A Word of Counsel

2nd edition 2019 (6th issue)
Articles

In The Changing Anatomy of Confidentiality in Arbitration, Anthony Houghton SC considers why confidentiality is double-edged. Is it appealing or does it inhibit certainty and preclude further development of the law? Read more about how the position may change.

The new interim measures are forecasted to change the slate of jurisprudence. Read more as DVC’s José-Antonio Maurellet SC, Ellen Pang and Yanhua Lin of Fangda Partners take you through the significance of the agreement and provide you with actionable takeaways.

Case Reports

Tip of the iceberg or tip of the spear? Find out what sets Hong Kong apart from other jurisdictions in two new groundbreaking cases spotlighting bid-rigging, market sharing and price-fixing featuring Catrina Lam, Connie Lee and Tommy Cheung.

This is not the Curious Case of the Dog in the Night-time but the Curious Case of the Hong Kong Company, its cross-border assets, the Taobao auction, and the interlocutory injunction in Chen Lingxia v. 中国金谷国际信托有限责任公司. Take a look at this novel and innovative case which raises complex cross-border issues authored by Rachel Lam, Cherry Xu and Tiffany Chan which also involved William Wong SC, Anson Wong SC, Gary Lam, Alexander Tang and Sharon Yuen.

Why can’t you have your cake and eat it too? Find out when Rachel Lam, Terrence Tai, Jasmine Cheung and Sharon Yuen consider a leading-edge case entailing applications and an anti-suit injunction involving an intersection between the Hong Kong Courts and the PRC. Anson Wong SC, Alan Kwong and Michael Ng were also involved.

How does the pivotal case of Re Ho Yuk Wah, David (the Bankrupt) change the narrative on the court’s power to compel the production of documents in bankruptcy and liquidation proceedings? Patrick Siu acted on behalf of the respondents, and he examines this case, which also featured David Chen who represented the applicants.

What calculation mechanisms are used to avoid double payments to employees? Connie Lee and Vincent Chiu answer this question and provide key takeaways in this pioneering decision in Mak Wai Man and Ors v. Richfield Realty Ltd.

Announcements

Who will be taking silk this year? Find out here. What singled out DVC at this year’s FT Innovation Awards? Read on to discover what category DVC was shortlisted for. And for the second consecutive year, DVC was nominated for a GRR award. Read on to find out more.

Turning to the Competition sphere, Catrina Lam launches the new Hong Kong Chapter of the LIDC and fills you in on how to join. She also shares with you an overview of its origins and how you can benefit from membership.

In this edition, you will additionally discover which of our 6 members were featured in this year’s Who’s Who Legal.

The ICC Young Arbitrators Forum (YAF) appointed one of DVC members as a Regional Representative for North Asia. Click here to find out who joined the YAF’s 10,000 strong network.

Find out which one of DVC’s juniors was selected to boost sustainable...
female leadership and promote upward mobility as part of the Women in Law Hong Kong’s (WILHK's) Mentoring Programme 2019.

Events

In our marquee event of the year, DVC joined forces with Hong Kong University to consider *New Technology and Changing Legal Ecosystems: The Good the Bad and the Ugly* in its premier *Legal Tech Forum*. Putting stakes in the ground in Hong Kong in this relatively nascent area, a formidable team consisting of DVC’s Winnie Tam SC, JP, William Wong SC, CW Ling, and Catrina Lam came together to join a panel moderated by Sabrina Ho which also comprised keynote speaker Anna Wu, GBS, JP, Chairman of the Hong Kong Competition Commission, Simon Wong, CEO, CLSC and Monckton Chambers’ visiting guest speaker, Tim Ward QC. At an event that saw over 100 solicitors and in-house counsel in attendance, the speakers unpicked the evolutionary crossroads that lawyers are finding themselves at in the context of new technology including Artificial Intelligence and the Internet of Things.

In DVC’s inaugural CSR initiative, members raised the funds needed to purchase a new library for underserved children, and a staunch cohort from DVC participated in a fun and lively off-site storytelling session to support Hong Kong’s *Bring Me a Book* charity. Read more about how DVC contributed to this worthwhile cause here.

Ever topical, William Wong SC, Michael Lok, Stephanie Wong and Look–Chan Ho painted a detailed portrait of recent changes to reciprocal enforcement and recognition and a shifting insolvency landscape in front of an engaged audience in Shanghai. To find out more about this changing matrix click here.

Closer to home, William Wong SC, Stephanie Wong and Look–Chan Ho again joined forces to elaborate on shareholders’ disputes in arbitration, this time before a firm of solicitors in Hong Kong.

The One Belt One Road and Greater Bay Area initiatives are redefining the velocity of business growth in the region. What are the challenges and opportunities young lawyers will face? William Wong SC and Richard Leung JP imparted their tips on how to leverage these prospects and how to land your first appointment as an arbitrator at this event organised by the HKIAC - which was prefaced by a keynote speech by Secretary for Justice, Teresa Cheng GBS, SC, JP.

Presenting shoulder to shoulder with OLN’s Eunice Chiu, DVC’s Terrence Tai delivered an earnest and insightful talk on how the finances of the mentally incapacitated are managed. Read on to find out key practices and tips for solicitors.

We heard earlier from Catrina, Connie and Tommy on two recent headline competition cases, and as a precursor to this, Connie and Tommy discussed the inner workings of the Wing Hing Construction case and the liability issues that arose as a result, at a seminar for in-house counsel and solicitors.

Appearing in a double-header, the first with Richard Leung JP, Tommy Cheung spoke consecutively on two occasions at a trusts seminar and then at a seminar centering on commercial litigation before a mixed audience made up of solicitors and in-house counsel.

Adrian Lai looked at recent developments in negligence claims against auditors and the controversies surrounding recent case law in this area.

In the final event showcased in this edition, Michael Lok partnered with Globe–Law Law Firm in Beijing and delivered an engaging presentation as part of a series on International Arbitration Practices.

We hope you enjoy this issue of *A Word of Counsel*.

If you’d like to read the 5th edition, please scan the QR code below.

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

Michael Lok speaks at Globe-Law Firm in Beijing as part of a series of cross-border talks

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Confidentiality is frequently cited by arbitration practitioners as one of the key, and attractive, distinctions between arbitral proceedings and court proceedings. If an award made in Hong Kong is subject to challenge or other court proceedings, ordinarily such proceedings will be heard “other than in open court” and will be subject to restrictions on reporting. On the other hand, confidentiality of the decisions of arbitrators does little to promote certainty for businesses, and lawyers advising clients, and the effect that this has on the development of the law has been the subject of some judicial comment. Whatever ‘learning’ might be available from an award is available only to the parties to the arbitration and not to others. Perhaps in part to address this, the HKIAC Administered Arbitration Rules (2018) contain an express provision dealing with publication of awards, and by a recently promulgated updated “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” (“the Note”) the ICC Court of Arbitration has revised its approach to the possible publication of Arbitral Awards made in ICC arbitrations.

How will the position change?

The approach now adopted by the ICC is that, from the beginning of 2019, awards may be published. The Note contains various provisions, including that the parties will be notified of the possible publication of the award at the time that it is notified to the parties, and providing that the parties may “…object to publication or require that any award be … anonymised … in which case the award will not be published or will be anonymised ”. Where there is a

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1 Cap 609 ss 16 and 17
2 “41. Parties and arbitrators in ICC arbitrations accept that ICC awards made as from 1 January 2019 may be published according to the following provisions...”
confidentiality agreement covering the arbitration (or aspects of it) publication will be subject to the parties' specific consent.

