Cover Story

Face to Face with

Ada Leung JP

Director of the Hong Kong Intellectual Property Department

FINTECH 金融科技
ICO Utility Tokens and the Relevance of Securities Law
ICO功能型代幣以及與證券法的關聯性

REGULATORY 監管
Crowdfunding in Hong Kong – there are Sufficient Gateways
在香港進行眾籌 – 具備充足的門道

FAMILY LAW 家庭法
Custody of Children in Relationships Across the Border
跨境婚姻關係所涉及的子女管養權問題
FINE & RARE WINES

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Championing the very best from the world of wine, the sale features notable favourites such as classic vintages from Bordeaux, Burgundy from Domaine Jacques Prieur and the Hospices de Beaune. In addition, there will be a selection of vintages from Paris City Hall and for the first time in Hong Kong, an unparalleled curation of South African ‘Grand Crus’.

AUCTION
17 March 2018 (Saturday)
10:30am

VENUE
The James Christie Room
22/F, Alexandra House
18 Chater Road Central,
Hong Kong

CONTACT
Tiffany Po
+852 2978 6761
wineauction@christies.com

Château Mouton Rothschild 1986
6 bottles
Estimate: HK$32,000-50,000/
US$4,000-6,500
Inside your March issue

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Sailing Through a Legal Mind

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Overview
Asian Legal Business invites you to join us at the Hong Kong Anti-Corruption Forum on 22 March 2018 to learn about recent regulatory updates on anti-corruption and anti-bribery and address key concerns faced by legal/compliance professionals in safeguarding corporate reputations and businesses.

Join us at this event to get regulatory updates and explore practical tips to mitigate anti-corruption risks and delve deep into key concerns which legal/compliance professionals need to address to successfully safeguard corporate reputations and businesses.

Agenda at a glance*
- Hong Kong Government Keynote Address: The Latest Developments in Hong Kong’s Anti-Corruption Law and Enforcement Trends
- International Anti-Corruption Enforcement Trends and Priorities
- Identifying Third Party Risks and Implementing Due Diligence Solutions to Mitigate these Risks
- Corporate Transparency and Legal Compliance – How can In-House Counsels Work Better by Learning from Best Anti-Corruption Practices
- How has U.S. FCPA Act and UK Anti-Bribery Act Influence Asian Businesses?
- Handling Crisis Management and Safeguarding Corporate Reputation during Regulatory Investigations
- Implementing Effective Risk Assessment Methodology and Monitoring Procedures in High Corruption Profile Businesses
- Corruption Pitfalls to Avoid and Useful Compliance Tips to Follow When Negotiating Cross-Border M&A Transactions
- Enhancing Cyber Security and Data Privacy Against Cross-Border Anti-Corruption Risks

Confirmed speakers to date*
- Moray Taylor-Smith, Head of Anti-Bribery & Corruption, Greater China and North Asia, Standard Chartered Bank
- Catherine Kardinal, General Counsel and Regional Compliance Officer, Siemens Limited
- Maaike van Meer, Chief Legal & Compliance Officer, AXA Insurance Hong Kong
- Bibsy Llenos-Flauta, Assistant General Counsel, Citibank
- Fiona Callanan-Thorsby, Assistant General Counsel, Head of Litigation and Regulatory Enquiries APAC, Bank of America
- Sasha Kalb, Vice President Compliance and Risk, APAC, American Express Global Business Travel
- Vivian Chui, Regional AML and Sanctions Advisor, BNP Paribas Hong Kong
- Robinson Cheng, Chief Compliance Officer, ZTE Corporation
- And more to be confirmed!

*Not finalized and subject to further revisions

Register
www.regonline.com/hkanticorruption2018
www.legalbusinessonline.com/conferences/hk-anticorruption-2018

Keynote speakers
William Tam, SC
Deputy Director of Public Prosecutions, Head of the Commercial Crime and Corruption Sub-Division, Prosecutions Division Department of Justice

Sandra Moser
Acting Chief, Fraud Section U.S. Department of Justice

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Most of us are aware of the fact that technology, crowdfunding, and ICOs are hot topics at the moment. But what exactly are they and how do they work? (p. 30)

Imagine browsing online and you somehow land on a page that displays some very innovative products but they are merely in the form of an idea or perhaps some prototype has already been produced. The owner of the project(s) is still in need of funds from third parties in order to progress the project(s) by way of mass production and making them available to the consumers. This is known as crowdfunding. It deals with projects or ventures raising funds from various individuals or groups of people through various platforms. The Regulatory feature discusses Hong Kong’s approach in regulating crowdfunding. (p. 36)

It appears that there is more excitement when investing in ICOs rather than in IPOs these days. The Fintech feature explains what an ICO is and examines the relevance of Securities Law in relation to ICO utility tokens. With regard to technology, the Practice Skills section concentrates on eDiscovery technologies and techniques to simplify document disclosures in litigation and arbitration. (p. 74)

Divorces or separation is increasing in Hong Kong and determining custody of the child in such cases can be problematic. What might be even more challenging is when one parent decides to unilaterally take a child across the border which is not uncommon given that Hong Kong is part of China, and the other parent who has full custody of the child wants his or her child back. The Family Law feature shares valuable insights in this context. (p. 42)

Hong Kong is considered as an international legal hub. There are more than one thousand registered foreign lawyers practising in Hong Kong. The President’s Message discusses the regulatory framework that permits foreign lawyers to practise law in Hong Kong. (p. 6)

Ending with a thought of a whiff of the sea, feeling the breeze and hearing the ocean, the Leisure section features Bo Lee’s experience in sailing and competing in the Volvo Ocean Race which Hong Kong hosted for the first time. (p. 88)
Your New Answer to Title Problems in Hong Kong

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An Open Regulatory Regime for Foreign Lawyers

The 2018 *Index of Economic Freedom*, an annual guide published by The Heritage Foundation, Washington’s No. 1 think tank, was released on 2 February 2018. Hong Kong tops the Index again as the world’s freest economy for the 24th consecutive year. Its overall score has increased with improvements in government integrity, business freedom and monetary freedom, and is well above the regional and world averages.

Hong Kong adopts a free trade policy, which applies to both merchandise trade as well as trade in services. With respect to the legal services sector, consistent with the free trade policy, our aim is to achieve services liberalisation to enable Hong Kong’s legal practitioners to compete with their overseas counterparts on a level playing field. Locally, the open regulatory regime for foreign lawyers also aligns seamlessly with the territory’s free trade policy approach.

From time to time, I receive enquiries from our international counterparts on the extent of liberalisation with respect to the practice of foreign lawyers in Hong Kong. I would like to take this opportunity to elaborate on the subject.

An overseas lawyer is permitted to offer his services to the public in Hong Kong as a practitioner of foreign law if he registers himself as a foreign lawyer with the Law Society in accordance with the requirements set out in the Legal Practitioners Ordinance (‘LPO’) and its subsidiary legislation. The requirements are reasonably standard. For example, the applicant must be of good standing, qualified to practise the law of his jurisdiction of admission and covered by professional indemnity insurance in a manner and extent similar to the indemnity provided to a Hong Kong solicitor under the statutory Professional Indemnity Scheme.

The practice requirements applicable to a foreign lawyer in Hong Kong under the Foreign Lawyers’ Practice Rules mirror those applicable to a Hong Kong solicitor under the Solicitors’ Practice Rules. A Hong Kong solicitor cannot practise on his own account or in partnership if he has not been employed as a solicitor of a Hong Kong law firm for at least two years after his admission. Similarly, if a foreign lawyer does not have at least two years of post-qualification experience in the full-time practice of foreign law, he may only practise foreign law as an employee of a law firm subject to conditions as to supervision.

Foreign lawyers can only advise on the laws of their own jurisdictions or international law. For the protection of the public, they cannot advise on Hong Kong law as they are not qualified as Hong Kong solicitors. Similarly, Hong Kong solicitors cannot advise on the laws of other jurisdictions in which they are not qualified to practise.

There is no residency requirement for registration as a foreign lawyer in Hong Kong. Nevertheless, to ensure proper indemnity protection, the services provided to the public by a registered foreign lawyer as a practitioner of foreign law must be from within a Hong Kong firm or a registered foreign firm in Hong Kong.

Foreign legal services are also permitted on a temporary basis to facilitate a lawyer with foreign qualifications, who is not registered as a foreign lawyer, to serve the public in Hong Kong as a practitioner of foreign law provided that he does so from within a registered foreign firm or a Hong Kong firm for a limited period (not more than three continuous months or 90 days in any 12 month period).

Foreign practitioners are also welcome to establish a commercial presence in Hong Kong by applying to the Law Society for registration of a foreign law firm. Once a foreign law firm is set up and registered, it can form an Association with a Hong Kong law firm and apply to register the Association with the Law Society. The two firms in a registered Association are then permitted to share fees, profits,
premises, management and employees between them. This avenue of cooperation allows foreign lawyers and Hong Kong solicitors to work closely together paving the way for a full integration of their services when they are ready to do so in accordance with the statutory requirements. Since the commencement of the statutory foreign lawyer regulatory regime in 1995, 72 foreign firms have subsequently become localized as Hong Kong law firms.

With respect to professional discipline, foreign lawyers, same as Hong Kong solicitors, are subject to the powers of the Solicitors Disciplinary Tribunal Convenor to dispose of complaints under the LPO. In the event that the Tribunal Convenor has to constitute a Solicitors Disciplinary Tribunal to hear a case and the matter relates to a foreign lawyer at the time, the Tribunal Convenor is obliged under the LPO to appoint a foreign lawyer to be a member on the Tribunal, in addition to the standard Tribunal composition of two solicitors and one lay person.

We embrace diversity and welcome talent from other jurisdictions to join and strengthen our legal services sector. The current open regulatory regime for foreign lawyers achieves the right balance between ensuring free competition for all on a level playing field, maintenance of high professional standards, and protection of clients’ interests.

If members have any views on the operation of the foreign lawyer regulatory regime in Hong Kong or have encountered difficulties in entering the legal service markets in other jurisdictions, you are most welcome to share with us at president@hklawsoc.org.hk.

Thomas So, President
對外地律師的開放規管制度

蘇紹聰 會長

華盛頓舉足輕重的智庫傳統基金會於2018年2月2日公佈《2018經濟自由度指數》，香港連續第24年成為全球最自由的經濟體，在「政府誠信」、「營商自由」和「貨幣自由」方面的得分均有進展，總分較去年為高，亦遠高於地區和世界平均水平。

香港實行自由貿易政策。自由貿易既適用於商品貿易，也適用於服務貿易。法律服務領域亦配合自由貿易政策，我們的目標是實現服務自由化，讓香港的法律執業者能夠在公平的環境下與海外同行競爭。就本地而言，針對外地律師的開放規管制度，也與香港的自由貿易政策一致。

我不時收到海外同行的查詢，問及外地律師在香港執業的自由程度。我想藉此詳細就此闡述。

海外律師按照《法律執業者條例》及附屬法例的要求註冊成外地法律執業者後，即可作為外地法律執業者向香港公眾提供服務。這些要求是合理的標準，例如申請人必須聲譽良好、在本身的司法管轄區合資格從事法律執業及已投購專業彌償保險，彌償的方式及程度須類似向香港律師所提供彌償的法定專業彌償計劃。

根據《外地法律執業者規則》，適用於香港外地律師的執業要求，與根據《法律執業者條例》適用於香港律師的執業要求一致。香港律師獲認許為律師後，須受僱於香港律師行從事法律執業至少2年，才可獨自或以合夥形式執業。同樣地，外地律師具備資格後亦須具備至少2年全職從事外地法律執業經驗，否則只能以僱員身份從事外地法律執業，並受僱務的條件限制。

外地律師只可就其本身的司法管轄區之法律或國際法提供意見。為保障公眾，他們不得就香港法律提供意見，因為他們並非合資格的香港律師。同樣地，香港律師也不能就其他司法管轄區的法律提供意見，因為他們不具備這些地方的執業資格。

在香港註冊為外地律師並無居港要求。儘管如此，為確保獲適當彌償保障，註冊外地律師作為外地法律的執業者而向公眾人士提供服務，必須透過香港律師行或在香港註冊的外地律師行進行。

擁有外地資格的律師而未註冊為外地律師者，亦獲准暫時以外地法律的執業者身份向公眾提供外地法律服務，但必須透過註冊外地律師行或香港律師行進行(在任何一段12個月的期間不超过連續3個月或總計不超過90天)。

我們也歡迎外地律師向律師會申請在香港註冊外地律師行。外地律師行成立並註冊後，便可向律師會申請註冊與香港律師行聯營。已註冊聯營的兩間律師行即可分享律師費、利潤、場所、管理層和員工。這個合作渠道令外地律師和香港律師能夠密切合作，為外地律師按照法定要求把他們的服務全面融入香港作好準備。自定外地律師規管制度在1995年生效以來，已有72間外地律師行進行本地化，成為香港律師行。

在專業紀律方面，律師紀律審裁組集人根據《法律執業者條例》處理針對香港律師及外地律師的申訴。若召集人必須成立律師紀律審裁組聆訊案件，而案件涉及外地律師，召集人必須根據《法律執業者條例》委任一名外地律師、2名律師及1名非法律專業人士組成審裁組。

我們擁抱多元化，歡迎來自其他司法管轄區的人才加入，提升法律服務界。現行對外地律師的開放規管制度，公平競爭、保持高專業水平和保障客戶利益之間取得了平衡。

若會員對香港外地律師規管制度的運作有任何意見，或在其他司法管轄區進入法律服務市場遇到困難，歡迎電郵至president@hklawsoc.org.hk與我們分享。

www.hk-lawyer.org
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Professor Alexa Lam teaches securities law and regulation in the Faculty of Law, University of Hong Kong. Prior to joining HKU, Professor Lam was the Deputy CEO and Executive Director of the Hong Kong Securities and Futures Commission. In those roles, Professor Lam promoted actively financial co-operation between the Mainland and Hong Kong on cross border capital market innovations and opening, including the Renminbi Qualified Foreign Institutional Investors (RQFII) and Mutual Recognition of Funds programs. She also played a significant role in international regulatory initiatives. She co-chaired the Working Group on Margining Requirements of the Basel Committee on Banking Supervision and the International Organization of Securities Commissions.

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Mr Johnstone has worked for over 25 years in securities regulation and corporate finance. He has undertaken senior management roles regulated by the Securities and Futures Commission and The Stock Exchange of Hong Kong Limited. In 2016 he co-authored “Financial Markets in Hong Kong: Law and Practice” (Oxford University Press). Syren holds two masters degrees, in science and law, from Oxford and London universities respectively. He is on the roll of solicitors in England & Wales and Hong Kong.

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Bo Lee
Citigroup, Vice President (Senior Counsel)

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Michael Yuen
埃貝，經理

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Bo Lee
花旗集團 副總裁 (高級法律顧問)
Disruptive Technologies in Legal Practice

The business concept of disruptive innovation becomes noteworthy in the legal practice. It refers to a process by which a product or service takes root initially in simple applications at the bottom of a market and then relentlessly moves up market, eventually displacing established competitors.

In his book Tomorrow’s Lawyers: An Introduction to Your Future, the legal futurist Richard Susskind commented that our legal profession will be dismantled in favour of increasingly capable systems. He highlighted the emergence of various disruptive legal technologies to challenge and change delivery of current legal services. Document automation, document analysis and legal project management are three currently widely-adopted technologies used in big law firms.

Document automation can automate a time-consuming and repetitive manual task into an almost instantaneous deliverable in minutes, whereas, in the past, junior lawyers and paralegals would have taken numerous hours to complete. This provides a much more less costly client solution and eliminates human errors.

Document analysis is particularly relevant to litigation and regulatory investigation work which often involves review of a large volume of documents. For instance, an e-discovery platform can enable lawyers to focus on the analysis of relevant information extracted from big data analytics.

Legal project management involves new methods, systems and techniques to meet a client’s particular needs with a level of efficiency akin to mass production. These strategies can improve communication amongst different stakeholders in the matter cycle, eliminate any wasteful steps, minimize complexity, diagnose bottlenecks and keep monitoring performance.

Innovation always starts from intrinsic motivation. Lawyers need time and space to experiment and explore without fear of being disadvantaged because of their contributions and at the same time law firms need to be able to efficiently develop and assess new ideas and get them to market. The future generations of lawyers can look for premium advisory work that would likely favour human judgment and capabilities. At the same time, they can directly get involved in building technological products that would ultimately automate some of the time-consuming manual repetitive work at the lower end.

Law firms can inspire their fee earners to develop own innovation capabilities and become original thinkers. In the UK, lawyers are now encouraged to pitch for time off from billable hours for exploration and reflection. An innovation group led by qualified professionals can be set up to encourage organisational collaboration and bring innovative ideas which will be a source of sustainable competitive advantage for law firms and for the clients. Afterall, a clear strategy, efficient delivery and engaging effectively with emerging technologies will be essential but disruption starts with people and their ideas.
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LEGAL INNO
A Facelift to Meet Changing Needs

This year marks the 20th anniversary of the Law Society’s move to its current office at Wing On House. We relocated from the former Swire House in April 1998, which was scheduled to be demolished and redeveloped into the current Chater House. Since then, our profession has doubled in numbers. As of the end of January 2018, we had 9,299 members holding a practising certificate and a team of 100 at the Secretariat, compared to 4,619 members holding a practising certificate and 56 Secretariat staff in 1998.

The scope of operation of the Law Society has been expanding to meet the needs of the growing membership and the changing legal services environment.

In 2008, the Law Society set up a new Member Services Department dedicated to providing more support to members. Its work ranges from the offer of recreation and sports activities to promote a work-life balance, to the organisation of social activities to facilitate professional networking and free legal advice schemes to enable members to contribute their expertise to help those in need.

To cope with the challenges of globalisation, the Law Society is taking a more active role in international activities to maintain its status as the representative body of the legal profession in the legal services hub of Asia and to keep itself abreast of the rapid changes taking place in the legal industry around the world.

In 2017, the Law Society received 41 delegations from the Greater China region and other overseas jurisdictions. We also sponsored young members to attend identified international conferences to gain more international exposure.
to better equip them for increasing globalisation. The growing interaction among jurisdictions around the world and the increasing mobility of the legal professionals across borders demand the Law Society to keep a close watch on the changing practice and regulatory landscape in different jurisdictions. More manpower is required to cover the research work and the organisation of a diverse range of events and activities.

To fulfill the space needs generated by its expanding operation, the Law Society offices had been renovated to create more office area for the Secretariat.

Further, with the Law Society library facilities fully digitalized, the Library and the reading area had been replaced with a new conference room. Four new work-stations each equipped with a computer for access to the Law Society’s Online Library have been installed in the common area at the Law Society Reception. Solicitors, trainee solicitors and registered foreign lawyers as well as paralegal staff authorised by law firms are most welcome to use the facility. The list of reference subscriptions available on our Online Library is published in our Circulars.

The former Clubhouse area had been refurbished into a multi-function room. The Law Society has been offering training courses under its mandatory Risk Management Education (RME) Programme and the Continuing Professional Development (CPD) Scheme. In 2017, the Law Society and The Academy of Law organised 375 training courses. It is expected that the multi-function room can be utilised to conduct some of the Law Society’s RME/CPD workshops, lunchtime seminars as well as evening receptions to relieve the pressure of sourcing suitable venues in Central.

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**Monthly Statistics on the Profession**
(Updated as of 31 January 2018):

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members (with or without Practising Certificate)</td>
<td>10,752</td>
</tr>
<tr>
<td>Members with Practising Certificate</td>
<td>9,299</td>
</tr>
<tr>
<td>(out of whom, 7,021 (76%) are in private practice)</td>
<td></td>
</tr>
<tr>
<td>Trainee Solicitors</td>
<td>1,176</td>
</tr>
<tr>
<td>Registered Foreign Lawyers</td>
<td>1,458 (from 34 jurisdictions)</td>
</tr>
<tr>
<td>Hong Kong Law Firms</td>
<td>894 (48% are sole proprietorships and 41% are firms with 2 to 5 partners, 21 are limited liability partnerships formed pursuant to the Legal Practitioners Ordinance)</td>
</tr>
<tr>
<td>Registered Foreign Law Firms</td>
<td>85 (14 are limited liability partnerships formed pursuant to the Legal Practitioners Ordinance)</td>
</tr>
<tr>
<td>Civil Celebrants of Marriages</td>
<td>2,110</td>
</tr>
<tr>
<td>Reverse Mortgage Counsellors</td>
<td>446</td>
</tr>
<tr>
<td>Solicitor Advocates</td>
<td>51</td>
</tr>
<tr>
<td>(46 in civil proceedings, 5 in criminal proceedings)</td>
<td></td>
</tr>
<tr>
<td>Student Members</td>
<td>176</td>
</tr>
<tr>
<td>Registered Associations between Hong Kong law firms and registered foreign law firms (including Mainland law firms)</td>
<td>38</td>
</tr>
</tbody>
</table>

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**業界每月統計資料**
(截至2018年1月31日):

<table>
<thead>
<tr>
<th>項目</th>
<th>數字</th>
</tr>
</thead>
<tbody>
<tr>
<td>會員(持有或不持有執業證書)</td>
<td>10,752</td>
</tr>
<tr>
<td>持有執業證書的會員</td>
<td>9,299</td>
</tr>
<tr>
<td>（當中有7,021位（76%）是私人執業）</td>
<td></td>
</tr>
<tr>
<td>實習律師</td>
<td>1,176</td>
</tr>
<tr>
<td>註冊外地律師</td>
<td>1,458（來自34個司法管轄區）</td>
</tr>
<tr>
<td>香港律師行</td>
<td>894（獨資經營佔48%；2至5名合夥人的律師行佔41%；21間為按照《法律執業者條例》組成的有限法律責任合夥律師行）</td>
</tr>
<tr>
<td>香港律師行</td>
<td>85（14間為按照《法律執業者條例》組成的有限法律責任合夥律師行）</td>
</tr>
<tr>
<td>婚姻監禮人</td>
<td>2,110</td>
</tr>
<tr>
<td>安老按揭輔導法律顧問</td>
<td>446</td>
</tr>
<tr>
<td>訴辯律師</td>
<td>51</td>
</tr>
<tr>
<td>（民事程序：46位，刑事程序：5位）</td>
<td></td>
</tr>
<tr>
<td>學生會員</td>
<td>176</td>
</tr>
<tr>
<td>香港律師行與外地律師行（包括內地律師行）在香港聯營</td>
<td>38</td>
</tr>
</tbody>
</table>

www.hk-lawyer.org 15
Ada showed me the oldest trademark registration in Hong Kong which was dated back to 1874. The mark consisted of an eagle design and the words 'NESTLE’s EAGLE BRAND'. The mark had an antique appearance, having an old burnt treasure map effect. Hong Kong’s trademark law was introduced in 1873 and is one of the oldest in the world (even older than the legislation in the UK). The registration of trademarks was administered by the Office of the Colonial Secretary at the time. This shows the long history of intellectual property (IP) protection in Hong Kong.

