THE BANKING LITIGATION LAW REVIEW

Fourth Edition

Editor
Deborah Finkler

THE LAWREVIEWS

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FOURTH EDITION

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This article was first published in December 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-436-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BGP LITIGATION

BORDEN LADNER GERVAIS LLP (BLG)

CERHA HEMPEL

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that litigation involving banks shows little sign of slowing and continues to evolve.

Disputes that have arisen in the past year cover a broad spectrum, from claims by consumers against banks (relating to losses incurred either to the bank or to third parties) to claims by banks for the recovery of loans and the enforcement of guarantees. Cross-border issues frequently arise, with banking litigation continuing to be a key area of focus for international commercial litigation.

One of the major challenges of 2020 has, of course, been covid-19, and this year has demonstrated the resilience and flexibility of court systems around the world, including in the UK, in adapting their procedures in order to minimise disruption to the administration of justice. At the time of writing, the 'new normal' in many jurisdictions now provides for virtual hearings (including remote witness evidence) and electronic trial bundles as a default. This enforced experiment seems likely to have a lasting impact on court procedures around the world. While it is likely that trials involving witness evidence will revert to being largely in person, the need to do so for many procedural applications is less obvious. In any event, it is to be hoped that some of the positive aspects of operating remotely – for example the reduction in the amount of paper used – are here to stay.

A continuing trend is the increase in the use of class or multi-party actions and representative claims. Although often perceived as a predominantly US phenomenon, the past year has seen growth in the use of class actions within non-US jurisdictions, particularly in the UK, Canada and Australia. Whether this rise is the precursor to a worldwide adoption will depend on a number of factors, including any new mechanisms for group actions that are adopted in countries where they did not previously exist and the way courts in different jurisdictions react to such new actions. In the UK, for example, judgment is keenly awaited in a Supreme Court case that is expected to play a key role in clarifying the operation of a new collective proceedings regime and, depending on its outcome, either energise or curtail the growth of competition class actions in the UK. Related to the rise of group actions, one potential area of reform is third party litigation funding (a frequent driver of such actions). Recent regulatory reforms in Australia means that litigation funders are now required to hold a licence and must comply with the same conduct obligations to which banks and other credit providers are subject, including the requirement to provide their licensed 'financial services' efficiently, honestly and fairly. It will be interesting to see whether other jurisdictions follow suit.

The preface to last year's edition highlighted the concern that claimants will seek to use data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, as a tool in litigation, and noted that this concern is only likely to

grow. The rise of UK class action cases for damages resulting from data breaches in the past year reinforces the importance of banks managing such risks, both in a regulatory and in a litigation context. Set against the background of increasingly litigious and well-funded claimants, and considering the extensive volume of personal data that banks hold, the need for adequate systems and controls to protect the data of consumers and employees is ever more vital.

At the time of writing, the Brexit transition period is drawing to an end, and nobody is any closer to being able to say what the political or economic impact of Brexit will be. The prospect of the transition period ending with no deal is a real possibility, and it remains to be seen whether the UK can agree a deal with the European Union in the time available. The UK government has declared its intention to sign up to either or both of the 2007 Lugano Convention and 2005 Hague Convention on Choice of Court Agreements, but unless and until that happens there remains a degree of uncertainty over jurisdiction and the enforcement of judgments.

Overall, 2020 has no doubt been a tumultuous year for many. As the year approaches its end, there are some reasons for optimism: global stock markets surged following the results of the US 2020 presidential elections and news of significant strides being made in the development of a covid-19 vaccine. Nevertheless, a substantial amount of political and economic uncertainty remains. Moving forward, the prospect of an unknown future legal landscape in the UK, and to an extent in the remainder of the EU, following Brexit and the continuing effect of covid-19 on the world economy (which may well persist long after the virus itself has been contained) can be expected to generate disputes in the banking sector for a long time to come.

Deborah Finkler
Slaughter and May
London
November 2020

Chapter 6

HONG KONG

Wynne Mok[1]

I OVERVIEW

Hong Kong is well known for being a gateway between the world and Mainland China, and it has remained a leading global and regional financial centre to a large extent by virtue of its competitive banking industry. While the world is hit by covid-19, the banking sector has been working diligently in order to overcome the challenges posed by the pandemic, as well as the more general regulatory and contentious issues.

II SIGNIFICANT RECENT CASES

Fraud has been a major theme in significant recent cases as banks and financial institutions remain at the forefront of the battle against fraud and money laundering. Banks are exposed to fraudsters and are expected to stay increasingly alert to fraud risks; however, they also face applications by victims of fraud for interim relief measures, such as *Mareva* injunctions and *Norwich Pharmacal* orders.

There has also been a surge in arbitration-related cases in Hong Kong. Courts in Hong Kong have adopted an arbitration-friendly approach; for instance, by granting anti-suit injunctions to restrain the pursuit of foreign proceedings in breach of arbitration clauses and ensuring that the losing party honours the terms of an arbitral award by making available a full range of remedies in a common law action. Further, a finding of fact by an arbitrator is generally conclusive and it is hard to convince a court to set aside an arbitral award on grounds such as the lack of an arbitration agreement.

