

## Commercial litigation newsletter – October 2021



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## Interview with Ivan Ng

Ivan Ng is the head of the litigation practice at Stephenson Harwood Hong Kong, who specialises in shareholders disputes, contractual disputes, letters of credit disputes and insolvency matters. Our trainees, Diana Liu and Hilary Leung, sat down with Ivan recently for a coffee chat, discussing all things from his love for cars to his passion for golf:

### Question 1: What would you be if you were not a lawyer?

*I would most likely be running a business in the textile industry. My family ran a textile business, selling different kinds of fabrics. After graduation and before becoming a solicitor, I spent a few years helping out my family with their business. So, if I were not a lawyer, I would probably continue running my family's business. In reality though, I told my mother that I did not like the financial uncertainty that comes with running a business, so I became a solicitor instead.*



*Alternatively, I would want to open my own garage for selling and repairing cars, since I love cars. Realistically, I know I won't do that even though I do have some basic knowledge on automobile repair from when I was younger. New cars nowadays are too complicated!*

*I used to like Ferraris a lot, but I have never driven one on an actual circuit before, so I can't say that they are phenomenal in that regard. They are good though. However, I have reached a point in life where I could just drive any car. I don't have a strong desire for materialistic things anymore.*

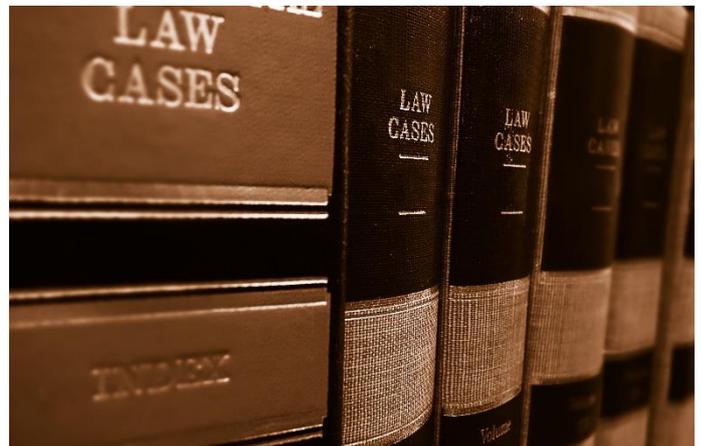
### Question 2: Where would you like to visit when the borders open?

*There are so many places that I would want to visit. The first place I would go to is Mainland China because one, it is the place where I normally play golf before COVID-19 and two, I also need to clean my house there. The second place would be the UK, which I will be visiting in November. In terms of holiday, I have always wanted to go to Yugoslavia or Eastern Europe for their beautiful sceneries and because these places are generally not my typical holiday destinations. I would also want to go to Tibet as one of my clients, whose factories are located there, always offered to give me a tour around Tibet. I would love to drive around Tibet and see the massive fields and yurts. I want to see and experience new things.*

### Question 3: Is there someone who inspires you and if so, who is it?

*Yes, the principal that I had when I was still a trainee solicitor. He's a quiet person but very smart and always very focused at work. I look up to him because of his professionalism and the way in which he strives for the best in every matter. All his clients really appreciated his work.*

*I still remember that my principal once asked me to draft a summons to seek security for costs against the defendant. It took me three to four days to finish the draft. Two weeks went by but my principal never mentioned the draft and I was too afraid to ask him about it. I later found out from his secretary that it had been filed long ago but instead of using my draft, my principal drafted a new one himself. He never communicated to me about my draft. Looking*



back, I now value the importance of feedback for one's growth. Aside from this one incident, my principal was always kind to me. He asked me to be his trainee even though I was 4 hours late to the interview. He single-handedly trained me and looked after me at all times.

**Question 4: What is your favourite memory at SH (apart from work)?**

After qualifying in the UK, I joined SH, which used to be called SHL, Stephenson Harwood & Lo. A lot of my colleagues then were young and were around the same age as I was. We would take turns booking the firm's yacht and speedboat almost every weekend and go water skiing together. Even though some of them have moved to other firms, we are still very close and will still help each other. I believe it is very rare for co-workers to have a genuine friendship like ours and I really cherish it. It is almost like we grew up together.