Ada majored in science. After completing her Bachelor of Science, she eventually joined the government as an executive officer. She wanted to pursue further studies and applied for a government scholarship for an Applied Science degree in a medical related field. However, the scholarship was not available that year and Ada was told that she might consider a legal training scholarship instead. Knowing at the time the high demand for local lawyers, Ada started studying law. She then joined Attorney-General’s Chambers (AGC) as an Assistant Crown Counsel a.k.a. trainee. After her training Ada was appointed as Crown Counsel and gradually promoted to Senior Crown Counsel.

After five years at AGC, Ada had contemplated specialising. Although the thought of specialising in IP had not occurred, opportunity led her to it. One of Ada’s colleagues at AGC told her about an opening at IPD which was still relatively new as it had been established for approximately five years. Ada conducted some research and learnt that IP was an emerging area at that time with Hong Kong being a founding member of WTO and the implementation of the TRIPS Agreement. Moreover, there were a lot of amendments to the IP legislation and there was discussion of localisation of Hong Kong’s IP legislation at the time.

IP was appealing. It was up-and-coming. However, Ada hadn’t studied IP. It was not that common in those days for LL.B. programs to offer IP as an elective course, and the university she studied at did not offer such program. She set her mind to it. She learnt IP after joining IPD in 1995.

Role of IPD

IPD, compared with other government departments is relatively small and new, as it was established in 1990. There are around 230 staff members including examiners, lawyers, marketing, administrative and IT staff.

One of the major roles of IPD since the very beginning is to administer the registration of trademarks, patents, and designs. In particular, registration of trademarks is their bread and butter. “We have close to 40,000 trademark applications each year.” The range in the recent years has been between 35,000 and 40,000 trademark applications per year. “You can imagine the amount of work that we are handling taking into account that we have to search each and every new application against our 400,000 records.”

“There are also back and forth communications if we raise objections.” If IPD raises objections, then the applicant will have to respond to the objections within a certain period which is set out in the legislation, and there would be a chain of correspondence before a decision is made. If eventually the application is not accepted, the applicant can apply for a registrability hearing. If however the application is accepted, IPD would advertise the application to check if there is any opposition to the registration. Any opposition could result in an opposition hearing.

Another main role is to act as the government’s legal and policy adviser. “We provide legal advice to other government bureaus and departments on IP related matters. For example, if a government department handling
a contract and there are IP issues for which they need legal advice, they will come to us. We have a team of lawyers handling this sort of requests for advice. We also provide policy advice to our policy bureau, namely the Commerce and Economic Development Bureau. They are the responsible policy bureau on IP policies and legislation, but we provide advice to them. We look at the international development, we conduct the legal research, and we provide the assessment to them both from a legal perspective and policy angle and provide them with policy options to consider. So, we work very closely with our policy bureau on development of future legislation and work with Department of Justice on the drafting of legislation.”

A third major role is to promote and educate the public on protection of intellectual property. “We have a budget of around nine million Hong Kong dollars each year to do local promotion as well as fostering regional cooperation and cooperation with the Mainland. Since 2015, we have had a budget each year to promote IP trading. We provide support to SMEs and promote the importance of making use of IP trading such as selling, assigning, and effective licensing to realise the value of IP. We also support businesses, especially SMEs in assisting them to be aware of the value of and managing their IP, and to formulate their strategy in commercialising their IP.”

In 2015, the Working Group on IP Trading which was formed in 2013 released a report with 28 recommendations under four strategic areas on measures to further develop Hong Kong as an IP trading hub in the region. “We are working on those measures. The four strategic areas include enhancing or rather further enhancing the IP protection regime; further supporting IP creation and exploitation; fostering the strength of our IP intermediary services and manpower capacity; and collaborating with different stakeholders in Hong Kong as well as externally.”

IPD currently runs a scheme which provides free IP consultation services for SMEs. “With the assistance and support of the Law Society of Hong Kong and its members, we offer a one-on-one free IP consultation for SMEs. The pilot service commenced in 2015 and was formally launched in September 2016 and is well received by SMEs. The aim is to raise their awareness of IP, assist them to develop effective IP management and commercialisation strategies, and to enable them to deal with possible challenges.”

Furthermore, IPD introduced the IP Manager Scheme also in 2015. “We have had over 700 business enterprises joining the IP Manager Scheme. Over 1,100 participants have already attended our two-day training course with thanks to the tremendous support from experienced IP practitioners. The course provides basic legal concepts on IP protection as well as suggestions and advice on formulation of IP within their businesses. We also offer a more advanced workshop which is a half-day course. Additionally, we provide information leaflets and reference materials to them. For example, two booklets in the areas of IP audit, diligence and licensing authored by Mr. Kenny KS Wong, Chairman of the Intellectual Property Committee of the Law Society of Hong Kong, were published in collaboration with the Law Society of Hong Kong.”

“I think these booklets are very useful for SMEs, and would help them identify important IP assets and properly manage them. Also, infringement threats and risks might be identified and resolved at the earliest opportunity. Besides, SMEs can grasp the basics of the general contents of an IP licence and the preferences of licensors and licensees from their different perspectives. So, these are the sort of practical tips well summarised in the form of a booklet.”

What are trademarks? “Well, I think we all come across trademarks day-in-day-out. Of course the Eagle Brand trademark I showed in the beginning, some might not know of it but for us especially the older generation like myself, should be very familiar with this trademark as it one of the few brands if not the only brand of milk that existed when we were young. A trademark is a sign that distinguishes goods or services provided by one trader from another. You could say it is a form of identification as it displays the trade origin of the goods or services. Sometimes it is referred to as a brand name. There are however some
requirements in law which one has to fulfill in order for the brand name to be a registered trademark.”

Do trademarks require registration? “A brand does not have to be registered as a trademark in order to be protected by law. It can be either protected as a registered trademark, or it can be protected as an unregistered trademark under common law. Of course there are a lot of advantages for it to be registered as it would provide certainty. It becomes public knowledge that a particular mark belongs to a particular trader. When there is dispute it is easier for the registered proprietor to establish its case. Generally, we expect most businesses would have applied for registration if they are conducting their business in Hong Kong.”

If the largest number of applications are for trademarks, what comes next? “Patents. We have around 13,000 applications for standard patents each year. We have short-term patents and standard patents. The former deals with protection for eight years whereas the latter is protected for 20 years. At the moment we do not conduct substantive search and examination of the novelty or inventiveness of the invention. Based on a report issued by the Advisory Committee on Review of the Patent System in Hong Kong in late 2012, we are undertaking a major reform of our patent system. The Committee comprising legal professionals, patent practitioners, members of the academia, members from the industrial sectors and officials from the relevant government agencies, recommended that one of the new major initiatives is the introduction of an original grand patent system in Hong Kong while retaining the existing re-registration route. The Government accepted the report of the Committee in early 2013. Since then, we have started to take forward the recommendations of the Committee. Hopefully the new patent system will be up and running in 2019.”

This means that in future an applicant can apply for a standard patent here in Hong Kong without first applying anywhere in the world. “We will have substantive examination in our system, although in the beginning we expect that we will not have the capacity to do the full range of substantive examination here in Hong Kong which requires a lot of technical expertise, a very strong database and so on. We would do the substantive examination with the assistance of the State Intellectual Property office in Beijing. In the future we hope to build our own substantive examination capacity in patents area, maybe starting with particular technology areas.”

International registration
What if a business in Hong Kong wishes to register its trademark internationally? “The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (‘Madrid Protocol’) adopted in 1989 is an international treaty that facilitates international registration of trademarks. Currently there are 100 countries that are party to the Madrid Protocol. Although Mainland China is a party to the Madrid Protocol, the Protocol has yet to be applied to Hong Kong. Hong Kong has an independent IP system which is separate from the system in Mainland China. However, under the international registration system, there is usually one trademark office per country.”

“The good news is that it has been decided Mainland China is going to have two trademark offices for the purpose of this international registration system, which will include the Hong Kong trademarks office. So in the future, a trademark owner will be able to apply for international registration of trademarks in Hong Kong designating different countries that are Contracting Parties to the Madrid Protocol. Then the IPD would have to look at their application to see whether it complies with the domestic legislation. The convenience lies in the application stage. The applicant needs only to file a single application and pay one set of fees. If an international application is filed in Hong Kong, we would then send it to the International Bureau of the World Intellectual Property Organization (‘WIPO’) after a formality checking. WIPO will distribute it to the destination IP offices for further handling. Conversely, an overseas applicant for international registration may file an application in one of the Madrid Protocol
countries and seek trademark protection here by designating Hong Kong as one of the territories they wish to cover.”

“Once the amendment of our trademark legislation is passed and other preparatory tasks (such as building the necessary IT infrastructure) are completed, Mainland China will submit a formal notification to WIPO to apply the Madrid Protocol to Hong Kong.”

Would overseas registration then affect existing registrations in Hong Kong? “IP is basically territorial. If the trademark right granted in let’s say UK has no effect in Hong Kong, then we would not consider it as conflicting or infringement as far as Hong Kong is concerned.

But there could be a scenario where, for example, there is already a local registration of a particular trademark here in Hong Kong and a different overseas proprietor of the same mark, say in the UK, wishes to extend its international registration to Hong Kong but the mark is conflicting as the goods are overlapping somehow.”

“Although the international registration originating from the UK was not extended to Hong Kong at the time of registration, once the Protocol is applied to Hong Kong, the registered owner in the UK may decide to extend that registration to Hong Kong, which is permissible under the Madrid system.

However, if the proposed extension conflicts with a Hong Kong domestic registration which is already on the register, a decision will have to be made as to who should have priority. Prima facie, the local proprietor should have an earlier right, just like the case where a conflicting domestic application is made when there is already an earlier registration. But of course, it is open for the subsequent applicant to challenge the validity of the earlier registration, and in which case, the Registrar will have to make a decision on the evidence produced by the parties.”

**Hong Kong and Mainland China**

“Although Hong Kong and Mainland China have separate IP regimes, we do have a lot of cooperation with our mainland counterpart including at a national level, regional level, as well as provincial level. I would like to mention that the IP office in Mainland China is one of the biggest in the world and has a very strong patent examination capacity. We started our cooperation with mainland since around the year 2000 and of course, we have seen a growth of the mainland IP office in a very fast pace in the past years. I believe it received 1.3 million patent applications in 2016 which is the highest in the world.”

What happens when for example Party A from Hong Kong travels to Shanghai and sees this beautiful coffee shop owned by Party B and likes it so much that Party A decides to open a coffee shop with a similar name and design as the one he saw in Shanghai? “It would really depend on whether that Shanghai coffee shop has any business in Hong Kong or any goodwill in Hong Kong. The easiest way is to prove that the Shanghai coffee shop has a business in Hong Kong established but in some cases it might be that Party B has not yet established any business in Hong Kong. There might still be a situation though where goodwill, ie the reputation of the Shanghai coffee shop is so strong that Party B could argue that his coffee shop has a spill-over reputation in Hong Kong. It would of course be more difficult to prove but it would depend on the evidence.”

“Of course, this scenario would not be limited to Mainland China and Hong Kong. It could apply to other countries too. However, Mainland China and Hong Kong are so close geographically and in terms of culture with frequent exchange of personnel and high volume of travel between the two places, so the possibility of such occurrence might be greater.”

**Dispute resolution**

“For IP infringement, an owner can commence civil action in court. There are also criminal sanctions enforced by the Customs and Excise Department in some cases of trademark and also for copyright infringement. I think arbitration and mediation are options which parties should consider when they have a dispute on IP matters.”

“Of course, one of the biggest advantages of using arbitration and mediation instead of the court’s proceedings is party autonomy - they can well choose their arbitrator or mediator and can choose the issues which they like to be resolved first. They can also decide on where the hearing should take place and the applicable law and so on. The Arbitration Ordinance has been amended and it has been clarified that IP disputes whether or not in Hong Kong, and whether it involves validity or otherwise (because in the past there has been some uncertainty on whether issues involving validity of IP rights could be resolved by arbitration) can be resolved by arbitration. We produced a leaflet together with the Department of Justice on the amendments and benefits of resolving IP disputes by arbitration.”

Ada is responsible to lead, manage and develop the Intellectual Property Department as a specialised legal services department in the Government. She also performs the statutory functions as Registrar of Trade Marks, Patents, Designs and Copyright Licensing Bodies. She also acts as the departmental Controlling Officer in financial management. ■
梁女士向我展示了香港歷史最遠的商標註冊，可追溯到1874年。該商標的設計由一隻鷹和NESTLE’s EAGLE BRAND字樣組成，加上舊藏寶圖的燒焦效果，外觀古色古香。香港的商標法於1873年訂立，是世界上最古老的商標法之一（甚至比英國商標法還要早）。商標註冊由當時的殖民主事大臣辦公室管理。這顯示了香港在知識產權保護方面擁有悠久歷史。

梁女士大學主修科學，完成理學學士學位後，她加入了政府擔任行政主任。她想繼續進修，於是申請了政府的獎學金，本想修讀醫學相關領域的應用科學學位。然而，那年的獎學金未發放，梁女士便獲建議申請法律培訓獎學金。她知道當時對律師的需求很高，於是便開始修讀法律，隨後加入前律政署擔任助理檢察官，完成法律培訓後先後晉升為檢察官和高級檢察官。

在律政署工作5年後，梁女士考慮轉投專業領域，機緣巧合下開始從事知識產權工作。律政署的一位同事告訴她，知識產權署即將增設新職位，當時知識產權署僅成立了約5年。梁女士知道知識產權是個新興領域，而香港是世貿組織的創始成員，並落實《與貿易有關的知識產權協議》（TRIPS）。此外，當時對知識產權法例進行了多項修改，亦正討論知識產權法本地化。

知識產權署的角色

知識產權署署長

與其他政府部門相比，知識產權署規模較小，歷史亦不悠久。該署於1990年才成立，約有230名職員，包括審查主任、律師、市場推廣主任、行政和資訊科技人員。知識產權署的主要職能之一，是管理商標、專利和設計的註冊。當中又以商標註冊的工作最為繁重。「我們每年接獲近4萬個商標申請。」近年，每年的商標申請數量在35,000個到40,000個之間。「每個新申請必須與400,000個記錄對照，可想而知我們的工作量不小。」

知識產權署的主要職能之一，是管理商標、專利和設計的註冊。當中又以商標註冊的工作最為繁重。「我們每年接獲近4萬個商標申請。」近年，每年的商標申請數量在35,000個到40,000個之間。「每個新申請必須與400,000個記錄對照，可想而知我們的工作量不小。」

知識產權署的主要職能之一，是管理商標、專利和設計的註冊。當中又以商標註冊的工作最為繁重。「我們每年接獲近4萬個商標申請。」近年，每年的商標申請數量在35,000個到40,000個之間。「每個新申請必須與400,000個記錄對照，可想而知我們的工作量不小。」
通信。若申請最終不被接受，申請人可以申請召開是否可予註冊的聆訊。若申請被接受，知識產權署將公佈申請詳情，以待是否有人就註冊提出反對。若有任何反對，就可能會召開反對聆訊。

知識產權署的另一個主要職能，是充當政府的法律和政策顧問。「我們就知識產權相關事宜向其他政府部門提供法律意見。例如政府部門要處理合約而需要有關知識產權的法律建議，便會聯絡我們。我們有一組律師處理這類要求。我們亦向所屬政策局，即商務及經濟發展局提供政策建議。我們亦與商務及經濟發展局緊密合作，制定未來立法方向，並與律政司合作起草法律。」「

知識產權署的第三個主要職能是促進和教育公眾保護知識產權。「我們每年有約900萬港元預算，用以進行地區宣傳及促進與區域及內地的合作。自2015年以來，我們每年獲分配預算用以促進知識產權貿易。我們為中小企提供免費知識產權諮詢服務。「在香港律師會及其會員的協助和支持下，我們為中小企提供一對一的免費知識產權諮詢服務。試驗計劃於2015年啟動，並於2016年9月正式推

甚麼是商標？「我們每天都會看到商標。剛剛提及的鷹牌商標，有些人可能未看過，但我們老一代就應該非常熟悉，因為它是少數我們自小就認識的牛奶品牌之一。商標是區分一個商人與另一個商人提供商品或服務的標誌。你可把它是一種識別形式，顯示貨物或服務的來源，有時稱為品牌名稱，不過品牌名稱必須滿足一些法律要求，才能成為註冊商標。」「

申請數量最多的是商標，那第二多是甚麼？「專利。我們每年接獲大約13,000份標準專利申請。專利分為短期專利和標準專利，前者的保護期為8年，後者則為20年。目前，我們沒有對發明的新穎性或創新性進行實質審查。香港專利制度檢討諮詢委員會於2012年年底發表的報告表示，我們正在對專利制度進行重大改革。該委員會由法律界人士、專利從業員、學者、工業界及有關政府官員組成，建議中的主要措施之一，是在香港引入原授專利制度，同時保留現有的再註冊制度。政府在2013年初接受了委員會的報告。從那時起，我們開始推進委員會的建議，新的專利制度可期於2019年投入運作。」「

這意味著將來申請人可以在香港申請標準專利，無需事先在其他地方申請。「我們將在制度中加入實質審查。預計起初我們將不具備在香港進行全面實質審查的能力，因為這需要大量的專業知識和強大的資料庫等。我們將在北京國家知識產權局協助下進行實質審查。展望未來，我們期望在專利領域建立自己的實質審查能力，或許從特定科技領域開始著手。」

國籍註冊

若香港企業希望註冊國際商標，應怎樣做？「1989年通過的《商標國際註冊馬德里協定有關議定書》（《馬德里議定書》）是促進商標國際註冊的國際條約。目前有10個國家簽訂了《馬德里議定書》。雖然中國是《馬德里議定書》的締
約國，但條約書尚未適用於香港。香港的知識產權制度獨立於中國內地。但是，根據國際註冊制度，每個國家通常只有一個商標局。」

「好消息是中國內地已決定設立兩個商標局，以配合國際註冊制度，其中包括香港的商標局。因此，兩國商標持有人將能在香港申請國際註冊商標，指定覆蓋《馬德里議定書》締約方的各個國家。知識產權署會審視申請是否符合本地法律。申請將十分便利，申請人只需提交一份申請，繳付一項費用。若在香港提交國際申請，我們會在形式審查後將申請發送給世界知識產權組織的國際部。世界知識產權組織會將申請分發給目的地的知識產權局，以便進一步處理。相反，海外國際註冊申請人可在《馬德里議定書》締約國申請尋求商標保護，並指定香港為保護的覆蓋地點之一。」

「一旦對商標法的修訂獲得通過並完成其他籌備工作（如建設必要的資訊科技基礎設施），中國內地將向世界知識產權組織提交正式通知，屆時《馬德里議定書》將適用於香港。那麼，海外註冊商標局屆時是否會影響到現時在香港的註冊？「知識產權基本上以領土為本。假如英國授予的商標在香港無效，那麼在香港不會出現衝突或侵權行為。但可能會出現這種情況：例如，在香港已經有一個特定商標的本地註冊，而在英國有另一個相同商標的海外擁有人希望將其國際註冊延伸到香港，但是由於商品某程度上重疊，因此出現商標衝突。」

「雖然香港與中國內地各有獨立的知識產權制度，但我們與內地國家級、地區級和省級對口單位緊密合作。國家知識產權局是世界上最大的知識產權機構之一，專利審查能力很強。我們從2000年開始與內地開展合作。過去數年，我們看到國家知識產權局的進展速度驚人。該局在2016年接獲130萬件專利申請，是世界之最。」

香港及中國內地

「雖然香港與中國內地各自有獨立的知識產權制度，但我們與內地國家級、地區級和省級對口單位緊密合作。國家知識產權局是世界上最大的知識產權機構之一，專利審查能力很強。我們從2000年開始與內地開展合作。過去數年，我們看到國家知識產權局的進展速度驚人。該局在2016年接獲130萬件專利申請，是世界之最。」

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「對知識產權侵權，知識產權持有人可在法庭進行民事訴訟。法例在某些商標及侵犯版權案件中也實施了刑事制裁。我認為仲裁和調解是知識產權糾紛中各方應予考慮的選擇。」

爭議解決

「對知識產權侵權，知識產權持有人可在法庭進行民事訴訟。法例在某些商標及侵犯版權案件中也實施了刑事制裁。我認為仲裁和調解是知識產權糾紛中各方應予考慮的選擇。」

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梁女士負責領導和管理知識產權署，把該署發展為專門提供法律服務的政府部門。她還履行商標註冊處、專利註冊處、外觀設計註冊處和版權特許註冊處處長的法定職能。此外，她亦是部門財政管理的管制人員。

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Ceremonial Opening of the Legal Year 2018 in Hong Kong

The Ceremonial Opening of the Legal Year 2018 (‘OLY’) was held on 8 January. Distinguished bar leaders from different jurisdictions around the world gathered in Hong Kong to experience and witness this solemn ceremony. This year, we have over 60 guests coming from 39 law societies and bar associations outside Hong Kong. Apart from attending the OLY Ceremony at City Hall and a visit to the Court of Final Appeal, the overseas guests were invited to participate in a number of OLY activities during the day.

