「剩余费用条款」的可执行性

序言

「剩余费用条款」在保养、设备租赁或订购服务合约中很常见。简而言之，这些条款规定，若提前终止合约，服务用户仍有责任为未届满的期限支付服务费。视乎未届满的期限长短，累计费用可能十分可观。这种持续的支付责任可为已出现现金流问题的企业带来巨大的财务压力，对受疫情打击严重的许多行业，如饮食业及旅游业来说，这种情况屡见不鲜。本文将讨论剩余费用条款的可执行性，并向就此问题提供建议的从业者提供一些技巧。

法庭对「剩余费用条款」可执行性的看法

有关「剩余费用条款」的可执行性，法庭仍未有定案。在*Fuji Xerox (Hong Kong) Ltd v Vigers Hong Kong Ltd* (HCA3753/2003) 一案中，打印机租赁协议出现争议，包括典型的「剩余费用条款」，规定若协议提早终止，服务用户应向服务提供商支付未到期的服务费的总额。服务用户试图提早终止合约，但服务提供商拒绝，后者根据「剩余费用条款」申索剩余的服务费。在原讼法庭，服务用户辩称「剩余费用条款」是惩罚性条款。法庭不同意这一点，认为这并不是惩罚性条款，因为复印机没有二手市场，而服务提供商确实因提早终止合约而蒙受收入损失。上诉法院维持了该决定。

Ricoh Hong Kong Ltd v Maxwin Digital Printing Ltd (DCCJ 3032/2006) 一案的事实相似，但区域法院的判决却截然不同。在此案中，法庭区分Fuji Xerox 案的事实，表示对原告有关复印机没有二手市场的说法有很大保留。此外，法庭的推定是（正如*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 的判决），若条款规定「因几项事件中的一项或多项或全部，其中一些可能引起严重的后果或微不足道的损害」而一次性支付款项，便属惩罚性条款。在这种情况下，考虑到「剩余费用条款」的性质规定无论答辩人何时终止协议都应支付全数租金，法庭认为「剩余费用条款」是一项惩罚性条款。

Tai Chok Man v TVB Pay Vision Ltd (HCSA 9/2009) 是有关「剩余费用条款」可执行性的较新近案例。此案与订阅电视频道的合约有关。订户与电视频道提供商签订了为期18 个月的合约。订户试图提早终止合约，电视频道提供商要求订户支付未到期的剩余服务费。值得注意的是，合约本身没有任何允许订户在合约届满前终止合约的条款。订户按要求支付了费用，但随后透过小额钱债审裁处尝试向电视频道提供者追讨已支付的费用。资深审裁官认为，「剩余费用条款」没有任何问题。订户向原讼法庭提出上诉，法庭支持资深审裁官的判决，其依据是：(1) 订户试图提早终止合约，违反了合约的规定(因为没有条款容许订户这样做)，及(2) 电视频道提供商因此有权要求提早终止合约的订户支付在合约剩余时间内应支付的款项，作为违约的损失。因此，法庭认为「剩余费用条款」不是惩罚性条款。

惩罚性条款的最新发展

以上三宗香港案例均应用了传统的惩罚性条款规则 (如Dunlop Pneumatic Tyre Co Ltd)， 该规则取决于商定的金额是否为「真正的损失估算」。但是，英国最高法院在*Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67 案中重新制定了该规则。在这个具有里程碑意义的判决中，最高法院认为真正的考虑是要求违约方付款的条款，是否与寻求执行条款的无辜的一方不成比例，法院有权考虑更广泛超出赔偿问题的因素。

香港法院直至最近才在Cavendish Square. In *Bank of China (Hong Kong) Ltd v Eddy Technology Co Ltd* [2019] HKCA 339案中采用了新的考虑。争议的问题是，条款容许贷款方收取违约利息，而贷方在先前与借款方的协议中同意豁免，是否属惩罚性条款。香港上诉法庭首次应用Cavendish Square的考虑，维持了该条款的可执行性，因为放贷人恢复其在违约条款下的全部权利，不具任何惩罚性，而借款人没有证据表明违约利率「不实际、过高或不合理」。

在*Dragon Access Holdings Ltd v Lo Chu Hung* [2020] HKCFI 2895一案中，争议的问题是，房地产销售中的临时买卖协议及买卖协议中的条款，规定若卖方未能完成交易，卖方有责任支付双倍订金，是否一项惩罚性条款。根据上诉法庭对*Bank of China (Hong Kong) Ltd v Eddy Technology Co Ltd* [2019] HKCA 339的判决，欧阳桂如法官应用了Cavendish Square的考虑，裁定该条款不属惩罚性，因为完成交易对买方的确有合法利益，而赔偿本质上也不是「过高或不合情理」。

