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EDITOR’S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 40 jurisdictions. I am delighted to take over as editor of this work from Jonathan Cotton of Slaughter and May, and would like to thank him for his valuable contribution to its development over his tenure as editor.

The Dispute Resolution Review offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

This ninth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction’s dispute resolution rules and practice, and developments over the past 12 months. The Dispute Resolution Review is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

I first began working on this publication in 2008 as a contributor during the early stages of the global financial crisis. At that point, there was much uncertainty about how the then financial world order would change and what that meant for disputes practices. Many predicted a surge in disputes as companies tightened their belts and fought more keenly over diminishing assets. Certainly, in my home jurisdiction – England and Wales – the commercial courts have been extremely busy. Since then we have seen green shoots of recovery followed by new crises both within the eurozone and globally, such as the more recent sharp fall in oil prices and consequential increase in disputes in the energy sector.

2016 may be seen as yet another benchmark year. Two major events have shaken investor confidence and are likely to have an impact on the legal profession for years to come. The UK’s vote to leave the EU has created considerable uncertainty in the region, and Donald Trump’s election as the US president is likely to affect the global international community. The special Brexit chapter in this edition explores some of the key issues that will form part of the UK–EU negotiations likely to commence this year. A top priority for disputes lawyers
in the region will be whether there will continue to be mutual recognition of judgments across Europe. How will this affect London as a popular global centre for dispute resolution? No one knows the answer to these issues, but what is certain is that clients and practitioners across the globe are likely to continue to face novel and challenging problems. The Dispute Resolution Review aims to shine a light on where to find the answer.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in The Dispute Resolution Review. Their biographies start at page 629 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
London
January 2017
Chapter 16

HONG KONG

Mark Hughes and Kevin Warburton

I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Although Hong Kong is a special administrative region of the People’s Republic of China (PRC), its legal system operates independently and there are very few similarities between PRC law and Hong Kong law. Hong Kong law is based on principles of common law, similar to those that apply in England, Australia and other Commonwealth jurisdictions, and this is formally acknowledged by the Basic Law (Hong Kong’s mini Constitution). The policy of ‘one country, two systems’ is constitutionally guaranteed until 2047.2

Hong Kong’s judiciary is generally well regarded and operates free of political or other interference. It is perhaps for that reason that the Hong Kong courts have recently found themselves being asked to rule on cases involving the politics of Hong Kong. However, the recent uninvited interpretation of Article 104 of the Basic Law by the Standing Committee of the National People’s Congress (NPCSC) on 7 November 2016 has given rise to some concern among constitutional lawyers in Hong Kong regarding the sanctity of the rule of law in Hong Kong, the independence of Hong Kong’s judiciary and the PRC’s approach to the ‘one country, two systems’ policy. (See Section II, infra).

There are two levels of court dealing with civil claims of substance3 at first instance: the District Court (which has jurisdiction over claims of up to HK$1 million) and the Court of First Instance (CFI), which has unlimited jurisdiction.

The Court of Appeal (CA) hears appeals from both the CFI and the District Court. It also hears appeals from the Lands Tribunal as well as other statutory bodies. The Court of Final Appeal (CFA) is the highest court in Hong Kong and is made up of local permanent judges and distinguished judges from England, Australia and New Zealand who serve as non-permanent judges. It hears appeals from the CA and the CFI.

1 Mark Hughes is a partner and Kevin Warburton is a senior associate at Slaughter and May.
2 Article 5 of the Basic Law of the Hong Kong Special Administrative Region.
3 Claims involving monetary value of over HK$50,000.
There are a range of specialist tribunals set up under statute, such as the Lands Tribunal, which deals with cases concerning real property; the Labour Tribunal, which deals with employment matters; and the Competition Tribunal, which deals with cases connected with competition law in Hong Kong.

Hong Kong is also a major centre for international arbitration. There is a sophisticated statutory regime in place to support arbitrations (see Section VI, infra). Mediation has become more widely accepted in Hong Kong, and this trend should continue over the coming years given the judicial encouragement of mediation under Practice Direction 31, which came into effect on 1 January 2010 (see Section VI, infra). With the opening of the Financial Dispute Resolution Centre (FDRC) in 2012, the option of mediation is intended to be available for the majority of disputes that arise between retail investors and financial institutions (see Section VI, infra).

II THE YEAR IN REVIEW

The moderate growth of the Hong Kong economy continued in 2016, supported by growth in private consumption expenditure and export of goods, while inbound tourism and export of services continued to decline. Although the outlook for Hong Kong’s economy remains broadly positive, the impact of recent major global events – such as the recent US presidential election and the result of the UK’s referendum on membership of the European Union – remains to be seen, and brings with it inherent uncertainty.

Hong Kong deservedly retains a reputation for a relatively laissez-faire style of capitalism. However, there is now a perceptible legislative trend toward what might be considered a more socially responsible development model. The enactment of the Competition Ordinance in June 2012 (which came into effect on 14 December 2015), aimed at creating a fairer marketplace for Hong Kong consumers by prohibiting certain anti-competitive conduct, is one example of the efforts being made by the Hong Kong government to achieve its stated objective of creating a fairer and more balanced society (see Section II, infra).

Regulators have maintained their prominent position in newspaper headlines in Hong Kong. On 3 May 2016, Mr Thomas Atkinson, the former Director of the Enforcement Branch of Canada’s Ontario Securities Commission, was appointed as the new Executive Director of Enforcement to the Securities and Future Commission (SFC). In the quarter ending 30 June 2016, the SFC alone started 160 investigations, a slight increase from the 131 it began in the corresponding quarter of the previous year, indicative of the SFC’s rigour in relation to enforcement. In the first issue of the SFC’s relaunched Enforcement Reporter newsletter published in December 2016, the SFC named listed company-related fraud and misfeasance, money laundering and creation and use of listed shells on the Growth Enterprise Market as top-priority cases, which it will focus its resources against.

The Independent Commission Against Corruption (ICAC) has stayed in the headlines following the trial in 2014 of the wealthy Kwok brothers, chairmen of Sun Hung Kai Properties, and Rafael Hui, former Chief Secretary of the Government of Hong Kong and former managing director of the Mandatory Provident Fund Schemes Authority. In 2015, the ICAC’s high-profile investigation – launched in 2012 – of corruption complaints related to former Chief Executive Donald Tsang culminated in its announcement on 5 October 2015 that Tsang had been charged with two counts of the common law offence of misconduct in public office. Tsang faces allegations that he received, while in office, inappropriate favours from businessmen. Mr Tsang’s trial was listed to commence on
3 January 2017 and is due to last for 20 days (further details are provided below). The ICAC has also recently faced questions about its independence and impartiality, following the unexpected demotion and subsequent resignation of its former acting deputy commissioner and head of operations, Rebecca Li Bo-lan, in July 2016. Critics have suggested that Li’s departure was connected with one of the ICAC’s most sensitive cases – a complaint against the incumbent Chief Executive CY Leung that he failed to properly disclose a payment of HK$50 million he received from an Australian Company, UGL.

Recent headlines in Hong Kong have been dominated by constitutional law issues arising out of the Legislative Council (Legco) elections held on 4 September 2016. The issues were triggered by the manner in which 13 newly-elected Legco members purported to take their oaths at the first meeting of the Legislative Council on 12 October 2016. The five localist and 13 pro-democratic Legco members used the oath-taking ceremony as an opportunity to protest by, for example, making extra statements before, during and after taking their oaths. The oaths of two newly elected Legco members, Sixtus Baggio Leung and Yau Wai-ching, were invalidated by Legco Secretary General Kenneth Chan.

