

## Commercial litigation newsletter – January 2022



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## Interview with Jamie Stranger

Jamie Stranger is the Office Managing Partner of Stephenson Harwood's Greater China offices. He heads the Greater China restructuring and insolvency team and acts for liquidators, receivers and bankruptcy trustees in formal insolvency proceedings as well as creditors, debtors and shareholders in corporate restructuring, schemes, buy-outs and other work-out arrangements.

### Question 1: How did you spend Christmas this year?

*I spent Christmas with Amelia and Ella, my two daughters, and a friend of mine who I went to university with, who is the godfather of the girls. We went to Saint-Gervais, a ski town in France. We went to one of our favourite restaurants for Christmas lunch and outdoor thermal hot springs afterwards.*



### Question 2: What is your favourite memory at SH?

*When I was a more junior associate, we had Spring Dinner in a ballroom at Ritz-Carlton and all trainees had to do skits on stage making fun of the partners. One of the trainees, who is currently one of our partners, dressed up as one of the partners in the Intellectual Property team at the time and made fun of her. He was very brave to do that as most people were very scared of her. We laughed a lot.*

### Question 3: What is the biggest challenge for a junior lawyer currently?

*I think the biggest challenge for junior lawyers these days is the rapid transition from "old law" to "new law". To me, "old law" means the usual and traditional way we do things, while "new law" means innovation and disruption. In my view, innovation and disruption in law is not exclusively about technology. It is about having an open mind and thinking laterally with a blank sheet of paper about how we might do things differently. In terms of technology, I think it is a good time to be a junior lawyer as a lot of the mundane work will be replaced by artificial intelligence. As part of our Five-year Strategy, a lot of resources will be poured into innovation. We have an Innovation Team in London from whom we will have to harness the learnings and innovation. SH Hong Kong is going to adapt in the next five years as well and young lawyers will have to be the forefront of that.*



*The challenge for young lawyers is to position themselves as the transition happens, but it is both a challenge and an opportunity for young lawyers.*

*"New law" is coming whether we are ready for it or not and there will be separation in the legal market between those that make it and those that do not.*

**Question 4: What is the biggest challenge for you as an Office Managing Partner?**

*The biggest challenge for me is managing people, including partners, business service functions and associates. This also includes managing relationships with other officers and our headquarters. The thing that surprises me the most is how much time it takes to keep everyone on the same path and to be consistent with each other on what we're trying to do. For me, it's the time and demand in managing all those relationships.*

**Question 5: How would you describe SH's culture?**

*We have a culture of decency. We treat each other well. There's no real politics in the office.*



**Question 6: What is your favourite place in Hong Kong?**

*If you hike at the back of Discovery Bay on a hill called Tiger's Head, you can traverse along the ridge line to the Hong Kong Olympic Trail in Mui Wo. It's about 5 kilometres. It's flat and slightly downhill once you get to the top of Tiger's Head. On the hiking trail, you get to see the views of Hong Kong Island and the airport to your left and on a clear day, Shenzhen to your right. I think that is my favourite place in Hong Kong.*

**Question 7: Do you have any new year's resolutions for yourself?**

*I haven't thought of any. I'm not a big fan of making new year's resolutions because I never stick to them.*

## Appointment of service agents

### Appointing process agents

Service of proceedings can be very costly if the party against whom you are seeking to serve is not within the jurisdiction, evading service or cannot be located.

To avoid the troubles in service of proceedings, parties can agree to a process agent clause in their contracts in order to designate an agent to accept service on their behalf in the event that disputes arise. According to Order 10 rule 3 of the Rules of High Court, service in accordance with the process agent clause shall be deemed good service.



However, it is important that the process agent clause is drafted with sufficient clarity in order to avoid disputes as to what constitute good service under the clause.

