Articles

We begin the latest edition of *A Word of Counsel* by reflecting on what happened in 2018. Here’s a brief recap by the numbers as we look back at a highly productive year at DVC. We also set our sights on what might lie ahead in 2019 and beyond; extrapolating from recent trends to provide you with key takeaways so as to shape your client strategy.

Next, you will find a state of the market IP roundup in the form of an intellectual property digest from Benny Lo. Benny considers the bold strokes AI has made in IA (international arbitration) but questions whether AI will ever be beneficial in terms of preserving the legitimacy, fairness and integrity of arbitration. He also unveils the power and pitfalls of a shifting IP landscape in a deep dive examination that uncovers the latest IP developments impacting Hong Kong.

In a headline case, Ian Pennicott SC, QC, Calvin Cheuk, Kaiser Leung and Ellen Pang provide you with a portrait of recent developments in the high profile MTR Inquiry in *Around the MTR Inquiry in 47 days*.

The uptick in insolvency cases we saw last year did not show any signs of slowing down at the tail end of 2018, and you will find in this issue, an article on Schemes of Arrangement and Bondholders’ Votes and in the next segment, a Case Report on the Flexible Application of *Parri Passu* Cross-border insolvency authored by José-Antonio Maurellet SC and Look-Chan Ho.

Case Reports

In the commercial sector, Head of Chambers, John Scott QC, SC, JP and John Hui deliver key takeaways from a recent judgment which clarified when the period of limitation is triggered in the banker-customer relationship in *Time after Time: PT Tugu Pratama Indonesia v. Citibank N.A.* [2018] HKCFI 2233.

In another case concerning Directors, Patrick Siu identifies what the ‘tripwire’ is when a director attempts to use his right to inspect for an improper purpose in *Yung Siu Wa v. Raffles Family Office Limited* [2018] 5 HKLRD 816. DVC’s Lai Chun Ho represented the Plaintiff in this case.

On the securities front, we learn from Cherry Xu that what happens overseas doesn’t always stay overseas in a new landmark decision on insider trading: *The Securities and Futures*

Commission v. Young Bik Fung & Others [2018] HKCFA 45

Connie Lee and Tommy Cheung take you through the 2nd enforcement action brought by the HK Competition Commission in a case that saw the Competition Tribunal exercise robust case management power.

Pivoting away from insolvency law, John Litton QC and Christopher Chain ask: What are the reasons for finding NOM (non oral modification clauses) legally effective in English law? They delve into this issue in the case of *MVB v. Rock Advertising* in *Contracts Caught in the Cross hairs*.

Announcements

Augmenting DVC’s offering to include criminal law; find out which white collar crime specialist joined DVC at the start of this year.

Take a look at who the repeat performers were and who debuted in the latest 2019 Chambers & Partners’ Asia Pacific rankings.

In the last quarter of 2018, a new pilot scheme for private adjudication broke ground in Hong Kong. Which members from DVC were involved and which sector did this touch upon?
Events

Our events segment mirrors the prevalence of activity we saw in the IP and insolvency domains, with the addition of a construction seminar held in collaboration with the SCLHK. This warmly received presentation was helmed by Ian Pennicott SC, QC in collaboration with Kaiser Leung, Ellen Pang, Tommy Cheung and Michael Ng.

The GRR Live event, supported by DVC, and held in collaboration with COINS was a marquee event attracting a full-house. This was headlined by keynote speakers, The Hon. Mr Justice Jonathan Harris and Dinny McMahon, Author and Fellow, The Paulson Institute, and chaired by DVC’s Look-Chan Ho, and Walkers’ Aisling Dwyer. The speakers were joined by a panel of esteemed experts across the insolvency and restructuring spectrum.

Just prior to Christmas, Look-Chan Ho was invited to speak at an EY event led by Sammy Koo, Partner, Restructuring, Ernst & Young Transactions Ltd. that saw an audience headcount made up of over 100 specialists in the area including DVC’s Anson Wong SC, Yang-Wahn Hew and Adrian Lai.

For more on current issues impacting the insolvency and restructuring domain, read about the recent COINS Greater Restructuring Forum held on 16 January 2019 in a ground-breaking, flagship conference featuring keynote speakers The Hon. Mr. Justice Harris, and Hong Kong’s Financial Secretary, The Hon. Paul Chan Mo-po, GBM, GBS, MH, JP amongst others.

Also in the company insolvency sphere, Douglas Lam SC, Sabrina Ho and Tom Ng delivered an engaging presentation on Winding-up and the appointment of Provisional Liquidators exclusively for the SFC on 23 January 2019.

Sabrina Ho also featured in a presentation which targeted issues central to Chinese shipping enterprises in collaboration with Patrick Fung SC who offered his views on how to safeguard Hong Kong’s position as an arbitration hub in Asia when they spoke at Hong Kong’s Maritime Week. DVC’s Tiffany Chan also attended the event.

On the IP front, Anthony Houghton SC and Benny Lo presented at a high-level event in Tokyo, as part of the Think Global Think Hong Kong Symposium, organized by the Hong Kong Trade Development Council (HKTDC.)

DVC’s Deputy Head of Chambers, Winnie Tam SC, JP spoke at the two day BIP Asia Conference where she was joined by luminaries in a discourse that forged a Roadmap for Global IP Ecosystems. She also delivered a presentation on Framing Global IP Protection Strategy in a Tech-Innovative Century in concert with the Secretary for Justice, the Hon. Ms Teresa Cheng GBS, SC, JP. DVC’s CW Ling, Christopher Chain and Eva Leung also attended.

DVC’s Richard Leung JP and Tommy Cheung presented two exclusive CPD seminars on adverse possession and provided their expertise on how best to conduct land law cases.

We hope you find the case digests and actionable takeaways helpful in this edition of A Word of Counsel.

DVC runs a series of thought leadership events and CPD accredited in-house seminars. These cover topical legal issues, recent developments and seminal cases our members have been involved in. These intersect with our areas of expertise. If there are any issues or themes of interest you would like to see covered, please email aparnabundro@dvc.hk

Click here to view the previous edition of A Word of Counsel.
Inside this issue

HIGHLIGHTS

Look-Chan Ho at the GRR Live event in collaboration with DVC and COINS

COINS Greater China Restructuring Forum featuring José-Antonio Maurellet SC and the Official Receiver, Phyllis McKenna

Winding-up and the appointment of Provisional Liquidators: presented by Douglas Lam SC, Sabrina Ho and Tom Ng

ALL CONTENTS

Articles

Foresight, Hindsight & Insight: What’s ahead in 2019? 7
Using AI in IA (International Arbitration) 10
The Power and Pitfalls of a shifting IP landscape in Hong Kong 12
Around the MTR Inquiry in 47 days 14
Scheme of Arrangement and Bondholders’ Votes – Split Voting and Voting as Contingent Creditors 16
Flexible Application of Pari Passu in Cross-border Insolvency: Re Guangdong International Trust & Investment Corporation Hong Kong (Holdings) Ltd [2018] HKCFI 2498 21
Caught between a Rock and a hard place: No oral modification clauses in MWB Ltd v Rock Advertising [2018] 2 WLR 1603 30

Case Reports

The Competition Tribunal Exercises Firm Grip On Case Management Powers 29

Announcements

DVC boosts headcount with arrival of new criminal law specialist 34
Chambers & Partners’ Asia Pacific rankings for 2019 unboxed 35
New Pilot Scheme for Private Adjudication 36
Recent Events

The Bricks & Mortar of Construction Disputes: Topics that will cement your knowledge

GRR Live Event in Hong Kong featuring luminaries from the Insolvency sphere

Recent Insolvency Developments: an Update from DVC’s Look-Chan Ho in concert with EY

COINS Greater China Restructuring Forum: creating a compass for the conversation around insolvency and restructuring in Hong Kong

Winding-up and the appointment of Provisional Liquidators: an update for the SFC presented by Douglas Lam SC, Sabrina Ho and Tom Ng

Patrick Fung SC and Sabrina Ho speak at Hong Kong’s Maritime Week

DVC Arbitration Specialists Spoke at International Trade Event in Tokyo

BIP Asia Conference

Epic Three Hour Seminar resulted in a request for an encore
Members of Chambers

Silks

Charles Sussex SC  Simon Westbrook SC  Clifford Smith SC
Chua Guan-Hock SC  Joseph Tse SC  Winnie Tam SC, JP
Johnny Mok SC  Barrie Barlow SC  Anthony Houghton SC
Ian Pennicott SC, QC  William M F Wong SC  Anson Wong SC
Douglas Lam SC  José-Antonio Maurellet SC  John Litton QC (England & Wales)

Juniors

Liza Jane Cruden  Mairéad Rattigan  Alfred Liang  Lawrence K F Ng
Pat Lun Chan  David Tsang  Richard Leung, JP  Ling Chun Wai
Richard Zimmern  Patrick Chong  Frances Irving  Janine Cheung
Catrina Lam  Johnny Ma  Teresa Wu  Jenkin Suen
Yang-Wahn Hew  Rachel Lam  Calvin Cheuk  Frances Lok
Gary Lam  Adrian Lai  John Hui  Benny Lo
Alvin Tsang  Alan Kwong  Christopher Chain  Sabrina Ho
Connie Lee  Patrick Siu  David Chen  Alexander Tang
Ebony Ling  Jason Yu  Kerby Lau  Justin Lam
Martin Kok  Jacqueline Law  Michael Lok  Eva Leung
Joseph Wong  Jonathan Chan  Kaiser Leung  Ross Li
Ellen Pang  Vincent Chiu  Tom Ng  Stephanie Wong
Cherry Xu  Terrence Tai  Tommy Cheung  Lai Chun Ho
Sharon Yuen  Kevin Lau  Michael Ng  Jasmine Cheung
Rosa Lee  Tiffany Chan  Howard Wong  Look-Chan Ho

Door Tenants

John Griffiths SC, QC, CMG  Jeffrey P. Elkinson  Jonathan Shaw  Kelvin Kwok
Arbitration

What’s on the horizon? We’ve seen key changes in the evolution of the arbitration arena in Hong Kong, with a host of reforms undertaken to boost efficiency, create clarity, and to align the city’s mechanisms with those of England & Wales, Australia and Singapore.