A court action was commenced by the government shortly thereafter, seeking (among other things) a declaration that Leung and Yau were disqualified from taking, or had vacated, their offices because they had, by their conduct, ‘declined or neglected’ to take the required oath under Article 104 of the Basic Law and Sections 19 and 21 of the Oaths and Declarations Ordinance.4 The case was heard by the CFI on 3 November 2016. However, prior to the handing down of the CFI’s judgment (see below), the NPCSC issued its interpretation of Article 104 on 7 November 2016 (the 2016 Interpretation). While the Hong Kong courts exercise the judicial power of Hong Kong,5 have the power of final adjudication6 and exercise that power free from any interference,7 Article 158 of the Basic Law vests the ultimate power of interpretation of the Basic Law in the NPCSC. Prior to the 2016 Interpretation, there had been four interpretations of the Basic Law by the NPCSC since the Basic Law came into force. The 2016 Interpretation was, however, unique in that it had not been requested (either by the courts or the Chief Executive) and was given while the court was considering its judgment.

The litigation and the 2016 Interpretation have generated significant public debate in Hong Kong and around the world. On the same day as the 2016 Interpretation was issued, the Hong Kong Bar Association issued a statement expressing ‘deep regrets’ regarding it, commenting that it is ‘unnecessary’ and ‘indeed would do more harm than good’ as it ‘inevitably gives the impression that the NPCSC is effectively legislating for Hong Kong, thereby casting doubts on the commitment of the Central People’s Government to abide by the principles of “One Country Two Systems, Hong Kong People Ruling Hong Kong, and High Degree of Autonomy”’.8

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4 Chapter 11 of the Laws of Hong Kong.
5 Article 80 of the Basic Law.
6 Article 82 of the Basic Law.
7 Article 85 of the Basic Law.
8 The Hong Kong Bar Association’s Statement Concerning the Interpretation made by the National People’s Congress Standing Committee of Article 104 of the Basic Law, 7 November 2016.
The Law Society of Hong Kong also, on 8 November 2016, issued a statement stating that ‘frequent interpretations of the Basic Law by NPCSC give an impression that the independence of the judiciary has been undermined’ and that ‘the NPCSC should exercise restraint in invoking its power’ to interpret the Basic Law under Article 158.

i  Regulatory enforcement

The SFC, as the independent non-governmental statutory body responsible for regulating the securities and futures markets in Hong Kong, has been continuing its high-profile campaign to pursue enforcement actions under both its criminal and civil jurisdictions.

In December 2014, the SFC commenced proceedings in the Market Misconduct Tribunal (MMT) against Mr Andrew Left, the former head of Citron Research, which is a US-based publisher of research reports on listed companies. He was alleged to have published a report that contained false and misleading information about Evergrande Real Estate Group Limited (a listed company in Hong Kong). The report stated that Evergrande was insolvent and had consistently presented fraudulent information to the investing public. The share price of Evergrande fell sharply on the same day following the publication. It was alleged that shortly before the publication, Mr Left short-sold up to 4.1 million shares of Evergrande, which made him a net profit of about HK$1,596,240. On 26 August 2016, the MMT found that Left had made false allegations against Evergrande recklessly and negligently inducing transactions – and therefore engaged in market misconduct under Section 277 of the Securities and Futures Ordinance (SFO).9 Left was banned from trading securities in Hong Kong for five years and the Tribunal has issued a cease and desist order against him. He was also ordered to disgorge his profit from short-selling and pay for the SFC’s investigation and legal costs.

In the past year, the SFC has also commenced several proceedings against directors of different corporations under Section 214 of the SFO, which gives the court power to disqualify persons from being directors for up to 15 years if they are found to be wholly or partly responsible for the company’s affairs having being conducted in a prejudicial manner or manner involving misconduct. For example, on 7 October 2016, the SFC commenced legal proceedings in the Court of First Instance to seek disqualification orders against 10 former and current directors of Freeman FinTech Corporation Limited, who were alleged to have (among other things) failed to act in good faith and failed to exercise reasonable care, skill and diligence in relation to the acquisition and disposal of a stake in Liu’s Holdings Limited in 2011. Similarly, on 31 May 2016, the SFC obtained disqualification orders from the Court of First Instance against three former senior executives of China Best Group Holding Limited for breach of directors’ duties in relation to a proposed acquisition of interests in a coal mine in 2008.

In late October and early November 2016, respectively, two banks in Hong Kong announced that the SFC intends to take action in relation to their respective roles as joint sponsors in certain initial public offerings in 2009.

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9 Chapter 571 of the Laws of Hong Kong.
ii Disclosure of inside information

The SFC has brought its first set of proceedings in the MMT in relation to the disclosure obligations imposed on listed companies, which came into force under the SFO as Part XIVA on 1 January 2013.

The SFC alleges that AcrossAsia Limited failed to disclose highly sensitive inside information as soon as was reasonably practicable. The SFC has also brought proceedings against the chairman of AcrossAsia, Mr Albert Saychuan Cheok, and the CEO of AcrossAsia, Mr Vicente Binalhay Ang, for their reckless and negligent conduct leading to the alleged breach by the company of requirements under the statutory corporate disclosure regime.

AcrossAsia had been involved in arbitration proceedings since August 2012, and on 4 January 2013 received a petition and summons issued by its subsidiary, PT First Media Tbk, and the Central Jakarta District Court respectively. The SFC alleges that these proceedings could lead to AcrossAsia being put into liquidation; therefore, the issuance of the petition and the summons – together with the information contained therein – are ‘inside information’ as defined under Section 307A of the SFO. The ‘inside information’ was not disclosed to the public until 17 January 2013, specifically after the Indonesian court made insolvency-related orders against AcrossAsia.

On 7 November 2016, the MMT found that AcrossAsia breached the disclosure requirement pursuant to Section 307B(1) of the SFO, while Cheok and Ang had been negligent in respect of AcrossAsia’s failure to make timely disclosure in breach of the disclosure requirements under Section 307G(2) of the SFO.

iii Competition Ordinance

The Competition Ordinance was passed on 14 June 2012 and came into full effect on 14 December 2015. Under the new regime, the Competition Commission (the Commission) is the main investigatory body with some enforcement powers. The Competition Tribunal (the Tribunal) meanwhile has jurisdiction to hear cases brought before it by the Commission as well as private ‘follow-on’ actions, and is armed with a wide range of powers including the power to grant injunctive relief.

On 27 July 2015, the Commission and the Communications Authority jointly issued six guidelines on how the two authorities intend to interpret and give effect to the provisions of the Ordinance (three on procedural matters and three on substantive issues). It is important to note, however, that the guidelines do not represent legal determinations of the meaning of the Ordinance. Ultimately, it will be for the Tribunal and other courts to decide how the Ordinance should be interpreted.

Moreover, in November 2015, the Commission published a Leniency Policy for Undertakings Engaged in Cartel Conduct, under which the Commission will agree not to bring proceedings in the Tribunal against the first cartel member to report cartel conduct to the Commission pursuant to Section 80 of the Ordinance. The Commission aims to, through its policy, provide an effective and transparent incentive to a cartel member for the cartel member to stop its cartel conduct and report any such conduct to the Commission. In the same month, the Commission also published its Enforcement Policy, which supplements the Ordinance and is intended to provide guidance on how the Commission plans to exercise its enforcement role in relation to investigations regarding possible contraventions of the First Conduct Rule and the Second Conduct Rule.
Since the Competition Ordinance has come into full effect, businesses and trade associations in Hong Kong have reviewed and adjusted their operations and practices to ensure compliance with the new legislation. Meanwhile, the Commission initiated at least six dawn raids in the second half of 2016 to investigate suspected anti-competitive conduct.

On 29 January 2016, the Court of First Instance handed down an important decision on both the procedural and substantive aspects of competition law in *Television Broadcasts Ltd v. Communications Authority & Another*.\(^1\) The case concerns Television Broadcasts Ltd’s (TVB’s) conduct of imposing certain allegedly anticompetitive contractual provisions and policies upon its artists and singers, including restrictions on, and prohibitions from using, their original voice and speaking in Cantonese when appearing for other broadcasters. TVB was found to have engaged in anticompetitive conduct in violation of Sections 13 and 14 of the Broadcasting Ordinance by the Communications Authority in September 2013. The Court of First Instance later quashed the Authority’s decision on the basis of procedural unconstitutionality, holding that neither the Authority (who made the decision) nor the Chief Executive in Council (who reviewed the Authority’s decision) was an ‘independent and impartial tribunal’ for the purpose of the Bill of Rights Ordinance. However, the Court at the same time upheld the Authority’s analysis and conclusion on the anti-competitive nature of TVB’s conduct, and confirmed that the regulator only has to prove its case up to the ordinary civil standard of proof (on the balance of probabilities), as opposed to the higher criminal standard of proof beyond reasonable doubt. The judgment provides helpful guidance on how the new Competition Ordinance may operate in future cases.