Article 45.5 of the HKIAC Administered Arbitration Rules (2018) also contains a provision under which an award may be published in anonymised form, provided that no party has objected to such publication.

However, the ICC rules (2017) also provide at Article 22 (3) that the parties may request the tribunal to make orders “concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration...”, and the 2018 HKIAC Rules contain a positive provision; that unless the parties have agreed otherwise, and subject to stated exceptions, “no party or party representative may publish, disclose or communicate any information relating to...” the arbitration or associated emergency arbitrator proceedings.

Subtle, but important distinctions

This apparent tension between the privacy of the process, and the possible publication of the award highlights some complexity in what is meant by arbitration being a private and confidential process. First, a distinction should be drawn between proceedings being held in private (as arbitration proceedings invariably are) and the confidentiality of those proceedings. A confidential process, arguably by definition, will be private, but a private process may not necessarily be legally confidential.

Second, a distinction is also to be drawn between the inherent confidentiality of (e.g.) documents used in an arbitration, and the confidentiality arising out of the arbitration process itself. The former may arise from the nature of the document itself, but the latter is (ordinarily) an implied obligation arising in the absence of express agreement.

What you need to do to protect confidentiality

The received wisdom, that arbitration is attractive to the commercial community in part because of its confidentiality, may be correct. The extent of such confidentiality is not always understood, or indeed, carefully considered. Now, perhaps, may be an appropriate time at which to remind parties involved in the arbitration process that confidentiality may be made the subject of express stipulation. If it is of significant importance, then, perhaps, express provision and agreement (or, where appropriate direction from the arbitral tribunal) should be considered.

Whatever learning might be available from an award is available only to the parties to the arbitration and not to others.
Hong Kong and Mainland authorities sign new arrangement on interim measures in aid of arbitration

On 2 April 2019, the Hong Kong Government and the Supreme People’s Court of China signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR ("Arrangement"), which allows a party to a Hong Kong arbitration to apply to the mainland PRC Court for interim measures in aid of arbitration.

Under PRC law, the power to grant interim measures in aid of arbitration rests exclusively with the PRC Courts. Prior to the Arrangement, PRC Courts could only grant preservation measures in support of domestic arbitration proceedings. Hong Kong is the first jurisdiction outside Mainland China to benefit from the PRC Court’s preservation system.

Scope of application

Hong Kong arbitration

The Arrangement applies to arbitral proceedings seated in and administered by arbitration institutions established or headquartered in Hong Kong.

While the list of institutions is yet to be published, it is expected that HKIAC, ICC Hong Kong and CIETAC Hong Kong will be qualified institutions. The Arrangement does not extend to ad hoc arbitration.

Insofar as Hong Kong arbitration is concerned, the Arrangement only covers three types of interim measures:

- Property preservation, which has the effect of ‘freezing’ assets such as funds in bank accounts, landed properties and shares;
- Evidence preservation, a process under which the PRC Court would allow for search, seizure and retention of evidence;
- Conduct preservation, which is an order requiring certain action to be taken or to be restrained.

One may easily associate the first two types of measures with Mareva injunctions and Anton Piller orders. While they may achieve a similar purpose, the PRC’s property preservation measure applies to the assets directly while a Mareva injunction operates by restraining the respondent from dealing with his assets. In relation to the PRC’s evidence preservation process, this is carried out by the PRC Court itself while an Anton Piller order

This article was co-authored by José-Antonio Maurellet SC and Ellen Pang of Des Voeux Chambers and Yanhua Lin of Fangda Partners.
operates by compelling the respondent to permit the applicant to enter his premises to search for and seize documents or objects that are relevant to the case.

**PRC arbitration**

As per the reciprocal arrangement, a party to arbitration proceedings administered by a PRC arbitral institution may now apply to the Hong Kong Court for interim measures. The Hong Kong Court is already empowered to grant interim relief in aid of foreign proceedings (including foreign arbitration) under s.21M of the High Court Ordinance. The Arrangement does not therefore appear to impact the existing mechanism.

**Application procedure**

An application can either be made to the Intermediate People's Court of the place of residence of the party against whom the application is made (i.e. the respondent) or the place where the property or evidence is located.

An applicant should only make one application to the PRC Court. If the place of residence of the respondent or the place where the property or evidence is located falls within a jurisdiction that is different to the venue of the the PRC Court, the applicant will have to make an election.

**Key Takeaways**

1. **Broad-brush approach**

   The Arrangement provides that an application will be determined in accordance with the law of the requested place. Therefore, an application to the PRC Court will be determined in accordance with PRC Law.

   Under Article 28 of the PRC Arbitration Law, a party may apply for asset preservation if, by reason of a party's conduct or for other reasons, it is impossible or difficult to enforce the award. Article 100 of the PRC Civil Procedure Law provides for a similar test – the PRC Court may grant preservation measures if it is satisfied that, by reason of a party’s conduct or for other reasons, the judgment may become impossible to enforce or damage may be caused to the other party.

   Accordingly, the PRC Court adopts a broad-brush approach in determining preservation applications. Unlike injunction applications in Hong Kong, the PRC Court is not required to examine the question of serious issues to be tried or the balance of convenience test. In practice, asset preservation applications will normally be granted provided the Applicant provides security, which is further discussed below.

2. **Procedure and timeframe**

   Unlike Hong Kong, the PRC law does not distinguish between ex parte and inter partes applications. Further, applications are usually dealt with on paper.

   While the Arrangement does not specify a time limit for determining applications for interim measures, Article 4 of the Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases of Property Preservation by the People’s Courts sets out the time requirements for PRC Courts to handle asset preservation applications. Under this provision, the PRC Courts shall render a decision within 5 days upon acceptance of the application or 5 days after security is provided in cases where security is required. After a decision is made, the enforcement of the decision will commence within 5 days.

3. **Requirement for security**

   While the Hong Kong Court normally requires an applicant to give an undertaking as to damages, such undertaking will only be fortified if it can be shown that (1) there is a likelihood of significant loss arising as a result of the injunction and (2) there is a sound basis for the belief that the undertaking as to damages is insufficient.
However, it is the usual practice of PRC Courts to order security to be provided before granting an application for an interim measure. Regarding the amount of security, the general rule is that the amount usually will not exceed 30% of the value of the assets the applicant seeks to preserve. However, the PRC Courts do retain the power to require the applicant to provide additional security depending on the circumstances of the case.

The requirement for security should not be an obstacle to obtaining a preservation order from the PRC Court. In practice, liability insurance is frequently purchased for asset preservation and is offered by qualified PRC insurance companies. The insurance companies will charge a premium at a percentage (for example, 0.2%) proportionate to the value of the assets covered by the application as well as the risk of wrongful preservation after evaluation of the case. Once the applicant enters into an insurance contract with the insurer, the insurer will provide a statement of guarantee to the PRC Courts to satisfy the requirement for security. However, whether the PRC Court will accept such liability insurance as security for interim measures in aid of Hong Kong arbitration remains to be seen.

4. Interim measures may not cover the post-award phase

An award made by a Hong Kong arbitral tribunal can only be enforced in the PRC if it is recognised by the PRC Court under the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* which was signed in June 1999.