在更近期的*Center (76) Ltd v Victory Serviced Office (HK) Ltd* [2020] HKCFI 2881判决中(2020年11月19日作出)，争议的问题之一是租赁协议下的条款规定，若租客违约，业主可追回三个月免租期的租金，是否一项惩罚性条款。高等法院暂委法官进一步详细说明Cavendish Square案的判决的原则：

1. 首先，合约条款是否属于惩罚性，是合约解释的问题，而真正的问题是本质上是否惩罚性。

2. 第二，在一方对另一方违反了主要责任时，施加次要责任，则存在惩罚性条款。它有别于有条件的主要责任，后者取决于不构成违反合约的事件。

3. 第三，条款是否对违反合约施加第二责任是实质问题，而不是形式问题。

4. 第四，对违反了主要责任一方施加第二项责任，若条款对违约方施加损害，与无辜一方在执行主要责任中任何合法利益不成比例，则属惩罚性条款(或以传统语言来说不实际、过高或不合理)。

5. 第五，责任在于指称条款属惩罚性条款的一方。因此，惩罚性条款的三个基本要素是：

    (1) 在违反主要责任时施加次要责任；

(2) 次要责任对违约方施加损害；及

(3) 而损害与无辜一方在执行主要责任中任何合法利益不成比例。

法庭认为，有争议的条款没有施加第二责任，即使有，业主的合法利益(即租客确保遵守租赁协议的条款)也超出了对租客施加的损害(即支付三个月的租金)。因此，该条款并非惩罚性条款。

分析「剩余费用条款」的可执行性

如上所述，香港法院在采用新的规则时，并未完全摒弃传统的惩罚性条款 (即损失是否「不实际、过高或不合理」)。由此可见，Cavendish Square Holding BV前的判决仍然具有意义。

我们认为，视乎每宗案件的事实，「剩余费用条款」可能会也可能不会被视为惩罚性条款。

显示并非惩罚性条款的因素

1. 服务用户履行合约规定的责任，就有责任继续缴付应缴的费用。

2. 即使该条款可以由无关重要的违约行为触发，服务用户或会获纠正违约行为的机会(有时协议可能包含免罚措施，容许服务用户在收到服务提供商的违约通知后，纠正违约行为)。

3. 服务提供商可能无法出售或出租二手产品(如型号太旧)。

4. 费用针对未届满的合约期，若没有终止合约，服务用户将有责任支付。

显示属于惩罚性条款的因素

1. 付款责任仅由违反合约引起。

2. 支付责任涉及未到期的费用。

3. 服务用户在合约终止后无合法权利使用服务或拥有产品，而服务用户需要支付未届满的合约期限内的服务费。

4. 无关重要的违约行为可触发该条款。

5. 服务用户实际上向服务提供商支付而没有任何回报(如上所述，因为该服务已被暂停)。

给从业者的提示

向服务提供商提供建议的从业者，建议采取以下预防措施：

1. 接受客户的指示，说明他们在「剩余费用条款」中的合法权益是什么，以及如何令这些条款在商业上显得合理；

2. 尽可能将「剩余费用条款」构建为主要责任(尽管Cavendish Square案明确规定，法院考虑条款是否施加了主要责任或次要责任，将超越合约规定的范围)；

3. 从惩罚中提供一定免罚措施，要求服务提供商发出违约通知(在发生违约的情况下)，容许服务使用者在一段时间内予以纠正；

4. 妥为保存双方之间在执行合约前的谈判记录(口头及书面)。

为服务用户提供建议的从业者，不妨考虑采取以下的预防措施：

1. 尽可能限制触发「剩余费用条款」事件的范围；

2. 加入触发「剩余费用条款」的一些例外情况；

3. 加插适当的终止条款，供服务用户加入合约。

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Enforceability of "Remaining Fee Clauses"

By Danny Leung (Partner), David Hung (Senior Associate)

Introduction

"*Remaining fee clauses*" are common in maintenance, equipment rental or subscription service contracts. Briefly, these clauses provide that if a contract is terminated prematurely, a service user would still be liable to pay the service fees for the unexpired term. The amount of the aggregate fees can be quite substantial depending on the length of the unexpired term. This continuous liability to pay can create enormous financial pressure on businesses already suffering from cashflow problems: a common occurrence in a number of industries hardest hit by the COVID19 pandemic such as the food and beverages and the travel industries. This article discusses the enforceability of remaining fee clauses and offers some tips to practitioners who are advising on such matters.