### iv Third-party funding in arbitration

On 12 October 2016, the Law Reform Commission published a report recommending that the Arbitration Ordinance should be amended to state that the common law principles of maintenance and champerty (both as to civil and criminal liability) should not apply to arbitration and associated proceedings under the Ordinance, hence clarifying the position that third-party funding for such proceedings is permitted provided that appropriate financial and ethical safeguards are complied with. The report also recommended that consideration should be given as to whether the same arrangements should be extended to mediation within the scope of the Mediation Ordinance.\(^1\)

On 30 December 2016, the government gazetted the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, which proposed changes to the current legal framework on third-party funding.

### v Anti-corruption

The ICAC’s investigation into the conduct of former Chief Executive Donald Tsang Yam-kuen while in office has kept concerns about corruption in politics in the headlines. Tsang is charged with two counts of misconduct in public office for failing to disclose his interests in a Shenzhen penthouse while he was in office.

The ICAC alleges that between November 2010 and January 2012, Tsang failed to disclose his negotiations with a major shareholder of Wave Media Limited in respect of a lease for a residential property in Shenzhen while Wave Media Limited’s various licence

\(^1\) [2016] HKCFI 135.
\(^1\) Chapter 620 of the Laws of Hong Kong.
applications were discussed and approved by the Executive Council. The ICAC further alleges that, between December 2010 and July 2011, Tsang failed to disclose his engagement of an architect to carry out interior design work at his personal residential property while referring for consideration for nomination this same architect under the Hong Kong Special Administrative Region (HKSAR) honours and awards system.

Tsang has stated that he has ‘every confidence the court will exonerate’ him.12 The trial for this case was scheduled to begin on 3 January 2017 and should last for 20 days.

The ICAC’s action against Tsang has prompted public debate about possible reforms to Hong Kong’s bribery laws. Currently, under Section 3 of the Prevention of Bribery Ordinance,13 any civil servant ‘who, without the general or special permission of the Chief Executive, solicits or accepts any advantage shall be guilty of an offence’. The result is that as it currently stands the Chief Executive cannot commit this offence.

vi Privity of contract

The Contracts (Rights of Third Parties) Ordinance was gazetted on 5 December 2014, came into effect on 1 January 2016 and applies to contracts entered into on or after its effective date.

The Ordinance amends the doctrine of privity of contract under common law and sets out the circumstances in which a third party may enforce a contractual term, which are when the contract expressly provides that the third party may enforce its terms or if a term purports to confer a benefit on the third party. Certain specific types of contract in relation to which the privity doctrine has already been modified by common law or statute are, however, excluded. These include bills of exchange, promissory notes or any other negotiable instruments, deeds of mutual covenant, covenants relating to land, contracts for the carriage of goods, letters of credit, the articles of a company and contracts of employment.

III OVERVIEW OF COURT PROCEDURE

Civil procedure in Hong Kong is governed by the Rules of the High Court and the accompanying Practice Directions issued by the Chief Justice. These Rules were substantially revised by the enactment of the Civil Justice Reforms (CJR), which came into effect on 2 April 2009.

i Ordinary commercial court proceedings

Reducing the cost of delay associated with litigation proceedings and proper case management are the declared cornerstones of the CJR. The reforms were introduced to counter a trend of multiple interlocutory applications, excessive discovery and unfocused proceedings that led to delay and unnecessary expense. Parties that do not follow the revised procedures as set out in the CJR can expect adverse cost orders14 or, in severe cases of non-compliance, to have their

12 ‘Donald Tsang charged with misconduct; former Chief Executive must answer in court allegations about Shenzhen penthouse, making him the city’s most senior official to be prosecuted.’ South China Morning Post, 6 October 2015.
13 Chapter 201 of the Laws of Hong Kong.
14 See, for example, Cheung Man Kwong Thomas v. Mok Chun Bor [2009] HKEC 1636.
There are a number of different procedures by which court proceedings can be commenced in Hong Kong. In particular, certain types of actions (such as judicial review) have their own specialised procedures. Nevertheless, most commercial actions are commenced by a writ of summons. A typical set of court proceedings will consist of the following steps.

1. The plaintiff (claimant) issues in the CFI a writ of summons endorsed with a statement of claim. In a typical claim for breach of contract, it will recite which provisions of the contract have been breached, the key facts supporting it and the remedy sought.
2. The defendant files its acknowledgement of service indicating whether it intends to defend the proceedings.
3. At this point, the plaintiff can apply for summary judgment if it considers that there is no defence to the claim. This application will be decided quickly by the court on affidavit evidence from both parties. Judgment may be given for the whole or part of the claim if the court is satisfied there is no real defence. If otherwise, the matter goes to a full trial, the stages of which are as follows:
   - The defendant files its defence, which must answer each of the matters raised in the statement of claim, and any counterclaim;
   - The plaintiff files its reply and defence to counterclaim;
   - The parties are then expected to proceed to disclose to each other documents relevant to the issues in dispute without the need to wait for an order of the court (this process, which is called ‘discovery’, is described in detail below);
   - The parties file and serve a timetabling questionnaire indicating their readiness for the trial;
   - The parties agree directions for trial and attend a case management conference where directions relating to the management of the case are made by the court;
   - There is the exchange of witness statements and any expert evidence (if required); and
   - Trial.

It is difficult to generalise about the time frame for a piece of civil litigation. This will depend on a variety of factors, including the extent of discovery, availability of witnesses and the complexity of the issues in dispute. Nevertheless, one can usually expect a judgment at first instance within two years of the commencement of proceedings; a summary judgment application may be determined within as little as three, but usually within six, months of proceedings being initiated.

ii Urgent or interim relief

The Hong Kong courts will hear urgent or interim applications in relation to a wide range of matters.

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Interim applications
Among the most common interim applications are those for summary or default judgment. As mentioned above, the plaintiff may apply for summary judgment on the grounds that the defendant has no defence to its claim, or no defence to a claim for liability, but possibly a defence to the amount of damages claimed. A plaintiff may enter default judgment against a defendant who has failed either to give notice of intention to defend or to serve a defence within the times prescribed in the rules.

Mareva injunctions
There is sometimes a risk that an unscrupulous defendant may remove its assets from the jurisdiction or otherwise dissipate them when it learns that proceedings have been commenced against it. This is a particular concern given the ease with which funds can be transferred electronically across borders. A Mareva injunction can be obtained at the outset of proceedings to restrain the defendant from disposing of assets that may be held in Hong Kong and, in certain circumstances, outside Hong Kong. The injunction is ancillary to the main proceedings and is made after the court has considered affidavit evidence from the plaintiff. Typically, the injunction order is served on banks that hold funds of the defendant and the banks must comply with the order. There are very strict requirements for full and frank disclosure in the evidence filed, and the plaintiff must give an undertaking to compensate the defendant and other parties affected by the injunction if it is subsequently held that the injunction should not have been granted.

Anton Piller relief
A party to litigation in Hong Kong can apply to court for an order permitting it to enter the premises of another party to inspect and preserve property belonging to that party that may, for instance, be needed as evidence in proceedings. The difficulty with following this procedure is that the other party will be alerted to what may happen if the order is granted and may take advantage of the delay to destroy the property concerned. To address this possibility, in exceptional circumstances, the court may grant an Anton Piller order, without prior notice to the defendant, which directs the defendant to allow the people specified in the order to enter its premises and take away and preserve evidence. Given the draconian nature of the order, which is almost akin to a criminal search warrant, it has been described as a 'nuclear weapon' in the law’s armoury. Accordingly, the courts are very concerned to ensure that the process is not abused.