Hong Kong courts have also, on various occasions, determined issues concerning cross-border insolvency, such as the approach to dismissing winding-up petitions and banks' duty of care towards client assets.

III RECENT LEGISLATIVE DEVELOPMENTS

The Banking Ordinance (Cap 155) (BO), which provides the legal framework for banking regulation, was updated by the Banking (Amendment) Ordinance 2018 (BAO) to implement the latest international standards on banking regulation promulgated by the Basel Committee on Banking Supervision (BCBS). While the BAO has come into full operation

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on 1 July 2019,[2] the subsidiary legislations under the BO require amendments. The amended Banking (Liquidity) Rules (Cap 155Q) took effect from 1 January 2020. The main changes were as follows:

a to expand the scope of 'level 2B assets' and 'liquefiable assets' under the Liquidity Coverage Ratio and the Liquidity Maintenance Ratio respectively; and

b to implement a required funding requirement on total derivative liabilities under the Net Stable Funding Ratio and the Core Funding Ratio.

The Banking (Capital) (Amendment) Rules 2020 will come into operation on 30 June 2021, whereby certain capital standards issued by the BCBS will be implemented, a new method for measuring the amount of counterparty credit risk incurred by banks from derivative contracts will be introduced, and the capital treatment for banks' exposures to central counterparties and clearing intermediaries will be revised. These amendments are intended to update the regulatory regime in Hong Kong and bring it in line with international standards.

Since the full implementation of the Insurance Companies (Amendment) Ordinance on 23 September 2019, the Insurance Authority (IA) has assumed direct regulatory function vis-a-vis all insurance intermediaries in Hong Kong with powers to grant licences, conduct inspections to ensure compliance with the Insurance Ordinance (Cap 41) (IO) by licensed insurance intermediaries, and impose disciplinary sanctions where necessary. Under the current regulatory regime for insurance intermediaries, any person carrying on a regulated activity under the IO is required to be licensed by the IA. On 22 October 2019, the IA issued the Explanatory Note on Licensing Requirements for Banking Sector under Regulatory Regime for Insurance Intermediaries to provide guidance on how far certain bank-client interactions or ancillary banking activities related to insurance would be regarded as 'regulated activities', thus requiring the relevant banks and bank staff to be licensed.

The Hong Kong government is currently looking to introduce further amendments to the insurance legislation. The Financial Services and the Treasury Bureau have introduced two bills,[3] both of which were gazetted on 20 March 2020. These proposed amendments seek to provide for a new regulatory regime for the insurance-linked securities business, expand the scope of insurable risks of captive insurers set up in Hong Kong, and enhance the regulatory framework for the regulation and supervision of insurance groups where a holding company is incorporated in Hong Kong. These amendments will reinforce and further strengthen Hong Kong's standing as a regional asset management centre and insurance hub.

IV CHANGES TO COURT PROCEDURE

Civil procedural rules under the High Court Ordinance (Cap 4) were subject to major reform back in 2009. The Civil Justice Reform (CJR), which came into effect on 2 April 2009, aimed to give the courts more powers to manage the progress of court cases in giving effect to the underlying objectives as set out in the Rules of the High Court (Cap 4A) (High Court Rules), namely to increase cost-effectiveness, to deal with cases as expeditiously as is reasonably practicable, to promote procedural economy, to ensure fairness between the parties, to facilitate settlement, and to ensure fair distribution of court resources.

2 Certain provisions of the BAO were brought into operation on 13 July 2018 and the remaining provisions came into force on 1 July 2019.

3 The Insurance (Amendment) Bill 2020 and the Insurance (Amendment) (No. 2) Bill 2020.

Another major reform that will have a profound impact on court procedure and bring Hong Kong in line with other common law jurisdictions is underway. On 17 July 2020, the Hong Kong Legislature passed the Court Proceedings (Electronic Technology) Bill. The bill symbolises a step towards a 'paperless' judiciary by introducing e-filing and service of court-related documents, the use of electronic signatures and electronic payments, which will hopefully reduce unnecessary costs and court visits by court users and increase efficiency of the court process. It is not yet known as to when this new law will come into force. In the meantime, the courts have been using technology on an individual case basis, bearing in mind the underlying objectives under CJR. For example, in *Hwang Joon Sang & Anor v. Golden Electronics Inc & Ors*,[4] the Court of First Instance (CFI) approved the use of a data room for ordinary service of documents under the High Court Rules, noting that the underlying objectives of case management pointed strongly towards the use of available technology, including the use of data room as a means of service.