**Question 5: What is your favourite quote and/or personal motto?**

The first quote I could think of is the first few lines of *The Romance of the Three Kingdoms* (三國演義): "the long divided must unite; the long united must divide" (分久必合, 合久必分). This quote is a fact about life - nothing on earth is eternal. Everything is always changing and evolving. My personal motto would be to always live up to your own conscience. It's inevitable that people have their own set of standards and viewpoints, so it is important that you do your best regardless and stay true to yourself.

**Question 6: What are your hobbies?**

I like playing golf. Before COVID-19, I would play golf in Zhongshan regularly as I am a member of a golf club in Zhongshan. However, I haven't been able to do that for a while now due to border restrictions, and golf courses in Hong Kong are hard to book due to high demand. I also played football and hockey when I was younger.



In my free time, I try to go to the gym around two to three times per week. I also wash my car on the weekends. Perhaps you could say that life starts to become boring at this stage in life, but I enjoy the stability and steadiness that comes with it.

# Comparison between HK and PRC civil procedures – Service

## Introduction

In view of the impact of the ongoing coronavirus (COVID-19) pandemic has upon service of documents, this article explores how the Courts in Hong Kong (“**HK**”) and Mainland China (“**the PRC**”) respond to service by electronic means, and offers a comparison between the service requirements in HK and the PRC.

## Service requirements

### HK

In general, there are three ways to serve an originating process on a defendant in HK:

1. **personal service** – by handing or leaving the originating process with the defendant<sup>1</sup>;
2. **ordinary service** – by post or by leaving the originating process at the usual or last known address of the defendant;
3. **substituted service** – if personal and ordinary service prove to be impracticable (e.g. the person has moved out from his usual or last known address and no updated address of his could be obtained), an application may be made to the Court for substituted service, which usually takes the form of advertisement in newspapers; and
4. **service pursuant to contract** – if the parties have agreed to appoint a process agent to accept service for and on their behalf, service can be made on the process agent.

### PRC

There are at least four ways to effect service in the PRC:

1. **direct service on the defendant**<sup>2</sup> - which is similar to HK’s personal service, but it is done by the People’s Court instead of the litigants.

Unlike in HK (where the originating process must be served on the defendant in person), the People’s Court can effect direct service even in the absence of the defendant. At the usual or last known address of the defendant, a cohabiting adult family member can acknowledge service on his/her behalf.

If, however, the defendant refuses to accept service, the document can be served by leaving it at his/her domicile. In this connection, the date and reasons of the refusal should be recorded and the entire service process should be documented either by photography or videography.<sup>3</sup>

2. **by mail** - If direct service proves to be difficult, the documents may be served by mail.<sup>4</sup>
3. **public announcement** – If the whereabouts of the defendant are unknown, or if a document cannot be served by any other method, the document can be served by public announcement.<sup>5</sup>



Hence, the approaches to service in HK and the PRC are similar. However, when it comes to service by electronic means, HK Courts adopt quite a different approach from their counterparts in the PRC.

<sup>1</sup> See 65/2/2 of White Book 2020 for a list of documents of which personal service is required.

<sup>2</sup> Article 85, Civil Procedure Law of the People's Republic of China.

<sup>3</sup> Article 86, Civil Procedure Law of the People's Republic of China.

<sup>4</sup> Article 88, Civil Procedure Law of the People's Republic of China.

<sup>5</sup> Article 92, Civil Procedure Law of the People's Republic of China.

## Service through electronic means

### HK

Even with a prevalence of the Internet and social media, HK courts are generally reluctant to accept service through electronic means by way of substituted service, unless there are exceptional circumstances.

In *Deacons v Stanley Wu Chen Kuo*,<sup>6</sup> the District Court refused to allow substituted service of a writ by email and ordered substituted service by advertising in the newspaper instead. However, in subsequent Court of First Instance (“CFI”) cases (*Top One International (China) Property Group Co Ltd v Top One Property Group Ltd*<sup>7</sup> and *Re Malcolm Westley Casselle*<sup>8</sup>) the former involving a debtor ordinarily residing in the United States and the latter involving a defendant providing only a PRC address for the service of documents, service by email was accepted as one of the means of substituted service, in addition to more traditional modes of service such as service at the last known addresses. This was because service by post to the last known addresses were undelivered.