Most notably, the issuance of the Code of Practice for Third Party Funding came into effect on 1 February. This expressly allows for third party funding for arbitration and related matters and this key development irrefutably abolishes the doctrines of champerty and maintenance. What we will expect to see this year is greater clarity and transparency in the Hong Kong panorama as it enables a person or entity who has no interest recognised by law in the arbitration to be a third party funder. The Code, which was published in early December 2018, outlines the practices and standards for third party funders. An advisory body will oversee elements that pertain to funding agreements, confidentiality, conflicts of interest, termination and other related issues.

What you can expect to see: Greater clarity and transparency and a spike in the number of funding agreements as Hong Kong’s landscape aligns itself with forward-thinking jurisdictions. It is likely that these new provisions will make it easier to ensure that strong claims can be pursued; and will allow claimants to hedge their costs. In construction disputes, which are often lengthy and expensive, funding may allow parties to spread risk by not having to bear the whole cost of bringing or defending a claim, and will certainly provide considerable cash flow benefits – the traditional 'life-blood' of the construction industry.

DVC’s Anthony Houghton SC and Benny Lo closely examined the impact of the Code at the high-level Think Hong Kong, Think Global event in Tokyo recently.

* Please note that these are only some of the developing themes; the topics covered are not exhaustive.
For more on recent trends on how third party funding is viewed by the courts in a civil claim, refer to the recent *Raafat Imam v. Life (China) Company Limited and Others* [2018] HKCFI 1852 case featuring DVC’s Clifford Smith SC, Sabrina Ho and Tommy Cheung. The *Mongolian Mining* and *China Solar* cases, are cases of third party funding in the insolvency context.

For more on third party funding in the insolvency domain and the interaction between insolvency and arbitration please see Look–Chan Ho’s overview from 2018’s *Arbitration Week* and Look–Chan Ho and Tommy Cheung’s presentation on Controlling Costs.

**Belt & Road Initiative**

Another prominent change to Hong Kong’s landscape in 2019 includes the Belt & Road Initiative.

The Belt & Road Initiative which is made up of a belt of overland corridors and a maritime road of shipping lanes linking over 60 countries will bring about complex investment opportunities bisecting the transport, logistic, maritime, telecommunications and other sectors. With multiple cross-border investors tied together contractually, this will inevitably (and unavoidably) lead to a myriad of disputes impacting international trade, commercial, company & insolvency, intellectual property, construction, telecommunications and other major sectors. Given that arbitration is the most popular and cost-efficient mechanism used to resolve cross-border disputes, Hong Kong is geographically poised to leverage contentions arising from these ventures. DVC has handled numerous enforcement (and setting aside) of awards.

The proposed Greater Bay Area initiative is potentially another landmark infrastructure project that will link Hong Kong, Macau and nine cities in Guangdong Province in order to establish a trading, logistical, manufacturing and technological axis for commercial activity.

Another significant change entailed the implementation of the new administered arbitration rules (‘HKIAC Rules’) enacted in Q4 of last year.

**Advancements in technology**

In the broader legal space, there have been significant developments in technology: as the utility of AI has evolved, advancements have been made in IoT (Internet of Things) and the 5G arena of wireless tech. Moving beyond merely unbundling commoditised tasks such as e-discovery, document review and creating new efficiencies, AI also has the ability to predict the outcome of court cases.

How will this help practitioners?

What you can expect to see: Though much of AI is still shrouded in mystery, AI now has the ability to analyse the decision-making process undertaken by judges and opponents. It also attempts to resolve some of the uncertainty surrounding outcomes. AI tools will also be able to predict the desirability of going to court vs. settling. This is achievable because AI will have access to years of trial data which can be harvested from databases and more comprehensive repositories set up over recent years. Understanding more about settlement prospects with the assistance of AI will provide foresight into and aid client strategy.
For more on how AI has impacted the Intellectual Property sector and other important changes, please see Benny Lo’s articles on pages 10 and 11.

In the Internet of Things and 5G wireless sphere, in addition to 3D printing and self-driving cars, personalised "smart contracts" will likely be introduced into the legal ecosystem over the course of the next year. Smart contracts are self-executing contracts that may represent game changers in the sense that they are automatically executed once the conditions of the agreement are met. They operate much like vending machines. Once a vending machine has verified that you have inserted sufficient money, it is pre-programmed to dispense your order without the need for anyone to operate it. Smart contracts operate in a similar way. They depend on blockchain technology and were conceived of to decentralise the process and obviate the need for third parties.

What you can expect to see: Smart contracts are designed to sidestep uncertainty and delays however the growth of smart contracts may contribute to new opportunities for legal practitioners given that smart contracts possess inherent risks. Which party should be liable for the losses suffered as a result of e.g. errors in the code of a smart contract? It will therefore be crucial that the drafter recalibrate standard contractual clauses to account for different scenarios.

Today's commercial contracts use terms like "reasonable" and "best endeavours" to provide flexibility. However these subjective terms cannot be translated into code.

What you can expect to see: When IoT and 5G wireless technology are unveiled and marketed, a litany of legal issues will arise ranging from data protection and privacy concerns, to cross-border contractual disputes. IP licensing strategies, real estate, competition, telecommunications and commercial outflows will ensue and a multitude of regulatory frameworks will need to be installed to ensure compliance of the revolutionary infrastructure that will eventuate. Monitoring these legal processes will entail a new ecosystem of regulation to ensure compliance as many of the legal matters arising have not been fully contemplated yet. Regulation of these novel issues on a global scale will be extremely complex.

For more on how thorny global enforceability can be given the advancing digital environment, see the write up to Winnie Tam SC, JP’s plenary as featured in the recent BIP Asia Conference in this edition of A Word of Counsel.
Using AI in IA (International Arbitration)

How has technology created a paradigm shift in the way we resolve disputes – and how does AI specifically impact international arbitration?

DVC’s Benny Lo drills down and considers various themes that emerge around this issue.

Disruptive technologies fundamentally challenge the way we do things; they can shake up an industry and beat out established competitors. We have seen examples of this with Uber disrupting conventional taxi services, language apps replacing tutors and smartphones supplanting a host of devices including MP3 players, cameras, calculators and GPS trackers.

No industry is immune and this is certainly true with the legal industry. But how has technology created a paradigm shift in the way we resolve disputes – and how does AI specifically impact international arbitration?

These were questions that were asked and answered by DVC’s Dr. Benny Lo at a previous Hong Kong Arbitration Week as part of a panel discussion with Latham & Watkins, and in collaboration with Hon Ng of Uber Hong Kong on Disruptive Technologies. That event was recently reported in the October 2018 issue of HK45’s Newsletter.

In the context of international arbitration, AI has not only commoditised routine tasks such as e-discovery but it has also scaled down the volume of arbitrations by usurping functions normally conducted by humans. It has also of course, created new efficiencies, with the ability to take on more mundane tasks that we would normally slavishly pour over. Many of these tasks are known to most e.g. online platforms, cloud-based technologies, secure documents repositories, and video conferencing. However ground-breaking strides have also been made with a view to cutting down the number of disputes by utilising e.g. a virtual or "Siri Lawyer" as Benny explained. He referenced examples as to how technology like WeChat is being
AI could perhaps work at the intersection of technology and arbitration rather than being seen as a possible deus ex machina solution.
The Power and Pitfalls of a shifting IP landscape in Hong Kong

In a recent Q&A interview published by Asia IP, Benny Lo provided a compass for the conversation on recent changes relating to IP protection and dispute resolution in Hong Kong.

Benny began by outlining two key composites that will impact the IP protection backbone over the next few years; namely the Patents (Amendment) Ordinance and the planned implementation of the Madrid Protocol.

When the Patents (Amendment) Ordinance comes into force in 2019, Benny explained, technology owners will have the additional option of protecting their inventions through original grant patents (OGP). This obviates the need for owners to first obtain a patent from Mainland China (SIPO, now known as CNIPA), the UK, or the EPO (designating UK) before re-registering for a Hong Kong standard patent locally, which is what the current regime mandates. This means that owners will be able to file directly in Hong Kong independent of the three designated jurisdictions. Substantive examination and prosecution of the applications will also be conducted locally. The obvious advantages this brings include cost-effectiveness and expediency, as well as the speed at which some owners, particularly SMEs, can bring their inventions to market.

Turning to the Madrid Protocol, Benny elucidated on the main benefits that would be brought to the fore, once it takes effect in Hong Kong. Once implemented it will, in a nutshell, confer reciprocity. In other words, trade mark applicants need only file a single international application in one of the contracting states and pay only one set of fees to benefit from international registration. At present, the Hong Kong Trade Mark Registry is jurisdiction specific so local businesses wishing to expand overseas will welcome this streamlined system and view it as a major advantage.
Shifting gears, Benny considered what Hong Kong is doing to support innovative, IP rich companies. To foster fund-raising and accelerate development in the biotech industries, biotech companies can now go public in Hong Kong under new rules enacted earlier this year. Those rules enable pre-revenue biotech companies to bypass the conventional requirements that relate to profits, cash flow and revenue etc to accelerate their listing. That said, to ensure proper safeguards are in place, it will still maintain a level of transparency by mandating public disclosure of IP rights and patents applied for.

On the topic of arbitration of IP disputes, through recent amendments to the Arbitration Ordinance, Hong Kong has aligned itself with other forward-thinking jurisdictions by clarifying that all aspects of IP right disputes may be the subject of arbitration, and any such arbitral award shall be binding upon the immediate parties to the arbitration. In Benny’s view, this is a compelling and desirable inclusion as it facilitates the swift resolution of domestic and international disputes in Hong Kong as the city matures into an innovation and technological hub.

In the second half of the interview, Benny also shared some specific anecdotes with practical and actionable takeaways for IP dispute resolution from his deep bench of experience in international arbitration, both from the angle of counsel and arbitrator. In particular, he discussed the benefits of submitting tech-heavy disputes to arbitration even after a dispute has arisen, the importance of a well-drafted arbitration clause and vital arbitral procedures from other areas of international arbitration which could be adopted in the IP arena to make IP dispute resolution in Hong Kong “Efficient, Expert-driven and Equitable”.

