INSIDE:

❄ HK scores a number of firsts with this new landmark ruling on the recognition of Mainland Liquidators in the cross-border insolvency context

❄ 23 of DVC’s members were ranked in the latest Chambers & Partners’ Asia-Pacific Guide. Find out who was included in the 2019-2020 rankings

❄ Who was the only Hong Kong barrister to make it on to this year’s Who’s Who Legal for Restructuring & Insolvency 2020?

❄ Who recently authored a new seminal IP Handbook on Hong Kong Trade Marks?

❄ Look out for DVC’s first crossword puzzle!

This edition is packed with fascinating Articles and Case Reports – where strides were made in particular in the tax, competition, arbitration, public law and insolvency fields. DVC’s members were at the forefront of many of these developments and headlined numerous events. You will find these included here.

Articles

At a time when Greta Thunberg was voted Time’s (Youngest) Person of the Year last year, we bring you a highly relevant article on the climate crisis which highlights how DVC’s Daniel Fung SC has sought to address (wo)man’s greatest existential challenges by establishing the NGO Cambridge Global Conversations. Look out for our upcoming podcast which will include a deep dive from some of DVC’s members who will weigh in on the impact of climate change and how AI might affect the legal profession over the next few years.

We also bring you a collection of write ups which take you through myriad topics including the newly reported Perfekta case and the resulting tax implications from Clifford Smith SC and Justin Lam.

Also in the tax domain, Barrie Barlow SC raises a number of interesting questions and themes which emanate from two recent tax cases.

Switching gears, Connie Lee and Tommy Cheung walk you through an extensive overview of the competition law regime in Hong Kong providing a valuable recap of developments in this sphere.

Find out how the recent Shanda Games Privy Council decision from the Cayman Islands has resonance in Hong Kong and look out for its possible wide-reaching implications in the context of judicial valuations of minority discounts. This article was authored by Harneys’ Paula Kay and James Granby.

And, capping off the Articles segment, Adrian Lai walks us through the finer points of Chinese state-owned enterprises and jurisdictional immunities.

Case Reports

In our Case Reports segment, John Hui provides you with formative takeaways from a landmark decision on seminal aspects of schemes of arrangement in Da Yu Financial Holdings.

How far do the courts go in invoking an arbitration clause? This was one of the questions considered in the recent Dickson Valora case involving Anson Wong SC, Alan Kwong and Michael Ng on behalf of the Petitioner and Rachel Lam SC, Terrence Tai and Jasmine Cheung for the Respondents.

A recent English decision confirmed what was held in Hong Kong two years ago in relation to foreign solvent liquidations. Find out what this position is in Re Sturgeon Central Asia Balanced Fund Ltd. Look-Chan Ho analyses this in detail here.

And lastly, Look-Chan Ho and Tommy Cheung helmed a precedent-setting 2020 decision in Re CEFC Shanghai International which carved out a number of important firsts in the context of cross-border insolvency. Click here to find out how the concept of universalism is being further championed by the Hong Kong courts.

Announcements

Zoom in on a series of exciting Announcements kicking off with the latest Chambers & Partners’ 2020 rankings which notably featured an uptick in the number of Up & Coming barristers from DVC. Who was recognised for being “practical, pragmatic...the complete package?” Who was said to “have the ear of the judge?” and who was noted for “leaving no stone unturned?” Find out in the e-version of this newsletter or click here for the full commentary.

Who is the only Hong Kong barrister to be featured in Who’s Who Legal: Restructuring & Insolvency 2020? This is revealed here.
Who is DVC’s latest Global Elite Thought Leader as listed in Who’s Who Legal for Construction Law 2020?

One of DVC’s IP specialists recently published a seminal text on Hong Kong Trade Marks. We lift the curtains on the author here.

DVC is pleased to announce that one of its juniors joined the Board of Review (Inland Revenue Ordinance) in January. Find out who this was here.

And which newly founded Committee were Jose-Antonio Maurellet SC and Benny Lo nominated to chair recently? This is covered here.

Find out which Silk was appointed to advise as part of the Standing Committee for Company Law Reform.

And lastly, which member joins the DVC cohort of editors for Civil Procedure Rules (The White Book) 2020. This is unveiled here.

**Events**

It was an especially active last quarter in 2019. Read on to review a series of events which bisected numerous sectors.

Dive into a series of videos as DVC’s Daniel Fung SC shared his views on the US-China Trade-War and the unpicking of China’s ambitions set against a backdrop of the current Hong Kong protests.

Curious about some of the special facets of the court’s jurisdiction in HK? Why are visiting judges specifically allowed to sit on the CFA to hear appeals? Find out in this summary of a panel chaired by DVC’s Winnie Tam SC at the 2019 Seoul IBA Conference.

What are the differences between satire, parody and pastiche in the context of Trademarks? Who won the battle between Lady Gaga and Lady Goo Goo? Read more here as DVC’s Winnie Tam SC JP, CW Ling and Stephanie Wong joined forces with DLA in a presentation entitled “Inspiration vs Appropriation: Well-known Trade Marks in Hong Kong, China and around the World.”

Banter flowed easily over sun-downers when professors, lawyers and students visited DVC from the University of Liechtenstein. DVC’s Patrick Fung BBS, SC, QC, Chua Guan-Hock SC, Clifford Smith SC, Christopher Chain, Jason Yu, Kevin Lau, Tiffany Chan and Euchine Ng welcomed Dr Francesco A Schurr and Dr. Alexandra Butterstein LL.M. in October where they parried over recent case law in the Trusts and Probate sector.

Then, in an illuminating presentation before the Shenzhen Office of Global Law Offices, William Wong SC, Sabrina Ho and Vincent Chiu imparted tips in the context of cross-border dispute resolution and interim measures in aid of arbitration and enforcement in relation to arbitral awards and judgments in Hong Kong. Read more about what they had to say about this development here.

Can mediation be used as an effective dispute resolution tool in the shipping industry? Find out Douglas Lam SC’s views on this topic as discussed at the Maritime Week Legal Forum on 19 November 2019 in a panel that was moderated by DVC’s Sabrina Ho.

In a two-day conference hosted by BIP Asia, DVC’s Winnie Tam SC moderated a panel on Effective Global IP Enforcement and Unwelcome uses of Well-known Copyright Works and Trademarks. CW Ling also spoke on the latter panel and homed in on the question of whether mediation was suitable for resolving disputes in the creative and entertainment industries.

Next, CW Ling and Sakinah Sat took the audience on a whirlwind tour around the world when they analysed the tension between free speech and the rights of IP owners under the laws of Hong Kong, PRC, US, UK and EU in a collaborative event with Dentons, Shenzhen.

DVC’s Christmas lunch featured a guest speaker who explored the link between Des Voeux Chambers and the strong Irish connection in Hong Kong.

And in a pre-Christmas get-together, CW Ling hosted a contingent of mediation specialists who converged for a festive soirée at DVC.

We hope you enjoy this wrap up from 2019 and the initial tracks we have made since knocking on the door of 2020.

Be the first to complete DVC’s new interactive crossword puzzle found on page 58 of this newsletter.
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A call for closer cross-border coordination between jurisdictions in the novel case of Re: Da Yu Financial Holdings Limited (formerly known as China Agrotech Holdings Limited)

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Non-Recognition of Bermuda Solvent Liquidation: Re Sturgeon Central Asia Balanced Fund Ltd

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DVC’s members attract acclaim variously for "knowing how best to play [their] cards in an adversarial case," for being armed with "an encyclopaedic range of dispute types" and for "always [being] at the top of our list."

Chambers & Partners Asia-Pacific 2020
Douglas Lam SC considered whether mediation can be used to resolve shipping disputes.

HK’s Irish Consul General, David Costello is DVC’s guest speaker at the annual Christmas lunch.

CW Ling organised a Pre-Christmas gathering at DVC for mediation experts.

Announcements

Chambers & Partners Asia-Pacific 2020

Who was singled out as the only Hong Kong barrister to be featured in Who’s Who Legal: Restructuring & Insolvency 2020?

Which construction specialist was included as a Global Elite Thought Leader in Who’s Who Legal for Construction Law 2020?

Who authored a recent IP Handbook on Hong Kong Trade Marks?

Another of DVC’s members joins the Board of Review (Inland Revenue Ordinance) in 2020

Two members are appointed to a new Sub-committee on Outcome Related Free Structures for Arbitration

New silk joins the Standing Committee for Company Law Reform

Another member joins the DVC cohort of editors for Civil Procedure Rules (The White Book) 2020.

Recent Events

Is Hong Kong a Victor or a Victim in the US-China Trade War?

IBA Conference Seoul 2019

“Inspiration vs Appropriation: Well-known Trademarks in Hong Kong, China and around the World” – a collaborative presentation by DVC and DLA

Visiting professors and students from the University of Liechtenstein converge at DVC

Spotlighting audit trails and interim measures in aid of arbitration

Maritime Week Legal Forum 2019

BIP Asia Forum featuring Winnie Tam SC, JP and CW Ling

DVC and Dentons Shenzhen in collaborative IP talk

DVC’s Christmas lunch featuring HK’s Irish Consul-General

Pre-Christmas Mediation get together hosted by CW Ling

DVC’s first crossword puzzle
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, BBS, JP  Barrie Barlow SC  Anthony Houghton SC
Ian Pennicott SC, QC  William M. F. Wong SC, JP  Anson Wong SC
Douglas Lam SC  José–Antonio Maurellet SC  Jenkin Suen SC
Rachel Lam SC  John Litton QC

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  Hew Yang–Wahn
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  Euchine Ng  Tinny Chan
Sakinah Sat  Martin Lau

Door Tenants
Jeffrey P. Elkinson  Jonathan Shaw  Kelvin Kwok

6  |  A Word of Counsel
A Word of Counsel

Many of today’s most fundamental conversations about global problems take place in an echo-chamber where only existing perceptions are reinforced. Cambridge Global Conversations (CGC), the newly set up education platform, seeks to redress this by illuminating complex and multi-layered problems with a view to delivering innovative insights and strategically disseminating the conversation to promote engagement.

In this interview with DVC’s Daniel Fung SC, the Founding Chair of CGC, he touches upon everything from climate change to the purpose of life, in discussing the mission and vision of CGC.

He explains that we need a recalibration and reaffirmation of human strengths and ethics to transcend the issues we currently face.

Des Voeux Chambers (DVC): What is the genesis of Cambridge Global Conversations? When was it established?

Daniel Fung (DF): CGC is a broad effort that came about after talking to different specialists hailing from different disciplines. The Conversations which attempt to draw in millions, are catalysts for change and the idea behind it is to resolve myriad existential challenges confronting us today. The 19th century Russian writer Alexander Herzen coined the phrase “the pregnant widow”. This is a very evocative statement which primarily means that the child (without his/her father) will eventually be born into a world which is full of uncertainty. We therefore have a moral imperative to create an environment which will be most conducive to the baby’s survival.

This inspirational phrase led to thinking about the current world order and a contemplation of how the nation state arose as a result of the Treaty of Westphalia in 1648. The Treaty served a very useful purpose because it ended the 30 year war; the most vicious, serious and destructive conflict in Europe between Roman Catholicism and the Protestant Movement. This kick-started the precedent of peace by diplomatic congress, and interstate aggression was held in check by a balance of power. Norms were established against interference with another state’s domestic affairs. And these precepts ultimately became central to international law.

However, today, we know that the nation state is actually an impediment to solving the world’s biggest problems so it is in this context that CGC was conceived – over a gestation period of 6 years. CGC was set up in July 2019.

DVC: What is CGC’s mission and vision?

DF: CGC’s purpose is to address existential challenges to humankind in the biosphere which lie beyond the
ability of individual nation states to resolve. No matter how powerful the US and China - not even supranational organisations like the EU have been able to tackle these issues successfully.

This is why I propose we need to overhaul the current global architecture to address these far-reaching concerns including climate change, the advent of AI (which will lead to the obsolescence of employment,) resource scarcity and unchecked migration. The question then becomes, with a loss of employment - what does it mean to be human? And what is the meaning of life because even if you’re lucky enough to live in a developed country rich enough to provide a minimum income - what do you do with your life? These problems very much affect the next generation. And it’s their world we are looking out for.

DVC: Where is CGC based and who are the collaborators/key players involved?

DF: As the name implies, Cambridge University is, if you like, the mothership for CGC. However, we host conferences in various locations around the world. The first Summit for example was held in Aspen on climate change in July 2019.

There are four main interlocutors, in addition to myself, and they have very different backgrounds. By pooling together people with niche expertise - this makes the whole greater than the sum of its parts. We want to achieve something holistic and interdisciplinary and through the lens of each of these individual experiences and their specialist expertise, we can explore different forms of governance. The founding members include myself as Founding Chair as well as:

1. Stephen Toope - Vice Chancellor of Cambridge
2. Lord Martin Rees - Astronomer Royal, Founder of the Centre of Study of Existential Risk, (CSER), Master of Trinity College, Cambridge
3. Julian Hubbard - Molecular Scientist, DNA specialist and Director of the Intellectual Forum
4. John Barker - Cambridge Governance Labs, Centre of Governance & Human Rights

DVC: How does CGC seek to include an audience that is increasingly made up of Millennials, Generation Z and what some are calling the Alpha Generation (the new cohort born after 2015) who are deeply invested in issues with current and long-term effects like climate change and employment etc?

CGC is about pulling millions into a wider conversation with a view to actioning problems that impact Gen Y, millennials and Gen Z. In order to resonate with
increasingly younger generations, we disseminate our message via social media and through blogs given shorter attention spans.

To this end, we also have a volunteer group in Hong Kong steered by graduates from different disciplines. They are young, in their 20s and passionate. We are lucky to have them.