The day started with a visit to the Hong Kong Court of Final Appeal. The Hon. Chief Justice Geoffrey Ma welcomed the delegates. Registrar Simon Kwang Cheok-wueng then provided our guests with a historical overview of the Hong Kong Court of Final Appeal building, which was followed by a guided tour.

Jointly with the Hong Kong Bar Association, we hosted a series of events for our overseas guests including a Presidents’ Roundtable on the topic of “Enhancing Competition and Talent Retention”, a luncheon and a dinner reception graced by the presence of the Secretary for Justice. It was a valuable opportunity to showcase Hong Kong’s hospitality, strengthen connections with our counterparts around the world and to update each other on the developments in the legal sector in our home jurisdictions.

At the OLY, the Chief Justice, the Secretary for Justice, the President of the Law Society and then Chairman of HKBA all delivered enlightening speeches. The speech made by the President of the Law Society has been posted on the Law Society website.

It was indeed an honour for the Law Society to have assisted the Judiciary in coordinating the participation of all overseas, PRC, Taiwan bar leaders and legal representatives on this occasion. We would further like to express our appreciation to the Secretary for Justice Teresa Cheng SC who attended the dinner reception.

Meetings with representatives of several overseas lawyers associations, including Commonwealth Lawyers Association, Osaka Bar Association, The Law Society of Brunei Darussalam, Tokyo Bar Association, and The Law Society of England & Wales, were conducted on 8 to 10 January to discuss the possibility of future collaboration.
2018年香港法律年度開幕典禮

2018年香港法律年度開幕典禮於1月8日隆重舉行。來自世界各地法律界代表雲集香港，見證此莊嚴的盛典。來自39個律師協會及大律師公會的60位代表除出席在大會堂舉行的法律年度開幕典禮，亦參觀了香港終審法院及參與當日的眾多活動。

當天，代表團參觀香港終審法院，獲終審法院首席法官馬道立接待，而司法常務官鄺卓宏為大家講解香港終審法院大樓的歷史，及帶領隊伍參觀。

律師會與大律師公會為海外嘉賓合辦了一系列活動，包括會長圓桌會議，今年的主題為：「提升競爭優勢」、午宴及晚宴，律政司司長鄭若驊及大律師公會主席亦出席當晚活動。展現出香港的好客之道之餘，透過活動加強與世界各地同業的聯繫，以及交流各地法律業界發展的最新消息。

在法律年度開幕典禮上，終審法院首席法官、律政司司長、律師會會長及時任大律師公會主席均發表發人深省的演說。律師會會長的講辭已上載至律師會網站。

律師會有幸獲邀協助司法機構接待與會的海外、內地和台灣法律界領袖及代表，非常感謝律政司司長鄭若驊資深大律師出席晚宴。

另外，律師會亦於1月8日至10日分別與Commonwealth Lawyers Association、大阪辯護士會、The Law Society of Brunei Darussalam、東京辯護士會和The Law Society of England & Wales的代表會面，討論日後合作的機會。

Belt & Road Seminar in Beijing

In conjunction with the Belt and Road General Chamber of Commerce, the HKSAR Government held a seminar entitled “Strategies and Opportunities under the Belt and Road Initiative - Leveraging Hong Kong’s Advantages, Meeting the Country’s Needs” in Beijing on 3 February. President Thomas So, Immediate Past President Stephen Hung and Council Members C.M. Chan and Simon Lai attended the seminar on behalf of the Law Society.

The seminar aimed to showcase the distinctive edge of Hong Kong as an international finance, trade and legal hub as well as its integral function to expedite the Belt and Road development. It was well attended by over 700 participants from the Hong Kong business and professional services sectors, as well as senior representatives from Chinese enterprises.

At the invitation of the Commerce and Economic Development Bureau, the President spoke at one of the thematic sessions on “The Integration of Creative and Information Technology Industries with Pillar Industries under the Belt and Road Initiative”. He explained the potential legal risks which Chinese enterprises would encounter during the process of “Bring in” and “Go Global”, and highlighted the strength of Hong Kong legal services to facilitate cross-border transactions under the Belt and Road Initiative.
The 12th Recreation and Sports Night

On 21 October 2017, over 470 members and guests set their sails for an evening on the “Ark of Justice” for the 12th Recreation and Sports Night, the must-go event every year organised by the Recreation and Sports Committee.

We saw participants dressed up like sailors and pirates. Some even turned themselves into mermaids and other sea creatures blissfully “flowing” and “swimming” around the ballroom decorated with shells and pearls depicting the mysterious yet beautiful underwater world. Among those contestants who joined the Best Dressed Competition, “Captain Jack Sparrow” seized the first prize in the individual category and the team with twelve members forming a lifelike steam boat took home the group champion title.

Besides a palatable buffet dinner and rounds of enjoyable dancing and live band performances by our fellow members, the voyage was also filled with fun games with prizes! The grand prize winner would continue his journey to Bali after disembarking the Ark of Justice as his prize was two Hong Kong to Bali return business class air-tickets with three-nights accommodation at a renowned resort!

The journey had come to an end but the memories would stay forever as participants could create their own photo flipbooks and videos recording their happy moments.

Our special thanks must go to Mr. TC Chan, Chairman of the Organising Committee of this year’s event, and his team for bringing us this amazing marine experience!

Reported by: Caroline Wong
第12屆康樂及體育晚會

超過470名會員及嘉賓於2017年10月21日參加康樂及體育委員會舉辦的第12屆康樂及體育晚會，登上「正義航海號」暢遊一個晚上。

來賓打扮成水手和海盜，有些甚至化身美人魚和其他海洋生物，「浮遊」於滿佈貝殼和珍珠的神秘海底世界。在芸芸最佳服裝造型比賽參賽者當中，「積克船長」憑其霸氣勇奪個人組冠軍，而由12人組成的「蒸氣船」則接走團體組冠軍的名銜。

會員一面享用美味的自助晚餐，一面在現場樂隊表演伴奏下起舞，航程還充滿了有趣的遊戲和豐富獎品！終極大獎得獎者獨享雙人來回香港至峇里島商務機票連三晚豪華住宿，繼續精彩的旅程！

旅程雖已圓滿結束，但來賓可於會場即時製作個人相冊和錄製視頻，記錄愉快時光，讓回憶得以永久保存。

我們特別鳴謝籌委會主席陳子遷律師和他的團隊，給我們帶來這個不一樣的海洋體驗！

由王洛林律師報導
Lions Club 100th Anniversary New Year’s Eve Charity Run

While most people were planning for the countdown party or other New Year celebrations on the last day of 2017, I found myself at University MTR station at the crack of dawn as part of the Distance Running Team getting ready for the Lions Club 100th Anniversary New Year’s Eve Charity Run (the ‘Run’).

Only the time of the five fastest runners in each team of ten would be counted in the Run, so no pressure for me!

It was a beautiful day. Although it was quite windy to start with, the wind turned into a lovely breeze by the time the Run started at 8:30am at Pak Shek Kok Promenade. We were to run along the Promenade towards Yuen Chau Tsai Park and back again, a distance of 10km, overlooking the Tolo Harbour.

We spotted a couple of fast runners (and I meant Hong Kong record holders fast), and waited for the results with trepidation. It was an amazing feat that we came first in the category of NGO with our five top runners completing the race in 3:43:05 hours, a good half an hour ahead of the first runner-up!

This was a perfect ending to 2017 for the Distance Running Team and we hope for another amazing year in 2018!

Reported by: Dora Chow
Asian Legal Business is the leading legal magazine in Asia. Each issue is packed with news, hard hitting analysis and investigative journalism. Regional editors provide up-to-the-minute legal and regulatory updates, while a team of dedicated journalists provide in depth analysis of all the issues facing lawyers and in-house counsel throughout the region.

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ICO Utility Tokens and the Relevance of Securities Law

Abraham Lincoln famously posited that if one calls a tail a leg it doesn’t mean that a dog has five legs. Similarly, a blockchain-based token offered in an initial coin offering (‘ICO’) may, irrespective of how it is called, be a security subject to securities laws applicable to the primary market as well as secondary market activities. ICOs are an example of how new technology is changing the way the public capital market is accessed by businesses, typically start-ups, in need of capital.

The legal treatment of tokens remains unclear in many jurisdictions, which is increasingly problematic as ICO activity has ballooned from around US$300 million during 2013 to 2016 to well in excess of US$5 billion in 2017. As Hong Kong is now considering its potential status as an ICO hub, it is essential that regulatory agencies and market professionals come to grips with a better understanding of how tokens are, or may be, regulated.

A focus of this article is “utility tokens”. Unlike tokens that clearly operate like equity or debt (via payments, voting rights, etc), utility tokens present problems as regards their legal characterisation. The nature of a utility token is to permit the holder to access a service provided by the issuer’s platform. This is typically a pre-sale made by a start-up seeking capital to develop the promised service. While token-holder rights bear resemblances to, for example, licensees, franchisees, or club memberships, utility tokens may have other features that lend securities-like properties to them.

**Regulatory attitudes**

Regulatory and practice attitudes (in markets that have not banned ICOs) have evolved with the ICO market and roughly fall into three phases.

Around the end of 2016, ICOs were generally considered to be undesirable owing to the risk of mis-disclosure and fraud, risks magnified by the speed and ease at which money was able to be raised – eight figure US dollar sums were able to be raised in a matter of minutes or hours with no regulatory oversight. The origin and subsequent use of funds being transacted also raise money laundering and terrorist financing concerns.

By this time it had already been widely understood that blockchain technology is important to future economic development. Tokens are important in this context because they collectively facilitate a blockchain-based ecosystem that provides operational functionality – imagine that one had train carriages but no train tracks. Going into 2017 regulators were adopting a more cautionary watching role, reluctant to inhibit evolution.
The law applying to the offering of securities and their marketing in Hong Kong, as set out in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) and the Securities and Futures Ordinance (‘SFO’) (Cap. 571), is in general consistent with best international practices that prohibit accessing public capital unless registration or authorisation requirements are complied with or a relevant exemption applies. Tokens that are securities may also be subject to laws concerning regulated activities and the operation of exchanges and automated trading services. However, whether a specific token is a security will require careful consideration.

The SFO’s definition of “security” provides little assistance in relation to tokens that do not clearly fall into pre-established categories, such as shares or debentures. The definition of “collective investment scheme” (‘CIS’), which is one form of security, is widely drafted and remains open to interpretation in its application. Hong Kong is absent of case law that provides useful guidance on either of these defined terms. The report of the UK’s Financial Markets Law Committee (July 2008) has acknowledged that the definition of CIS in s. 253 of the UK Financial Services and Markets Act 2000, which the SFO’s definition reflects, is very wide and subject to legal uncertainties. There have been a handful of cases in the UK that provide some limited assistance to understanding the CIS term, though less so regarding the particular characteristics of tokens.

The scope of the term “security” has been more extensively explored in the U.S. and the ICO community has long been well aware of the relevance of the test established by the U.S. Supreme Court in SEC v. W.J. Howey Co. (328 U.S. 293 1946) (‘Howey’). Howey established that an “investment contract”, which is one type of security as defined by the Securities Act of 1933, means “a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party” (Howey, 2). Howey is of interest here for two reasons. First, because Howey has been applied to tokens by the U.S. SEC. First in the 21(a) Report to the Slock.it ICO and most recently (December 2017) to the “Munchee” ICO. Slock.it unsuccessfully sought to take its tokens outside of the securities legislation via a distributed autonomous organisation (‘DAO’) that tried to remove the concept of a third party’s efforts. “Munchee” actively promoted that its tokens could be traded and investors could expect to profit from the increase in the value of the tokens as a result of the efforts of its promoters, i.e. a purchaser of the tokens could expect profits from the efforts of another. Both of these cases are relatively clear cut, and that may not always be the case.

What is a “security”? In consequence of the foregoing, there has been a more profound examination of what are the features of a utility token that might render it to be regarded as a security.

That began to change with the rapid growth of offerings in 2017 and following the “21(a) Report” issued by the U.S. Securities and Exchange Commission (‘U.S. SEC’) in July 2017. The 21(a) Report concluded that a token known as “Slock.it” was a security, although it had not been promoted as such. The U.S. Sec and the Hong Kong Securities and Futures Commission (‘SFC’) have recently gone on the offensive to warn issuers and market professionals not to put form over substance when structuring tokens as a means of seeking to circumvent securities laws that serve to protect investors, and are accordingly applying greater scrutiny to ICOs.
Second, because of potential similarities to elements in the definition of CIS that align with, though are not identical to, the concept in Howey of a common enterprise in which the efforts of another are key. The “purpose or effect” requirement under the CIS definition is possibly wider than Howey because that phrase may encompass expectation, and the notion of “profit” in Howey is easily encompassed by the CIS concept of profits, income, payments or “other returns”.

However, applying existing law to tokens is inherently problematic because blockchain has enabled fundamental changes in the ease and manner of accessing public capital, the cost and timing of doing so, the willingness of the public to purchase tokens and the ease of trading them. Moreover, the ICO market, and the new digital economy it represents, is global and borderless in a way never before encountered. These new realities make it difficult to continue with oversimplified analogies to user licenses, franchises or memberships that have traditionally not amounted to capital raising exercises from a large and anonymous public market.

Hong Kong practitioners will therefore need to exercise some caution when advising on the nature of a proposed token issuance and how it is undertaken.

Best practices

The increasing awareness that tokens can be subject to securities laws that possess uncertainties in their potential scope of application has had an impact on practices in the industry. This has led to the emergence of best practices such as Coinbase’s “A Securities Law Framework for Blockchain Tokens” (December 2016) and the “Best Practices for Token Sales” issued by the Fintech Association of Hong Kong (December 2017). A core principle of both is that an ICO should be, inter alia, transparent as to its legal structure and regulatory treatment.

While best practices have been developed to promote self-regulation of the industry, they have not always been observed in practice. As already noted, the form of a token may be given precedence over its substance in an attempt to remove them from securities laws. This has led to stern warning language from the Chairman of the U.S. SEC as regards semantic gymnastics or elaborate structuring exercises (before the Senate Committee on Banking, Housing and Urban Affairs, 6 February 2018). Two days later, the SFC issued a circular stating that “ICO issuers are typically assisted by market professionals such as lawyers, accountants and consultants for advice to structure the offering as utility tokens to fall outside the purview of the SFO and to circumvent the scrutiny of the SFC” (emphasis added).

Legal practitioners will be well aware that avoidance and evasion are quite different matters. Professional advisers often structure transactions to avoid or minimise various legal ramifications, and are under no responsibility, moral, legal or otherwise, to bring a matter under consideration within any particular law or regulatory scrutiny. There is a significant difference between that role and engaging in professional misconduct by advising issuers to engage in (or cooperating in) evasion of the law through, for example, window dressing that mischaracterises the real nature of the token. Doing so may be tantamount to conspiracy to defraud.

While that distinction may be clear-cut in principle, the characteristics of a utility token that might cause it to be regarded as a security are less clear. Where a relevant grey area is in play, advice may fall into the difficult territory of avoision. Here it will be essential that advice is based on a thorough understanding of the token’s functionality and the other circumstances of the offering, is appropriately qualified to recognise potential uncertainties and attendant risks, and that full and fair disclosures are made in connection with the ICO.

Solicitors in Hong Kong should also be cognisant of Law Society’s Practice Direction P (Guidelines on Anti-Money Laundering and Counter Terrorist Financing).

The purpose of securities laws

The overarching purpose of securities laws is to regulate investments, irrespective of the form or name they assume. Accordingly, the development of securities laws and the definition of “security” were intended to be adaptable, not to create fixed and unchangeable categories. Flexibility is the foundation on which the Financial Secretary has the power under s. 392 of the SFO to specify interests, rights or property as securities.

One might point to the development of structured product regulation as a lesson in the failure of looking at how a product fits into a pre-existing set of categories, rather than considering its function in the market. A product structured as a debenture that bears no relationship to the usual commercial purposes of a debenture is a debenture in name only. Similarly, there is a risk that bisecting utility tokens into “securities” or “not securities” based on established categories fails to identify and regulate how tokens are interacting with the public capital market.

New challenges may require regulatory agencies to interpret the law with one eye firmly fixed on regulatory intent. The Howey test and the definition of securities in the SFO with its broadly drafted definition of CIS, both permit considerable latitude. The recent comment of the Chairman of the U.S. SEC that “by and large, the structures of ICOs that I have seen involve the offer and sale of securities and directly implicate the ... investor protection provisions of our federal securities laws” (made in his personal capacity
亞伯拉罕林肯有一句名言，就是：假如人們將尾巴稱為腿，這不能說狗便是有五條腿。

同樣地，發行人如果為其以區塊鏈作基礎的代幣進行「首次代幣發行」（initial coin offering,以下簡稱ICO），那麼不論這些代幣是以甚麼名稱來表示，它都有可能會被視為證券的一種，須受適用於一級市場及次級市場活動的證券法所監管。對於有資金需求的企業（一般是指初創企業）而言，ICO是一種新技術，改變它們以往進入公開資本市場的做法。

法律上如何處理代幣問題，許多司法管轄區對此的態度有欠明確。然而，由於ICO活動所涉及的金額，已從2013年至2016年期間的大約3億美元，激增至2017年的超過50億美元，代幣問題亦因此而日益受到關注。香港正在考慮是否有可能發展成為一個ICO中心，因此讓監管機構和市場專業人員能夠更有效地掌握和了解如何（或可以如何）對代幣進行監管，實在是至關重要。

本文將重點放在討論「功能型代幣」（utility tokens）方面。功能型代幣有別於該等有如股權或債權般運作的代幣（通過支付和表決權等方式），因為前者在法律的識別上仍然有欠明確。功能型代幣的性質，是讓代幣持有者能夠享用到代幣提供者的平台所提供的服務。因此，這基本上是等同一項預售，由該等在設法尋求資本，以發展其所承諾的服務的初創公司所提供。儘管代幣持有者的權利，與例如獲許可人、特許經營者、俱樂部會員等相類似，但功能型代幣也可能具有其他與證券相類似的特性。

監管態度

社會對ICO的監管和實際運作所抱持的態度（在並無禁止進行ICO的市場中），隨著ICO市場的發展而有所改變，並可大致分為三個階段。

在2016年底以前，ICO一般而言並不受市場所歡迎，因為它存在不實披露和欺詐等方面的風險，亦存在因資金籌集的速度與便利程度的提升所增加的風險－發行人可在數分鐘或數小時之內，募得數位數字的美元金額，而不須接受任何監管和監督。此外，交易金額的來源及其後續使用，也引起當局對清洗黑錢和恐怖主義融資的關注。

此時，人們已普遍認識到區塊鏈技術對未來經濟發展的重要性，而代幣在這方面扮演非常重要的角色，因它們在整體上促成了一個運用區塊鏈技術，從而發揮運作功能的生態系統－試想想：要是只有火車廂，但沒有建造火車軌，這些
火車廂還可以起甚麼作用？踏入2017年，監管機構所扮演的，是一個給予市場告誡的監察者角色，而不會隨意干涉這領域的發展。

隨著該等代幣的發行量在2017年大幅攀升，以及美國證券交易委員會在2017年7月所發表的「21(a)報告書」，情況開始逐漸發生變化。該「21(a)報告書」所下的結論是：該等稱為“Slock.it”的代幣，其性質實際上是證券，儘管它並沒有以此作招徠。美國證券交易委員會(以下簡稱「美國證交會」)與香港證券及期貨事務監察委員會(以下簡稱「香港證監會」)近期主動表態，告誡發行人和市場專業人員不要只強調形式而忽視實質，將代幣構建成為一種規避法律監管的手段，企圖讓它不受保障投資者的證券法所監管，並因而對ICO採取了更嚴格的審查。

何謂「證券」？

基於上述情況，人們對功能型代幣的特性乃進行更深入的研究，以了解在甚麼情況下，它們有可能會被視作證券。

一般而言，香港的參與證券發行和營銷有關的法規(例如是《公司(清盤及雜項條文)條例》(第32章)和《證券及期貨條例》(第571章)所載的條文)與最佳國際常規一致，而該等常規訂明，除非發行人遵守相關的註冊或認可規定，又或是適用相關的豁免，否則不準取用公開資本，而在性質上屬於證券的代幣，也許亦須遵守與監管活動、交易所運作、自動交易服務等有關的法律。然而，某一特定代幣其在性質上是否屬於證券，仍需詳加對其作出審視。

《證券及期貨條例》對「證券」所下的定義，對於該等未被明確涵蓋在先前所確立的類別(例如股份或債權證類別)的代幣而言，未能起太大的參考作用。「集體投資計劃」(作為證券的一種)一詞的定義所涵蓋的範圍相當廣，其適用情況仍有待給予進一步的闡明，而香港現行的判例法，並未能對該兩個被界定的用詞所具的含義提供有用指引。

