

Cooperation Agreement and Confidential Agreement 合作協議和保密協議



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合作協議 Cooperation Agreement

1. 有效合約的要素 **Elements of a Valid Contract**
2. 如何避免合約陷阱 **Pitfalls of Entering into a Contract**
3. 合作協議 **Cooperation Agreement**
4. 保密協議 **Confidential Agreement**



有效合約 Valid Contract

1. 有效合約的要素 Elements of a Valid Contract

有效合約 Valid Contract

◆ 兩個或以上合約方

Two or more parties:

承諾人 Promisor/ 被承諾人 Promisee

◆ 共識

Meeting of minds/ consensus on specific matters

有效合約 Valid Contract

◆ 要約 Offer:

“an expression by a person made to another, of his willingness to be legally bound to a contract on terms either certain or capable of being rendered certain”

◆ 承約 Acceptance:

“an indication by the offeree of the offeree’s willingness to be bound unconditionally to a contract with the offeror on the terms stated in the offer”

有效合約 Valid Contract

◆建立法律關係的意圖

Intention to create legal relationship:

➤商業合約Commercial Contract :

假設具法律意圖implied intention to be legally bound

➤家庭及社交合約Family, domestic and social agreement :

rebuttable presumption: do not intend the agreement to be legally bound 假設沒有法律意圖(但可推翻)

有效合約 Valid Contract

- ◆代價 Consideration:
 - Price of the bargain
 - Value to promisor or detriment to the promisee
 - 合約 Contract v.s 契約 Deed

- ◆確定的條款 Certainty of terms

合約內容

Contract Contents

◆立約方

Parties (合約參與原則Privity of Contract)

◆列明合約方的權利

Set out the rights of the parties

◆列明合約方的責任

Set out the obligations of the parties

◆合約期

Contract term

◆終止合約方法

Ways of termination of contract

◆監管法律及司法管轄

Governing law and jurisdiction

◆爭議解決 (訴訟、調解、仲裁)

Dispute Resolutions (litigation, mediation, arbitration)

合約陷阱 Contract Pitfalls

2. 如何避免合約陷阱 Pitfalls of Entering into a Contract

合約陷阱

Contract Pitfalls

1. 口頭協議 Oral Agreement

➤ 法律沒有限制合約的特定格式

The law does not require a particular form or formalities of a contract

➤ 合約可以書面或口頭協議

Contract may be in writing, or by oral agreement

➤ 口頭協議可能造成爭議

Oral agreement may be subject to argument

合約陷阱 Contract Pitfalls

香港案例 Hong Kong Case

Wing Hing (1956) Company Limited (榮興(1956)有限公司) v Nissin Foods Company Limited (日清食品有限公司)

