Neutral Citation Number: [2024] EWHC 2921 (Comm)

Case No: CL-2024-000186

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/11/2024

Before :

SUE PREVEZER KC

- -

Between :

Claimant

COLUMBIA PICTURES CORPORATION LTD

- and -

Defendant

WANDA KIDS CULTURAL DEVELOPMENT CO., LTD

- -
- -

Tamara Oppenheimer KC and Kit Holliday (instructed by Dentons UK and Middle East LLP) for the Claimant/Respondent
Tom Foxton (instructed by Travers Smith LLP) for the Defendant/Applicant

Hearing dates: 24th October 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 20 November 2024.

SUE PREVEZER KC :

Introduction

1. The Applicant, Wanda Kids Cultural Development Co., Ltd, represented by Mr Tom Foxton, seeks a declaration that the Claim Form, Particulars of Claim and other documents in these proceedings (collectively "the Claim Documents") have not been validly served on it by the Respondent, Columbia Pictures Corporation Limited. The Respondent purported to serve the Claim Documents on the Applicant on 27 March 2024 by having a clerk from the Hong Kong office of the Respondent's solicitors leave the documents (by hand) at the Applicant's registered office in Hong Kong. The Applicant contends that this service did not comply with the Hague Service Convention of 15 November 1965 ("the Convention") which regulates the service abroad of judicial and extra judicial documents in civil or commercial matters, nor was it permitted by the law of Hong Kong. It follows, so the Applicant contends, that the Claim Documents have not been properly served under CPR 6.40 and the Applicant asks the Court to make an order to that effect.

2. The Respondent, represented by Ms Tamara Oppenheimer KC and Mr Kit Holliday, contends that service was validly effected on 27 March 2024 in the manner mentioned above. It contends that leaving foreign process at a company's registered office is a permitted means of serving foreign process under the Convention and Hong Kong law, and accordingly, the Court should dismiss the Application.

3. The matter comes before the Court pursuant to directions made by Mr Justice Henshaw on 17 June 2024, which, inter alia, gave permission to the Parties to rely on expert evidence on Hong Kong law. On behalf of the Applicant, expert evidence has been provided by Mr Eric Chun Yu Chan, a partner at Simmons and Simmons in Hong Kong by a Report dated 28 May 2024 and a Supplemental Report dated 9 August 2024 and by Mr Dawes SC on behalf of the Respondent, in a Report dated 18 July 2024 and a Supplemental Report dated 14 October 2024. At the hearing on 24 October 2024, I approved a Consent Order giving permission to the Respondent to file Mr Dawes SC's Supplemental Report.

4. The factual background to the present Application is largely uncontentious and not directly relevant to the Application. In short summary, the dispute between the parties concerns the disputed exercise of a put and call Option Agreement entered into by the Parties on 16 October 2017. The Respondent contends that the Applicant has failed to pay the sale price under the Option Agreement in the sum of USD49 million. The Respondent claims that sum, alternatively damages in the same amount for breach of contract, alternatively specific performance of the obligation to purchase the relevant shares for USD 49 million, together with interest for late payment under the Late Payment of Commercial Debts (Interest) Act 1998.

5. A letter of claim was sent by the Respondent to the Applicant on 12 February 2024. Following correspondence in which the Applicant's solicitors confirmed that they were not instructed to accept service of any claim on the Applicant's behalf, a Claim Form was issued on 25 March 2024 and on 27 March 2024 the Respondent purported to effect service on the Applicant in Hong Kong in the manner above. It is common ground that the Respondent was entitled to serve the Claim Documents out of the jurisdiction without permission from this Court under CPR 6.33(2B)(b) owing to an

exclusive jurisdiction clause in clause 20.1 of the Option Agreement. On 28 May 2024, the Applicant filed and served the present Application.

The issue

6. It is common ground that the issue of whether the Claim Documents have been validly served under the service provisions of CPR Part 6 ultimately turns on whether the method of service used by the Respondent in the present instance is permitted by Hong Kong law.

7. CPR 6.40 sets out the methods that may be used to serve the Claim Form and other documents on a party out of the United Kingdom. It provides, in relevant part (emphasis added):

> "(1) This rule contains general provisions about the method of service of a claim form or other document on a party out of the jurisdiction.
>
> […]
>
> Where service is to be effected on a party out of the United Kingdom
>
> (3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served –
>
> (a) by any method provided for by –
>
> (i) Omitted [sic.]
>
> (ii) rule 6.42 (service through foreign governments, judicial authorities and British Consular authorities); or
>
> (iii) rule 6.44 (service of claim form or other document on a State);
>
> (b) **by any method permitted by a Civil Procedure Convention or Treaty**; or
>
> (c) **by any other method permitted by the law of the country in which it is to be served**.
>
> (4) Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served."