The covid-19 pandemic has in fact acted as a catalyst for more immediate changes to court procedures in Hong Kong. While the courts and tribunals suspended services for over 13 weeks at the onset of the pandemic, the judiciary had to adopt alternative modes to hear submissions by means of technology, including video-conferencing facilities (VCF) and telephone for suitable civil cases. In *Au Yeung Pui Chun v. Cheng Wing Sang*,[5] the CFI allowed the parties to give evidence in a civil trial in relation to the ownership of a residential property via VCF.[6] To this end, the judiciary has issued guidance notes to set out the practice for remote hearings by electronic means in civil cases.[7]

Another much-awaited change is the Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Cases between the Hong Kong Special Administrative Region (HKSAR) and the Macao Special Administrative Region which came into force on 1 August 2020,[8] by virtue of the Rules of the High Court (Amendment) Rules 2020 and the Rules of the District Court (Amendment) Rules 2020. There is now an official channel for service of judicial documents in civil and commercial proceedings between the two special administrative regions. This arrangement substantively mirrors the one between Hong Kong and the Mainland.[9]

In addition to regular court procedures, since June 2012, the Financial Dispute Resolution Centre (FDRC) has been operating as a forum for mis-selling related disputes between banks and other financial intermediaries on the one hand and retail customers (including individuals, sole proprietors and small enterprises) on the other hand.[10] In the

4 [2020] HKCFI 1084.

5 [2020] HKCFI 2101.

6 See also *Taishin International Bank Co Ltd v. QFI Ltd* [2020] HKCU 1212.

7 'Remote Hearings for Civil Business in Civil Courts' (Judiciary, 20 July 2020) <www.judiciary.hk/en/court_services_facilities/gap_remote_hearing.html>.

8 'Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Hong Kong Special Administrative Region and the Macao Special Administrative Region' (Department of Justice, 1 August 2020) <https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual1e.pdf >.

9 'Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts' (Department of Justice, 4 January 1999) <https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual1e.pdf >.

10 According to the Terms of Reference which set out the FDRC's rules and processes, a small enterprise means a limited company or a partnership that has an annual turnover not exceeding HK$50 million, gross assets not exceeding HK$50 million, and not more than 50 employees in Hong Kong.

spirit of 'mediation first, arbitration next', the FDRC is tasked to help resolve claims of up to HK$1 million.[11] The FDRC provides an alternative (and in principle more economic and expeditious) means of resolving low-value disputes for claimants who would otherwise have no choice but to bring legal proceedings in either the Small Claims Tribunal or the District Court. According to the FDRC's latest annual report dated 30 June 2020, it has achieved a mediation success rate of over 90 per cent for the year ended 31 December 2019.[12] The FDRC has also issued Guideline No. 5,[13] outlining the prescribed procedure that the FDRC will adopt in handling an accepted case in which one of the parties concerned is uncontactable and thus causing delay to the progress of mediation.

V INTERIM MEASURES

The court is empowered to issue various interim measures. An application for summary judgement under Order 14 of the High Court Rules is suitable where the defendant has no substantive defence except as to the amount of damages claimed. If the defendant fails to duly serve the defence, the plaintiff may enter a final default judgment. In addition, *Mareva* injunctions for both Hong Kong and overseas proceedings are commonly used to prevent defendants from dissipating assets pending conclusion of those proceedings.

Parties to arbitral proceedings in Hong Kong may now apply to the mainland courts for interim measures and vice versa. On 2 April 2019, the Hong Kong government 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 took effect on 1 October 2019. Hong Kong became the first and only jurisdiction outside the Mainland where parties to arbitral proceedings can apply to the mainland courts for interim measures in aid of arbitral proceedings. Provided that the arbitration is seated in Hong Kong and administered by designated arbitral institutions (including the Hong Kong International Arbitration Centre (HKIAC)), parties to the arbitration can apply to the mainland courts for orders to preserve property or evidence, or to prohibit a party from conducting in certain ways pending conclusion of the arbitral proceedings in Hong Kong. It should be noted, however, that different procedures are applicable depending on whether the parties apply for interim measures before or after acceptance of the case by an eligible arbitral institution. The mainland courts might require the applicant to provide security pending its determination and the applicant would be responsible for any related fees of the mainland courts.

Within less than one year of the implementation of the Arrangement, the HKIAC has processed 25 applications made to the mainland courts for interim measures and approximately US$1.4 billion worth of assets have been preserved as a result. Parties from the Mainland accounted for around 30 per cent of the applications whereas 70 per cent of them were made by parties from other jurisdictions such as the Cayman Islands, Singapore,

11 The maximum claim was originally set at HK$500,000 but was increased to HK$1 million in January 2018.

12 '2019 Annual Report' (FDRC, 30 June 2020) <https://www.fdrc.org.hk/en/annualreport/2019/>.

13 'Guideline No. 5: Procedure on terminating a case with an un-contactable party at the mediation stage' (FDRC, 1 June 2020) <https://www.fdrc.org.hk/en/doc/FDRC_Guideline_No.5_en.pdf>.

and the British Virgin Islands. In all cases, the HKIAC issued a letter of acceptance certifying the HKIAC's acceptance of an arbitration as required by the Arrangement, typically within 24 hours from its receipt of the application.

VI PRIVILEGE AND PROFESSIONAL SECRECY

The principle of legal professional privilege is considered fundamental in the judicial system in Hong Kong. It protects from disclosure confidential communications between a client and its lawyer for the dominant purpose of giving or receiving legal advice (legal advice privilege), and communications between parties and their lawyers and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation (litigation privilege).