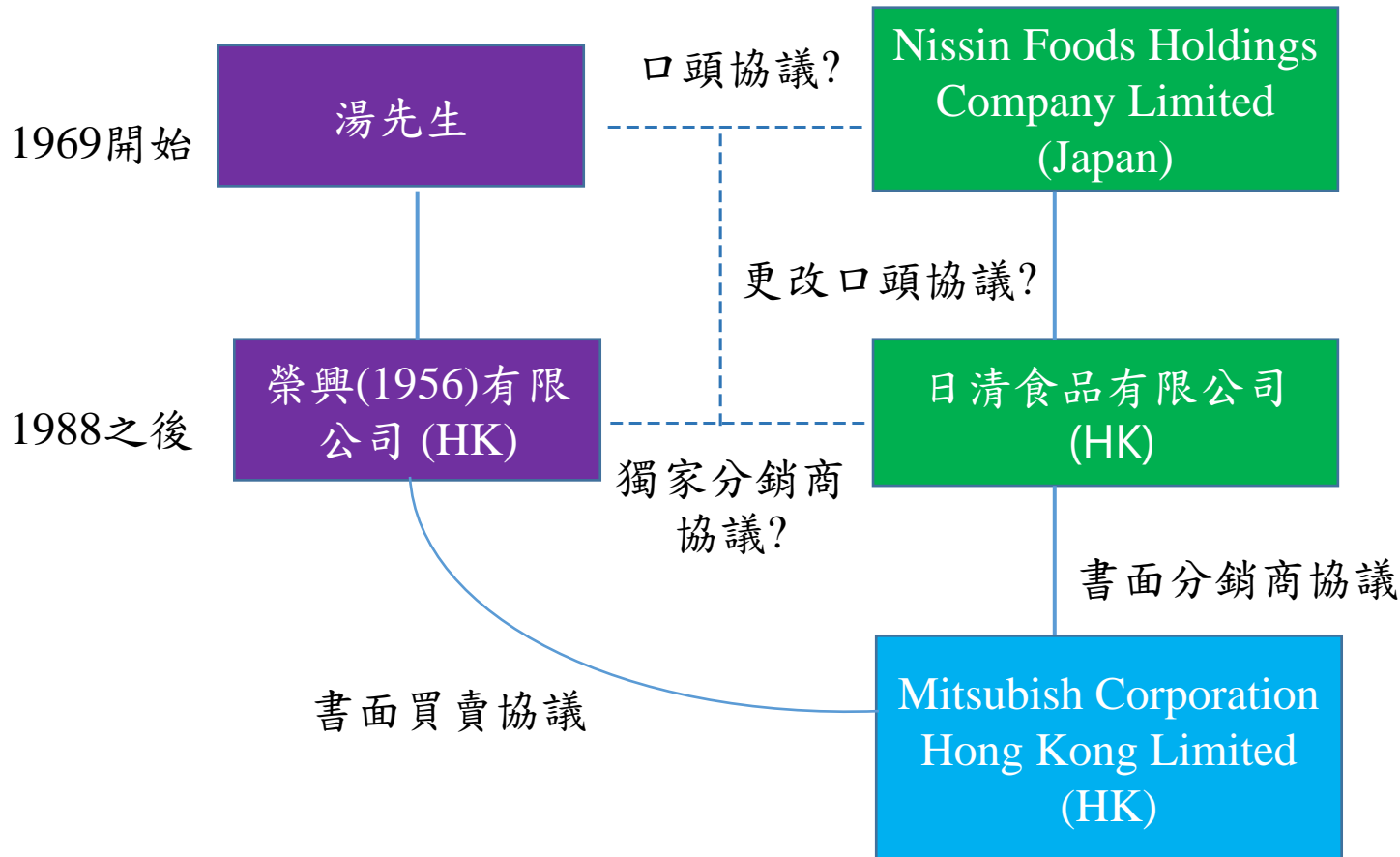
案號 Court Ref: HCA 1988/2017; [2021] HKCFI 638

判決日期 Date of Judgment: 12/ 03/ 2021



合約陷阱

Contract Pitfalls



合約陷阱 Contract Pitfalls

◆ 判詞 Judgement:

“Lack of evidence of proving the existence of the alleged oral agreement”

“Both Mr. Tong & Nissin HK are sophisticated operators, they should be highly attuned to the value and importance of clear written records of significant third party dealings”

合約陷阱 Contract Pitfalls

港聞

2021年3月13日星期六

港聞二

未證有口頭分銷協議 港代理告日清違約敗訴



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未證有口頭分銷協議 港代理告日清違約敗訴



讚好 1

A⁺ A⁻



【明報專訊】於1960年代起已替日清食品在港分銷「出前一丁」即食麵的榮興（1956）有限公司，4年前入稟高等法院，稱日清沒給予3年通知期就突然終止雙方逾50年的合作關係，要求日清賠償逾4400萬元。高院暫委法官陳樂信昨頒下判辭，稱未能證明雙方有口頭分銷協議，無法證明日清違約，裁定榮興一方敗訴。

合約陷阱

Contract Pitfalls

2. 要求提供母公司擔保/董事、股東個人擔保

**Ask for guarantee provided by parent company/
personal guarantee provided by individual directors/
shareholders**

原因 Reasons:

- 獨立法律實體 Separate legal entity
- 立約公司沒有實際資產/ 空殼公司 Contracting company has no substantive assets/ One dollar company
- 股東放棄公司 The shareholders abandon the company

合約陷阱 Contract Pitfalls

3. 離場方式Exit Method

- 固定合約Fixed term
- 續約權option to renew
- 自動續約（如不約滿前提早通知終止）
automatic renewal if not give notice to terminate the contract
before the expiry of term
- 無須原因隨時終止Termination at any time without causes
- 須要原因才可終止Termination for causes only

有效合約 Valid Contract

3. 合作協議 Cooperation Agreement

什麼是合作協議？

What is a Cooperation Agreement?