8. China (including the Special Administrative Region of Hong Kong) is a party to the Convention as is the UK. As is well established, the Convention provides for the channels of transmission to be used when a judicial or extrajudicial document is to be transmitted from one contracting state to another for service in the latter. The

Convention deals primarily with the transmission of documents and does not address or comprise substantive rules relating to the actual service of process. The main channel of transmission under the Convention is the "Central Authority" of the requested state (Articles 1-5). A request for service, in the required form, is addressed to the Central Authority of the requested state and the Central Authority will execute the request for service or cause it to be executed either by a method provided for under the law of the requested state, or by a particular method requested by the forwarding authority (unless incompatible with the law of the requested state), or by informal delivery to the addressee who accepts service voluntarily.

9. There are however alternative channels of transmission provided for by the Convention. The Convention permits service directly by diplomatic or consular officers of the state of origin (Article 8) and relevantly for present purposes, Article 10 provides that:

> *"Provided the State of destination does not object, the present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad, (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destinations (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination"*.

10. Further, Article 19 of the Convention provides "*To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions*".

11. In the case of method (a) under Article 10, the state of destination may declare that it objects to such service unless the document is to be served on a national of the state of origin. Further, methods (b) and (c) are only available provided that the state of destination does not oppose and the Convention provides a system of notification by which a contracting state notifies the depositary of its opposition to the methods of transmission set out in Article 10. The nature and extent of objections made by individual contracting states to service in accordance with the informal methods of service mentioned in Article 10 are collated by and are available from the Hague Conference and, in respect of this notification system, the view stated in *Dicey, Morris & Collins (16th edn)* at 10-073 is that such notification is conclusive as to whether these alternative methods of service have been excluded by the relevant state of destination.

12. Hong Kong has made no objection to Article 10 (a). As regards Articles 10 (b) and (c) it has made the following notification: *"With reference to the provisions of sub paragraphs b and c of Article 10 of the Convention, documents for service through official channels will be accepted in the Hong Kong Special Administrative Region only by the Central Authority or other authority designated, and only from judicial, consular or diplomatic officers of other Contracting States"*.

13. Further,

(1) Hong Kong's answer to the 2008 questionnaire sent by the Convention to contracting states, confirmed that in relation to Article 10(b), "*the Hong Kong Special Administrative Region only accept those entities designated as "forwarding authorities" by other Contracting States"*, and in relation to Article 10(c), in answer to the question "*Which of the following would be considered to be "any person interested in judicial proceeding under the law of your State",* Hong Kong stated "*the Hong Kong Special Administrative Region only accepts those entities designated as "forwarding authorities" by other Contracting States.*

(2) In Hong Kong's most recent questionnaire sent by the Convention to contracting states in 2022, in relation to questions concerning Article 10(b) and (c), Hong Kong has made no objection to service under methods provided in Article 10 (b) or (c) that "*attorn[ies] and solicitor[s]"* are recognised as competent persons to effect service and that when service is effected under Article 10(b); "*a private agent (usually a firm of solicitors) may be appointed directly to effect service. Such service can be effected directly without going through the Government or the Judiciary of Hong Kong SAR, China….."*.

(3) In Hong Kong's response to an earlier questionnaire in 2003, addressing "*Alternative Transmission Channels*", Hong Kong's authorities stated in connection with Article 10 (b) that: "*a private agent (usually a firm of solicitors) may be appointed directly to effect service. Such service can be effected directly without going through the Government or the judiciary".* In addition, in response to a direct question "*Are your country's lawyers or solicitors authorized to perform service from abroad*", the authorities responded "*Nothing in the law of Hong Kong prevents solicitors in Hong Kong from being appointed as agent to serve foreign process".*

14. In his Skeleton, Mr Foxton had initially challenged whether a law clerk from the Respondent's office was a "*competent person*" for the purposes of serving the Claim Documents in Hong Kong under Articles 10(b) and (c). However, at the hearing this point was not pursued and Mr Foxton accepted that if the Court held that the method of service used in the present instance is permitted under Hong Kong law, then the Applicant has been properly served.

The Court's approach to disputed questions of foreign law

15. It is common ground that the content of foreign law is a question of fact, which is generally proved (on the balance of probabilities) by opinion evidence from an appropriately qualified expert. As helpfully set out in Mr Foxton's Skeleton, "*The task for the Court is to evaluate the expert evidence of* [foreign] *law and to predict the likely decision of the highest court in the relevant* [foreign] *system of law if this case had been litigated there on each of the points in dispute": Dexia Crediop SpA v Comune di Prato* [2015] EWHC 1746 (Comm) at [128] per Walker J. Further, the "*function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction. In the latter case, the expert merely proves the foreign rules of construction, and the*

court itself, in the light of these rules, determines the meaning of the documents": Alhamrani v Alhamrani [2014] UKPC 37 at [19] per Lord Clarke.