Documents needed

In order to enforce an award, the applicant needs to first submit to the Intermediate People’s Court of the place of residence of the respondent or the place where the property is situated – an application along with the award, the arbitration agreement and relevant documents for the Court’s consideration. If there are no grounds for refusing the award, the Court will make a decision to recognize and enforce the award. The process can take up to 1 year or sometimes even longer. Therefore, there will be a time lag between the release of the award and its actual execution.

Regrettably, the Arrangement only provides that an application may be made “before the arbitral award is made.”

It is unclear whether post-award interim measures are also covered by the Arrangement. It is hoped that this matter will be clarified in due course.

What is the significance of the Arrangement?

1. Prior to the Arrangement, the only way to ensure that interim measures could be enforced in the PRC was to have the arbitration seated in the PRC. Parties now have the option of conducting the arbitration in Hong Kong.

2. The Arrangement is an important development, which will no doubt further enhance Hong Kong’s status as a centre for international arbitration in the Asia-Pacific Region, particularly for PRC-related disputes.
3. The effect of the Arrangement is additionally to boost Hong Kong’s competitiveness and increase its appeal as an arbitration hub.

When might this be useful?

As a typical example, for cases where the “valuation adjustment mechanism (VAM)” is involved (i.e. founding shareholders of the target company and/or the company itself agree that the investor may adjust the valuation of the company and receive payment from the founding shareholders and/or the company upon the company’s failure to meet certain conditions e.g. achieving a qualified IPO within a certain period), the founding shareholders are usually PRC citizens and the majority of their assets are located in the Mainland. The VAM agreements between the founding shareholders and the investors (especially foreign investors) usually opt for Hong Kong arbitration. In these cases, the investor would benefit greatly from the Arrangement as they will be able to apply for interim measures to be sought against the PRC shareholders in aid of the Hong Kong arbitration, thereby gaining a significant strategic advantage in the dispute resolution process.

Ms. Lin is a Partner of Fangda Partners. She specializes in arbitration, litigation and regulatory investigation and compliance matters. Ms. Lin has represented various clients including State-owned Enterprise, PRC private companies/entrepreneur and foreign parties in Hong Kong arbitration proceedings including HKIAC, ICC Hong Kong and ad hoc cases. She also has extensive experience in the recognition and enforcement of foreign arbitral awards in the PRC.
Case Reports

Competition Bid-rigging in Hong Kong: tip of the iceberg?

This Case Report was authored by Catrina Lam and Connie Lee.

What is the Hong Kong Competition Tribunal’s approach in dealing with enforcement actions concerning Bid-Rigging and Market Sharing and Price Fixing? Find out in two recent landmark decisions handed down on 17 May under the new competition regime featuring Catrina Lam, Connie Lee and Tommy Cheung.

The Competition Tribunal ruled that the criminal standard of proof applies in enforcement actions seeking a pecuniary penalty for contravention of competition law. This distinguished Hong Kong from UK, Canada, New Zealand, Singapore and Australia as the only common law jurisdiction which applies a criminal standard of proof.

In the first case, **Competition Commission v. Nutanix Hong Kong Limited & Ors** [2019] HKCT 2:

(1) The Competition Tribunal found all but 1 of the respondent IT companies liable for contravening the First Conduct Rule by engaging in bid-rigging concerning a tender for supply and installation of new IT system for YWCA in 2016. In summary, 4 dummy bids were arranged to be submitted in order to assist BT Hong Kong Ltd’s bid.

(2) These arrangements fall within the definition of bid-rigging and, hence, within the definition of “serious anti-competitive conduct” under the Competition Ordinance. The Competition Commission was not required to issue a warning notice to any of these respondents before issuing proceedings.

(3) However, the conduct of submitting a dummy bid by a junior rogue employee whose general duties did not include submission of tender or provision of any binding quotation was not attributable to SIS International Limited.

In the second case, **Competition Commission v. Wing Hing Construction Company Limited & Ors** [2019] HKCT 3:

(1) The Competition Tribunal found all 10 respondents who were contractors approved by the Hong Kong Housing Authority liable for contravening the First Conduct Rule by engaging in market sharing and price fixing. They were found to have allocated the floors they would work on and 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.
These arrangements were properly characterized as an agreement that restricted competition by reason of its very object within the meaning of the First Conduct Rule.

The Competition Tribunal also set out the law and analysis on the efficiency defence and how it should be treated. It was held that the burden rests upon the relevant respondents to establish the defence on the balance of probabilities, and that they had failed to satisfy the conditions of the efficiency defence.

The Competition Tribunal also examined the concept of “a single economic unit” in the present context which significantly, is not comparable to any decided cases e.g. a parent and its subsidiary; a principal and his agent, and a firm and its commercial representatives or its employees. It ruled that the 2 respondents who had let their “sub-contractors” use their respective names for a fee to independently carry out the decoration works, nevertheless, formed part of the same undertakings which also comprised their sub-contractors. They were therefore liable for their sub-contractors’ contravention notwithstanding that they had no knowledge and did not participate in the same.

Catrina Lam (led by Mr. Mark Hoskins QC and Mr. Peter Duncan SC) represented the Competition Commission in the first case [2019] HKCT 2.

Please scan the QR code below to read the full judgment.

Connie Lee and Tommy Cheung represented the 9th Respondent in the second case [2019] HKCT 3, running the sub-contractor defence. Please scan the QR code below to read the full judgment.

The Competition Tribunal will schedule another hearing to determine the orders to be made consequent upon its findings and conclusions in both cases.

Catrina Lam

Connie Lee

Tommy Cheung
In the recent innovative case of *Dickson Valora Group (Holdings) Co Ltd and another v Fan Ji Qian* [2019] HKCFI 482, the Court was faced with a groundbreaking application for an anti-suit injunction, whereby the Hong Kong Court was invited to (and did) injunct proceedings in the PRC on a novel basis.

**Facts**

The 1st Plaintiff is a joint venture company ("Company") formed by Moravia CV ("Moravia"), a corporate vehicle owned by Mexican investors, and Dickson Holdings Enterprise Co Ltd ("DHE"), a corporate vehicle owned by the Defendant. Moravia, DHE and the Company entered into a shareholders’ agreement governing the operation of the Company and its wholly-owned subsidiary, the 2nd Plaintiff. The shareholders’ agreement was subsequently supplemented and modified by a supplementary agreement and various addendums to the supplementary agreement. Of particular relevance to the application was the fact that the shareholders’ agreement contained an arbitration clause in favour of arbitration in Hong Kong.

The parties’ relationship broke down. In June 2018, unbeknownst to the Plaintiffs, the Defendant commenced proceedings against the Plaintiffs in the PRC under the 3rd addendum to the supplementary agreement. One of the clauses in this addendum provided for a success fee to be paid to the Defendant, notwithstanding he was not a party to that agreement or indeed any of the supplementary and shareholders’ agreements. Upon discovering the existence of the PRC proceedings, the Plaintiffs’ challenged the jurisdiction of the PRC Court (on the basis of the arbitration clause). This challenge was rejected by the PRC Court. Shortly thereafter, the Plaintiffs applied in Hong Kong for an anti-suit injunction against the Defendant. The Court, having considered the following issues, granted an anti-suit injunction.

