IN-DEPTH

Banking Litigation

HONG KONG

LEXOLOGY

Banking Litigation

EDITION 8

Contributing Editor

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Slaughter and May

In-Depth: Banking Litigation (formerly The Banking Litigation Law Review) provides a practical overview of the litigation landscape and framework for banking disputes in major jurisdictions worldwide. Focusing on recent developments and trends, it examines a wide range of issues – including significant recent cases and legislative changes; procedural considerations; legal privilege; conflicts of law; available remedies; exclusion of liability; and much more.

Generated: November 5, 2024

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LEXOLOGY

Explore on **Lexology**

Hong Kong

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Summary

Introduction

The Hong Kong government continues to work towards providing a facilitating environment for promoting sustainable and responsible development of the virtual assets sector given the status of Hong Kong as an international financial centre. Against this backdrop, there have been more significant regulatory and legislative developments in relation to the provision of virtual assets services in the city. In addition to legal developments concerning the licensing regimes for virtual asset service providers and the mutual enforcement of judgments between mainland China and Hong Kong, this year we have seen crucial judicial decisions concerning the *Quincecare* duty, the police's practice of issuing letters of no consent and creditors' winding-up petitions while the parties have agreed to resolve their contractual disputes under an exclusive jurisdiction clause or arbitration clause. All of these judicial decisions are relevant to banks.

Year in review

Recent cases

There has been recent legal development in relation to the *Quincecare* duty in Hong Kong. *Quincecare* duty has always been understood to arise only in circumstances where misappropriation of a customer's funds occurred due to a payment instruction from an authorised or trusted agent on behalf of a customer, instead of a customer's direct instructions.[1]

In *PT Asuransi Tugu Pratama Indonesia TBK v. Citibank NA*,[2] where the respondent bank made payments out of a customer's account based on payment instructions by purported authorised signatories to themselves, the Court of Final Appeal confirmed that the *Quincecare* duty can only be triggered where a bank receives payment instructions from a customer's agent, and notfrom the actual customer. Lord Sumption (sitting as a non-permanent judge), however, clarified (concurred by the rest of the panel) that a bank's duty when making payments out of a customer's account could arise from not only the seminal *Quincecare* duty to exercise reasonable skill and care in executing a customer's instructions as the customer's agent, but also the duty to act on the instructions from the customer's agent who possesses actual or apparent authority granted by the customer. This latter duty would require the bank to make necessary inquiries before executing the instructions purportedly given by the customer's agent if there are features of the transaction apparent to a bank that indicated wrongdoing, unless special explanation is given. In *Excel Courage Holdings Limited v. Seto Ming Wai & CLC Securities Limited*,[3-] the Court of First Instance confirmed that a mere non-compliance with regulatory best practices or a general irregularity in the structuring or documentation of a transaction would not be material or serious enough to engage the *Quincecare* duty.[4]

The Hong Kong police's common practice to issue 'letters of no consent' to banks when a suspicious transaction report is received, pursuant to the Organized and Serious Crimes Ordinance (Cap 455) (No Consent Regime) has been challenged in recent years, but the issue has now been settled with the Court of Final Appeal's decision in *Tam Sze Leung*

v. Commissioner of Police.[5] A letter of no consent issued by the police to a bank has the effect of freezing the relevant bank account that holds criminal proceeds. However, this No Consent Regime was held by the Court of First Instance to be unconstitutional and *ultra vires*.[6] In 2023, the Court of Appeal held that the police have always possessed the statutory *vires* to issue letters of no consent within the Organized and Serious Crimes Ordinance, and that the No Consent Regime is 'part and parcel of the measures used to combat organised crime in money laundering'.[7] On appeal, the Court of Final Appeal upheld the constitutionality of the No Consent Regime, stating that the Police Force Ordinance (Cap 232), which authorised the police to prevent crime and protect property, and not the Organized and Serious Crimes Ordinance formed the basis of the No Consent Regime, and thus the regime could not be *ultra vires* of the latter. The Court further decided that the police's approach to freezing bank accounts was proportionate in the circumstance as the measure was temporary, there were clear principles governing police's conduct during investigations or interactions with banks and the police were entitled to keep the investigations confidential to avoid prejudice. Now that the constitutionality of the No Consent Regime has been clarified, banks should stop further activities in the relevant bank accounts upon receipt of letters of no consent.

Recent legislative developments

The legislative development concerning virtual assets services in recent years is notable and is relevant to banks that may wish to embrace new business opportunities (including providing banking services to virtual asset service providers).

Part 5B of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615) (AMLO), which came into effect on 1 June 2023, set out a licensing regime for virtual asset trading platforms (VATPs) for non-security tokens. The AMLO Regime operates in parallel with the licensing regime under the Securities and Futures Ordinance, which regulates the trading of security tokens[8] that fall under the definition of 'securities' under Schedule 1 thereto. In general, under the dual regimes, those who carry on (or hold themselves out as carrying on) a business of providing virtual assets services,[9] and centralised virtual asset trading platforms carrying on their businesses in Hong Kong, or actively marketing their services to Hong Kong investors, will have to be licensed with the Commission[10] to avoid criminal sanctions.[11]

Given the ever-changing landscape of virtual assets, the Hong Kong government has, in December 2023 and February 2024, issued public consultations on legislative proposals to regulate over-the-counter trading of stablecoin issuers[12] and virtual assets[13] via licensing regimes, and has published the positive consultation results for the latter with a view to introducing a bill into the Legislative Council.[14] It is therefore expected that more legislation governing virtual asset services will soon be published.