Under Hong Kong law, legal advice privilege does not extend to cover legal advice given by professionals other than practising lawyers in light of the Court of Appeal's (CA) decision in *Super Worth International Ltd v. Commissioner of Independent Commission Against Corruption*,[14] which followed an English Supreme Court's decision.[15]

Legal advice privilege only protects confidential client-attorney communications. In *CITIC Pacific Ltd v. Secretary for Justice (No. 2)*,[16] the CA interpreted 'client' broadly so as to cover the client's employees and not only employees specifically authorised to seek and receive legal advice on behalf of the client. In other words, communications sent by an employee within the client organisation are protected by legal advice privilege, provided that those communications have been produced for the dominant purpose of obtaining legal advice. This represents a significant departure from the definition of 'client' adopted by the English Court of Appeal in *Three Rivers v. Governor and Company of the Bank of England (No. 5)*.[17] In a subsequent case,[18] the English Court of Appeal considered the authorities in Hong Kong (including *CITIC Pacific*) and acknowledged concerns with the narrow definition of 'client' adopted in *Three Rivers*. The issue, however, was left open and as such, the interpretation of 'client' in *Three Rivers* remains valid. The difference in the approach between English courts and Hong Kong courts remains.

VII JURISDICTION AND CONFLICTS OF LAW

i Anti-suit injunctions

Section 45 of the Arbitration Ordinance (Cap 609) (AO) and Section 21L of the High Court Ordinance (Cap 4) give the CFI the power to grant anti-suit injunctions to restrain the pursuit of proceedings in breach of jurisdiction clauses, such as an agreement to resolve disputes by arbitration. Recently, in *Cheung Shing Hong Ltd v. China Ping An Insurance (Hong Kong) Co Ltd*,[19] the CFI reaffirmed that it must stay the proceedings in favour of arbitration if all of the following questions are answered in the affirmative:

14 [2016] 1 HKLRD 281.

15 *R (on the application of Prudential plc & Anor) v. Special Commissioner of Income Tax & Anor* [2013] UKSC 1.

16 [2015] 4 HKLRD 20.

17 [2003] QB 1556.

18 *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation* [2018] EWCA Civ 2006.

19 [2020] HKCFI 2269.

a whether the clause in question is an arbitration agreement;
b whether the arbitration agreement is valid and enforceable;
c whether there is in reality a dispute or difference between the parties; and
d whether the dispute or difference in question is within the scope of the arbitration clause.

The CFI has also considered whether to exercise its discretion to grant an interim stay of an arbitration where the parties have previously settled their disputes by way of a settlement agreement, which does not contain an arbitration clause, while those disputes relate to an underlying contract containing an arbitration clause.[20] The well-established *American Cyanamid* requirements for the grant of interim injunction are relevant in this kind of applications. The CFI was satisfied that there was a serious issue to be tried in that because the settlement agreement does not have an arbitration clause, its validity or effect ought to be determined by the court. The interim stay application that was made *ex parte* on an urgent basis was nevertheless dismissed by the CFI due to a lack of urgency.

The court may also grant an interim anti-suit injunction to restrain the pursuit of foreign winding-up proceedings in favour of arbitration in Hong Kong. However, in case of an application for interim relief, the court has stressed that the applicant must meet a high standard that its case is right given the potential impact of the injunction on the foreign proceedings. Comity and delay are also relevant considerations. In *C v. D*, [21] the CFI refused to grant an interim anti-suit injunction on an urgent basis, on the grounds that the applicant had delayed in making the application and considerable resources had already been used to prepare for the substantive hearing before the foreign court.

ii Recognition and enforcement of foreign judgments (including Mainland judgments) and awards

Foreign judgments are generally enforceable either under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) or at common law. Notably, the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (Reciprocal Enforcement Ordinance), which gives effect to the Arrangement on Reciprocal Recognition and Enforcement of Judgments of Civil and Commercial Matters by the Courts of the Mainland and of HKSAR Pursuant to the Choice of Court Agreements between the Parties Concerned 2006 (2006 Choice of Court Arrangement), allows Mainland judgments to be enforced in Hong Kong. The 2006 Choice of Court Arrangement is expected to be replaced by a more recent arrangement between the Mainland and Hong Kong for the mutual recognition and enforcement of judgments signed on 18 January 2019, which will expand the scope of the reciprocal enforcement mechanism to cover non-monetary judgments and remove the strict requirement of an exclusive jurisdiction clause. It is still not yet known when it will take effect.

While the 2006 Choice of Court Arrangement remains in force, where any mainland court or Hong Kong court has made a final monetary judgment in a civil and commercial case, any party concerned may apply to a mainland court or Hong Kong court for recognition and enforcement of the judgment. In order to rely on the 2006 Choice of Court Arrangement, the judgment must have been made by the court pursuant to a written agreement between the parties to submit their dispute to the sole jurisdiction of a mainland court or Hong Kong

20 *Atkins China Ltd v. China State Construction Engineering (Hong Kong) Ltd* [2020] HKCFI 2092.
21 [2020] HKCU 2374.

court. A judgment so recognised shall have the same force and effect as one being made by a court of the place where the enforcement of the judgment is sought. This means that parties to cross-border contracts can confidently choose to have disputes resolved in either the Mainland or Hong Kong, knowing that there is an avenue to enforce a judgment in the other jurisdiction without incurring significant costs and time in initiating new proceedings.