16. In his Skeleton and in oral submission, Mr Foxton floated the possibility that if the Court did not feel able to determine the question of Hong Kong law arising on the Application, then the Court should adjourn the Application so that the Parties can apply to the Hong Kong Court to rule on the question. This approach was taken by this Court in *Fortune Hong Kong Trading Ltd v Cosco-Feoso (Singapore) Pte Ltd*, the relevant part of which judgment is quoted in the judgment of the Singapore Court of Appeal [2000] SGCA 24. Ms Oppenheimer KC objected to this suggestion on the basis, she contended, that the issue for determination is simple and the answer straightforward. Having considered the matter, I am not minded to adjourn the determination of the Application and my judgment on the substantive issue arising on the Application is set out below.

The Applicant's submissions

17. Relying on the expert evidence of Mr Chan, Mr Foxton's argument, in summary, is as follows:

(1) in Hong Kong, the service of foreign process from Convention countries is governed exclusively by Order 69 r 2 of Hong Kong's Rules of the High Court ("Order 69"), which mandates that a written request for service must be received by the Central Authority Registrar. Under Hong Kong law, all service of process between Convention states has to go through the Registrar, as Order 69 provides a mandatory and exclusive method of service for foreign process.

(2) while Hong Kong law contains other provisions for serving domestic judicial documents, most notably Section 827 of Hong Kong's Company Ordinance ("Section 827"), those general provisions are subject to (and cannot trump) the specific regime for Convention process set out in Order 69 r 2. This is a basic tenet of statutory interpretation absent which Section 827 or the general law would drive a coach and horses through the regime of Order 69 r 2.

(3) Mr Dawes SC for the Respondent does not identify an authoritative legal source supporting the proposition that foreign process from Convention states may be served by leaving the documents in question, by hand, at the registered office of a defendant. This is because the express provisions in Order 69 r2 are clear, and it is common ground that Order 69 r2 is the only statutory provision that deals with Convention states' service of process, and indeed the only statutory provision referring to Convention service.

18. Order. 69 r 2 provides:

> *"This Order applies to the service on a person in Hong Kong of any process related to civil or commercial proceedings in a court or tribunal of a country or place outside Hong Kong if the Registrar receives a written request for service-*

> *(a) from the Chief Secretary for Administration with a recommendation by the Chief Secretary for Administration that service should be effected;*
>
> *(b) if the court or tribunal is in a convention country-from a consular or other authority of that country;*
>
> *(c) if the court or tribunal is in the Mainland -from the judicial authorities of the Mainland; or*
>
> *(d) if the court or tribunal is in Macao-from the judicial authorities of Macao."*

A "*convention country*" (referred to in Order 69 r 2(b)) includes a country that is party to the Convention and under Order 69 r 4, the process server under Order 69 must be the Chief Bailiff: (Chan 1, ¶7.4).

19. Mr Foxton contends that, on its natural and ordinary meaning, Order 69 r 2 creates a mandatory procedure for the service of foreign documents in Hong Kong from Convention states, and that one of the conditions for service under Order 69 is the receipt by the Registrar of a written request for service from the relevant foreign authority. In his Supplemental Report (Paragraphs 4.3 et seq), Mr Chan in fact suggests that Order 69 applies to <u>all cases</u> where there is service on a person in Hong Kong of any process related to civil or commercial proceedings in Court or Tribunal of a country or place outside Hong Kong, not just to service between Convention states. Mr Chan's contention is that the word "*if*" before "*the Registrar receives a written request*" imposes an overarching condition of service of <u>any</u> foreign process that the Registrar must receive a written request, regardless of which of the scenarios under sub rules 2(a) to 2(d) is triggered, and that sub rules 2(a) to 2(d) set out a further condition of service in the different scenarios. In the scenario where the foreign Court or Tribunal is a party to the Convention, the additional condition is that the request for service must originate from a consular or other authority of that country. At the hearing Mr Foxton did not adopt this broader submission on the basis that he did not need to do so for present purposes. However, he relies on the fact, highlighted by Mr Chan (at Paragraph 7.5 of his first Report) that Order 69 is the only local legislation in Hong Kong that provides for service of foreign processes in Hong Kong and that in his Reports Mr Chan does not state definitively whether it might be possible to serve non-Convention process under some other rule. Whilst the latter is strictly correct, at Paragraph 4.12 of his Supplemental Report, Mr Chan states expressly that Order 69 "*occupies the field of service of foreign process in Hong Kong exclusively",* which may reasonably be read as suggesting that all foreign process has to be served under Order 69.

