

**Commercial litigation newsletter – July 2022**



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## Interview with Emily Li

Emily Li is a partner in Stephenson Harwood's Greater China offices. She has extensive experience in commercial litigation and dispute resolutions, with a focus in contentious liquidation and insolvency matters, as well as international trade finance disputes.

### **Question 1: You have recently transitioned both in your roles as a new mom and a new partner, what are the challenges?**

One of my biggest challenges is how to manage my time well given the demands on a new mom and a new partner. My son is still quite young and he needs a lot of care and affection from me. At the same time, having just been promoted as a partner means that I need to devote more time to work while my role diversifies further than when I was a senior associate.

What's fortunate is that Stephenson Harwood is quite supportive in different aspects. We have a flexible policy on working from home which makes the transition in both of these capacities easier. At the same time, the senior partners here provide great support to junior partners in adapting to their new roles.



### **Question 2: What made you want to specialize in commercial litigation?**

When I was a junior lawyer at another international firm, I had quite a bit of exposures to commercial litigation practices. In comparison to other areas, I got an intuitive sense that commercial litigation was the most interesting. I have not looked back at that decision and questioned it since then.



### **Question 3: You have clearly had a very successful career at such a young age, including being recognized as a rising star in Hong Kong dispute resolution, can you share with us some of your work highlights over the years?**

The most memorable work was my first time appearance at a court hearing. I was newly qualified at the time and did not have a clue. I still remember how nervous I was. Luckily, my supervising partner (who is still my supervisor now!) had given me a lot of guidance. Now that I have become a partner, I realise how important guidance is to juniors.

### **Question 4: What advice would you give junior lawyers who are following your footsteps?**

I think the most important thing is to be very dedicated to the job and work hard. There is no substitute for getting through the grind in terms of learning the technical skills required of a lawyer. When I was a junior lawyer, I went through the same process, and I never said no to any work that came my way. While I know that this is quite difficult, it is very valuable to be exposed to different types of work.

Another important aspect is probably active learning and frequent reflection. When senior lawyers correct your work or do things differently, you will not learn if you only do as you are told. You have to actively reflect why they choose to do things differently and how you can improve to bring more values. I tried to work as close to a finished product as I could when I was a junior.

**Question 5: Apart from work, what do you like to do in your spare time?**

I am quite a laid-back person outside of work. I have a cat at home and I used to spend a lot of time playing with him. Now that my son is here, it was a bit of a challenge getting them to like each other. My son is quite playful so the cat gets spooked from time to time.

Other than that, now that the Covid restrictions have somewhat eased, I try to bring my son out to meet up with friends and go to different places.



## Hong Kong recent case law relating to surrogacy

As some of us may know, surrogacy is allowed in a number of countries in the world, but not in Hong Kong. Legal complication therefore arises whenever couples in need decide to resolve their issues in scientific means. Below are summary of two recent case laws:-



### Parental Order

In *T v N* [2022] HKCFI 7441 HCMP797/2021, a couple (Applicants A and B, who are the father and mother respectively) applied under s. 12 of the Parent and Child Ordinance ("PCO") for a parental order, namely a declaration that Minor B is to be regarded in law as the Applicants' child. B was born by a surrogate mother in the Republic of Georgia with the sperm of the father and is now around 17 months old. The Applicants were not aware that B could not be brought to Hong Kong until the baby was born. In gist, without a parental order, B being a non-Hong Kong resident would not be allowed entry at all. Hence, B is still residing in Georgia under the care of his genetically connected grandparent.