The platform is generously funded by a few donors. One is The Layden-Shimberg Foundation and its associate UK Education Charity - the WEL Foundation (World Ethics & Leadership Foundation). We've also brought in another very powerful outfit called Nexus. They are made up of millennials and Gen Z, who have inherited very substantial wealth. They're a robust cohort in their 20s and 30s who wield money and influence. And importantly, they want to shift the needle. They are in a position to put their trust funds to work. Nexus is hugely supportive of what we do.

In order to stay relevant, we need to continually include millennial and other voices in our conversations and this needs funding to keep the flywheel going. You cannot shift the needle without funding and resources. Nexus has been very useful in this regard because they divest and then invest and by that I mean, they can pull funds out of a venture (e.g. fossil fuels) and channel this into, say, hydrogen because this is an eco-friendly alternative source that has the potential to meet a range of energy needs.

DVC: CGC seems to be sideways political - can it be characterised as an NGO? In what ways is it different e.g. funding etc?

DF: It is similar to an NGO yes. But the focus is on education. We’re very careful to ensure that CGC is not a pressure group. We present the facts and ask our audience to decide but we don’t try to lobby. So that’s the big difference.

We also steer clear of anything hierarchical. CGC is not siloed. We make it known that everyone’s voice is legitimate. That way we don’t alienate millennials, Gen Y or Gen Z because ultimately it is their world we are dealing with.

In terms of funding, as I mentioned, we are supported by The American Foundation, Nexus and a UK registered company which originally started as a 501(c). This then became WEL (World Ethical Leadership.) They emphasise ethical leadership in business and politics. This resonates because of the ethical dimension associated with combating climate change. There is usually much more of an emphasis on the tech side of climate change vs. the ethical aspects so the WEL Foundation is distinct in that regard. In addition, 50% of our funding comes from a mainland couple. This was a pleasant surprise. I am in constant fund-raising mode but I don’t mind; I find it gratifying.

We’re catalysts in a broad conversation. Given that CGC has already demonstrated it has legs, and we believe that success breeds success, this continues to attract money and donors' investment as well as more like-minded people. It snowballs and we’re very gratified that we’ve also had people approach us to ask how they can help.

DVC: How do you walk the talk?

DF: Firstly, input is evaluated on the merits, not on the reputation of the speaker. This way the dialogue remains authentic.

We do not use slideshows as they are very stilted. After all, what do graphs really mean? We look for more dynamic ways to express ourselves and to continue the dialogue.

The set up of our conferences is very different. Many have said it's unlike any other conference they have ever been to, because of the way this is structured. There's no podium, there are no lectures and there is no Q&A because this is extremely stilted. It’s not conducive to having a real conversation. So it’s actually one enormous
round table. The result is it is refreshing, completely horizontal, and importantly everybody is engaged.

The conversations are meant to act as catalysts for change for a broader audience involving millions. The point is not to educate the elites because that is when you ignore the 99%; the knock-on effect of which is a backlash. These are how and why many problems arise because the 99% are alienated and this has resulted in an unhealthy dichotomy. People need to be enfranchised and empowered in order to create a level playing field.

With experts from such a diverse range of backgrounds, we are able to have honest conversations.

The ethical dimension underpins much of what we discuss but there are different forks in the road too. There is an element of spiritual leadership as well.

**DVC**: How do you set an agenda, how do you establish goals and objectives and then achieve them in a realistic time-frame?

**DF**: That’s a very good question. CGC is still very much in its start-up stage. However, initially we wanted a declaration at the end of the conference. It didn’t work as effectively as we thought, because everybody wanted their own particular pet point being made, and this then became extremely long and unmanageable so we’ve scrapped that. What we’re going to do instead is roll out blogs so we can channel feedback. The feedback we get will set the agenda for the next round. This way it is more meaningful and is based on a collective voice.

We are far from the World Economic Forum but we feel that many of these old structures have lost credibility because they are no longer relevant. CGC is more dynamic.

**DVC**: What topics have you addressed and what will you address over the course of the next year?

**DF**: Climate change really resonates and we have looked at the ethical dimensions of it. We held our inaugural 4 day Summit (AREDAY) in Aspen this Summer at the American Renewable Energy Institute, of which I am Vice Chair. The Summit covered extensive ground with titles that included Y on Earth, New Frontiers in Energy Efficiency, Economically Sustainable Carbon Capture and Quantifying the Cost of Adaptation. With climate change, there is a lot we can do in everyday life but will we put our money where our mouth is? Will we actually stop eating meat to reduce methane emissions? We have Impossible Meat. We can create meat in a lab so we know we already have the ability to prevent cruelty to animals. But we have to ensure that the rubber meets the road to enact positive change.

Later this year, we will tackle AI.

AI may facilitate a whole host of things but it also shades off into personal life. It is a massive topic with huge ethical dimensions.

We will have an update on this after the 2020 Summer Summit... so watch this space

**DVC**: So often we start with a negative, e.g. the uphill battle we face with climate change. We have already also seen Indonesia for example shift its capital to Borneo as a direct result of rising water levels and the physical impact of the weight of development and infrastructure on Jakarta. Is this something we will see more of (i.e. human brinkmanship with nature) before we take action? Is CGC the vehicle that will give us a reason to stay positive and be hopeful about the future when we there are so many challenges on the horizon?

**DF SC**: Life is not static. And I think the key message is that we don’t want to rest on our laurels because this is not a battle we fight once and then breathe a huge sigh of relief. It’s ongoing and we want to build on whatever we achieve at CGC.

What we don't want to do is characterize this as a Sisyphean battle where one is seen as pushing a boulder up a hill only to watch it roll back again i.e. something laborious and futile. Nevertheless, we cannot afford to be complacent. Look at what’s happening in the atmosphere right now. Look at the Amazon. This is not something we can be complacent about.
DVC: The book and TV show the Handmaid’s Tale, which some say is even more relevant today is an eerily prescient look into our future. With the current political backdrop we have, abortion laws in the US and a potential abrogation of Roe v Wade on the cards – some may cynically see CGC as a moonshot. What can we do to help the cause?

The same can be said about Roe v Wade. We currently have a level of globalization in the world that is second to none in human history. The benefit of this is that we are integrated and therefore so connected. 90% of humanity, at least in the developed world, have not benefited from globalization. This means that only 10% have. However, there is populist push back. And therefore we can’t announce the obsolescence of Westphalia because people will invariably have a very different vision, because they want to fight for something that is familiar.

I think the answer, which is clearly inclusive globalization, is something we need to work at. We can’t just say that globalization has more on the plus side of the ledger than on the negative side therefore we’re fine – because we are not.

There needs to be an attitudinal change. There are some things we can’t change, but there are some things we can. We can help with economic inequality, for example.

I believe our work is cut out for us. As I said, we don’t want to posit a Sisyphean prognosis, but we can’t be complacent so the way to rally people is to be inclusive, not just in terms of how we live as a society, but also in terms of what people can do. This, I believe, goes towards the definition of happiness and ties into what I said earlier about finding a purpose in life.

We need to be able to transcend our individual constraints. If we can make a small difference, and dedicate our energy towards something we believe in, we can move the needle, if only a little bit. We’re the lucky ones, we’re not living on the bread line, we’re not living on a knife’s edge of starvation – we have a surplus in terms of energy, in terms of intellectual ability, and therefore there is a moral obligation to do something to redress the balance.

So the message I would like to convey is that it is good for us (and for our happiness levels!) to get involved. CGC fights against disenfranchisement, dissolution, and alienation. So what better way to combat alienation than to be engaged in something that is not only worthwhile, but something that is essential.

We’re fighting for jobs, future survival, our children and our grandchildren.

Want to hear more about CGC and how you might get involved? Click on the link below to view Daniel’s video

➡️ Look out for an upcoming podcast on climate change and the impact of AI in the legal profession from some of DVC’s members.

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Instagram: cgcinsta

* Please note this interview was conducted in August 2019 and some of the content may now have been superseded.
Taxing questions raised to determine whether there was a change of intention

This article was authored by Clifford Smith SC and Justin Lam

Introduction and Factual Background

In the recently reported decision in *Perfekta Enterprises Ltd v Commissioner of Inland Revenue* [2019] 4 HKC 383 the Court of Final had occasion once again to consider the perennially interesting question of “change of intention” in the context of liability to pay profits tax on the disposal of an asset that was originally acquired as a capital asset. The taxpayer’s appeal was conducted by Clifford Smith SC leading Justin Lam.

The case was a lengthy battle with the Commissioner of Inland Revenue which concerned events back in 1994. The tax assessment was determined in 2011 and the matter was taken through the Inland Revenue Board of Review, the Court of First Instance by way of a case stated, the Court of Appeal and finally to the Court of Final Appeal. A number of legal points arise from this complicated procedural history of the case. However, before going into them, it is pertinent to set out the underlying factual circumstances of the case, which were essentially undisputed.

The appellant taxpayer was a toy manufacturer with industrial premises in Kwun Tung which it had acquired many years ago as a capital asset (“the Lot”). Its manufacturing activities had gradually moved to the mainland and the taxpayer decided to enhance the value of its capital asset by seeking the necessary approval for the lot to be redeveloped. Approval was given subject to the payment of a premium. The taxpayer entered into discussions with a major developer who proposed redeveloping the site and selling the newly developed industrial and office building to third parties. This led to a meeting of the taxpayer’s board which resolved that for internal purposes any such joint development should be carried out by a separate entity, that is to say a wholly owned subsidiary, which would buy the Lot from the taxpayer and then enter into a development venture.

The redevelopment went ahead on the basis of two relevant contracts. The first is a Redevelopment Agreement made between the taxpayer on the one hand and the developer and one of its subsidiaries on the other. Under this agreement the taxpayer was paid $165m as an Initial Payment in consideration of the right to develop the Lot. The taxpayer was obliged to assign the Lot to a subsidiary, referred to as Newco, and to procure Newco to enter into an agreement with the developer and its subsidiary in the terms of a draft agreement annexed to the Redevelopment Agreement and described as the New Agreement under which...
the Lot would be redeveloped. As a safeguard for the developer it was expressly provided in the Redevelopment Agreement that failure by Newco to execute the New Agreement would result in the taxpayer retaining or re-acquiring the Lot and itself becoming party to the New Agreement. The taxpayer assigned the Lot to Newco for $314m and Newco executed the New Agreement. The redevelopment went ahead pursuant to the New Agreement, to which the taxpayer was not a party.

Determination and Board of Review

The issue was whether the Initial Payment of $165m was assessable to profits tax under Section 14 of the Inland Revenue Ordinance (Cap. 112) (“IRO”). Crucially, the Commissioner did not rely on any of the anti-avoidance provisions e.g. Sections 61 and 61A of the IRO to fix liability to pay tax on the taxpayer.

The Commissioner determined against the taxpayer that the Initial Payment was assessable to profits tax. He relied on the case of *Hong Kong Oxygen & Acetylene Co Ltd v CIR* [2001] 1 HKLRD 489, considering that the facts of that case was materially similar to those in the present case given the use of the "initial payment" mechanism for the parent company to receive payment from the developer.

The taxpayer appealed to the Inland Revenue Board of Review. By a majority the Board allowed the appeal, with the Chairman dissenting (case no: B/R 18 of 2011). However, what should be noted is that the majority of the Board ruled in favour of the taxpayer on a certain case theory which was not presented by the taxpayer, namely the "reinvestment theory" that the taxpayer took home part of the value of the Lot in the form of cash (by way of the Initial Payment) while reinvesting the balance in a joint venture with the developer to earn more profit. On this basis, it was held that the taxpayer had not changed its intention to trade in respect of the Lot. In contrast, the Chairman held that the taxpayer did change its intention to trade, even though it intended to use its subsidiary to carry out the joint venture, as he considered the subsidiary to be the “alter ego” of the taxpayer. In coming to this conclusion, the Chairman relied on the case of *Tai Hing Cotton Mill Ltd v CIR* (2007) HKCFAR 704, which was in fact a case on the anti-avoidance provisions which the Commissioner had not relied upon in the present case.

Case Stated before the Court of First Instance

The Commissioner appealed to the Court of First Instance by way of case stated (now superseded by the new appeal mechanism introduced by the Inland Revenue (Amendment) No.3 Ordinance 2015). As the majority decision of the Board did not reflect the taxpayer’s case, the taxpayer included its own questions for determination by the Court of First Instance in the case stated, which operates in a similar way as a respondent’s notice in a civil appeal to the Court of Appeal.

On a case stated, it was not disputed that, even if the Board of Review’s decision was vitiated by an error of law, it was not open to the Court to substitute a different conclusion to that drawn by the Board on the primary facts found unless the contrary conclusion is the true and only reasonable conclusion on those primary facts. Instead, the proper course would be to remit the matter to the Board of Review with the court’s opinion for it to make findings on the relevant question. This was highlighted by the Court of Final Appeal, reiterating the well-established principles set out by Bokhary PJ in *Kwong Mile Services Ltd v CIR* (2004) HKCFAR 275.
By the judgment of Chung J dated 27 April 2017 (unrep., HCIA 1/2016, 27 April 2017), it was held that the Board majority decision to remit the assessment to the Commissioner should be set aside, as there was no evidential basis for the “reinvestment theory”. Chung J rejected the taxpayer’s argument that there had been no change of intention because it was the taxpayer’s subsidiary (rather than the taxpayer) that participated in the joint venture and therefore carried out the redevelopment project.

**Court of Appeal**

The taxpayer then appealed to the Court of Appeal. By a majority the Court of Appeal dismissed the appeal, with G Lam J (sitting as an additional judge of the Court of Appeal) dissenting: [2018] HKCA 301.