Benny’s interview with Asia IP in its entirety may be downloaded here.
From May 2018 onwards, reports began to appear in the local media which suggested that steel fixing works in the diaphragm walls and platform slabs at the Hung Hom Extension, constructed as part of the Shatin to Central Link project (the “SCL Project”) under the relevant contract known as Contract 1112, might be defective.

Contract 1112 involved the expansion of the existing Hung Hom Station and comprises, amongst other things, two additional track slabs for the East West Corridor (Tai Wai to Hung Hom) (“EWL”) and North South Corridor (Hung Hom to Admiralty) (“NSL”).

The Issues

There were allegations made that an unknown number of steel bars (which were designed to be connected by couplers) embedded in the concrete of the completed diaphragm walls and the EWL slab were either deliberately shortened or never properly connected to the couplers before concrete pouring.

On 10 July 2018, the Chief Executive appointed the Commission of Inquiry (“Commission”) to look into the Diaphragm Wall and Platform Slab Construction Works at the Hung Hom Station Extension under the SCL Project. The Terms of Reference of the Commission included the following:

(a) to inquire into the facts and circumstances surrounding the steel reinforcement fixing works, including but not limited to those works at locations that have given rise to extensive public concern about their safety since May 2018

(ii) to inquire into the facts and circumstances surrounding any other works which raise concerns about public safety; and

(iii) to ascertain whether the works in (i) and (ii) above were executed in accordance with the Contract. If not, the reasons therefore and whether steps for rectification have been taken;

(b) to review, in the light of (a) above.

(i) the adequacy of the relevant aspects of MTRCL’s project management and supervision system, quality assurance and quality control system, risk management system, site supervision and control system and processes, system on reporting to Government, system and processes for communication internally and with various stakeholders, and any other related systems, processes and practices, and the implementation thereof;
(ii) the extent and adequacy of the monitoring and control mechanisms of the Government, and the implementation thereof; and

(c) in the light of (b) above, to make recommendations on suitable measures with a view to promoting public safety and assurance on quality of works.

The Inquiry is one of the most high-profile construction-related matters in Hong Kong in recent years and it has drawn significant public attention. The interested parties include:

- Four Government departments and bureaux namely the (1) Transport and Housing Bureau, (2) Highways Department, (3) Development Bureau and (4) Buildings Department;
- The MTR Corporation Limited (“MTRCL”), the Project Manager for the SCL Project;
- Leighton Contractors (Asia) Limited (“Leighton”), the Main Contractor for Contract 1112 of the SCL Project i.e. the construction contract relating to the platform slab works for the East West Corridor;
- Intrafor Hong Kong Limited, Leighton’s sub-contractor responsible for the diaphragm wall construction including re-bar preparation, bending and couplers installation;
- Fang Sheung Construction Company, Leighton’s sub-contractor responsible for carrying out the slab bar bending, preparation and fixing works;
- China Technology Corporation Limited, Leighton’s sub-contractor responsible for responsible for erecting formwork, carrying out cleaning prior to pouring concrete and for concrete pouring;
- Atkins China Limited, MTRCL’s detailed design consultant and Leighton’s temporary works design consultant for Contract 1112;

Ian Pennicott SC, QC and Calvin Cheuk are counsel appointed to the Commission. Kaiser Leung acts for the MTRCL and Ellen Pang acts for the Government in the Inquiry.

The hearing lasted for a total of 47 days - between 24 September 2018 and 29 January 2019. In that time, 70 factual witnesses and 7 expert witnesses gave evidence.

Mr Michael John Hartmann, former Non-Permanent Judge of the Court of Final Appeal, was appointed Chairman and Commissioner of the Commission, and Professor Peter George Hansford, Professor of Construction and Infrastructure Policy at University College London, was appointed Commissioner. The Commission will submit a report on its findings and recommendations to the Chief Executive.

What happens next?

The Report is expected to have a long-term impact on the construction industry in the future.

Watch this space for an update following the publication of the Report.

This article was authored by Ian Pennicott SC, QC, Calvin Cheuk, Kaiser Leung, and Ellen Pang.
Recent Hong Kong, Singapore and English cases have converged and re-confirmed how bondholders vote in schemes of arrangement where the bonds are issued in global form. The position in summary is as follows:

(a) if the bond trustee votes, a split-vote approach respecting the underlying beneficial bondholders' wishes is to be adopted such that:

(i) for the purposes of the headcount test, the trustee's vote will be counted as one vote for, one vote against, or zero;

(ii) for the purposes of the majority-in-value test, the trustee's vote will reflect the beneficial bondholders' wishes as if they were voting directly themselves;

(b) alternatively, instead of the bond trustee voting, the underlying beneficial bondholders may vote directly as creditors on the basis that they are contingent creditors, provided the beneficial bondholders can acquire direct rights against the company in some (even remote) circumstances.

**Scheme voting requirements and bond issuance structure**

Under Part 13 of the Companies Ordinance (Cap. 622), the court may sanction a scheme of arrangement between a company and its creditors provided the two pre-conditions set out in section 674(1) are satisfied. First, a majority in number of the class of creditors present and voting must agree to it (“headcount” test), and secondly, 75% in value of the class of creditors present and voting must agree to it (“majority-in-value” test).

The Companies Ordinance does not define “creditor”, but case-law has established that “creditor” means anyone who has a monetary claim against the company which, when payable, will constitute a debt. Contingent claims are included for this purpose.

The application of the scheme voting requirements to bonds issued in global form have given rise to some potentially complex issues which have now been resolved by case-law.

When bonds are issued in global form, legal ownership of the bonds rests with the nominee of a common depositary (“bond trustee”). The direct creditor of the bond issuer is thus the bond trustee while he holds his interest on trust for the underlying beneficial bondholders.

This bond issuance structure gave rise to a concern that the underlying bondholders beneficially interested under a trust might not be considered to be creditors for the purposes of the scheme jurisdiction. If so, only the bond trustee could vote in a scheme of arrangement.
However, bond documents typically contain a mechanism whereby the beneficial bondholder can upon request become a direct creditor of the bond issuer. Typically, on the occurrence of an event of default, there is a provision that the global note is to be transferred to the beneficial owners in the form of definitive notes upon the request by the beneficial owners. Because of the existence of this mechanism, the ultimate beneficial bondholders may be regarded as contingent creditors of the bond issuer. The beneficial bondholders may thus vote as creditors in the bond issuer’s scheme of arrangement.

If the beneficial bondholders are not called upon to vote, the bond trustee may of course vote as he is the legal creditor of record in any event.

Where the bond trustee votes, case law has established that his single vote is to be calculated using the split vote analysis. The split vote analysis produces the following consequences.

First, if all the beneficial bondholders accept or reject the scheme proposal, the bond trustee’s vote will be treated as one vote for or against the scheme, for headcount purposes.

Second, if the beneficial bondholders do not speak in one voice, then for headcount purposes, the bond trustee’s vote will be treated as one vote for and one vote against the scheme, thus cancelling each other out.

Third, for the majority-in-value test, the trustee’s vote will simply reflect the value for and against the scheme according to the beneficial bondholders’ wishes.

Time After Time:

**PT Tugu Pratama Indonesia v. Citibank N.A. [2018] HKCFI 2233**

This case involved John Scott QC, SC, JP and John Hui. This Case Report was authored by John Hui.

**In PT Tugu Pratama Indonesia v. Citibank N.A. [2018] HKCFI 2233**

HKCFI 2233 (12 October 2018), the Court of First Instance clarified the banker-customer duty in relation to the bank’s role as a paying agent. The Court also decided on a number of points concerning the defence of limitation.

**The facts and the decision**

The Plaintiff was the largest insurance company in Indonesia in the 1990s. It was founded in November 1981 by Pertamina, the Indonesian state-owned oil and gas company.

In December 1990, three commissioner/directors (the “Rogue Directors”) of the Plaintiff opened a bank account (the “Account”) in the name of the Plaintiff with Citicorp Investment Services Ltd (CISL) in Hong Kong, which was at the time a subsidiary of the Defendant. The account was opened pursuant to an application form signed by the Rogue Directors and a mandate of the Plaintiff’s board resolutions authorising the opening of the Account. The Account was later transferred from CISL to the Defendant in early 1994.

Between 3 June 1994 and about 14 July 1998, the Rogue Directors by written instructions caused payments in excess of US$50 million to be made, *inter alia*, to their personal accounts from the Account, which formed the subject matter of the Plaintiff’s claim (the “Disputed Payments”). The Account was closed in July 1998, pursuant to the instructions by letter signed by two of the Rogue Directors. Instructions for the Disputed Payments and the closure of the Account was given in accordance with the Account opening mandate. The Plaintiff said that the Disputed Payments constituted misappropriation of its money by the Rogue Directors, and was made without its authority. The Plaintiff also said that it became aware of the Account and the Disputed Payments only in 2001.

On 6 October 2006, the Plaintiff wrote to the Defendant and alleged that it had wrongly debited the Account with the Disputed Payments which were made without the Plaintiff’s authority. The Plaintiff demanded that the Defendant reconstitute the Account but without inclusion of the debits which represented the Disputed Payments.

On 2 February 2007, the Plaintiff commenced the action.

In a judgment dated 12 October 2018, the Honourable Mr. Justice Anthony Chan held that the Defendant acted in breach of its duty of care to the Plaintiff by effecting
The Plaintiff’s proposition would be equivalent to suggesting that a closed bank account may be reopened without time constraint after the customer had discovered that there was a breach of fiduciary duty of its directors.

Negligence – breach of Quincecare Duty

It was held that the Defendant was in breach of its duty of care to the Plaintiff in making the Dispute Payments. In relation to the duty of care of a bank as paying agent, following *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 and *DEX Asia Ltd v DBS Bank (HK) Ltd* [2009] 5 HKLRD 160, it was held that if the circumstances are such that an honest and reasonable banker would be put on inquiry, but the bank did not make enquiries before making the payments, then it would be negligent. The Court identified a number of “red-flags” which it maintained put the Defendant on inquiry.