Under s. 12 of the PCO, the court may make an order providing for a child to be regarded in law as the child of the parties to a marriage if (a) the child has been carried by a women other than the wife as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination; (b) the gametes of the husband or wife, or both, were used to bring about the creation of the embryo; and (c) the conditions in subsections (2) to (7) of the said s. 12 are satisfied, including but not limited to:-

1. The application must be taken out within 6 months of the birth of the child;
2. At the time of the application, the child's home must be with the applicant or either of them;
3. The husband or wife, or both of them, must have attained the age of 18 years and (i) be

domiciled in Hong Kong; (ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or (iii) have a substantial connection with Hong Kong;

4. The court must be satisfied that both the father of the child, where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order;
5. The PCO does not require the agreement of a person who cannot be found or is incapable of giving agreement and the agreement of the woman who carried the child is ineffective for the purposes of that subsection if given by her less than 6 weeks after the child's birth; and
6. The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife.

Putting aside the legal procedural requirements, the paramount consideration of the court in considering such application is the best interests of B and public policy. The court needs to make sure that commercial surrogacy agreement entered into overseas are not used to circumvent childcare laws in Hong Kong, allowing people who would not have been approved as parents on welfare/best interests grounds under currently existing law to be parents in such manner.



In the circumstances, the court is of the view that B should be brought to Hong Kong first before any final decision on the parental order is to be made. The social work officer was therefore directed to see B with the Applicants physically and to make further investigation after B's arrival and completion of quarantine, and to submit a supplemental report within two months thereafter, together with a

supplemental Suitability Assessment Report containing a confirmation as to whether the Applicants have any previous criminal record.

### Adopting Surrogacy Child

In *C and Another v A and Others* [2022] HKCFI 556, a girl who is around 3 years old ("**Child**") becomes the subject of an application to the court for amongst other things, that the Child be placed with the couple for adoption under section 23A of the Adoption Ordinance, Cap. 290.

The Child is not genetically linked to the couple making such application, due to health issues. The egg and sperm are both provided by donors in the USA, who voluntarily and contractually relinquished all of their parental rights and custody towards the Child. After the birth of the Child, the couple obtained a judgement from the Superior Court of the State of California for the County of Los Angeles that they were the legal parents of the Child. The couple were registered as the legal parents on the Child's "Certificate of Live Birth". While having a US passport, the Child applied for a HKID and the application could not proceed as the couple are not the natural parents of the Child.

Due to the uncertain legal status of the Child, she was made a ward (i.e. that the Court becomes the child's legal guardian) of the Court. The suitability assessment report prepared pursuant to the Court order explained the social worker office's view that the family is dedicated to raise the Child and had placed the Child well-being as their paramount concern. The applicants

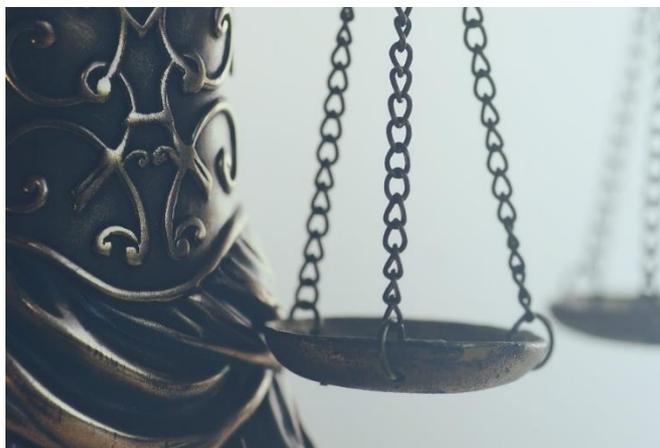
also have no criminal record in or outside Hong Kong. The Child therefore appears to be well cared for and there is no evidence that she needs any protection from this Court, nor is there any evidence at this stage as to why she should continue to remain a ward of this Court. The Court therefore is of the view there is no reason for the Child to continue to remain a ward of this Court.



Having considered all the circumstances of this case, in the Court's view, the appropriate course is to de-ward the Child, and the Plaintiffs are free to make their section 23A application afresh in the District Court.

