Preface

This first edition of *Employment Laws of Hong Kong and China* is intended to find an audience among legal practitioners in Hong Kong who find themselves in need of a clear and up-to-date exposition of local employment law. There are chapters here on the legislative framework of Hong Kong employment law, the approaches to identifying employment, termination and wrongful dismissal. I have tried in this modestly sized work to capture something of the local flavour of Hong Kong laws on employment by raising reform options in many chapters. A large chapter on wrongful dismissal in Hong Kong has been included so that this most important aspect of local law is given its due recognition. There are also chapters discussing employment law as it is particularly experienced in Hong Kong and a notable one deals with confidential information. In addition, coverage is given of the numerous new statutory developments on employment law in the PRC and in this regard particular focus is given the emerging laws on termination, dispute resolution and workplace safety.

It is hoped that this book will encourage practitioners and the bench alike to reflect on the strengths and weaknesses of the law and to positively assist in the drive to reform it, or to give further thought to what is unique about it. It is also hoped that legal professionals in Singapore and Malaysia will see correspondences between Hong Kong and their law due to a common history of British colonialism. Above all, it is wished that the book assists in a shared endeavour to make the law clearer and more understandable to the people it regulates.

For those who are drawn to these pages for their coverage of key laws in the PRC take both caution and heart: while the law is extremely formative, the rule of law is tentatively but unmistakably taking hold on the mainland. We do, however, need to see beyond the present difficulties. The PRC's laws on employment are sometimes oddly translated or haphazardly applied. On occasions a law is repeated in two or more statutory instruments which are decades apart. The statutory material often has little or no easily available case law to offer interpretation and, where case law exists, the reported reasoning of judges can be slight. This is a function of how nascent the law is as well as the newness of judges to applying it. National and provincial laws appear to overlap. Enforcement of the old and new laws is a highly problematic area from the payment of wages on time to the effective prosecution of OSH transgressors. For all these shortcomings, a courageous start has been made on codifying individual employment rights and providing a meaningful system of employee remedies in the PRC. Much of it relies on a legislated combination of imported labour practices and a distinctively Chinese approach to the employment relationship.

The author also hopes that this book's audience will lend a hand in shaping its direction and content in future editions. In this way it will be able to

celebrate what is distinctive in Hong Kong and PRC law as well as maintain a commentary on those matters which are the most practically useful. Much of Hong Kong's employment law provides only what is absolutely necessary and much of the PRC's is focused on what is ideal. In a small way, the author hopes that by taking the step of writing on these legal systems what is deemed necessary in Hong Kong can be enlarged and what currently aspirational in the PRC can one day result in consistent outcomes for those who the law tries to protect. Particular thanks go to Professor Charles Rickett (University of Queensland) for his review of the chapter on confidential information, Assistant Professor Bjorn Ahl (City University of Hong Kong) for supplying a chapter on employment termination in the PRC and Ms Holly Allan (the Helpers for Helpers Legal Service) for her efforts on the chapter concerning employing foreign domestic helpers. Finally Ms Sasha Thomas-Nuruddin and Ms Surinder Kaur deserve particular credit for propelling the book along the path to publication with such efficiency. The law stated here was current on 25 November 2009.

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in it. On the other hand, a person who is demonstrably in business on his or her own account is considered an 'independent contractor' and will not enjoy the same entitlement to the protection of various ordinances because he or she is said to work under a *contract for services,* not a contract of service (or under a more modern usage, an 'employment contract'). As was recently stated in the Court of Final Appeal, the determination of an employee's status one way or another requires 'a nuanced and not a mechanical approach'.[1] Indeed, especially over the last 50 years or so, the common law has been placed under increasing pressure to recognize a variety of new working relationships which are other than full-time employment under a contract of service.[2]

2–002 Coverage issues arising from statutes. An ordinance can have a broader coverage than simply the relationship between an employer and employee, by referring to a person as a 'worker' or a 'person'.[3] Another approach is to leave the definition of 'employee' undefined except for certain roles or occupations which are specifically named as not being 'employees'.[4] For instance, s 4 of the Employment Ordinance makes it clear that it applies to every employee engaged under a contract of employment, to an employer of such employee and to a contract of employment between such employer and employee. Moreover, a member of a proprietor's family working in a business and living under the same roof is not an employee for the purposes of the Ordinance.[5]

Under the Contracts for Employment Outside Hong Kong Ordinance ('CEOHKO'), coverage is defined by reference to the specific kind of employment contract in the contemplation of the legislators: 'the Ordinance applies to contracts of employment entered into in Hong Kong after the commencement of this Ordinance, by which a person in Hong Kong enters or agrees to enter into the service of another person who is not in Hong Kong and not carrying on a business in Hong Kong where the contract is to be performed, whether wholly or partially, outside Hong Kong'.[6] This, however, does not apply to the crew of ships or aircraft,[7] people entering another country as a migrant on a permanent basis[8] and any person who does not perform primarily manual work.[9] This last proviso provides a clue to the policy behind the CEOHKO: it is designed to prevent manual employees and those non-manual employees with monthly wages not exceeding HK$20,000 employed by foreign employers when going outside Hong Kong for employment, from being engaged without a clearly laid down written contract.[10]

A seafarer under a crew agreement under the Merchant Shipping Ordinance (Cap 281) includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.[11] An employer under the Merchant Shipping (Seafarers) Ordinance (Cap 478) strikes a very broad definition designed to establish an inclusive regime for liability. Under this ordinance, an employer can be the person who supplied that seafarer an employment or employed that seafarer in a ship regardless of whether the employer owns, charters or

manages a ship or acts as an agent for another person doing so see p. 22 and may be bound as an employer either if referred to by name or 'by necessary implication'.[12]

(b) Liability for Contractors

2–003 Rule against vicarious liability of employer for contractor. The general rule is that an employer will be vicariously liable for the tortious act of an employee but not that of an independent contractor. The English Court of Appeal in *Honeywill and Stein Ltd v Larkin Bros Ltd* said that 'it is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract' and '... the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done'.[13] In recent times, it has been observed by the High Court of Australia in *Sweeney v Boylan Nominees*[14] that the original reason for the distinction between an employee class and that of an independent contractor was derived from Roman law where the servant was akin to a slave and subject as property to the rights of an employer whilst a contractor was a free man in society.[15] It is further noted in that case that such a distinction no longer holds relevance. In particular, Gleeson CJ stated that regardless of how inapt the old reasoning has become, the 'central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out'.[16] Indeed, this is a view that most judges of the common law world would find unexceptionable.

2–004 Contractors distinguished. The contemporary reason for a distinction between a servant and a contractor was indicated by Dixon J in *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-operative Assurance Co of Australia Ltd*:

> In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance.[17]

His Honour is referring in this case to the agency aspect of employment, namely, that an employer is liable in circumstances where the work done by an employee is in some way representative of his or her employer or done by the employee in the place of his or her employer. The existence of agency