英國金融市場法律委員會的報告書(2008年7月)確認，《2000年英國金融服務及市場法》第253條中所載的關於「集體投資計劃」的定義，其內容顯示於《證券及期貨條例》所載的定義，其含義非常廣泛，並受法律上的不明確因素所影響。英國有若干案例在某程度上，有助我們了解「集體投資計劃」一詞的含義，但關於代幣的特性為何，則未見對此有所說明。

美國對「證券」一詞的適用範圍作出了更為廣泛的探討，而ICO社群亦早已確知悉美國最高法院在SEC v. W.J. Howey Co. (328 U.S. 293 1946)一案(以下稱「Howey案」)中所確立的測試之關聯程度。Howey案確認「投資合約」是《1933年證券法》所界定的其中一種證券，意思是指「一項合同、交易或計劃，任何人可透過它將資金投放於一個共同企業，並預期可單憑發起人或第三方所付出的努力而獲得收益」(Howey, 2)。Howey案是基於下述兩項原因而與這方面相關。

首項原因是，美國證交會已將Howey案適用於涉及代幣的情況。《21(a)報告書》首先談及Slock.it ICO的情況，並於最近期(2017年12月)談及「Munchee」ICO的情況。Slock.it試圖通過一個分散式自主組織(distributed autonomous organisation)而將第三方努力的概念移除，使其所發行的代幣不受證券法的規管，然而它的此舉並不成功。“Munchee”強調它的代幣可進行買賣交易，而投資者可期望通過發起人的努力，使代幣的價值上升，從而獲得收益；亦即是說，購買代幣的人可期望透過其他人的努力而獲得收益。雖然這兩個案例較為清晰，但情況並非經常如此。

第二項原因是，由於與「集體投資計劃」的定義中的元素存在相類似之處(僅管不盡相同)，該定義亦與Howey案中的共同企業概念一致，而在當中，其他人努力是至為關鍵的因素。「集體投資計劃」的定義所述的「目的」，可能比Howey案的涵蓋範圍更廣，因為「目的」可以包含期望；而且，由於Howey案中所述的「收益」概念，可以包含在「集體投資計劃」的定義中所設想的各種回報中，當中包括來自購買、持有、管理或處置有關財產的回報。

然而，將現行法律適用於代幣，事實上是存在本質上的問題，因為區塊鍊技術促使以下各種情況產生了根本變化：獲取公開資本的便捷程度和方式、所需的成本和時間、公眾購買代幣的意願、以及進行代幣交易的便利性等各方面。此外，ICO市場(以及其所代表的新數碼經濟)是全球性的，並無任何疆界，此等情況實屬前所未見。新現實情況的出現，讓人們不能繼續以過於簡化的形式，將其與用戶許可、特許經營權、會員資格等來進行類比，而事實上一直以來，它們都並不存在於大規模和不具名的公開市場所進行的集資活動。

因此，香港的法律執業者如果須就某項擬議的代幣發行之性質，以及應該如何將其付諸實行等問題提供意見，便務須格外審慎行事。

最佳常規

如果代幣發行須受證券法的規管，而有關法例的潛在適用範圍卻存在不確定性，那麼該產業的運作亦可能會因此受到一定程度的影響。此等情況乃促使最佳常規的出現，例如：Coinbase的「區塊鏈代幣的證券法框架」(2016年12月)；香港金融科技協會發表的「代幣銷售最佳常規」(2017年12月)，而它們的核心原則皆為：ICO的法律架構和監管處理都應當具透明度。

儘管當局已制定最佳常規，促進行業的自我監管，但在實際運作上，該等常規並沒有經常被遵守。正如所指出的情況那樣，發行人若試圖將代幣置於證券法的規管範圍以外，便可能特別強調它的形式，多於它的實質內容。此舉促使美國證交會主席就代幣發行方面所運用的語義技巧和複雜建構操作，發出了措辭嚴厲的警告(2018年2月6日在美國參
議院的銀行業、住房和城市事務委員會的席前）。兩天後，香港證監會亦發出了通告，指出ICO發行人一般會徵詢律師、會計師及顧問等市場專業人士的意見，並在他們的協助下，將所發售的加密貨幣建構為功能型代幣，藉此繞過《證券及期貨條例》的監管範圍和規避證監會的監管）。

兩天後，香港證監會亦發出了通告，指出「ICO發行人一般會徵詢律師、會計師及顧問等市場專業人士的意見，並在他們的協助下，將所發售的加密貨幣建構為功能型代幣，藉此繞過《證券及期貨條例》的監管範圍和規避證監會的監管）。

法律執業者明確知悉，迴避與逃避是截然不同的兩回事。專業顧問經常會將有關的交易建構起來，使其得以迴避或盡量減輕各種可能的法律後果，而無需承擔該等須將某一事宜置於特定法律或監管審查之下的責任（不論是道德、法律，還是其他方面的責任）。這一職能，與作出專業不當行為有著明顯的差異，因為前者是建議發行人通過櫥窗粉飾，就所發行的代幣之真實性質，作出（或與他人共同作出）與事實不符的描述。此等作為屬於迴避法律規管的行徑，有可能等同於串謀欺詐。

講證券法的目的

證券法的首要目的，是對各項投資進行監管，不論該等投資是以甚麼形式或名稱來呈現。因此，證券法的發展以及對「證券」所下的定義，必須對環境的轉變具有適應能力，從而不致於於各個固定和不可變更的類別中。故此，靈活性是其基礎，而財政司司長在這一基礎上，有權根據《證券及期貨條例》第392條指明權益、權利或財產為證券。

有人或會指出，結構性產品監管的加強，是由於業界未能正視如何將產品適當地置於先前確立的每一個類別中（即並非只考慮到該產品在市場上的功能），而從中吸取的一個教訓。一項被建構成為債權證的產品，如果其本身與債權證的一般商業目的並無任何關連，那麼它只能說是名義上的債權證。同樣地，假如根據既定的類別而將功能型代幣區分為「證券」或「非證券」，那麼當中所存在的風險將會是：它可能對於該等代幣與公開資本市場如何進行互動，無法作出識別和監管。

基於現時所面臨的各種新挑戰，監管機構在解釋有關法例時，可能需要將部分注意力牢牢地放在監管機構的意圖上。Howey案中的測試與《證券及期貨條例》對證券所下的定義，連同法例對「集體投資計劃」一詞所下的寬泛定義，均顯示法例允許享有相當的自由度。美國證交會主席近年發表評論稱：「大體而言，我所見到的ICO結構都涉及證券的發行和銷售，並直接涉及……美國聯邦證券法的投資者保障條款」（該等評論是他以個人身份，於2018年2月6日向美國參議院的銀行業、住房和城市事務委員會作出），這也許顯示，美國現時傾向採納一個範圍更廣，並且以目的為本的做法。然而，以目的為本的做法亦有可能會帶來風險。

需要注意的是，監管機構所採取的該等以目的為本的靈活做法，並不會因此帶來不確定性。瑞士的金融監管機構FINMA面對本國缺乏ICO方面的法律，遂於2018年2月發出了相關指引，就其如何根據瑞士法律來處理ICO作出了相關說明。如果其所發揮的功能，是完全或部分地區有如在經濟上的一種投資，則該機構可能會將該功能型代幣視為一種證券。有人可能會問，此舉是否會導致代幣發行人須面對事後的監管，因為此等發行有別於傳統市場的做法，而有關的發行人也許並無機會參與交易所批准其代幣上市的決定－這將會取決於該交易所對需求的認知－而相當可能出現的情況是，該項上市本身會促進需求，而此等需求會促使該等代幣發揮有如經濟上投資功能。如果發行人並沒有採取適當措施，促進在次級市場方面的活動，這將會導致複雜問題的出現。

現在回到亞伯拉罕林肯於上面所說的一番話。林肯的說法，可以說是在語義上犯錯。如果我們將尾巴稱為腿，那麼我們的確可以說：狗有五條腿。如果發行功能型代幣，會導致公開資本被置於風險之下，消費者可能會面對欺詐風險，而該等代幣的表現，如果又與已確立的證券類別中的投資項目相類似，這也許足以使該等代幣發行，等同於立法機構原來所指的證券。對此，法律執業者稱之為「嗅覺檢定法」。事實上，《證券及期貨條例》中訂明：「通常被稱為證券的權益、權利或財產」，將被視為證券；而另一方面，即使我們將證券稱為功能型代幣，這亦不會改變其原來性質。
Crowdfunding in Hong Kong – there are Sufficient Gateways

By Alexa Lam, Professor
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A s start-ups and small businesses continue to crowdfund through the Internet, governments and regulators have had to respond. The United States created a tailored regime for crowdfunding. The United Kingdom and Singapore publicly consulted and clarified their regulatory approaches. The Hong Kong regulator has been less proactive, thus inviting criticisms that Hong Kong has fallen behind in enabling financial innovation and entrepreneurship.

Are these criticisms fair and accurate? Not necessarily so. In my latest research paper, I ventured to show that gateways for crowdfunding already exist in Hong Kong. If these exemptions were fully utilised, Hong Kong would be broadly on a par with, or even ahead of, other international financial centres in allowing entrepreneurs to tap capital from professional (accredited) investors – the investor pool most coveted by entrepreneurs.

**How Far Did the United States Go?**

With a strong political will to create jobs and promote growth after the global financial crisis, the United States was the most ardent in enacting legislation to enable crowdfunding. The Jumpstart Our Business Startups Act (‘JOBS Act’) was passed in 2012 against this background.

What often hit the headlines was Title III of the JOBS Act, which crafted a new exemption for securities crowdfunding for retail investors. Securities offerings not exceeding US$1.07 million over a 12-month period are exempted from SEC registration. The exemption comes with restrictions designed for investor protection – issuers are subject to substantial disclosure requirements, the offering must be conducted via regulated intermediaries, and retail investors are subject to an annual cap on their investments. Under these restrictions, Title III might not be as helpful for a fund raising avenue as its founding architects first envisaged.

The unsung hero is in Title II of the JOBS Act, which liberalised the private placement exemption. Before Title II, private offerings to accredited investors under Rule 506 of Regulation D were exempt from SEC registration, but issuers could not advertise or promote their offerings. This created an information barrier, making it difficult for issuers to seek out and connect with latent angels and accredited investors. Given the reach of the Internet, the ban was particularly problematic. Title II and the new Rule 506(c) lifted the ban, allowing issuers to engage in general solicitation and advertising in respect of their private securities offerings. So long as an issuer takes reasonable steps to verify that all investors are accredited investors and they continue to be so at the time of sale, the offering comes within the exemption even if the advertisement reached non-accredited investors. There is no ceiling on the number of investors or the amount raised, and no requirement for disclosure (subject however to antifraud provisions in federal and state securities law).

Accredited investors account for only 7.4 percent of all households in the U.S., but they control over 70 percent of the available capital. A significant portion of capital-raising in the U.S. comes from the non-public capital market. Given the relaxations in Title II, some anticipated that Title III will be much less used than Title II. It has been suggested that only issuers who failed to raise funds among accredited investors will resort to crowdfunding with retail investors, making the latter a “market for lemons”.

**What have the United Kingdom and Singapore Done?**

The regulators in both markets consulted the public. In the end, neither regime introduced any new exemption for securities offerings through crowdfunding. These offerings must comply with applicable prospectus and registration requirements, unless one or more of the existing exemptions (eg private offerings to accredited investors and small-size offerings) are available. The traditional restrictions commonly applicable to private placements continue to apply with these offerings.

**Where is Hong Kong?**

(i) **Offerings to Professional Investors**

In Hong Kong, the exemption for offerings to professional investors is in s. 103(3)(k) of the Securities and Futures Ordinance (‘SFO’). While s. 103(1) SFO prohibits the issue to the public of any invitation, advertisement or document that offers or invites offers in respect of securities, structured products or interests in a collective investment scheme (‘CIS’), s. 103(3)(k) provides that the s. 103(1) prohibition does not apply if the relevant investments “... are or are intended to be disposed of only to professional investors.” A plain reading of s. 103(3)(k) suggests that a person may issue an invitation to the public or a sector of the public and still come within the s. 103(3)(k) exemption, provided that the investments in question are or are intended for professional investors only. Yet, not wanting to test the limits of the exemption lest they found themselves on the wrong side of the s. 103(1) prohibition, issuers and their advisers have followed the practice for private placements: no public advertising, small pool of recipients, existing or personal relationships with recipients, etc.

This practice should be revisited in light of the Hong Kong Court of Final Appeal (‘HKCFA’) decision in the case of SFC v Pacific Sun Advisors Ltd. [2015] 18 HKCFAR 138 (‘Pacific Sun case’).

In the Pacific Sun case, an investment adviser sent emails to contacts on its...
database about a new fund. It also posted relevant documents on the firm’s website. It was accepted in the courts (the Magistrate’s Court, Court of First Instance and the HKCFA) that the advertisements were issued to the public or a sector of the public. The question was whether the s. 103(3)(k) exemption was available. On the face of the documents, there was no mention that the fund was exclusive for professional investors. Is a statement to that effect necessary for the issue of an advertisement to come within the s. 103(3)(k) exemption?

The HKCFA answered in the negative. As a matter of statutory construction, s. 103(3)(k) only requires a person to prove a genuine intention to limit the offer to professional investors exclusively. There is no further requirement of a statement to that effect in the advertisements or documents. Hence, the case turned on a question of fact: did the investment adviser genuinely intend to limit the offer to professional investors only? The Magistrate’s finding, which was binding in the appeal hearings, was that the fund was intended to be available to professional investors only, as the firm had adopted procedures to screen out non-professional investors. As a result, the exemption under s. 103(3)(k) was available.

It follows logically that issuing an invitation to the public or a sector of the public is permissible so long as there is a genuine intention (the burden of proof being on the issuer) to limit the offer to professional investors, and no investments have been sold to non-professional investors. As a result, the exemption under s. 103(3)(k) was available.

There should be a word of caution here. The s. 103(3)(k) exemption turns on a proof of “intention”. If an issuer in Hong Kong advertised its offering on a mass-scale, such as in all local supermarkets or on open-to-all social media, it might be difficult to convince the court that there was a genuine intention to limit the offer to professional investors exclusively.

The HKCFA’s clarification of the application of s. 103(3)(k) has potentially far-reaching implications. There are 200,000 high net worth individuals in Hong Kong holding US$1.1 trillion in wealth. Start-ups will likely prefer a smaller number of keen professional investors to a large number of random retail investors. It has been reported that angel investors tend to stay away from companies that have crowdfunded from retail – a company with too many investors is difficult to manage. The HKCFA decision will make it easier for issuers to locate and connect with these business angels. There is speculation that the authorities may consider legislating to reverse the HKCFA decision. That would be regrettable.

As Fok PJ succinctly explained in his judgement in the Pacific Sun case, “… if the investment products are not in fact sold or intended to be sold to the general public and instead are sold or intended to be sold only to professional investors, there is no necessity for protection to be afforded to the general public since they are not exposed to any material risk.”

(ii) Offerings to Retail Investors

Small-scale retail crowdfunding has always been an option. Under Part 1 of Schedule 17 of Companies (Winding Up and Miscellaneous Provisions) Ordinance (“CWUMPO”), offers of securities not exceeding HK$5 million over a 12-month period are exempted from the prospectus requirement under CWUMPO. Issuers need only state on the document that it has not been reviewed by any Hong Kong regulatory authority. Under s. 103(2)(ga) SFO, these exempt offers are also exempted from the s. 103(1) prohibition. The combined effect of these provisions is that small-scale offers can be made to the public without the disclosures in a compliant prospectus.

The HK$5 million small-scale offer exemption is slightly lower than the US$1.07 million small-scale offering exemption in the United States. The Hong Kong regime however comes with a lighter touch. There is effectively no particular disclosure requirement (subject however to provisions in the SFO governing false or misleading statements). One should not underestimate the potential of this exemption for small or initial capital-raising, such as seed funding. Note however that the exemption is available to companies only. This exemption is not available to projects that are structured in the form of a non corporate CIS or a structured product.

Going Forward

As demonstrated, Hong Kong is not falling behind in the gateways that are available for securities crowdfunding. Yet, because the prohibitions and exemptions in the securities offering regime are fraught with difficulties, and the penalties for contravention severe, market players have been hesitant in making full use of the exemptions.

We have heard endless debates on why and how the Hong Kong regulatory rules should facilitate crowdfunding. Rather than wait for a tailored regime to come, issuers should kick-start their projects by making purposeful use of existing exemptions. As the market starts to mature, regulators will have a fuller sense of how best to facilitate and regulate the crowdfunding space. In the meanwhile, there is sufficient room for going forward.
在香港進行眾籌－具備充足的門道

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隨著源源不斷的初創企業和小型企業透過互聯網進行眾籌(crowdfunding)，各國政府和監管機構不得不對此作出回應。美國成立了一個有關眾籌的專門制度，而英國和新加坡也進行了公眾諮詢，並說明了其對此等活動的監管策略。唯獨香港的監管機構似乎對此有欠積極，因而招致外界的批評稱：香港在金融創新與企業開創方面皆落後於人。

然而，此等批評是否公允、無誤呢？事實不見得如此。筆者在最近期所撰寫的研究論文中，嘗試指出香港其實已存在眾籌的門道，如果有關的豁免措施能夠被充分利用，香港在讓創業者尋求專業(或認可)投資者(它們是創業者最覬覦的一群投資者)投入資金方面，將不亞於其他國際金融中心，甚至有超越它們的可能。

美國採取了甚麼措施?
環球金融危機發生後，美國在政治上，有強烈的意願希望能創造更多就業機會，和促進經濟的增長。因此，他們在制訂法規以推動眾籌方面，態度最為積極。美國的《初創企業扶助法案》(Jumpstart Our Business Startups Act)就是在這一背景下，於2012年獲得通過。

該法案最受關注的部分，是它的「第三章」，當中涵蓋新制訂的豁免措施，而散戶投資者可據此得以參與證券眾籌。發行人在12個月內所發行的證券，其總額如果不超過107萬美元，可免除向美國證券交易委員會登記。該項豁免措施附有為保障投資者而訂立的各項限制－－發行人必須遵守實質性的披露規定；有關的發售必須透過受監管的中介機構進行；以及，散戶投資者所作的投資，須受每年最高金額
的限制。基於這種種限制，「第三章」也許不如其建構者原來設想的那樣，能有效地協助企業進行集資。

其實，真正的無名英雄該是「第二章」，即該法案中，對私人配售的豁免作出放寬的那一部分。在「第二章」的有關規定實施前，發行人根據《規例D》第506條規定向認可投資者作出的私人要約，可免除向美國證券交易委員會登記，前提是發行人不得為其產品進行任何宣傳或推廣。此舉構成了信息流通的障礙，以致發行人難以尋找和聯繫潛在的天使和認可投資者。由於互聯網的接觸面廣，該等禁令确实令人感到困擾。然而，「第二章」以及新制訂的第506(c)條規則，解除了此等禁令，並批准發行人就其私人證券發行，進行一般性的招攬和廣告宣傳。只要發行人採取合理措施，核實所有投資者皆為認可投資者(且在發售之時仍然如是)，則即使有關的廣告宣傳，有被非認可投資者看到的可能，該等證券發行仍然是在豁免範圍之內。至於投資者的人數或所募集的金額，皆沒有設定任何上限，也沒有任何資料披露規定(但必須遵守聯邦及有關州份的證券法所載的反欺詐條款)。

在美國，認可投資者僅佔所有投資戶總數的百分之七點四，但在它們控制下的可用資本，卻佔其總額的百分之七十以上。美國大部分的資金籌集，皆來自非公開的資本市場。由於「第二章」放寬了有關限制，因此有人估計「第三章」的使用率將遠低於「第二章」。也有人認為，只有那些無力向認可投資者籌集資金的發行人，才會向散戶投資者進行眾籌，從而使得後者成為一個「劣幣驅逐良幣的市場」。

香港的情況又如何？

(i) 以專業投資者為發行對象

在香港，向專業投資者作出要約所獲的豁免，載於《證券及期貨條例》第103(3)(k)條。雖然《證券及期貨條例》第103(1)條規定集體投資計劃中的證券、結構性產品或權益所作出的要約或邀請作出要約，禁止向公眾發出任何邀請、廣告或文件，但該條例第103(3)(k)條亦規定，如果相關投資「......是只轉讓予或擬只轉讓予專業投資者」，則第103(1)條的禁止規定將不予適用。第103(3)(k)條表明，只要有相關的投資項目僅限於或擬僅限於向專業投資者提供，則即使是向公眾或部分公眾發出邀請，它仍然是在第103(3)(k)條的豁免範圍之內。然而，為了避免因測試該等豁免的底線，而觸犯了第103(1)條的禁令，發行人及其顧問需準備好將非認可投資者排除在外，故該基金確實只擬侷限於向專業投資者提供，第103(3)(k)條下的豁免因此可予適用。

必須注意的一點是：發行人要享有第103(3)(k)條下的豁免，必須能夠證明存在相關「意圖」。香港的發行人若就其證券發行進行大規模廣告宣傳(例如在香港所有本地超市，或在開放的社交媒體上進行宣傳)，這便很難說服法院相信，發行人真的有意圖僅局限於向專業投資者作出邀約。

終審法院就第103(3)(k)條的適用範圍所作的解釋，具有潛在的深遠影響。香港現時有20萬高淨值人士，其總計持有共1.1萬億美元財富。也許，初創企業的心目中，它們寧可獲得那些更具誠意的專業投資者垂青，而並非大批隨機性的投資散戶，即使前者的數目遠比後者為少。有報導指出，天使投資者並不願
意指那些曾向散户投资者进行众筹的公司，如果一家公司的投资者太多，将会导致经营管理上的困难。终审法院的裁决，将有助发行人更易于寻找此等商业天使，并与其建立联系。但有人推测，当局可能会考虑进行立法，从而推翻终审法院所作的裁决。果真如此，此举将是令人遗憾的。终审法院常任法官霍兆刚在Pacific Sun案件的判词中解释称：「......投资产品如果并非实际出售或打算出售给公众，而是只出售或打算只出售给专业投资者，那么便没有必要为公众提供保障，因为他们并没有面对任何重大风险。」

(ii) 以散户投资者为发售对象

进行小规模的散户众筹，向来都是一个选项。根据《公司(清盘及杂项条文)条例》附表17第1部的规定，所发售的证券金额，如果在12个月内不超过500万港元，可免除遵守《公司(清盘及杂项条文)条例》中招股章程的规定。发行人只需在有关文件上声明，它未经任何香港监管机构的审查。根据《证券及期货条例》第103(2) (ga)条，该等发售也获得免除遵守第103(1)条的禁止规定。该等条文的综合效力是：如果只是向公众作出小规模的发售，便可以不需在合规格招股章程中作出披露。

香港为500万港元之小规模发行所给予的豁免，与美国为107万美元之小规模发行所给予的豁免比较，金额虽然略低，但香港的制度却较为宽松，且并无任何特定披露要求(惟须遵守《证券及期货条例》有关虚假或误导性陈述的规管条文)。我们不應低估此等向小规模或初始集资(例如种子基金)提供的豁免所具的潜力，但必须注意的是，此等豁免仅限于向公司提供，而非法团集集投资计划 (non-corporate CIS)、结构性产品 (structured product) 等形式构建的项目，将不获给予豁免。

邁步向前

正如所展示的情况般，香港在为证券众筹提供门道方面，并没有落后于人。然而，由于该证券发行制度附随各种禁止和豁免，给市场参与者造成诸多的妨碍，而违反有关规定，又有可能招致严厉的处罚，因此市场参与者对于是否充分利用此等豁免，一直是举棋不定。

香港的监管规则为何及应如何推动和促进众筹，当中存在许多未休止的辩论。发行人与其等待一个专门为众筹成立的制度出现，倒不如积极运用现行的豁免措施，推动其各个项目的进展。随著这一市场逐渐迈向成熟，监管机构将更懂得如何最有效地促进和规范众筹领域的发展，而即使在现阶段，众筹仍有著充足的活动空间。
Custody of Children in Relationships Across the Border

By Philippa Hewitt, Professional Support Lawyer
Billy Ko, Associate

Withersworldwide
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On 20th June 2017 the Secretary for Justice in Hong Kong and the Executive Vice President of the Supreme People’s Court of the PRC, signed an Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases. The need for a clear and effective legal regime, similar to that which already exists in respect of civil claims, was becoming increasingly obvious with the growing number of cross border relationships and marriages. In 2016, 35 percent of marriages in Hong Kong involved a party from the PRC. Since the handover of Hong Kong from British rule to the PRC in 1997, there has been a significant increase in the number of families with connections in both jurisdictions. Family members are often born and marry in one place and move to work in the other, they buy property in both places and sometimes travel weekly between the two, effectively living and working in both jurisdictions. Children are born and schooled in either or both and often families will be Chinese citizens but also hold a Hong Kong Permanent Residency.