## First recognition of English Commercial Judgement by the PRC Court

On 17 March 2022, with the approval of the PRC Supreme People's Court, the Shanghai Maritime Court ("**SMC**") issued a ruling allowing for the recognition and enforcement of an English Court judgment under the principle of reciprocity (*Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd* (2018) Hu 72 Xie Wai Ren No.1) (the "**Ruling**"). The Ruling marks the first time that the PRC Court recognised an English commercial judgment. It suggests a welcome shift by the PRC courts to a more relaxed approach in finding a reciprocal relationship with country which has not recongised Chinese judgments in the past.



### Background

The claimant, Spar Shipping AS ("**Spar**") owned three vessels which were let on a long-time charter to Grand China Shipping (Hong Kong) Co., Ltd ("**GCS**"). The defendant, Grand China Logistics Holding (Group) Co., Ltd ("**GCL**") is the parent company of GCS, and was incorporated in Shanghai. GCL acted as a guarantor in respect of GCS's obligations towards the three vessels.

GCS failed to pay the charter hire. Subsequently, Spar brought proceedings under the performance guarantees against GCL before the English High Court, whose decision was later appealed by GCL. In both decisions, GCL was held liable. Spar then sought to enforce the English judgment against GCL in the PRC, where it had assets.

### Relevant Legal Principle – Principle of Reciprocity

Under the PRC Civil Procedure Law, the PRC Courts may recognise and enforce a foreign civil and commercial judgment on one of the following bases:

1. If relevant international treaties have been concluded between the PRC and the relevant foreign jurisdiction; or
2. the principle of reciprocity.

In the absence of international treaty on mutual recognition and enforcement of court judgments concluded between the PRC and the UK, the key question was whether reciprocal relationship existed between the two jurisdictions.

Traditionally, the PRC courts would only enforce and recognise a foreign judgment if a court in that foreign jurisdiction has previously recognised a Chinese judgment. In this regard, the SMC refused to treat the case of *Spliethoff's Bevrachtingskantoor BV v Bank of China Limited* [2015] EWHC 999 (Comm) as a precedent of English courts recognising Chinese judgments because, in SMC's view, the English court had simply acknowledged the evidential value of the Chinese judgment, without considering it binding on the English Courts.

Nevertheless, remarkably, the SMC held that a foreign court need not have enforced a PRC judgment in the past for the reciprocity criterion to be met. It would be sufficient so long as the foreign court can, in principle, recognise and enforce a PRC judgment. In the present case, the SMC was satisfied that this would be the case in the English Court, and allowed the recognition and enforcement of the English judgment in the PRC.



## Approach endorsed by the PRC Supreme Court

The Ruling was likely influenced by the Memorandum of the National Courts' Symposium on Trials for Commercial and Maritime Cases (全国法院涉外商事海事审判工作座谈会会议纪要) (the "**Memorandum**") issued by the PRC Supreme Court on 24 January 2022 before the Ruling was made.

Article 44 of the Memorandum states that a foreign judgment can in principle be recognised by a PRC Court, provided that:

"according to the laws of the country where the court is located, the civil and commercial judgments made by the People's Court can be recognised and enforced by the courts of that country".

The PRC Supreme Court issues interpretation notes and memoranda such as the Memorandum from time to time to guide lower courts in interpreting certain statutes. Such notes and memoranda are often relied on by lower courts in practice. It is therefore likely that the other PRC courts will follow the approach set out in the Memorandum if faced with a similar situation.

## Significance

The Ruling is the first case in which a PRC Court recognised an English Court judgment. This is certainly a welcome development. It shows the readiness of the PRC Courts to adopt an expanded interpretation of the concept of reciprocity and recognise and enforce judgment made by a foreign court that has not recognised and enforced a PRC judgment in the past.

Due to the uncertainty as to whether an English judgment can be enforced in the PRC, prior to the

Ruling, it was generally believed that it would be more beneficial to have an arbitration clause than English court jurisdiction clause in contracts involving Chinese parties as the PRC is a contracting state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985. The Convention allows mutual recognition and enforcement of arbitral awards among its contracting states. The Ruling may make English courts a more attractive alternative than before.