Authorities on the enforceability of "*remaining fee clauses*"

The authorities on the enforceability of "*remaining fee clauses*" have remained unsettled. In *Fuji Xerox (Hong Kong) Ltd v Vigers Hong Kong Ltd* (HCA3753/2003), the dispute arose out of a printers' rental agreement with a typical "*remaining fee clause*" which provides that, upon premature termination of the agreement, the service user should pay the total service fees for the unexpired term to the service provider. The service user sought to terminate the contract prematurely but such attempt was rejected by the service provider who sued for the remaining service fees under the "*remaining fee clause*". At the Court of First Instance, the service user argued that the "*remaining fee clause*" is a penalty clause. The court disagreed, and held that the same was not a penalty clause, having regard to the fact that there was no second-hand market for the rented photocopiers and there was indeed a loss of earnings by the service provider in respect of the early termination of the contract. The decision was upheld by the Court of Appeal.

A diametrically different decision was arrived at by the District Court in *Ricoh Hong Kong Ltd v Maxwin Digital Printing Ltd* (DCCJ 3032/2006) which bore a similar factual matrix. In this case, the Court distinguished the facts of the *Fuji Xerox* case and noted that it had great reservation about the plaintiff's argument that there was no second-hand market for the photocopiers. Further, the Court relied on the presumption (as held in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79) that a clause would be a penalty clause if it provided for payment of a single lump sum "*on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage*". In the circumstances, and having regard to the nature of the "*remaining fee clause*" providing for payment of all the rental fees irrespective of when the defendant terminated the agreement, the court held that the "*remaining fee clause*" was a penalty clause.

A slightly more recent case on the issue of enforceability of "*remaining fee clause*" is *Tai Chok Man v TVB Pay Vision Ltd* (HCSA 9/2009). This case is concerned with a contract for subscription to TV channel. The subscriber entered into an 18-month contract with the TV channel provider. When the subscriber sought to terminate the contract early, the TV channel provider demanded payment for the remaining service fees for the unexpired term. Notably, the contract itself did not contain any provision to allow the subscriber to terminate the contract before expiry of the term. The subscriber paid as demanded but subsequently sought to recover the fees so paid from the TV channel provider at the Small Claims Tribunal. The learned Adjudicator held that he saw nothing wrong about the "*remaining fee clause*". In the subscriber's appeal to the Court of First Instance, the Court sided with the learned Adjudicator and upheld his decision, on the basis that (1) the subscriber breached the contract by seeking to terminate the contract prematurely (as there is no provision to allow the subscriber to do so) and (2) the TV channel provider was thus entitled to demand the subscriber who terminated the contract prematurely to pay such sums as were payable for the rest of the contract period as damages for the breach. Thus, the Court held that the "*remaining fee clause*" was not a penalty clause.

Recent development of the rule on penalty clauses

The above three Hong Kong cases all applied the traditional rule on penalty clauses (as held in the *Dunlop Pneumatic Tyre Co Ltd* case) that hinges on whether the agreed sum is a "*genuine pre-estimate of loss*". Such rule has, however, been reformulated by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67. In this landmark decision, the Supreme Court held that the true test is whether the clause mandating payment by the defaulting party is out of proportion to the innocent party seeking to enforce such clause, and the Court is entitled to take into account broader consideration which goes beyond the issue of compensation.

The Hong Kong Court has only recently adopted the new test in *Cavendish Square*. In *Bank of China (Hong Kong) Ltd v Eddy Technology Co Ltd* [2019] HKCA 339, the issue in dispute was whether a clause providing for the lender retrospectively to charge default interest which the lender agreed to waive in light of a previous settlement with the borrower was a penalty clause. For the first time, the Hong Kong Court of Appeal applied the *Cavendish Square* test and upheld the enforceability of the said clause, on the basis that there was nothing penal for the lender to revert to its full rights as it had been expressly provided for under the default clause, and that the borrowers showed no evidence that the default rates are "*extravagant, exorbitant or unconscionable*".

In *Dragon Access Holdings Ltd v Lo Chu Hung* [2020] HKCFI 2895, the issue in dispute is whether a clause under a preliminary sale and purchase agreement in a property sale stipulating that the vendor was liable to pay a sum which doubled the initial deposit should it

fail to proceed to completion was a penalty clause. The Hon Queenie Au-Yeung J applied the *Cavendish Square* test following the Court of Appeal's decision in *Bank of China (Hong Kong) Ltd v Eddy Technology Co Ltd* [2019] HKCA 339 and held that the clause was not a penalty, because the buyer did have a legitimate interest in the completion of the sale and the said compensation was neither "*exorbitant nor unconscionable*" in nature to justify judicial intervention.