However, until the agreement in June, China would not recognise a Hong Kong divorce decree and the orders of Hong Kong courts in respect of families were not enforceable. This provided real difficulties for many families as cross border disputes are commonplace and the position of vulnerable children acutely felt. In addition, although Hong Kong signed the Hague Convention and incorporated its provisions into the Child Abduction and Custody Ordinance Cap. 512 in 1997, the PRC has yet to sign and there has been real concern in Hong Kong regarding the ability of parents to find their children should one parent decide to unilaterally take a child across the border.

This was highlighted recently in the Court of Appeal in Hong Kong: L v. L (CACV 204 of 2016 1st November 2017). This case involved a mother who was a Chinese national but holding a “one way permit” which allowed her to stay in Hong Kong and a Hong Kong born and bred father. Here the child was clearly habitually resident in Hong Kong prior to the mother leaving for China without the consent of the father, and the whereabouts of the mother and child remain unknown. She left shortly after receiving the divorce papers and therefore had been effectively served in Hong Kong. The mother had not contested the jurisdiction of the Hong Kong court and the father was granted interim custody of the child. He then applied in the Lo Wu People’s Court in Shenzhen, who declined jurisdiction on the basis that the Hong Kong court had already assumed jurisdiction in the matter. The father successfully appealed to the Court of Appeal for the interim custody order to be made final. Such order, however, remains unenforceable in China. Whilst the Reciprocal Arrangement has been signed, it has no retrospective effect and only applies to orders made after the effective date. This will be when both sides have completed their respective internal procedures. Specifically, it will be implemented in the Mainland by way of judicial interpretation and in Hong Kong by way of legislation. It is anticipated that this will happen before the end of 2018. In the meantime, the father in this case has not seen his five-year-old son since December 2014 with no real prospect of seeing him in 2018, despite having full custody of the child.

Headway has been made, therefore, here in Hong Kong, but the problem of getting a child out of China remains a problem for other jurisdictions. This has been recognized by the High Court in England & Wales recently in DO and BO (Temporary Relocation to China) [2017] EWHC 858 (Fam) in which a mother applied for permission to take her two sons to China for a holiday.

The case concerned two boys (eight and six), their Australian/UK father and Chinese mother. Both boys held dual British and Australian citizenship and neither held Chinese citizenship. They had been born and brought up in England, with visits in the past to Australia and China to see relatives.

Baker J held that it was not in the boys’ interests to be taken to China at this stage, given the lack of sufficient safeguards to ensure that they would be returned and the dire consequences if they were not. He cited the leading Court of Appeal authority on the law relating to temporary relocation of children (Re R (A Child) [2013] EWCA Civ 1115) and drew on earlier authorities, in particular the decisions of the same Court in Re K (Removal from the Jurisdiction: Practice) [1999] 1 FLR 1084 and Re M (A Child) [2010] EWCA Civ 888, Patten LJ observed (at para 23):

“The overriding consideration for the court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child’s return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent.”
The court also stressed the importance of obtaining expert legal advice in respect of the foreign jurisdiction in these scenarios. When in doubt, the court should err on the side of caution and refuse to make the order. In this case, the expert advice on Chinese law was sought from Ms Flora Huang of the Shanghai Promise Law Firm. She confirmed that China was not a signatory to the Hague Convention and that foreign orders for custody were not recognised or enforceable, but may be brought in evidence in the PRC. The father would have to bring the case to the Chinese Court de novo, but it was some comfort that Chinese Courts have a similar aim in respect of children’s welfare. Ms Huang confirmed that the PRC court would not issue a mirror order without first considering the case in full. Although both the father and the mother had the right to start proceedings regarding their children in the PRC, such proceedings would be conducted in Chinese with application of Chinese law and there was no legal mechanism to apply for or issue urgent or emergency orders in family law cases in the PRC.

The expert also made useful observations in respect of the mother’s Chinese nationality. As a Chinese citizen, the mother had sufficient jurisdictional connection to start a case in the PRC, even though she has been habitually resident in England. However, she would lose the ability to claim jurisdiction as of right if she renounced her Chinese citizenship; she would have to complete one full year of uninterrupted residency and although she could reapply for citizenship, the failure rate was “extremely high”. Abandonment would be considered a permanent decision and if she renounced her citizenship, and travelled to China on her British passport, she would be subject to Chinese laws and regulations concerning foreign aliens. The ability of a Chinese citizen to hold more than one nationality is explicitly precluded by Chinese domestic law.

Despite the dire consequences therefore for a Chinese mother should she renounce her citizenship, the court still found on balance that she might decide to make the move in view of the turbulent nature of the parties’ relationship, her contacts and family in China and her ability to find work and stability there, and therefore that the risk to the children was too high. The court looked at the consequences of such a retention for the boys and found that it would be “devastating” for them – the judge commenting, “apart from the company of each other and their mother, they would be deprived of everything in their lives to date - friends, home environment, school, the culture in which they have been brought up, and, above all else, the relationship with their father”.

It is noteworthy that the children’s guardian had, on balance been in favour of their trip in order to enable the boys to explore their Chinese heritage and to get to know their maternal family. Bearing in mind the number of Chinese nationals worldwide, the lack of reciprocity presents a significant problem. Under article 5 of the Nationality Law of the PRC “any person born abroad whose parents are both Chinese nationals or one of his parents is a Chinese national shall have Chinese nationality” although “a person whose parents are both Chinese nationals and have settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth, shall not have Chinese nationality”. Therefore the boys in this case were not Chinese nationals but it is a potential problem for many individuals in this increasingly integrated world.

Clearly the best result for such cases would be for China to sign the Hague Convention on Child Abduction. Failure to do so does not just cause problems, of course, for parties with connections in China. There appears to be a general trend in England and Wales whereby the Family Court is declining to grant permission for temporary removal of children for holidays to non-Hague countries. In his article “On the Side of Caution” for Family Law Journal November 2017, James Copson comments on such applications and argues that more could be done internationally to ensure that a ‘safety-first’ policy, which results in families being cut off from their roots, is not the default position of the court.
跨境婚姻關係所涉及的子女管養權問題

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2017年6月20日，《關於內地與香港特別行政區法院相互認可和執行婚姻家庭民事案件判決的安排》，由香港律政司司長與中華人民共和國最高人民法院常務副院長共同簽訂。隨著香港與內地之間的跨境聯繫不斷加強，兩地人士跨境婚姻的數目不斷上升，建立一個與這方面有關的清晰而有效法律制度，實在已到了刻不容緩的地步（在民事申索方面，雙方已經建立了類似的法律機制）。

然而，在上述協議於去年六月達成以前，內地並不承認香港的離婚判令（divorce decree），而香港法院所頒發的家庭管養令，亦不能在內地執行。這情況給許多家庭帶來了相當程度的困難，因為跨境性質的家庭糾紛經常發生，而這些家庭的子女也因此受到重大影響。在外，儘管香港於1997年加入了《海牙公約》，並將該公約的條文納入本地的《撈拐和管養兒童條例》（第512章）中，但中國在目前仍不承認《海牙公約》的簽署國，這會令人關注到：假如有父母其中一方自行決定將子女帶回內地，另一方是否有能力將其子女尋回？

香港上訴法庭的一宗近期案件 L v L (CACV 204 of 2016 1st November 2017) 突顯了此等情況。該案的父親享有中華人民共和國國籍，並獲發可在香港居留的「單程證」；而該案的母親是在香港出生和長大。該名母親在未經其丈夫同意的情況下，將孩子帶返內地，而該名孩子之前一直在香港生活。至今，該名母親及孩子依然下落不明。她是在收到有關的離婚文件不久之後才離港的，因此那份離婚文件是在香港有效送達，而她亦並未就香港法院的司法管轄權提出爭議。該名父親獲香港法庭授予子女的臨時管養權。之後，他向深圳市龍華區人民法院提出申請，但不獲受理，理由是該案受香港法院的司法管轄權所管轄。該名父親向上訴法庭成功提出上訴，將該項臨時管養權轉化成為最終管養權。然而，儘管香港與內地已經簽訂上述的《相互認可安排》，但由於該協議並沒有追溯力，而是只適用於在生效日期之後所頒發的判令，因此該判令仍然無法在內地強制執行。該協議有待雙方完成各自的內部程序後生效。具體而言，該協議將會分別通過司法解釋和立法，在內地和香港實施，而正式的生效時間，預計是2018年年底。雖然該案的父親現獲法庭授予子女的全面管養權，但從2014年12月至今，他一直無法與其5歲的兒子取得聯繫，而今年的情況也不容樂觀。

因此，儘管中港在相互認可安排方面取得了進展，但如何讓子女離開中國，仍然是其他司法管轄區必須面對的問題。英格蘭和威爾士高等法院在近期的 D O and BO (Temporary Relocation to China), Re [2017] EWHC 858 (Fam) 一案中，同意此等顧慮。在該案中，一名
母親要求法院批准她帶同兩名兒子往中國度假。

該案涉及兩名男孩（一個8歲，另一個6歲），以及其澳洲籍/英籍父親和中國籍母親。該兩名男孩皆擁有英國和澳洲雙重國籍，但並無中國國籍。他們是在英國出生和長大，過往曾經到過澳洲和中國探親。


「法院在決定是否批准父母將子女帶往該等並非《海牙公約》締約國的國家時，其首要考慮的問題是：作出有關判令是否符合該子女的最佳利益？如果當中存在某程度的擄拐風險（正如在大多數情況中），以及，假如該風險真的出現，並會給該名子女帶來明顯的傷害，在這情況下，申請人必須能明確地讓法院信納，在這情況下，申請人必須能明確地讓法院信納。」

此外，Ms Huang亦就該名母親所擁有的中國國籍提供了有用的意見。儘管該名母親長居英國但她仍然擁有中國公民身份，因此她與中國有著充分的司法聯繫，而中國法院也會根據中國法律來對該案進行審訊。相反，若該案的家庭糾紛在中國，中國法院將會根據中國法律來對該案進行審訊。晴

都曉得，全球華人數目眾多，兩地法院如果沒有一個民事相互認可的機制，這將會導致嚴重問題出現。《中華人民共和國國籍法》第5條訂明：「父母雙方或一方為中國公民，本人出生在外國，具有中國國籍」，而子女「父母雙方或一方為中國公民並定居在外國，本人出生時即具有外國國籍的，不具有中國國籍」。因此，該案的兩名男孩並非中國公民，而對於在這個日益融合的世界中許多中國人來說，這是一個潛在的問題。

很明顯，該等情況的最理想結果是：中國國內的兩地法院如果沒有一個民事相互認可的機制，這將會導致嚴重問題出現。墨淡。不過的話，這會使得那些與中國存在聯繫的人面對許多困難；而現時即使是英格蘭和威爾士，也出現一個普遍趨勢，就是當地的家事法院不願意批准父母將子女送往該些並非《海牙公約》締約國的國家度假。James Copson於2017年11月在Family Law Journal刊登了一篇題為“On the Side of Caution”的文章，而在該文章中，他就有關的申請作出了評論，並指出其實際國際社會中可以有更多的作為，從而確保該項導致許多家庭被切斷了根源的「安全第一」政策，不會成為許多法院的既定立場。
INDUSTRY INSIGHTS
業界透視

ARBITRATION

Disputes Over Legal Fees

The recent case of Fung Hing Chiu v. Henry Wai & Co [2018] HKCFI 31 confirms that the High Court’s power to order the taxation of a solicitor’s bill, pursuant to s. 67 of the Legal Practitioners Ordinance (Cap. 159), does not prevent a solicitor and a client agreeing to include an arbitration clause in their letter of engagement.

For solicitors and their clients the judgment is important. Where a client, acting in the course of a business, and a solicitor enter into a letter of engagement that contains a model arbitration clause, or where they subsequently agree in writing to arbitrate a dispute over legal fees, as a matter of legal principle the arbitration clause or agreement is valid.

In this case, the solicitors’ two engagement letters contained comprehensive arbitration clauses. The engagement letters were signed by an individual client and on behalf of a corporate client (of which the individual was a director). A dispute arose as to the solicitor’s outstanding fees alleged to be owed by the two clients. The solicitors commenced separate arbitration proceedings against both clients.

The clients, in turn, commenced separate court proceedings seeking (among other things) to stay the arbitration proceedings and to refer the dispute to a taxing master of the court. The solicitors applied for the legal proceedings to be stayed to arbitration, pursuant to s. 20 of the Arbitration Ordinance (Cap. 609).

The court’s judgment is a good review of the relevant legal principles. A number of points are worth noting:

• there is no public policy which prevents disputes relating to a solicitor’s legal fees from being decided by arbitration. Indeed, while acknowledging the supervisory jurisdiction of the court, pursuant to s. 67 of the Legal Practitioners Ordinance, the judgment is another testament to the Hong Kong courts’ pro-arbitration stance;

• depending on the wording of the arbitration agreement, it is not only disputes as to legal fees that are arbitrable. Allegations of breach of contract or claims in tort against a solicitor’s firm are arbitrable;

• the arbitration of a dispute over legal fees does not deprive a client of protection. An arbitrator can apply the same taxation principles as a court and can usually award reliefs that could have been ordered by a court had the dispute been subject to court proceedings (“Award of remedy or relief” – s. 70 of the Arbitration Ordinance);

• where a solicitor is retained in contentious proceedings by a commercial client and charges hourly rates based on the guideline rates used in court proceedings, it is difficult to see how an arbitrator could decide that those rates are unreasonable;

• if a party to an arbitration concerning legal fees is dissatisfied with a tribunal’s award that party can apply to the court to set aside the award or seek appropriate relief. The court’s supervisory jurisdiction is not impacted, although (as readers will appreciate) seeking to challenge an arbitration award or an arbitration agreement in Hong Kong is difficult. While such challenges are not supposed to be the norm they are not unusual. Unsuccessful challenges are visited with indemnity costs against applicants. Whether this is a deterrence is a moot point;

• a party that engages a solicitor in the course of a business is not acting as a “consumer”, so s. 15 (“Arbitration agreements”) of the Control of Exemption Clauses Ordinance (Cap. 71) is not engaged*;

• whether a solicitor’s firm should include an arbitration clause in (for example) its standard terms of business is a matter for the firm. There are plenty of “model clauses” to choose from.

- David Smyth and Warren Ganesh, RPC

* Requirement for “written consent signified” after a dispute has arisen.

仲裁

法律費用爭議

根據《法律執業者條例》（第159章）第67條，法院有權命令評定律師帳單，最近的Fung Hing Chiu v Henry Wai & Co [2018] HKCFI 31確定，高等法院這項權力不阻止律師及客戶同意將仲裁條款納入他們的委任書內。

判決對律師和他們的客戶是重要的。原則
上，如果在業務過程中，客戶和律師訂立
一份包含標準仲裁條款的委任書，或者他
們其後書面同意藉仲裁解決法律費用爭
議，仲裁條款或協議是有效的。
在這宗案件，律師的兩份委任書包含涵蓋
全面的仲裁條款。該兩份委任書是由客戶
(個人)及另一客戶(公司)(「兩名客戶」)的
代表簽署的，該人是該公司的董事。兩名
客戶被指拖欠律師費用，兩方因為未清繳
的費用發生爭拗。
之後，兩名客戶另行展開法律程序，尋求
(其中包括)攤置仲裁程序，將爭議轉呈法
庭訴費評定官。律師根據《仲裁條例》(第
609章)第20條申請攤置法律程序，進行仲
裁。
法庭的判決充分檢討了相關的法律原則。　　
以下幾點值得留意：　　
• 公共政策並不阻止律師法律費用爭議
藉仲裁作決定。事實上，根據《法律
執業者條例》第67條承認法庭有監督
權的同時，判決是香港法庭支持仲裁
的另一證明；　　
• 視乎仲裁協議的措詞而定，不只是關於
法律費用的爭議可予仲裁。指稱某律
師行違約或針對某律師行的侵權申索
是可予仲裁的；　　
• 就法律費用爭議進行仲裁並不剝奪客
戶享有的保謢。假如爭議事項是法庭
法律程序所裁的，法庭可命令判給濟
助，仲裁員通常可以一如法庭般，應
用一樣的稅務原則，並且通常可以判
給該項濟助(「判給補救或濟助的裁
決」——《仲裁條例》第70條)；　　
• 如果商業客戶就具爭議的訴訟聘用律
師，而律師每小時費率是按法律程序
所用參考費率收取的，人們就難以
明白仲裁員怎麼可以決定費率並不合理；　　
• 如果仲裁是與法律費用有關，而仲裁
一方不滿意仲裁庭的裁決，該方可向
法庭申請將裁決作廢或要求合適的濟
助。法院的監督權不受影響，不過(讀
者會理解)，想在香港質疑仲裁裁決或
仲裁協議是困難的。雖然這類質疑不
被認為是常態，但卻並不罕見。申請
人如果敗訴，就得支付償償訴費。這
點是否礙事尚有商榷餘地；　　
在商業過程中委聘律師的一方不以「客
戶」的身份行事，因此，《仲裁條例》(第
71章)第15條(「仲裁
協議」)不適用*；　　
應否在(譬如說)標準商業條款中包括仲裁
條款在內是律師行得考慮的問題。現
時有大量「標準條款」可供選擇。　

* 規定在爭議發生後「獲得 ……書面同
意」。　

ARBITRATION
Establishing Hong Kong as
an International Legal Hub

On 14 December 2017, the HK SAR
government and the National
Development and Reform Commission
signed “Advancing Hong Kong’s Full
Participation in and Contribution
to the Belt and Road Initiative” (the
‘Arrangement’). The Arrangement serves
as a blueprint for Hong Kong’s further
participation in the “Belt and Road
Initiative” (the ‘Initiative’).
The Arrangement has explicitly given
its support to establish Hong Kong
as an international legal and dispute
resolution service hub for the Asia-Pacific
region, hence to provide international
legal and dispute resolution services
for the Initiative. In order to practically
implement the policies under the
Arrangement and effectively realize a
series of preferential policies towards
Hong Kong, there is an imperative need
for the negotiation between HK SAR
government and legal industries to
formulate specific proposals with
detailed measures. Hence, the following
foremost question for Hong Kong is,
how to utilize Hong Kong’s legal and dispute
resolution service for disputes arising
from commercial transactions related to
the Initiative.