20. By way of analogy, Mr Chan argues that the syntax of Order 69 r 2 is similar to the following sentence "*You may ride your motorcycle on the street if you are wearing a helmet… (b) if you have a motorcycle permit from the Transport Department*". Mr Chan submits that it is readily understood from this analogy that the first "if" is imposing an additional condition of wearing a helmet; it is not the case that you can ride a motorcycle, with or without a license, if you are not wearing a helmet. Mr Chan goes further to submit that the Chinese text of Order 69 confirms this interpretation. Under Hong Kong law, according to Section 10B of the Interpretation

and General Clauses Ordinance (Cap 1), the Chinese and English texts of Hong Kong's legislation are equally authentic and are presumed to have the same meaning. Appended to his Report, Mr Chan provides an English translation of the Chinese text prepared by an independent translation company. That translation provides: "*In any case where a civil or commercial legal proceedings conducted in a court or tribunal of a country or place outside Hong Kong, this Order applies to the service of legal process documents on a person in Hong Kong concerning such legal proceedings, provided that the Registrar receives a service request that meets the following descriptions……*". Mr Chan concludes that it is clear from the Chinese text that Order 69 r2 would apply in any or every case where there is a need to serve foreign process in Hong Kong and it is a precondition of such service that the Registrar must receive a request for service satisfying certain criteria.

21. Mr Foxton submits that the exercise by foreign courts of jurisdiction in Hong Kong is not a matter to be treated lightly and the purpose of Order 69 r 2 is to place procedural conditions on when this exorbitant jurisdiction can be exercised. Although in *AXA China Region Insurance Company Ltd v Leon Fong Chen* [2016] 6 HKC 220, the Hong Kong Court of Appeal adopted the more modern pragmatic approach to service out stated by the Supreme Court in *Abela v Baadarani* [2013] UKSC 44, namely that it should no longer be regarded as an assertion of sovereignty and that it is, in reality, probably no more than notice of the commencement of proceedings which is necessary to enable a defendant to decide whether and if so how to respond in its own interest, Mr Foxton contends that the former Hong Kong Court of Appeal case concerns service on a non-Convention state (Thailand) and the Court must in the present instance have regard to the terms of the Convention in deciding whether service in Hong Kong is valid. As the cases make clear (including *Abela v Baadarani)*, the position in a Convention case is different to a regular service out case. As ICC Judge Briggs observed in *Entertainment One UK Ltd v Sconnect Viet Nam* [2023] 1 WLR 2333 at [107], "*The rule for service out of the jurisdiction where a bilateral treaty or convention exists is anchored in interference with the sovereignty of the state, and service on a party to the Hague Convention, by an alternative method under CPR r 6.15 should be regarded as exceptional and be permitted in special circumstances only".* Mr Foxton also relies on other decisions of the Hong Kong Court, such as *Yantai Wanhua Polyurethanes Co Ltd v Pur Products Ltd* [2013] 1 HKLRD 590, which have held that the exercise of exorbitant jurisdiction in the territory of foreign States is to be regarded as an infringement of their sovereignty and will only be done with great caution. The fact, he submits, that the purpose of service is also to notify a defendant that proceedings have been commenced does not detract from this fact. It would be very surprising, so Mr Foxton contends, if the *"if"* in Order 69 justified opting out of the detailed rule for service provided for by the Convention. It is only if one assumes that Hong Kong law allows you to do something otherwise than service by the Convention that Article 19 of the Convention is engaged, and if there is any ambiguity in the construction of Order 69, one should resolve that ambiguity by having regard to the Chinese text, which according to Mr Chan, confirms that Order 69 is mandatory and exhaustive in setting out the methods of service of foreign process in Hong Kong, with one of the preconditions being that a request for service must be received by the Registrar (Mr Chan's Supplemental Report, Paragraph 4.6).

22. Mr Foxton takes the further point that Mr Dawes SC, in his Supplemental Report, does not say that the English translation obtained by Mr Chan from the independent translator is wrong. Whilst Mr Dawes SC states that the translation of the first word in the Chinese text of Order 69 r 2 could equally be interpreted as "*insofar as*", that would still be mandatory. A rule that begins "*insofar as a civil or commercial legal proceedings conducted in a Court or Tribunal of a country or place outside Hong Kong*" is, Mr Foxton submits, a mandatory rule; insofar as you are doing the activity that is the subject of the rule you must comply with its terms. Indeed, the reason why the first word of Order 69 r 2 can be translated both as "*In any case where*" or "*Insofar as*" is because they mean the same thing. Mr Foxton disagrees with Mr Dawes SC that the receipt of a request by the Registrar is a precondition if Order 69 is to apply at all. That is, he says, a very curious way of interpreting a rule which purports to set out how an action with important legal consequences may be carried out. As a matter of construction, he contends, the meaning is clear and the context and purpose make it yet clearer.

23. Further, according to Mr Chan, the Courts of Hong Kong often construe procedural rules as constituting the "entire code" on certain procedural matters, and if a code contains a rule specifically dealing with a certain subject matter, such as service of foreign process from Convention states, the logical assumption is that the regulation of the relevant subject matter falls entirely within the rules so that the rules cannot be sidestepped by appealing to some general practice outside of them. There are, Mr Foxton contends, by analogy, many rules in the English CPR which provide that a Court may take a certain step if specified conditions are met. If those conditions are not met, it is no answer for a party to invite the Court to take the step anyway, on the basis that the word "may" means the rule is not mandatory. The wording of Order 69 is a complete code in relation to its subject matter, and the fact that service from a non-Convention country is not expressly mentioned (and, according to Mr Foxton, may or may not fall outside Order 69 r 2) is irrelevant and has no bearing on whether Order 69 catches the service in this case. Whilst the drafters of Order 69 r 2 did not use the word "must", they did, Mr Foxton submits, adopt a mandatory form of words suitable for the particular rule in issue.