Recently, the CFI has considered whether an asymmetrical jurisdiction clause in a facility agreement constituted an exclusive jurisdiction clause for the purpose of the Reciprocal Enforcement Ordinance. Asymmetrical jurisdiction clauses are widely used in financial documents with cross-border elements because they give lenders the optionality as to where to enforce their rights depending on the location of the borrowers' assets while having the certainty that the borrowers can only sue in a designated jurisdiction. However, in *ICBC (Asia) Ltd v. Wisdom Top International Ltd*,[22] the CFI held that such a clause did not qualify as a 'choice of Hong Kong court agreement'[23] under the Reciprocal Enforcement Ordinance because the plaintiff lender had the option to commence proceedings elsewhere and the choice of forum was therefore at large. As such, the plaintiff could not benefit from the more efficient statutory regime to enforce the judgment in the Hong Kong court against a debtor in the Mainland.

As for arbitral awards, the Arrangement of the Supreme People's Court on Mutual Enforcement of Arbitration Awards between the Mainland and the HKSAR 2000 facilitates the enforcement of awards between the Mainland and Hong Kong. To enforce a Hong Kong award in the Mainland, the applicant has to apply to the court at the place of domicile of the respondent by submitting a written application, the arbitral award and the arbitration agreement. Enforcement may be refused if (1) under the law of the place of enforcement the dispute is not arbitrable (i.e. incapable of being settled by arbitration) or (2) it is contrary to public policy.

In terms of recognition and enforcement of arbitral awards in general, Hong Kong courts have continued to embrace a pro-arbitration approach. A finding of fact is conclusive and not subject to challenge while a point of law is not subject to appeal unless it relates to a question of general importance and is 'at least open to serious doubt' or 'obviously wrong'.[24] Likewise, the bar of setting aside an arbitral award on the basis that there was no arbitration agreement is high. The standard of review of the tribunal's ruling on the existence of an arbitration agreement and hence its jurisdiction is one of 'correctness'. Courts in Hong Kong are expected to intervene only in rare circumstances where there is a true question of jurisdiction, as opposed to the merits of findings of fact and law made by the tribunal, on issues unrelated to or not necessary for the question of jurisdiction.[25]

In Hong Kong, a winning party in an arbitration may commence a legal action at common law if the losing party fails to honour the terms of the arbitral award. This action is founded on the parties' implied promise to honour subsequent arbitral awards and is separate from the statutory regime of enforcement. The Court of Final Appeal (CFA) has recently confirmed that in the common law action, Hong Kong courts have jurisdiction to grant

22 [2020] HKCFI 322.

23 It is defined under the Reciprocal Enforcement Ordinance to mean an agreement concluded by the parties in Hong Kong or any of them as the court to determine a dispute that has arisen or may arise in connection with the specified contract to the exclusion of courts of other jurisdictions.

24 *P v. C* [2019] HKCFI 2625.

25 *X v. Jemmy Chien* [2020] HKCFI 286.

remedies beyond those originally awarded in the arbitration. This is particularly encouraging for winning parties who cannot benefit from the statutory enforcement due to change of circumstances since the favourable awards were granted.[26]

Material non-disclosure in an application for recognition and enforcement of an award, however, may jeopardise the chance of having it enforced. In *1955 Capital Fund I GP LLC v. Global Industrial Investment Ltd*,[27] the CFI discharged an enforcement order relating to an arbitral award on the ground of material non-disclosure because the judgment creditor's attorney deliberately omitted from his affidavit the fact that the award was subject to 'the filing of an application to correct or vacate the arbitration award under applicable law', which created the impression that the award was immediately enforceable. It is also important to note that where a party applies to set aside or seeks to resist the enforcement of an arbitral award, it must set out all grounds that it intends to rely on and will be precluded from raising additional grounds at a later stage.[28]

VIII SOURCES OF LITIGATION

i Banks' obligation in respect of anti-money laundering, counter-terrorism financing obligations and fraud

Banks remain at the forefront of the battle of anti-money laundering and counter-terrorism financing. Where the authorities are investigating alleged money laundering or receipt of proceeds of crime in circumstances in which customers find that, without explanation, their accounts are suddenly frozen, banks are placed in a difficult position because its response to customers' demand for reasons may constitute prospective tipping off.[29] The CFI has clarified that, at the very least, a bank is entitled to unconditional leave to defend in a summary judgment action for release of the frozen assets.[30]

Where a fraudster successfully elicits funds from a victim, genuine victims may apply for interim measures against banks to protect their position. In cases of forged instructions to direct banks to transfer funds out of the victim's bank account, an injunction to freeze funds in the hands of third party recipients is not uncommon.[31] In addition, where a victim is unaware of the identity of recipients, a *Norwich Pharmacal* order is particularly helpful to trace the movement of misappropriated funds.[32]

A restitutionary claim against the third party recipient is not unusual, even if the recipient is innocent. Recipient(s) of misappropriated funds sometimes raise the defence(s) that either (1) he is a bona fide purchaser for value or (2) he has changed his position by acting to his detriment in good faith after the receipt of such funds, thus warranting protection under equity (or both). The CFI has rejected these defences on the basis of illegality (e.g., where the recipient used 'underground banking' in violation of PRC laws) because equity does

26 *Eton Properties Ltd & Anor v. Xiamen Xinjingdi Group Co Ltd* [2020] HKCFA 32.