Encourage Chinese enterprises to
choose Hong Kong as the dispute
resolution venue

With the continuous growth of trade
globalization and the Initiative, cross-
border transactions become even more active. Hence, the number of disputes
related to cross-border investments and international trade will increase
accordingly. Imagine, in a transaction where one party is a Chinese enterprise
and the other is an overseas enterprise, the overseas enterprise would always
seek overseas arbitration institutions for settlement of any potential contract
dispute. This is out of the concerns that overseas enterprises are generally
incomprehensive of and are also lack of trust for mainland legal system and
arbitration institutions. Nevertheless, for Chinese enterprises, equally, they will be
uncertain about going overseas to settle disputes and also will have concern on
the expensive legal costs. Under such circumstance, as the only common law
jurisdiction in China and also under the protection of the Basic Law, as well
as having the unique geographical location which allows for Western-
Chinese cultural fusion, Hong Kong will undoubtedly be the ideal arbitration
venue where both parties can accept.

As the bargaining power of Chinese
timates in international trade and
investments gradually increase, it
becomes obvious to “stay at home”
for dispute resolution regarding
disputes in cross-border investments
and transactions. Therefore, HK SAR
government should establish a cross-
department group, and actively seek to
set up a cooperation mechanism with
the relevant national authorities and
organisations, which are respectively
responsible for communications with the
stated-owned enterprises and private
tprises. This group should aim to
promote Hong Kong’s legal and dispute
resolution services to all kinds of Chinese
enterprises, and also encourage these enterprises to choose Hong Kong as the seat of arbitration for commercial disputes.

Provide more accommodation for the recognition and enforcement of Hong Kong arbitration awards in mainland China

With the progression of the Initiative, it is envisaged that there will be more foreign-invested enterprises as well as wholly foreign-owned enterprises incorporated in Mainland China and especially in free trade zone (FTA). If both such companies agree to arbitrate overseas (including Hong Kong), according to the current Chinese legislation, the relevant arbitration awards are very likely not to be recognized and enforced by the Chinese courts because such awards do not have foreign affairs.

In 2015, the Supreme People’s Court (the ‘SPC’) introduced a document with a view to providing judicial assistance and protection to the Initiative. In particular, the SPC indicated to support the parties to resolve the disputes in relation to the Initiative. Thus, HKSAR government should negotiate with the SPC and other mainland authorities to introduce relevant judicial interpretations to affirm that the enforcement of arbitration awards made in Hong Kong will not be affected due to its absence of foreign affairs under the abovementioned circumstances. If this result can be successfully realized, it will inevitably attract more commercial contracts to choose their arbitral seat in Hong Kong. Hence it will in no doubt enhance the status of Hong Kong as the international arbitration hub and help to improve the general business environment in Mainland China.

Edward Liu, Senior Associate, Reed Smith Richards Butler, Vice President, The Hong Kong and Mainland Legal Profession Association

仲裁

建立香港成為國際法律樞紐

隨著貿易全球化和「一帶一路」不斷發展，跨境交易更加活躍。因此，與跨境投資和國際貿易有關的爭議數量將相應增加。試想像一宗交易中，一方是中國企業，另一方是海外企業，海外企業總是會找海外仲裁機構解決潛在的合同糾紛，因為海外企業普遍不理解內地的法律制度及仲裁機構，對它們亦缺乏信任。相反，中國企業也不願意到海外解決爭議，還會擔心法律費用高昂。在這種情況下，香港作為中國唯一的普通法管轄區，受到《基本法》的保障，地理位置獨特，東西方文化融合，無疑是可為各方接受的理想仲裁地點。

隨著中國企業在國際貿易和投資中討價還價的能力逐漸增強，「留在家中」處理跨境投資和交易爭議是必然的選擇。因此，香港特區政府應該建立跨部門工作組，積極與負責與國有企業和私營企業的溝通的國家部門和組織建立合作機制。工作組應以各類中國企業推廣香港的法律和爭議解決服務為目標，鼓勵這些企業選擇香港作為商業爭議的仲裁地點。

為香港的仲裁裁決在內地獲承認和執行提供條件

隨著「一帶一路」的推進，預計內地及自由貿易區將會有更多的外資企業及外商獨資企業落戶。根據中國現行法例，若兩家公司同意在海外進行仲裁（包括香港），相關仲裁裁決很可能不被中國法院承認和執行。

2015年，最高人民法院出台了文件，為「一帶一路」提供司法協助和保護。最高人民法院特別提到，支持「一帶一路」各方解決爭議。因此，香港特區政府應與最高人民法院和其他內地部門進行磋商，提出相關司法解釋，確認在上述情況下在香港作出的仲裁裁決的執行不會受到影響。若能成事，將吸引更多的商業合同選擇香港作為仲裁地點，因而提升香港作為國際仲裁中心的地位，同時有助改善中國內地的整體營商環境。

- Edward Liu, Senior Associate, Reed Smith Richards Butler, Vice President, The Hong Kong and Mainland Legal Profession Association

Hong Kong Arbitration
CROSS-BORDER

Belt & Road’s Funding Shortfall: Hong Kong’s Key Opportunity

The mighty Dragon has changed direction. It has begun to breathe fire West, across an ancient route through the Taklimakan Desert, bounded by the Kunlun Mountains to the South and the Pamir Mountains to the North, once known as the Silk Road, now known as the “Belt and Road Initiative” (“BRI”). The BRI is the greatest infrastructure project in human history, affecting 65 percent of the world’s population, 70 countries and 30 percent of global GDP, driven, in part, by a Chinese economy with over-capacity.

The role for Hong Kong is very simple. The BRI cannot be funded with current capital commitments. It requires funding from international finance markets. Hong Kong is uniquely placed to be the centre for capital-raising for BRI projects. Packaging a comprehensive suite of services to this effect is the next step.

The BRI is a significant development strategy launched by Chinese President Xi Jinping in 2013. On 3 February 2018, Zhang Dejiang, Chief of the National People’s Congress addressed the Belt and Road General Chamber of Commerce here in Hong Kong and trumpeted the idea of Hong Kong playing a key role in BRI. At its heart it is, for all intents and purposes, infrastructure project financing. Building overland economic corridors towards Europe and maritime corridors through the Indian Ocean creates an infrastructure system designed to make China the primary economic power in the world. By investing in rail, ports and power plants along the centuries old silk routes, China is seeking to stimulate cross-border trade.

China has established two major new financial entities – the Asian Infrastructure Investment Bank (‘AIIB’), and the Silk Road Infrastructure Fund. The AIIB provides financing in a variety of ways including loans, investing in the equity capital of an enterprise and guaranteeing as primary or secondary obligor loans for economic development. The Silk Road Fund is a state-owned investment fund primarily backed by China’s foreign currency reserves to foster increased investment in countries covered by the BRI.

AIIB President Jin Liqun has stated that the bank aimed to lend US$1.2 billion in 2016. The bank approved US$3.3 billion in its second year for a total of just under US$4.5 billion in approved lending to date. However, the BRI has an infrastructure deficit estimated at US$1.5 trillion per year. The Asian Development Bank has estimated a funding shortfall for Asian (only) infrastructure projects of US$750 billion per year through 2020. Or another way at looking at it, the present China-based institutions do not have sufficient capital to make BRI work on their own. By way of comparison, the rival Asian Development Bank led by Japan approved new loans worth US$17.5 billion in 2016 and US$19.1 billion in 2017 for a two year total of US$36.6 billion, more than eight times the approvals of the AIIB. In fact, China has borrowed more from the ADB than it has lent through the AIIB. Furthermore, increased exposure to countries with poor credit profiles along the Belt & Road could put China at risk of being bogged down by the costs involved. China will be keen to spread that risk with other financiers.

The BRI provides an historic opportunity to Hong Kong to leverage its status as China’s most cosmopolitan city – an efficient financial hub combining rich infrastructure experience, well-regulated markets with deep understanding of both Chinese and Western culture as well as business practices. BRI infrastructure projects bring together investors, bankers, construction companies and other business enterprises. The complex transactions require deep analysis of legal, regulatory and tax parameters involving multiple countries. Hong Kong is the world’s leading offshore renminbi market and gateway for more than half the mainland’s outward investment. Mainland companies account for half the market capitalisation of Hong Kong’s stock exchange offering direct two-way access to exchanges in Shanghai and Shenzhen.

Hong Kong’s resident BVI, Cayman Islands and Bermuda lawyers will play their usual support role to their Hong Kong counterparts in assisting in the establishment of offshore vehicles which provide efficient hub-connectors for the influx of capital and financing from around the world. As more flexible POEs play a larger part in BRI transactions, and as BRI transactions begin to move into more complex industries that benefit from improved infrastructure including technology and logistics, there will be greater requirements for more complex structuring. In such industries people and not assets are the real value and a holistic investment approach providing financial incentives and some influence over management can help to maximise returns and provide project stability. This is often best established through contractual agreement at the offshore level where both Chinese and local counterparts can have the comfort of a tax neutral platform with predictable laws and robust judges with disputes ultimately being capable of being resolved by the universally well-regarded Privy Counsel in the UK. Offshore structures will continue to facilitate international finance the BRI era. The opportunities for Hong Kong are boundless.

- Ian Mann and Jonathan Culshaw, Harneys
March 2018 • INDUSTRY INSIGHTS

跨境

一帶一路資金短缺：香港的重大機遇

巨龍翻身轉了方向，騰雲駕霧，向西方進發，沿著古代絲綢之路，現稱「一帶一路」，橫越南連崑崙山，北倚帕米爾山的塔克拉瑪干沙漠。「一帶一路」是人類有史以來最偉大的基建項目，影響全球65%人口，70個國家及全球國內生產總值的30%，推動力部分來自產能過盛的中國經濟。

香港的角色非常簡單。「一帶一路」不能以現時的資金承諾為資金來源，需要在國際金融市場籌集資金。位處中心地帶，獨享優勢，有利給「一帶一路」項目籌集資金的香港，下一步是包裝一套全面周到的集資服務組合。

「一帶一路」是國家主席習近平2013年推出的重大發展策略。2018年2月3日，全國人大常委會委員長張德江在香港政府和香港「一帶一路」總商會合辦的論壇上致辭，宣傳香港在「一帶一路」擔當關鍵角色的想法。實際上來說，重點是基建項目的融資。陸上興建經濟走廊通往歐洲，海上打通穿越印度洋的航道，建立基礎設施系統，旨在使中國成為世界上的經濟強國。絲綢之路經歷了幾個世紀，中國現時投資沿路興建鐵路、港口和發電廠，尋求刺激跨境貿易。

中國已經新設立兩大金融實體——亞洲基礎設施投資銀行（「亞投行」）及絲綢之路基礎設施基金。亞投行提供不同方式的融資，包括貸款、投資企業股本，以及作為經濟發展的主要或次級貸款債務人。絲路基金是國有投資基金，主要靠中國外幣儲備作後盾，以促進更多投資於「一帶一路」沿線國家。

亞投行行長金立群表示，亞投行的目標是在2016年放貸12億美元。亞投行在第二年批出33億美元，到目前為止，合共批出約45億美元貸款。然而，「一帶一路」的基礎設施赤字估計為每年1.5萬億美元。亞洲開發銀行（「亞銀」）估計，直到2020年，亞洲（只是亞洲）基建項目資金每年短缺7,500億美元。或者換個方式去看資金短缺的問題：中國機構目前沒有充裕資金一力進行「一帶一路」的工作。相比之下，由日本主導的競爭對手，亞洲開發銀行，2016年批出新貸款175億美元，2017年191億美元，兩年合共366億美元，較亞投行多出八倍。事實上，中國從亞銀借入的貸款多過透過亞投行借出的貸款。此外，「一帶一路」沿線有信貸狀況較差的國家，風險相繼增加，中國有可能得承擔因為成本問題而陷入困境的風險。

「一帶一路」給香港提供千載難逢的機會。香港可利用本身作為中國首要國際城市的地位——有效率並且基礎設施豐富的融資樞紐、監管完善並且深入了解中西文化及營商方法的市場。「一帶一路」基建項目將投資者、銀行家、建築公司及其它企業聚攏起來。複雜的交易需要對有關乎多個國家的法律、法規及稅收參數進行深入分析。香港是全球主要的離岸人民幣市場，也是內地一半以上對外投資的門戶。內地公司佔香港證券商交易所市場資本總額的一半，為上海及深圳兩地的交易所提供直通雙向通道。

香港常駐英屬處女群島、開曼群島及百慕達的律師將如常給香港同行提供支援，協助他們成立離岸工具，提供高效的樞紐連接服務，促進從全球各地流入資金和融資。由於更為靈活，私營企業在「一帶一路」交易發揮較大作用，加上「一帶一路」交易開始進入受惠於完善基建（包括技術和物流）並且更為複雜的行業，對複雜結構的需求將會更大。在這些行業之中，人，不是資產，才是真正的價值所在，另外，提供經濟誘因的綜合投資方法及在管理上的一些影響力，皆有助達到最大回報並維持項目穩定性。通常來說，離岸工具最好透過離岸合約協定成立。在海外，中國及當地交易對手同樣可以安心使用稅務中立平台，相關法例可以預測得到，判斷也很稳妥。香港最終能夠在國際金融的「一帶一路」時代，香港的機會數之不盡。

- Harneys的Ian Mann及Jonathan Culshaw

CROSS-BORDER

“Powdered Milk Formula”

For many readers (particularly, “couples” travelling through the customs channel from Hong Kong to the Mainland), the Court of Final Appeal’s judgment in HKSAR v. Lam Ton Ching [2018] HKC FA 1, 25 January 2018, may come as some relief.

The defendant (appellant) was apparently stopped by customs officers and found to have had four cans of powdered milk formula in his backpack, being two cans for him and two for his wife. By the time he was stopped the defendant had become temporarily separated from his wife.

As some readers may recall, the Import and Export (General) (Amendment) Regulation 2013 came into operation on 1 March 2013 in order to combat so-called parallel trading in powdered milk formula between Hong Kong and the Mainland. As a result of amendment to the relevant regulations (Cap. 60A), the export of powdered formula to all places outside Hong Kong became prohibited pursuant to s. 6D(1) of the Import and Export Ordinance (Cap. 60), unless done in accordance with an export licence. However, regulation 6(1D) exempted powdered formula that

(a) if –

(i) the person did not leave Hong Kong in the last 24 hours; and

(ii) the formula does not exceed 1.8 kg in total net weight;”.

The four cans found in the defendant’s possession apparently weighed approximately 3.6 kg. He was convicted before a magistrate of an attempted offence under s. 6D(1) of the Ordinance and received a nominal fine. That decision was affirmed by a High Court judge. It appears that the defendant’s explanation that he was carrying two cans for his wife was to no avail because the magistrate took the view that each person leaving Hong Kong –
The issue before the CFA was essentially whether “the accompanied personal baggage of a person” was limited to the personal baggage carried by the person or extended to baggage carried by another who accompanied the person leaving Hong Kong. This issue turned on the meaning of “accompanied personal baggage”. The unanimous judgment of the CFA treated this as an everyday expression that was fact dependent and a matter of common sense.

A telling passage from the judgment states (at paragraph 13):

“… Without attempting an exhaustive definition, I am of the view that on the basis of the defence case, two of the four cans of powdered formula should be regarded as part of the wife’s accompanied personal baggage, just as if she shared a suitcase with her husband and her clothes were in his suitcase. They were travelling on the same journey with her and belonged to her and should be regarded as her accompanying personal baggage.”

The CFA had no hesitation in quashing the defendant’s conviction. As the judgment notes, “Families travelling together often carry stuff for one another.”

The issue of parallel trading in Hong Kong is serious (particularly, with respect to certain items). However, on reflection, it would seem that the circumstances of this case are not the sort that the regulations were designed to catch. The issue of parallel trading in Hong Kong is serious (particularly, with respect to certain items). However, on reflection, it would seem that the circumstances of this case are not the sort that the regulations were designed to catch.

- Warren Ganesh and David Smyth, RPC

**Hong Kong Ponders Discrimination Law Shakeup**

The Hong Kong Government is considering key changes to the existing anti-discrimination ordinances. The proposed changes have been brought forward following a consultation carried out by the Equal Opportunities Commission (EOC) in 2014. In her inaugural policy address, the Chief Executive Carrie Lam said the Government would submit legislative amendment proposals in the 2017-2018 session of the Legislative Council (LegCo) to implement the key recommendations.

**The major changes**

The proposed changes are meant to encourage family-friendly workplaces, expand the scope of harassment protection and address the issue of
stereotypical assumptions during the hiring process. The main changes are as follows:

**Discrimination on the basis of breastfeeding**

The Government plans to introduce express provisions in either the Sex Discrimination Ordinance (‘SDO’) or the Family Status Discrimination Ordinance (‘FSDO’) prohibiting direct and indirect discrimination on grounds of breastfeeding and to include expressing milk in the definition of breastfeeding.

Although Hong Kong has made every effort to normalise breastfeeding, breastfeeding is still plagued by discrimination at work and amongst the public at large. If the proposed changes become law, it will become unlawful to ask women to stop expressing milk in the workplace or breastfeed in restaurants, libraries and clubs. Rigid or inflexible policies that prohibit or restrict employees from taking lactation breaks could give rise to discrimination complaints.

**Dispensing with proof of intention to discriminate**

The Government proposes to repeal provisions under the SDO, FSDO and RDO that require proof of intention to discriminate in order to award damages for indirect discrimination claims.

At present, awarding damages for indirect discrimination under these Ordinances requires proof that the respondent intended to discriminate against the claimant. Successful claims for indirect discrimination are therefore quite rare in Hong Kong. The repeal of provisions requiring a proof of intention to discriminate will make it easier for genuinely aggrieved parties to make good their indirect discrimination cases and obtain damages from the wrongdoer.

**Best practice for employers**

Even before the proposed changes are tabled for discussion at LegCo, there is much that employers can do to improve their brand, promote diversity and attract talent.

• **Family-friendly facilities and policies**: Employers should be prepared to provide appropriate space in the office to allow employees to take lactation breaks and express milk. Work policies should be sufficiently flexible to enable new mothers to take lactation breaks at work.

• **No stereotypical assumptions**: The provisions regarding discrimination on the ground of the race of an “associate” are likely to have most effect in the hiring process. For example, an employer may make an assumption that a candidate does not read or speak Chinese or English based on their surname or appearance, when the candidate is fully capable of doing so. Employers should be warned not to make stereotypical assumptions before making any hiring, firing or promotion decisions.

• **Anti-harassment policies, training & complaint procedures**: It is important for corporates to have in place appropriate anti-harassment policies and procedures and to make sure these are communicated and understood by everyone working on the premises.

To promote a harassment free and non-hostile workplace, everyone should be encouraged to report any incident of harassment by co-workers, customers and service users whether on the basis of sex, disability, race and even breastfeeding. Disciplinary action should also be taken against the wrongdoer for inappropriate behaviour in the workplace!
主要修訂
修訂建議旨在鼓勵提供給予家庭方便的工作場所，擴大免被騷擾的保障範圍，並處理招聘時抱有定型觀念的問題。主要修訂如下：

基於餵哺母乳的歧視
政府計劃在《性別歧視條例》或《家庭崗位歧視條例》引入明確條文，禁止基於餵哺母乳而直接或間接作出的歧視，並在餵哺母乳的定義中包括擠奶在內。

基於「所歸類」種族的歧視
《種族歧視條例》的修訂將包括保障任何人免因被認為屬某一種族或歸類為某一種族而受到歧視或騷擾。

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擴大免受騷擾的保障範圍
不幸的是，騷擾，特別是性騷擾，在香港依然相當普遍。要是修訂成為法例，在普通工作場所、共同出租或分租的處所、飛機、船及會所基於性別、殘疾、種族(包括所歸類種族及與某種族有關聯)而作出騷擾即屬違法。為了促進建設一個不受騷擾及沒有暴力的工作場所，應鼓勵所有人舉報任何由同事、客戶、服務使用者作出的騷擾事件，不管騷擾是基於性別、殘疾、種族、甚至餵哺母乳亦然，也應針對違法者在工作場所作出的不當行為採取紀律行動。

僱主的最佳做法
即使在修訂建議提交立法會討論之前，僱主也有很多改善其品牌、促進多元化及吸引人才的事可以做。

• 家庭友好設施及政策：僱主應當願意在辦公室提供合適空間，讓僱員有哺乳休息時間及可以擠奶。工作政策應當靈活，足以讓新媽媽工作時有哺乳休息時間，可能會引起歧視投訴。

• 不抱有定型觀念：在招聘過程中，有關於基於「有聯繫人士」的種族而作出歧視的條文可能最為見效。譬如說，應徵人完全能講或能讀中文或英文，但僱主有可能基於姓氏或外貌而假定該人不懂。作出任何招聘、解僱或晉升決定之前，僱主務應記住不要抱有定型觀念。

• 反騷擾政策、訓練及投訴的程序：對公司來說，有兩件重要的事要做：制定合適的反騷擾政策和程序，以及肯定已向處所每名工作人員傳達政策和程序，而他們亦了解有關內容。為了促進一個不受騷擾及沒有暴力的工作場所，應鼓勵所有人舉報任何由同事、客戶、服務使用者作出的騷擾事件，不管騷擾是基於性別、殘疾、種族，甚至餵哺母乳亦然，也應針對違法者在工作場所作出的不當行為採取紀律行動。

- 高偉紳律師行顧問律師林尹菁

FINTECH
Blockchain – the Future?
Comes with the Bitcoin fever and its fall, believe it or not blockchain is the future. This 10-year-old technology allows digital information to be distributed but not copied; its application ranges from the mostly-talked-about payments and banking—including the uses of cryptocurrencies (Bitcoin, Ethereum, Litecoin, Ripple...etc.) and Initial Coin Offerings (ICOs)—and smart contracts to many unsung potentials such as supply chain audit, counterfeit combat, governance and compliance.

But for the over-emphasis of the cryptocurrencies, people would have had realised the epoch-making features of distributed ledger technology.