With the new rules and procedures for reciprocal recognition and enforcement of judgments in civil and commercial matters by Hong Kong and mainland courts becoming operative in January 2024, the judiciary is working closely with the Hong Kong government and the Supreme People's Court of the PRC on improving the implementation of existing mutual legal assistance arrangements with mainland China, including the arrangements for the mutual service of judicial documents in civil and commercial proceedings between the two jurisdictions.[15]

Changes to court procedure

The procedural rules for High Court and District Court have been amended to enable the courts to enter summary judgments for actions that have begun by writ, including claims based on allegations of fraud.[16] Under the current rules, a plaintiff may now apply for judgment against a defendant without going through a full trial on the basis that the defendant has no arguable defence, even when the claim is more than a monetary one. In *Boston Consulting Group (Brasil) Ltd v. Kaisheng Technology Co Ltd*,[17] the Court of First Instance granted a summary judgment in favour of the plaintiff, whose employees were deceived into making transfers of funds that ended up in the defendant's bank account.

To enhance the efficiency of court operations, the judiciary has been implementing the integrated Case Management System (iCMS) in stages to handle court-related documents and payments electronically.[18] The use of iCMS is not yet made mandatory for all court proceedings but it is encouraged.

Hong Kong courts have been conducting hearings of civil cases remotely since 2020. Following a public consultation, the judiciary has been finalising the Courts (Remote Hearing) Bill (the Bill), which aims to provide a comprehensive legal framework concerning the application, operation and effect of remote hearings for court proceedings. Under the Bill, judges and judicial officers may order remote hearings at various levels of courts and tribunals where it is just and fair to do so, having regard to a list of factors including:

1. the nature, complexity and urgency of the proceeding; and
2. the potential impact of the order when assessing the credibility of witnesses and the reliability of the evidence presented.

The judiciary also aims to issue practice directions and operational guidelines to provide operational and administrative details for the conduct of remote hearings.

Interim measures

All of Hong Kong's courts can issue various interim measures to prevent defendants from dissipating assets pending both local and foreign proceedings. Such interim measures work to protect traditional assets, such as monies in a bank account, as well as digital assets. The Court of First Instance has granted an interim proprietary injunction to freeze certain Bitcoins pending resolution of the substantive dispute between the parties over the ownership of those digital assets.[19]

Hong Kong remains the first and only jurisdiction outside mainland China where parties to arbitral proceedings can apply to the mainland courts for interim measures in aid of arbitral proceedings. Under the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of mainland China and of the Hong Kong Special Administrative Region (Interim Measures Arrangement), where an arbitration is seated in Hong Kong and administered by one of the 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 acting in certain ways pending conclusion of the arbitral proceedings in Hong Kong. The application, accompanied with a letter of acceptance issued by the designated arbitral institution, can be made to the Intermediate People's Court of the counterparty's place of residence, or the place where the relevant asset is located. 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.-[20] Within four years of implementing the Interim Measures Arrangement, the HKIAC has granted orders preserving assets totalling US$3.7 billion.[21]

Since 22 June 2022, the HKIAC has been included in the One-Stop Platform for Diversified International Commercial Dispute Resolution (One-Stop Platform) of the China International Commercial Court, which was set up to adjudicate international commercial cases and create an efficient legal business environment under the Belt and Road Initiative. Parties to an HKIAC-administered arbitration can apply directly to the Commercial Court for interim relief or enforcement, provided that the amount in dispute exceeds 300 million yuan, or would otherwise likely be of significant influence. In large-scale arbitrations involving multiple parties or assets scattered across different provinces within mainland China, one single application can be made to the Commercial Court.

Privilege and professional secrecy

Legal professional privilege 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.[22]

Legal advice privilege only protects confidential client–attorney communications. In *CITIC Pacific Ltd v. Secretary for Justice (No. 2)*,[23] the Court of Appeal interpreted 'client' broadly to cover the client's employees, and not only employees specifically authorised to seek and receive legal advice on behalf of the client. Communications sent by an employee within the client organisation for the dominant purpose of obtaining legal advice are therefore protected by legal advice privilege.

Jurisdiction and conflicts of law

Anti-suit injunctions and anti-arbitration injunctions

The Court of First Instance has the power to grant anti-suit injunctions to restrain the pursuit of court proceedings in breach of an agreement to resolve disputes by arbitration.-[24] The principle of comity requires that the jurisdiction to grant anti-suit injunctions be exercised with caution and restraint. An applicant is required to show to a high degree of

probability that the initiation of foreign proceedings constituted a breach of an arbitration agreement.[25] Delay is also a relevant consideration.[26]

The High Court in *G v. N*[27] refused to set aside an order to enforce an interim order made by an arbitral tribunal that required one of the parties to an ongoing arbitration to stop pursuing foreign court proceedings in breach of the arbitration agreement, notwithstanding that the foreign proceedings also involved parties who were not bound by the arbitration agreement. The High Court recognised that the interim order made by the arbitral tribunal was effectively an anti-suit injunction. Whether or not an anti-suit injunction could be made against a party that is not party to the arbitration depends on the construction of the arbitration agreement, and the underlying contract, to see if the party sought to be injuncted can be considered to have been included by the parties to the contract and agreement concerned, and if the dispute in the proceedings to be injuncted falls within the scope of the arbitration agreement. These were matters for the arbitral tribunal to decide. The High Court refused to interfere with the arbitral tribunal's decision as the grounds for setting aside the interim order were not established.