### **BOCOM International Holdings Co Ltd v Red Victory Group Ltd and another [2019] HKCFI 1701**

In this case, the process agent clause in question essentially provides that:

- The defendants appoint Dacheng Law Office of Room 1915, 19<sup>th</sup> Floor, COSCO Tower, 183 Queen's Road Central, Hong Kong (Attention: Mr Guo JinKai) to receive service of process in any proceedings in Hong Kong on their behalf;
- Such service shall be deemed completed on delivery to the process agent and failure of the process agent to inform the defendants of

the process will not invalidate the proceedings;

- If for any reason the process agent ceases to be able to act as such or no longer has an address in Hong Kong, each of the defendants irrevocably agrees to appoint a substitute process agent reasonably acceptable to the plaintiff, and to deliver to the plaintiff a copy of the new agent's acceptance of that appointment within 5 days.

Prior to the plaintiff's commencement of proceedings, Dacheng Law Office merged with Dentons with the merged firm called "Dentons". The plaintiff therefore issued and served the Writs of Summons on the defendants at Dentons (formerly Dacheng Law Office) at the office address of Denton. However, it is later transpired that Dacheng Law Office did not form part of Dacheng Beijing's global merger with Dentons; and that Dacheng Law Office later changed its name to "Y L Sze & Co" with a "Mr Sze Yeuk Lung, Benedict" as the sole proprietor of the firm. On the other hand, Mr Guo JinKai was practising as a foreign lawyer at a Hong Kong law firm, Patrick Mak & Tse.

The plaintiff therefore amended the Writs and served them to Y L Sze & Co for the attention of "Mr Guo JinKai", as well as on Mr Guo at Patrick Mak & Tse. The defendants did not acknowledge service of the Writs nor file any defence.

The question was who was the process agent of the defendants, namely Mr Guo or Dacheng Law Office.



The Court held that:

- Mr Guo by himself was not the process agent appointed for the defendants; if this was the case, it would not be necessary for the clause to refer to "Dacheng Law Office". The appointment could be simply "appoints Mr Guo JinKai" as agent for the defendants.
- On the language used in the clause, neither Dacheng Law Office on its own nor Mr Guo on his own was appointed as process agent. The wording clearly stated that the process agent was "Dacheng Law Office of [address] (Attention Mr Guo JinKai)". Hence, it had to be both, i.e. "Dacheng Law Office" with which Mr Guo was working. Such process agent is no longer there available to accept service of legal proceedings for the defendants.
- The defendants should have appointed a substitute process agent according to the clause. It seems that they are in breach of this contractual obligation. However, such

breach would only confer the plaintiff the contractual right to claim damages but would not have the effect of changing the clause.

- In the circumstances, the plaintiff's service of the Writs of Summons on the defendants is invalid.

### Conclusion

Careful consideration has to be given as to how parties intend to appoint their process agent (for instance, whether it is an appointment of an individual, or an individual of a specific company/firm), and such intention should be clearly reflected in the wordings of the process agent clause. It is also useful to provide for the requirement to appoint a substitute agent so that the parties can be protected in the event the existing appointed agent ceases to exist for whatever reasons.

## FAQ for interim measures in Hong Kong in aid of foreign proceedings

Our team has recently received a lot of enquiries for obtaining interim measures in Hong Kong in aid of foreign legal or arbitration proceedings. Below is a quick Q&A guide on this topic. If any further explanation and/or details are required, please feel free to contact any member of our team.



**Q: If I have commenced legal action against a Defendant outside of HK, is there anything I can do to preserve the Defendant's assets in HK?**

A: Yes.

Generally speaking, under s. 21M of the High Court Ordinance of HK, the Court may appoint a receiver or grant interim reliefs (such as injunction) in aid of proceedings which are commenced outside of HK (including overseas and Mainland proceedings) that may give rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law. In exercising such power, the HK Court is of the view that such reliefs would facilitate the process of a court outside HK that has primary jurisdiction over such proceedings.

Similarly, under s. 45 of the Arbitration Ordinance, the HK Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside Hong Kong, grant an interim measure.

**Q: If I do not know whether the Defendant has assets in HK, how can I find out?**

A: There are certain asset search agencies which you could engage to locate the

Defendant's assets. However, from our experience, the information that could be retrieved by these agencies may be limited.