Crowdfunding through ICOs is probably the most powerful feature of these cryptocurrencies. Yet, in Hong Kong, equity crowdfunding, as in the case of ICOs, is to be regarded as ‘regulated activities’ under the Securities and Future Ordinance, Cap. 571 (the ‘SFO’) whereas peer-to-peer lending, depending on its scale and frequency (ie business model), may subject to the requirement of a license under the Money Lenders Ordinance, Cap. 163 as well as the SFO. (See: the Securities and Future Commission’s news on 9th February 2018, circular on 11th December 2017, and notice dated 7th May 2014.) Assuming license is not a problem, one would still have doubts on the ‘smartness’ of the contracts built on these cryptocurrencies blockchain after the hard lessons learned from the US$50 million hack of the decentralized investment fund from the Decentralized Autonomous Organization (DAO) in June 2016 and most recently, over US$500 million hack of Coincheck in Japan.

On 4th September 2017, the People’s Bank of China issued a ban on ICOs totally, declaring them to be illegal and disruptive to economic and financial stability. Settling for less, many suggested that cryptocurrencies are the future of micropayments as they provide a free and instant way to exchange value without middleman and/or government supervision. The day won’t come unless and until technology of and confidence on cryptocurrencies have been raised; the reasons are twofold:

The issue of efficiency: cryptocurrencies are not totally free and instant; their current process time and level of energy consumption simply render them inefficient—transactions per second for Bitcoin is three to four, whereas those for Ethereum, PayPal and visa are 20,
193, and 1,667 respectively; the energy consumption of Bitcoin for each second’s transactions is 35 times higher than that for visa.

The issue of security: if you put your money in banks or use the credit cards issued by them, anything goes wrong, to a certain extent (say, HKD500,000 under the Deposit Protection Scheme), you are covered; none would apply for cryptocurrencies—the case of Mt. Gox, world largest Bitcoin trader in 2014, losing over US$400 million investor money by theft for example.

The above problems coupled with the existence of cash eliminate any practical uses of cryptocurrencies, save for speculation and illegal transactions. However, the current dead-end of cryptocurrencies uses does not mean an end of the blockchain application. To the contrary, blockchain technology has been applied to all walks of life, spearheaded by different bank-backed projects, such as IBM-backed Hyperledger Fabric project, the Utility Settlement Coin and R3’s blockchain consortium. The Hong Kong Monetary Authority has commissioned the Hong Kong Applied Science and Technology Research Institute to conduct researches on the deployment of such technology (see its two Whitepapers dated 11th November 2016 and 25th October 2017.) With blockchain application in different internet-of-things (IoT), such as your fitbit (imprecisely), one would expect to live in a truly ‘smart city’ in the near future.

- Foster Yim, Liberty Chambers

2017年9月4日，中國人民銀行發出禁令，全面封殺ICO，宣布ICO屬非法活動，擾亂經濟金融穩定。很多人退而求其次，指加密貨幣是小額付費的未來；因為它們提供免費即時交換價值的方法，不需要中介人及／或政府監管。除非加密貨幣技術提升了，人們對加密貨幣的信心也增強，否則這一天不會來到；原因有二：

效率問題：加密貨幣不是完全免費和即時交換的；它們現在的處理時間和能源消耗水平的確是效率不足的原因——比特幣每秒處理21次交易，比太幣、PayPal及visa則分別是20、193及1,667次；比特幣每秒鐘交易的能源消耗量比visa的高出35倍。

安全問題：如果你把錢放在銀行或使用銀行發出的信用咭，一旦出了甚麼岔子，你會受一定程度的保障（比如說，存款保障計劃的港幣500,000元存款保障）；沒有一種保障會適用於加密貨幣——例如，全球最大比特幣交易所Mt. Gox的投資是不受保障的，該交易所在2014年被盜走投資者款項，損失逾4億美元。

除了是投機和非法交易之外，上述問題和現金的存在都化除加密貨幣任何的實際用途。然而，目前加密貨幣在用途上是走到了盡頭，但這不意味區塊鍊的應用同樣會終。相反，區塊鍊技術一直有應用於各行各業，率先應用的是不同銀行所支持的項目，例如IBM支持的超級帳本項目（Hyperledger Fabric project）、多功能結算幣（Utility Settlement Coin）及R3的區塊鍊聯盟。香港金融管理局已經委託香港應用科技研究院進行關於調配這種技術的研究（見研究院兩份白皮書，日期分別為2016年11月11日及2017年10月25日）。隨著區塊鍊在各個物聯網（IoTs）的應用，例如你的Fitbit（純屬推測），你會期望不久的將來在真正的「智能城市」生活。

- Foster Yim, Liberty Chambers
FINTECH

Spoke in the Wheel – Economic Sanctions Compliance in the Age of Blockchain

Blockchain, the technology that underpins digital currencies such as Bitcoin, has the potential to drastically alter the global financial system. However, developers and market participants must consider the extraordinary reach of US economic sanctions and the magnitude of the penalties for breach.

Blockchain and trade finance

Trade finance is a cornerstone of the global economy to this day. However, it is costly, unwieldy, and slow, with a single transaction often taking weeks to complete.

Blockchain technology uses digitised ledgers of title and assists with execution and settlement, thereby reducing costs, streamlining the cash cycle, and increasing transparency. But as the use of blockchain technology increases, sanctions risks will come into sharper focus for the parties involved.

The impact of economic sanctions

The jurisdiction-based sanctions administered by the US Treasury Department’s Office of Foreign Assets Control (‘OFAC’) generally prohibit “US persons” from directly or indirectly engaging in or facilitating transactions involving individuals, entities, governments, or countries that are the target of OFAC sanctions.

Blockchain technology owned or developed in the United States or by US persons will be subject to US jurisdiction and may also be subject to US export controls depending on the technology used. If the blockchain is owned or licensed by a US person, OFAC may take the view that any transaction using the blockchain – or which involves the selling or licensing of the software - which involves a sanctions target, could trigger the facilitation prohibition.

The Risks

One of the concepts underpinning blockchain technology is that information is verified by multiple users agreeing that the content on the ledger is complete and accurate – the “shared truth”. The integrity of the information is then protected by the ledger protocol. For trade finance transactions, this means that a user will need to input into the blockchain ledger, relevant information from the bills of lading, letters of credit, and other shipping documents.

Failure to enter in all information relevant to sanctions (even if not all of it is necessary for commercial reasons) may expose those involved in the transaction to OFAC or other sanctions risks.

There is also a risk that sanctions might deliberately be evaded if, through collusion between the exporter or importer or even the issuing bank, information is included in the ledger that does not accurately reflect the underlying transaction details.

One potential solution would be for the parties to agree on the information that needs to be entered into the ledger and who will be responsible for the accuracy of the data. Banks could agree that the “mandatory” information will include, for example, basic information such as the name and address of the exporter and the importer, the banks involved, the ports of loading, unloading and transit, the vessels and the insurers as well as the origin and description of the goods being shipped.

Keeping one step ahead

Given that OFAC sanctions are subject to change without notice developers of blockchain technology need to consider a range of issues to ensure they are not unwittingly caught by sanctions. Here, we highlight four sanctions-specific functionalities that developers should consider with a view to mitigating the risks.

• Blockchain technology should incorporate sanctions screening technologies.
• For US banks, as well as other US persons, it is important to have the ability to block transactions involving Specially Designated National (SDN) or other blocked persons.
• Sanctions provisions should be built into blockchains.
• Blockchain technology should include the ability for users to record data in accordance with their regulatory requirements and retrieve all of the data in the ledgers if required to produce the data to the relevant authorities.

Sanctions regimes in their current form cut against the vision of a global financial system underpinned by blockchain technology, a wide-open ledger that disintermediates traditional gatekeepers such as banks and trading houses, and with which governments and regulators cannot interfere.

Ultimately, blockchain advocates will have to submit to the reality of cross-border, extra-territorial regulation, including sanctions. An open and frank discussion on where the sanctions pitfalls lie in implementing blockchain solutions will help developers focus on these commercial and regulatory challenges.

- Ali Burney, Counsel, Clifford Chance
  Brian Harley, Registered Foreign Lawyer, Clifford Chance
區塊鏈及貿易融資
貿易融資是現今全球經濟體的基石。然而，如果花數星期才完成一宗交易，成本既高昂，過程也複雜、緩慢。

區塊鏈技術使用數碼化總帳科目，協助執行和結算，從而降低成本、精簡現金週期並增加透明度。不過隨着區塊鏈技術的使用增多，制裁風險將成為有關各方更加深切關注的問題。

經濟制裁的影響
一般而言，美國財政部外國資產管制辦公室（OFAC）在司法管轄權的基礎上實施制裁，禁止“美國人”（US persons）直接或間接參與或促進涉及已成為OFAC制裁目標的個人、實體、政府、國家的交易。

由美國擁有或由美國人開發的區塊鏈技術將受美國司法管轄權管轄，並視乎所使用的技術而定，可能受制於美國出口管制。如果區塊鏈是由美國人擁有或特許，OFAC可能認為，任何使用區塊鏈的交易——或涉及軟件銷售或許可的交易——軟件涉及一項制裁目標，有可能觸動便利化禁令。

風險
支援區塊鏈技術概念之一是，資訊是由眾多同意總帳內容完整準確的用家核實——「共用的真相」（shared truth），而資訊的完整性是受到總帳協定保護的。就貿易融資交易來說，這意味用家需要在區塊鏈總帳輸入提單、信用證及其他付運文件的相關資料。

如果沒有輸入所有與制裁有關的資料（即使基於商業理由而不必輸入所有資料），參與交易的人有可能承擔被OFAC制裁的風險或其他制裁風險。

出口商或進口商，甚至開證行有可能互相串通，在總帳輸入並不準確反映相關交易詳情的資料，故意逃避被制裁。這亦是一種風險。

有一種可能的解決方案：各方協定需要輸入總帳的資料，以及誰人及就數據的準確性負上責任。銀行可同意「強制性」（mandatory）資料包括（例如）出口商及進口商的姓名和地址，參與的銀行，裝貨港口、卸貨港口、中轉港口，還有船隻、保險商，以及裝運貨物的來源地和說明。

繼續領先一步
鑒於OFAC的制裁可以改變而無須預先通知，區塊鏈技術的開發商需要考慮一系列問題，確保它們不會被制裁但卻不明所以。我們在此特別指出開發商要減輕風險就應顧慮到的四種制裁的具體功能。

• 區塊鏈技術應加上制裁篩選技術。
• 對於美國銀行及其他美國人來說，重要的是有能力阻止涉及被特別指認國民（SDN）和被阻禁者的交易。
• 區塊鏈應包含制裁規定。
• 區塊鏈技術應包括用家能夠按照其管理要求記錄數據，並在有需要向有關當局提交數據時，檢索總帳內所有數據。

區塊鏈技術是完全開放的總帳，不需要銀行和貿易公司等傳統中介人，政府及監管機構無法干預由區塊鏈技術支持的金融體系。制裁制度現時的形式與全球金融體系的願景背道而馳。

最終，區塊鏈的擁護者將不得不面對現實，屈服於跨境域外監管，包括制裁。就落實區塊鏈解決方案時的制裁陷阱進行公開坦誠的討論，將有助開發商專注於這些商業及監管挑戰。

- 高偉紳律師行顧問律師Ali Burney
- 高偉紳律師行註冊外地律師Brian Harley
Town planning — Town Planning Board — decision rejecting application under s. 12A to rezone site from “open space” to “residential” — whether procedural irregularity by taking into account irrelevant matter — whether decision Wednesbury unreasonable — Town Planning Ordinance (Cap. 131) s. 12A

Administrative law — Town Planning Board — decision rejecting application to rezone site from “open space” to “residential” — judicial review

X and other owners of land zoned as “O” (Open Space) (‘the Site’) since 1970 in a densely built-up area, applied to rezone it for residential use (‘the Application’). The Planning Department (‘PD’) opposed the Application. In a paper submitted to the Metro Planning Committee (‘MPC’) of the Town Planning Board (‘Board’) (‘the MPC Paper’), the PD summarised inter alia X’s view that the findings of a PD review of “O” zones in 2006 were outdated because there was still no plan to develop the Site as public open space through acquisition and urban renewal; and the proposed development (‘the Tower’) would not exacerbate the poor air ventilation in the locality. X had provided its own Air Ventilation Assessment Report in support of the Application. During consideration of the Application and the MPC Paper in the deliberation session by the MPC (‘the MPC Meeting’), the Vice-Chairman said that the proposed east-west orientation of the Tower would block the air path between certain streets and create air ventilation problems (‘the Remark’). The MPC rejected the Application (‘the Decision’) for the similar reasons given by the PD in the MPC paper. X applied for judicial review, arguing that inter alia the MPC’s Reason (c), namely that there was no strong planning justification or merit in rezoning, was based partly on the Remark and so took into account an irrelevant matter and was procedurally unfair (Ground 2); and the MPC’s Reason (d), namely that the approval of the application would set an undesirable precedent for similar applications in the “O” zone and the cumulative effect would deprive the built-up environment of much needed spatial and visual relief, was unlawful (Ground 4).

Held, allowing the judicial review on Grounds 2 and 4 only, quashing the Decision and remitting the Application to the MPC for reconsideration in light of the Court’s reasons under those Grounds that:

• Properly understood in context, the Remark constituted part of the basis for Reason (c), as the effect on air ventilation in the area under the proposed development scheme was one of the main issues discussed by the MPC. The PD and MPC Paper rejected X’s air ventilation assessment report as inaccurate and insufficient to demonstrate the Tower would not adversely affect air ventilation in the vicinity. (See paras. 41–42, 44–47.)

• The MPC’s reliance on the Remark in rejecting the Application was a procedural irregularity. The purported concern about the orientation of the Tower blocking air ventilation was never raised in the MPC Paper or at the Meeting and it was procedurally unfair that X had no opportunity to properly address it before the Decision was made. (See paras. 48–49.)

• Reason (d) was Wednesbury unreasonable. There were clearly relevant and material differences between the Site and UOL, but the MPC had failed to properly evaluate the differences and explain why the sites were nevertheless treated alike in considering rezoning applications. Further, the Board’s argument that, even without Reason (d), the MPC would have reached the same conclusion was rejected. Given that some MPC members were sympathetic toward X and one even supported the Application, the Court could not exclude the possibility that Reason (d) might have “tipped the balance” and ultimately resulted in the Decision (R (FDA) v. Secretary of State for Work and Pensions [2013] 1 WLR 444 applied). (See paras. 63, 66–67, 71–74.)
Application

This was an application for judicial review of the decision of the Metro Planning Committee of the Town Planning Board rejecting an application to rezone land from “open space” to “residential”. The facts are set out in the judgment.

行政法

Jonnex International Ltd v. Town Planning Board [2018] HKEC 42

原訟法庭

憲法及行政訴訟案件2015年第130號

區慶祥法官

2016年9月20日；2018年1月12日

城市規劃 — 城市規劃委員會 — 對於根據第12A條將場地從「休憩用地」重新規劃為「住宅用地」的申請予以駁回的決定 — 案例撮要

行政法 — 城市規劃委員會 — 將場地從「休憩用地」重新規劃為「住宅用地」的申請予以駁回的決定 — 司法覆核

X以及一幅土地的其他擁有人—該土地坐落於高樓宇密度地區，而自1970年以來，它已被規劃為“O”（即休憩用地）用途（下稱「該場地」）—申請將該幅土地重新規劃為住宅用途（下稱「該項申請」），但該項申請遭規劃署反對。在規劃署向城市規劃委員會（下稱「城規會」）轄下的都會規劃小組委員會所提交的文件（下稱「MPC文件」）中，該署稱X的看法總括而言是(除其他事項外)：規劃署在2006年對“O”地帶進行檢討時所提出的結果已經過時，因為當時仍然沒有計劃要通過收購及市區重建，將該場地發展成為公眾休憩用地；而X擬進行的發展項目(下稱“該大樓”)，並不會對該範圍的通風不佳情況更形惡化。X提供了它自己的「空氣流通評估報告」以支持它所提出的申請。在都會規劃小組委員會開會審議該項申請及MPC文件時，會議的副主席指出，X所建議的該大樓的由東至西方向，將會堵塞某些街道之間的空氣流通路徑，從而造成通風問題（下稱「該意見」）。都會規劃小組委員會基於規劃署在MPC文件中所提出的類似理由而否決了該項申請（下稱「該決定」）。X乃提出司法覆核申請，聲稱都會規劃小組委員會所提出的第(c)項理由(亦即是：並不存在強而有力的重新規劃理據或優點)，是部分建基於該意見，因此他們是考慮了不相關的事宜，並且在程序上不公(下稱「理由2」)；而都會規劃小組委員會的第(d)項理由(亦即是：如果批准該項申請，這將會為類似的“O”用途場地之間，顯然地存在相關及重大的差異，但都會規劃小組委員會沒有適當衡量此等差異，以及解釋為何在考慮有關的重新規劃申請時，會以相類似的做法去處理這等場地。此外，城規會曾稱即使第(d)項理由沒有被提出，都會規劃小組委員會仍然會達致相同的結論，法庭並不接納這一論點。由於若干都會規劃小組委員會的委員對X是持同情的態度，而其中一位委員甚至支持通過該項申請，因此法庭不能排除第(d)項理由在當中起了決定性的作用，而最终導致委員會作出該決定(援引 R (FDA) v. Secretary of State for Work and Pensions [2013] 1 WLR 444一案)。（參見第48–49段）

裁定— 基於理由2及理由4而提出的司法覆核得直，有關決定被撤銷，並將該項申請發回都會規劃小組委員會重新考慮。法庭的理由如下：

• 對有關情況的正確了解是，該意見構成第(c)項理由的部分基礎，因為該項擬進行的發展計劃對區內的空氣流通所產生的影響，是都會規劃小組委員會所討論的其中一個主要議題。規劃署及MPC文件否決了X的「空氣流通評估報告」，認為它在說明該大樓的興建不會對此區的空氣流通造成不良影響方面，是不準確和不充分的。（參見第41–42、44–47段）

• 都會規劃小組委員會依據該意見駁回了該項申請，這於程序上存在懸疑之處。關於該大樓的方向是否會妨礙空氣流通，MPC文件或該會從來沒有提出所宣稱的對這方面的關注，而在作出該決定前，X並沒有獲得機會適當表達它的意見，這這是屬於程序上的不公。（參見第48–49段）

• 第(d)項理由與Wednesbury案的合理性原則不符。該場地與未發展的“O”用途場地之間，顯然地存在相關及重大的差異，但都會規劃小組委員會沒有適當衡量此等差異，以及解釋為何在考慮有關的重新規劃申請時，會以相類似的做法去處理這等場地。此外，城規會曾稱即使第(d)項理由沒有被提出，都會規劃小組委員會仍然會達致相同的結論，法庭並不接納這一論點。由於若干都會規劃小組委員會的委員對X是持同情的態度，而其中一位委員甚至支持通過該項申請，因此法庭不能排除第(d)項理由在當中起了決定性的作用，而最終導致委員會作出該決定(援引 R (FDA) v. Secretary of State for Work and Pensions [2013] 1 WLR 444一案)。（參見第63、66–67、71–74段）

有關申請

本案是關於申請人要求將一幅土地從「休憩用地」重新規劃為「住宅用地」，但遭遇城市規劃委員會轄下的都會規劃小組委員會拒絕批准，申請人乃就該委員會的決定向法庭提出司法覆核申請。該案的情節詳見有關的判案書。
BANKRUPTCY

Re Chu Wai Tung (a bankrupt) (No 2) [2017] 4 HKLRD 610
Court of First Instance
Bankruptcy Proceedings No 4839 of 2016
Deputy Judge Marlene Ng in Chambers
30 November, 13 December 2017

Bankruptcy — bankrupt’s estate — whether property subject to living trust agreement and excluded from bankrupt’s estate — whether new evidence to be adduced on appeal — Bankruptcy Ordinance (Cap. 6) s. 43(3)

Trusts — family trust — living trust agreement executed by husband and wife — whether created present trust in favour of son

Civil evidence — appeal — adducing further evidence — self-created document made between hearing and decision below — failed to satisfy first condition in Ladd v. Marshall

Held, dismissing the application, that:

• B’s proposed grounds of appeal had no reasonable prospect of success. (See para. 26.)

• The Resolution was inadmissible. P had failed to satisfy the first condition in Ladd v. Marshall that such new evidence could not have been obtained with reasonable diligence for use at the hearing below. The Resolution was self-created after the hearing and might have been prompted or coloured by what had happened then. In any event, it was B’s duty to advance his case at once and not piecemeal as he found out the objections in his way (Ladd v. Marshall [1954] 1 WLR 1489 applied). (See para. 10.)

• B had also failed to satisfy the second condition in Ladd v. Marshall that the Resolution must be relevant and would, as far as could be foreseen, be a determining factor. B’s claim that the Resolution took effect in June 2010 was inconsistent with its express term that it was effective on 18 August 2017, which was too late to have any legal effect. Whether any interest in the remaining equity of the Property fell within B’s Estate and thus vested in Ts depended on the status of the interest at the time of the Bankruptcy Order, ie 16 August 2016, not any later date. (See paras. 11–15, 25.)

• Even if the Agreement was valid and/or recognised, under s. 43(3) read with ss. 12 and 58 of the Bankruptcy Ordinance (Cap. 6), the question was, assuming B was a trustee, whether at the time of the Bankruptcy Order he held the Property on trust “for any other person”. Further, the effect of the Agreement was determined not by the Grantors or Trustees’ subjective intent or motive, but on an objective reading of its terms which did not create any present trust in favour of S. The Trustees could distribute the trust assets for the benefit of the couple, not only S as their successor, and during the couple’s lifetimes, they, as both Grantor and Trustees, would enjoy the trust assets (in particular the Property) and the beneficial interest in the Property would not vest in S, despite being the beneficiary and being allowed to live with the couple in the Property. (See paras. 19–24.)