The Court of First Instance also has the power under Section 21L of the High Court Ordinance (Cap 4) to grant anti-arbitration injunctions. However, the Court would exercise this power only in wholly exceptional circumstances, having due and proper regard to the objectives and principles of the autonomy, independence and finality of arbitration as enshrined in the Arbitration Ordinance (Cap 609).[28] An applicant for an anti-arbitration injunction must show the following:

1. the injunction does not cause injustice to the claimant in the arbitration; and
2. the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.[29]

Stay of proceedings in favour of arbitration

An application for a stay of Hong Kong proceedings in favour of arbitration can be made.-[30] In *Cheung Shing Hong Ltd v. China Ping An Insurance (Hong Kong) Co Ltd*,[31] the Court of First Instance reaffirmed that it must stay the proceedings in favour of arbitration if there is a valid and enforceable arbitration agreement, a dispute exists between the parties and the dispute falls within the scope of the arbitration agreement. The Court of First Instance further decided in *Falcon Insurance v. Bing Lee*[32] that if there is a prima facie or plainly arguable case that the parties are bound by their agreement to resolve their dispute by arbitration, the court proceedings should be stayed so that the arbitral tribunal could determine whether the issue in dispute is arbitrable (hence exert its own jurisdiction over the matter). The perceived lack of merits of any defence does not mean that there is no genuine dispute to be resolved by arbitration and subsequently does not constitute a ground for not staying the court proceedings.

A party wishing to have Hong Kong proceedings stayed must make an application before they submit to the substantive jurisdiction of the Hong Kong courts. This means that they should make an application before they submit their first statement on the substance of the dispute (e.g., their defence). However, a party will not be prejudiced by the mere taking of an action in relation to the proceedings that is merely protective of their position (e.g.,

acknowledgement of service of a writ).[33] While the stay application is pending, parties can commence or continue arbitral proceedings, and any arbitral award made therefrom will be valid. However, where an arbitration agreement is spent (e.g., where the Tribunal had ruled that the parties' disputes should be determined by the Hong Kong courts), a stay of the original court proceedings from which arbitral proceedings were brought should be uplifted.[34]

The Hong Kong courts have decided that when faced with simultaneous applications to set aside a default judgment and to stay proceedings in favour of arbitration,[35] the stay application would be determinative. If the defendant can show a good prospect of success that the parties were bound by an arbitration agreement, the court proceedings should be stayed and the default judgment set aside.

Recognition and enforcement of foreign judgments (including mainland judgments) and awards

The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645), which came into force on 29 January 2024, gives effect to the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of Mainland and of the Hong Kong Administrative Region signed on 18 January 2019. Mutual enforcement of judgments is now possible even without a prior written agreement between the parties accepting the sole jurisdiction of a mainland Chinese or Hong Kong court, and only requires that the relevant court had jurisdiction at the time that the proceedings were accepted. This means that most mainland Chinese judgments in civil and commercial matters[36] can now be enforced in Hong Kong through a registration procedure, provided that other requirements of the arrangement are also satisfied. It also expanded the scope of enforceable relief to include non-monetary relief such as declaratory relief or orders for specific performance.

The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597)[37] continues to be applicable to judgments made before 29 January 2024. An important requirement of this Ordinance is the existence of a written agreement between the parties to submit their dispute to the sole jurisdiction of a mainland Chinese or Hong Kong court. As such, a judgment made by a Hong Kong court pursuant to an asymmetrical jurisdiction clause (giving one contractual party options as to where to enforce its rights depending on the location of the counterparty's assets while having the certainty that the counterparty could only sue in a designated jurisdiction) may not be enforced under this Ordinance as the choice of forum is still undetermined.[38]

Foreign judgments are generally enforceable under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) or at common law.

Hong Kong is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Hong Kong courts will enforce arbitral awards made in Hong Kong and in another contracting state to the New York Convention[39] in the same manner as a judgment in Hong Kong, subject to the leave of the court. As such, the court will apply the same considerations to a stay application for award enforcement as an application to stay enforcement of a judgment.[40]

The Arrangement Concerning Mutual Enforcement of Arbitral Awards between mainland China and the Hong Kong Special Administrative Region since 1 February 2000 (Original

Arrangement) provides for mutual enforcement of arbitral awards between the two jurisdictions on terms largely similar to those of the New York Convention. An applicant can apply to the Intermediate People's Court at the respondent's place of domicile or the place in which their property is situated.[41] Enforcement may be refused if, under the law of the place of enforcement, the dispute is incapable of being settled by arbitration or is contrary to public policy.

The Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between mainland China and the Hong Kong Special Administrative Region (Supplemental Arrangement), which was signed on 27 November 2020 and implemented into the Arbitration Ordinance, makes interim measures available before and after the court's acceptance of an application for the enforcement of an arbitral award.[42]

Furthermore, the Supplemental Arrangement has broadened the scope of mutually enforceable arbitral awards to cover any arbitral awards rendered pursuant to the Arbitration Law of the People's Republic of China,[43] by making it possible to enforce an arbitral award rendered under the Arbitration Ordinance so long as it had been made in a Chinese-seated arbitration, regardless of whether the award was made by a local arbitral authority or an international arbitration institution. Moreover, a winning party can now apply to enforce an arbitral award in the courts of mainland China and Hong Kong simultaneously (provided that the total amount recovered does not exceed the amount of the arbitral award),[44] which was previously not possible.