24. At Paragraph 4.13 of Mr Chan's Supplemental Report, Mr Chan refers to a number of cases decided by the Hong Kong Courts concerning other Hong Kong rules of procedure (in particular Orders 6, 11 r 1, 12 and 13) where the particular Orders have been construed as providing an exclusive code. Mr Foxton contends that these authorities assist his argument and establish a commonsense point that there is an exhaustive procedural code in Hong Kong in relation to certain processes and Mr Chan's conclusions accord with the legislative framework of Hong Kong's legal system.

25. Finally, Mr Foxton dismisses the Respondent's argument that Convention state process can be served informally under Section 827, which provides that a document may be served on a company by leaving it at or sending it by post to the company's registered office address. Mr Chan's position, explained in his first Report at Paragraph 8, is that this provision only applies where the document sought to be served is one commencing or relating to Hong Kong domestic legal proceedings, and does not apply to the service of foreign process or, at any rate, the service of foreign process from Convention states.

26. Section 827 is located within Part 18 of the Companies Ordinance dealing with communications to and by companies and Mr Chan accepts that documents referred to in Section 827 would include documents issued for the purpose of legal proceedings. However, Mr Chan submits that it is unlikely that the Hong Kong legislature would have intended for the specific regime in Order 69 on the service of foreign process from Convention states to be wholly circumvented by a general provision in the domestic Companies Ordinance, which would effectively render the Order 69 regime redundant. Section 827 does not expressly mention foreign process, let alone Convention service of process and Mr Chan also submits that it is a well-established principle of statutory construction under Hong Kong law that, where there is potential for conflict between two legislative provisions, a general provision that might apply to any case must give way to a specific provision dealing with the particular case. The broader construction of Section 827, urged by Mr Dawes SC, makes it difficult to understand why Order 69 was adopted at all and the section must be construed in the context of the Hong Kong legislative scheme as a whole.

27. Mr Foxton makes the yet further point that Mr Dawes SC produces no authority in support of the broader construction he advocates with regard to Section 827, nor does he point to any statutory provision (other than Section 827) for service of Convention process through solicitors nor properly engage with the issue whether Order 69 is mandatory in Convention cases. Mr Dawes SC's citation of Dicey on *Conflicts of Laws (16th Edition)* (at Paragraph 10-62, at Paragraph 35 of his first Report) does not assist the Court on what the position is in Hong Kong, in that England does not have a rule like Order 69 with regard to Convention service. Likewise, the three authorities relied upon by Mr Dawes SC from the US and Australia, where these foreign Courts have considered the position of service in Hong Kong are unreliable guides as to the position in Hong Kong. They are not decisions of Hong Kong judges and not evidence of Hong Kong law. In this regard, Mr Foxton relies on Section 4 of the Civil Evidence Act 1972 dealing with evidence of foreign law, which, he says, prevents this Court from relying on these decisions as to what Hong Kong law is. Mr Foxton submits that these decisions are inadmissible in that regard and in any event, the cases do not speak in one voice. For example, in *HCT Packaging v T Int'l Trading Ltd*, March 2014, the District Court of California held that it is mandatory to apply the Convention when both parties are signatories and although Article 10(b) allows for personal service if the state of destination does not object, the Court there held that Hong Kong has objected to Article 10(b) (citing *Denlinger v Chinadotcom Corp,* 110 Cal. App 4th 1396, (Ct App 2003)) and found that personal service was insufficient.

28. Finally, and returning back to Article 10 of the Convention, Mr Foxton reminded the Court that Article 10 does not give additional liberty or power to serve process that is not acceptable under Hong Kong law. In this regard, Hong Kong's declarations to the Convention, set out above, qualify all the modes of service in Articles 10(b) and (c), and Hong Kong's answers to the 2008 questionnaire make clear that documents must be transmitted from a designated forwarding authority in the originating state, which did not occur in the present instance. Hong Kong's answer to the 2008 Questionnaire (above), relied upon by Mr Dawes SC, is referring to a solicitor appointed to serve documents in Hong Kong after the Chief Secretary of Administration has received the claim documents from a forwarding authority in the originating state, as this is the only way to read the questionnaire response consistently with Hong Kong's declarations. To the extent there is any inconsistency between the questionnaire

responses and Hong Kong's declarations, the declarations, which have formal legal status, must override the questionnaire responses. The latter are not sources of Hong Kong law, they are not part of the Convention and to the extent that the most recent questionnaire does not sit comfortably with Order 69 or Hong Kong's declarations, it should be given little weight. In conclusion therefore, Convention process can only be served in accordance with Order 69 and that was not done in the present case.