The majority rejected the taxpayer’s argument in relation to there being no change of intention on its part to trade in relation to the Lot. The majority considered that it was open to Chung J and the Court of Appeal to rely on the findings made by the dissenting Chairman in the Board of Review, to the extent that the burden was on the taxpayer to demonstrate that the Chairman’s findings were “unreasonable, illogical or plainly wrong which allows [the CFI or] this Court to intervene”.

In contrast, G Lam J held that the true and only reasonable conclusion was that there was no change of intention on the part of the appellant to trade, having regard to the fact that the taxpayer intended to and did use its subsidiary to carry out the joint venture with the developer. He considered that it was wrong as a matter of law to look at the “substance” or “commercial reality” with the effect of disregarding the separate legal personalities of the taxpayer and the subsidiary. He relied on what Lord Hoffmann NPJ said in Tai Hing Cotton Mill stating that it is a perfectly normal commercial practice to employ subsidiaries to undertake the development of properties acquired from the parent. If there was any artificial transactions so as to reduce the profits and thus tax payable, the law’s response is to deprive the taxpayer of such benefit under the anti-avoidance provisions, which the Commissioner had not suggested to be applicable to the present case. He would therefore have allowed the appeal and annulled the assessment.

For the sake of completeness, G Lam J also considered the Commissioner’s original reliance on the case of *Hong Kong Oxygen* (which was no longer relied upon on appeal). He considered that the case was materially different from the present, because in that case (i) the taxpayer’s board resolved to enter into the joint venture in question before any decision was made for a subsidiary to be used, so that the subsidiary was no more than a vehicle to implement that intention, (ii) the taxpayer was a party to the actual joint venture development agreement and remained a real participant in the project and (iii) the land was assigned by the taxpayer to its subsidiary for the entire market value of $497 million so that the additional payment the taxpayer received of $180 million could be said to be not on account of the capital value of the land. None of these features are present in the case before the Court.

**Court of Final Appeal**

The taxpayer obtained leave from the Court of Final Appeal to appeal on two grounds: [2018] HKCFA 55.

The first involved a question of law arising from the fact that the minority decision of the Board was (as submitted by the taxpayer) substituted for that of the majority by both the Court of First Instance and the majority of the Court of Appeal, which the taxpayer argued to be impermissible as a matter of legal...
principle. The minority decision did not form any part of the Board’s decision and if the majority Board decision was set aside, the proper way to deal with the matter was to remit the case back to the Board for redetermination.

The second was on the “or otherwise” ground i.e. the true and only reasonable conclusion which the Court could have arrived at was that the taxpayer had not changed its intention to trade as the joint venture was carried out by the subsidiary instead of itself.

The CFA allowed the taxpayer’s appeal and set aside the Commissioner’s assessment on the “or otherwise” ground holding, in agreement with the dissenting judgment in the Court of Appeal, that the true and only reasonable conclusion on the undisputed evidence and primary facts is that the taxpayer did not change its intention in relation to the Lot and did not enter into a venture in the nature of a trade in disposing of it.

The Court of Final Appeal reiterated the well-established principles in determining “change of intention” for the purposes of profits tax:

- As held by the Court of Final Appeal in Church Body of Hong Kong Sheng Kung Hui v CIR (2016) 19 HKCFAR 54, in order for a receipt to be taxable for profits tax in respect of an asset held as a long-term capital asset prior to its disposal, it would be necessary to find that there was a change of intention on the part of the taxpayer such that its intention was to dispose of the property as part of a trade or business. Disposal of land at an enhanced value would not necessarily indicate an intention to trade by its owner, nor would the expenditure of money on the property in order to enhance its sale price necessarily lead to the conclusion that the landowner was engaging in an adventure in the nature of trade. In determining an intention to trade, it is important to identify the activity that is said to amount to trading and, in practical terms, to ask the question: “What trading or business venture has the taxpayer embarked upon?”

- The fact that a subsidiary was to be used for the purpose of the redevelopment of the Lot is important. The Court of Final Appeal upheld the importance of the principle of separate legal personality, which has to be respected save in limited circumstances. One such circumstance might have been where the Commissioner was able to rely on the anti-avoidance provisions in the IRO, but the Court noted that there is no suggestion in the present case that those provisions apply and the Commissioner has not sought to invoke them.

- The Court emphasised what Lord Millett NPJ held in ING Baring Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 117 about the importance of looking at each company separately from the group or other members of the group: “… for tax purposes in this jurisdiction a business which is carried on in Hong Kong is the business of the company which carries it on and not of the group of which it is a member; the profits which are potentially chargeable to tax are the profits of the business of the company which carries it on; and the source of those profits must be attributed to the operations of the company which produced them and not to the operations of other members of the group”.

In arriving at the holding that the true and only reasonable conclusion was that the taxpayer had not changed its intention to trade, the Court of Final Appeal relied on the following factors:

- The Lot had been held as a capital asset. Unless there was a change of intention on the part of the taxpayer to trade, so that the Lot was disposed of as part of a trade or business, profits tax would not be chargeable on the Initial Payment.

- Enhancing the value of a capital asset, for example by applying for and obtaining the necessary approval that would facilitate redevelopment, is consistent with disposing of the Lot as a capital asset for the best possible price.
• The taxpayer’s board had resolved that the Lot would be assigned to a subsidiary, and the subsidiary, not the taxpayer, would carry out the development jointly with the developer.

• The subsidiary must be regarded as a separate legal entity; and the principle of separate corporate identity could not be eroded by describing the subsidiary as the “alter ego” of the taxpayer (which the minority in the Board of Review had done) or reading the words “for internal purposes” in the taxpayer’s board resolution as having a similar effect (as the CFI had done) or treating the involvement of the subsidiary as only a method or mechanics of implementing the taxpayer’s intention to trade (as the majority in the Court of Appeal had done).

• The mere existence of a provision in the Redevelopment Agreement whereby the taxpayer would become a party to the New Agreement if Newco failed to execute it did not assist the Commissioner. As the taxpayer had the power to procure Newco to execute the New Agreement, there would be no change of intention on the part of the taxpayer unless it decided that Newco would not execute the New Agreement (which Newco did subsequently execute).

• The Commissioner had not sought to rely on the anti-avoidance provisions in sections 61 or 61A of the Inland Revenue Ordinance, whereby the interposition of a subsidiary might be disregarded in certain circumstances.

• Moreover, the present case was not one in which the anti-avoidance provisions could have applied. The Initial Payment and the consideration for assigning the Lot to the subsidiary were in line with the land value.

The Court of Final Appeal also held that it was not possible to contend that the taxpayer had embarked on an adventure in the nature of trade by procuring its subsidiary to enter into the joint venture by executing the New Agreement. This “alternative trading” argument was advanced on behalf of the respondent Commissioner during the hearing of the appeal. Without deciding whether it was open to the respondent to advance a new point at that stage, the argument was rejected as being untenable. The contractual obligations undertaken by the taxpayer were for the purpose of disposing of its capital asset and dropping out of the joint development. The taxpayer’s business did not include acting as a procurer of joint venture partners for property developers.

In view of the Court of Final Appeal’s conclusion on the “or otherwise” ground, it was not necessary to address the ground of appeal on legal principle, namely whether the Court can substitute the finding in the minority decision for that of the Board in the event that the majority decision has been set aside. However, there seems to be a clear indication from the Court of Final Appeal’s judgment at paragraph 30 that the Court is not allowed to do so, unless the Court can come to its own conclusion that the minority decision is the true and only reasonable conclusion on the facts. Absent such a clear result, the proper course would be to remit the matter back to the Board of Review with the Court’s opinion for the Board to make findings on the relevant question (which in this case was whether there was a change of intention).

Clifford Smith SC and Justin Lam acted for the taxpayer in the Court of Final Appeal.
Within taxation law, few subjects have been able to divide informed and experienced practitioners as much as the application of the principles governing the taxation of payments received by employees upon the non-consensual termination of employment (whether by reason of redundancy or otherwise). Thus, in 1972, Lord Wilberforce commented (in *Comptroller-General of Inland Revenue v. Knight* [1973] A.C. 428 at 433D):-

“Questions as to the taxability of payments received by employed persons at the end of their employment have frequently come before the courts: they have often been described as difficult, borderline and depending on narrow distinctions.”

In Hong Kong, salaries tax liability arises under sections 8 and 9 of the Inland Revenue Ordinance (Cap. 112), which taxes all income from an employment here, which will include:--

“any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others...”

The main 2 core principles are long settled and they were summarised by Lord Wilberforce in *Knight* (supra) at 433E, namely:--

“Two propositions are accepted as common ground in the present case. First, where a sum of money is paid under a contract of employment, it is taxable, even though it is received at or after the termination of the employment: see for example *Henry v. Foster* (1931) 16 T.C. 605. Secondly, where a sum of money is paid as consideration for the abrogation of a contract of employment, or as damages for the breach of it, that sum is not taxable: see for example *Henley v. Murray* (1950) 31 T.C. 351.”

As has been frequently noted by the courts, it is the application of those principles that has given rise to the controversies noted above.

In Hong Kong, over the last decade or so, guidance upon the application of those principles has been provided in two appellate decisions (each involving Barrie Barlow, S.C. for the taxpayer) namely: (a) the decision of our Court of Appeal decision in *Commissioner of Inland Revenue v. Elliott* [2007] 1 HKLRD 297; and (b) the decision of our Court of Final Appeal decision in *Fuchs v. Commissioner of Inland Revenue* (2011) 14 HKCFAR 74.

In *Elliott*, LePichon, J.A. explained (at §§27-28):--

- “payments received as compensation for loss of office are not chargeable to income tax.”
“Where the question in each case is whether, on the facts of each case, the lump sum paid is in the nature of remuneration of profits in respect of the office or is in the nature of the sum paid in consideration of the surrender by the recipient of his rights in respect of the office.”

In *Fuchs*, Ribiero, P.J. explained (at §§19-22):-

- “damages … for wrongful dismissal or a payment under a settlement agreement … in such a suit are not regarded as income from employment.”
- Where “the sum is plainly an entitlement under the contract of employment” it is income.
- Where the sum is “an entitlement earned as a result of past services” or “an entitlement accorded to him as an inducement to enter into the employment” it is income.

However, following those decisions, controversy continued in respect of two important questions, namely:

1. Is the nature and/or purpose of the payment concerned primarily to be gauged from the terms of the contracts involved (i.e. the employment contract and the termination contract) or from a broader enquiry?

2. If the latter, should the broader enquiry include a consideration of the legal merits of the taxpayer’s actual or threatened or possible wrongful dismissal (etc) rights of action against his former employer?

In June 2018, in *Poon Cho-Ming John v. Commissioner of Inland Revenue* (CACV 94/2016; 1 June 2018), who had earlier been represented by Barrie Barlow, S.C., our Court of Appeal, per Yuen, J.A. reversed Anthony Chan, J. and the Board of Review upon the basis that both had erred in law by failing to hold, as a matter of contractual construction, that the payments in controversy were...
made “to avoid any litigation from the Taxpayer” (§31) and that, the merits of the former employee’s litigation entitlements are irrelevant, since they are subsumed within the termination contract (§32.1). She explained:—

“27.1 It is clear from [Fuchs:§22] that the test, whether in a termination situation or not, is the purpose of the payments.”


• In Fuchs the “sums were paid in satisfaction of rights which had accrued to Mr. Fuchs under his contract of employment” and therefore they were income (§17).

• A termination benefit (such as the vesting of share options) which “the Taxpayer [otherwise] had no right to” is not income (§65).

• Elliott was correctly decided because “the rights ….. were contingent on Mr. Elliott remaining in the employment for at least five years and were not enforceable after cessation of the employment.” and therefore they were not income (§66).

• In Fuchs, the CFA distinguished Elliott because “Mr. Elliott could not have sued for those rights under his contract of service, [whereas] what Mr. Fuchs received were sums for which he could have sued under his contract of service.” (§67).

• The termination contract benefits to Mr. Poon were benefits which he otherwise “would never have received ….. at all” and therefore they were not income (§74).

Thus, the enquiry devolves into the question of whether the purpose of the payment concerned was to discharge “rights which had accrued” (meaning legal rights for which the Taxpayer “could have sued”) under or pursuant to: (a) the employment contract; or (b) the termination contract.

Also relevant to the identification of the purpose of the payment will be:—

(1) the presence of any pre-conditions that the employee was required to satisfy before the employer became obliged to make the payment;

(2) the contractual consideration, i.e. the actions or omissions that the employee was required to take or forego from taking in order to receive the payment; and

(3) the circumstances existing at the time that the payment was made.

In most cases the employer’s purpose in making the payment should become apparent from the answers to the following questions:—

(1) Was it paid pursuant to an accrued contractual obligation of the employer to make the payment and if so, where is that obligation to be found?

(2) Is the consideration for the making of the payment clear from the terms of the contract concerned and if not, does the evidence of the surrounding circumstances indicate the parties’ shared objective in entering into that contract?

(3) Was the making of the payment conditional upon contractual performance obligations of the employee?

(4) Upon the discharge of the employer’s contractual obligation by payment to the employee, did the employee become subject to consequential contractual performance obligations that were not (fully or partially) present before his receipt of the payment?
Overview of the competition law regime

Hong Kong joined over 130 jurisdictions around the world in implementing a cross-sector competition enforcement regime when the full provisions of the Competition Ordinance (Cap 619) (CO) came into force on 14 December 2015. The CO regulates or provides for the following:

1. agreements which may harm competition (the First Conduct Rule)
2. abuse of substantial market power (the Second Conduct Rule), and
3. merger control for the telecommunications industry (the Merger Rule).

The Competition Commission (‘the Commission’) is the regulatory body in Hong Kong that brings enforcement actions to the Competition Tribunal (the Tribunal).