Following the inclusion of the HKIAC in the One-Stop Platform, parties to international commercial cases administered by the HKIAC with an amount in dispute of over 300 million yuan, or otherwise likely to be of significant influence, may also apply directly to the China International Commercial Court for enforcement of the arbitral award via the One-Stop Platform.

Sources of litigation

Bond defaults and insolvency

There have been an increasing number of bond defaults in the past few years. Banks, as trustees of the bonds, can obtain judgments against the issuer or guarantor and enforce the judgment by obtaining a garnishee order.[45] A bank trustee can also petition for the winding up of the issuer or sue the keepwell provider of such issuer for breach of keepwell deeds.[46]

Hong Kong courts have seen increasing attempts to wind up foreign companies in Hong Kong. In many cases, creditors have sought to wind up a Hong Kong-listed company that was incorporated in offshore jurisdictions, such as the Cayman Islands, but had core business and assets in mainland China held through intermediate holding companies incorporated in another offshore jurisdiction. Such structures are prevalent among listed issuers in Hong Kong.

In general, the most appropriate place to wind up a company is its place of incorporation. In deciding whether to exercise its jurisdiction to wind up a foreign company, a court considers three core requirements:

1. the foreign company must have a sufficient connection with Hong Kong;
2. there must be a reasonable possibility that the winding-up order would benefit those applying for it; and
3. the court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

The second core requirement has proven to be the most problematic. In *Re China Huiyuan Juice Group Ltd*,[47] the Court of First Instance held that the group that employs an offshore structure could not be wound up in Hong Kong as the petitioner could not demonstrate real benefit in doing so. This was because the company's main assets were in mainland China, but the laws of mainland China did not recognise the Hong Kong-appointed liquidators, which meant that a winding-up order made by a Hong Kong court would not serve any meaningful purpose. The liquidators would not be able to take control of the Chinese subsidiaries and ultimately reach the assets in mainland China. However, in *Shandong Chenming Paper Holdings Ltd v. Arjowiggins HKK 2 Ltd*,[48] the Court of Final Appeal held that the leverage created by the commencement and existence of winding-up proceedings in Hong Kong is sufficient to satisfy the second core requirement.

On 14 May 2021, mainland China and Hong Kong entered into an Arrangement on Mutual Recognition of and Assistance to Insolvency Proceedings (Co-operation Mechanism), which allows Hong Kong-appointed liquidators to be recognised and assisted by a mainland court, and exercise powers available to them under Hong Kong law within mainland China. Under the Co-operation Mechanism, three pilot courts (the Intermediate People's Courts in Shanghai, Xiamen and Shenzhen) will consider applications for recognition of and assistance to Hong Kong insolvency proceedings in respect of companies with a centre of main interest in Hong Kong for at least six months prior to the application, and have principal assets or business operations or representative offices in one of these pilot areas. A first letter of request was issued under the Co-operation Mechanism by the Hong Kong court to the Shenzhen Bankruptcy Court in *Re Samson Paper Co Ltd*[49] to seek recognition of Hong Kong liquidation proceedings.

The Co-operation Mechanism also provides for the recognising and assisting of mainland China-appointed administrators in Hong Kong. The Court of First Instance in Hong Kong has recognised an administrator appointed by the Guangzhou Intermediate People's Court and granted him powers that are ordinarily given to a liquidator appointed in Hong Kong under the Co-operation Mechanism.[50] Notably, the Judge noted in *Re Guangdong Overseas Construction Corp (in liq)* that the Co-operation Mechanism merely prescribes the framework of mutual recognition and assistance of insolvency proceedings between the courts of mainland China and of Hong Kong, and the manner to do so. It does not purport to confer jurisdiction on the relevant court to seek recognition and assistance – that remains to be found at common law insofar as Hong Kong courts are concerned.

It is also notable that a pilot scheme for an individual bankruptcy regime has been running in Shenzhen[51] since 1 March 2021. It remains to be seen whether a national bankruptcy

regime will be implemented in mainland China in the near future, and whether, as a result, the Co-operation Mechanism would be extended to individual bankruptcies.

Companies in financial distress may wish to effect restructuring in Hong Kong to avoid winding up. However, whereas other common law jurisdictions allow 'soft-touch provisional liquidation', whereby provisional liquidators are appointed to facilitate corporate restructuring while the board maintains day-to-day management of the company (thereby adopting a debtor in possession model), this mechanism is not available in Hong Kong. The approach of appointing soft-touch provisional liquidators in the company's place of incorporation and seeking recognition and assistance in Hong Kong with a view of implementing a scheme of arrangement in Hong Kong has faced scrutiny from the courts, particularly in cases where soft-touch provisional liquidators are appointed after a winding-up petition has been issued in Hong Kong and attempts are made to adjourn the insolvency proceedings in Hong Kong.[52] However, where a foreign provisional liquidator is appointed in the wake of ongoing winding-up proceedings within that particular jurisdiction, the Hong Kong courts would more readily grant an order for assistance. The Hong Kong courts would consider especially the views of unsecured creditors in deciding whether to adjourn the petition in favour of restructuring. Furthermore, where the centre of main interest is in Hong Kong, the court may not give primacy to the insolvency proceedings in the company's place of incorporation (including any restructuring attempt commenced there) and, instead, order the company to be wound up in Hong Kong.