Analysis

29. Despite the clear and persuasive advocacy of Mr Foxton, in my view, the answer to the question of whether leaving a foreign process at a company's registered office is a permitted means of serving foreign process under Hong Kong law is yes, and the Application must fail. For the reasons put forward by Mr Dawes SC in his Reports and the submissions made on behalf of the Respondent by Ms Oppenheimer KC, (summarised below), Order 69 does not in my view provide the mandatory and exhaustive method of service for foreign process in Hong Kong from a Convention state contended for by Mr Foxton and the Applicant has been properly served in accordance with Hong Kong law.

30. As stated at the outset, it is common ground that the Convention applies in the present case and where the Convention is applicable, service must be effected in accordance with its provisions. As was made clear in *Cecil and others v Bayat and others* [2011] EWCA Civ 135, it is not possible to circumvent the procedure provided for by the Convention save in exceptional circumstances. The Convention is often described as non-mandatory (in the sense that it will only apply if under the internal law of the forum, a document has to be transmitted for service abroad) but exclusive in character (in the sense that one of the methods of transmission under the Convention must be used), although Article 19 of the Convention (above) does not prevent the internal law of Convention states from permitting methods of transmission of documents coming from abroad other than those provided for under the Convention.

31. Whilst the primary method of service under the Convention is pursuant to Article 5 and involves the Central Authorities of the originating and receiving states, as set out above, there are four alternative channels of transmission: consular or diplomatic channels (direct or indirect) (Article 8 (1) and 9), postal channels (Article 10(a)); direct communications between judicial officers, officials or other "competent persons" of the state of origin and the destination state (Article 10(b)); and direct communication between a person interested in a judicial proceeding and a judicial officer, official or other competent persons of the state of destination (Article 10(c)), provided that, in relation to Article 10(a) the receiving state has not objected to this form of transmission, or in relation to Article 10(b) and (c) has not made a relevant declaration in opposition to these forms of transmission. There is no hierarchy or order of importance among these channels of transmission. However, it is common ground that no process may be served in a manner which is contrary to the law of the country where service is to be effected.

32. Hong Kong's declaration of objection to Article 10(b) and (c) set out above, refers only to "*documents for service through official channels*" and not to all methods of transmission, and, as Ms Oppenheimer KC submits, as a matter of construction, those

words (in italics) would be otiose if Mr Foxton were right on his construction of the Convention and the "*freedoms*" expressly preserved by Article 10 of the Convention would also be lost. Had Hong Kong intended to object to any method of service other than the Central Authority method under Article 5, it would no doubt have made that clear.

33. Further, as Ms Oppenheimer KC submits, since no declaration/notification is made by Hong Kong with reference to Article 10(a), it appears that Hong Kong has no objection to the method of transmission for foreign process which comprises sending foreign process through the post. She also points out that this Hong Kong declaration (which was first made in 1970 when Hong Kong was a British Overseas Territory) uses precisely the same wording as the United Kingdom's declaration, and England and Wales do not preclude service of foreign process by solicitors. In this regard, Ms Oppenheimer KC draws the Court's attention to *Dicey, Morris & Collins (16th edn) at Paragraphs 10-078*, and the point made that the position in England is in fact analogous; that the CPR does have a provision equivalent to Order 69 (CPR r 6.48-6.52) and that this is also understood not to be exhaustive.

34. Further, the Hong Kong government's responses to the most recent 2022 questionnaire and the questionnaire in 2008 referred to above would appear to support the view that the law of Hong Kong does not preclude service of foreign process by methods other than through official channels. Attorneys and solicitors have been recognized as "competent persons" to effect service and a private agent may be appointed to effect service without going through the government or the judiciary of Hong Kong.

35. Against this background of the Convention, one then turns to the wording of Order 69. I agree with Ms Oppenheimer KC that the natural reading of Order 69 is that the word "*if*" precedes a pre-condition of the provisions set out thereafter applying, as opposed to being an overarching condition of service of any foreign process. On the plain reading of Order 69 r 2, the rule only applies *if* the Registrar receives a written request for service and not otherwise. *If* the Registrar receives such a request, whether, for example, from the Chief Secretary for Administration (under (a)) or from a consular or other authority if the Court or Tribunal is a Convention country (under (b)), then Order 69 r 2 is engaged and provides how such process is then to be served. It must be accompanied by a translation (under Order 69 r 3) and subject to paragraphs (3) and (5) of r 3, it is to be served by the process server leaving a copy of the process with the translation (or a certificate from the originating state that the person to be served understands the language of the process), with the person to be served. The process server then sends the Registrar a copy of the process and an affidavit proving due service or stating reasons why service could not be effected, and in the event of the former, the Registrar then sends a certificate, together with a copy of the process to the consular or other authority of the originating state as required. Paragraphs (3) and (5) of r 3 provide for service through a letter box for service of process from a country or place outside Hong Kong as they apply to the service of writ (save that it must be proved by an affidavit or certificate as the Registrar directs) and for substituted service also for service of process from a country or place outside Hong Kong. Order 69 r 4 provides that the process server for the purposes of Order 69 shall be the Chief Bailiff.