Limitation

As the last Disputed Payment took place in July 1994, more than 6 years before the commencement of the action in 2007, *prima facie*, the Plaintiff’s claim for negligence was time-barred. Nonetheless, the Plaintiff aimed to answer the limitation defence by:

1. Contending that the limitation period only started to run from the day on which the Plaintiff demanded the reconstitution of the Account without the wrongful debits on 6 October 2006;

2. Relying on deliberate concealment pursuant to s26(3) of the Limitation Ordinance, Cap 347.

Reconstitution of the Account

The Plaintiff argued that since the Disputed Payments were unauthorised, the Plaintiff was entitled to ignore those payments and demand that the Defendant pay the balance which would have remained in the Account. Relying on *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, the Plaintiff argued that the cause of action arose only at the time of the demand, i.e. 6 October 2006.

The Plaintiff’s argument was rejected by the Court on the basis that the Account was already closed in July 1998 in accordance with the mandate. At that point in time, the banker–customer relationship between the Plaintiff and the Defendant was terminated, so any balance in the Account also became payable, and accordingly, the limitation period would, at the latest, start to run by that time.

The learned Judge held that the Plaintiff’s proposition would be equivalent to suggesting that a closed bank account may be reopened without time constraint after the customer has discovered that there was a breach of fiduciary duty of its directors.

Section 26 of the Limitation Ordinance

The Defendant argued that s26 of the Limitation Ordinance did not apply at all, as the Plaintiff should have been treated as having knowledge of the Disputed Payments at all material times by reason of the Rogue Director’s knowledge being attributed to it.

Referring to *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, the Court accepted the Defendant’s attribution of knowledge argument. The learned Judge held that like *Moulin Global*, the present case is neither a “liability” or “redress” case, the company (i.e. the Plaintiff) is neither being sued by third parties for its directors’
conduct, nor suing its own directors, but is suing a third party (its banker). In the context of the Limitation Ordinance, it provides under s26 for delay in the running of time in cases of fraud, concealment and mistake. The fraud and concealment have to be of/by the defendant. This militates against the application of “special rules of attribution”. As a result, the Court attributed the Rogue Directors’ knowledge to the Plaintiff, including the knowledge of the Disputed Payments.

The Court nonetheless went on to consider whether the Plaintiff could satisfy the requirements for invoking section 26 of the Limitation Ordinance. It was held that there was no basis to suggest that the Defendant was guilty of deliberate breach of duty. Further, even if the Plaintiff were able to rely upon s26(3), on the facts, it was unable to discharge the burden of proving that it could not with reasonable diligence have discovered the concealment until mid-February 2001.

**Points to look out for**

Although strictly *obiter*, the Court dealt with a number of other issues raised in the proceedings.

- The Court rejected the Plaintiff’s claim of “reckless assistance”, as it held that on the facts, there was no evidence of the Defendant being reckless or “turning a blind eye”.

- The Defendant’s argument based on exemption clauses in the banking contract was rejected. It was held that the clauses do not exempt liability based on “wilful default” which covers the Defendant’s negligence in the present case.

- On the issue of contributory negligence, the learned Judge was inclined to follow the English and the current Australian approach where the defence of contributory negligence is available when the contractual duty of care co-exists with one owed in tort. On the facts, the learned Judge said that he would have apportioned 50% of the losses to the Plaintiff and the Defendant alike.

**Key Takeaway Points from this Judgment**

I. This is an important authority concerning the bank’s duty of care as paying agent.

II. When a bank account is closed, the limitation period for a customer’s claim for payment of the money in the bank account starts to run from the date of closure.

III. In the context of s26 of the Limitation Ordinance, special rules of attribution of knowledge do not apply, such that directors’ knowledge is attributable to their own company *vis-à-vis* a third-party banker.

IV. To rely on s26(3) of the Limitation Ordinance so as to delay the triggering of the limitation period - the fraud and concealment had to have been perpetrated by the defendant.

John Scott QC, SC, JP and John Hui of DVC acted as Counsel for the successful Defendant in this trial.

Tom Ng, also of DVC, represented the Plaintiff and was led by Nigel Kat SC.
Flexible Application of *Pari Passu* in Cross-Border Insolvency:

*Re Guangdong International Trust & Investment Corporation Hong Kong (Holdings) Ltd* [2018] HKCFI 2498

Look–Chan Ho authored this Case Report and acted for the liquidators.

In the ground-breaking case of *Re Guangdong International Trust & Investment Corporation Hong Kong (Holdings) Ltd* [2018] HKCFI 2498 (“GITIC”), the Court held that the principle of *pari passu* distribution may be applied flexibly to distribute the insolvent estate’s assets in Hong Kong and abroad.

**The factual context**

Guangdong International Trust & Investment Corporation Hong Kong (Holdings) Limited (“Company”) was in the final stages of its liquidation which started in October 1998.

To close the liquidation, the liquidators had to distribute the Company’s remaining assets in the form of cash held in Hong Kong and Mainland bank accounts. The usual way of dealing with assets in different jurisdictions would be for the liquidators to gather and pool all the assets so that they could be distributed *pari passu* to all creditors in accordance with section 250 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

But the Mainland bank account balance could not be converted into Hong Kong Dollars and remitted to Hong Kong because the Mainland balance represented the proceeds of recoveries of a loan made by the Company to a Mainland entity and that loan did not comply with certain Mainland regulatory requirements. Under Mainland regulatory rules, the Mainland balance could be distributed only in RMB and only to creditors holding Mainland bank accounts.

Some creditors did not have a Mainland bank account. If the liquidators were to distribute the Mainland balance...
The typical cross-border insolvency case concerns the recognition of foreign insolvency proceedings, but this case concerns something not usually discussed in cross-border cases, namely choice of law.

to creditors with Mainland bank accounts and the Hong Kong balance to the remaining creditors, it would result in an unequal distribution because the Mainland balance was more than twice the amount of the Hong Kong balance. In other words, one could not achieve a pari passu distribution of the Company’s assets on a pooled basis.

Therefore, the liquidators applied for directions authorising them to distribute:

(a) the Mainland balance to creditors who have Mainland bank accounts and were willing to accept RMB dividends, on a pari passu basis; and

(b) the Hong Kong balance to the remaining creditors on a pari passu basis.

Ruling

The Court granted the directions sought, reasoning thus:

(1) The proposed distribution of the Mainland balance was capable of two alternative analyses, neither of which would constitute a breach of the pari passu principle:

(a) Every creditor with a Mainland bank account would be entitled to pari passu distribution from the Mainland balance. The requirement of having a Mainland bank account ought to be regarded as merely a procedural requirement which would not detract from the substance of pro rata division of the Mainland balance among all eligible creditors.

(b) Alternatively, given that the pari passu principle would apply only to assets that were available for pari passu distribution and Hong Kong insolvency law (including section 250 of Cap 32) would not override the Mainland limitations attached to the Mainland balance which was a chose in action governed by Mainland law, the operation of the Hong Kong pari passu principle in respect of the Mainland balance must be qualified accordingly.

(2) In any event, this would be a proper case for the Court to depart from the pari passu principle because permitting the proposed distribution...
of the Mainland balance would be in the best interests of the creditors as a group and would be consistent with the principle of liquidation being an administrative process which did not expand or diminish the Company’s substantive rights and obligations.

(3) In principle, the Hong Kong balance must be distributed to all creditors on a pari passu basis. But creditors who have received dividends from the Mainland balance would be subject to the hotchpot rule. Given the amount of the Mainland balance and the Hong Kong balance, the effect of the hotchpot rule would be that creditors who have received RMB dividends would not be eligible to receive further dividends from the Hong Kong balance.

As regards the flexible application of the pari passu principle, the Court cited with approval the dicta in Beluga Chartering v. Beluga Projects (Singapore) [2013] SGHC 60; [2013] 2 SLR 1035 and Look Chan Ho’s book, Cross-Border Insolvency: Principles and Practice (Sweet & Maxwell, 2016).

Actionable Takeaways

The typical cross-border insolvency case concerns the recognition of foreign insolvency proceedings, but this case concerns something not usually discussed in cross-border cases, namely choice of law.

The Court’s application of the pari passu principle is as much pragmatic as it is intellectually sound – pragmatic because it enables the 20-year old liquidation to progress to closure in the best interests of all creditors, and intellectually sound because it gives effect to choice of law principles applicable to the Mainland balance (the lex situs being Mainland law).

Look–Chan Ho acted for the liquidators.
Director’s Right to Inspect Documents: What constitutes ‘improper purpose’ as decided in:

**Yung Siu Wa v. Raffles Family Office Limited** [2018] HKCFI 2620

Patrick Siu authored this Case Report and acted for the Defendants.

Pioneering a new conversation around the issue of ‘improper purpose’ in the context of a director’s right to inspect documents, this recent decision clarifies what “improper purpose” really means.

This recent decision is one of the first cases in Hong Kong where the companies successfully resisted a director’s application to inspect documents on the ground that the application was made for an improper purpose, even though such a purpose did not injure the companies.

Under common law and sections 374–375 of the Companies Ordinance (Cap. 622), a director has a right to inspect the company’s books and records. The relevant principles can be summarized as follow (see **Ng Yee Wah v. Lam Chun Wah** [2012] 4 HKLRD 40): –

1. The right of inspection flows from the director’s duties to the company and a director does not have to explain why the inspection is sought or demonstrate any particular ground or need-to-know as a basis.

2. Where it can be proved that the director intends to abuse the confidence in relation to the company’s affairs and to injure the company in a material way, the director’s right of inspection can be interfered with.

3. The exercise of a director’s right of inspection is not a matter of discretion for the Court.

4. The onus of establishing that the right of inspection will be exercised for improper purpose lies on the person who asserts it and clear proof is required to satisfy the court affirmatively that the grant of the right of inspection would be detrimental to the interests of the company.

In the past, a company that wished to oppose an inspection application would usually contend that, by...
In the past, a company that wished to oppose an inspection application would usually contend that, by making the application, the director sought to abuse the confidence in relation to the company’s affairs and to injure the company in a material way, i.e. relying on principle (2) above. Litigants seemed to equate “abusing confidence to injure the company” with “improper purpose”.

The view changed with the advent of the English case *Oxford Legal Group Ltd v Sibbasbridge Services Ltd* [2008] Bus LR 1244. In that case, the English Court of Appeal made it clear that the Court would not grant a director’s inspection application if the director was using his right to inspect for improper purposes, even if those purposes did not give rise to injury to the company. In other words, “abusing confidence to injure the company” is merely one example of “improper purpose”.

