

## Transaction Advisory: Self-help Provisions

BY CURTIS H.L. WONG CPA, LLB, PCLL



Self-help remedies for breach of contract may confer certain protections on contracting parties against breach of contract without direct recourse to legal suits.

In drafting contracts, we used to incorporate certain contract terms and conditions, or expressly provide for a right to withhold performance and/or terminate the contract where conditions are warranted. Shifting the onus of proof or performance onto the party in breach may reverse the balance of bargaining power and impose burden to take proceedings or challenge action.

Secondly, the contract may provide that a party can withhold performance of his own obligations where the other has failed to perform a substantial obligation. It must provide that the other side's performance is a condition precedent to one's performance.

The right to withhold performance may only be

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effective where the innocent party has not yet performed his obligations. If the innocent party has already performed his obligations, for instance by paying in advance, he still need to sue for repayment.

Withholding performance may be in form of requiring one party to give the other security, such as a charge over property. In the event of default, the innocent party can then enforce the security. For example, on the supply of goods, seller may retain title to the goods under a title retention clause that expressly provided the circumstances in which the seller can enforce his security.

Advance payments, such as deposits or installments, can be retained in the event of default. Advance payments can be recovered by the party in breach if the contract is terminated and there is a total failure of performance. However, where part of the work under the contract has been performed, there will not be a total failure.

If the payment is categorized as a deposit and is paid as a security for the payer's performance, it is not recoverable by the payer if the contract is terminated (even if the contract is not performed). Attention should be drawn on the statutory limitations on the forfeiture of deposits and part payments if the amount does not reflect the estimated damages. Moreover, the court has a general equitable power to grant relief from forfeiture.

Another arrangement for the contract is to provide for one or both sides to offer security in the form of a guarantee from a trustworthy third party, such as a bank. In the event of default by one party, the other may obtain compensation by enforcing the guarantee. It is rare for the guarantor to dispute liability. However, where disputes involved from the interpretation of the guarantee terms, court proceedings is still unavoidable.

**Author:** Curtis holds a U.S. CPA license and is a Barrister of the High Court of Hong Kong SAR. He is a member of American Institute of Certified Public Accountants; a U.S. Certified Management Accountant with Certified in Financial Management; and a fellow member of the Hong Kong Institute of Certified Public Accountants.

Curtis has extensive accounting and business management experience in multinational and listed corporations. He had been in legal practice for about 10 years and used to deliver lectures in tertiary education institutions and training courses to HKSAR Government Departments and various professions. He also got publications on law and accounting topics.

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## Introduction to Business Valuation

BY ANNIE K.Y. CHEUNG

ARA & ASSOCIATES CERTIFIED PUBLIC ACCOUNTANTS

**B**usiness valuation concerns valuing the worth of a business entity. It can be a highly specialised process.

The value of a business comes from its ability to generate cash flows consistently over periods. Business valuations are usually conducted in the situation such as entering joint venture; merger and acquisitions; divestitures; recapitalization; or ongoing review of performance of particular business segment.



Most valuations are on operation-based. There are different methods of valuation. Here are some examples:

- **Discounted super-normal earnings** If an entity can earn only a normal rate of return on its assets, the investors will pay no more than the value of its assets. Super-normal earnings are equal to total earnings minus normal earnings. The estimated value of an entity's equity is the sum of the current book values plus the future super-normal earnings.
- **Discounted cash flow** It involves detailed calculation of forecasts of cash flows to the capital providers or investors, and focuses on discounting cash flows from operation after investing in working capital and net of capital expenditures.
- **Market-value-added** It is calculated by present value of debt plus market value of a firm's equity minus capital invested at start-up. It seeks to measure the increased value on stock market capitalization during period.
- **Price multiples model** It seeks to derive the value of a firm from the price multiples of "comparable" firms in the industry and apply the desired price multiples to calculate the value. Examples of price multiples include price-to-earning (P/E) ratio, price-to-book value ratio, price-to-cash-flow ratio, etc.

**Author:** Annie is a practicing CPA and experienced in handling accounting, assurance and tax engagements and in working with a wide variety of business enterprises and organizations including listed companies, SME businesses, non-profit entities and charitable organizations. She held a Master of Arts in International Accounting and is a fellow member of the Hong Kong Institute of Certified Public Accountants and a member of the Institute of Chartered Accountants of England and Wales.

**Dare & Habere Consulting Ltd.**

Room 1201, 12/F  
Shanghai Industrial Investment Building  
48-62 Hennessy Road, Wanchai, Hong Kong

Phone : (852) 2110 6989  
Fax : (852) 2549 4866  
E-mail : [info@darehabere.com](mailto:info@darehabere.com)

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## Life/Balance



### **Hearst Castle – California, US**

Hearst Castle lies near No. 1 Pacific Highway coast in California Pacific coast near San Simeon. It is a famous tourist spot which situates halfway between Los Angeles and San Francisco Bay Area. The distance either from both cities is approximate 3.5 hours drive.

The property was constructed during 1920-40s. It is now a 165-room Moorish castle with 127 acres of gardens, terraces, pools and walkways, furnished with Spanish and Italian antiques and art, flanked by three large guest houses. The Hearst's family donated Hearst Castle to the State in 1957. Today, Hearst Castle is a State Historical Monument and open to the public.

When stepping into the Castle, you may see the most frequent visit stop - National Geographic Theater. You can see the 40-minute show that highlights all the attractive spots in the Castle. There are bus tours departing from the Visitor Center and an audio tape program providing background information during the 15 minutes trip to the Castle.

The tour brings you to the Neptune Pool, a Greco-Roman outdoor pool, and the Roman Pool, an indoor pool lined with Venetian glass and gold. Most visitors are impressed with the outdoor Neptune Pool which reflects a unique European architectural building in the west coast of North America. The evening tour might be more fascinating as the site would be accompanied with the sunset view of Pacific Ocean.

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