36. There is nothing in the wording of Order 69 that suggests that it is overarching or exhaustive as regards the service of foreign process generally. Order 69 does not, on its face, create a mandatory rule that must be followed whenever foreign process is to be served in Hong Kong, either from a Convention country or otherwise. Although both at the hearing and in his Skeleton Mr Foxton sought to distance himself from the broader proposition that Order 69 applies to the service of all foreign process (not just process between Convention states), if Mr Chan's broader construction is correct, it begs the question how service of process from a non-convention country can ever be effected in Hong Kong.

37. The analogy that Mr Chan seeks to draw between the words in rule 2 and the sentence "*You may ride your motorcycle on the street if you are wearing a helmet ... (b) if you have a motorcycle permit from the Transport Department*", does not, with respect to Mr Chan, advance matters, as the two sets of wording are not in fact analogous. Mr Chan's sentence begins with an imperative "*you may ride your motorcycle on the street*" whereas Order 69 r 2 ("*this Order applies to the service on a person in Hong Kong of any process related to civil or commercial proceedings in a court or tribunal of a country or place outside Hong Kong if...*") merely sets out a premise. In Mr Chan's example, what comes after "if" is an additional condition, as opposed to a necessary pre-condition as in Order 69 r 2.

38. Further, I agree with Mr Dawes SC (at Paragraph 4 of his Supplemental Report) that Mr Chan's construction of the Chinese text of Order 69 is somewhat strained, and considering the Chinese words used (as well as applying the presumption that bilingual texts have the same meaning), I agree with Ms Oppenheimer KC that the English and Chinese texts of Order 69 are consistent in meaning. I also note Mr Dawes SC's disagreement with Mr Chan's submission that the Hong Kong Court "*construes procedural rules in the Rules of the High Court as having been devised as the 'entire code' on a certain procedural matter*". Whilst Order 1 of the Rules makes clear that the Rules establish a legislative code prescribing all the circumstances in which the High Court may exercise jurisdiction, I accept Mr Dawes SC's view (at Paragraphs 6-15 of his Supplemental Report) that each rule of procedure has to be construed according to the specific words used having regard to their context. Mr Dawes SC provides a number of examples to illustrate this point and makes the further point above that Order 69 is silent on how foreign process is effected when it originates from non-Convention states or states that are not party to other bilateral agreements, which militates strongly against the suggestion that Order 69 is intended to be an exhaustive regime.

39. As regards the argument advanced by Mr Foxton that the service of foreign process is an "*infringement of the sovereignty of Hong Kong*" and that this should affect the construction of Order. 69, I have already mentioned the approach of the Supreme Court in *Abela v Baadarani* [2013] UKSC 44 (which is discussed in Mr Dawes SC's first Report at Paragraphs 41-43, and has been adopted by the Hong Kong Court of Appeal in *Axa China Region Insurance Company Ltd v Leong Fong Cheng* [2016] 6 HKC 220). This suggests that this traditional view of service of foreign process may now be considered as outdated and no longer applicable. Mr Dawes SC's approach to the issue finds further support in what I am told is an authoritative practitioner's text dealing with cross-border legal issues in Hong Kong; Paul Harris SC's, *The Conflict of Laws in Hong Kong* (3rd edn). This provides that:

> *"Parties wishing to serve foreign court documents in Hong Kong have a wide choice between (i) informal service by parties or their agents or (ii) service by the court bailiff.*
>
> *(i) Informal service by parties or their agents. Hong Kong places no restrictions on the service of documents by parties or their agents. It is common for a Hong Kong solicitor to be instructed to effect service of foreign process as agent. Similarly, Hong Kong does not object to service by post. Of course, the responsible foreign lawyers will have to consider whether there are any relevant restrictions imposed by foreign law.*
>
> *(ii) Service by the bailiff. Service of "any process in connection with civil or commercial proceedings in a court or tribunal of a country or place outside Hong Kong" is regulated by O.69 RHC. This provides for cases where the Registrar of the High Court receives a written request for service…"*

40. If a party elects the "*informal service*" method referred to, one method of service available under Hong Kong law consists of the claimant or its agent leaving foreign Court documents by hand at the defendant company's registered office address. This is provided by Section 827, which states: "*A document may be served on a company by leaving it at, or sending it by post to, the company's registered office*". Mr Dawes SC deals with this provision at Paragraphs 32-39 of his First Report, referring to the aforementioned text, *The Conflict of Laws in Hong Kong (3rd edition)* and noting that this method of service is in line with the approach to foreign process in common law jurisdictions, which traditionally have had no objection to the direct service of foreign process on the territory by a claimant or his agent (in contrast to the civil law tradition, where service of process is by nature a judicial act).