As with a Mareva injunction, if an Anton Piller order is later found by the court to have been wrongfully obtained, the party who obtained the order is liable to compensate the other party and other affected third parties for losses suffered as a consequence of the order.

iii Class actions
Unlike many other jurisdictions, Hong Kong does not currently have specific provisions for dealing with multiparty litigation. In May 2012, the Law Reform Commission (LRC) published a report, following a three-month consultation period in February 2010,
recommending the introduction of a comprehensive regime for multiparty litigation. The LRC further recommended that the new class action regime should adopt an opt-out approach (unless one of the plaintiffs is foreign, in which case the LRC recommended an opt-in approach), so that once the court certifies a case as suitable for a class action, the members of the class would automatically be considered bound by the litigation, unless within a prescribed time limit a member opts out. Responding to reservations expressed during the consultation period, the LRC recommended an incremental approach of implementation whereby a restricted regime covering only consumer cases is introduced first, to be extended to other cases once sufficient experience has been gained. Consumer cases are considered to be a suitable starting point because potential representative plaintiffs can take advantage of the existing Consumer Legal Action Fund to fund the class action. In the long term, the LRC recommended that a general class actions fund be established to make discretionary grants to all eligible impecunious class action plaintiffs and be reimbursed by successful ones.

In late November 2012, the Department of Justice announced that it would establish a working group to study and consider the LRC’s proposals. The working group would be chaired by the Solicitor General and consist of members representing the major stakeholders in the private sector, the relevant government departments, the two legal professional bodies and the Consumer Council. The working group has conducted 13 meetings to date. In addition, a sub-committee of the working group was formed to assist the working group on technical issues that might arise during its deliberations.

However, the LRC’s recommendations have not been implemented. Until they are, the only alternative is a ‘representative procedure’ that has been generally criticised as being too restrictively interpreted. A slight variation of facts or a possibility of a different defence to a claim brought by one member of the ‘class’ may be sufficient to deny the entire class the ‘same interest’ in the proceedings.

iv Representation in proceedings and solicitors’ higher rights of audience

Currently (and generally), companies may not begin or carry on proceedings without being represented by a solicitor. Previously, only barristers (instructed by a firm of solicitors) could appear in the higher courts on behalf of parties; however, this restriction was removed by the Legal Practitioners (Amendment) Ordinance 2010 (LPAO). The Higher Rights Assessment Board (HRAB), established under the LPAO, was tasked to devise the eligibility requirements for solicitors who wish to apply for higher rights of audience. The resultant Higher Rights of Audience Rules (HRA Rules) came into operation in June 2012. According to the HRA Rules and the Legal Practitioners Ordinance, as amended by the LPAO, in order to be eligible, the applicant must hold a current practising certificate, have practised for at least five years aggregate in the seven years preceding the application and have the ‘necessary professional competence’, which, as elaborated in an explanatory document published by the HRAB,19 is equivalent to the level of competence expected of a barrister appearing in higher courts in the areas of ethics, evidence and procedure, general advocacy, trial advocacy and appellate advocacy. The first round of assessments took place in autumn 2012. Fifteen solicitors passed and were registered to practise in the highest court in February 2013. To date, a total of 49 practitioners have been appointed as solicitor-advocates.

19 HRAB, ‘Standards of Professional Competence’.
A notable exception to the audience rule is in hearings before the Labour Tribunal where neither barristers nor solicitors have rights of audience unless they are appearing on their own behalf as a claimant or defendant in proceedings.\textsuperscript{20} If a company is a defendant in proceedings, it is expressly empowered to give notice of its intention to defend by any person duly authorised to act on its behalf. Generally, litigants in person may represent themselves in proceedings except where the litigant is a minor or under a disability pursuant to the Mental Health Ordinance.

\textbf{v} \hspace{2em} Service out of the jurisdiction

A party who intends to serve documents initiating proceedings on a person outside of Hong Kong must, except in certain limited circumstances, obtain the prior leave of the court in order to do so.\textsuperscript{21} There are a number of different grounds under which leave to serve out may be obtained. These include, for instance, actions commenced in respect of contracts where the Hong Kong courts have explicitly been granted jurisdiction and contracts governed by Hong Kong law. However, in addition to a valid ground, applicants seeking the court’s leave to serve out of the jurisdiction need to satisfy the court that there is a serious issue to be tried on the merits of the claim and that Hong Kong is the most convenient forum for the trial of the case.

\textbf{vi} \hspace{2em} Enforcement of foreign judgments

At common law, an action may be brought in Hong Kong to enforce a foreign judgment debt (without the need to relitigate the underlying cause of action).

Under the Foreign Judgments (Reciprocal Enforcement) Ordinance, the judgments of certain countries (including Australia, Belgium, Brunei, France, Germany, India, Israel, Italy, Malaysia, New Zealand and Singapore) are capable of more direct enforcement by registration. Once registered, the foreign judgment may be enforced in the same way as a judgment obtained in a court in Hong Kong.

The Mainland Judgments (Reciprocal Enforcement) Ordinance, which provides a mechanism by which certain judgments made in mainland China may be enforced in Hong Kong and Hong Kong judgments in China, came into operation on 1 August 2008. However, the scope of this legislation is quite limited. It only applies to judgments from certain PRC courts (essentially Intermediate People’s Courts and higher) that must arise from a ‘commercial agreement’ and must also be final and conclusive. The requirement for the agreement to be a commercial agreement prevents, for example, judgments arising from tortious acts, IP infringements and product liability disputes from being registered. Furthermore, the underlying contract must give the relevant mainland court exclusive jurisdiction to resolve disputes that may arise. As it is relatively rare for non-PRC corporations to provide in their contracts for exclusive jurisdiction of the PRC courts, the underlying arrangement between Hong Kong and mainland China may be more important in facilitating the enforcement of Hong Kong judgments against assets in the mainland rather than vice versa. The arrangement only applies to contracts entered into after 1 August 2008, and thus far this arrangement has not been widely used to enforce Hong Kong judgments in the PRC.

\textsuperscript{20} Section 23(2) of the Labour Tribunal Ordinance (Chapter 25).
\textsuperscript{21} Hong Kong Civil Procedure, Rules of the High Court, O.11 r.1.
vii Assistance to foreign courts
Hong Kong courts will assist foreign courts to serve process in Hong Kong\(^\text{22}\) and to obtain evidence from witnesses resident in Hong Kong for use in foreign proceedings.\(^\text{23}\)

viii Access to court files
As a general rule, the full court file cannot be inspected by members of the public; in exceptional cases the public may be granted leave from the High Court Registrar to inspect affidavits, pleadings and other evidentiary court documents if there are very cogent reasons for them to do so. However, the public may inspect and obtain copies of writs or other documents by which proceedings are commenced. Final and interlocutory court judgments are filed in the High Court library and are also freely accessible by the public on the judiciary website.

ix Litigation funding
Generally, third-party funding of litigation is prohibited under Hong Kong law. There are, however, three limited exceptions. First, a person may have a legitimate common interest in the outcome of the litigation sufficient to justify him or her supporting the litigation. Second, an individual may be permitted to fund litigation of a claimant who would otherwise be unable to pursue litigation owing to a lack of funds. This is because of the public interest in promoting access to justice.\(^\text{24}\) Finally, as recently confirmed by a decision of Harris J in the CFI, third-party funding may be permitted by the courts in order to allow a liquidator to pursue litigation that may improve the return to creditors.\(^\text{25}\) However, outside these situations, the Hong Kong courts take a firm approach towards third parties who aid litigation in return for a share of the profits.\(^\text{26}\)

Despite Hong Kong’s strict approach towards third-party funding of litigation, there is an ongoing debate with regard to third-party funding in arbitration. On 12 October 2016, the LRC published a report recommending that third-party funding for arbitration taking place in Hong Kong should be permitted under Hong Kong law. The LRC believes that such a reform could introduce clear benefits to those interested in arbitration in Hong Kong and further enhance Hong Kong’s increasingly competitive role as an international arbitration centre. It is suggested that the Arbitration Ordinance should be amended to expressly provide that the common law principles of maintenance and champerty (both as to civil and criminal liability) do not apply to arbitration and associated proceedings under the Arbitration