Where foreign incorporated companies seek to restructure debts through a scheme of arrangement in Hong Kong, they should avoid pursuing parallel restructuring efforts in their place of incorporation. Where the debtor company is listed in Hong Kong, whose debt is very largely governed by Hong Kong law, the debtor company should pursue a scheme of arrangement in Hong Kong only. Where parallel schemes are introduced unnecessarily, the court may refuse to sanction the Hong Kong scheme.[53]

Winding-up proceedings

Traditionally, the court would only dismiss a winding-up petition if it is satisfied, on the evidence, that the petitioned debt is genuinely disputed on substantial grounds.[54-] However, the courts in Hong Kong have recently decided that if such disputes are subject to an arbitration or exclusive jurisdiction clause, the winding-up petition should generally be stayed or dismissed so that the dispute should be submitted to arbitration or the jurisdiction as agreed by the parties (as the case may be).

In *Re Lam Kwok Hung Guy*,[55] the Court of Final Appeal held that where an exclusive jurisdiction clause exists under the underlying agreement between the parties that gives rise to a dispute, the parties should resolve the dispute pursuant to the exclusive jurisdiction clause, following the approach espoused by Harris J's in *Lasmos Ltd v. Southwest Pacific Bauxite (HK) Ltd,*[56] which took heavy inspiration from the dicta in *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)*.[57] In those circumstances, the Court would decline to exercise its insolvency jurisdiction, absent any countervailing factors such as the risk of insolvency affecting third parties or that the dispute concerned is frivolous or borders on an abuse of process.

The Court of Appeal then decided that the *Guy Lam* principle should be extended to winding-up proceedings involving an arbitration agreement. In *Re Simplicity & Vogue*

Retailing (HK) Co, Limited,[58] the Court of Appeal considered the statutory framework that was protective of arbitration and held that there was a strong case for upholding the parties' contractual bargain to arbitrate. Therefore, in insolvency proceedings, where the agreement that gave rise to the disputed petitioning debt is subject to an arbitration clause, the court should exercise its discretion to stay or dismiss proceedings unless there are countervailing factors such as the defence being wholly without merits. The court should be satisfied, however, that there is a genuine intention to arbitrate before exercising its discretion to dismiss or stay the proceedings. In *Re Shandong Chenming Paper Holdings Ltd*[59] the Court of Appeal confirmed that the *Guy Lam* principle would also extend to cross-claims as there is no practical distinction between claims and cross-claims when establishing a defence to a winding-up petition. The salient question is whether the petitioner is a net creditor having an interest in having the debtor wound up.

Though the Hong Kong courts have settled its approach on exclusive jurisdiction and arbitration clauses for now, the Privy Council in the case of *Sian Participation Corp (in liquidation) v. Halimeda International Ltd*,[60] expressly directed the English courts not to follow *Salford Estates* because a winding-up petition is not a type of claim caught by the mandatory stay provision in the UNCITRAL Model Law on International Commercial Arbitration and, in any case, adjudicating on whether the petitioning debt is disputed on genuine and substantial grounds does not offend the general objectives of arbitration legislation. It remains to be seen how Hong Kong courts will react to the Privy Council's judgment. Creditors should therefore remain cautious when considering whether to present a winding-up petition in Hong Kong if the contract that gives rise to the debt concerned has an exclusive jurisdiction clause or an arbitration clause and it seems that the debtor is likely to dispute the debt and challenge the insolvency court's jurisdiction over the matter.

Exclusion of liability

While the wording varies, anti-Bartlett provisions are commonly found in trust deeds for the purpose 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. The current position, as a result of the Court of Final Appeal decision in *Zhang Hong Li v. DBS Bank (Hong Kong) Ltd*,[61] is that if an anti-Bartlett provision consciously agreed by contracting parties was clearly drafted to relieve trustees of any duty to interfere with the management of the company, including querying or objecting to the transactions entered into by the company, the provision would generally absolve the trustee from liability for failing to intervene. The court would not impose a high-level supervisory duty on the trustee. However, if the trustee was found to have mostly retained the power and control over the trust or at least shared such power and control with the settlor, the anti-Bartlett clause might not work to absolve the trustee of their supervisory responsibilities.[62]

In any case, the trustee should remain mindful of the 'irreducible core of obligations' as Lord Millett put it in the seminal case of *Armitage v. Nurse,*[63] namely the duty to perform the trust honestly and in good faith for the benefit of the beneficiaries. This duty 'provides a touchstone for deciding whether the minimum requirements for constituting a trust have been met' and can never be excluded.

Regulatory impact

In recent years, to fend against the increasing threat of financial and digital fraud, Hong Kong regulators have increased their activities. For example, the Hong Kong Monetary Authority (HKMA) has fined DBS Bank (Hong Kong) Limited HK$10 million for failing to continuously monitor business relationships and conduct enhanced due diligence in high-risk situations during various periods between 2012 and 2019, as well as failing to keep records of some of its customers and implement effective internal control procedures to carry out its duties under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance.[64]

The HKMA, in January 2024, concluded its public consultation on a proposal for sharing customer information (including personal data of individual customers and beneficial owners of corporate customers) among authorised institutions to aid financial crime prevention. The consultation conclusions, expected to be published in the second half of 2024, will inform any necessary legislative amendments.[65]

Hong Kong regulators have also issued further guidance on virtual asset-related activities. The HKMA adopts a risk-based approach[66] in supervising authorised institutions' virtual assets activities in line with applicable international standards.[67] In 2022, it issued a circular[68] reminding authorised institutions to assess associated risks before engaging in activities involving virtual assets. This includes considerations for prudential supervision, anti-money laundering, counterterrorism financing, financial crime risk and investor protection. Therefore, authorised institutions intending to engage in virtual assets activities should consult the banking regulator (and other regulators where appropriate) to ensure that their risk management controls are adequate before launching relevant products or services.