27 [2020] HKEC 2008.

28 *SC v. OE1* [2020] HKCFI 2065.

29 *Crown Aim Ltd v. Uco Bank* [2020] HKCFI 212.

30 ibid.

31 *Cheung Hon Kuen v. Hang Seng Bank Ltd* [2019] HKCFI 2874.

32 *Malayan Banking Berhad, Singapore Branch v. Legend Six Holdings Ltd & Anor* [2020] HKCFI 990; *Cinatic Technology Ltd v. Hongkong and Shanghai Banking Corp Ltd* [2020] HKDC 278.

not assist a wrongdoer.[33] In *Akbank TAS v. Mainford Ltd & Ors*,[34] the third party recipient sought to argue that it was merely a conduit as the funds were deposited into its account and were subsequently withdrawn without its authority. The CFI rejected the 'conduit defence' because such defence is only available to banks or similar agents that are instructed to handle the mechanical receipt and transmission of funds.

Banks have become even more exposed to fraud and its repercussions in light of the recent UK Supreme Court's decision to uphold the first successful claim in negligence for breach of the *Quincecare* duty of care owed by financial institutions to their customers.[35] The *Quincecare* duty refers to a bank's duty to exercise reasonable skill and care in executing the customer's orders. While banks are not expected to question every payment instruction from their clients, they cannot turn a blind eye to signs that would be obvious and glaring to any reasonable banker that their clients' trusted agents are perpetrating a fraud. The *Quincecare* duty has been recognised by Hong Kong courts. In *PT Tugu Pratama Indonesia v. Citibannk NA*,[36] the CFI found that the bank had breached the *Quincecare* duty to the customer because it had been put on enquiry in the light of the pattern of payments together with the lack of apparent business connection between the disputed payments and the customer, as well as the fact that the payment instructions were signed by those who would benefit from them. The CFI therefore held that the bank was negligent in failing to make any enquiry, although the action failed because it was time-barred. In *HSBC v. SMI Holdings Group Ltd*,[37] the CFI reaffirmed that the *Quincecare* duty applies in Hong Kong, though the required threshold to put banks on inquiry is high.

ii Debt-enforcement and insolvency

It is common for banks as creditors to commence winding-up proceedings against their debtors. Traditionally, the court should not dismiss a winding-up petition unless it is satisfied on the evidence that the debt is genuinely disputed on substantial grounds.[38] While an injunction to prevent the presentation of a winding-up petition is based on the court's inherent jurisdiction to prevent the abuse of its own process, great circumspection is to be exercised before granting such an injunction as the right to petition for winding-up in appropriate circumstances is a right conferred by statute that should not be restricted except on clear and persuasive grounds.[39]

In *Lasmos Ltd v. Southwest Pacific Bauxite (HK) Ltd*,[40] the CFI held that a statutory demand should be set aside or winding-up petition should generally be dismissed if:

a the company debtor has a genuine dispute over the debt relied on by the petition;

b the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

33 *DBS (Hong Kong) Ltd v. Pan Jing* [2020] HKCFI 268.

34 [2020] HKCFI 396.

35 *Singularis Holdings Ltd (In Official Liquidation) (A Company Incorporated in the Cayman Islands) v. Daiwa Capital Markets Europe Ltd* [2019] UKSC 50.

36 [2018] HKCFI 2233.

37 [2019] HKCFI 1948.

38 *Hollmet AG v. Meridian Success Metal Supplies Ltd* [1997] 4 HKC 343.

39 *Synergy Lighting Limited v. HSBC* [2020] HKCFI 2490.

40 [2018] HKCFI 426.

c the company has complied with the contractually agreed dispute resolution process by commencing action and files an affirmation for this purpose.

The *Lasmos* approach is a departure from the traditional approach above and has been queried in *obiter dicta* by the CA, which is of the view that public policy mandates that the statutory right of winding up a company should not be fettered or precluded.[41] In another case, the CA has also expressly discouraged debtors from making opportunistic attempts to invoke the *Lasmos* approach in the future.[42] More recently, the CFI has held that where there is no real intention to resolve the dispute by arbitration, the *Lasmos* approach may not be available to the company debtor.[43]

In winding-up cases concerning banks or asset holding entities, significant care should be taken towards clients' assets. In *Re the Joint and Several Liquidators of Bankamerica Nominees (Hong Kong) Ltd (In Members' Voluntary Liquidation)*,[44] which concerns the winding-up of a broker company set up by a bank to hold collateral posted by clients, there remained assets of unidentified clients in the broker company's bank account at the time of winding-up. The CFI reiterated the well-established principle that a client-broker relationship is one of principal and agent, and thus cash held by a broker company is held on trust for clients who have a proprietary interest in those assets. As such, the unidentified assets do not form part of the broker company's assets.