**Issue 1: Is the 3rd addendum subject to the arbitration clause?**

Given that the arbitration clause was contained in the shareholders’ agreement rather than the 3rd addendum...
a failed jurisdiction challenge in the overseas jurisdiction cannot automatically be fatal to an application for an anti-suit injunction in Hong Kong.

upon which the Defendant’s claim was based, the first issue was whether the 3rd addendum was subject to the arbitration clause at all.

As the 3rd addendum was essentially an appendix to the supplementary agreement, which in turn was expressly intended to complement the shareholders’ agreement, the Court held that the documents were intended to be read together as a whole, and it would be wholly uncommercial to suggest that parties intended to resolve their disputes under the shareholders’ agreement and the 3rd addendum in different fora by different modes of adjudication under different governing laws. On that basis, the 3rd addendum was held to be subject to the arbitration clause.

Issue 2: What is the basis of the anti-suit injunction sought, given that the Plaintiffs deny that the Defendant is party to the 3rd addendum?

Generally, an anti-suit injunction sought on the basis of a breach of a contractual jurisdiction or arbitration clause is subject to a different (arguably, less stringent) test than an anti-suit injunction sought simply on the grounds of forum non conveniens. The unusual feature in this case is that the Plaintiffs themselves deny that the Defendant is a party to the contract. The question for the Court was whether the threshold test for a contractual anti-suit injunction applied.

The answer was yes. As it was clear that the Defendant’s claim in the PRC Court was a contractual one based upon an agreement subject to an arbitration clause, the Court held that it would be no less unconscionable for the Defendant to make a claim under the contract in a different forum than it would be for an actual party to the contract to do so. The Defendant was seeking to claim a benefit under the contract without recognizing the condition to which it was plainly subject, and the Plaintiffs had a right to prevent a claim against them based on their contractual obligations being pursued otherwise than by the contractually agreed mode. In other words, the Defendant could not have his cake and eat it. One cannot pick and choose which parts of a contract one wishes to adopt, and then simply discard the other parts or ask the Court to disregard the same.

In coming to the above view, the Court reviewed and approved a line of English authorities on what is known as a quasi-contractual anti-suit injunction, although...
this label was not expressly adopted by the learned Judge. The Defendant was therefore subject to the same threshold as those applicable for contractual anti-suit injunctions i.e. he had to show strong reasons against the grant of an anti-suit injunction.

Issue 3: Are the Plaintiffs barred from applying for an anti-suit injunction given the PRC Courts had ruled against the Plaintiffs in the jurisdictional challenge?

An added complication was that the Plaintiffs had, prior to the application in Hong Kong, taken out a jurisdictional challenge in the PRC Court challenging the PRC Court’s jurisdiction on the basis of the arbitration clause. The PRC Court had rejected this challenge and determined that it had jurisdiction to hear the dispute. The question was whether this gave rise to an issue estoppel on the point of whether there was an arbitration clause binding on the Defendant?

The Hong Kong Court held that no issue estoppel arose by virtue of section 3 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance, which provided that a judgment given by a court of an overseas country in any proceedings shall not be recognized or enforced in Hong Kong if the bringing of those proceedings was contrary to a jurisdiction or arbitration agreement and the person against whom the judgment was given did not consent or submit to the jurisdiction of that overseas court. This applied even though strictly speaking the Defendant was not a party to the arbitration clause, as the statute did not require the plaintiff in the foreign jurisdiction (i.e. the Defendant) to be a party to the agreement, and the same principles as those applicable to a quasi-contractual anti-suit injunction applied.

Further, as a matter of discretion, a failed jurisdiction challenge in the overseas jurisdiction cannot automatically be fatal to an application for an anti-suit injunction in Hong Kong. Having regard to all the circumstances, including the period of delay and stage of proceedings reached in the PRC Court, an anti-suit injunction was ultimately granted by the Hong Kong Court.

This judgment represents the first case in which the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance has been applied in answer to an issue estoppel point.

Conclusion

Not only does this case provide guidance on the unconventional quasi-contractual anti-suit injunction, it also sets out principles pertaining to the interaction between failed jurisdictional challenges in overseas courts and applications for anti-suit injunctions which are of wider application.

Rachel Lam, Terrence Tai and Jasmine Cheung acted for the Plaintiffs.

Anson Wong SC, Alan Kwong and Michael Ng acted for the Defendants.
The curious case of the Hong Kong company, its cross-border assets, the Taobao auction, and the interlocutory injunction

Chen Lingxia v. 中國金谷國際信託有限責任公司 & Others

This Case Report was authored by Rachel Lam, Cherry Xu and Tiffany Chan.

Backdrop

This case raises novel and innovative issues brought about by deploying complex cross-border corporate structures.

It is not uncommon for businesses and people entering into commercial ventures to establish companies in Hong Kong as corporate vehicles for holding a PRC subsidiary, which in turn holds substantial assets or business opportunities in the PRC.

This case highlights the significance and impact of establishing a holding entity in Hong Kong, which can, in certain circumstances, afford parties access to a layer of immediate interlocutory protection under Hong Kong law when disputes arise over the affairs of the company.

This case also has the distinction of being one of the first Hong Kong cases dealing with the unique situation where assets (including shares in a Hong Kong company) have been dealt with in the PRC on the online e-commerce platform run by Taobao.

The factual matrix

The Plaintiff’s claim centres around the beneficial ownership of 51% shares (the “Subject Shares”) in a Hong Kong company named South Asia Group (HK) Limited (“South Asia”).

South Asia’s wholly owned subsidiary is a PRC company named 香山國際游艇俱樂部（廈門）有限公司 (“Xiangshan”). In turn, Xiangshan holds a substantial project in the PRC for developing a yacht club in Xiamen in the name of 香山游艇俱樂部項目 (the “Project”).

In 2010, the Plaintiff pledged the Subject Shares to the 1st Defendant by transferring the shares to the 2nd Defendant (the 1st Defendant’s nominee) (the “Share Pledge Arrangement”).

The Share Pledge Arrangement was part of a security package for a series of loan arrangements from the 1st Defendant (the “Loans”) to Xiangshan for the purposes of funding the Project.

Subsequent to the Share Pledge Arrangement, the 1st Defendant caused its representatives to be appointed to the board of directors of South Asia, but the Plaintiff remained a director of South Asia and the legal representative and director of Xiangshan at all material times.

In 2015, the 1st Defendant alleged that Xiangshan had breached the agreements relating to the Loans and thereafter took various steps in the PRC to attempt to execute/enforce against the Loans and the collateral.
in the PRC Courts. This was contested by Xiangshan and the Plaintiff, and the parties were then engaged in ongoing litigation in the PRC.

Separately, whilst those legal proceedings were still pending in the PRC, the 1st Defendant purported to auction off the Loans and the various items of collateral on an e-commerce platform run by Taobao, whereupon the 3rd Defendant bid on and purportedly won the auction.

The Plaintiff’s case was that she was unaware of this auction (although this was disputed by the Defendants), and that in any event, such auction was impermissible under PRC law as an illegitimate means of circumventing the proper enforcement procedures.

Following the auction, the 1st Defendant caused the 2nd Defendant to transfer the Subject Shares to the 3rd Defendant’s nominees, the 4th to 6th Defendants, and caused the representatives of the 3rd to 6th Defendants to be appointed to the board of South Asia to replace the 1st Defendant’s appointees.