This proposition has been approved by the Hong Kong Court. Companies in various subsequent cases sought to rely on this “improper purpose” ground but did not succeed, e.g. see *Re Fook Lam Moon Restaurant Limited* [2011] 1 HKLRD 964 and *Tsai Shao Chung v Asia Television Limited* [2012] 4 HKLRD 52.

The present case concerns the internal dispute of a family office (an increasingly popular mechanism to provide one-stop financial management services to high net worth families). A director, who was also a shareholder of the parent company, sought to inspect the documents of the parent and the subsidiaries. The Court refused the application for the following reasons:

1. The Originating Summons was issued only after it had become clear that the plaintiff would soon inevitably be removed as a director. This was against the background that the plaintiff was making serious allegations against other shareholders, to the extent that litigation would be likely.

2. The fact that a director would inevitably be removed soon was not *per se* a reason to refuse inspection. But from the evidence, the Court could draw a clear inference that the plaintiff was making serious allegations against other shareholders, to the extent that litigation would be likely.
assist him in his own foreshadowed litigation with other shareholders.

Nowadays, in litigations involving shareholders' dispute, parties who are directors habitually invoke their directors’ right to inspect, apparently hoping to exert pressure on their opponents. This case is significant because it identifies and clarifies what the “tripwire” is and reinforces the scope of a director’s right to inspect. In the words of the Court, “[an] attempt to achieve an advantage in proceedings, anticipated or existing, between various shareholders of the company concerned, if established, would be an improper purpose, as this would not be for the purpose of discharging one’s duties as a director.”

What can you takeaway from this?

- This is a watershed case and directors would do well to remember that the Court will not sanction the inspection of documents where a director seeks to capitalise on an unfair advantage in other proceedings by doing so.
- The Court will take a wide angle view and consider the big picture when determining the real reason for inspection.
- Causing “injury to the company” is not a prerequisite to finding that inspection is sought for an improper purpose.

Lai Chun Ho represented the Plaintiff.

Patrick Siu represented the Defendants.

Patrick Siu authored this Case Report.
What happens overseas doesn't always stay overseas: Landmark Decision on Insider Trading

**The Securities and Futures Commission v. Young Bik Fung & Others**

[2018] HKCFA 45

> **Cherry Xu** authored this Case Report and appeared on behalf of the Appellants in the appeal to the CFA (as well as the appeal to the CA.)

This recent Court of Final Appeal (CFA) case is a forerunner and a landmark judgment on the principles in Hong Kong governing s.300 of the Securities and Futures Ordinance (Cap.571) (SFO), which regulates fraudulent or deceptive conduct in transactions involving securities, etc.

**Background**

The defendants were alleged to have engaged in insider dealing in the shares of a company listed on the Taiwan Securities Exchange. The 1st defendant, whilst on secondment to Standard Chartered Bank ("SCB") in Hong Kong, obtained inside information regarding SCB’s intended takeover of Hsinchu International Bank Co Ltd ("Hsinchu Bank"), a company listed on the Taiwan Stock Exchange. It was found that the 1st defendant disclosed inside information about SCB’s intended offer to the 2nd defendant, who then procured his sister, the 3rd defendant, to open a securities account with a Hong Kong broker to purchase Hsinchu Bank shares. The defendants injected funds into the said account to purchase Hsinchu Bank shares and, after the takeover was announced, accepted the tender offer from SCB, resulting in profits.

Although the defendants’ dealings in the Hsinchu Bank shares had all the features of insider dealing, the insider dealing provisions under the SFO only apply to dealings in shares listed on the Hong Kong Stock Exchange. In order to bring the defendants’ dealings in the Hsinchu Bank shares within its jurisdiction, the SFC, for the first time, commenced proceedings under s.213 of the SFO seeking declarations that the defendants had contravened s.300 of the SFO in respect of their dealings in the Hsinchu Bank shares.

S.300 of the SFO provides that a person shall not, directly or indirectly, in a transaction involving securities:

(a) employ any scheme with intent to defraud or deceive; or

(b) engage in any act, practice or course of business which is fraudulent or deceptive, or would operate as a fraud or deception.

**Findings of the Lower Courts**

The Court of First Instance found for the SFC, finding that by misusing the inside information in the dealings in Hsinchu Bank shares to obtain personal profits without making any disclosure to SCB, the 1st, 2nd and 3rd defendants have contravened s.300 of the SFO.

The defendants appealed to the Court of Appeal. The Court of Appeal affirmed the trial judge’s decision, finding that the word “transaction” in s.300 covered the “whole deceptive scheme or the whole course of dealings”,...
including not only the sale and purchase of the Hsinchu Bank shares, but also the 1st defendant’s tipping off the 2nd defendant, the 3rd defendant’s setting up of the securities account, and the deposits of funds into the account for the purpose of trading.

Finding the Court of Appeal’s interpretation of the word “transaction” too wide, the defendants (other than the 1st defendant) appealed to the CFA and were granted leave on the following issues:

1. In the context of s.300 of the SFO, how should the word “transaction” be construed?

2. In the context of s.300 of the SFO, how does one determine whether the alleged fraudulent or deceptive act or scheme occurred “in a transaction involving securities”, particularly where the transaction in issue concerned securities traded on a stock exchange?

CFA’s Findings

On 31 October 2018, the CFA delivered its judgment and upheld the Court of Appeal’s findings. In particular, Mr. Justice Tang PJ (with whom the other members of the CFA agreed) found that the word “transaction” should be given a wide meaning to cover the entire scheme of fraud or deception, and, in this case, the defendants’ scheme to “make a profit by purchasing and then selling the shares by accepting the tender offer” (§23).

Tang PJ also confirmed that the “transaction” in the present case covered acts such as the disclosure of inside information for the purpose of trading in securities, the opening of the securities account, the depositing of money for the purpose of trading, and the giving of instructions for the purpose of trading in securities (§27).

It therefore follows that any fraudulent or deceptive scheme or device, etc., that one employs or engages in any “transaction involving securities”, as widely defined by the CFA, would fall within the scope of s.300.

Takeaways for Practitioners

- The ramifications of the CFA’s decision in Young Bik Fung may be wide-ranging. As mentioned above, traditionally the insider dealing offences (under s.270 or 291 of the SFO) only pertain to dealings in Hong Kong listed securities. The CFA’s decision in this case confirms that the Hong Kong court has jurisdiction over insider dealing activities in respect of overseas listed securities, provided that a “substantial measure of activities” constituting the crime took place in Hong Kong.

- It is also pertinent to note that the definition of “securities” in Schedule 1 of the SFO is extremely wide and includes, inter alia, “shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, a body, whether incorporated or unincorporated, or a government or municipal government authority” and “rights, options or interests (whether described as units or otherwise) in, or in respect of, such shares, stocks, debentures, loan stocks, funds, bonds or notes” (though it does not include shares and debentures of a private company within the meaning of s.11 of the Companies Ordinance (Cap.622)).

- It follows that the SFC has power to investigate and prosecute fraudulent or deceptive conduct (including misuse of inside information) in transactions involving overseas listed securities. As signalled by this case, the courts can be expected to take a vigorous stance where there has been a misuse of inside information in Hong Kong. It remains to be seen how far the scope of s.300 may extend in future cases.

Cherry Xu (led by Gerard McCoy SC and Derek Chan SC) appeared on behalf of the appellants in the appeal to the CFA (as well as the appeal to the CA).
The Competition Tribunal Exercises Firm Grip On Case Management Powers

Connie Lee authored this Case Report. Connie and Tommy Cheung are acting for the 9th Respondent in this action.

The Competition Tribunal in the recent case of *Competition Commission v W. Hing Construction Company Limited & Ors* [2018] 5 HKLRD 437 exercised robust case management power.

It dismissed the 4th Respondent’s last minute application at the PTR for what was “virtually a wholesale substitution” of the original pleaded Response and the introduction of three proposed new witness statements in support of the new case.

The Tribunal held that notwithstanding the fact that the proceedings are an enforcement action which is not entirely the same as ordinary civil litigation, the public interest in maintaining the integrity of the litigation process is no less important in the Tribunal than in cases in the High Court.

Connie Lee and Tommy Cheung are acting for the 9th Respondent in this second enforcement action brought by the Competition Commission for alleged contravention of the first conduct rule in the form of market sharing and price-fixing.

The trial of the action took place from 26 November 2018 to 20 December 2018. Connie Lee and Tommy Cheung appeared for the 9th respondents at the trial.

The trial on liability concluded in December 2018.

This Case Report appeared in December's edition of *Asia Law Portal*.

Watch this space for the pending judgment, and an update.
Caught between a Rock and a hard place: No oral modification clauses in

*MWB Ltd v. Rock Advertising*

By John Litton QC and Christopher Chain

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**An exceptional case**

“Modern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional. It raises two of them. The first is whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties (commonly called a “No Oral Modification” clause) is legally effective. The second is whether an agreement whose sole effect is to vary a contract to pay money by substituting an obligation to pay less money or the same money later, is supported by consideration.”

So said Lord Sumption in his introductory comments to his majority judgment in *MWB Ltd v. Rock Advertising Ltd* [2018] 2 WLR 1603.

Although he identified two fundamental issues raised by the case, the Supreme Court, in one of Lord Sumption’s last judgments before he retired in December 2018, did not decide the second of these two issues.

**Context is everything: are no oral modification clauses legally effective?**

Context is everything and the legal context in which *Rock Advertising* was decided includes the common law principle that there are no formal requirements for the validity of a simple contract (except where statute requires) and the parties to a contract are free to vary that contract orally. Nonetheless, parties to contracts frequently include a “no oral modification” or “NOM” clause in their contracts and the question raised in *Rock Advertising* was whether such a clause was legally effective.

**The facts**

Rock entered into a licence agreement with MWB to occupy premises for a monthly fee which increased after the first 3 months. Clause 7.6 of the licence agreement said:-

“This licence sets out all of the terms as agreed between MWB and licensee. No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.”