In May 2023, the HKMA revised its Guideline on Anti-Money Laundering and Counter-Financing of Terrorism,[69] specifically requiring authorised institutions that are themselveslicensed VATP providers to additionally comply with the Commission's Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (for Licensed Corporations and the Commission licensed Virtual Asset Service Providers),[70] particularly Chapter 12 (titled 'Virtual Assets') therein.[71] Chapter 12 warns against the potential uses of virtual assets in money laundering, and provides further guidance to authorised institutions in various broad areas, including customer due diligence and risk assessments.[72] These were followed by more guidance on specific compliance requirements for different virtual asset-related activities, such as sale and distribution of tokenised products[73] and provision of custodial services for digital assets.[74]

The Commission has also published their considerations when approving investment funds with over 10 per cent of their net asset value exposed to virtual assets[75] and authorising tokenised investment products,[76] and providing guidance for intermediaries' virtual asset[77] and tokenised securities-related activities.[78] It has also announced that it will join forces with the Hong Kong Police Force to combat virtual-asset related fraud.[79]

Sustainable finance continues to be a regulatory focus. The Green and Sustainable Finance Cross-Agency Steering Group, established by the HKMA and the Commission in May 2020,

outlined its key priorities to enhance Hong Kong's role as a leading sustainable finance hub in 2023.[80] Key initiatives include adopting the International Financial Reporting Standards Sustainability Disclosure Standards locally[81] and publishing a directory of local green fintech solution providers.[82]

The HKMA has also set out the methods for assessing the greenness of projects and assets,[83] and has outlined the standards expected of authorised institutions when selling and distributing green products.[84]

Outlook and conclusions

Debt recovery and insolvency remain burning issues for creditors, including financial institutions. Financial institutions as creditors will need to consider what the most effective method of recovering their debts would be and which jurisdiction is best placed to deal with debt recovery and insolvency of the debtors. These issues could be complex, notwithstanding that some of the legal issues involved have become clearer.

Nonetheless, financial institutions can be assured by a number of factors. First, Hong Kong has a pro-arbitration legal system that encourages businesses to resolve disputes by arbitration and remains arbitration friendly. Second, Hong Kong has developed a solid legal framework for banking and insurance that has gradually extended to include virtual assets, standing the courts in good stead to navigate novel situations. Virtual assets have also taken stage in the regulatory space and Hong Kong regulators have provided welcomed clarity.

Endnotes

1 *Luk Wing Yan v. CMB Wing Lung Bank Ltd* [2021] HKCFI 279. ^ Back to section

2 [2023] HKCFA 25 (Hong Kong Court of Final Appeal). ^ Back to section

3 [2024] HKCFI 984. ^ Back to section

4 Harris J at [58]. ^ Back to section

5 [2024] HKCFA 8. ^ Back to section

6 *Tam Sze Leung v. Commissioner of Police* [2022] 1 HKLRD 480 (Hong Kong Law Reports and Digest) at [165]. ^ Back to section

7 *Tam Sze Leung v. Commissioner of Police* [2023] HKCA 537 at [98]. ^ Back to section

8 According to the Commission, 'security tokens' are digital representations of the ownership of assets (e.g., gold or real estate) or economic rights (e.g., share of profits or revenue) using blockchain technology, meaning that they are cryptography-secured products. ^ Back to section

9 Under Schedule 3B of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (referencing Section 53ZR), a 'VA service' is defined as providing services through means of electronic facilities whereby offers to sell or purchase virtual assets are regularly made or accepted in a way that forms or results in a binding transaction (or there is a reasonable expectation of such), and where client money or client virtual assets comes into direct or indirect possession of the person providing such service. 'Virtual asset' is separately defined under Section 53ZRA of the Ordinance. On a reading of the legislation, the definitions would most likely cover non-security blockchain-based crypto products, such as Bitcoin, Ethereum and Tether that are sold on an online platform. Platform operators would therefore be squarely caught within the Ordinance's definitions. ^ Back to section

10 Section 53ZRD(1)(a), (b) and Section 53ZRD(2) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance. ^ Back to section

11 Section 53ZRD(5) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance. ^ Back to section

12 Legislative Proposal to Implement the Regulatory Regime for Stablecoin Issuers in Hong Kong (FSTB, December 2023) (https://www.fstb.gov.hk/fsb/en/publication/consult/doc/Stablecoin_consultation_paper.pdf). ^ Back to section

13 Public Consultation on Legislative Proposals to Regulate Over-the-Counter Trading of Virtual Assets (Financial Services and the Treasury Bureau (FSTB), 8 February 2024) (https://www.fstb.gov.hk/fsb/en/publication/consult/doc/VAOTC_consultation_paper_en.pdf). ^ Back to section

14 Consultation Conclusions for Legislative Proposal to Implement Regulatory Regime for Stablecoin Issuers in Hong Kong (FSTB and HKMA, 17 July 2024). ^ Back to section

15 Hong Kong Judiciary Annual Report 2023 (https://www.judiciary.hk/en/publications/annu_rept_2023r/eng/home.html). ^ Back to section