Subsequently, the 3rd to 6th Defendants’ appointees on the board of South Asia moved to call extraordinary general meetings of the shareholders, seeking discussions on allotting new shares (which would have the effect of diluting the original shareholding as represented by the Subject Shares) and to remove the Plaintiff as a director of South Asia. Upon becoming aware of this, the Plaintiff applied for interlocutory injunctive relief to protect her interest in the Subject Shares.

As emerged during the hearing, the auctioning off of non-performing loans and distressed assets on the Taobao online platform is an aspect of financial innovation which has sprung up and been embraced in recent years in the PRC. There is a distinction drawn between judicially sanctioned auctions and non-judicially sanctioned auctions. The proper ambit and operation of this innovative e-commerce tool, quite unique to the PRC, is an ongoing issue in dispute between the parties in this litigation. In this case, the Hong Kong Court has had to grapple with the legal implications of this novel cross-border development.

The Applications

(i) The Plaintiff’s Application for Interlocutory Injunctions

The Plaintiff sued to claim back the Subject Shares from the Defendants.

In seeking to protect her interests in the interim, she sought injunctive relief, broadly to (1) prevent the Defendants from disposing of or diminishing the value of or otherwise affecting her interest in the Subject Shares; and (2) to exercise any rights in the Subject Shares to increase share capital, and/or to remove her as director / legal representative at the various corporate levels in Hong Kong and the PRC.

Given the urgency of the situation (as the EGMs were due to be held very shortly after the filing of the injunction application), at the first hearing of her application, the Plaintiff also sought an “interim interim injunction” restraining South Asia, by its officers and agents, from taking steps along the lines above. This interim interim injunction was to maintain the status quo pending the substantive hearing of the injunction application proper.

“... the auctioning off of non-performing loans and distressed assets on the Taobao online platform is an aspect of financial innovation which has sprung up.... in recent years in the PRC.”
Soon after, the 1st Defendant applied to discharge the interim injunction, or alternatively for the Plaintiff’s cross-undertaking in damages to be fortified. Separately, South Asia also opposed the continuation of any injunction against it.

The 3rd to 6th Defendants also opposed the Plaintiff’s application.

The Court’s Decision

After considering all the circumstances, the Court granted part of the Plaintiff’s application, and declined part of it.

The Plaintiff was successful in obtaining injunctive relief against the 3rd to 6th Defendants (on the condition of her providing fortification) to prevent them from dealing with the Subject Shares in a manner which would detrimentally affect their value.

In coming to this decision, the Court considered that there was at least serious issues to be tried in respect of:

| I. | The nature of the Plaintiff’s interest in the Subject Shares. The Court was satisfied that there was a serious issue to be tried that the Subject Shares were placed in an arrangement akin to a pledge or charge. This impacted any alleged right or entitlement which the 1st Defendant’s had to deal with the Subject Shares. |
| II. | Whether the enforcement of the agreements in the PRC (in this case, by way of non-judicially sanctioned Taobao auction) is permissible without an order of the Mainland Court. |
| III. | In all the circumstances, whether the Taobao Sale was valid. |
| IV. | Whether the 3rd Defendant was a bona fide purchaser for value based on the evidence presented. |

The Court emphasised in particular that (1) there remained a serious question as to the validity of the transfer of the Subject Shares; (2) the 3rd Defendant, in the process of the Taobao auction, had notice of the disputes over the Loans and the associated collateral; and (3) the 3rd Defendant was in any event able to look to other assets of Xiangshan to enforce the Loans.

Having granted the first part of the injunction in relation to the Subject Shares, the Court held that it was unnecessary to grant any further or more specific injunctive relief concerning exercise of rights in the Subject Shares, whether relating to the increase of capital or the Plaintiff’s directorship / status as legal representative. In so doing, the Court took into account the 3rd to 6th Defendants’ undertaking that it would take steps to maintain the proportions of the shareholding in a way that ensured the 51% was not diluted.

Further, although it was held that the Plaintiff had failed to sufficiently disclose information relating to her financial and legal situation in the PRC (an issue raised by some of the Defendants as material non-disclosure), the Court nonetheless held that it had the discretion to decide whether to grant the Interim Injunction in order to preserve the status quo.

Another issue which was argued was whether the Court should have granted the interim interim relief against South Asia (the 7th Defendant) to preserve the status quo in the first place. South Asia had argued that this was an improper means to hold the fort, given South Asia itself had not been sued for any relief of substance. The Court decided that the interim interim relief was nonetheless rightly granted. The cause of action against South Asia was for rectification of its share register. Although the Plaintiff may simply have joined South Asia in the proceedings simply to ensure that it was bound by any eventual order of the Court regarding the Subject Shares, it could not be said that the Court had no power to make an interim injunction against the company in order to give full effect to the orders which
it would make against the other Defendants, and for the interim preservation of the Subject Shares.

**Key takeaways**

This case is momentous for a number of reasons.

(1) It is the first Hong Kong case which deals with the implications of dealings with distressed assets via the increasingly popular Taobao platform. There is still some dispute as to whether non-judicially sanctioned dealings (such as in the present case) are permissible.

(2) It is a prime example of the legal complexities that can arise as a result of the cross-border corporate structures often deployed by businessmen. It has accordingly become a routine practice for the Hong Kong Courts to derive assistance from experts on PRC law matters. In the present case, the experts opined on the status and validity of the Taobao auction, and the PRC legal rubric under which the pledge of Hong Kong company shares was analysed. The jurisdictional disputes are ongoing, and, as indicated by counsel for the 3rd to 6th Defendants during the hearing, there will be an upcoming application as to the appropriate forum in which to conduct the case - so watch this space!

(3) The Court’s observations on interim interim relief represents a vindication of the Court’s powers to maintain the status quo in an effective and practical manner prior to the substantive hearing.

This case note is authored by Rachel Lam, Cherry Xu and Tiffany Chan.

Anson Wong S.C., Rachel Lam, Cherry Xu and Tiffany Chan acted for the Plaintiff.

Alexander Tang acted for the 1st Defendant.

Ambrose Ho S.C. and Gary Lam acted for the 3rd to 6th Defendants.

William Wong S.C., Allen Lam and Sharon Yuen acted for the 7th Defendant.
Testing the waters: Are Team-Based Commissions and Bonuses Deductible from Employees’ Statutory Entitlements?

This Case Report was authored by Connie Lee and Vincent Chiu

Pioneering a new path, this recent novel decision in Mak Wai Man & Ors v. Richfield Realty Limited [2019] HKDC 358 applied sections 35(4), 41(6) and 41C (6) of the Employment Ordinance for the first time since their enactment.

The Decision

The Court held that Team-Based Commission/Bonuses paid already covered statutory entitlements of holiday pay, sickness allowance and annual leave and should accordingly be deducted.

This was the re-trial of the 4 Plaintiffs’ claim against the Defendant for shortfalls of their statutory entitlements.

The Labour Tribunal’s Decision

On 29 July 2015, the Labour Tribunal granted an award to each of the Plaintiffs on the basis that the commission earned by them in addition to their monthly salary did not include payment in respect of the statutory entitlements and the same could not be reduced by any part of the commission.