iii Performance bond

Recently, the CA examined the on-demand payment feature of a performance bond, which is a guarantee over delivery of goods or performance of services, failure of which triggers the payment obligation on the guarantor thereunder. In *West Kowloon Cultural District Authority v. AIG Insurance Hong Kong Ltd*,[45] the guarantor attempted to resist payment by claiming that the payment conditions had not materialised and thus no payment obligations arose. The CA reiterated that the commercial efficacy of this instrument dictates that the threshold to resist payment is high because it is widely used and 'treated as cash' given its high certainty of payment obligation.

IX EXCLUSION OF LIABILITY

The effectiveness of 'anti-Bartlett' provisions has been subject to judicial consideration in recent years. While the wording varies, anti-Bartlett provisions are commonly found in trust deeds for the purposes of relieving trustees from any duty to exercise control over or interfere with, or become involved in the management or conduct of the trust-owned investment company that primarily remains in the hands of the settlors. In *Zhang Hong Li v. DBS Bank (Hong Kong) Ltd & Ors*,[46] the CFA gave a final decision on the legal effect of the anti-Bartlett clause contained in a discretionary trust after the issue had been considered in the courts below. The CFI held that the clause concerned did not absolve the trustee from liability for failing

41 *But Ka Chan v. Interactive Brokers LLC* [2019] HKCA 873.

42 *Sit Kwong Lam v. Petrolimex Singapore Pte Ltd* [2019] HKCA 1220.

43 *Dayang (HK) Marine Shipping Co, Ltd v. Asia Master Logistic Ltd* [2020] HKCFI 311.

44 [2020] HKCFI 399.

45 [2020] HKCA 778.

46 [2019] HKCFA 45.

to intervene in relation to the risky investments made by the company notwithstanding that the clause was drafted extensively to exclude any duty to interfere in the business of the trust company and to require the trustees to leave the administration, management and conduct of the business to the directors and assume that the business was conducted competently and honestly, unless the trustees had actual knowledge of any dishonesty. The trustee and the corporate director were found liable for grossly negligent breaches of trust and fiduciary duty. As upheld by the CA, the reasoning was that notwithstanding the wording of the anti-Bartlett clause, the trustees and the corporate director owed a 'high level supervisory duty' to the beneficiaries so as to ensure the value of the trust assets was under appropriate control, reviews and management with investment expertise.

Nevertheless, the CFA overturned the lower courts' decision and held that the 'high level supervisory duty' found by the lower courts was plainly inconsistent with the anti-Bartlett provision that was found to be effective in relieving the trustees of any duty to interfere with the management of the company, including querying or objecting to the transactions entered into by the company, so long as they did not have actual knowledge of any dishonesty. The 'high level supervisory duty', as the CFA decided, introduced 'an amorphous and ill-defined basis for undermining the legitimate arrangement consciously adopted by the parties, exposing the trustees to unanticipated risks of liability and sowing confusion as to the extent of their duties'.[47] While the CFA's decision is no doubt an important one, whether a particular anti-Bartlett provision works to exclude certain duties of the trustee is ultimately a matter of contractual construction.

X REGULATORY IMPACT

The banking industry has been unprecedentedly shaken by the covid-19 pandemic. As the pandemic continues to evolve, measures that were planned to be short-term may have to remain for relatively longer or even reintroduced. Social distancing and travel bans have impacted how banks and customers interact. The situation has also put pressure on resources, which is addressed by measures including equipping staff with remote working capabilities and devising technology solutions. The Hong Kong Monetary Authority (HKMA) has published a circular on the Anti-Money Laundering and Counter-Financing of Terrorism measures in response to covid-19.[48] While the HKMA believes that financial technology is a valuable tool to manage some of the challenges presented, it also reminds banks to stay vigilant to financial crime risks. The relevant technologies include an increased use of VCF to interact with customers for on-boarding and ongoing customer due diligence reviews.[49] By June 2020, more than 10 authorised institutions have launched remote on-boarding. The HKMA has reviewed how banks may be exposed to money laundering and counter-financing risks

47 ibid [45].

48 'Coronavirus disease (COVID-19) and Anti-Money Laundering and Counter-Financing of Terrorism (AML/CFT) measures' (HKMA, 7 April 2020) <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200407e1.pdf>.

49 'Coronavirus disease (COVID-19) and Anti-Money Laundering and Counter-Financing of Terrorism (AML/CFT) measures – An Update' (HKMA, 30 July 2020) <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200730e1.pdf>.

with these initiatives.[50] Banks are reminded to adopt a risk-based approach when introducing remote on-boarding and may refer to relevant guidance, including the Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (For Authorised Institutions).