First Conduct Rule

The First Conduct Rule is set out in Section 6(1) of the CO. It provides that an undertaking (that is, any entity engaged in economic activity; see Section 2(1) of the CO) – if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong – must not:

- make or give effect to such an agreement
- engage in such a concerted practice, or
- as a member of an association of undertakings, make or give effect to such a decision of the association.
Common examples of anti-competitive conduct targeted by the First Conduct Rule include cartels, which usually involve price-fixing, bid-rigging, market sharing and/or output restrictions.

**Second Conduct Rule**

The Second Conduct Rule is set out in Section 21(1) of the CO. It prohibits an undertaking which has a substantial degree of market power in a market from abusing that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

In determining whether an undertaking has a substantial degree of market power, the following matters listed in Section 21(3) of the CO will be considered:

- market share of the undertaking
- the undertaking’s power to make pricing decisions, and
- any barriers to entry to competitors into relevant markets.

Common examples of abuse of substantial market power include predatory pricing, tying and bundling, refusal to deal and exclusive dealing.

**Merger Rule**

The Merger Rule is established by schedule 7 and takes effect pursuant to Section 162 of the CO. It prevents an undertaking from directly or indirectly carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong. Nevertheless, the rule only applies where an undertaking that holds a carrier licence within the meaning of the Telecommunications Ordinance (Cap 106) is involved in a merger.

**The significance of the competition law regime**

The significance of this new regime must not be overlooked.

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... the criminal standard of proof applies in enforcement actions...

First, the regime applies to all Hong Kong’s economic sectors, including the construction sector, the financial services industry, retail sectors, the telecommunications and broadcasting sector and the transport industry (see Conor Quigley QC and Suzanne Rab, Hong Kong Competition Law; Hart Publishing, 2017, Chapter 7).

Second, undertakings, including natural persons, that contravene the rules may face serious consequences. They could face pecuniary fines of up to 10% of the turnover (that is, revenue before deduction of expenses) during the period of contravention. If that contravention occurs for more than three years, the cap is at 10% of the turnover of the three years with the highest turnover (see Section 93(3) of the CO).

Third, natural persons involved in a contravention of the rules may also face pecuniary fines. The Tribunal can also seek a disqualification order of up to five years against directors of the companies involved in the infringement (see Sections 101–102 of the CO).

**The two enforcement actions**

On 17 May 2019, the Tribunal handed down its judgments on the first two enforcement actions involving a breach of the First Conduct Rule: (i) *Competition Commission v Nutanix Hong Kong Ltd and Others* [2019] HKCT 2 (the Nutanix decision), and (ii) *Competition Commission v W Hing Construction Co Ltd and Others* [2019] 3 HKLRD 46 (the W Hing decision).

The Tribunal ruled that the criminal standard of proof applies in enforcement actions seeking a pecuniary penalty for contravention of competition law. This set Hong Kong apart from the UK, Canada, New Zealand, Singapore and Australia as the only common law jurisdiction that applies a criminal standard of proof,
in other words, beyond reasonable doubt. This is a very onerous standard for the Commission to meet. In particular, most competition law infringements are necessarily clandestine by nature.

These two landmark decisions also laid down many other significant rulings that have helped to shape the landscape of the new competition law regime. We will however focus on the doctrine of attribution of liability: (i) whether a rogue employee’s contravention can bind his/her employer, and (ii) whether an independent contractor’s contravention can bind a party.

**The Nutanix decision**

In this first enforcement action, the Tribunal found all but one of the five respondents – each of which was an IT company – liable for contravening the First Conduct Rule by engaging in bid-rigging concerning a tender for the supply and installation of a new IT server system for YWCA in 2016. In brief, ‘dummy bids’ were arranged to be submitted in order to assist BT Hong Kong Ltd’s bid.

This enforcement action has far-reaching implications for when liability of an employee can be attributed to an employer.

1. The conduct of submitting a dummy bid by a junior rogue employee of the third respondent (SiS International Ltd), whose general duties did not include submission of tenders nor provision of any binding quotation, was not attributable to SiS (see paragraphs 375 to 377 of the Nutanix decision).

2. In reaching this decision, the Tribunal formulated a somewhat new test for attribution of liability in Hong Kong, that is, the ‘sufficient connection’ test, stating that: ‘There must be a sufficient connection between the acts of the employee in question and the undertaking so that the former can properly be regarded as part of the latter in the relevant context’ (see paragraph 372 of the Nutanix decision).

**The W Hing decision**

The Commission brought the second enforcement action against 10 decoration contractors approved by the Hong Kong Housing Authority (HKHA) for decoration works of three new blocks of flats in public housing estates. The Commission’s case was that the 10 respondents had allocated the floors they would work on and had used a joint flyer setting out basic packaged...
prices in providing decoration works in Phase 1 of On Tat Estate between June and November 2016.

All respondents – except the first respondent (W Hing) and the ninth respondent (Wide Project Engineering & Construction Co) – initially relied on the economic efficiency defence under Section 1 of schedule 1 to the CO. On the other hand, W Hing and Wide Project relied on the subcontractor defence in that they had subcontracted the entirety of the works to respective independent contractors for their own profit and loss, in exchange for a fee of HK$200,000.

The Tribunal ruled that all respondents were liable for the contravention of the First Conduct Rule in the form of market sharing and price-fixing. In so ruling, the Tribunal also rejected the economic efficiency defence and the subcontractor defence.

**Key lessons from the two enforcement actions**

Notwithstanding the fact that some of the respondents in the first two enforcement actions are appealing against the decisions, the decisions have nevertheless provided important pointers for compliance purposes and internal control.

Corporate entities in Hong Kong must familiarise themselves with the concept of an ‘undertaking’ as the perpetrator of a contravention of competition law that underpins the limits of an enforcement action. It is a very broad concept and can encompass several entities or even legal persons within an economic unit (see *Akzo Nobel and Others v European Commission* (C-97/08P) [2009], paragraphs 55–56; *Sasol and Others v European Commission* (re Candle Wax Cartel) (T-541/08) [2014] 5 CMLR 16, paragraphs 139–140). Not only are employees usually being treated as part of an undertaking, agents and subsidiaries may well also be treated as part of the undertaking of a principal or parent.

In the context of an employment relationship, an employer who has no knowledge of, or who has not authorised, a contravention carried out by an employee will only be able to escape liability if the employee’s duties had no sufficient connection with the acts that led to the contravention. In other words, the employee was clearly not put up to the very task in question. Likewise, a party cannot disclaim liability by simply outsourcing the relevant works. The determining factor is whether there is unity in the conduct of the relevant entities on the market. In the W Hing decision, the Tribunal held that, amongst others, the renovation work was promoted to the tenants in the name of W Hing and Wide Project, and the contracts with the tenants were also executed in the name of W Hing and Wide Project, who remain ultimately answerable to the HKHA. Therefore, W Hing, Wide Project and their respective subcontractors had to ‘act together’ in the provision of renovation services such that there was unity in their conduct on the market (see paragraph 317 of the W Hing decision).

In order to protect companies and employers, proper internal monitors and compliance procedures must be in place. There must be training for both management and staff in the major pitfalls related to competition law, and specific directives on these compliance or regulatory matters must be issued. Crucially, companies should only place people they can trust in important positions that provide access to sensitive information, including price information.
Shanda Games: Important Privy Council ruling on minority discount

In its recent decision in the Cayman Islands case of *Maso & Blackwell v Shanda Games* [2020] UKPC 2, the Privy Council delivered a landmark judgment on the question of whether a minority discount should be applied when valuing shares under Section 238 of the Cayman Islands Companies Law. Shanda Games is the first case under Section 238 to reach the Privy Council, the highest appellate court in the Cayman jurisdiction.

Section 238 gives shareholders of a Cayman company the right to dissent from a proposed merger or consolidation, and to thereby demand payment of the "fair value" of their shares. In recent years, many US-listed Cayman Islands companies with operations in the PRC have decided to "go private" by means of a Cayman Islands merger. This has in turn given rise to several high-profile dissenting share appraisal cases, often involving professional arbitrage funds seeking to exploit Section 238 for profit.

Shanda Games (the *Company*), which had previously been listed on NASDAQ, was taken private by way of merger on 18 November 2015. Shareholders who did not form part of the buyer group and did not exercise their right to dissent from the merger were cashed out at a price of US$3.55 per ordinary share or US$7.10 per ADS (the *Merger Price*). Two shareholders dissented from the merger with an aggregate shareholding of 8,822,062 ordinary shares, equivalent to 1.64% of the Company’s issued share capital (the *Dissenting Shareholders*). On 4 February 2016, the Company presented a petition to the Grand Court of the Cayman Islands seeking a determination of the fair value of the Dissenting Shareholders' shares.

At trial, the parties' respective valuation experts agreed on two key issues. The first was that the most appropriate valuation methodology in the circumstances of the case was the discounted cash flow (DCF) methodology. It should be noted that Section 238 does not prescribe any particular valuation methodology. In the recent Grand Court decision of Qunar Cayman Islands Limited (FSD 76 of 2019 – RPJ), for instance, Justice Parker ruled in favour of a weighted approach, combining equally the DCF approach with an analysis of the company's share trading price prior to the announcement of the merger.

The second issue agreed by the experts concerned the discount to be applied to the overall valuation of the Company to reflect the fact that the shares held by the Dissenting Shareholders constituted a minority holding. The experts agreed that, if such a minority discount should be applied as a matter of law, then the appropriate rate would be 23%.

There was, however, disagreement between the parties on the law as to whether Section 238 permitted a minority discount to be applied at all. The Dissenting Shareholders, who opposed any discount, argued that the Court should follow the law and practice regarding minority discount in the US state of Delaware, which has its own, similar regime of dissenting share appraisal with a well developed jurisprudence. Under Delaware law, it has long been settled that dissenting shares are to be valued as a pro rata share of the company, with no minority discount permitted. The Grand Court accepted this argument and refused to...
apply a minority discount. It determined that the
fair value of the Dissenting Shareholders' shares
was US$8.34 per share or US$16.68 per ADS, or
approximately 2.35 times the Merger Price.

The Company appealed to the Cayman Islands
Court of Appeal on the grounds that the judge ought
to have followed English, rather than Delaware,
jurisprudence on share valuation, in particular
because the Delaware position of pro rata valuation
was founded on public policy considerations that
had no relevance in the Cayman Islands. The
Company also relied on the fact that there were
two other mechanisms in the Companies Law that
required the valuation of shares to be acquired
compulsorily, both of which allowed for minority
discount. The Company's appeal was successful,
with the result that fair value was reduced by 23%
to US$6.4218 per share or US$12.8436 per ADS.

The Dissenting Shareholders subsequently
appealed to the Privy Council, which concluded
that a minority discount could be applied,
although this would depend on the facts of the
case, and it accordingly dismissed the Dissenting
Shareholder's appeal on this issue. Three primary
factors were cited in support of the decision:

1. Comparable provisions of the Cayman Islands
Companies Law relating to schemes of
arrangement and squeeze-outs did not
provide for pro rata valuation;

2. The general principle of valuation of shares on
sale is that what has to be valued is what the
shareholder has to sell, which in this case was a
minority shareholding; and

3. The similarities between the Delaware appraisal
remedy and Section 238 did not justify departure
from the principle.

Of particular interest is the Privy Council's explanation
of the "general principle" of valuation of shares,
established in the House of Lords' decision in Short v
Treasury Comrs [1948] AC 534:

"That general principle is that where it is necessary
to determine the amount that should be paid when
a shareholding is compulsorily acquired pursuant
to some statutory provision, the shareholder is only
entitled to be paid for the share with which he is
parting, namely a minority shareholding, and not for
a proportionate part of the controlling stake which
the acquirer thereby builds up, still less a pro rata part
of the value of the company's net assets or business
undertaking." (para. 47).

The Board noted that this "judge-made principle"
 could be displaced or varied by legislation.
Nonetheless, the reasoning behind the Board's
decision gives it a relevance that goes far beyond
the Cayman Islands' merger regime. The general
principle expounded by the Board will potentially
affect judicial valuations of minority shareholdings
across the common law world, especially where the
application of a minority discount is in contention. It
may also turn out to be influential in jurisdictions in
which the Privy Council's decisions are not, or are no
longer, binding, such as Hong Kong.
State immunity and crown immunity are two types of jurisdictional immunities invoked by Chinese State-Owned Enterprises (“Chinese SOEs”) before national courts from time to time. These two types of immunities, though derive from different legal notions, afford jurisdictional immunities to States and their instrumentalities and/or agents.

This paper examines, both from the common law approach and the perspective of the Chinese law, whether Chinese SOEs are entitled to state immunity or crown immunity.

What is a Chinese state-owned enterprise? The term “Chinese state-owned enterprise” is not a legally defined concept under the PRC law, but it is commonly recognised that there are three types of Chinese state-owned enterprises: (1) wholly state-owned enterprises, namely the entire share capital of the state-owned enterprise is owned by the state through the State-Owned Assets Supervision and Administration Commissions (the central or provincial levels) (“SASAC”); (2) state-controlled enterprises, primarily referring to state-owned enterprises of which 51% of shareholding or more is owned by the state; and (3) state-participated enterprises, namely companies where the state have some (but less than 51%) shareholding interest.
I. STATE IMMUNITY AND CROWN IMMUNITY

State immunity is a principle of public international law derived from the maxim *par in parem non habet imperium* (“equals have no authority over one another”). The classical statement of the rationale of jurisdictional immunity is that of Marshall CJ in the US Supreme Court in *The Schooner Exchange v. McFadden* [1812] 7 Cranch 16:

“This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”

Accordingly, one State cannot claim jurisdiction over another State.1 This immunity covers not only from suit, but also from execution. So, foreign State’s assets cannot be seized by national courts of another State to satisfy a court judgment.2

Crown immunity, different from state immunity, is a common law principle derived from the maxim *rex non potest peccare* (“the king can do no wrong”). Evatt J. in *Federal Commissioner of Taxation v. Official Liquidator of E O Farley Ltd* (in Liq) [1940] HCA 13 explained:

“The Crown is, by virtue of its common–law prerogatives, entitled to the benefit of certain preferences, immunities and exceptions which are denied to the subject. Illustration of such prerogatives are … the rule that the King is immune from the processes of his courts....”