The Defendants successfully appealed against the award pursuant to the judgment dated 23 June 2016 in HCLA 28-31/2015. The award was set aside and the matter was remitted to the Labour Tribunal for determination of the issue as to–

“whether, having regard to the legislative intent of sections 35(4), 41(6) and 41C(6) of the Employment Ordinance (the “Deduction Sub-sections”), the statutory entitlements payable to the Plaintiffs should be reduced by such payment of the team-based commission and team leader bonus under the Deduction Sub-sections.”

The Rationale

The Labour Tribunal transferred the remitted case to the District Court for re-trial. After re-trial, the Court
“This decision has clarified the law in respect of bonuses and commissions in the context of employees’ statutory entitlements and double payments.”

dismissed the Plaintiffs’ claim and held that:-

(1) Adopting the purposive approach in statutory interpretation, the phrase “any other reasons” under the Deduction Sub-sections should not be interpreted narrowly and should not be confined to the genus of agreements. Those “reasons” must be consistent with the policy objective of the legislation, namely, to avoid double payments being made by the employer.

(2) The team-based commission and the team leader bonus were sums paid for every day of the month, including non-working days i.e. days on which the Plaintiffs were on leave. Though not expressly stipulated by agreement, such payments were taken to have included the Plaintiffs statutory entitlements.

(3) The team-based commission and the team leader bonus therefore fell under the limb of “any other reasons” within the Deduction Sub-sections and should be deducted when calculating the statutory entitlements to avoid double payment.

Actionable Takeaways

➤ This decision has clarified the law in respect of bonuses and commissions in the context of employees’ statutory entitlements and double payments.

➤ It is wise however for employers to provide transparent and unequivocal directives in relation to the calculation mechanism in order to guide employees through the appropriate laws to reduce the possibility of a conflict between the employer and employee.

Connie Lee and Vincent Chiu appeared for the Defendants at the re-trial in [2019] HKDC 358.

Connie and Vincent (led by Anson Wong S.C.) also appeared before the Court of First Instance in HCLA 28-31/2015.

Please scan the QR codes below to read the judgments which provide detailed overviews of the legislative history and intent behind the Deduction Sub-sections.
Relaxing the Rules on compelling discovery in Bankruptcy & Liquidation in

Re Ho Yuk Wah David (the Bankrupt) [2019] HKLRD 961

This Case Report was authored by Patrick Siu.

This decision is a pivotal one in that it moves the needle on and clarifies the scope of the Court’s power in ordering a person to produce documents in bankruptcy and liquidation proceedings.

Under section 29 of the Bankruptcy Ordinance (Cap. 6), the Court may order any person to produce any documents in his custody or power relating to the bankrupt, his dealings or property. In the liquidation context, similar powers can be found in section 286B of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 622), pursuant to which the Court may order a person to produce any books and papers in the person’s custody or power relating to the company.

In addition to an order for production of documents, it was customary for trustees or liquidators to seek an order that the respondent do make an affidavit if the respondent had at one time possession of the documents but has parted with possession of the same. Orders of this kind have been made in cases such as Re Lai Kwok Ying (A Bankrupt) HCB 8750/2007 (unreported, 7 August 2009) and Re Ho Yuk Wah David (bankrupt) [2015] 2 HKLRD 603. (In the latter case, the respondents’ omission to make such affidavits led to contempt proceedings.)

Such orders were made presumably with reference to the Court’s power under Order 24, rule 7 of the Rules of the High Court (Cap. 4A) on specific discovery. Under that provision, the Court may order a person to make an affidavit stating whether any document has at any time been in his possession, custody or power, or when he parted with it and what has become of it.

A subtle but meaningful shift

However, in this recent decision, the Court clarified that section 29(1A) of the Bankruptcy Ordinance only empowered the Court to require a person to submit an affidavit containing an account of his dealings with the bankrupt; the Court did not have jurisdiction to order the making of an affidavit similar to one under Order 24, rule 7.
Key Takeaways

- This decision sends a clear message to third parties and is a welcome correction of past practices and a favourable change to the status quo.

- After all, the respondents in such applications are usually innocent third parties – caught in the cross-hairs – and they should not be subject to the onerous burden of having to state on oath the whereabouts of documents, especially when the respondents may have parted with them years ago.

What’s Next?

- This case will change the narrative in terms of advising third party clients on the nature of their burden. It will be interesting to see how case law continues to crystallise in the wake of this decision.

Patrick Siu represented the Respondents.

David Chen represented the Applicants.
DVC is delighted to announce that Jenkin Suen and Rachel Lam will take silk this year effective from 22 June 2019.

This will take the number of Senior Counsel from 18 to 20 at DVC.

Please scan the adjacent QR code to view the Judiciary announcement for further details.
DVC broke ground as the only Chambers in Asia to be shortlisted by the FT for their Innovative Lawyers Awards APAC 2019. From more than 500 submissions across Asia and Australia, DVC was selected for Practice Development within the “Innovation in the Business of Law: New Business & Service Delivery Models” category.

Des Voeux Chambers was recognised for pioneering the first ever Practice Development Department in Hong Kong and as “the first Chambers in Hong Kong to take advantage of a relaxation in legal bar and marketing rules. [By employing] two dedicated business developments [DVC] is winning new work through their efforts.”

Scan the QR code below to read the full FT Innovative Lawyers Awards Report.
DVC nominated for GRR Award 2019

For the second year in a row, DVC has been nominated for a GRR Award. This year, DVC has been shortlisted for “Jurisdiction of the Year” for China.

The 3rd Annual GRR Awards Ceremony will take place on Saturday, 15 June 2019 at El Palace, Barcelona.

Last year, DVC won the GRR award for Most Significant Restructuring/Insolvency related litigation in the matter of China Solar Energy Holdings.
Hong Kong Chapter of the International League of Competition Law

The Hong Kong Chapter of the International League of Competition Law (Ligue Internationale du Droit de la Consurrence), an association established in 1930 and reconstituted in 1950, which focuses on the study of competition law, intellectual property law and unfair competition has launched.

The LIDC Hong Kong Chapter (LIDC HK) will continue the mission of LIDC by serving as a local platform for fostering discussion and the exchange of views on issues and questions pertaining to competition and intellectual property law. LIDC HK is committed to promoting and contributing to the development of competition law and practice in Hong Kong.

Winnie Tam SC, JP has been appointed Chairman of LIDC HK. The new chapter also includes Catrina Lam and Brent Snyder as Vice Chairmen.

If you would like to:

- Stay in touch with new developments in the competition and intellectual property sectors
- Identify new challenges in the emerging competition law landscape and learn how to address them
- Be involved in a forum to ventilate new legal issues arising from the competition and intellectual property law panorama
- Network with thought leaders and academics in the field

you are encouraged to join.

To join and for more information, please scan the QR code below to visit https://www.hongkongcompetitionlaw.com/ or contact Catrina Lam at catralam@dvc.hk or on 2526 3071.
The following members from DVC have been recognised in 4 different sectors by Who’s Who Legal in 2019:

- **John Scott QC, SC, JP** for Construction Law
- **Winnie Tam SC, JP** for Intellectual Property Law (Trademarks)
- **Ian Pennicott SC, QC** for Construction Law
- **José-Antonio Maurellet SC** for Litigation
- **Calvin Cheuk** for Construction Law
- **Look-Chan Ho** for Restructuring & Insolvency
DVC’s Benny Lo has recently been appointed to the International Chamber of Commerce’s Young Arbitrators Forum (ICC YAF) as a Regional Representative for North Asia.