A cooperation agreement is a contract between two parties who want to enter into a working relationship together. It is used to:

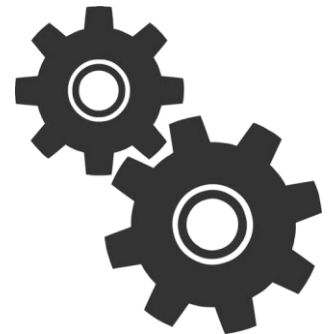
合作協議是雙方建立工作關係的合同，用於：

- Outline the intentions, goals and conditions of the future working partnership
- 概述未來合夥工作關係的意圖、目的及條件
- Address the information or establishment of the cooperative venture
- 處理合作業務的信息或創立事宜
- Outline how much each person in the cooperation agreement owns of a business arrangement and the amount of the profits they can be distributed
- 概述合作協議中每人擁有的業務份額及其可獲分配的利潤金額
- Identify the obligations of the parties involved
- 明確相關各方的義務

合作協議的作用

Functions of a Cooperation Agreement

- Provide flexibility in allowing the parties to include terms that meet their needs and requirements → to ensure that the venture is as profitable (financially or otherwise) as possible
- 提供靈活性，允許各方列入符合其需求的條款 → 以確保業務盡可能盈利（財務上或其他方面）
- Outline critical details → to help both sides of the contract keep their end of the agreement up
- 概述關鍵細節 → 以幫助合同雙方遵守他們的協議內容



合作協議的內容

Content of a Cooperation Agreement

- The percentage of ownership of each partner
- 每個合夥人的所有權百分比
- How the division of profit and loss will take place
- 如何劃分利潤和損失
- The length of the partnership
- 合夥關係的期限
- How decisions will be made and disputes resolved
- 如何作出決定和解決爭端
- Define who holds the Binding Authority
- 界定誰持有約束性權力
- What happens in case of withdrawal or death
- 在退出或死亡的情況下會發生什麼



合作協議的優勢

Advantages of a Cooperation Agreement

- By clearly setting out what both sides want from the cooperation and how the parties should cooperate, there is less chance for the cooperation to fail.
- 通過明確說明雙方希望從合作中得到什麼以及雙方應如何合作，合作失敗的可能性就會降低。
- By clearly outlining what is required from both sides, it can motivate both sides far better than a cooperation between two entities that do not have a legally binding agreement in place.
- 通過明確概述雙方的要求，它能比無法律約束力的協議更好地促進兩個實體之間的合作。



2. 保密協議的適用情形

Where NDA would be helpful

- A confidentiality agreement or non-disclosure agreement (NDA) is a legally binding contract in which a person or business promises
- 保密協議，又稱不披露協議（NDA），是對個人或企業具有法律約束力的合同。協議方承諾：
 - To treat specific information as a trade secret
 - 將特定信息視為商業機密
 - Not to disclose the secret to others without proper authorisation
 - 在未經正當授權的情況下，不向他人泄露商業機密
 - *the information has to be private. Once a piece of information becomes public, an NDA can no longer protect it.
 - 信息須保持私密性。一旦信息被公開，便不再屬於NDA 的保護範圍之內。
 - NDAs are often a critical first step in significant business deals
 - 保密協議通常是重大商業交易的關鍵第一步



4. 保密協議

Confidential Agreement



Where NDA would be helpful

保密協議的適用情形

- Presenting an **invention** or **business idea** to a potential partner, investor, or distributor
- 向潛在的合作夥伴、投資者或分銷商展示發明或商業理念
- Sharing financial, marketing, and other **information** with a prospective buyer of your business
- 與企業的潛在買家共享財務、營銷和其他信息
- Showing a **new product or technology** to a prospective buyer or licensee
- 向潛在買家或被授權人展示新產品或技術
- Receiving **services** from a company or individual who may have **access to some sensitive** information in providing those services
- 接受公司或個人提供的可獲取企業敏感信息的服務
- Allowing **employees access to confidential and proprietary information** of your business during the course of their job
- 允許員工在工作期間接觸企業機密和專有信息



Unilateral vs Mutual NDAs

單方合同 vs 雙方合同

- **Unilateral 單方保密協議**



For when you are contemplating that only **one side will be sharing** confidential information with the other side.