Under this common law principle, a common law court has no jurisdiction over its Crown. It is immune from suit and from being sued; and also its assets are immune from execution.

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1 The principle remains in force and is said to have “[occupied] an important place in international law and international relations”: see Art.5 of the draft Articles on jurisdictional immunities of States and their property (“the Draft Articles”), Jurisdictional Immunities of the States (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p.99, para.57. That said, exceptions have been created thereto. For instance, the ICJ in Germany v. Italy noted that many States now distinguished between acta jure gestionis, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and acta jure imperii (para.59): see also Art.10 of the Draft Articles.

2 Germany v. Italy, paras.113–119.
In the Jassy case, it was held that the state agent entered into appearance without the knowledge or approval of the State. The court held that because it is only the State who can waive immunity and that the immunity was allegedly waived without the knowledge or approval of the State, accordingly the waiver was invalidly made. The Jassy ruling was referred to in Re Republic of Bolivia Exploration Syndicate Ltd., in which the court held that there was no valid waiver of diplomatic immunity in the light of the diplomat having entered into appearance before the court in ignorance of his entitlement to such immunity.

II. ‘STATE AGENTS’ AND ‘STATE INSTRUMENTALITIES’

The next pertinent question to be considered is under what circumstances an entity can be regarded as a state agent or instrumentality. ‘State agent’ or ‘state instrumentality’ are terms used in both context of state immunity and crown immunity. In the context of state immunity, a state agent or state instrumentality, which are used interchangeably, is considered as part of the State under certain circumstances, and hence enjoys state immunity. Insofar as crown immunity is concerned, it has been held that a crown agent or instrumentality may be immune from suit or execution e.g. Gilleghan v. Minister of Health. There is no universal definition of ‘state agency’ or ‘state instrumentality’. I would advocate a twofold test: (1) whether the entity concerned is regarded by the State as its agent under lex incorporationis (“the law of the place of incorporation”). Applying that test to Chinese SOEs, the relevant law to be considered is the PRC law; (2) assuming that the first test is satisfied, then we move on to the next test, namely whether the entity concerned fulfilled the “control” test.

4 See Commentary (16) on Art.1 of the Draft Articles. However, the Federal Court of Australia in PT Garuda Indonesia Ltd. v. Australian Competition and Consumer Commission [2011] FCAFC 52 considered that the two terms should not be treated as largely synonymous (paras. 30–39).
5 See Art.1(b)(iv) of the Draft Articles; ss.3(1), 9, 22, 30 and 35 of the Australian Foreign States Immunities Act 1985; s.14 of the UK State Immunity Act 1985 (the term “separate entity” is used).

6 The two-fold test, however, is not universal. For instance, the US Foreign Sovereign Immunities Act 1976 defines “agency or instrumentality of a foreign state” as an entity (1) which is a separate legal person, (2) which is an organ of a foreign state or political division thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen or a state of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country”, sect 1603.
A. Is the entity regarded by the State as its agent under the lex incorporationis

The relevance of lex incorporationis is obvious. The assertion of an entity being a state / crown agent or instrumentality does not even arise when the relevant State / Crown does not even consider the entity to be as such. In *Fisher v. Begrez* 2 C&M 240 (a diplomatic immunity case) the claim of diplomatic immunity was rejected when the ambassador even refused to acknowledge his servant as within the privilege. In *Krajina v. The TASS Agency* [1949] 2 All ER 274, Tucker LJ held (284D–E):

“I should desire to reserve for future consideration the question whether or not the mere fact of a separate legal existence is necessarily inconsistent with the entity being part and parcel of a sovereign independent state. There again, it must depend on the foreign law. It may be that under some foreign systems of law such a separate existence might be considered inconsistent, but it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as necessarily incompatible with it being a department of State for which immunity can be claimed.”

B. Has the entity fulfilled the ‘control’ test

In addition to lex incorporationis, many jurisdictions apply the control test in determining whether an entity can be considered to be a state agent or instrumentality. In the *Hua Tian Long* case, Stone J. (at para.52) held:

“I agree with the contention that when assessing whether a corporation can be said to be part of the Crown at common law, the material consideration is the control which the Crown has over that corporation, albeit the objects and function of that corporation also go into the evaluative ‘mix’. In terms of ‘control’, I further agree that the salient question to be asked is whether the corporation in question is able to exercise independent powers of its own; as a consequence, ... no doubt it would be possible for a corporation to enjoy immunity for one purpose and not for another.”

The control test is also relevant in the context of state immunity. In *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356, Lord Denning MR discussed the relevance of the control test in the context of state immunity:

**Alter ego or organ of government**

... how are we to discover whether a body is an “alter ego or organ” of the government? ...

I confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions. That is the way in which we looked at it in *Mellenger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604, when I said, at p. 609:

“The corporation ... has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does.”

Whilst it has been held that a state agent or instrumentality need not be subject to day–to–day control of the state, it is suggested that an entity not owned or controlled by the State is not capable of acting in the exercise of sovereign authority, and hence cannot be regarded as a state agent or instrumentality.

The control test is *de jure*, not *de facto*. That is the court is not concerned with whether as a matter of fact the State control the entity; but the more important

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7 Bayley B held “The privilege is not the privilege of the servant, but of the ambassador. This [plea of immunity] is not made on behalf of the ambassador, or of anyone connected with him, but on behalf of the defendant alone.”

8 That said, Lord Denning MR rejected the argument that state immunity should be granted or refused according to the immunities granted internally: pp.559–569; Stephenson LJ also held that the cases on crown immunity should not be used “more than a guide to determining the immunity of government agencies externally”: p.565.


question is whether the State, according to lex incorporantis, has power to control the entity. Needless to say, the greater control, the more likely it is that the entity is recognised as a state agent. But judicial practices tell us that the tendency is against affording entity immunities ascribed to State. For instance, in the context of crown immunity, it was said in Hogg:

The tendency of the decisions is to require a high degree of control; in other words, the tendency of the decisions is against the finding of Crown agent status. The reason, without doubt, is justified reluctance on the part of the courts to extend the special privileges of the Crown any further than necessary. The prevalent judicial attitude was well captured by Gibbs CJ in the High Court of Australia:

‘All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them.’

The result is that the status of Crown agent (at common law) will only be extended to public bodies that are fairly closely controlled by the executive. Any substantial measure of independent discretion will suffice to deny the status of Crown agent to a public body that is subject to some degree of direct control.13

Whether an entity is regarded as a state agent or instrumentality is a fact-sensitive question. The list of factors to be taken into account is far from exhaustive. Here, only some factors commonly considered by common law courts are highlighted.

First, whether the entity enjoys independent discretion over its operation.14 If one considers this factor from the different perspective, using the case of Halifax City v. Halifax Harbour Commissioners [1935] SCR 215, one should ask “Is the entity subject at every turn in executing those powers to the control of the State?”

The next factor to be considered is, assuming that the State has some control over the entity, does the State exercise that control in its capacity as an investor as opposed to the state? So, if the State exercises its control over an entity in its capacity as an investor, that does not count.14 The other three factors that are highlighted here are whether that entity enjoys separate legal personality,15 whether the State has power over the entity’s officers,16 and whether the entity enjoys financial autonomy.17

III. ARE CHINESE STATE OWNED ENTERPRISES PART OF THE CENTRAL PEOPLE’S GOVERNMENT, OR ITS AGENTS/INSTRUMENTALITIES?

A. The position under PRC Law

1. The PRC Constitution

It is quite clear from the PRC Constitution that Chinese state-owned enterprises are not part of the CPG, which is regarded as the Crown after the Hua Tian Long case. Articles 85 and 86 of the PRC Constitution provide:

Article 85

“The State Council, that is, the Central People’s Government, of the People’s Republic of China is the executive body of the highest organ of state power, it is the highest organ of State administration.”

15 E.g. Cannon Brewery Company v. Central Control Board (Liquor Traffic) [1918] 2 KB 101 (CA); the Tamlin case; the Townsville case; and the China Coal case.
16 The Sheedy case, the Westeel–Rosco case, the Townsville case, the Tamlin case and the China Coal case.
17 The Queensland Trading Power case; the China Coal case.
Article 86

“The State Council is composed of the following: the Premier; the Vice-Premiers; the State Councillors; the Ministers in charge of ministries; the Ministers in charge of commissions; the Auditor-General; and the Secretary-General.

The Premier assumes overall responsibility for the work of the State Council. The ministers assume overall responsibility for the work of the ministries and commissions.

The organization of the State Council is prescribed by law.”

It is clear from the above provisions that Chinese SOEs do not form part of the CPG of the PRC.

More importantly, the PRC has also been consistent in rejecting the suggestion that Chinese SOEs are its agents or instrumentalities.

2. Declarations of the PRC Government

In the speech by Mr Guan Jian, Counsellor and Legal Adviser of the Chinese Mission to the United Nations, on 16 November 2000 addressing the United Nations on behalf of the PRC on the Convention on Jurisdictional Immunities of States and their Property, it was said:

“16. ... Under Chinese law, our State enterprises had independent ownership of and the right to dispose of their own assets; they were thus independent of each other and of the State. (The draft articles) objectively reflected that independent relationship between the State and State enterprises, without creating any additional privileges for either, and should therefore be retained.”

The same stance was reiterated on 28 October 2003 by the following statement of the PRC Ministry of Foreign Affairs:

With regard to the relationship between a State and a State enterprise, the Chinese Delegation

maintained that in principle a State enterprise or any other entity set up by a State should not enjoy State immunities, so long as the State enterprise or the other entity has independent act and the capacity to sue or be sued and has the capacity to acquire, possess or own or dispose property, including the property they operate and manage authorized by the State. At the same time, the Chinese Government maintained that it was necessary to differentiate clearly a State and a State enterprise or any other entity set up by a State and that a State enterprise or any other entity set up by a State should independently bear civil liabilities and a State, in principle, should not bear joint and several liabilities for commercial acts and liabilities or debts of a state enterprise or any other entity.

B. The Experience of the Hong Kong courts

1. The China Coal case: the control test

In the China Coal case, an inquiry was made by the Secretary for Justice to the Hong Kong and Macao Affairs Office (“HKMAO”) of the CPG on “the opinion of the Central Government in respect of the issue of Crown immunity involved in the litigation of (the Chinese SOE)” in Hong Kong. HKMAO issued the letter (“the HKMAO Letter”) as follow:

China National Coal Group Corporation is a wholly state-owned enterprise, an enterprise legal person, established according to the law. According to the relevant legal regulations of our country, a state-owned enterprise is an independent legal entity, which carries out activities of production and operation on its own, independently assumes legal liabilities, and there is no special legal person status or legal interests superior to other enterprises. In the Mainland or in foreign states, all state-owned enterprises of our country respond to litigation arising from their activities of production and operation in the capacity of independent legal persons. Therefore, save for extremely extraordinary circumstances where the conduct was performed on behalf of the state via appropriate authorization,
etc., the state-owned enterprises of our country when carrying out commercial activities shall not be deemed as a part of the Central Government, and shall not be deemed as a body performing functions on behalf of the Central Government. It should be pointed out that the opinion above shall not be interpreted as derogation of any rights and immunity enjoyed according to law by the Central Government and its bodies in the Hong Kong SAR.

Accordingly, save and except the “extremely extraordinary circumstances” where a Chinese SOE performs a state function, a Chinese SOE is not regarded as a state agent or instrumentality from the PRC’s perspective.

The stance taken by the PRC quite clearly suggests that a Chinese SOE generally is not entitled to assert immunity that is afforded to the PRC. In fact, Mimmie Chan J. in the China Coal case held (para.23):

Far from stating any support of the Respondent’s claim of extensive control by CPG, and of its being part of CPG, or that the Respondent’s Shares are assets of the CPG, [the HKMAO Letter] in fact states that the Respondent has no special status or interests, and is not to be deemed as a part of the CPG. In my view, the Letter signally defeats the Respondent’s assertion of Crown immunity.

2. The China Coal case: State owned enterprises and institutional organisations (shiye danwei)

Chinese SOEs are to be distinguished from another type of Chinese entities known as 事業單位 (shiye danwei) (institutional organisations). A Chinese intuitional organisation is established for a public purpose. It is not allowed to carry on business without government’s consent. It is usually financially supported by the government and the assets allocated to it must be used for specified purposes.

Also, a Chinese institutional organisation enjoys no autonomy in maintaining assets or disposing assets. In the Hua Tian Long case, the entity concerned therein was an institutional organisation and regarded as part of the Chinese Ministry of Communications (“MoC”). It would have been entitled to crown immunity (upon assertion by MoC) subject to waiver.

IV. AUTONOMY ENJOYED BY CHINESE SOES

A. Protection under the PRC Constitution

A Chinese state-owned enterprise’s autonomy is constitutionally protected under the PRC law. Article 16 of the PRC Constitution provides that “State-owned enterprises have decision-making power with regard to their operation within the limits prescribed by law.” This is consistent with the Chinese policy of separation of the social public administrative functions of the government (政企分家) enshrined in its law such as the Provisional Regulations for Supervision and Administration of State-Owned Assets in Enterprises (企業國有資產監督管理暫行管理條例), in which Arts.7 and 10 provide:

**Article 7**

“The people’s governments at various levels shall strictly execute the laws and regulations on the administration of state-owned assets, shall stick to the separation of the government’s function of administration of public affairs and the function as the contributor of state-owned assets, and stick to the separation of government bodies and enterprises and the separation of ownership and management power.