Alternatively, you may try to retrieve the information from public domains. For instance:

- Land search could be conducted against a particular property (provided that the address of the property is known) to ascertain its ownership;
- company/director search could be conducted with a view to identify the private companies in which the Defendant holds shares.

There are however information that cannot be obtained through public domains, e.g. bank account information. In this case, you may consider making an application for a discovery order against party(ies) whom you think have information on the Defendant's assets.

**Q: What do I need to prove in order to obtain an interim measure under s. 21M in HK?**

A: The precondition for the HK Court to exercise its jurisdiction under s. 21M is that the judgment given by the foreign court is one that the HK Court may enforce. If this precondition is satisfied, the HK Court will then decide:

- whether the applicant has a good arguable case in the foreign court; and
- whether the fact that the HK Court has no jurisdiction on the subject matter (apart from ancillary jurisdiction under s. 21M) would be it unjust or inconvenient to grant the interim measure.

**Q: What are the procedures?**

A: An Originating Summons ("**OS**") (supported by affidavit evidence) should be issued for interim measures to be granted pending determination of the foreign proceedings.

However, if the applicant foresees that it may take some time for the OS to be determined, it should issue an additional Summons at the same time of the OS, and ask for "interim interim" measures to be granted pending determination of the OS.

Upon issuance of the Summons, a hearing date would be fixed (normally on Friday). If the applicant is able to satisfy the Court on the matters set out in the above question, the Court is likely to grant the "interim interim" measures at the hearing.

**Q: Do I need to instruct Counsel (or barrister) to represent me in the application?**

A: The legal profession in Hong Kong is divided into two streams, namely barristers and solicitors. One of barristers' major expertise is advocacy in Court. We would normally recommend instructing barrister for the application. Depending on the complexity of the case, instructing a Senior Counsel may be necessary.

**Q: How long does it take for me to obtain an interim measure?**

A: As explained above, if the Court is satisfied that the applicant has made out a case, it will grant an order for the "interim interim" measures at the hearing of the Summons. The parties will then have time to file evidence and argue on the OS (i.e. whether interim measures should be granted pending determination of the foreign proceedings). The whole process may take 3-6 months.

**Q: What is the legal effect of the interim measures?**

A: Usual interim measures include injunction and appointment of a receivers.

An injunction is appropriate where the Defendant which you are suing in the foreign court has assets within HK. The injunction will restrain the Defendant from disposing of or in any way dealing with his/her assets within HK pending determination of the foreign proceedings, thereby allowing you to take enforcement action against such assets after obtaining a judgment in your favour in the foreign court.

Receivers are usually appointed when Defendant's assets in HK are the subject of the dispute in the foreign proceedings. Receivers are normally independent third parties (usually professionals such as accountants), who would receive the assets in question and to "hold the ring" so that neither parties can get their hands over the assets before determination of their dispute.

**Q: If I obtain a judgment in my favour in the foreign court, how can I enforce the judgment in HK?**

A: A foreign judgment may be enforced in HK (1) under statute or (2) at common law.

The relevant Ordinances are the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) and the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597). If the foreign/Mainland judgment satisfies the requirement under the relevant Ordinances, you may apply for the judgment to be registered under the relevant Ordinances. Once registered, they have the same effect as a HK judgment.

As to arbitral awards, you will have to obtain leave from the HK Court pursuant to s. 84 (applicable to foreign arbitral awards) or s. 92 (applicable to Mainland arbitral awards) of the Arbitration Ordinance (Cap. 609) to enforce them in HK. If leave is granted, the HK Court may enter judgment in terms of the awards.

After the foreign/Mainland judgment/award is recognized by the HK Court, it may be enforced by different means (depending on the nature of the assets), including garnishee proceedings, charging order and writ of fi fa.

**Q: If I successfully obtain an order for interim measures from the HK Court, can I recover my legal costs?**

A: The general rule is that costs follow the event, i.e. the winning party can get its legal costs, and that costs will be awarded on a party and party basis. If parties cannot agree on costs, taxation proceedings should be commenced for the Court to assess the amount of costs that should be paid by the losing party. From our experience, a winning party will be able to recover around 60-70% of its costs on a party and party basis.