In a recent case *Zhuhai Gotech Intelligent Technology Co Ltd v Persons Unknown*, the CFI even accepted service through social media. The Plaintiffs sued certain unknown persons operating different Facebook groups and pages for passing off pirated satellite television subscription services provided by the Plaintiffs. As the Plaintiffs do not know the

identity of the defendants, the Court considered that there were no alternative means to contact the defendants without incurring significant costs. It also opined that technology has evolved to becoming a safer and more secure form of communication. The Court therefore allowed the Plaintiffs to serve documents out of jurisdiction by sending soft copies through Facebook Messenger to the pages/accounts of the Defendants.<sup>9</sup>

### PRC

Unlike HK, the PRC seems more responsive to technological changes and allow service through the following electronic means (with the consent of the person to be served<sup>10</sup>):

- fax;
- email;
- mobile communications; and
- other specific systems that enable real-time receipt.

However, consent to service by electronic means can only be given by written confirmation on the address for service of documents<sup>11</sup>.

### Conclusion

Compared to HK, the PRC appears to adopt a more flexible approach in terms of service.

In HK, although the *Zhuhai* case may be seen as an exceptional decision of the HK Court in light of the extraordinary circumstances, this is a novel and significant development in HK civil procedures. It, together with recent CFI cases and the fact that HK Courts have started conducting hearings by video link in light of the COVID-19 pandemic, show that HK Courts are now more willing to adopt electronic means in the litigation process. It remains to be seen how the law on service through electronic means will develop in HK.

<sup>6</sup> [2010] 6 HKC 153 at §9-12 .

<sup>7</sup> [2011] 1 HKLRD 606 at §16.

<sup>8</sup> HCB 1698/2010 at §11.

<sup>9</sup> [https://dcc.law/case\\_commentary/the-court-of-first-instance-grants-service-by-facebook-messenger/](https://dcc.law/case_commentary/the-court-of-first-instance-grants-service-by-facebook-messenger/)

<sup>10</sup> Article 87, Civil Procedure Law of the People's Republic of China (although service of judgment, civil ruling and mediation ruling cannot be done electronically; and Article 135, SPC Judicial Interpretation of Civil Procedure Law

<sup>11</sup> Article 136, SPC Judicial Interpretation of Civil Procedure Law

## New Law Alert: Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance, Cap. 639

Starting from 15 February 2022, mutual enforcement of judgments in matrimonial and family cases between Hong Kong (**HK**) and mainland China (**Mainland**) will be allowed under the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (**the Ordinance**). This symbolizes the further enhancement of the relationship between HK and Mainland beyond commercial and business levels.

The Ordinance was introduced upon the signing of the Arrangement on Reciprocal Recognition and Enforcement of civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region between the Supreme People's Court of the People's Republic of China and the Government of the HKSAR on 20 June 2017.



When marriage regrettably comes to an end, people (in particular those residing and possessing assets in both HK and mainland China) struggle about where they should file their divorce petitions, i.e. the HK Court or the relevant mainland Court with jurisdiction over the subject marriages. When making such decision, people take into account the whereabouts of the matrimonial assets, the parties' place of residence and/or the relevant legal implications when submitting to a particular jurisdiction. With the implementation of the Ordinance, it is believed that such decision could be made relatively easier.

### Registration of Mainland Judgment in HK

Under the Ordinance, a party to an effective Mainland Judgment given in a matrimonial or family case<sup>1</sup> rendered on or after 15 February 2022 (i.e. commencement date of the Ordinance) may apply to the District Court to register a specified order in Hong Kong. The definition of **Mainland** under the Ordinance means those parts of China other than HK, Macao and Taiwan.

Under the Ordinance, a Mainland Judgment (as defined in the Ordinance) is effective if (a) it is enforceable in the Mainland; (b) it is a Mainland Judgment given by the Supreme People's Court, a Higher People's court or an Intermediate People's Court; and (c) according to the law of the Mainland, no appeal is allowed from the Judgment or the time limit for appeal has expired and no appeal has been filed. *Vice versa*, a HK Judgment (as defined) is effective if it is enforceable in HK and it is given or made by the Court of Final Appeal, the Court of Appeal, the Court of First Instance (**CFI**) or the District Court (**DC**). The primary registering court for the registration application (**Application**) would be DC. In the event that DC considers that the Application can be more conveniently dealt with by the CFI, it could order the Application to be transferred. Transferal may also be allowed upon a party's *ex parte* application to the DC.