The state-owned assets supervision and administration bodies shall not exercise the government’s function of administration of public affairs, and the other bodies and departments of the government shall not perform the duties
of the contributor of state-owned assets in enterprises.”

**Article 10**

“The contributed enterprises and the enterprises invested and established thereby are entitled to the right to autonomy in business operations. The state-owned assets supervision and management bodies shall support the enterprises to independently carry out business operations according to law, and may not intervene with the production and business activities of the enterprises except for performing the contributor’s duties.”

**B. Protection under the PRC laws**

Also, Article 6 of the law on the State-Owned Assets of Enterprises (企業國有資產法) (“the PRC SOA Law”) provides that “The State Council and the local people’s governments shall, according to law, perform the contributor’s functions, based on the principles of separation of government bodies and enterprises, separation of the administrative functions of public affairs and the functions of the state-owned assets contributor, and non-intervention in the legitimate and independent business operations of enterprises.”

Accordingly, Chinese SOEs enjoy autonomy in their operation. Whilst the CPG, through SASACs, exercises some control over them, it does so in its capacity as an investor, as evidenced by Article 4 of the PRC SOA Law – “The State Council and the local people’s governments shall, in accordance with the ... laws and administrative regulations, perform” respectively the contributor’s functions for “State-invested enterprises and enjoy the contributor’s rights and interests on behalf of the State”. Also, a Chinese SOE is financially autonomous. Its financial autonomy is protected by the PRC Company Law where an SOE is entitled to have its own assets; also, Article 16 of the PRC SOA Law provides that an SOE has autonomy in possessing, using and profiting or disposing its assets.

In conclusion, Chinese SOEs are not controlled by CPG as a matter of law. It was in fact held in the China Coal case that a China SOE has the capability to exercise independence of its own, and that its business and operation autonomy are in fact enshrined and guaranteed under the PRC law.

**V. CONCLUSION**

From time to time there have been allegations that the PRC is harbouring Chinese SOEs under the guise of state immunity or crown immunity. These allegations ignore the stance that the PRC Government consistently and publicly held that Chinese SOEs are neither their agents nor instrumentalities and they do not enjoy any special status over their counterparts before national courts. Chinese SOEs, in dealing with their commercial counterparts, should also be aware of the stance of the PRC Government and any misconception that they are immune from suit.

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21 The Law on the State-Owned Assets of Enterprises was adopted at the 5th session of the Standing Committee of the 11th National People's Congress of the PRC on 28 October 2008 and came into force on 1 May 2009.

22 Art. 3 of the PRC Company Law.
This Case Report was authored by John Hui

In Da Yu Financial Holdings Limited (formerly known as China Agrotech Holdings Limited) [2019] HKCFI 2531 (17 October 2019), the Companies Court handed down a landmark decision in relation to an important aspect of schemes of arrangement for debt restructuring i.e. professional fees. The decision also breaks new ground by calling for tighter cross-border coordination and for outmoding the practice of “parallel schemes” in different jurisdictions.

**Background and Decision**

Da Yu Financial Holdings Limited (the “Company”) is a company listed in Hong Kong in the trade of fertilizers, pesticides, and other agricultural and non-agricultural resources products. It is incorporated in the Cayman Islands and registered in Hong Kong as an overseas company with its principal place of business in Hong Kong.

The Company has been in liquidation in Hong Kong since a winding up order was made against it on 9 February 2015, with its listing status as its only remaining substantial asset. In order to realise the value of the listing status, the Company’s liquidators found a “white-knight” investor to pursue a debt restructuring of all the Company’s liabilities with a view to resume trading of the Company’s shares. This involved capital reorganisation and issuing new shares to investors, the proceeds of which would be used to pay for the acquisition of a new business, the Company’s restructuring and liquidation expenses, and a compromise of the Company’s existing indebtedness through parallel schemes of arrangement in Hong Kong (the “Scheme”) (pursuant to section 670 of the Companies Ordinance) and the Cayman Islands (the “Cayman Scheme”). Under the Scheme and the Cayman Scheme, the rate of recovery for the general unsecured creditors would be around 4.28%, compared to nil recovery in the otherwise liquidation scenario.

With leave from the Hong Kong Court, a meeting of the Company’s general unsecured creditors was held on 5 July 2019 for them to consider and vote on the Scheme, during which an overwhelming majority of the creditors...
present voted in favour of the Scheme. On 8 July 2019, the Company issued a petition seeking the Hong Kong Court’s sanction of the Scheme (the “Petition”).

In the meantime, the Cayman Court also granted leave for the Company to convene a creditors’ meeting for the voting of the Cayman Scheme, and on 16 July 2019, the Cayman court sanctioned the Cayman Scheme.

The Petition was heard by DHCJ William Wong SC on 22 July 2019. At the hearing, the Judge sanctioned the Scheme with an undertaking from the Company that all its restructuring and liquidation costs and expenses would be subject to taxation, and that any cost savings resulting from the taxation process should be distributed to the Scheme Creditors. A permanent stay of the winding-up of the Company was also granted.

As a result, the Company completed its debt restructuring and succeeded in resuming its shares for trading on 26 July 2019.

On 17 October 2019, the Judge handed down his Reasons for Decision for the Petition.

The Court’s discretion to sanction a scheme

The Court laid out succinctly the principles in considering whether to sanction a scheme. Although the Court has an unfettered discretion to sanction a scheme, it will be hesitant to differ from the views of the creditors as long as these principles are satisfied:

(a) That the scheme is for a permissible purpose;

(b) That creditors who were called on to vote as a single class had sufficiently similar legal rights that they could consult together with a view to determining their common interest at a single meeting;

(c) That the meeting was duly convened in accordance with the Court’s directions;

(d) That creditors have been given sufficient information about the scheme to enable them to make an informed decision whether or not to support it;

(e) That the necessary statutory majorities have been obtained;

(f) That the Court is satisfied that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and

(g) If in an international case, that there is sufficient connection between the scheme and Hong Kong, and that the scheme is effective in other relevant jurisdictions.

In applying these principles, the Court was concerned in particular with how to draw the line with regards to the ratio of the return to creditors to the restructuring and liquidation costs such that the purpose of the Scheme could still be said to be for the benefit of the creditors, and thus fall within the permissible purpose of propounding a scheme. The Court held that there were no hard and fast rules, nor a specific percentage as a guideline. The question to be asked in every case would be (taking into account all circumstances of the case such as the complexity of the scheme) whether the level of the restructuring and liquidation expenses was reasonable as compared to the rate of return to the creditors.

The court also held that there would need to be sufficient information in the Explanatory Statement about the restructuring and liquidation and expenses, such that the creditors and the Court could meaningfully assess the reasonableness of such expenses and that an informed decision could be made as to whether the scheme should be supported or not.

In the present case, the Court held that despite the fact that a breakdown of costs had been included in the Explanatory Statement, there was insufficient information for the Court to assess the reasonableness thereof, given that the amount of such costs was significant as compared to the amount available for distribution among creditors.

The Court also held that although the amount of restructuring expenses is a matter of contractual arrangement between the investor and relevant professionals, which are normally not subject to the
supervision and taxation of the Court, jurisdiction remains with the Court to impose conditions in exercising its function to sanction schemes. The Court therefore only sanctioned the Scheme on the condition that all of the restructuring and other expenses would be subject to taxation, and any cost savings resulting from the taxation process would be distributed to the creditors.

**Cross-border coordination**

After observing that it has become an established practice of Hong Kong-listed companies to use parallel schemes for debt restructuring, the Court remarked that such a practice is outmoded – and is in fact the antithesis of cross-border insolvency cooperation. As the raison d’être for recognising foreign proceedings is the avoidance of parallel proceedings, the Court called for all jurisdictions to provide assistance by giving effect to Hong Kong schemes without requiring Hong Kong office-holders to go to the trouble of instituting full-blown parallel insolvency proceedings in the offshore jurisdiction.

**Key Takeaways from this Decision**

- This is a useful authority summarising both the Hong Kong and English legal principles on the sanctioning of a scheme of arrangement.
- Much more attention should be paid to the issue of restructuring and liquidation costs. Adequate information must be set out in the explanatory statement, enabling the creditors and the Court to assess the reasonableness of the costs. Practitioners should expect that failure to do so will result in the Court’s refusal of sanction.
- Adequate information includes a detailed breakdown of the costs, a detailed description of the nature of the work done, its necessity and complexity, and justification for the level of the costs incurred.
- Practitioners acting for off-shore companies should actively consider doing only one primary scheme (usually in Hong Kong), and liaising with the Court in the off-shore jurisdiction in good time for recognition proceedings.

**John Hui** acted for the Company and the Liquidators in this application.

For more on how Hong Kong is moving closer towards a modified universalist approach click [here](#).
Drawing a line in the sand... how far do the courts go in invoking an arbitration clause?

The recently reported case of *Re Dickson Valora Group (Holdings) Co Ltd* [2019] 3 HKLRD 210 is of jurisprudential importance. It sets the proper limits to (a) striking out an unfair prejudice petition on the ground of lack of *locus standi* and, more importantly, (b) arbitration clauses in shareholders’ agreements.

**Background**

The Petitioner and the Respondents were both shareholders of Dickson Valora Group (Holdings) Co Ltd (the “Company”), which was formed for the purpose of pursuing a business opportunity, which entailed building a shopping mall and hotel complex in Mainland China. The parties entered into a shareholders’ agreement with the following arbitration clause:

> “Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration under the Hong Kong International Centre Administered Arbitration Rules in force at the date of this Agreement (the “Arbitration Rules”)...” (the “Arbitration Clause”).

On 5 November 2012, the Respondents passed a written resolution to make a call on the unpaid shares and for forfeiture of the shares in case of non-payment, relying on certain provisions in the articles. It was the Petitioner’s case that its shares had been fully paid, so it did not pay any of the instalments demanded. As a result, the Petitioner’s 275,000 shares in the Company were forfeited and cancelled.

On 4 December 2017, the Petitioner issued a petition for unfair prejudice complaining about, *inter alia*, the forfeiture of shares (the “Petition”). In May 2018, the Respondents took out a summons to (i) strike out the Petition on the ground that the Petitioner was not a member of the Company; and (ii) stay the Petition in favour of arbitration relying on the Arbitration Clause.

Both of the Respondents’ applications were dismissed.

**Locus Standi of the Petitioner**

The court held that despite the fact that the Petitioner was not registered as a member of the Company when the Petition was presented, it still had *locus standi* to present the Petition.

The forfeiture of shares was the very conduct complained of by the Petitioner as unfairly prejudicial in the Petition. The learned judge considered it to be “highly unattractive”
to contend that the Petitioner should be denied standing to complain about conduct which deprived it of its membership in the Company, on the ground that it is not a member. Whether the Petitioner's shares were validly and properly forfeited should be allowed to be dealt with in the Petition.

As such, the strike-out application was dismissed.

This decision reinforces existing Hong Kong jurisprudence derived from *Re Rational Industrial Ltd* (unrep, HCCW 1193/2002, 20 March 2003); *Alipour v Ary* [1997] 1 WLR 534; *Re Kenly (HK) Ltd* (unrep, HCCW 964/2002, 2 January 2003); and *Re Mak Shing Yue Tong Commemorative Association Ltd* [2005] 4 HKLRD 328, §§52-65.

**Limits to the Arbitration Clause**

Moreover, despite the breadth of the Arbitration Clause, the court further held that the Respondents had not shown, even on a *prima facie* basis, that the matter or substance of the dispute in the Petition fell within the ambit of the Arbitration Clause.

In reaching this decision, the learned judge acknowledged the fundamental differences between company law and contract law. He observed that there were various rights and obligations associated with membership of a company that existed independently of any shareholders’ agreement. There can be various types of disputes between shareholders on questions upon which their shareholders’ agreement, as such, makes no provision at all.

Indeed, the Arbitration Clause applies to disputes arising out of or relating to the shareholders’ agreement or the breach, termination or invalidity thereof, and not arising out of or relating to any affairs of the Company. The complaint is based on a breach of the articles and of the fiduciary duty of directors, on which the shareholders’ agreement makes no provision. These are governed by ordinary company law and therefore does not fall within the scope of the Arbitration Clause.

Accordingly, arbitration clauses in shareholders’ agreements do not necessarily encompass disputes arising out of breach of the Company’s articles. The stay application was therefore also dismissed.

**Key Takeaways**

- This decision brings Hong Kong’s jurisprudence in line with that of other common law jurisdictions, including Australia (*ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896), Canada (*Robotunits Pty Ltd v Mennel* [2015] VSC 268), and Singapore (*BTY v BUA* [2018] SGHC 213).

- This case is a timely reminder that arbitration clauses are not invariably invocable, despite the Court’s generous approach in their interpretation. In the context of shareholders’ disputes, arbitration clauses in shareholders’ agreements may not necessarily encompass disputes arising out of the Company’s articles of association and/or breach of directors’ duties.

The counsel teams involved in this case were:-

**Anson Wong SC, Alan Kwong, and Michael Ng** for the Petitioner

**Rachel Lam SC, Terrence Tai, and Jasmine Cheung** for the Respondents
In *Re Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch), the English court essentially confirmed and bolstered what the Hong Kong court held two years ago – that a foreign solvent liquidation is not entitled to cross-border insolvency assistance.