16 Order 14 of the Rules of High Court (Cap 4A) and the Rules of District Court (Cap 336H). ^ Back to section

17 [2022] HKCFI 447. ^ Back to section

18 Pursuant to Section 7 of Court Proceedings (Electronic Technology) Ordinance, the Chief Justice has designated iCMS as the e-system to facilitate the use of electronic technology, principally in relation to proceedings and for other court-related proceedings. ^ Back to section

19 *Yan Yu Ying v. Leung Wing Hei* [2021] HKCFI 3160. ^ Back to section

20 Qualified arbitral tribunals under Article 2 of the Arrangement are eligible. These include arbitral institutions that are established in Hong Kong or that have their headquarters established in Hong Kong, and with their principal place of management located within the Hong Kong Special Administrative Region. Ad hoc arbitrations would not be eligible for the Interim Measures Arrangement. ^ Back to section

21 HKIAC's statistics for 2023 at: https://www.hkiac.org/news/hkiac-releases-statistics-2023 (Accessed: 20 August 2024). ^ Back to section

22 *Super Worth International Ltd v. Commissioner of Independent Commission Against Corruption* [2016] 1 HKLRD 281, following the decision by the UK Supreme Court (UKSC) in *R (on the application of Prudential plc & Anor) v. Special Commissioner of Income Tax & Anor* [2013] UKSC 1. ^ Back to section

23 [2015] 4 HKLRD 20. ^ Back to section

24 Section 45 of the Arbitration Ordinance (Cap 609) and Section 21L of the High Court Ordinance (Cap 4). ^ Back to section

25 *Capital Wealth Holdings Limited & Ors v. Nantong Jiahe Technology Investment Development Co Ltd* [2021] HKCFI 272. ^ Back to section

26 *C v. D* [2020] HKCU 2374 (Hong Kong Cases Unreported) (https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=129731&currpage=T). ^ Back to section

27 *G v. N* [2024] HKCFI 721. ^ Back to section

28 *SA v. KB* [2016] 2 HKLRD 1249. ^ Back to section

29 [illegible] *formerly known as* [illegible] *v. Eton Properties Ltd and Another* [2023] HKCFI 1327. ^ Back to section

30 Section 20 of the Arbitration Ordinance. ^ Back to section

31 [2020] HKCFI 2269. ^ Back to section

32 [2023] HKCFI 1129 ^ Back to section

33 Section 20(1) Arbitration Ordinance. ^ Back to section

34 *ZS Capital Fund and Others v. Astor Asset Management 3 Limited and Another* [2023] HKCFI 1047. ^ Back to section

35 [illegible] *Super Best Investment Limited* [2023] HKCFI 2494. ^ Back to section

36 In additon to judgments under Section 7 of the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (e.g., on family law, administration or distribution of estates, insolvency and bankruptcy). Note, however, that some of these excluded categories have other cross-border arrangements in place for their recognition and enforcement. ^ Back to section

37 The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) was enacted to give effect to the Arrangement on Reciprocal Recognition and Enforcement of Judgments of Civil and Commercial Matters by the Courts of mainland China and of Hong Kong Special Administrative Region pursuant to the Choice of Court Agreements between the Parties Concerned 2006, which allowed enforcement of mainland Chinese judgments in Hong Kong and vice versa. ^ Back to section

38 *ICBC (Asia) Ltd v. Wisdom Top International Ltd* [2020] HKCFI 322. ^ Back to section

39 Section 87 of the Arbitration Ordinance. ^ Back to section

40 *CF v. SHK & S Listco* [2024] HKCFI 1493. ^ Back to section

41 Article 1 of the Original Arrangement. ^ Back to section

42 Article 4 of the Supplemental Arrangement. ^ Back to section

43 Article 2 of the Supplemental Arrangement. ^ Back to section

44 Article 3 of the Supplemental Arrangement. ^ Back to section

45 *China Life Trustees Ltd v. China Energy Reserve and Chemicals Group Overseas Co Ltd* [2024] HKCFA 15. ^ Back to section

46 *Re Tsinghua Unigroup Co, Ltd* [2023] HKCFI 1572, where a bond trustee successfully claimed against the PRC keepwell provider for breaching keepwell deeds in failing to ensure their offshore subsidiary issuer (and guarantor) remained solvent with sufficient liquidity to pay interest and principal on such bonds. However, note that the enforceability of keepwell deeds is highly susceptible to PRC regulatory approval or reorganisation proceedings, and breaches of keepwell deeds are only subject to the usual rules of assessing contractual damages. ^ Back to section

47 [2020] HKCFI 2940. ^ Back to section

48 [2022] HKCFA 11. ^ Back to section

49 [2021] HKCFI 2151. ^ Back to section

50 *Re Guangdong Overseas Construction Corp (in liq)* [2023] 3 HKLRD 262. ^ Back to section

51 *Regulations of Shenzhen Special Economic Zone on Personal Bankruptcy 2021*. ^ Back to section

52 *Re Global Brands Group Holding Ltd (In Liq)* [2022] 3 HKLRD 316. ^ Back to section

53 *Re China Oil Gangran Energy Group Holdings Ltd* [2021] HKCFI 1592. ^ Back to section

54 *Hollmet AG v. Meridian Success Metal Supplies Ltd* [1997] 4 HKC 343. ^ Back to section

55 (2023) 26 HKCFAR 119 (*Hong Kong Court of Final Appeal Reports*). ^ Back to section

