

# Global Employment Standards for Global Financial Institutions in Hong Kong

*International banks, asset managers and other financial intermediaries with New York and London offices frequently second staff to their Hong Kong offices, potentially subjecting themselves and their staff to Hong Kong employment law. A recent interlocutory Court of First Instance decision suggests, however, that Hong Kong employment law may not apply in situations where the parties have designated the law of a different jurisdiction to govern their employment contract, even where the employee is based in Hong Kong.*

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Given the global nature of the financial markets, it is not uncommon for international banks, asset managers and other financial intermediaries to transfer senior staff from one office in one country to another office in another country. Some commentators believed that where such staff were transferred to Hong Kong, they would be undoubtedly be subject to Hong Kong employment law.

However, on November 28, 2007, in *HSBC Bank plc v. Steven Andrew Wallace*, the Court of First Instance held that an employee seconded to Hong Kong by his English employer would likely not be able to avail himself of the protections of Hong Kong's Employment Ordinance ("EO"), despite the fact that he had lived and worked in Hong Kong for the previous 3 years, because his contract of em-

ployment specified that it was to be governed by English law. In consequence, the employee was likely not entitled to terminate his employment contract by payment in lieu of notice as allowed by the EO, but was likely to be required (consistent with English employment law) to serve out the full six month notice period specified in his employment contract.

## Applicability of the EO

At issue in the Court of First Instance decision was whether the choice of law provision in the contract of employment was enforceable or whether it ran afoul of section 70 of the EO, which reads:

*"Any term of a contract of employment which purports to extinguish or*

*reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void."*

Section 70, entitled "Contracting Out", is, as its name suggests, intended to prevent parties from contracting out of the numerous employee protection provisions of the EO. It would almost certainly prohibit a Hong Kong employer from foisting an employment contract on its Hong Kong employees which required them to sacrifice statutory entitlements to such benefits as annual leave, severance or long service payments, but its applicability to employment contracts governed by the law of a different jurisdiction has not been authoritatively decided.

The employee in the *HSBC Bank* case argued that the choice of law provision in his contract with HSBC Bank should be treated as any other term in a contract of employment. Since, by purportedly applying English law, the provision reduced the employee's rights, benefits and protections, it violated Section 70 and was unenforceable. To enforce it would be to strip section 70, and to a large extent the EO itself, of its authority.

### Parties Entitled to Choose Governing Law of Contract

The Court disagreed. It found that section 70 notwithstanding, the choice of law provision was likely valid and English law likely governed the parties' contract.

The Court began its analysis by stating that parties to a contract were, subject to certain exceptions, entitled to choose the law governing that contract. As a result, there was a presumption that English law applied to the employment contract at issue which could only

be overridden in two instances:

- if the EO were an "overriding statute," as defined below; or
- if the parties had no connection with England so that the invoking of English law was done to evade the protections of the EO.

Whether rightly or wrongly, the Court gave no consideration to the fact that the employee had been living and, more significantly, performing his duties under the employment contract in Hong Kong for more than 3 years, and that the terms of his secondment required him to remain in Hong Kong for an additional 2 years. Nor did it consider that the company for which the employee worked under the terms of the secondment was incorporated and based in Hong Kong.

### Not an Overriding Statute

An "overriding" statute is one which has such a strong social or economic imperative that it will be considered to apply, within its own terms, even to a contract which is otherwise governed by foreign law. Whether a statute is an "overriding" statute is a matter which may be expressly spelt out in the statute or, failing that, which may be decided by the courts based on whether the connections with Hong Kong are sufficient strong and relevant to trigger the application of the statute.

The Court found that the EO was not an overriding statute because it did not contain express language saying that it was one. In reaching this conclusion, the Court compared the language of the EO with that of the English Employment Rights Act of 1996, which states

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that “for the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person’s employment is the law of the United Kingdom, or of a part of the United Kingdom, or not.” Finding no similarly strong language in the EO, the Court found that it was likely not an “overriding statute” and that it would be incapable of overriding the presumption that English law applied.

### Following the Connections

The Court further noted that the employee could not likely show that the invoking of English law was intended to evade the protections of the EO because there was a genuine connection between the parties and England. The employer, HSBC Bank, was a UK incorporated and based company. It contracted with the employee in England and then, by mutual agreement, seconded him to its Hong Kong subsidiary, HSBC Markets (Asia) Limited. Thus it did not appear that the choice of English law was artificially devised to evade the protections of the EO. To the contrary, according to the Court, it made “good sense that a group of companies spread out all over the world [*i.e.*, the HSBC group] would want to employ its senior executives under one umbrella and one governing law.”

### Limitations

The Court’s ruling came on an interlocutory application for an interim injunction. Its findings are not absolute, but are based on the likelihood that the employer will prevail on the same issues at a full trial. Because it is a Court of First Instance decision, it does not carry

the same precedential authority as a decision of a higher court. Nonetheless, it remains valid law unless and until it is overturned at trial or on appeal.

However, there are certain potential weaknesses in the Court’s reasoning which should be noted before decisions of practical import, such as the drafting and execution of multinational employment agreements, are taken in reliance upon it.

While it is true that a statute will not generally be held to apply to a matter governed by foreign law unless a contrary intention appears, there is no requirement that the contrary intention be expressly stated by legislation. In this regard, the Court’s decision omitted a crucial line of analysis.

When a statute is silent as to whether it is an overriding statute or not, it is the function of the courts to determine from the public policy reasons underlying the statute whether the statute is or is not overriding. In the case of an employment statute, it would seem to follow that the courts should look at whether the connections of the employer and employee with the local jurisdiction (*e.g.*, Hong Kong in the current case) are strong enough to trigger the application of such public policy. Yet the Court of First Instance completely ignored the policy rationale underlying the EO, failing to consider whether that policy was sufficiently significant, and the parties’ connection with Hong Kong sufficiently strong, to justify extending the EO’s protection to the employment contract in issue. As previously noted, the fact that the employee had been living and performing his duties under the employment contract in Hong Kong for three years and was ex-

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*The Court found that the [Hong Kong Employment Ordinance] was not an overriding statute because it did not contain express language saying that it was one.*

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pected to continue in the same capacity for an additional 2 years in no way factored into the Court's decision.

## Practical Implications

If the ruling stands up through trial and appeal, then parties to employment contracts may be able to opt out of the EO by specifying that the law of a different jurisdiction is to govern. The *HSBC Bank* decision suggests that freely-chosen choice of law clauses may be enforced so long as the parties have a sufficient connection with the chosen jurisdiction to show that they are not merely trying to escape application of the EO. For an international financial inter-

mediary transferring senior staff from a New York or London office to a Hong Kong office, the ruling opens up the possibility of using a New York or London standard employment contract to govern the relationship of the staff member following the transfer to Hong Kong. Equally, the ruling opens up the possibility of using a New York or London standard employment contract to govern the relationship of all executives of a certain level of seniority.

However, because of the blind spots in the Court's reasoning, parties wishing to avail themselves of these new options should consult with competent counsel to ensure that the gray areas in the *HSBC Bank* decision are properly

addressed. Skillful draftsmanship and tactical positioning may be able to preserve the choices afforded by the *HSBC Bank* decision, even if parts of that decision are subsequently rejected or modified at trial or on appeal. ■

*TIMOTHY LOH, SOLICITORS serves as Hong Kong and International Legal Counsel to financial institutions. Since its establishment in 2004, its clients have included 10 financial institutions ranked in the FT Global 200 and it has been recommended each year by the Asia Pacific Legal 500 for its financial services and regulatory practice.*

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