**The Hong Kong position before Sturgeon**

In *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277; [2018] 1 HKLRD 1120, Harris J suggested that a foreign solvent liquidation would not be entitled to recognition at common law and declined to follow the Singapore court’s decision in *Re Gulf Pacific Shipping* [2016] SGHC 287 in respect of the latter’s approval of the US Bankruptcy Court’s decision in *In re Betcorp Limited*, 400 BR 266 (Bankr D Nev 2009). In *Betcorp*, the US Bankruptcy Court recognised an Australian members’ voluntary liquidation under Chapter 15 of the US Bankruptcy Code.

In *Supreme Tycoon*, Harris J reasoned as follows:

“[I]f the foreign liquidation is a solvent liquidation (for instance, a members’ voluntary liquidation), it would not fall within the principle of modified universalism. A foreign solvent liquidation is not a collective insolvency proceeding, and is more akin to the “private arrangement” the Privy Council was referring to [in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675]. In this connection, with respect, I agree with Lord Neuberger’s dissenting observations in *Singularis*. Accordingly, unlike the Singapore court [in *Gulf Pacific Shipping*], I would not rely on the US Bankruptcy Court’s decision in *In re Betcorp Limited* which concerns an Australian members’ voluntary liquidation being recognised under Chapter 15 of the US Bankruptcy Code. At any rate, it appears that *Betcorp* is a controversial decision even from the perspective of the UNCITRAL Model Law on Cross-Border Insolvency: see Look Chan Ho, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, pp 185–189; *UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (2013) at [73].” (*Supreme Tycoon* at [17] (footnotes omitted)).
The English position after Sturgeon

The material facts are in brief these. Sturgeon Central Asia Balanced Fund Ltd ("the Company") is a fund incorporated in Bermuda. The majority of the Company’s assets were managed in England. In March 2018, the Bermuda court wound up the Company on a shareholder’s petition on just and equitable grounds. The petition argued that there had been a serious breakdown in the basis on which the Company was set up and investors were being denied their rights. The evidence before the court suggested that the Company was solvent throughout.

In May 2019, the provisional liquidators of the Company appointed by the Bermuda court ("Liquidators") obtained recognition in England under the Cross-Border Insolvency Regulations 2006 ("CBIR") which implemented the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") in Great Britain. The Liquidators obtained the recognition order through an ex parte without notice application.

Subsequently a former director of the Company applied to terminate the recognition order. The court treated the application as a review application analogous to the return date of an ex parte application for an injunction.

The court granted the application and terminated the recognition order because the court concluded that a solvent liquidation falls outside the Model Law, and thus CBIR. The key parts of the court’s reasoning are as follows (at [117], [119] and [121]):

"It would be contrary to the stated purpose and object of the Model Law to interpret ‘foreign proceeding’ to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency but have the purpose of producing a return to members not creditors...

The foreign procedure must relate to the resolution of insolvency or financial distress..."

[A] wrong turn was made in Betcorp as it was not an insolvent liquidation but a solvent liquidation. It was necessary to go one step further and ask whether the company was insolvent or in severe financial distress.”

In coming to this conclusion, the court also took account of academic criticisms of Betcorp in Look Chan Ho (ed), Cross-Border Insolvency: A commentary on the UNCITRAL Model Law (4th ed, 2017); Look Chan Ho, Cross-Border Insolvency: Principles and Practice (2016); and Richard Sheldon (ed), Cross-Border Insolvency (4th ed, 2015).

Summary

From a Hong Kong law perspective, this English decision probably cements the common law view that a foreign solvent liquidation will not be entitled to recognition and assistance.

It remains to be seen whether the Singapore common law will move in the same direction.
In Re CEFC Shanghai International Group Limited [2020] HKCFI 167, the Hong Kong Court scored a number of important firsts.

For the first time, the Hong Kong Court recognised and assisted Mainland liquidators.

For the first time, the Hong Kong Court concluded that the infamous House of Lords decision in *Galbraith v Grimshaw* [1910] AC 508 is now anachronistic and does not represent Hong Kong law.

And, most importantly, for the first time, the Hong Kong Court sent a message to the world that while the Hong Kong Court adopts an open and universalist attitude to cross-border insolvency assistance, it expects foreign courts, whose officeholders come to seek recognition, to maintain an equally open and universalist attitude. Foreign courts with a territorialist bent should not expect universalist assistance granted by the Hong Kong Court.

**The facts in brief**

CEFC Shanghai International Group Limited (“Company”) was incorporated in the Mainland, an investment holding company, and part of a conglomerate whose business included capital financing, petroleum refining and infrastructure.

In November 2019, the Shanghai court wound up the Company on insolvency grounds and appointed Mainland liquidators. The Mainland liquidators then discovered the following. The Company’s assets included a claim against its Hong Kong subsidiary, Shanghai Huaxin Group (Hong Kong) Limited (“HK Subsidiary”), amounting to some HK$7.2 billion (“HK Receivable”). As the HK Subsidiary was in liquidation in Hong Kong, the Company had already submitted a proof of debt.

However, before the Company’s liquidation, one creditor of the Company had obtained a default judgment in Hong Kong and a garnishee order nisi in respect of the HK Receivable to enforce the default judgment.

In order to prevent the creditor from obtaining a garnishee order absolute, the Mainland liquidators applied to the Hong Kong Court for recognition and assistance.
The Hong Kong Court’s decision

Mr Justice Harris granted the recognition and assistance sought by the Mainland liquidators. In particular, the recognition order imposes a stay on proceedings against the Company as if the Company were in liquidation in Hong Kong.

In granting the recognition, the Court was satisfied that the Mainland liquidation was a collective insolvency proceeding and thus qualified for recognition in Hong Kong. As the Mainland liquidation requires pari passu distribution of the Company’s assets, the pending garnishee proceedings violated the pari passu principle and the principle of collectivity. Thus the garnishee proceedings ought to be stayed immediately.

In the course of its reasoning, the Court disapproved the House of Lords decision in *Galbraith v Grimshaw*. There a creditor obtained a monetary judgment against the debtor in Scotland, and the judgment was extended to England under the Judgments Extension Act 1868. The creditor then served a garnishee order nisi on a firm who owed a debt in England to the judgment debtor. After the service of the garnishee order nisi, the judgment debtor was adjudicated bankrupt in Scotland, resulting in his estate being sequestered and transferred to the Scottish trustee in bankruptcy. The Scottish trustee in bankruptcy then brought interpleader proceedings in England to determine his rights and that of the judgment creditor with respect to the garnished debt. The House of Lords decided that where a Scottish sequestration occurred about a fortnight after an English garnishee order nisi, the judgment creditor prevailed over the Scottish trustee in bankruptcy.

If *Galbraith v Grimshaw* were to be followed, one could conclude that where a Hong Kong garnishee order nisi had preceded a foreign liquidation, the Hong Kong Court’s recognition of the foreign liquidation would not prevent the creditor from obtaining a garnishee order absolute. However, Mr Justice Harris concluded that the House of Lords decision “is inconsistent with contemporary cross border insolvency law and its reasoning is inapplicable to modern common law cross border insolvency assistance”.

Commentary

- This decision is a most welcome and important development of common law cross-border insolvency assistance.
- No less important is this *obiter* comment: “The extent to which greater assistance should be provided to Mainland administrators in the future will have to be decided on a case by case basis and the development of recognition is likely to be influenced by the extent to which the court is satisfied that the Mainland, like Hong Kong, promotes a unitary approach to transnational insolvencies.”
- As Hong Kong is now the most advanced jurisdiction in the world in terms of common law cross-border insolvency assistance, this is an important message and reminds the world of the true rationale of cross-border insolvency assistance: universalism.
- Taken to its logical conclusion, this is also a message that territorialist courts should not take the Hong Kong Court’s openness and universalist attitude for granted.

Look-Chan Ho and Tommy Cheung acted for the Applicants in this case.
DVC is delighted to announce that 23 members were recognised by Chambers & Partners Asia 2019-2020 comprising 14 Silks and 9 Juniors including a debut entry for Christopher Chain. To read more about this click here.

For an overview of members' accolades from Chambers and Partners Asia-Pacific 2020 click here.
Who from DVC made it on to Who’s Who Legal: Restructuring & Insolvency – 2020?

DVC’s Look-Chan Ho is uniquely, the only Hong Kong barrister to be featured in this year’s Who's Who Legal: Restructuring & Insolvency – 2020 Global Guide.

Who made it onto the Global Elite Thought Leader's list for Who's Who Legal for Construction Law?

DVC’s Ian Pennicott QC, SC was recognised by Who's Who Legal for Construction Law as a Global Elite Thought Leader 2020.

Butterworths Hong Kong Trade Marks Law Handbook – 3rd Edition authored by DVC’s Stephanie Wong

DVC’s Stephanie Wong is the author of the recently published Butterworths Hong Kong Trade Marks Law Handbook (3rd Edition)

This comprehensive guide consolidates and breaks down the text found in the Trade Marks Ordinance (Cap 559) and provides section-by-section annotations covering significant judicial decisions, discussions on practical aspects, contentious issues, and other authoritative materials.

Latest DVC member to join the Tax Board of Review 2020

Connie Lee is DVC’s latest member to join the Member of the Board of Review (Inland Revenue Ordinance).
Two members from DVC are appointed to a new Sub-committee on Outcome Related Fee Structures for Arbitration

Hong Kong lawyers are currently precluded from charging fees dependent or contingent upon the outcome of an arbitration. As part of an effort to review the current position relating to outcome related fee structures for arbitration, a Sub-Committee was constituted in October 2019 to consider whether reform is needed to the relevant law and regulatory framework and, if so, to make recommendations for reform as appropriate.

DVC’s José-Antonio Maurellet SC and Benny Lo were appointed as members of that Sub-Committee.

Which Silk was recently appointed a member of the Standing Committee on Company Law Reform?

DVC’s Rachel Lam SC has been appointed a member of the Standing Committee on Company Law Reform (SCCLR) for a period of two years effective from 1st February 2020 - 31st January 2022.

The remit of this position will entail advising the Government on new developments relating to HK’s evolving company law. This will include amendments relating to the Companies Ordinance and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (CWUMPO) as well as the Securities and Futures Ordinance.

The latest contributor from DVC to join as editor for the White Book 2020

This year, Sabrina Ho joins a cohort made up of 14 DVC members as an Editor of HK’s Civil Procedure Rules (The White Book) for 2020.
Recent Events

Is Hong Kong a Victor or a Victim in the US-China Trade War?

“An Oxford Study that came out after the Umbrella Movement showed that out of 136 countries [polled] globally, in terms of inequality, top of the list, no surprise, was ... Swaziland where one person owned 99% of the GDP. Second on the list was a huge surprise to everybody... because we all think that the real inequality exists in places like China, Sub-Saharan Africa, Russia, etc. But in fact, number 2 was Hong Kong, where 45 individuals or families owned 76% of the GDP. So we know exactly what's going on...”

This was a poignant quote lifted from Daniel Fung SC’s talk at the AmCham Conference entitled Global Impact: The US-China Relationship in the 21st Century held on 20th September*. Daniel joined an eminent panel, flanked by Regina Ip Lau Suk-yee, GBS, JP, member of the Executive Council and Legislative Council of Hong Kong, as well as the founder and current chairperson of the New People’s Party along with Steve Vickers of Steve Vickers Associates, and Mary Hui, reporter for Quartz, also joined the panel. Shibani Mahtani, South East Asia’s correspondent for the Washington Post moderated the panel entitled “Victor or Victim: Hong Kong’s Role between the Battling Giants” and asked a series of probing questions anchored in the Hong Kong protests and Hong Kong’s position in the US-China trade war.

Unsurprisingly, the questions raised by the audience centered on whether and how the Gordian knot of the HK protests could be unpicked. Was the potential for a negotiated resolution dimming or was a sense of urgency going to pave the way for an accelerated approach?

Weighing in with salient points turning on the rise and fall of China vs. Hong Kong, Regina Ip noted, “you don’t have to be pro Hong Kong, and anti-China, but the lack of identification with China on the part of a lot of young people is a fact. And it’s not something that is easy to fix. There is a sense,” she stated “that many of HK’s young people don’t see a way forward. There’s a... loss of hope, because of our declining competitiveness in many areas. There’s a sense of China rising, and Hong Kong falling.” The solution wasn’t easy - but neither did she believe the current status to be “permanent.”

Despite noting that the “genie could not be put back in the bottle,” Daniel Fung SC was relatively more bullish about the crisis in HK than his counterparts on the panel given that as he stated, “HK has always been a win-win-win, historically; for HK, for China and for the outside world.” According to Daniel, there were ways to capitalize on the gains in the wake of the protests and indeed, gains had been made insofar as achieving concrete results by first securing the suspension of the bill and second by achieving the withdrawal of the bill. Time, was critical, he asserted, going on to say that “there was a time and tide in the affairs of men.” In his view, there was no reason why the One country Two systems precept couldn’t continue after June 30th 2047 because China took the approach that if it ain’t broke, then don’t fix it. He maintained that “nobody argued against One Country, Two Systems except for perhaps a marginalized majority who advocate independence” – but as Daniel decried this was “pie in the sky.” Given that he was instrumental in the drafting of

* Please note that this event took place in September 2019 and therefore some content may be out of date.
the Basic Law in 1985, he noted that the One Country Two systems solution didn’t mean that the lights had to go off at the stroke of midnight on 30 June 2047. There was certainly scope for One Country, Two Systems to continue.

Some split-screen thinking later emerged on the stage when Mary Hui suggested that large scale peaceful marches were a great way to express what protesters wanted given that this was a form of dialogue. Taking a different view, Steve Vickers expressed that he did not see an endgame if the marches continued and that the violence that had accompanied the protests were “disastrous” for Hong Kong. He believed that leaderless protests were unsustainable given that a leader was needed to instigate a dialogue.