## News update

### Webinar

We will be hosting our next commercial litigation webinar in February 2022, 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
28 January	KT Fung (Banking Partner) and Emily Li (Senior Litigation Associate)	Practical advice on debt recovery and credit risk mitigation*
16 December	Stephanie Poon (Senior associate) and Karies Lam (Associate)	Legal regime for mental incapacitated person and enduring power of attorney
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

\*This is an exclusive webinar for a particular client. If you also wish to receive any tailor-made webinar, please feel free to contact our Ms Emily Li at [Emily.Li@shlegal.com](mailto:Emily.Li@shlegal.com).

### Webinar highlights

#### 10 Highlights for our webinar "Legal regime for mental incapacitated person and enduring power of attorney"

We thank everyone for all the support of and attendance at our webinar on 16/12/2021. After considering all the questions raised during and after the webinar, we have put together a list of 10 key takeaways relating to our webinar topic. Please be aware that the following are very high level points and you are most welcome to contact our Ms Stephanie Poon at [Stephanie.Poon@shlegal.com](mailto:Stephanie.Poon@shlegal.com) and Ms Karies Lam at [Karies.Lam@shlegal.com](mailto:Karies.Lam@shlegal.com) for any specific discussions regarding your particular concerns (e.g. tax issues and/or potential claims against attorneys).

1. An Enduring Power of Attorney ("**EPA**") only deals with the donor's financial matters, e.g. collection of income or capital, selling of property, expenses etc. It does not deal with the medical treatment and/or personal care of the donor.
2. An EPA must be signed before a Hong Kong registered medical practitioner and a Hong Kong solicitor, but "the registered medical practitioner and the solicitor before whom the instrument is signed must each be a person **other than** the person being appointed as the attorney, the spouse of such person or **a person related by blood or marriage to the donor** or the attorney" under section 5(2)(aa) of the Enduring Powers of Attorney Ordinance (Cap. 501) ("**EPAO**").
3. An attorney becoming mentally incapacitated is not listed as one of the grounds for revocation of the EPA under section 13 of the EPAO.

4. Under section 11(1) of the EPAO, the court may on the application of an interested party revoke an enduring power or varying an enduring power; or if satisfied that the interests of the donor of an enduring power so require it, **remove the attorney**.
5. An advance directive, being a statement setting out ones' wishes in relation to personal care and/or medical treatment, would be a good way for people to plan and communicate their wishes in advance (together with an EPA which relates to financial matters).
6. An EPA can be registered once it is executed. Alternatively, it could also be registered as and when you believe that the symptoms of mental incapacity are showing and the EPA could be put into use soon.
7. The appointment of a committee for a mentally incapacitated person ("**MIP**") may be terminated upon:-
  - i. The Court's finding under section 27 of the Mental Health Ordinance that the MIP has regained his/her mental capacity;
  - ii. The death of the MIP;
  - iii. The death or bankruptcy of the members of the committee; or
  - iv. The making of an order by the Court terminating the appointment.
8. For general guidance regarding the duties of a committee, you may refer to [Guidance Note to Persons appointed as Committee of Estate of a Mentally Incapacitated Person \(judiciary.hk\)](#).
9. Upon the death of the MIP, the assets would forthwith vest into his/her estate and would be administered and/or distributed by the executor pursuant to the terms of the Will (if any) or administer pursuant to the intestate law of Hong Kong (if there is no Will).
10. When a committee member of the MIP is adjudged bankrupt, it is suggested that the committee should report to the court and seek for directions. If the sole attorney becomes bankrupt, the EPA will be revoked under section 13(1)(b) of the EPAO.

## Recent articles

Date	Author	Title
9 Nov	Ian Childs	<a href="#">Hong Kong to end its 'fraud exception rule'</a>
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.



## Corporate and Commercial Disputes Hub

Please visit the [Stephenson Harwood Corporate and Commercial Disputes Hub](#) to see latest updates from our team.

## Get in touch

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