By the end of the 4th month, Rock were in arrears with the licence fee. In a telephone call between Rock’s director and MWB’s credit controller it was purportedly agreed to vary the licence to the effect
that Rock would defer payment and spread payment of the arrears over the remainder of the licence term. However, shortly afterwards, MWB locked Rock out of the premises, terminated the licence and sued Rock in the County Court for arrears of the licence fee.

The County Court held that an oral agreement had been made to vary the licence in accordance with the revised payment schedule and that the oral variation agreement was supported by consideration (i.e. the prospect to MWB of being paid the arrears). However, the variation was ineffective because it was not recorded in writing or signed by both parties as required by clause 7.6. and MWB was entitled to be paid the arrears without regard to the oral variation.

On appeal from the County Court, the Court of Appeal agreed that an oral agreement to vary the contract had been made which was supported by consideration but that the oral agreement to vary the payment schedule also amounted to an agreement to dispense with clause 7.6 and MWB were not, therefore, entitled to claim the arrears when the action was commenced.

**The Supreme Court’s Judgment**

In the Supreme Court, Lord Sumption gave the majority judgment. He held that:

- The law should and does give effect to a contractual provision requiring specified formalities to be observed.
- “Party autonomy” was a fallacy and only operates up to when a contract is made and, thereafter, only to the extent that the contract allows.
- NOMs are commonly inserted into contracts by businessmen and the law does not normally obstruct the legitimate intentions of businessmen.
- There was no mischief in NOMs or inconsistency with any policy of the law.
- The reasons for the ineffectiveness of NOM’s (i.e. that it is impossible for parties to agree not to vary orally because any such agreement would automatically be destroyed upon the parties agreeing to do so) were entirely conceptual.
- Other legal systems avoid formal requirements for the validity of a commercial contract and give effect to NOMs.
- There was no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring variations to be in writing.
- There was an analogy with “entire agreement clauses” as they and NOMs are intended to achieve contractual certainty.

In reaching his judgment, Lord Sumption rejected Lord Denning MR’s dicta in the earlier case of *Brikom Investments Ltd v. Carr* [1979] QB 467 that entire agreement clauses are of no effect in the face of an express promise or representation on which the other party has relied. And he held that the true position is that if a collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then most standard forms of entire agreement clause will not prevent the collateral agreement being enforced. However, if reliance on the clause would modify what would otherwise be the effect of the agreement, the courts will give effect to the clause and decline to give effect to the collateral agreement.

Lord Sumption further said, first, that in agreeing to an NOM the parties have not agreed to an oral variation being forbidden, only that the variation will be invalid, and agreeing to an oral variation is not a breach of the clause. Second, it is not generally difficult to record a variation in writing and the natural inference from a failure to comply with the requirements of an NOM is not that the parties intended to dispense with it but that they had overlooked the NOM. Further, if the parties are aware of the NOM, but choose not to comply with the formalities, they are “courting invalidity with their eyes wide open.”

**Dissenting view...**

Lord Briggs disagreed with the majority judgment but only on a very narrow ground. He agreed that clause 7.6 of the NOM deprived the oral agreement
in agreeing to an NOM the parties have not agreed to an oral variation being forbidden, only that the variation will be invalid, and agreeing to an oral variation is not a breach of the clause.

asserted by Rock of any binding force as a contractual variation; and he agreed that NOMs are common sensible arrangements in business agreements which the common law should be given effect to if possible.

In his view, the freedom of parties to a contract to bind themselves by further agreement as to their future conduct was applicable to their substantive mutual obligations and to any procedural restraints upon which they may agree, including NOMs. Therefore, there were two critical questions. First, whether the parties can agree to remove a NOM from their bargain orally. Secondly, if so, whether such an agreement will be implied where they agree orally on a variation of the substance of their agreement (which the NOM would require to be in writing) without saying anything at all about the NOM?

As to the first question, Lord Briggs (disagreeing with the majority) said that for as long as either party to a contract with an NOM wishes the NOM to remain in force they can insist it do so and only a written variation of the substance will be sufficient to vary the rest of the contract (leaving estoppel aside) and the NOM will remain in place until all the parties agree to do away with it. This, he said, will deprive any oral variation of the substance of their contractual obligations of any immediately binding effect until they are put in writing or the NOM is itself removed or suspended by agreement. Lastly, he said that this reflected the autonomy of parties to bind themselves as to their future conduct, while preserving their autonomy to agree to release themselves from the NOM.

As regards the second question Lord Briggs said that Lord Sumption’s analogy with “entire agreement clauses” was not helpful but that a powerful analogy was the way the law treats “subject to contract” negotiations because there the parties can only get rid of the ‘subject to contract’ qualification if all the parties expressly agree that such an agreement should be expunged or necessarily implied. However, implication by necessity was a strict test and where parties orally agree to a variation of the contract (but are unaware of the NOM) it is unlikely that the court will imply a term through necessity. Where the orally agreed variation called for immediately different performance from that originally contracted for, and before any written record of the variation could be made/signed, then necessity may lead to the implication of an agreed departure from the NOM (or an estoppel).

Lord Briggs considered his approach to the effect of NOMs (i.e. binding until the parties have expressly or by necessary implication agreed to do away with it) to be a more cautious approach than the majority which gave parties most of the commercial benefits (certainty etc.) but was an incremental development of the common law and more in line with other common law jurisdictions.

The Road Ahead

Rock Advertising has been mentioned by the English Courts in a number of first instance decisions since the Supreme Court’s judgment in May last year.
but has only been applied in one case – *Axis Fleet Management Ltd v. Rygor Group Services Ltd* [2018] EWHC 2276. In that case the plaintiff sought to strike out part of a defence in a claim alleging the breach of a rental agreement requiring the rental sums to be paid in advance and by direct debit without any set-off, counterclaim or deduction.

The relevant clause was both an entire agreement clause and a NOM. In its defence, the defendant alleged that the rental agreement had been orally varied so that the payment obligations fell on a third party to whom, it was alleged, the agreement had been assigned to. The Court applied *Rock Advertising* and struck out that part of the defence alleging the oral variation.

**What is the position in Hong Kong?**

In Hong Kong, the status of NOM remains uncertain. An attempt to strike out a claim was made in *Natamon Protpakorn v. Citibank NA*, a typical financial mis-selling case with the customer suing the bank and alleging that there had been an oral variation to the written contracts between them, failed. In that case, the NOM required any variation to be in writing and signed by the bank. The claim was initially struck out but the Court of Appeal allowed an appeal on the basis that the uncertain state of the law on NOMs meant it was inappropriate for the case to be dealt with on a summary basis.

At the subsequent trial, Harris J relied on the NOM and found, as a matter of fact, that no oral variation had been agreed as alleged. However, he went on to say that even if an oral agreement had been reached the NOM would have applied to and, foreshadowing the UKSC in *Rock Advertising*, that the oral agreement would not therefore have been binding. The Court of Appeal upheld Harris J’s judgment without further consideration being given to the legal efficacy of NOMs.

*Rock Advertising* is, of course, only persuasive. Nonetheless, it was referred to by the Hong Kong CA in *Wu Kit Man v. Dragonway Holdings Ltd* [2018] 2 HKLRD 117. However, this was only in the context of the consideration point which the Supreme Court declined to decide. Consequently, the position in Hong Kong at present remains uncertain.

Click here to see John Litton QC and Christopher Chain’s Powerpoint in full.
It is with delight that DVC announces the arrival of criminal law and white collar crime specialist, Joseph Tse SC. He joined us in the new year.

Joseph was called to the Hong Kong Bar in 1984 and commenced practice in 1985. He was appointed as a Senior Counsel in 2006. Joseph practises in criminal law with expertise and interest in white collar crime cases involving, *inter alia*, the ICAC.

He was a graduate and a post-graduate of the School of Law of the University of Hong Kong as it was known at the time.

Joseph was a member of the Bar Council for the years 2002 to 2007 and 2015 to 2016. He was the Senior Vice Chairman for the years 2015 to 2016. He has been one of the rotating Chairmen of the Duty Lawyer Service Council, and he is an Executive Committee member of an NGO, the Society for the Rehabilitation of Offenders (SRACP) as well as the Chairman of its Service Development Committee, and a Project Consultant to its Mock Trial Programme.
DVC is delighted to unpack the latest rankings from Chambers & Partners Asia Pacific (2019) for 12 of our Silks and 10 of our Juniors.

In addition to seeing a robust representation in Commercial Dispute Resolution, Intellectual Property and Family Law, we also welcome newcomers John Hui, Sabrina Ho, and Justin Lam this year. Congratulations to all of them. Click here to find out more.
DVC's Head of Chambers, John Scott QC, SC, JP, Mairéad Rattigan and Frances Irving worked on a new groundbreaking procedure in Hong Kong in the last quarter of 2018 to enable private Adjudication of Financial Disputes in Matrimonial and Family disputes, assisted by training from UK experts. The Pilot scheme will seek to take this type of dispute out of the courts and into private adjudicators' hands, whilst maintaining Court Supervision of the process.
Before an audience that consisted of construction specialists from the in-house community and private practitioners, Ian Pennicott SC, QC together with Kaiser Leung, Ellen Pang, Tommy Cheung and Michael Ng led a seminar, entitled “The Bricks & Mortar of Construction Disputes: Topics that will cement your knowledge.” The event was part of a larger thought leadership series held in conjunction with the Society of Construction Law Hong Kong towards the end of last year at the Hong Kong Arbitration Centre (HKIAC).

Ian is a leading silk in construction and arbitration matters, and Kaiser, Ellen, Tommy and Michael are all recipients of the Society of Construction Law Hong Kong Scholarship.

Opening with the recent developments surrounding the MTR inquiry, Ian highlighted some of the key issues brought about by the high-profile case which are in the public domain. The case is still ongoing and also involves DVC’s Calvin Cheuk, Kaiser and Ellen.

The introduction was followed by four informative presentations, unpacked by Kaiser, Ellen (both on professional negligence in construction), Tommy (on termination of construction contracts) and Michael (on defect claims).

The audience raised stimulating questions and this led to enlightening exchanges between the speakers and the attendees.