41. A "*document*" under Section 827 includes a document that is issued for the purpose of any legal proceedings (Section 831 of the Ordinance) and the Ordinance places no restrictions on the proceedings being domestic proceedings. Accordingly, the act of leaving the Claim Documents at the Applicant's registered office is a valid means of service under Hong Kong law. If Order 69 is not mandatory, then it appears that Mr Foxton has no distinct or alternative basis to say that Section 827 cannot be used to effect foreign process, as Mr Chan's arguments are all premised on Order 69 being an exhaustive method of process. Further, in circumstances where the Convention expressly preserves the freedom of parties to use existing methods of service, the argument that Section 827 renders Convention service redundant goes nowhere.

42. Finally, for completeness, as regards Mr Foxton's submissions on the admissibility of the common law authorities put forward by the Respondent and Mr Chan's argument that Mr Dawes SC provides no Hong Kong authorities to support his views:

(1) As Ms Oppenheimer KC submitted, rightly in my view, it is perhaps unsurprising that there are no Hong Kong authorities concerning service of process into Hong Kong. Challenges to service into Hong Kong, as in the present case, will almost invariably be made in the forum/requesting state not in Hong Kong.

(2) It is not contended by Ms Oppenheimer KC that the authorities put forward from other common law jurisdictions are determinative of Hong Kong law and they are clearly not. Further, there is certainly nothing to preclude Ms Oppenheimer KC from making the same arguments in support of her case as are made in these authorities. As regards Mr Foxton's reliance on Section 4 of the Civil Evidence Act 1972, I agree with Ms Oppenheimer KC that Section 4 is directed to the situation where a party seeks to rely on a previous English decision on a question of foreign law to prove a point of foreign law in present proceedings. Section 4 does not prevent this Court from looking at authorities of other courts on issues of foreign law.

(3) Whilst I agree with Ms Oppenheimer KC that a number of the authorities she referred to are supportive of the Respondent's position, in particular the decision of the Californian Court of Appeal in *Whyenlee Industries Ltd v Superior Court of San Mateo Country* 33 Cal. App 5th 364 (Cal. Ct. App. 2019) where it was held that personal service by an agent (rather than via the Hong Kong government's Central Authority) had been effective under Hong Kong law, and where the Court dismissed the suggestion that Hong Kong had objected under the Convention to service by such agents, the position on the Application is, in my view, clear on the wording of Order 69 and Article 10 of the Convention, and the Respondent succeeds on the Application without the assistance of these authorities.

(4) For completeness however, it is noted that: (a) the Supreme Court of New South Wales in *Bindaree Beef Pty v Chinatex (Australia) Pty Ltd & Ors* [2018] NSWSC 1499 has held that leaving the claim document at the Hong Kong company's registered office pursuant to Section 827 is valid service of foreign process in accordance with the laws of Hong Kong; (b) the District Court for the Southern District of New York in *McIntire v China MediaExpress Holdings, Inc.* (S.D.N.Y. 2013) 927 F.Supp.2d 105 dismissed the argument that service through an agent was improper in Hong Kong under the Convention, and (c) the Bankruptcy Court of the Southern District of Texas has held in *In re Cyprus II Partnership* (Bankr. S.D.Tex 2008) that Hong Kong has not objected to Article 10(b) of the Convention allowing for service of judicial documents direct through other "competent persons", which includes a private agent. What these authorities evidence is other judges in different jurisdictions considering the same issue as in the present case and their judgments are reasoned and detailed. Whilst Mr Foxton is correct that not all the authorities referred to speak with one voice- in particular, *HCT Packaging v TM International Trading Ltd*, March 10 2014 - I agree with Ms Oppenheimer KC that this decision is almost per incuriam and certainly does not alter my view on the Article 10(b) and the proper construction of Order 69 in the present case.

(5) Finally, I accept Mr Dawes SC's contention at Paragraph 31 of his first Report that service of foreign process through solicitors is commonplace in Hong Kong and that in the premises, the Applicant was validly served under the law of Hong Kong in accordance with Section 827. It follows that I accept Mr Dawes SC's evidence that parties are not required to serve foreign process in accordance with the provisions of Order 69 in order for service of foreign process to be valid and that the Hong Kong Court does not regard the service of foreign process in Hong Kong as an exercise of exorbitant jurisdiction by a requesting state. *Yantai Wanhua*

Polyurethanes Co Ltd v Pur Products Limited) (ibid) relied upon by Mr Chan predates the decision of the Court of Appeal *in AXA China Region Insurance Company Ltd v Leong Fong Cheng* (ibid) and those cases concerning service by alternative means referred to by Mr Foxton do not undermine Mr Dawes SC's contention that service of foreign process under the Convention is no longer regarded as the exercise of an exorbitant jurisdiction.

Conclusion

43. For all the reasons set out above, the Application is dismissed. The Court will hear submissions on costs (either in writing or orally) if the Parties cannot reach agreement on the same. The Court thanks Counsel for their helpful and detailed submissions.