In general, anti-money laundering remains a major regulatory focus of the HKMA. Criminals are taking advantage of covid-19 to perpetrate fraud and exploitation scams. In light of the circumstances, banks are working to manage emerging financial risks and incorporate changes into transaction monitoring rules and scenarios. Furthermore, in response to the pandemic, the Financial Action Task Force, an independent inter-governmental body, decided on a general pause on the review process for jurisdictions that have strategic deficiencies in their anti-money laundering, counter-financing of terrorism and counter-proliferation financing regimes, and banks should continue to refer to the HKMA circular on 'Statements issued by the Financial Action Task Force' dated 11 March 2020.[51]

Foreign regulatory developments have also had an impact on banks in Hong Kong. Due to uncertainties arising from covid-19, the Prudential Regulation Authority in the UK has requested seven large-scale banks to suspend the declaration and payment of dividends in order to preserve and strengthen the capital position of the banking system. Similar actions were also taken by the regulatory authorities in Europe. A few banks that are listed in Hong Kong have accordingly announced the cancellation of their final dividend payments for 2019 and the suspension of quarterly or interim dividend payments for 2020. The Hong Kong government has issued a written reply that the dividend policy and arrangements of listed companies are commercial decisions of the respective companies' board of directors, and it is believed that the relevant decisions would not affect the overall competitiveness of Hong Kong's securities market.[52] However, the HKMA has requested the banks concerned to reflect the concerns of shareholders in Hong Kong to the banking groups.[53] The HKMA has also informed the Prudential Regulation Authority in the UK of these concerns.

In August 2020, the US Department of the Treasury imposed sanctions on 11 individuals in the Mainland and Hong Kong. The sanctioned persons will have all property in the US 'blocked' and effectively frozen, and US entities are generally prohibited from having business dealings with these individuals. The HKMA has expressed that unilateral sanctions imposed by foreign governments are not part of the international targeted financial sanctions regime and have no legal status in Hong Kong, thus creating no obligation for banks under Hong Kong law.[54] Banks are reminded to treat their customers fairly when assessing whether to continue to provide banking services to an individual or entity designated under such unilateral sanction.

50 'Feedback from recent thematic reviews of Anti-Money Laundering and Counter-Financing of Terrorism (AML/CFT) control measures for remote customer on-boarding initiatives' (HKMA, 3 June 2020) <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200603e1.pdf>.

51 'Statements issued by the Financial Action Task Force' (HKMA, 8 August 2020) <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200717e1.pdf>.

52 'LCQ11: Cancellation of dividend payments already announced' (HKSAR Government, 13 May 2020) <https://www.info.gov.hk/gia/general/202005/13/P2020051200565.htm>.

53 'LCQ21: Cancellation of dividend payments already announced' (HKSAR Government, 27 May 2020) <https://www.info.gov.hk/gia/general/202005/27/P2020052700289.htm>.

54 'Financial Sanctions' (HKMA, 8 August 2020) <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200808e1.pdf>.

XI OUTLOOK AND CONCLUSIONS

The outbreak of covid-19 has brought upon unprecedented challenges to the banking industry in Hong Kong. While it has caused significant difficulties for both the legal and banking sectors, efforts are ongoing to cope with the situation and innovative initiatives have been implemented. In particular, the pandemic has accelerated the use of technology by the judiciary, for instance by allowing the use of electronic documents in court proceedings. These are welcome changes because they breathe new life into the dispute resolution process.

Banking litigation has continued despite the turmoil caused by covid-19. Recent cases have shed light on the remedies available to banks and victims alike in cases of fraud. Interim measures have become ever more important to speedily protect banks' position and facilitate the resolution of disputes. Courts have also addressed issues in insolvency proceedings that may be of relevance to banks, such as the grounds for restraining the presentation of a winding-up petition and the implications of unidentified assets in insolvency proceedings.

While it is anticipated that covid-19 will take a toll on global economy in general, investors can be assured by a number of factors. First, Hong Kong has a pro-arbitration legal system that appeals to business communities. Second, the pandemic has demonstrated Hong Kong regulators' ability to respond swiftly in times of crisis. Third, Hong Kong has witnessed important legislative developments, with changes to the legal framework for banking and insurance regulation that will strengthen Hong Kong's standing as an international financial centre.

Appendix 1

ABOUT THE AUTHORS

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Wynne Mok joined Slaughter and May in September 2018 and is a partner in the Hong Kong office's Asia-wide Dispute Resolution practice, focusing on regulatory investigations and inquiries, commercial litigation, and securities investigations. She is an appointed Solicitor Advocate in Hong Kong and has been granted Higher Rights of Audience before the High Court and the Court of Final Appeal in civil proceedings in Hong Kong.

Prior to joining Slaughter and May, Wynne was a Director of Enforcement of the Securities and Futures Commission (SFC) where her principal responsibilities included managing litigation involving the Enforcement Division, giving advice on operational issues encountered by the SFC's Enforcement Division, and participating in the management of the division.

Prior to the SFC, Wynne was a dispute resolution partner at a global law firm where she handled cases in a broad range of areas with a particular focus on commercial litigation, securities investigations, business ethics and anti-corruption, contentious trust and probate, and employment disputes. Her previous practice had a focus on PRC corporations and individuals.

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ISBN 978-1-83862-436-1