Benny’s appointment is for two and a half years and part of his mandate includes augmenting ICC YAF’s professional development activities, exchanging views on international arbitration trends and expanding its regional network – which currently stands at 10,000 members.

Benny joins the panel at a time when it is at its largest, and its most diverse. The Forum was launched in 2008 and it reflects ICC’s status as the world’s leading arbitral institution.

Benny, an independent barrister and a Chartered Arbitrator, is a seasoned arbitration practitioner. Apart from acting as counsel in international arbitrations, he has also been sitting as an international arbitrator in commercial, maritime, and investment treaty arbitrations.

Scan the adjacent QR code for a full list of all Regional Representatives appointed.
Women in Law Hong Kong's (WILHK's) Mentoring Programme

Catrina Lam has been selected to join the Women in Law Hong Kong Mentoring Programme for 2019.

The Programme set up by women for women is designed to instill confidence in mentees, enable the development of a solid network, foster communication skills and facilitate the growth of women’s careers in Hong Kong.
DVC partnered with HKU to present:

**A Legal Tech Forum** – *New Technology & Changing Legal Ecosystems: The Good, the Bad & The Ugly*

Do lawyers view tech as an opportunity or a threat? Are they embracing change by looking to improve their services or are they resistant for fear that robots will take over their jobs?

These were some of the tough questions that were considered at the DVC-HKU Legal Tech Forum on 20 May.

A coterie of eminent speakers gathered to discuss *New Technology and Changing Legal Ecosystems: The Good, The Bad & The Ugly* before an audience made up of solicitors and in-house and general counsel at the Bankers Club. Possibilities for importing the uses of AI, digital competition, IoT, e-filing and arbitration and mediation e-platforms were thrashed out in the intellectual property, competition and arbitration/litigation spaces as a distinguished panel consisting of Winnie Tam SC, JP, William Wong SC, CW Ling, Catrina Lam, Look Chan Ho drilled down to deliver key touchstones to an audience of over 100 lawyers. The presentations were bookended by an initial keynote speech by Anna Wu Hung-yuk GBS, JP, Chairman of the Competition Commission and a wrap up session from Simon KY Wong CEO, Hong Kong R&D Centre for Logistics and Supply Chain Management Enabling Technologies. Visiting guest, Tim Ward QC from London’s Monckton Chambers also weighed in on Patent Wars and Competition Law from a UK perspective.

Scan the adjacent QR code to see the full programme.
Dismantling the myths surrounding the potential demise of lawyers following a new wave of technology, the speakers reframed the narrative by suggesting how lawyers could best utilise technology and re-architect it to save time and generate new efficiencies instead. Examples of this included e-filing as well as the deployment of AI to synthesise voluminous data with a view to assisting judges with their drafting.

Context

Thought-provoking questions that were raised included: Can a robot programmed in accordance with an algorithm (whether it be generated by a human or by the use of artificial intelligence) be an “author” in the context of intellectual property? (Cue the first AI generated song Daddy’s Car and AI created art The Next Rembrandt.) In the competition space, could or will humans agree to collude and use computers to create, monitor and police cartels in the digital equivalent of a smoke-filled room agreement?

A panel discussion covering competition and IP law focused on how the boundaries of established concepts in IP and competition law would be challenged and how future legislation may be shaped. The panel discussion was moderated by Sabrina Ho.

What’s Next?

The Forum prompted meaningful conversations on how legal tech is geared towards taking on the commoditised end of the spectrum while enabling lawyers to focus on the bespoke end of the service delivery model. The conclusion? Human interaction between lawyers and clients is still every lawyer’s north star: in other words, the “add tech and stir” approach is still a long way off.
DVC supports Bring Me a Book Charity in its first CSR initiative

Des Voeux Chambers’ first CSR initiative saw children’s faces light up when 8 of our barristers travelled to Tin Shui Wai to read them stories from books that our Chambers donated as part of a new library in support of the Bring Me a Book Charity.

DVC’s Deputy Head, Winnie Tam SC, JP, Catrina Lam, Johnny Ma, Teresa Wu, Rachel Lam, Alan Kwong, Sabrina Ho, and Eva Leung visited The Social Welfare Department Integrated Family Service Centre on the afternoon of 12 March for a ribbon-cutting ceremony.

Paradoxically, we learned that although Primary students in Hong Kong score well in terms of academic achievement in reading (3rd out of 50 countries globally), in terms of Interest, Motivation and Confidence they score in the 30s–40s out of 50.

Bring Me A Book tries to redress this by providing books to underprivileged children from supplied donations that are light-hearted, fun and engaging.

Deputy Head Winnie Tam SC, JP delivered a short, entertaining speech to the children between the ages of 3 and 6 playfully berating them for watching too much TV and playing too many video games and steering them towards books instead. This was followed by break-out reading sessions where our members regaled them with tales from various books which were read aloud to small groups of 20 children in all.

The children were lively and receptive and it was an enjoyable afternoon for the little ones and for many of our barristers who dedicated their time towards a worthwhile cause.
Reciprocal enforcement, recognition, cross-border insolvency and company disputes: a changing matrix

Prior to Easter, on 20 April 2019, DVC’s William Wong SC, Michael Lok, Stephanie Wong and Look–Chan Ho delivered an engaging and insightful seminar on recent hot topics relating to reciprocal enforcement and recognition, mutual taking of evidence, and cross-border insolvency and company disputes in Shanghai. About 60 PRC lawyers attended the presentation and the event was co-organized and hosted by Messrs JunHe LLP and The China Legal Education and Career Seminar Series (CLECSS) at JunHe’s offices in Shanghai.

William and Stephanie delivered the first session on reciprocal recognition and enforcement of judgments in civil and commercial matters by the Courts of Mainland and Hong Kong. They also shared practical insights on the two new arrangements entered into between the Supreme People’s Court of China and the HKSAR Government, namely “The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region” and “The Arrangement Concerning Mutual Assistance on Court-ordered Interim Measures in Aid of Arbital Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region.”

Look subsequently spoke on “The Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region” and Schemes of Arrangement. Michael then closed the day with an expansion on cross-border insolvency and shareholders’ disputes as well as a review of key landmark cases.

After an afternoon of erudite discussion, the seminar ended with interesting and nuanced questions from the floor.

For more on a recent discussion of the new arrangement on interim measures, scan the adjacent QR code.

For tips on how to land your first arbitrator appointment from William Wong SC and Richard Leung JP, scan the adjacent QR code to read Challenges and Opportunities for Young Arbitrators.
DVC’s William Wong SC, Stephanie Wong and Look-Chan Ho shed light at a seminar on recent cases on arbitration, jurisdiction and cross-border insolvency.

William Wong SC, Stephanie Wong, and Look-Chan Ho delivered an illuminating lunchtime seminar at Stevenson, Wong & Co’s offices.


Lastly, Look provided a comprehensive update on cross-border insolvency and winding-up which was stippled with anecdotes and practical tips curated for the audience made up of solicitors.