For more on the key features of the MTR Inquiry, please see Around The MTR Inquiry in 47 days on pages 14 and 15
DVC’s **Look-Chan Ho** and Maples & Calder partner, Aisling Dwyer recently moderated the GRR Live Event in Hong Kong. The event featured **The Hon. Mr. Justice Harris** as keynote speaker on mutual recognition and pushback on Singapore moratoriums.

Opening this year’s GRR Live Hong Kong, the Judge in charge of Hong Kong’s company and insolvency portfolio, **Mr Justice Jonathan Harris**, has called for a mutual recognition protocol for insolvency orders between mainland Chinese courts and their Hong Kong counterparts, and raised scepticism over the cross-border moratorium provisions in Singapore’s recent restructuring reforms, which were the subject of his recent decision in CW Technologies.

Opening the event in Hong Kong’s Lan Kwai Fong district on 6 November, Harris J said in his keynote he saw no reason “in principle” why such a protocol should not be introduced, allowing Hong Kong schemes to compromise both offshore and domestic debt – and urged practitioners to lobby Hong Kong’s authorities in support of one.

While Hong Kong’s lack of a statutory cross-border regime for recognition and assistance of foreign officeholders is the subject of much commentary, Harris J said the same question between the mainland and Hong Kong potentially engages different considerations to those that commonly apply in more conventional situations.

The latter is “not in a conventional sense a cross-border matter at all”, given that Hong Kong is part of the People’s Republic. Its relationship with mainland China is “fundamentally different” to that with sovereign states like the United States or Singapore.

“One might reasonably assume that recognition will be readier and more extensive,” he said. But this is not currently the case, reflecting the fact that the two jurisdictions have very different legal systems, and Hong Kong enjoys administrative independence.

Despite that autonomy, the two jurisdictions are inextricably linked economically, and both face the
“significant challenge” of the high – but unknown – level of non-performing debt that has built up in the mainland’s economy.

“Hong Kong is part of China and one would expect a more engaged approach to recognition and assistance with both sides trying to leverage the situation to the maximum for the mutual benefit,” he said.

If Hong Kong and the mainland could agree to a protocol, it would be a constructive way for Hong Kong to help the mainland with its NPL problem, but could also have “significant benefits” for Hong Kong itself, he argued.

Mainland China still does not have any distinct legal mechanism available for restructuring debt and capital, so Hong Kong with its scheme of arrangement was “the obvious place for the mainland to look for a fully operational model”, Harris J said, both in actually assisting the restructuring of debt and also informing its consideration of suitable mechanisms.

Hong Kong courts normally have jurisdiction to accept a scheme with both international and domestic components, he observed, though a mainland company with only limited connection with Hong Kong might not pass this test. But Harris J said it should be “quite easy” to amend Hong Kong’s companies ordinance to allow its courts to sanction schemes of companies incorporated anywhere in China.

The judge said that he did not contemplate schemes being recognised automatically. “Consideration would need to be given to consistency between the terms of any scheme and substantive mainland law,” he said. “One would not expect a scheme to be recognised that contained terms inconsistent with mainland law.”

He also suggested that any protocol could include terms to this effect, allowing mainland courts to give a preliminary review of whether a scheme might be objectionable. The judge likened this to New York bankruptcy judge Martin Glenn’s preliminary view in the 2016 restructuring of coking coal supplier Winsway, of whether the company’s Hong Kong scheme of arrangement was capable of recognition.

Harris J added that Hong Kong practitioners should not be concerned about the potential for unwelcome mainland decisions finding their way into Hong Kong law in the other direction. “I don’t think we need to be concerned about their justice system, and we’re not going to get far with recognition that only goes one way,” he said.

“If something came to Hong Kong with something very, very odd, which we would find objectionable, we wouldn’t recognise the order.”

He urged practitioners who agreed with him to “make their views known” to Hong Kong’s department of justice and financial services bureau. “My impression is that, certainly in the mainland, they would listen to sensible proposals along these lines.”

**CW Technologies and forum shopping**

Harris J also used the keynote to address what he called “the rather unhelpful notion” of forum shopping. He called attention to his own recent decision in CW Technologies, in which he agreed to the appointment of provisional liquidators over an engineering group headquartered in Singapore, listed on Hong Kong’s stock exchange, and with a topco registered in the Cayman Islands. While its notes under a multicurrency debt programme were all governed by Singapore law, its...
Hong Kong subsidiary’s bank debt was governed by Hong Kong law.

The group obtained a moratorium in Singapore, and Harris said the case “could have been even more interesting” had the parties asked him to recognise that moratorium in Hong Kong, as he said he had expected. “There were opponents lined up to argue the moratorium should not be recognised but unfortunately the company didn’t want to argue that, so I didn’t get the kind of debate that justified me considering and deciding some of the issues I thought the facts gave rise to,” he said.

But CW’s facts provided an answer to questions that he had been considering for some time: “Why was I reading articles in journals like GRR suggesting that Singapore might be an alternative forum for the restructuring of mainland business debt?”

Although Singapore’s new regime had helpful mechanisms, particularly the cross-border moratorium, the judge said there was “rather obviously a large elephant in the room which nobody seemed to want to talk about, which is recognition”.

“There’s no point trying to avail yourself of a Singapore moratorium if you’ve got creditors in Hong Kong who are going to ignore it.”

He said he understood Hong Kong’s financial services bureau had concluded that a debtor-in-possession (DIP) regime is not suitable for Hong Kong generally. “Banks in particular don’t like it,” he said. He said it would be “slightly surprising if you didn’t get significant pushback” from Hong Kong’s official receiver upon an application to recognise a moratorium originating in a DIP system.

Harris J also said recognition would raise questions of degree of connection with the subject matter of the scheme or the debt. He said in his experience it was “rare” for mainland companies to have debt with a sufficiently significant connection to jurisdictions other than Hong Kong, the mainland itself, the United States or London.

“You can’t simply create on a blank piece of paper what looks like an ideal system, and think that because it looks good on paper, and on the face of it may be attractive to debtor companies, that those companies are going to be able to avail themselves of that system and get it recognised in other jurisdictions.”

Introducing Mr Justice Harris, Des Voeux Chambers barrister Look Chan Ho, who co-chaired GRR Live Hong Kong with Maples & Calder’s Aisling Dwyer, described him as “one of the most forward-looking, pragmatic and creative companies judges Hong Kong has ever had”. Ho reflected on the last decade of insolvency and restructuring law development in Hong Kong, much of which he attributed to the “oracle” of Jonathan Harris.

“With Lehman coming to an end things have suddenly become very interesting in this part of the world, and we have seen a lot of landmark developments,” he said. “It’s not just that we have seen seminal developments here in Hong Kong, we have also seen a lot of innovation.”

GRR Live Hong Kong took place at the Townhouse in central Hong Kong on 6 November in association with Hong Kong Restructuring Week 2018. It was sponsored by venue partner Des Voeux Chambers, conference supporter Walkers, and supporting organisations IWIRC and the Company and Insolvency Law Society (COINS*).

*DVC’s Look-Chan Ho and Michael Lok are Secretariat and Co-Founders of COINS.
Recent Insolvency Developments: an Update from DVC’s Look–Chan Ho in concert with EY

On 10 December 2018, DVC’s Look–Chan Ho presented as a guest speaker at a seminar-cum-Christmas drinks organised by Sammy Koo, Partner, Restructuring, Ernst & Young Transactions Ltd. Look reviewed the many recent seminal developments in Hong Kong on company, restructuring and insolvency practices, while Sammy spoke about the listing rules changes and the resulting challenges to restructuring deals. Look highlighted that the seminal developments reflect the pragmatic and solutions-oriented approach of the Companies Judge, The Hon. Mr Justice Harris. More than 100 guests from the legal profession attended the event, and it was a fun evening.
COINS Greater China Restructuring Forum: creating a compass for the conversation around insolvency and restructuring in Hong Kong

Incisive discussions around Hong Kong’s role in international debt restructuring for Chinese businesses, and Hong Kong serving as the platform for international distress featured as part of the **COINS Greater China Restructuring Forum** held on 16 January 2019, during Hong Kong’s International Financial Week. COINS is the acronym for **Company & Insolvency Law Society**.

Over 200 attendees came together at the Hong Kong Convention Centre in a Conference that broke ground given that it was the first of its kind in Hong Kong in the insolvency context, especially in Asia.

A number of DVC’s members attended including **William Wong SC**, **Douglas Lam SC**, **José-Antonio Maurellet SC**, and co-founders of **COINS**, **Michael Lok** and **Look-Chan Ho**. DVC’s Head of Chambers, **John Scott QC**, **SC**, **JP**, **William Wong SC** and **José-Antonio Maurellet SC** are also members of COINS.

**The Hon. Mr. Justice Harris**, in his capacity as the Honorary President of **COINS** and Judge of the Court of First Instance of the High Court, delivered the lively Opening Remarks and this was followed by engaging keynote addresses by Hong Kong’s Financial Secretary, **The Hon. Paul Chan Mo-po, GMB, GBS, MH, JP** and **Marc Lasry**, Chairman, Chief Executive Officer and Co-Founder of Avenue Capital Group.

Converging at the high-level event were a diverse range of luminaries, including Hong Kong’s **Official Receiver**, and a panel of eminent judges hailing from 5 different jurisdictions.

**The Hon. Paul Chan Mo-po, GMB, GBS, MH, JP** shone a light on Hong Kong’s cardinal facets and it’s unique features which make it an ideal hub for attracting global businesses and international investors. Some of these included Hong Kong’s strategic location as a connector...
between Mainland China and the rest of the world. Hong Kong’s unique selling points and key differentiators as the world’s biggest offshore Renminbi hub, coupled with its positioning as Asia's chief asset management centre enabled it to leverage multiple opportunities stemming from the Belt and Road Initiative. Adopting an optimistic tone, he referenced Hong Kong’s unswerving commitment to forge ahead with introducing a statutory corporate rescue procedure; aligning it with comparable global regimes, including the UK and Australia. He also analysed issues relating to cross-border insolvency and set this against a backdrop that would require a large international co-operation framework.

In a buoyant and high-level Q&A, José-Antonio Maurellet SC interviewed Hong Kong’s Official Receiver, Phyllis McKenna as they peeled back the layers of Hong Kong’s Restructuring System and Ecosystem.

