may find themselves assessable for profits tax. Nevertheless, this does not affect the territoriality principle of taxation: the exemption is not relevant where profits are considered to be sourced offshore or arise from the sale of capital assets.

Given the rapid evolution and increasing digitalisation of the trading/asset management space, investors should consult with legal experts in the area when considering the structure of their investment activities. This will enable them to avoid hefty legal and financial complications.

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IP due diligence - the art of leaving nothing to chance

Introduction

Technological development in the past two decades has been nothing short of spectacular. Almost daily, businesses ranging from micro-entrepreneurs to MNCs are looking to create the next multi-million-dollar tech asset. Astute investors are constantly on the hunt in tech-rich sectors, such as the biotech, fintech and medtech industries, for transformative assets that provide them with an edge over their competitors and possibly a launching pad into new markets.

Given the sums involved in tech acquisitions, it is commonly understood and accepted that the conduct of corporate and financial due diligence is essential to ensure that the asset or company to be acquired is worth the hefty investment. However, investors also need to bear in mind that a significant consideration of the acquisition is the technology itself, which is likely to comprise intangible assets protected by intellectual property ("IP"). Investors should therefore pay closer attention to an aspect of due diligence which receives far less attention than it should- IP due diligence ("IP DD").

The purpose of IP DD

Like corporate due diligence, IP DD is an audit process in an acquisition. However, it is centred specifically on the IP being acquired.

Broadly speaking, purposes of the IP DD process include: (i) understanding the scope of the acquisition and ensuring that the necessary rights allowing the exploitation of the assets are being acquired, (ii) uncovering any red flags associated with the rights being acquired, (iii) verifying the title and scope of the rights, and (iv) determining the true value of the assets.

An interesting case study demonstrating the importance of IP DD arose in 1998, when Volkswagen AG sought to acquire Rolls-Royce, Ltd. from Vickers PLC. It was only after the deal had closed that Volkswagen AG discovered that the Rolls-Royce trade marks were owned by Rolls-Royce PLC, the aircraft-engine arm, and not Rolls-Royce, Ltd.. While Volkswagen AG received the rights to assets such as the factory and equipment owned by Rolls-Royce Ltd., it did not receive the rights to use the Rolls-Royce trade marks. This case study is a classic example of the importance of engaging IP specialists to conduct IP DD and ensure that targeted assets are actually acquired.

The process of IP DD

While each IP DD exercise must be tailored according to the assets being acquired, certain fundamental matters are typically associated with an IP DD exercise. These include:

- verifying the ownership and validity of the IP rights;
- ensuring that the IP rights are registered in the countries of interest;
- checking whether the IP rights are encumbered by third party rights or have been licensed for use by third parties; and
- whether the IP rights are the subject of threatened or ongoing litigation, or registry proceedings.

However, certain due diligence issues specific to the type of IP rights being acquired are prone to being overlooked. This may fundamentally affect

the nature of the rights being acquired. Below are several examples.

Patent

Where patents are being acquired, IP DD must necessarily involve an analysis of the patent claims. This will provide information on the scope, validity, enforceablility and value of the patent rights being acquired.

The scope of protection provided by a patent is dependent on how the patent claims are drafted.

Patent claims must therefore be reviewed to ensure that all key aspects of the technology are adequately covered by the patent.

Generally, where the patent claims are drafted broadly, the patent may be useful in restricting use of similar technology by competitors. But if the patent claims are drafted narrowly, the value and utility of the patent may be less desirable than marketed and may warrant a reduction in price.

IP DD need not be limited to the technology itself, but may be expanded to include an analysis of the market and the competitive landscape associated with the technology. This can be done by carrying out a freedom-to-operate ("FTO") analysis (which seeks to identify existing patents that may overlap with the targeted technology, its use, or its manufacture) or a patent landscape review (which uncovers gaps in the relevant technological space through the analysis of data pertaining to the particular space).

Trade Mark

The scope of protection afforded to a registered trade mark is demarcated by the specification of goods and services. It is therefore important to ensure that the scope of the specification of goods and services of the registered trade marks being acquired sufficiently covers the purchaser's intended use of the relevant trade marks.

The commercial use of the trade marks is another issue of significance within the IP DD process. Registered trade marks are typically susceptible to revocation if they have not been put to commercial use for a period of time. Purchasers should therefore check if the trade marks being acquired have been put to commercial use, and if available, request the seller to provide evidence of such use of the marks.

Copyright

Copyrights are particularly tricky, because most jurisdictions do not have a system of registration in place for them. It is therefore important to trace and review the proof of ownership of copyrighted works.

This may involve proof of the creation of the copyrighted works, such as the original documentation containing the source code of the software being acquired. If the copyright was purchased from a third party, purchasers should review the purchase agreement to ensure that the rights were properly acquired.

Conclusion

The IP DD is an important and complex process in ascertaining the type of IP rights and the scope of rights being acquired.

The IP DD process cannot be dismissed as a matter of formality in a due diligence exercise.