56 [2018] 2 HKLRD 449. ^ Back to section

57 [2014] EWCA Civ 1575. ^ Back to section

58 [2024] HKCA 299. ^ Back to section

59 [2024] HKCA 352. ^ Back to section

60 [2024] UKPC 16. ^ Back to section

61 [2019] HKCFA 45. ^ Back to section

62 *Ivanishvili v. Credit Suisse Trust Ltd* [2023] SGHC(I) 9. ^ Back to section

63 [1997] EWCA Civ 1279 (England & Wales Court of Appeal (Civil Division)). ^ Back to section

64 The Monetary Authority takes disciplinary action against DBS Bank (Hong Kong) Limited for contraventions of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Hong Kong Monetary Authority (HKMA), 5 July 2024) (https://www.hkma.gov.hk/eng/news-and-media/press-releases/2024/07/20240705-3/). ^ Back to section

65 Public consultation on proposal for information sharing among Authorized Institutions to aid in prevention or detection of financial crime (HKMA, 23 January 2024) (https://www.hkma.gov.hk/media/eng/regulatory-resources/consultations/Consultation_on_AI-AI_info_sharing_en.pdf). The public consultation ended on 29 March 2024. ^ Back to section

66 For example, see the guideline for Risk Management Considerations related to the use of distributed ledger technology, setting out the risk management considerations of the Hong Kong Monetary Authority when reviewing proposals of authorised institutions involving the use of distributed ledger technology. (HKMA, 16 April 2024) (https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2024/20240416e1.pdf). ^ Back to section

67 For example, see the public consultation (HKMA, February 2024) and notice (HKMA, 23 July 2024) to update Hong Kong regulations to align with the standards espoused by the Basel Committee on Banking Supervision issued on 17 July 2024 (https://www.hkma.gov.hk/media/eng/regulatory-resources/consultations/CP24_01_Cryptoasset_Exposures.pdf; https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2024/20240723e1.pdf). ^ Back to section

68 'Regulatory approaches to Authorized Institutions' interface with Virtual Assets and Virtual Asset Service Providers' (HKMA, 28 January 2022) (www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2022/20220128e3.pdf). ^ Back to section

69 Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (For Authorized Institutions) (SFC, 25 May 2023) (https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/guideline/Guideline_on_AML-CFT_(for_AIs)_eng_May%202023.pdf). ^ Back to section

70 The Guideline was issued in June 2023. ^ Back to section

71 Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (for Licensed Corporations and SFC licensed Virtual Asset Service Providers) (SFC, 1 June 2023) (https://www.sfc.hk/-/media/EN/assets/components/codes/files-current/web/guidelines/guideline-on-anti-money-laundering-and-counter-financing-of-terrorism-for-licensed-corporations/AML-Guideline-for-LCs-and-SFC-licensed-VASPs_Eng_1-Jun-2023.pdf?rev=d250206851484229ab949a4698761cb7). This Guideline is issued pursuant to Sections 7 and 53ZTK of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance. ^ Back to section

72 This is also provided for under Schedule 2 to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance, which is titled 'Requirements Related to Customer Due Diligence and Record-Keeping'. ^ Back to section

73 Guidelines on Sale and Distribution of tokenised products (HKMA, 20 February 2024) (https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2024/20240220e2.pdf). ^ Back to section

74 Guidelines on Custodial Services for Digital Assets (HKMA, 20 February 2024) (https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2024/20240220e4.pdf). ^ Back to section

75 Circular on SFC – authorised funds with exposure to virtual assets (SFC, 22 December 2023) (https://apps.sfc.hk/edistributionWeb/api/circular/openFile?lang=EN&;refNo=23EC65). ^ Back to section

76 Circular on tokenisation of SFC-authorised investment products (SFC,2 November 2023) (https://apps.sfc.hk/edistributionWeb/api/circular/openFile?lang=EN&;refNo=23EC53). ^ Back to section

77 Joint circular on intermediaries' virtual asset-related activities (HKMA and SFC, 22 December 2023) (https://apps.sfc.hk/edistributionWeb/api/circular/openFile?lang=EN&;refNo=23EC53_). ^ Back to section

78 Circular on intermediaries engaging in tokenised securities-related activities (SFC, 2 November 2023) (https://apps.sfc.hk/edistributionWeb/api/circular/openFile?lang=EN&;refNo=23EC52). ^ Back to section

79 SFC warns public of Tokencan, VBIT Exchange and HKD.com Corporation for suspected virtual asset-related fraud and/or unlicensed activities (SFC, 28 June 2024) (https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/corporate-news/doc?refNo=24PR113). ^ Back to section

80 'Cross-Agency Steering Group announces priorities to further strengthen Hong Kong's sustainable finance ecosystem' (SFC, 7 August 2023) (https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=23PR86). ^ Back to section

81 Cross-Agency Steering Group announces key initiatives to support Hong Kong in capitalising sustainable finance opportunities (HKMA, 8 January 2024) (https://www.hkma.gov.hk/eng/news-and-media/press-releases/2024/01/20240108-5/). ^ Back to section

82 Prototype Hong Kong Green Fintech Map 2024 (The Green and Sustainable Finance Cross-Agency Steering Group, Cyberport and InvestHK, 1 March 2024) (https://www.sustainablefinance.org.hk/en/data-technology/prototype-hong-kong-green-fintech-map-2024). ^ Back to section

83 Hong Kong Taxonomy for Sustainable Finance (HKMA, May 2024) (https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2024/20240503e1.pdf). ^ Back to section

84 Sale and Distribution of Green and Sustainable Investment Products (HKMA, 29 November 2023) (https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2023/20231129e1.pdf). ^ Back to section

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