In a more recent decision in *Center (76) Ltd v Victory Serviced Office (HK) Ltd* [2020] HKCFI 2881, which was decided only on 19 November 2020, one of the issues in dispute was whether a clause under a tenancy agreement providing that the landlord might recover the rent during the three months' rent-free period in the event of the tenant's default is a penalty clause. DHCJ To further elaborated the principles as decided in the *Cavendish Square* case:

1. First, whether a contractual provision is a penalty is a question of interpretation of the contract and the real question is whether it is penal or punitive in nature.

2. Second, a penalty clause exists where a secondary obligation is imposed upon a breach of a primary obligation owed by one party to the other. It is to be distinguished from a conditional primary obligation, which depends on events that do not constitute breaches of contract.

3. Third, whether a clause imposes a secondary liability upon a breach of contract is a question of substance and not of form.

4. Fourth, a provision that in substance imposes a secondary liability for breach of a primary obligation is penal if it imposes on the party in default a detriment which is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation (or using traditional language, which is exorbitant, extravagant or unconscionable).

5. Fifth, the onus lies on the party alleging that a clause is a penalty clause. Thus, the three essential elements of a penalty clause are:

    (1) that it imposes a secondary obligation upon breach of a primary obligation;

    (2) that the secondary liability imposes a detriment on the party in breach; and

    (3) that the detriment is out of all proportion to the legitimate interest of the innocent party in the enforcement of the primary obligation.

The Court held that the clause in dispute did not impose a secondary obligation and even assuming that it did, the legitimate interest of the landlord (i.e. to ensure observance of the terms of tenancy agreement by the tenant) outweighed the detriment to be suffered by the tenant (i.e. to pay three months' rent). It follows that the clause was not a penalty clause.

Analysis on the enforceability of "*remaining fee clauses*"

As alluded to above, the Hong Kong courts, whilst applying the reformulated rule, have not completely discarded the traditional rule on penalty clauses (i.e. whether the agreed loss is "*exorbitant, extravagant or unconscionable*"). It follows that the pre-*Cavendish Square Holding BV* authorities continue to be relevant.

In our view, depending on the facts of each case "*remaining fee clauses*" may or may not be regarded as penalty clauses.

Factors suggesting they are not penalty clauses

1. There is only one obligation to pay the fees which continue to be due and payable so long as the service user performs its obligation under the contract.

2. Even though the clause can be triggered by a trivial breach, the service user may be afforded an opportunity to rectify the breach (sometimes an agreement may contain a built-in relief from the penalty by allowing the service user to rectify the breach after receiving notice of breach from the service provider).

3. The service provider may not be able to sell or rent out the second-hand products (if the models are too old).

4. The fees are for the unexpired term of contract, which the service user would have been liable to pay had the contract not terminated.

Factors suggesting they are penalty clauses

1. The liability to pay is triggered only by the breach of the contract only.

2. The obligation to pay concerns fees for the unexpired term.

3. The service user has no legal right to use the service or possess the products after termination of the contract, whilst the service user needs to bear the service fee for the unexpired term of the contract.

4. The clause can be triggered even for trivial breach.

5. The service user is in effect paying the service provider for nothing in return (because, as alluded to above, the service would have been suspended by that time).

Tips for practitioners

For practitioners advising the service provider, it is advisable to adopt the following non-exhaustive precautionary measures:

1. taking client's instructions on what their legitimate interest in the "*remaining fee clauses"* are and how such clauses can be commercially justified;

2. structuring, as far as possible, the "*remaining fee clauses"* as primary obligations (although the *Cavendish Square* case expressly provides that the court will look beyond the stipulation of the contract to see whether the clause imposes a primary or secondary obligation or not);

3. providing certain built-in relief from the penalty to the effect of requiring the service provider to give a notice of breach (in the case of occurrence of a breach) and allowing the service user certain time thereafter to rectify the same;

4. maintaining proper records (both oral and written) of negotiations between the parties leading up to execution of the contract.

For those advising the service user, they may wish to consider adopting the following non-exhaustive precautionary measures:

1. limiting the scope of any triggering event for the "*remaining fee clauses"* as far as possible;

2. adding some exceptions to the triggering of the "*remaining fee clauses"*;

3. inserting a proper termination clause for the service user to be added to the contract itself.

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