\(^{22}\) Hong Kong Civil Procedure, Rules of the High Court, O.69.
\(^{23}\) Hong Kong Civil Procedure, Rules of the High Court, O.70; see also Section 75 Evidence Ordinance.
\(^{25}\) See paragraphs 4 to 11 of the judgment of Harris J on 4 May 2010, In Re Cyberworks Audio Video Technology Limited (HCCW 1113/2002).
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Ordinance, hence clarifying the position that third-party funding for arbitration is permitted under Hong Kong law. The LRC also believes that setting clear ethical and financial standards should minimise the potential risks arising from allowing third-party funding.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Solicitors in Hong Kong are subject to rules of the Law Society of Hong Kong, which impose strict duties to:

a hold in strict confidence all information concerning the business and affairs of the client that the solicitor acquires through acting for the client;\textsuperscript{27} 

b pass on to a client all information relevant to the subject matter in relation to which the solicitor has been instructed regardless of the source of the information;\textsuperscript{28} and 

c not to accept instructions from a new client where it is likely that the solicitor would be duty-bound to disclose to that new client, or use for its benefit, relevant confidential knowledge where this would be in breach of the solicitor’s duty of confidentiality owed to an existing or former client.\textsuperscript{29}

The effect of these duties is that a solicitor who is in possession of confidential information concerning one client that is, or might be, relevant to another client is put in an impossible position because he or she owes duties to both clients that conflict; he or she must keep the information confidential but at the same time must pass it on to the other client. Thus, managing conflicts of interest in Hong Kong can be a difficult process compared with, say, England, where the rules make allowances for this type of situation.

ii Money laundering, proceeds of crime and funds related to terrorism

Lawyers in Hong Kong, as elsewhere in the world, are vulnerable to being used unwittingly to launder the proceeds of crime or to fund terrorism. The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance\textsuperscript{30} came into force in April 2012, imposing stricter statutory requirements on financial institutions relating to customer due diligence and record keeping, and an obligation to report suspicious transactions to the authorities. The Ordinance empowers the Hong Kong Monetary Authority to prosecute or discipline banks for ignoring or assisting in money laundering or terrorist financing. In addition to the Ordinance, and other statutory requirements that apply generally to everyone in Hong Kong,\textsuperscript{31} solicitors in Hong Kong are subject to mandatory requirements (which reflect the statutory law) to:

a have appropriate policies and internal control procedures in place for identifying and reporting suspicious transactions;

\textsuperscript{27} Principle 8.01. 
\textsuperscript{28} Principle 8.03. 
\textsuperscript{29} Principle 9.02. 
\textsuperscript{30} Chapter 615 of the Laws of Hong Kong. 
\textsuperscript{31} See the Drug Trafficking (Recovery of Proceeds) Ordinance, the Organised and Serious Crimes Ordinance and the United Nations (Anti-Terrorism Measures) Ordinance.
take reasonable steps to identify and conduct due diligence on all clients and to maintain detailed records;

consider with special care unusual transactions and high-risk clients, especially those from internationally recognised high-risk jurisdictions such as offshore tax havens and the PRC; and

report to the Hong Kong authorities, without reference to the client or potential client, any suspicion of money laundering or terrorist financing that the solicitor may have. This would include suspicions that a solicitor may have in the course of representing a client in litigation; for example, the subject matter of the litigation may arouse suspicions that it relates to money laundering. Solicitors can face criminal sanctions if they fail to do this or if they tip off a client or potential client about their suspicions or the fact that they are about to or have reported the matter to the Hong Kong authorities. Note, however, that any communications protected by legal professional privilege (LPP) would not be covered by the ambit of these strict requirements.32

Where a report is made to the Hong Kong authorities, they will assess the information provided and advise the solicitor whether or not he or she should act for the particular client or in relation to the specific matter. Apart from the possibility of criminal sanctions in serious cases, solicitors can face disciplinary proceedings for non-compliance with these requirements.

On 11 July 2016, the CFA in *HKSAR v. Yeung Ka Sing Carson*33 declined to follow English law and confirmed the position in Hong Kong that for a defendant to be convicted for dealing with the proceeds of crime under Section 25(1) of the Organized and Serious Crimes Ordinance, it is not necessary for the prosecution to prove that the property with which the defendant dealt in fact represented the proceeds of a serious offence. To secure a conviction it is sufficient to establish that the defendant had reasonable grounds to believe that it was.

### iii Data protection

The protection of personal data in Hong Kong is governed by the amended Personal Data (Privacy) Ordinance (PDPO). One of the principles provided in the PDPO is that personal data may not be used for any purpose except with the prescribed consent of the data subject.34

Two exceptions to this rule are:

the restriction does not apply to data that is required by any rule of law or court order in Hong Kong in connection with any legal proceedings in Hong Kong, or for establishing, exercising or defending legal rights in Hong Kong;35 and

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32 The reasoning of the English Court of Appeal in *Bowman v. Fels* [2005] EWCA Civ 226 has been adopted in Hong Kong under Section 81 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

33 [2016] HKEC 1506.

34 Schedule 1 (Principle 3) of the Personal Data (Privacy) Ordinance (Chapter 486).

35 Ibid, Section 60B.
data may be transferred for the necessary due diligence exercise in the course of mergers and acquisitions, provided that goods or services provided to the data subject would be the same or similar after the completion of the proposed transaction.\footnote{Ibid, Section 63B.}

New provisions on the regulation of direct marketing activities and the provision of legal assistance under the PDPO came into force on 1 April 2013. First, a new opt-in system has been introduced to strengthen the right of data subjects to control their personal data. Direct marketers must have notified the data subject and obtained his or her consent before they approach the data subject with marketing messages. Second, data subjects have the right to opt out from direct marketing activities, even if they have previously consented to receiving direct marketing messages or if they have not responded to requests to indicate their objection. There is no time limit for exercising the right to opt out.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The two main forms of LPP – legal advice privilege and litigation privilege – that apply in Hong Kong are essentially the same as those recognised under English law.

Confidential communications between a lawyer and his or her client for the purpose of giving or receiving legal advice are protected from disclosure by legal advice privilege. This privilege is unlikely to extend to legal advice that may be given by other professionals such as accountants and surveyors, with the Hong Kong courts expected to follow the approach of the United Kingdom Supreme Court in its decision of \textit{R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another}.\footnote{[2013] UKSC 1.}

Where there is litigation or it is reasonably contemplated that it will occur, not only will communications between the solicitor and a client be privileged but also communications they have with third parties, if it can properly be said that their sole or dominant purpose is preparing for the litigation.

In both cases, the privilege belongs to the clients and only the clients can properly choose to waive it. They can also lose it if, for example, legal advice is disclosed to third parties where there is no litigation or it is not reasonably contemplated.

In 2015, the CA, in \textit{CITIC Pacific Limited v. Secretary for Justice and Commissioner of Police},\footnote{[2015] 4 HKLRD 20.} set down a broader definition of ‘client’ to state that the client is the corporation, and the key question is therefore which employees are or should be regarded as authorised to act on behalf of the company in obtaining legal advice. The CA also adopted a broader test for legal advice privilege, which can now protect internal confidential documents in a client organisation that have been produced for the dominant purpose of obtaining legal advice. The court recognised that the definition of ‘client’ has to be broad enough to take into account the fact that various members of a corporation, not simply those in the legal team, may be required to obtain legal advice for the corporation. The CA in the \textit{Citic} decision declined to follow the approach of the English Court of Appeal in \textit{Three Rivers No 5}.\footnote{[2003] EWCA Civ 474.} In the
Three Rivers case, the court defined ‘client’ more narrowly to refer only to those employees who had been authorised by the company to give instructions to legal advisers. Both the CITIC and Three Rivers cases were Court of Appeal decisions in Hong Kong and in the United Kingdom respectively. The issue of who is capable of constituting the client for the purposes of legal advice privilege has yet to be considered by the United Kingdom Supreme Court or the CFA in Hong Kong.

ii Privilege and regulators

As a general rule, a lawyer or client cannot be compelled to disclose legally privileged communications in the context of a regulatory inquiry. Some statutes setting out the powers of the regulator expressly recognise this; for example, the SFO, which provides that persons being investigated by the SFC can rely on LPP in the same way as they could in the context of court proceedings. While this is the strict statutory position, the SFC has adopted a policy of effectively rewarding those under investigation (by discounting any penalty to be imposed) for voluntarily disclosing material relevant to an issue under investigation that otherwise would be protected by legal privilege.