Echoing this sentiment, Daniel too observed that there was an inverse relationship between the level of violence and the size of the protesting crowd – noting that the escalating violence had to make up for the declining numbers.

Daniel’s message was an appeal to dial down the rhetoric and to “lower the temperature given that time is an effective balm.” He suggested that a Commission of Inquiry be set up as this has historically worked for HK so there was no reason it couldn’t work now. It also offered a prospective solution geared towards looking ahead and would have the desired effect of generating a dialogue which could be an effective tool to address the undercurrent that had arisen.

Listen to the video here to hear more of Daniel’s current thinking on the origins of the One Country Two Systems ‘mantra.’

Keynote speakers at the conference included Max Baucus, former US Ambassador to China during Obama’s presidency.
IBA Conference Seoul 2019

Sharing strategic insights on the state of play of many of the world’s most pressing issues including rising populism, bullying, sexual harassment and AI, a diverse range of speakers came together before a global audience at the IBA Conference in Seoul in September 2019.

DVC’s Winnie Tam SC, JP chaired a deep dive discussion on global justice.

In a video that revealed that the uses of AI are potentially infinite, we saw the intersection between intellectual property and AI. This engaging video of a blind employee at Microsoft showed how he was able to develop an app that enabled him to ‘see’ via AI. What can be patented turns on what is deemed ‘technical’ and whether the contribution is regarded as novel, amongst other things.

Global Justice and Globetrotting Judges

In a talk entitled Global Justice and globetrotting judges, DVC’s Winnie Tam SC, JP chaired a world cafe style session at the IBA Conference in Seoul on 24th September.

The session explored the issues associated with the administration of and delivery of justice in international courts. The speakers also contemplated the unique position of foreign judges who sit in appellate courts of domestic jurisdiction.

The Hon. Mr Justice Joseph Fok, PJ took the audience through the special facets of the court's jurisdiction in HK with specific regard to the Court of Final Appeal, (CFA) and a novel but significant feature of the HK judicial system which enables visiting judges, usually made up of 1 voice out of 5, to sit on the CFA to hear appeals.

Mr Justice Fok explained that the CFA was established after the Handover in 1997 and that it replaced the Judicial Committee of the Privy Council in London as the highest Court in Hong Kong. He clarified that it heard civil and criminal appeals. The Basic Law, he elucidated, which came into effect after the 1997 Handover, guaranteed that the previous legal system would remain in tact and he verified that Article 81 in particular stipulates that the CFA may invite judges from common law jurisdictions to sit on the CFA, which the speaker maintained was a contributing factor to the success of the Court since its establishment. The rationale for this was to ensure a combination of a deep bench of experience, drawn from diverse fields of law, as well as a commitment to the preservation and reaffirmation of the rule of law, and the independence of the Court and the HK judiciary, amongst other things.

Winnie deftly chaired the lively panel which consisted of speakers, the Hon. Mr Justice Joseph Fok, PJ and Justice Quentin Loh, Supreme Court of Singapore. Co-moderators included: the Hon Justice Martin Daubney AM, Supreme Court of Queensland, Brisbane, Queensland, Australia, Member, Judges' Forum Advisory Board, and Justice Ngozika Okaisabor, Customary Court of Appeal, Abuja, Nigeria, Vice Chair, Judges' Forum.
“Inspiration vs Appropriation: Well-known Trademarks in Hong Kong, China and around the World” – a collaborative presentation by DVC and DLA

Differences between satire, parody and pastiche as well as the phenomenon known as Shanzhai were discussed in a joint IP presentation featuring DVC’s Winnie Tam SC, JP, CW Ling and Stephanie Wong and their counterparts, Ed Chatterton and Liam Blackford from DLA Piper. In a seminar entitled "Inspiration or Appropriation: Well known Trademarks in Hong Kong, China and around the World", DVC and DLA joined forces on 17th October to home in on these topics and more before an engaged audience made up of over 50 in-house counsel and solicitors.

After opening remarks by Winnie Tam SC, JP, Stephanie kicked off by providing an overview of the factors that made up well known trademarks, and the conditions of infringement. She also discussed the concept of dilution in the context of economic behaviour, commercial magnetism and genericide. As regards genericide, she cited the example of Pepsi’s slogan, "dying for a coke, take a Pepsi." And in a memorable quote about Louis-Vuitton’s ‘designer paper offerings' which pays homage to the dead, Stephanie quipped that people in HK not only "lived by Louis-Vuitton but seemingly died by the brand as well."

CW Ling discussed the need for a link and for a change in consumers’ behaviour in the context of infringement. Establishing a link necessitated a degree of similarity so as to call an earlier mark to mind. He cited the LV case. He also elaborated on the elements of Encoding, Recoding and Decoding and provided interesting examples of Parodising vs Recoding Trademarks in the context of McDonalds and Starbucks.

In an animated presentation that hewed closely to the images contained in her presentation, Winnie took the audience through several jurisdictions to show different stances taken: in the US she referred to a more liberal approach whereas in the UK and the EU, more conservative stances were adopted.
in the context of granting/refusing to grant injunctions for infringement. A standout example was the Lady Gaga vs Lady Goo Goo case (Ate My Heart v Mind Candy Ltd [2011] EWHC 2741 (Ch)) where Lady Gaga successfully obtained an injunction to stop the Defendant from releasing a song called The Moshi Dance. Vos J took the view that that the parody defence was not available. Winnie also spotlighted cases from South Africa, the EU, Hong Kong and the UK. A short video featuring the jarring and colourful song Barbie Girl by Aqua was played during the presentation. This was an example of when the Courts dismissed a lawsuit filed by Mattel for infringement in the case of Mattel v MCA Records, 296 F.3d 894 (9th Cir. 2002).

Ed Chatterton from DLA homed in on Shanzhai or counterfeit consumer goods, citing some amusing examples that included Pizza Huh, KFG (instead of KFC), Adidos and Buckstar Coffee. And Liam wrapped up by taking the audience through the Michael Jordan v Qiaodan case, the Lafite case and the Xinhua Zidian case - the latter pertaining to unregistered TMs, infringement and unfair competition. He concluded with a helpful summary of the key takeaways from each case and moderated some thought-provoking questions from the audience after the seminar.

It was an entertaining and lively presentation and DVC would like to thank DLA for providing a lovely venue for the event.
Recent Events

**Trusting and probate law over sundowners**

It was a pleasure welcoming an erudite group of students and qualified lawyers from the University of Liechtenstein to Chambers on Monday, 21st October for sundowners and conversation relating to recent case law on Trusts and Probate with DVC’s Patrick Fung BBS, SC, Qc, Chua Guan–Hock SC, Clifford Smith SC, Christopher Chain, Jason Yu, Kevin Lau, Tiffany Chan and Euchine Ng and Dr Francesco A Schurr and Dr. Alexandra Butterstein LL.M. from the University of Liechtenstein.

**Spotlighting audit trails and interim measures in aid of arbitration**

On 12 October 2019, a small delegate from Des Voeux Chambers delivered an engaging seminar on practice tips in the context of cross-border dispute resolution in the Shenzhen Office of Global Law Offices.

DVC’s Dr William Wong SC JP shared with the audience practical guidance on proper preparation in litigation. Drawing from his experience, he homed in on the importance of keeping an adequate audit trail. The audience was made up of solicitors and in-house legal counsel.

Sabrina Ho and Vincent Chiu respectively spoke about the topical issue of interim measures in aid of arbitration and enforcement of arbitral awards and judgments in Hong Kong. The presentation was insightful and illuminating.

This event was co-organised by CLECSS and Global Law Offices.
Recent Events

Maritime Week Legal Forum 2019

The Maritime Week 2019 Legal Forum, “Maritime Dispute Resolutions in A Weak Market – Is mediation a feasible alternative resolution?” was successfully held by the Hong Kong and Mainland Legal Profession Association (“the HKMLPA”) on 19 November 2019 in the Department of Justice Function Hall.

Mr. Liu Chun Hua, Director-General of the Department of Law of the Liaison Office of the Central People’s Government in the HKSAR extended his welcome remarks to the audience. Sabrina Ho, Committee Member of the HKLPA and Douglas Lam SC then joined forces with Ms. Ada Chen of the Department of Justice, Dr. Francis Law of the International Disputes Resolution and Risk Management Institute and the Mediation Centre, Mr. Min Lee of Reed Smith Richards Butler and Mr. Dimitris Seirinakis, Managing Director, The American P&I Club to deliver a seminar and an interactive panel discussion to over 80 guests.

The pros and cons of mediation and the growing trend of using mediation as the preferred means to resolve shipping and commercial disputes were thoroughly and critically explored, and an overall consensus was reached that mediation is a feasible alternative resolution to litigation and arbitration with its unique advantages.
BIP Asia Forum featuring DVC’s Winnie Tam SC, JP and CW Ling

On Day 1, Winnie Tam SC, JP and CW Ling appeared as panellists in the BIP Asia Forum held at the HKCEC. Winnie was a panel speaker on a talk entitled: Divergence: Unwelcome users of well-known copyright works and trademarks. On Day 2 she was the keynote speaker for a panel entitled: Effective Global IP enforcement mechanisms – How does the HKSAR contribute to the cause? CW Ling’s talk featured unwelcome uses of well-known copyright works and trademarks and explored the issue of parody through the lens of owners and users of IP rights. The discussion raised searching questions about our conventional understanding of IP laws and their functions. He shared his insights on international case law and legislation in an entertaining and memorable session moderated by Anita Leung, of the Licensing Executives Society China.

The following day, on 6 December 2019, CW Ling was invited back to the BIP Asia Forum in a panel discussion on IPR dispute resolution and innovative technology. In his capacity as the Chairman of the Hong Kong Mediation Council, CW homed in on the question of whether mediation was suitable for resolving disputes in the creative and entertainment industries. The talk centred on a (fictitious) story about how a singer fell out with a recording company, and how mediation helped the parties reach a win-win solution. The session kicked off with welcome remarks by Teresa Cheng GBS, SC, JP, the Secretary for Justice.
In a first-time collaboration between DVC and Dentons Shenzhen, a joint presentation was held on 10 December 2019, on the topic of well-known trademarks. Speakers from Dentons (Ms. Wang Haifeng, Mr. Zhao Long and Mr. Christopher Zhang) shared their insights on PRC trademark law. Then, in a lively and interactive presentation, DVC’s CW Ling and Sakinah Sat took the participants on a whirlwind tour around the world, exploring the tension between free speech and the rights of IP right owners under the laws of Hong Kong, PRC, US, UK and EU. Colourful graphics, amusing stories and a music video taken from case examples ensured the audience were kept engaged.
DVC’s Christmas lunch featuring HK’s Irish Consul-General

David Costello, the Irish Consul General for Hong Kong, attended Des Voeux Chambers’ Christmas lunch on Friday, 13 December.

As DVC’s guest speaker, he examined the Irish contribution to Hong Kong's legal and judicial system. David was uniquely positioned to explore Hong Kong’s jurisprudence given the deep roots and connections that the Irish community have to Hong Kong and its history. Notably, Sir William Des Voeux served as the 10th Governor of Hong Kong between 1887–1891.

William Des Voeux, of particular interest to our members given the namesake, came from a French Huguenot family. Before becoming the 10th governor of Hong Kong in 1887, he also passed the Bar Exams.

David took us through a brief but vivid overview of William Des Voeux’s contribution to HK’s history sketching out the details of an indelible legacy that he left behind. This included the launch of the first girls’ school in 1890 on Hollywood Road. He was also responsible for establishing the Peak Tram which provided affordable
transportation for residents on the Peak. And a year before he left office, HK Electric was installed in order to provide electricity to HK island. Taking us through the hallmarks of the other Irish governors of HK, David also referenced Henry Pottinger, an Anglo-Irish soldier who became the first governor of Hong Kong. He established both ExCo and LegCo.

Over our Christmas lunch, we learnt about the significant Irish impact in Hong Kong, discovering that numerous Governors, Chief Justices, Attorney Generals, and Police Magistrates hailed from Ireland.

David capped off his talk with a nod to Henry Blake – the 12th Governor of Hong Kong. He revealed that the Bauhinia, discovered in 1880 (the flower that appears on the HK flag and our currency) was named after him as its original name is the Bauhinia Blakeana. The Bauhinia became Hong Kong’s official emblem on 1 July 1997 and this is one of the most enduring symbols of the Irish influence that can still be felt in Hong Kong today.
Pre-Christmas Mediation get together hosted by CW Ling

Fellow mediators, lawyers and friends enjoyed a cup of Christmas cheer with CW Ling, Chairman of the Hong Kong Mediation Council, at a party held at DVC on 18 December 2019.
DVC's Crossword Puzzle

Have a go at completing DVC’s inaugural interactive crossword puzzle. Scan the adjacent QR code to unlock the clues to the puzzle and click [here](#) for the e-version. Send the completed version to [aparnabundro@dvchk](mailto:aparnabundro@dvchk).

All answers can be found in this edition of *A Word of Counsel*.

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**DVC Donation**

In light of the Coronavirus (CovID–2019) many of DVC’s members donated masks and funds to support those in need of masks – particularly the homeless, the elderly and the street cleaners – via ImpactHK.

[impacthk.org](http://impacthk.org)
DVC's standout members are recognised for being exceptionally good for being "quick on [their] feet" and "for having the ear of the judge" and for being "relentless", "eloquent and well-liked" and "not afraid of a scrap."

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Patrick Fung BBS, SC, QC, FCIArb
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Winnie Tam SC, JP
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