#### *Care-related Orders*

For orders in relation to (a) the custody, guardianship or access of a person under the age of 18 years old; (b) custody of a person aged 18 years or above who cannot live independently; and/or (c) protection of a person from violence in a domestic relationship (**Care-related Orders** as defined), one could apply if:-

- (a) There has not been non-compliance of the said orders as at the date of the Application; or
- (b) If there has been non-compliance of the said orders as at the date of the Application, the Application would need to be made within 2 years after the date on which non-compliance

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<sup>1</sup> S. 3(1) of the Ordinance

first occurred (or with an extension granted by the DC).

#### *Maintenance-related Order*

For orders relating to the maintenance of a person under the age of 18 years old, a person aged 18 years or above who cannot live independently, spousal maintenance and division of property between parties to a marriage (including delivery or transfer of property to one party to the marriage, payment of a sum of money to one party to the marriage; or the vesting property in one party to the marriage) and a declaration that property belongs to one party to the marriage (**Maintenance-related Order** as defined), one could apply for registration if:-

- (a) The date by which the payment is to be made, or the act is to be performed, is a date before the Application date;
- (b) The payment has not been made or fully made or the act has not been performed or fully performed by the Application date; and
- (c) The Application is made within 2 years after such date (or with an extension granted by the District Court).

#### **Effect of registration**

Upon registration, the relevant orders would be enforceable in HK as if it were an order originally made by the registering court and the registering court had jurisdiction to make it. Proceedings can then be brought for, or with respect to, the enforcement of the order, as if it were an order originally made by the registering court on the day of registration of the order.

#### **Setting aside registration**

When making a registration order, the registering court would specify the period within which an application for setting aside the registration may be made. The registering court may set aside the registration if it is satisfied *inter alia* that:-

- (a) the respondent to the Judgment was not summoned to appear according to the law of Mainland or was not given a reasonable

opportunity to make submission or defend the proceedings;

- (b) the Mainland Judgment was obtained by fraud;
- (c) a court in HK has given a judgment on the same cause of action between the same parties;
- (d) a court in a place outside HK has given a judgment on the same cause of action between the same parties, and the judgment has already been recognized by a court in HK;
- (e) the recognition and enforcement of the order is manifestly contrary to the public policy of Hong Kong; or
- (f) the Mainland Judgment has been reversed or otherwise set aside pursuant to an appeal or a retrial under the law of the Mainland.



There is still around 4 months to go before the effective date of the Ordinance. Apart from pushing forward the development of matrimonial law regime of both sides, it is considered that this new piece of legislation would bring along widespread impacts on the family planning and/or financial management of citizens in HK and Mainland.

## News update

### Webinar

We will be hosting our next commercial litigation webinar in December 2021, with details to follow. Stay tuned and please feel free to contact us if you wish to receive an invitation of the webinar.

Please also contact us if you would like to view our recent commercial litigation webinars:

Date	Speakers	Topic
20 October	Karis Yip (Senior associate, Stephenson Harwood) and Sanjay A. Sakhrani (Barrister-at-law and accredited mediator)	Current employment issues and trends
5 August	Emily Li (Senior associate, Stephenson Harwood) and Alexander Tang (Counsel of Des Voeux Chambers)	Exclusive or non-exclusive jurisdiction clause

### Recent articles

Date	Author	Title
16 July	Ian Childs	<a href="#">Hong Kong employment law update</a>
21 June	Emily Li	<a href="#">Is an exclusive jurisdiction clause conclusive?</a> (English) <a href="#">排他性管辖权条款是否一锤定音?</a> (Chinese)

### Publications

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



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### Hong Kong office



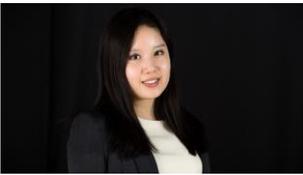
#### Emily Li

Senior associate  
T: +852 2533 2841  
E: [Emily.Li@shlegal.com](mailto:Emily.Li@shlegal.com)



#### Karis Yip

Senior associate  
T: +852 2533 2703  
E: [Karis.Yip@shlegal.com](mailto:Karis.Yip@shlegal.com)



#### Stephanie Poon

Senior associate  
T: +852 2533 2842  
E: [Stephanie.Poon@shlegal.com](mailto:Stephanie.Poon@shlegal.com)

### Guangzhou office\*



#### Henry Zhu

Partner  
T: +86 20 8388 0590  
E: [henry.zhu@shlegalworld.com](mailto:henry.zhu@shlegalworld.com)

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