Sometimes there is no real practical alternative to disclosing privileged material to demonstrate to the regulator what happened in a transaction that is under investigation. There is, however, a potential danger in doing this, in that the SFC is a party to numerous cooperation arrangements with other regulators in Hong Kong and overseas, as a consequence of which the SFC may be obliged to produce to other regulators the disclosed privileged material. The question is whether such danger could be alleviated if a person could claim ‘partial waiver’ (i.e., waive LPP as against the regulator but retain it as against other parties, or waive LPP only for limited purposes).

The trio of cases of Rockefeller & Co Inc v. Secretary for Justice,41 James Daniel O’Donnell v. Lehman Brothers Asia Ltd (In Liq)42 and CITIC Pacific Ltd v. Secretary for Justice and Commissioner of Police43 have explored the concept of ‘partial waiver’ of LPP in the context of the SFC’s regulatory investigations.

In the Rockefeller case, the plaintiff disclosed documents protected by LPP to the SFC subject to an express agreement not to waive any confidentiality or privilege in the documents. The documents were eventually passed on to a third party, against whom the plaintiff sought an injunction from using the document. The plaintiff argued that the relevant documents were only disclosed to the SFC for a limited purpose (i.e., LPP was only partially waived). The CFI held that the waiver given was limited for a particular purpose but an injunction was not appropriate in the circumstances.44 The judgment was affirmed on appeal, with an obiter comment from Keith JA that the ‘partial waiver’ may be ‘conceptually unsound’.

In the Lehman case, the SFC sought from the liquidators documents that were relevant to the offering of the Lehman minibonds. The liquidators declined to disclose the minibond documents to the SFC on the grounds that the documents contained legal advice or were created for the purpose of obtaining legal advice. Instead, the liquidators disclosed redacted

40 See the Guideline of March 2006 – Cooperation with the SFC.
41 [2000] 3 HKC 48 (CA).
42 HCMP 1081/2009 (unreported).
43 [2012] 2 HKLRD 701.
versions of the documents. The CFI held that the redacted portions indeed constituted a record of legal advice or were created for the purpose of obtaining legal advice. Accordingly, most of the documents should remain to some extent redacted. This decision confirms that the partial waiver of LPP for limited purposes could be achieved by tailoring the evidence to fulfil only the stated purposes.

The principles in the *Rockefeller* case were further discussed in the *CITIC* case in 2012. In this case, certain documents were surrendered to the SFC pursuant to an authority to require production of and a direction to produce records and documents. A declaration, *inter alia*, that the surrendered materials be returned was sought by CITIC. The CA unanimously held in favour of CITIC, overturning the lower court’s ruling that CITIC’s waiver was absolute and finding instead that it was partial and solely for the purpose of the SFC investigation.

While the CA’s decision in the CITIC case is very helpful, the CFA has not yet given a definitive judgment in this area. The risk that any disclosure might still be treated as a blanket waiver should not be lightly dismissed. Therefore, any partial waiver should be considered with great care and should not be granted unless it is clearly justified. Where the company has made the commercial judgment that the benefits of partial waiver outweigh the risks of prejudice, it should mitigate its risk by putting the specific terms in writing at the outset when the documents are handed over, making clear the precise purpose and scope of investigation for which the partial waiver is made (e.g., for the purposes of the SFC’s investigation only).

iii **In-house lawyers**

As a general rule, in-house lawyers are treated like external lawyers and thus communications to and from in-house lawyers conveying or seeking legal advice will be treated as covered by legal advice privilege. The main qualification to this is where the in-house lawyer has both a business and a legal role in an organisation. Requests for legal advice and pure legal advice given will still be privileged. However, where there is a mix of legal and business advice, for example, if the in-house lawyer in an internal memorandum proposes a course of action having regard to legal advice and other factors, it becomes more difficult to properly assert that the document is protected by legal privilege.

iv **Legal privilege and foreign lawyers**

Hong Kong law recognises legal privilege whether the lawyer involved in giving the legal advice is admitted in Hong Kong or elsewhere. Thus legal advice given by, say, a French lawyer on issues of French law will be protected by legal privilege in the same way as legal advice on Hong Kong law given by a Hong Kong lawyer. This principle applies equally to legal advice given by an in-house lawyer. Thus legal advice on an issue of New York law given by an in-house lawyer admitted in New York working in a Hong Kong branch of a US bank will be protected.

v **Production of documents**

A party to proceedings before the Hong Kong courts is under a strict duty to preserve and disclose to the other parties to the proceedings all documents in its possession, custody or control that are relevant to the matters in question in the proceedings. This disclosure of documents is an automatic consequence of proceedings and generally must be given shortly after the parties have formally pleaded their respective cases. The reforms under the CJR allow for orders to be given to limit discovery in appropriate cases and ways; and the
availability of pre-action and third party discovery has been extended to all cases (previously these were only available in personal injury actions). The issues that have been pleaded provide the yardstick for determining what documents are relevant. The parties do not have to make a request for disclosure of particular documents. It is for the lawyers on each side to decide which documents are properly relevant to the pleaded issues and should therefore be disclosed. In doing this, the lawyers are deemed to act as officers of the court and not simply on the instructions of their clients. Parties are required to disclose the existence of all relevant documents. It is irrelevant that a document is prejudicial to a party's case: it must still be disclosed if it is relevant and a party cannot choose which documents to disclose. A document is relevant if it may assist one or other of the parties to advance his or her own case or damage his or her opponent's in relation to any issue, or if it may lead to a train of enquiry that may (indirectly) have that result. Such a result need not be inevitable: if disclosure of the document may potentially have that result, disclosure must be made. This rule applies equally to documents stored overseas, which must be brought into the jurisdiction for the purpose of litigation.

This obligation covers both documents in existence and those produced at any time after a dispute has occurred. A party will have to account for documents that are lost or destroyed and unfavourable inferences may be drawn if it is apparent that documents have been destroyed. The parties and their lawyers must preserve documents relevant to a dispute and thus destruction of unhelpful documents is not an option. The exception to this obligation is that a party may claim legal privilege as an objection to production of documents.

‘Documents’, for these purposes, are widely defined and they include anything on which information or evidence is recorded in a manner that is intelligible to the senses or capable of being made intelligible by the use of equipment. Thus computer records, tape recordings, emails and manuscript notes are all potentially disclosable to the other side in proceedings. Information on a computer database that is capable of being retrieved and converted into readable form is treated as a ‘document’.

The test of whether documents held by a third party are in the power of a party to proceedings is whether the party has a presently enforceable legal right to obtain the documents from the third party. Merely because a party is the majority shareholder of a subsidiary does not mean that it is deemed to have control over relevant documents that are held by the subsidiary. If a professional adviser holds relevant documents that are the property of the party, and the party has the immediate right to demand their return, they will be treated as being in the party's control. However, the internal working papers of the adviser will generally not be treated as belonging to and thus under the control of a party.

The burden of disclosing documents may fall disproportionately on one party compared with another. Sometimes, because of the nature of the dispute and the degree of its involvement, a party may have a great deal more documents to disclose than the other parties. That is a risk of litigation and a factor to be taken into account when embarking on litigation (a plaintiff may quite possibly have a heavier discovery burden than the defendant in a case), and in the past the courts have not intervened to address any imbalance. It is possible that this position may begin to change following the introduction of the CJR that now require parties and the judiciary to have regard to proportion and procedural economy in the conduct of proceedings.45 In particular, the new Practice Direction 5.2 requires parties

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45 Order 1A, rule 1.
'to try to agree directions for modifying discovery obligations [...] with a view to achieving economies in respect of discovery'. This may be of particular relevance, for example, with respect to disclosure of electronic records. The courts in the future may not require parties to expend disproportionate resources on retrieving electronic documents that have been ‘deleted’ from a computer system. However, it remains to be seen how this new approach will work in practice.