- 適用於一方向另一方共享機密信息的情況

- **Mutual 雙方保密協議**



- For situations where **each side may potentially share** confidential information, and each party are bound by the clauses of the agreement

- 適用於雙方可能共享機密信息的情況，且雙方均受協議條款的約束



Main clauses in Confidential Agreement

保密協議的主要條款



- **The Parties to the Agreement 協議各方**
 - Defining and introducing the parties 定義和介紹協議各方
- **Purpose of the Agreement 協議用途**
 - Introducing the aim of the agreement 介紹協議的目的及用途
- **Binding Effect of the Agreement 法律約束力**
 - **Definitions and Interpretations 定義和解釋**
 - Key terms and specific wordings used in the Agreement 協議中使用的關鍵術語和特定措辭



One-way vs Two-way

- Two-way: This Confidentiality Agreement is entered into in connection with discussions about a potential business relationship between [Party A] and [Party B]. [Party A] may receive information relating to [Party B]'s operations and businesses and [Party B] may receive confidential information from [Party A].
- 本保密協議（"協議"）是為討論[甲方]和[乙方]之間的潛在業務關係而簽訂的。[甲方]可能會收到與[乙方]的經營和業務有關的資料，而[乙方]可能會收到來自[甲方]的保密資料。

VS

- One-way: [Party A] wishes to disclose Confidential Information to Info Keeper in relation to the [Project and/or Permitted Purpose] and to: (a) regulate the Use of the Confidential Information by Info Keeper; (b) preserve the confidentiality of the Confidential Information.
- [甲方]會就[項目和/或許可用途]向[資訊保管方]披露機密資訊，及希望達到(a) 規範[資訊保管方]對機密資訊的使用以及(b) 維護機密資訊的保密性。

Definition of Confidential Information 保密資訊的定義

- "Confidential Information" shall include 保密資訊包括： —
- In whatever form and means and nature, all information or material that has or could have commercial value or other utility in the business in which Disclosing Party is engaged.
- 在披露方所從事的業務中具有或可能具有商業價值或其他效用的所有信息或材料，其形式性質不受限制。
- Considered **commercially sensitive**
- 具有商業敏感性的信息
 - E.g. Services, business information, strategies, rights, customer服務, 商業信息, 策略, 權利, 客戶等
 - E.g. Information on customers, suppliers, plans 有關客戶, 供應商, 計劃的信息等

Definition of Confidential Information 保密資訊的定義

- Important dates of effect
- 生效日期
- May include exclusion clauses on what is not considered Confidential Information
- 可納入定義“非保密信息”的免責條款

Confidentiality Obligations

保密義務

•Undertaking of each Party 各方承諾



- Keeping information confidential, **not be used for unpermitted purposes**
- 對信息保密，不得用於未經許可的用途
- Using all endeavours to **ensure no one gets access**
- 盡一切努力確保無人可訪問保密信息
- Informing the other party** immediately upon discovery/
awareness of disclosure to an unauthorised third party
- 一旦發現/意識到保密信息被披露給未經授權的第三方，須立即通知另一方。

Disclosures 披露

• Permitted disclosures 經同意的披露

- To fulfil ends allowed in the agreement 為達成協議中的目的

• Forced disclosure 強制披露

- Where **jurisdiction or order of court, rules** require, clauses may stipulate confidential information be **disclosed to the minimum extent possible**
- 在受法院指令或規則要求的情況下，條款可規定機密信息應以最低限度披露
- Parties shall **inform the other party** and **gain assurance** from the authority that information disclosed will be kept confidential
- 各方須使當局保證披露方所披露的信息將被保密，並將此強制披露通知另一方。

Return of confidential information

- Upon the disclosing party's written request, the receiving party shall return to the disclosing party all tangible items and embodiments containing or consisting of the disclosing party's Confidential Information and all copies thereof (including electronic copies) and provide the disclosing party with a **written officer's certificate** certifying the receiving party's compliance with the foregoing obligation within [[*] days/ [*] month(s)] from the date of the written request.
- 根據披露方的書面要求，接收方應在書面要求之日起[*]天/[*]月內向披露方歸還所有包含或由披露方機密資料組成的有形物品和實施方案及其所有副本（包括電子副本），並向披露方提供一份書面證明書，證明接收方遵守了上述義務。