One caveat is that the Ruling is not binding. Court decisions in the PRC are merely persuasive, rather than binding on lower courts as is the case in common law jurisdictions. Whilst the Ruling opens the possibility of recognition and enforcement of future English Court judgments, or even judgments made by courts of other jurisdictions, in the PRC Courts, it remains to be seen as to whether and how the expanded interpretation of the principle of reciprocity will be applied by the other PRC Courts.

## News update

### Webinar

We will be hosting our next commercial litigation webinar in August 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
6 July 2022	Ivan Ng (Litigation Partner) and Emily Li (Litigation Partner)	Cross-border Injunctions – the Shanshui case as an example
12 May 2022	Emily Li (Litigation Partner) and Henry Zhu (Partner, Wei Tu Law Firm*)	Commercial litigation Greater Bay Area series – part 1
28 January 2022	KT Fung (Banking Partner) and Emily Li (Litigation Partner)	Practical advice on debt recovery and credit risk mitigation <sup>^</sup>
16 December 2021	Stephanie Poon (Managing associate) and Karies Lam (Associate)	Legal regime for mental incapacitated person and enduring power of attorney
20 October 2021	Karis Yip (Managing associate, Stephenson Harwood) and Sanjay A. Sakhrani (Barrister-at-law and accredited mediator)	Current employment issues and trends
5 August 2021	Emily Li (Litigation Partner, Stephenson Harwood) and Alexander Tang (Counsel, Des Voeux Chambers)	Exclusive or non-exclusive jurisdiction clause

<sup>^</sup>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).

### Recent articles

Date	Author	Title
26 April 2022	Emily Li, Karis Yip, Stephanie Poon	<a href="#">Commercial litigation newsletter - April 2022</a>
17 January 2022	Emily Li, Karis Yip, Stephanie Poon	<a href="#">Commercial litigation newsletter - January 2022</a>
9 Nov 2021	Ian Childs	<a href="#">Hong Kong to end its 'fraud exception rule'</a>
16 July 2021	Ian Childs	<a href="#">Hong Kong employment law update</a>
21 June 2021	Emily Li	<a href="#">Is an exclusive jurisdiction clause conclusive?</a> (English) <a href="#">排他性管轄權條款是否一錘定音?</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.

## Office news

The Hong Kong office recently celebrated Pride month with an LGBT+ Walking Tour led by Benita Chick, D&I advocate and founder of social enterprise Encompass HK.

The tour started in front of the Court of Final Appeal, where Benita discussed landmark court cases in relation to gay rights in Hong Kong. The tour continued through the central district where participants learned more about the LGBT pride movement and the stories behind various locations important to the movement.

After the recent covid restrictions, this was a very memorable and enjoyable in person event.

\*Wei Tu (a PRC law firm registered in Guangzhou) and Stephenson Harwood (a law firm registered in Hong Kong) are in a CEPA association under the name "Stephenson Harwood - Wei Tu (China) Association". CEPA (Closer Economic Partnership Arrangement) is a free trade agreement concluded between Mainland China and Hong Kong. Under CEPA, Hong Kong based law firms are permitted to operate in association with Mainland Chinese law firms to provide comprehensive legal services in Mainland China governed by Chinese and non-Chinese laws.

## Get in touch

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Stephenson Harwood is a law firm of over 1100 people worldwide, including 190 partners. Our people are committed to achieving the goals of our clients – listed and private companies, institutions and individuals.

We assemble teams of bright thinkers to match our clients' needs and give the right advice from the right person at the right time. Dedicating the highest calibre of legal talent to overcome the most complex issues, we deliver pragmatic, expert advice that is set squarely in the real world.

Our headquarters are in London, with eight offices across Asia, Europe and the Middle East. In addition, we have forged close ties with other high quality law firms. This diverse mix of expertise and culture results in a combination of deep local insight and the capability to provide a seamless international service.