The parties will usually agree on a date by which they will exchange lists of documents, accompanied by a notice that the other party may inspect and take copies of documents (though parties are now encouraged to dispense with formal lists if this would be more economical).

In response to concerns regarding the increasing burden on parties of providing their electronic documents for discovery, the Hong Kong judiciary recently introduced Practice Direction SL1.2 – the Pilot Scheme for Discovery and Provision of Electronically Stored Documents for Commercial List Cases. The Practice Direction came into effect on 1 September 2014, and is mandatory in terms of all actions commenced on, or transferred into the Commercial List on or after, 1 September 2014 in which the claim or counterclaim exceeds HK$8 million and there are at least 10,000 documents to be searched for the purposes of discovery.

In February 2016, the English courts, for the first time, approved the use of predictive coding technology in electronic discovery in Pyrrho Investments Ltd & Anor v. MWB Property Ltd & Ors. Predictive coding refers to the review of electronically stored documents by computer software using specifically designed algorithms, where the software grades and prioritises the documents for human review according to their relevance to the issues of a case. The Pyrrho decision acknowledged that predictive coding could significantly reduce inconsistencies and costs to legal proceedings, and it is anticipated that the English case may prompt the Hong Kong judiciary to more readily accept the use of technology in electronic discovery going forward.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration is commonly stipulated in commercial agreements relating to Asia as the method of resolving disputes. The 2015 International Arbitration Survey, prepared by Queen Mary University of London’s School of International Arbitration, listed Hong Kong as one of the top three jurisdictions that organisations have preferred and selected to use as the seat of arbitration in their contracts. There are a number of reasons for Hong Kong’s popularity as a seat and venue for arbitration.

A new Arbitration Ordinance came into operation on 1 June 2011 (replacing the former Arbitration Ordinance in force since 1963). The Arbitration Ordinance is intended to simplify arbitration law in Hong Kong and make it more user-friendly by following the UNCITRAL Model Law structure from ‘Arbitration Agreement’ through to ‘Recognition and Enforcement of Awards’. There is now a unitary regime of arbitration on the basis of the UNCITRAL Model Law, thereby abolishing the distinction between domestic and international arbitrations previously applicable under the old Ordinance. In general, the

46 [2015] IEHC 175.
provisions under UNCITRAL previously applicable to international arbitrations now apply to all arbitrations together with most of the other provisions that previously applied to all arbitrations.

Schedule 2 of the Arbitration Ordinance contains all of the existing domestic provisions currently applicable and parties will still be free to opt in to one or more of the provisions outlined in this Schedule in their arbitration agreement, which include arbitration by a single arbitrator, consolidation of arbitrations, the ability of the court to decide a preliminary point of law, the right of appeal against awards on questions of law and challenging an arbitral award on the grounds of serious irregularity. The provisions contained in Schedule 2 will automatically apply to existing arbitration agreements or arbitration agreements entered into within six years of the commencement of the Arbitration Ordinance if the arbitration agreement states it is a domestic agreement.

There are no restrictions on the arbitration rules that parties may choose to resolve disputes in Hong Kong. Equally, there are no restrictions on the laws governing a contract that can be applied when determining a dispute by arbitration. Thus, in theory, an arbitration under the International Chamber of Commerce (ICC) Rules could be conducted in Hong Kong between a Norwegian and Indonesian party applying Swiss law. Whether that would be a sensible commercial way of resolving a dispute is another matter.

Hong Kong has a highly regarded arbitration centre, the HKIAC, and has, since the end of 2008, hosted the Asian branch of the ICC Court Secretariat. In 2012, Hong Kong also became the first jurisdiction outside mainland China to host a China International Economic and Trade Arbitration Commission arbitration sub-commission. In January 2015, the Permanent Court of Arbitration (PCA) also signed a Host Country Agreement with the PRC government and a related Memorandum of Administrative Arrangements with the Hong Kong government to facilitate the conduct of PCA-administered arbitration in Hong Kong, including state–investor arbitration.

Hong Kong has a wealth of lawyers experienced in arbitration and enjoys a reliable independent court system to support the use of arbitration. The latest available figures published on the HKIAC website, for example, indicate that in 2015, the HKIAC handled 271 arbitrations, of which 94.8 per cent were international in nature and featured parties from 41 jurisdictions.

The HKIAC revised its Administered Arbitration Rules with effect on 1 November 2013. The measures are intended to reflect the latest international developments in arbitration, while enhancing the flexibility afforded to parties. The key developments include the following:

- Arbitrators are given a broad power to join an additional party to an existing arbitration and to consolidate two or more arbitrations, provided that the claims arise under the same contract or the same series of contracts.
- Arbitrators may now be engaged on the basis of a capped hourly rate, although the rules retain the flexibility to allow parties to agree on a payment above the capped rate.
- A party may now apply for emergency relief concurrent to or following the filing of a notice of arbitration. In urgent cases, an emergency arbitrator must be appointed within two days and any emergency decision must be made within 15 days of the date on which the HKIAC delivered the file to the emergency arbitrator. The emergency arbitrator will remain in place until the arbitral tribunal is constituted; the tribunal's
jurisdiction is not bound by the previous decisions of the emergency arbitrator. The interim measures that the emergency arbitrator may make are broad, which could be any temporary measure, whether in the form of an award or an order.

The Arbitration Ordinance was also amended with effect from 19 July 2013, partly to accommodate the provisions in the HKIAC’s rules for emergency arbitrators. Hong Kong courts now have the power to enforce relief granted by an emergency arbitrator, whether obtained in or outside Hong Kong.\(^{47}\) In the case of agreements between Hong Kong parties and non-Hong Kong parties, the difficulties of enforcing Hong Kong court judgments in other jurisdictions are an important factor in favour of arbitration.\(^{48}\) Further amendments have been made to the Arbitration Ordinance to reflect the arbitration sector’s concern over whether parties that opt for domestic arbitration and specify the number of arbitrators in the arbitration agreement retain rights to seek the court’s assistance in accordance with Sections 2 to 7 of Schedule 2 of the Arbitration Ordinance. Schedule 2 of the Arbitration Ordinance preserves the rights formerly granted to parties under the domestic regime prior to the unification of the arbitration regimes for domestic and international arbitration under the Arbitration Ordinance. Section 100 of the Arbitration Ordinance states that Sections 1 to 7 of Schedule 2 apply automatically to parties to two types of domestic arbitration agreements;\(^{49}\) Section 100, however, is subject to Section 102 (specifically Section 102(b)(ii)), which provides that Section 100 does not apply if the arbitration agreement concerned has provided expressly that ‘any of the provisions in Schedule 2 applies or does not apply’. The effect of these provisions was therefore that either all or none of the provisions applied. Under Section 1 of Schedule 2,\(^{50}\) if parties to an arbitration fail to agree on the number of arbitrators, Section 1 takes effect; consequently, if parties specify the number of arbitrators in a domestic arbitration agreement, they are in effect expressly providing that Section 1 applies or does not apply, which would trigger Section 102(b)(ii) and result in the disapplication of Section 100.

The Arbitration Ordinance has been amended to clarify that even if parties opting for domestic arbitration agree on the number of arbitrators, they retain their right to seek the court’s assistance on matters set out under Sections 2 to 7 of Schedule 2.