The intimate setting over lunchtime gave way to multiple questions and a meaningful exchange of views among their solicitors and DVC’s members.
Challenges and Opportunities for Young Arbitrators

Des Voeux Chambers’ Richard Leung JP moderated a panel consisting of experts who weighed in with different viewpoints on the Challenges and Opportunities awaiting Young Arbitrators on 8 April 2019 at the HKIAC. Rodney L Martin, Charlton Group, Eliza Jiang, Fangda Group and Daniel Allen from Mori Hamada & Matsumoto discussed different perspectives in ADR – with common threads being a changing landscape shaped by the Belt & Road Initiative and the Greater Bay Area. Another trend that was referenced included increasing investment in Latin America and emerging interest in third party funding in Japan.

The morning session was prefaced by a keynote speech by Secretary for Justice, Teresa Cheng, GBS, SC, JP. Painting a portrait of the challenges and opportunities, she observed that arbitrations were becoming more institutional and more international so a comprehensive understanding of powers and procedural rules as well as how other jurisdictions operated was key. She mentioned that developing technology, including blockchain and AI, was an opportunity that could be leveraged especially by younger arbitrators who would pick up the intelligence tools very quickly.

In the afternoon session, DVC’s William Wong SC imparted his tips on how to land your first appointment as an arbitrator. The panel was made up of seasoned arbitrators including Mariel Dimsey, CMS Law, John Cock, On Q Consulting Ltd, Ronald Pang, Gary Soo’s Chambers and Albert Yeu, ARUP. Citing the chicken and egg scenario, William foreshadowed a number of roadblocks that can sometimes eventuate on the pathway to securing a first appointment. Forewarned is forearmed, and William began by letting the audience know that the “arbitration circle in Hong Kong is a closed shop.” Some of the helpful pointers he shared included raising visibility through networking, contributing articles to relevant publications and joining members’ committees e.g. HK45.

DVC was a diamond sponsor of the event.

Tommy Cheung from DVC also attended the seminar.
Part 2 Applications & Enduring Power of Attorney– Practice & Procedure: A CPD accredited seminar featuring DVC’s Terrence Tai

An earnest and insightful conversation around mentally incapacitated persons (MIP) and the management of their finances under the Mental Health Ordinance featured as the anchoring theme of a talk by DVC’s Terrence Tai and OLN’s Eunice Chiu on 25 March 2019.

Over 60 attendees converged to find out more about Practice and Procedure associated with Part 2 Applications and the Enduring Power of Attorney in the context of MIPs in the CPD accredited seminar organised by LexOmnibus.

Terrence provided a comprehensive overview of the 4 different stages of the Part 2 application including the pre-application, directions, inquiry and post-inquiry stage. He also deftly covered the court’s jurisdiction in determining the appointment of a ‘committee’ – emphasising that the court always considered what was in the MIP’s best interests, and clarifying that the process was inquisitorial, as opposed to adversarial. He peppered the talk with frequent references to case law.

Terrence’s presentation was counterpointed by a detailed discussion delivered by Eunice on the Enduring Power of Attorney and the advantages that ensued including the efficiency of the mechanism as a way of administering the donor’s property and obviating the difficulty and distress usually endured by the donor’s family in connection with the donor’s financial affairs.

The presentation was an informative one, interspersed with key practices and tips for solicitors and in-house counsel. It ended with an engaging Q & A session.
DVC’s Connie Lee and Tommy Cheung recently appeared as counsel for one of the respondents in a 4-week trial before the Competition Tribunal: Competition Commission v. W Hing Construction Company Limited & Ors CTEA 2/2017, the first enforcement action on market sharing and price fixing in Hong Kong, see also [2018] 5 HKLRD 437. Trial on liability was completed by the end of December 2018, with judgment pending. A full review of this case appears on pages 13 and 14.

As competition law is still evolving and enforcement actions are still nascent in Hong Kong, this was an area ripe for discussion and the seminar gave way to thought-provoking questions surrounding both the theoretical and practical aspects that this entailed. Connie and Tommy held a well-attended CPD seminar on 4 April and provided an overview of the first conduct rule and shared some top tips on preparation for enforcement actions under the Competition Ordinance.

Tommy first took the audience through the doctrinal underpinnings of the first conduct rule. Connie then shared with the audience practical tips on how best to prepare for the different stages of an enforcement action from a practitioner’s point of view, starting with the investigation stage and leading up to trial. They further discussed the scope of raising an illegality defence in civil proceedings based on an allegation of competition law infringement.

The seminar ended with an interesting and lively Q&A session.
On 27 February 2019, DVC’s Richard Leung JP and Tommy Cheung delivered a CPD seminar on trusts and estoppel in land and property disputes. Richard and Tommy shared their experience in property litigation, highlighted frequently litigated issues, and stressed the importance of persuasion by facts in this area before an audience made up of solicitors and in-house counsel. The participants were also given an update of recent case law in this domain.

Questions from the floor were not limited to the fundamentals of Hong Kong property law, but extended to recent developments in other jurisdictions as well as potential law reform.

On 29 March 2019, Tommy delivered another CPD seminar on pre-emptive remedies in commercial litigation, covering general injunctions, Mareva injunctions, proprietary injunctions and Anton Piller orders. Tommy not only examined the doctrinal aspects of the various remedies, but also shared practical tips on how to deploy these pre-emptive remedies to protect a litigant’s legitimate rights and interests.

Drawing from his experience on injunctive relief applications, Tommy shared his views on how to handle ex parte applications in a way that could better assist the Court, and highlighted the cardinal points in setting aside applications. He also summarised the latest developments and pinpointed some recent controversies in these areas.

The seminar was an engaging one and prompted informative exchanges between the participants.
What are the controversies surrounding negligence claims against auditors by liquidators and what steps can liquidators take to protect themselves against these claims?

These questions were addressed by Adrian Lai who recently delivered a talk in concert with Ludwig Ng, Senior Partner at ONC Lawyers.

A review of recent case law exposed lacunae that have yet to be addressed from as far back as Caparo v Dickman [1990] 2 AC 605 to the House of Lords case of Stone & Rolls Ltd v Moore & Stephens [2009] 1 AC 1391 and the more recent Hong Kong cases of Moulin v CIR [2014] 17 HKCFAR 218 and Days Impex Ltd v Fung, Yu & Co HCA 1035/2014 (24 October 2017.)

Adrian began by recapping auditors’ duties and took the audience through a run-down of the available defences to negligence claims. Adrian and Ludwig discussed the lessons to be learned from the Stone & Rolls case and referenced various quotes highlighting the level of criticism the controversial case attracted e.g. a notably scathing quote by Lord Neuberger: “the Stone & Rolls case should be put on one side in a pile and not to be looked at again.”

The controversial nature of the cases that came under the microscope gave way to a lively Q&A discussion between the speakers and ONC’s solicitors.


DVC’s Michael Lok was invited to take part in a cross–border arbitration seminar series, hosted by Globe–Law Law Firm in Beijing on 23 May 2019. The series was entitled “International Arbitration Practices.”

The presentation was divided into three parts; the first homed in on Cross–border Company disputes and Insolvency and the role of arbitration. The second focussed on the Interpretation of Provisional Measures in International Arbitration – which Michael co–presented with a US qualified Lawyer from Globe–Law Law Firm.

The final segment for the day centred on Jurisdiction of Investor–State Arbitration and 4 approaches to waiving States’ Jurisdictional Immunity.
DVC’s standout members are known for being “every kind of well prepared”, for being “quick operators” and “top specialists” and they are recognised for their “uncommon talent and extensive experience”

CHAMBERS & PARTNERS ASIA PACIFIC (2019)

GET IN TOUCH

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

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

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