It would therefore be prudent for businesses to engage IP professionals who possess the requisite experience and knowledge to assist them in the IP DD process. At the end of the day, it is in the purchaser's interest to ensure that the deal covers all rights sought to be acquired, and that the rights come free of red flags.

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Employers be aware - indirect liability to employees or third parties in Hong Kong

Whether you are a business owner who employs a small team of professionals or you are managing a corporation that employs thousands of staff, it is important to appreciate the potential liability that may be invoked by the actions of your employee/s or third parties. Adopting a cautious approach will help to manage your business and protect its reputation.

In late May, an employee of a fast food restaurant chain in Hong Kong was attacked when she was on the way to work. She nonetheless attended her work as usual but was later found in a coma at home and then died several days after. Feeling sorry for the deceased and her family, one cannot help but ask – is her estate entitled to claim compensation from her employer?

Under the Employee Compensation Ordinance, an employee can claim compensation for injury by accident arisen out of and in the course of employment. In general, the court is prepared to examine all circumstances of the case, with no one factor being so decisive as to outweigh the others. In relation to street accidents, the court would normally look at whether the employee was at the time going about the employer's business, or in pursuance of a duty owed to the employer. For instance, if an employee is obliged to use the employer's transport, then the employee will normally be regarded as acting in the course of employment.

In addition to potential liability to pay employees compensation for injuries suffered in the course of employment, employers may also be held liable to third parties for negligence or other torts committed by employees in the course of employment. This obligation is derived from the law of vicarious liability.

In the course of employment

Recently, the meaning of "in the course of employment" has come before the Supreme Court of the United Kingdom in the case of WM Morrison Supermarkets plc v. Various Claimants [2020] UKSC 12, where the court is invited to decide whether Skelton, an employee, was acting in the course of employment when he made unauthorised disclosure of payroll data of 98,998 employees of Morrisons. If it is concluded that Skelton was acting in the course of employment, then Morrisons will be held vicariously liable for Skelton's wrongful conduct towards all the 9,263 claimants for damages in respect of alleged distress, anxiety, upset and damage. The amount of compensation at stake could be astronomical.

The general position is to look at whether the wrongful conduct is so "closely connected" with the employee's duties that such conduct may be regarded as done by the employee while acting in the course of employment.

Having considered the guidance derived from decided cases, the Supreme Court held that Skelton was not engaged in furthering his employer's Business interest when he committed the wrongdoing in question. On the contrary, he did this with a personal vengeance against his employer for disciplinary proceedings taken against him at an earlier instance. In the premises, the Supreme Court reversed the decisions of the lower courts and concluded that Skelton's wrongful conduct has failed the close connection test, and Morrisons was not held liable for his wrongdoing.

The Morrison case highlights that in applying the close connection test, the motive of the employee and the purpose of the wrongdoing are also relevant. Even if there is an unbroken chain of events from the employee's job duties leading up to the wrongdoing, it cannot be said the wrongful conduct was committed "in the course of employment" when the employee is not furthering the employer's Business interest.

A relationship akin to employment

Businesses should be aware that vicarious liability could also arise even if the wrongdoing is conducted by third parties who are not employees, but stand in a relationship akin to employment. In the parallel case of Barclays Bank plc v. Various Claimants [2020] UKSC 13, the Supreme Court was asked to consider whether the Bank is vicariously liable for any assaults perpetrated by Dr Bates, a medical practitioner who was engaged by the Bank to conduct medical examination of prospective employees as part of the recruitment process. 126 claimants were involved in this group action.

Traditionally, the law is that the employer of an independent contractor is generally not liable for the torts committed by the contractor in the course of execution of the work. In recent years, this trite proposition of law have been expanded, such that the court will consider a range of factors, and in particular the 5 policy considerations, in deciding whether it is "fair, just and reasonable" to impose vicarious liability in relationships falling short of employment. This may open or may have already opened a floodgate of litigation against businesses who are likely to have the means to compensate and can be expected to have insured against that liability.

Having considered the 5 policy reasons as enunciated in past cases and adopted in lower courts, the Supreme Court stopped short of applying the same in the present case on the ground that those considerations are only helpful in doubtful cases. Where it is clear that the wrongdoer is carrying on business on his or her own account, he or she is to be treated as an independent contractor and the position under trite law remains unchanged.

The Supreme Court has then engaged in a close examination of Dr Bates' practice, e.g. he was paid a fee for each report, he was entitled to refuse an offered examination, he carried his own medical liability insurance, etc. It then reversed the decisions of the lower courts and concluded that Dr Bates carried the business on his own account and therefore the Bank should not be held liable for his assaults on the Bank's prospective employees.

Conclusion

Until the above decisions were handed down by the Supreme Court, there has been a trend to protect claimants under the law of vicarious liability by adopting a liberal approach in the application of the "close connection" test or in the interpretation of a relationship sufficiently analogous to employment or a combination of the two. These recent decisions have tilted the balance towards employers and serve as a word of caution to claimants who are in search of deep pockets.

It is expected that employers and insurers, who have seen their potential liabilities being expanded under the law of vicarious liability, may welcome these two decisions.

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