\(^{47}\) Section 22B of the Arbitration Ordinance (Chapter 609).
\(^{48}\) Hong Kong had only a limited number of reciprocal enforcement arrangements with other jurisdictions prior to 1997. This decreased further following the PRC’s resumption of sovereignty, as many of the arrangements were tied to Hong Kong being a part of the Commonwealth.
\(^{49}\) The two types of domestic arbitration agreements under Section 100 of the Arbitration Ordinance (Chapter 609) are (1) an arbitration agreement entered into before the commencement of the Arbitration Ordinance, which has provided that arbitration under the agreement is a domestic arbitration; or (2) an arbitration agreement entered into at any time within a period of six years after the commencement of the Arbitration Ordinance, which provides that arbitration under the agreement is a domestic arbitration.
\(^{50}\) Section 1 of Schedule 2 of the Arbitration Ordinance (Chapter 609) states, ‘If the parties to an arbitration agreement fail to agree on the number of arbitrators, any dispute arising between the parties is to be submitted to a sole arbitrator for arbitration.’
The Hong Kong court has generally adopted a pro-arbitration policy and a ‘hands off’ approach to cases involving arbitration. Recently, in *Chee Cheung Hing & Company Limited v. Zhong Rong International (Group) Limited*, the CFI considered an application to stay proceedings and refer the matter to arbitration under Section 20 of the Arbitration Ordinance. Although the existence of the underlying contract between the parties (and thus whether the parties are bound by an arbitration clause therein) was in dispute, the CFI nonetheless held that the proceeding be stayed (and the matter be referred to arbitration) on the basis that the applicant had demonstrated ‘a prima facie and plainly arguable case’ that the parties were bound by an arbitration clause. By refusing to decide on the validity of the arbitration clause and leaving the matter to the arbitration tribunal, the CFI firmly endorsed the competence-competence principle – that an arbitration tribunal should have the power to rule on its own jurisdiction. This principle was also applied by the CFI in *Macao Commercial Offshore Ltd v. TL Resources Pte Ltd*, in which it was held that where the claimant had apparently departed from the applicable arbitration agreement between the parties by commencing proceedings before the ICC rather than the Singapore International Arbitration Centre, the court should leave the matter to the ICC tribunal to determine its own jurisdiction over the case.

Hong Kong, through the PRC, is a party to the New York Convention. As between Hong Kong and the rest of the PRC, there is an arrangement for reciprocal enforcement of arbitration awards called the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (the Arrangement), which broadly follows the New York Convention. Hong Kong also entered into a similar arrangement with Macau in January 2013. The enforcement arrangements for the New York Convention and arbitration awards concerning parties from the PRC remain in place and are unaffected by the Arbitration Ordinance.

The CFA considered the application of the New York Convention to Hong Kong in *Hebei Import & Export Corp v. Polytek Engineering Co Ltd*, and in particular the ‘public policy’ ground for refusal to enforce a foreign arbitral award. In the *Hebei* case, the CFA held that the ‘public policy’ ground for refusal of enforcement is to be narrowly construed and applied. It also held that the courts have a residual discretion to uphold leave to enforce an award, even if the grounds for setting aside such leave have been demonstrated. The CFA noted in this respect that it was appropriate to have regard to the principles of ‘finality and comity’ contained within the New York Convention.

Such a pro-enforcement approach was reaffirmed by the CA in the case of *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd* in May 2012. The case concerned an arbitral award made against Pacific China Holdings Ltd (Pacific China) in favour of Grand Pacific Holdings Ltd (Grand Pacific) in 2009. Pacific China filed a petition to set aside the award for serious procedural irregularity (e.g., the refusal of the arbitral tribunal to consider Pacific China’s responses to Grand Pacific’s post-hearing submissions) pursuant to Article 34(2) of the UNCITRAL Model Law. The CFI found that Article 34(2) was indeed violated. It directed itself that if the result of the arbitration may have been

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51 [2016] HKEC 656.
52 [2015] HKEC 2439.
54 [2012] 3 HKC 498.
different had the violation not occurred, it must set aside the award. The CA unanimously overturned the CFI’s decision and reinstated the award, holding that there was in fact no violation of Article 34(2). This case was conclusively resolved in February 2013, when the CFA refused to grant leave to appeal from the CA decision, expressing its view that the award complained of was made by the arbitral tribunal in the proper exercise of its procedural and case management discretions. The judgment illustrated the court’s reluctance to interfere with arbitral awards and its preference for a pro-enforcement approach that is in line with the principles of ‘finality and comity’.

Moreover, the court is generally in favour of speedy and efficient enforcement of arbitration awards. Even in circumstances where the court is willing to stay enforcement of an arbitration award pending the result of a challenge made to set aside the award, substantial security is likely to be required from the party applying for the stay. In L v. B, an arbitration award of approximately US$41.8 million was made against B in an arbitration seated in the Bahamas. B commenced proceedings in the Bahamian court to set aside the award on the ground of serious irregularity and to appeal on a question of law. At the same time, B applied to the CFI to stay enforcement of the award in Hong Kong. After considering the strength of the arguments and the ease or difficulty of enforcement of the award if enforcement is delayed, the CFI granted a four-month stay of enforcement on the condition that B must provide a sum of HK$41.6 million as security. This decision demonstrated the court’s reluctance in postponing the enforcement of arbitral awards.

ii Mediation
Mediation has been achieving increased prominence following the implementation of the CJR. Practice Direction 31, which came into force on 1 January 2010, requires parties to have made genuine attempts to resolve disputes by mediation. Any party that resists this could face a potential costs penalty if at the conclusion of the proceedings the court determines the party has unreasonably failed to engage in mediation. The HKIAC has its own mediation rules and maintains a list of accredited mediators.

The Mediation Ordinance (MO) came into force on 1 January 2013. The primary purpose of this relatively short Ordinance is to provide statutory underpinning to support the confidentiality of mediation communications, defined as anything said or done, any document prepared or any information provided for the purpose of or in the course of mediation. The MO specifies situations where a disclosure may be made, for instance, where both parties and the mediator consent to the disclosure, where the disclosure is necessary to prevent danger of injury to a person or of serious harm to the well-being of child or where the disclosure is required by law.

The FDRC came into operation on 19 June 2012. The FDRC’s primary function is to allow retail investors alleging mis-selling by banks and other financial intermediaries the opportunity to make claims for compensation not exceeding HK$500,000 under a framework of ‘mediation first, arbitration next’. Prior to the establishment of the FDRC, an aggrieved customer’s options were limited. He or she could have elected to report the alleged mis-selling to the SFC or the HKMA, but while the regulators may examine the practices of

55 FAMV 18/2012.
56 HCCC 41/2015.
57 Chapter 620 of the Laws of Hong Kong.
the financial institutions and impose penalties in appropriate cases, they do not adjudicate on claims for financial remedy. Instead, an aggrieved customer’s only way of recovering financial losses was to go through the court system, which was considered often too costly and time-consuming for relatively low-value claims. The FDRC was established to provide investors with an alternative avenue of dispute resolution that is hopefully more expeditious and affordable.

In order to facilitate the establishment of the FDRC, the SFC introduced amendments to the Code of Conduct for Persons Licensed by or Registered with the SFC, which took effect on 19 June 2012. The key amendment requires licensed or registered persons regulated by the SFC or the HKMA to comply with the FDRC Scheme and be bound by its process.

iii Expert determination
Expert determination is frequently incorporated into agreements as a cost-effective and quick means of resolving a narrow dispute; for example, as to the amount of deferred consideration that is payable under a sale and purchase agreement or the terms of a renewed lease.

VII OUTLOOK AND CONCLUSIONS
The number of investigations and enforcement actions begun by the key regulators is expected to remain consistent into 2017. The SFC has indicated a determination to exercise its prosecutorial powers for breaches of the SFO where available and is displaying a growing appetite for seeking to establish personal as well as corporate liability for relevant civil contraventions and criminal offences under the SFO against officers of corporations and other entities as well as the organisations themselves.

Hong Kong meanwhile continues to consolidate its position as an arbitration hub. With the potential for more flexible funding arrangements for arbitrations in Hong Kong in the future, Hong Kong has the opportunity to further enhance its competitiveness as a seat of choice for international arbitrations.

Hong Kong faces a number of constitutional challenges in 2017. Some of these issues go to the heart of the rule of law in Hong Kong and will no doubt be keenly observed both inside and outside Hong Kong.
Appendix 1

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