Andrew Brown, Partner, Macro and Strategy ShoreVest Capital Partners examined China’s Macro Economic and Distressed Credit Opportunities. This was followed by a panel of speakers who concluded the morning session with a wrap up of Distressed Debt and their take on Finding Value and Opportunities in a Hot Market. This session was moderated by Teresa Ko, Freshfields’ China Chairman.

Robert Petty, Co-Chief Executive Officer, Co-Chief Investment Officer, Clearwater Capital Partners and Henny Sender, Chief Correspondent, International Finance, Financial Times delivered the final keynote address before the networking lunch began.

In the afternoon, a distinguished panel of judges including The Hon. Judge Martin Glenn, United States Bankruptcy Court, The Hon. Mr. Justice Alastair Norris, High Court of England and Wales, The Hon. Justice Aedit Abdullah, from the Supreme Court of Singapore, and The Hon. Justice Nicholas Segal, from the Grand Court of the Cayman Islands, collectively delivered an edifying and inspirational presentation in a Judicial Colloquium, which centred around The Court’s Role in Cross-Border Chinese Restructuring. This was moderated by The Hon. Mr Justice Harris.

A portrait of the shifting tectonic plates underscoring China’s Changing Bankruptcy Law (Reform) was outlined by the The Hon. Judge Wang Fang, of the Shenzhen Intermediate People’s Court. She also spoke at the 2nd Annual GRR Live event held on 6th November 2018.

The Hon. Mr. Justice Harris brought the day to a satisfying end with upbeat Closing Remarks that reinforced Hong Kong’s key advantages and restructuring expertise.
In one of the first events of the new year, Douglas Lam SC, Sabrina Ho and Tom Ng delivered a seminar on “Winding up in the Public Interest and Appointment of Provisional Liquidators” before an audience consisting of members of the Securities and Futures Commission.

The seminar focused on s.212, 213 and 214 of the Securities and Futures Ordinance (Cap.571), as well as s.193 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32).

Drawing on their experience, the speakers discussed the relevant Hong Kong and English authorities. The seminar concluded with an interactive Q and A session.
Members of DVC attended a series of events during Hong Kong’s Maritime Week at the tail end of 2018 to celebrate Hong Kong’s renowned role in the maritime industry.

In particular, Patrick Fung SC, Sabrina Ho and Tiffany Chan attended a forum entitled “When Hong Kong Lawyers Meet Shipping Enterprises,” which addressed key issues in the way forward for Hong Kong’s thriving maritime industry.

The forum, organised by the Hong Kong and Mainland Legal Profession Association, attracted Hong Kong qualified solicitors and barristers, Mainland lawyers from Hong Kong, as well as a myriad of legal practitioners and executives from Chinese enterprises.

Mr. Mathew Cheung, Chief Secretary for Administration, Ms. Teresa Cheng SC, Secretary for Justice and Mr. Rimsky Yuen SC, former Secretary for Justice, delivered keynote speeches to the attendees.

The forum covered the opportunities and challenges facing Hong Kong under the “Belt and Road Initiative” and “Guangdong Hong Kong Macau Greater Bay Area” Initiatives, the respective pros and cons in choosing litigation or arbitration in dispute resolution for shipping enterprises, and the risks and prevention of legal noncompliance in the industry.

Patrick Fung SC shared his past experiences in litigation and arbitration and offered his views on how to safeguard Hong Kong’s position as the heart of arbitration in Asia and and deliberated on how Hong Kong could continue fostering confidence from shipping enterprises by tailoring the trinity of litigation, arbitration, and mediation to different enterprises. Sabrina Ho targeted issues central to Chinese shipping enterprises that are involved in multinational deals: covering questions on how to minimise the risk of cross-country disputes, and how to manage them once instigated.

Together, participants shared their views on how to preserve and strengthen the value of Hong Kong’s common law system, its prime location, international standing and the steady development of its arbitration scene to international shipping enterprises.
On 1 November 2018, DVC’s Anthony Houghton SC and Benny Lo spoke in Tokyo, Japan as part of the Think Global Think Hong Kong Symposium, a high-level mega-promotion event organized by the Hong Kong Trade Development Council (HKTDC) to attract overseas companies to use Hong Kong’s service platforms to tap into Mainland China and the global market.

Tony and Benny, both being experienced arbitration counsel and Chartered Arbitrators, were respectively invited to participate as delegates of a mission led by the Secretary for Justice Teresa Cheng GBS, SC, JP and as panelists at a thematic seminar at the symposium entitled “From Deal Making to Dispute Resolution: Legal Risk Management for Japanese Enterprises” on the topics of third-party funding in international arbitration and the arbitrability of IP rights disputes in Hong Kong.

Tony was one of a group of speakers who imparted to the audience the recently introduced, and significant, amendments to legislation permitting
parties with no direct interest in arbitration or mediation proceedings to fund them, in return for a share in any award or settlement. The legislative amendments were passed in June 2017, and consultation over the Code of Conduct to be followed by third party funders has recently concluded. It is likely that these new provisions will make it easier to ensure that strong claims can be pursued; and will allow claimants to hedge their costs. In construction disputes, which are often lengthy and expensive, funding may allow parties to spread risk by not having to bear the whole cost of bringing or defending a claim, and will certainly provide considerable cash flow benefits – the traditional “life-blood” of the construction industry.

With the effort of the Hong Kong Government to develop the city into a regional innovation and technological hub, Benny discussed how and why international arbitration could be an attractive option for resolving cross-border disputes involving IP rights and how arbitration would fit in with other formal and alternative dispute resolution procedures in the wider dispute resolution landscape. He specifically took the Japanese audience through the recent legislative changes in Hong Kong which unequivocally clarified that IP rights of whatever nature are arbitrable and accordingly, that puts the integrity and enforceability of any awards beyond doubt. By reference to a real arbitration case involving alleged infringement and validity of a US-patent in which he acted as counsel, Benny further illustrated the willingness of a Hong Kong seated tribunal to issue anti-suit orders restraining a respondent from challenging the patent-in-suit before the USPTO by way of an inter-partes review.

In addition to the seminar, Tony and Benny also attended a networking lunch hosted by the Secretary for Justice with representatives of Japanese Legal Associations and exchanged ideas with their Japanese counterparts on how Tokyo and Hong Kong could collaborate synergistically on the growing sphere of international arbitration particularly in light of the Belt and Road Initiative.
Closing out an extremely active year, DVC’s Winnie Tam SC, JP’s plenary session and talk at the HKTDC’s Business of IP Asia Forum, held on 6 and 7 December was one of DVC’s last presentations for 2018.

On the first day of the Forum, Winnie chaired a Plenary Session featuring IP luminaries hailing from variously the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO.) The session was entitled Dialogue with IP Policymakers: The Roadmap for Global IP Ecosystems. Taking centre-stage was the challenge of IP protection in the context of a rapidly advancing digital environment given that rights remain enforceable territorially. Key policymakers questioned how robust and effective current regulatory regimes were in light of accelerated globalization and large-scale technological changes.

On the following day, Winnie delivered a presentation in a breakout session entitled: Framing Global IP Protection Strategy in a Tech-Innovative Century co-hosted by the Department of Justice. The Hon. Ms. Teresa Cheng, GBS, SC, JP, Secretary for Justice, prefaced the presentation with Opening Remarks.

In a title that was perfectly married to the meat of the talk, “Interplay between Modes of Resolving International IP Disputes & The Enforcement of Arbitration Awards in Mainland China,” Winnie took the audience through:

- Common types of cross-jurisdiction IP Disputes including the options for resolution
- Advantages and Disadvantage of Litigation vs. Advantages and Disadvantages of Arbitration and Mediation
- Alternate uses of Litigation, Arbitration, Mediation and IP disputes
- Pros and Cons of an Arbitrator acting as a Mediator in the same case
- Arbitrability of IP Disputes
- Arbitration of IP Rights and Enforcement of Arbitration Awards in the PRC
- Enforcement of International IP arbitral awards in PRC including tips on how to overcome the risk of Non-Enforcement
The conference was teeming with market updates, latest trends, leading examples of IP disputes and prominent guest speakers, including Chief Executive, Carrie Lam and Benjamin Bai of Alipay [now known as Ant Financial Services Group Limited]. The symposium successfully twinned topical and insightful content with excellent networking opportunities.

The event additionally lent itself to interaction with a diverse cross-section of the Intellectual Property community, with participants and delegates comprising IP service providers, solicitors, patent agents, consultants, in-house counsel and scientists and fintech investors hailing from various countries around the region. It also afforded a fantastic opportunity to discern particular concerns and needs, to raise awareness as to why Hong Kong represents a desirable forum for IP dispute resolution, and to exchange new ideas and share expertise.

In addition to featuring Winnie Tam SC, JP as a speaker and a moderator, DVC’s CW Ling, Christopher Chain and Eva Leung also attended the conference.
Epic three hour Seminar resulted in a request for an encore

Towards the tail end of last year, Richard Leung JP and Tommy Cheung delivered two exclusive CPD seminars on topical issues in the land law arena at Henry Wai & Co.

In an epic 3 hour seminar on trusts, estoppel, adverse possession and building management, Richard and Tommy shared practical insights gleaned from their experience on how best to conduct land law cases in practice.

In an encore, Richard and Tommy were invited to present on adverse possession in a lively setting where the audience, made up of over 100 attendees, posed questions concerning the constitutional aspects of adverse possession and potential law reforms. The academic discussions that ensued contributed to a convivial and collegiate atmosphere on both occasions.
DVC’s standout members are known for being “every kind of well prepared”, for being “quick operators” and “top specialists” and are recognised for their “uncommon talent and extensive experience”

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GET IN TOUCH

If there are any topics you would like to see covered in upcoming editions of DVC’s newsletter, please contact our Editor Tom Ng (tomng@dvchk) or Practice Development Director, Aparna Bundro (aparnabundro@dvchk)

Stay tuned for future newsletters
Scan the adjacent QR Code

DVC also runs a series of thought leadership events and CPD accredited in-house seminars. These cover topical legal issues, recent developments and seminal cases our members have been involved in. These intersect with our areas of expertise. If there are any issues or themes of interest you would like to see covered, please email aparnabundro@dvchk
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