Optional clauses (if applicable)

任意性條款 (如適用)



排他性 Exclusivity

- Immediately on signing this Agreement, the Undertaking Party shall terminate, or procure the termination of, any Third Party Negotiations currently taking place.
- 在簽署本協議時，承諾方應立即終止，或促使終止目前正在進行的任何第三方談判。

Duration 期限

- Stipulates the period of obligation when the Agreement would remain in full force and any expiry dates
- 列明協議保持全部效力的期限及任何失效日期。
- Parties shall hold Confidential Information in confidence and the Agreement shall remain in effect until the Confidential Information no longer qualifies as a trade secret or until Disclosing Party sends Receiving Party written notice releasing Receiving Party from this Agreement, whichever occurs first.
- 直至機密信息不再符合商業秘密的條件或披露方以書面通知的形式解除接收方的保密義務（以先發生者為準），雙方須維持保密信息的機密性。

Non-solicitation 禁止招攬

- Agreement not to solicit or approach any employees/ customers/ suppliers of the other party or customer
- 同意不招攬或接觸另一方或其客戶的任何員工/客戶/供應商

Limitation of Liability of Disclosing Party

披露方的責任限制

Indemnity 賠償：

- In event of **breach or misrepresentation** by the undertaking party, whether by fault or negligence, the undertaking party shall **indemnify the other party for the cost** and fees incurred
- 無論是出於過失或疏忽，若承諾方違約或作出失實陳述，便須向另一方賠償由此衍生的成本及費用

Others 其他

•Cost 費用

- Cost bore by the each of the parties 各方承擔的費用

•Assignment 轉讓

- All obligations in the agreement are personal to the Party and shall not be assigned
- 協議內的所有義務均屬於協議方個人且不可被轉讓

•Acting as principal

- Parties warrant to each other that they act as principal but not agent
- 各方相互保證以“委託人身分”而非“代理人身分”進行交易

Others 其他

•Third Party Rights and Intellectual Properties 第三方權利及知識產權

- Only enforceable on and benefits the **Parties within this Agreement**
- 指明協議僅對協議方生效

•Variation and waiver 更改及棄權

- Variation of the Agreement shall be in writing and signed by both parties to the Agreement
- 協議內容的更改須以書面形式呈現並獲協議雙方簽署
- Waiver of any rights under this Agreement is only effective in writing
- 以書面形式的棄權方可被認為有效

Others 其他

•Severance 無效條款

- Addresses what would happen if any provisions in the Agreement is invalid
- 應對協議中出現無效條款時的情況
- Where **any provision** is found to be **unenforceable** by court or any competent authority, the **other provisions shall remain in force**
- 當法院或任何主管當局認定某條款為“不可執行”時，其他條款仍然有效。
- If any invalid provisions would become valid upon **modification**, the **provision shall apply with whatever modification is necessary**
- 若任何無效條款在變更後即可生效，則該條款應在任何必要的變更後適用。

•Notice 告知

- The Agreement shall stipulate the methods of giving notice and address (email or physical) of notice
- 協議須指明通知方法及通知地址（電子郵件或實體）

Governing law and Jurisdiction

適用法律及管轄權

- State that all **disputes arising out of and in connection** with the Agreement shall be governed and construed in accordance with the **laws of Hong Kong**
- 闡明所有因本協議所引起或與之相關的爭議均受香港法律的管轄並按其解釋。
- **HK courts** shall have jurisdiction
- 香港法院具有管轄權

OR 或

- Parties can settle disputes by **arbitration**, the arbitration seat being Hong Kong
- 當事人可通過仲裁解決爭議，仲裁地為香港
- **Language and procedures** of arbitration can be stipulated
- 可規定仲裁的語言和程序

得著 Take Away

1. 有效合約的要素
Elements of a Valid Contract
2. 口講無憑，利用書面記錄
Put everything in writing
3. 合作協議和保密協議
Cooperation Agreement and Confidential Agreement



問 答 時 間

免責聲明

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