Application

This was an application by the bankrupt for leave to appeal against the dismissal by Deputy Judge Marlene Ng of his application for a determination to validate a living trust agreement (see [2017] 4 HKLRD 610). The facts are set out in the judgment.
破產

Re Chu Wai Tung (破產人) (第2號) [2017] 4 HKLRD 610

原訟法庭
破產法律程序2016年第4839號
暫委法官吳美玲內庭聆訊
2017年11月30日及12月13日

破產 - 破產人的產業 – 物業是否屬於生前信託協議的財產而排除於破產人的產業 - 上訴時引用新的證據 - 《破產條例》(第6章)第43(3)條
信託 - 家庭信託 - 由夫妻執行的生前信託協議 – 兒子可否現即受益於信託
民事證據 - 上訴 – 援引进一步證據 - 在聆訊和裁定之間自行訂立的文件 - 未能滿足Ladd v. Marshall案例的第一個條件

裁決
駁回申請:
B 的上訴理由沒有合理勝算。(見第26段)
該決議不獲接受。B未能滿足Ladd v. Marshall案例的第一個條件, 即不能以合理的努力獲得新證據用於聆訊。

申請
這是一宗針對暫委法官吳美玲駁回確定生前信託協議有效申請的上訴(見[2017] 4 HKLRD 610)。案情已在判決書詳細列出。

Civil procedure — pleadings — further and better particulars — denial of negative allegation — whether amounted to mere traverse (in respect of which no particulars would be ordered) or pregnant negative (in respect of which particulars would be ordered)

P claimed that there was a common understanding (the Alleged Common Understanding) between the Original Trustee and subsequently D (HSBC International Trustee Ltd, which became trustee in place of the Original Trustee in 1999), P and her husband (F, who died in 2006) in relation to the Trust in question. Under the Alleged Common Understanding, the Trust was to be established solely for the purpose of minimising the estate duty payable in respect of the assets of P and F, including their controlling interest in a group of companies ('GE'), passing on their death and that the trustee would administer the Trust in accordance with the couple's wishes. P further claimed that D departed from the Alleged Common Understanding and refused to follow P's requests regarding the administration of the Trust since January 2016. P claimed against D for, inter alia, an order that D reconsider P's requests or alternatively, that D be removed as trustee of the Trust. D's case was that the Trust was a conventional discretionary trust and it disputed the Alleged Common Understanding. P applied for further and better particulars in relation to various paragraphs of D's Amended Defence.

Held, allowing P's application in part, that:
P was not entitled to the first set of particulars sought, namely in relation to paras. 26(1), 59 and 64
of the Amended Defence. By those paragraphs, D denied that, in acting in accordance with F’s wishes in relation to a number of specific matters as pleaded by P, the Original Trustee or D were not exercising discretions conferred on them as trustee of the Trust. Thus D was denying a negative allegation. Whether a denial of a negative allegation amounted to a mere traverse (in respect of which no particulars would be ordered) or a pregnant negative raising an affirmative case (in respect of which particulars would be ordered) was to be determined primarily on the basis of existing pleadings. Nevertheless, the Court was also entitled to act upon the confirmation by D’s counsel that the relevant paragraphs did not involve any traverse which imported affirmative allegations (Pinson v. Lloyds and National Provincial Foreign Bank Limited [1941] 2 KB 72, Tin Shui Wai Development Ltd v. AG [1991] 1 HKC 511 applied). (See paras. 26–27, 30–31).

• A fair reading of paras. 26(1), 59 and 64 of the Amended Defence was that the denial was a mere traverse and not a pregnant negative raising an affirmative case. P’s allegations that the Original Trustee and D never properly exercised their discretionary powers under the Trust prior to 2016 but simply acted in accordance with the wishes of F and/or P was put forward for the purpose of evidencing the Alleged Common Understanding. There was no allegation on the pleadings that the Original Trustee or D failed to properly discharge their duties as trustee in acting in accordance with the wishes of F in relation to the specific matters pleaded. Further, P’s request for particulars went beyond D’s pleas. (See paras. 28–33.)

• P was entitled to the second set of particulars sought in relation to para. 54(3)(b) of the Amended Defence. The request sought particulars of fact which went directly to D’s allegation that various named persons, including GE, F, P and their children, were “important” customers of the HSBC Group and would explain why the Original Trustee and D would be prepared to accept a fixed percentage fee for acting as trustee of the Trust which, according to P, was “relatively insubstantial compared with the value of the Trust Fund”. D’s submissions that those particulars related to matters of evidence or were wholly unnecessary for the fair disposal of this action or for saving costs were rejected. (See para. 38.)

Application
This was an application by the plaintiff for further and better particulars of various pleas in the Amended Defence. The facts are set out in the judgment.

民事訴訟程序
Tao Soh Ngun v. HSBC International Trustee Ltd [2018] HKEC 348

原訴法庭
高等法院訴訟編號2016年第3246號
周家明法官於內庭進行聆訊
2017年12月21日；2018年1月12日

民事訴訟程序 — 状書 — 更詳盡清楚的詳情 — 否認負面指稱 — 是否只單純構成拒認(法庭不會命令提供關於它的詳情)還是構成一項隱含肯定意思的否定(法庭會命令提供關於它的詳情)

P聲稱「原來受託人」及其後的D（即匯豐國際信託有限公司，其於1999年取代「原來受託人」成為與本案有關的受託人），與P及其丈夫F（他於2006年去世）就本案所涉及的有關信託，存在一項共同理
解（下稱「指稱的共同理解」）。根據「指稱的共同理解」，有關信託是傳統的酌情信
託，並否認它們與對方存在「指稱的共同
理解」。P要求D就它們在經修訂的抗辯書中的各個不同段落的內容，提供更詳盡清楚的詳情。

裁定 — 批准P所提出的部分申請，理由如下：

• P無權就首系列的詳情提出要求，即是該經修訂的抗辯書中的第26(1)、59及64段。D在該等段落中，否認它們就P所提交的若干特定事宜，在根據
F的意願來行事時，「原來受託人」或D作為有關信託的受託人，並沒有行使所賦予它們的酌情決定權。因此，D是在否認一項負面指稱，而否認一項負面指稱，是否只單純構成拒認（法庭不會命令提供關於它的詳情），還
是構成一項隱含肯定意思的否定（法庭會命令提供關於它的詳情），這主
要須根據現有的狀書來確定。然而，法庭也把根據D的代表律師所作出的
確認（即是各相關段落並不涉及任何
意味著含有肯定指稱的拒認）來行事
（援引Pinson v. Lloyds and National Provincial Foreign Bank Limited [1941]
2 KB 72；Tin Shui Wai Development Ltd v. AG [1991] 1 HKC 511 等案例）。（參見第26-27、30-31段）

• 如果我們正確閱讀該經修訂的抗辯書
中的第26(1)、59及64段，D等否認
純粹是屬於拒認，因而並
不構成一項隱含肯定意思的否定。D指稱「原來受
託人」及D從來沒有在2016年以前，
根據有關信託來適當行使它的酌情決定權，而只是單純根據F及
P的意願來行事。D的此舉，是為了證明存在「指稱的共同理解」。該等狀書
中並沒有任何指稱，認為「原來受託人」或D在根據F的意願，就所提出的特定事
宜行事方面，沒有適當履行其作為受
託人的職責。此外，P要求D提供的詳
情，是超越了D的申辯範圍。（參見第28-33段）

• P有權就次系列的詳情提出要求，亦即
是經修訂的抗辯書的第54(3)(b)段。該
要求所尋求提供的某些事實詳情，
直接關係D所作出的指稱，即是：各指
定人士（包括GE、F、P及其子女）乃
匯豐銀行集團的「重要」客戶，這解釋了「原來受託人」及D為何在任職有關信託的受託人方面，願意接受一個固定百分比的收費。但根據P的說法，該等收費若與「該信託基金的價值相比，實在是微不足道」。D向法庭提出，該等與證據事宜有關的詳情，對於有效處理該宗訴訟或節省有關訟費來說，是完全不必要的。（參見第38段）

有關申請
這是一項由原告人提出，就經修訂的抗辯書中所提出的名項申辯，要求對方提供更詳盡清楚的詳情之申請。該宗案件的詳情載於有關的判案書。

COMPANY LAW
Re JV Fitness Ltd [2017] HKEC 2834
Court of First Instance
Companies Winding-Up Proceedings
No 209 of 2016
Harris J in Chambers
29 November 2017

Company law — liquidators — ex parte application in writing for appointment — failure to disclose finding of contempt against one of three proposed liquidators — whether new insolvency practitioners to be appointed

Company law — compulsory winding-up — regulating order — order dispensing with first meeting of creditors

The Court declined to deal in writing with the ex parte application of T, H and K, the provisional liquidators (‘PLs’) of a company, for inter alia their appointment as liquidators, because it did not mention that T had been found in HCMP 450/2016 to be in contempt of court. Following the subsequent partial overturning of that finding by the Court of Appeal, T was fined $300,000, although after the written application was made. PLs subsequently issued a summons seeking a regulating order; an order dispensing with the first meeting of creditors because there was a large number of them; the appointment of H and K only as liquidators; and a committee of inspection. The Official Receiver raised no objection.

Held, making the orders sought, that:

• Although the finding of contempt against T did not fall within s. 262D of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) and so did not need to be included in the s. 262C disclosure statement, H and K should have appreciated the duty on an ex parte application to make full and frank disclosure required the finding to be brought expressly to the Court’s attention. (See paras. 9–12.)

• Although H and K had failed in their duties to the Court, they would be appointed as liquidators. On balance, the liquidation of was so far advanced that replacing PLs with new insolvency practitioners at this stage would incur potentially significant additional costs, to the prejudice of the interests of the unsecured creditors for no real benefit. (See para. 13.)

Application
This was an application by summons for the appointment of two of three provisional liquidators of the subject company, a regulating order, an order dispensing with the first meeting of creditors and for a committee of inspection. The facts are set out in the judgment.

公司法
Re JV Fitness Ltd [2017] HKEC 2834
原訟法庭
公司清盤案件2016年第206號
高等法院原訟法庭法官夏利士內庭聆訊
2017年11月29日

公司法 - 清盤人 - 委任的單方面書面申請 - 未有披露一名建議清盤人之一被裁定藐視法庭 - 是否委任新的清盤從業員

法院拒絕處理T、H和K擔任公司C的臨時清盤人的單方面申請, 因為申請內沒有提到T在HCMP 450/2016一宗被裁定藐視法庭。上訴法庭隨後部分推翻該裁決後，在提出書面申請後T被判罰款30萬元。臨時清盤人隨後發出傳票, 寻求法庭作出規管令; 由於有大量債權人, 作出召開第一次債權人會議的命令; 僅委任H和K為清盤人; 和設立審查委員會。破產管理署署長沒有提出反對。

裁決 – 作出有關命令:

• 尽管T被裁定藐視法庭一事不屬《公司(清盤及雜項條文)條例》(第32章)第262D條的範圍, 因而不須納入第262C條規定的披露陳述書, 但H和K應該理解單方面申請的義務, 全面而坦白地將裁決披露, 明示提請法庭注意。(見第9-12段)

• 尽管H和K沒有履行對法庭的義務, 但他们被委任為清盤人。權衡之下, 由於清盤程序已經進行, 在此階段以新的清盤從業員取代臨時清盤人有可能產生大筆額外費用, 將損害無擔保債權人的利益。(見第13段)

申請
匯豐銀行集團的「重要」客戶, 這解釋了「原來受託人」及D為何在任職有關信託的受託人方面, 愿意接受一個固定百分比的收費。但根據P的說法, 該等收費若與「該信託基金的價值相比, 實在是微不足道」。D向法庭提出, 該等與證據事宜有關的詳情, 對於有效處理該宗訴訟或節省有關訟費來說, 是完全不必要的。（參見第38段）
Contempt of court — committal for contempt — undertaking given by defendants against diminishing value of their shares in holding company — no breach of undertaking as defendants were ignorant of liquidation of subsidiary — director of subsidiary did not constitute defendants shareholders’ agents — no breach of disclosure order — burden on applicant to show that it was within defendants’ power to comply with order

Contempt of court — committal for contempt — duty of party seeking leave to apply for committal to give full and frank disclosure — materiality to be determined by court — material consideration of defendants’ continued willingness to seek information

D1–3 were the daughters of X, the former chairman, CEO and majority shareholder of the Ps group of companies. Unbeknownst to Ds until June 2015, X caused shares in C1, a Belize company, to be given to Ds. C1 was at the top of a web of corporate structure, the bottom of which were two PRC companies (‘the PRC Companies’), including C2. Between June 2011 and March 2012, X caused USD82 million to be transferred to the PRC Companies. Ds were not involved in the management or operation of C1 and did not hold any position in C2. In related proceedings, Ps alleged fraud against X. In June 2015, Ds gave an undertaking to the Court that they “shall not … deal with or diminish the value of their shareholdings in [C1] or the direct or indirect assets of [various companies including C1 and C2] …” (‘the Undertaking’). In August 2015, the Court ordered Ds to disclose, among other things, what had become of USD82 million injected into the PRC Companies (‘the Disclosure Order’). Ds, through their mother, entrusted the task of compliance with the Disclosure Order to a professional accountant (F). While information was sought from C2’s director (L), Ds and F were not informed of C2’s liquidation which had commenced in March 2015. A report was duly produced by F, but Ps considered the disclosure to be deficient. Ps obtained leave to commit D1–2 for contempt of court, contending that D1–2 were in breach of the Undertaking and the Disclosure Order. In particular, Ps contended that D1–2 permitted or failed to prevent C2’s liquidation. The Judge dismissed Ps’ application to commit D1–2 for contempt.

Held, dismissing the appeal, that:

Alleged breach of Undertaking

• The Undertaking operated only as a negative undertaking restraining Ds from doing certain acts. It was not a guarantee by Ds that the assets of the relevant companies would not be depleted by acts or events occasioned by third parties. Further, the Undertaking was given by Ds, not C1. Ds were only responsible for their personal acts or those of their servants or agents. The mere relationship of director and shareholder did not make the former an agent for the latter. L and those involved in the liquidation process of C2 were not Ds’ servants or agents. Given the finding that Ds were ignorant of the liquidation process of C2, there was no basis for holding that Ds acquiesced in that process. There was no breach of the Undertaking by Ds (Hone v. Page [1980] FSR 500, Concrete Constructions Pty Ltd v. Plumbers and Gasfitters Employees’ Union of Australia (1987) 72 ALR 415, Kao, Lee & Yip v. Koo Hoi Yan (2009) 12 HKCFAR 830 distinguished). (See paras. 32–35, 40–49.)

• As Ds were protected by the right against self-incrimination, no adverse inference could be drawn on the basis that F did not conduct any investigation into the assets of the companies covered by the Undertaking. Further, considering matters relied on by Ps such as Ds not taking steps to ascertain C2’s assets against Ds’ background and the role they played in the companies, the steps taken by F to obtain information from L about the companies, there was no basis for holding that Ds should have pursued the matter more vigorously (HKSAR v. Lee Fuk Hing (2004) 7 HKCFAR 600, YBL v. LWC [2017] 1 HKLRD 823 applied; Inplayer Ltd v. Thorogood [2014] EWCA Civ 1511, NFU v. Tiernan [2015] EWCA Civ 1419 distinguished). (See paras. 36–39.)
Alleged non-compliance with Disclosure Order

• To establish a case of contempt, the applicant had to show not only non-compliance with an order, but also that it was within the power of the alleged contemnor to comply with it. This was a question of fact. The judge had to be satisfied that there was a specific omission on the part of the alleged contemnor which was within the latter’s power to do. The burden was on the applicant to prove beyond reasonable doubt such specific omission was within the power of the alleged contemnor. The mere fact that an order was made would not pre-empt an alleged contemnor from showing in a contempt application based on non-compliance with such order that it was not within his power to comply (Kao, Lee & Yip v. Koo Hoi Yan [2009] 12 HKCFAR 830, Re L-W (Enforcement and Committal: Contact) [2010] EWCA Civ 1253, Re Jones [2013] EWHC 2730 (Fam) applied). (See paras. 64, 66–68, 71, 77.)

• By reason of the principle that contempt should be a last resort, it was wrong to bring contempt proceedings without regard to the efforts and continued efforts by the alleged contemnor to comply with the order even though he had failed to completely fulfil its requirement within the time prescribed. The Judge was correct in holding that one could not consider the fact that Ds were C1’s only shareholders without regard to the other relevant factual circumstances, including the uncooperativeness of L and the difficulties F faced in obtaining information. (See paras. 83–84.)

• Though the rules provide that an application for leave was to be made ex parte, it was open to a judge to seek further information or hold a hearing inviting submissions from putative respondents. However, the leave application was only a filtering process, even if a hearing was to be held it should not be an elaborate process in any event. (See para. 85.)

Appeal
This was an appeal by the plaintiffs against the decision of Bebe Chu J dismissing the applications to commit the first and second defendants for contempt of court. The facts are set out in the judgment.
CRIMINAL LAW AND PROCEDURE

HKSAR v. Walsh Kent Andrew [2017] HKEC 2714
Court of First Instance
Criminal Case No 368 of 2015
Zervos J in Chambers
16 November, 15 December 2017

Held, ruling that neither of those two courses was open to the Court, that:

• The court's discretion under s. 49(1) of the Criminal Procedure Ordinance (Cap. 221) to "direct otherwise" related to the norm of defendants being placed at the bar of the court unfettered and not in prison clothes. (See paras. 5-6.)

• As appears by ss. 79H to 79L (Taking Evidence From Witnesses Outside Hong Kong by Live Television Link) of the Criminal Procedure Ordinance (Cap. 221) and Practice Direction 9.9, what was permitted by television link was the taking of evidence of evidence from witnesses. It did not extend to permitting his absence at his arraignment. (See paras. 5-6.)

The Department of Justice having decided to terminate the prosecution of D for unlawful trafficking in dangerous drugs and he wanting to be arraigned so as to be formally acquitted, the Court was asked to decide whether his arraignment could take place without his presence or via television link from Australia where he was currently residing.

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Application
This was an application for a ruling that the defendant’s personal attendance at his arraignment was unnecessary in the circumstances. The facts are set out in the judgment.

CRIMINAL SENTENCING
HKSAR v. Chan Yiu Shing
[2017] HKEC 2716
Court of First Instance
Criminal Case No 41 of 2016
Zervos J
17 November, 8, 15 December 2017

Criminal sentencing — conspiracy to make explosive substances — possessing explosive substances — conspiracy to make smoke bombs for use at impending public demonstrations — possessing explosive substances including those for making smoke bombs, thermite mixture and triacetone triperoxide — deterrent sentence required due to ready availability of information, instructions and materials

D2–3 were convicted of conspiracy to make explosive substances (smoke bombs) from “a mixture of nitrate salts, capable of producing a pyrotechnic effect” (‘Count 1’). D1, D4–5 were acquitted of Count 1. D1, D2 and D3 were convicted of possession of various explosive substances contrary to s. 55(1) of the Crimes Ordinance (Cap. 22) (Count 4; Count 2; and Counts 3 and 5 respectively). On 27 May 2015, police conducting surveillance on D1–5, observed them going to a McDonald’s restaurant, returning to D1’s home and D1 taking a cooler box to the ATV studio (‘ATV’) with D4–5. In the early hours of 28 May 2015, police observed D2 join D1 and D4–5 and flashes and smoke from ATV. On 14 June 2015, D2–3 were observed on ATV’s rooftop, mixing and adding substances to bottles and leaving with the cooler box and white smoke was later seen billowing from a window of ATV. On the same day, D2 was found with explosive substances for making a thermite mixture (‘Count 2’); D3 was found with explosive substances for making smoke bombs, a thermite mixture, and a nitrate explosive mixture (‘Count 3’); and D1 was found at and outside his home with substances for making a thermite mixture (‘Count 4’). A McDonald’s cup was retrieved from ATV containing a substance which, when ignited, emitted a large volume of smoke. Police found in D3’s home materials, including acetone, for making smoke bombs and also Triacetone triperoxide (‘TATP’); apparatus for causing explosions, ie a detonating device (‘Count 5’); and a Post-it note and electronic data about explosives, including using acetone to make TATP. The jury rejected D1–3’s claims that they possessed explosive substances for a lawful object, including to make thermite for welding and cooling packs. D1–2 were aged 36 and 31 respectively. D3 was a 24-year-old aeronautical engineering graduate and of clear record.

Held, that:
• At a time when information about how to obtain ingredients for making explosives, as well as the instructions themselves, were so readily available on the Internet and when materials for improvised explosives were generally found in commercial and household items, deterrence must play a
significant part in the sentencing process (R v. Marcin Kasprzak [2014] 1 Cr App R (S) 20 115 applied). (See paras. 2–3.)

Count 1: D2–3

- D2–3 had conspired together to make explosive substances with a pyrotechnic effect for use at impending public demonstrations. The smoke bombs were rudimentary and designed only to emit a large volume of smoke. D2–3 were each sentenced to 2 years' imprisonment on Count 1. (See paras. 22, 43.)

Count 4: D1

- As regards Count 4, thermite was dangerous as it produced extreme heat and there was no reason for D1 to have possessed it other than for some untoward purpose. The quantities were small but they could cause great harm and damage. There being no mitigating factors, D1 was sentenced to 2 years and 2 months' imprisonment (considered). (See paras. 42, 48–50.)

Count 2: D2 and overall sentence

- The same sentencing considerations, including lack of mitigating factors, in respect of D1 applied to D2 on Count 2 as did a sentence of 2 years and 2 months' imprisonment. Taking into account totality, 8 months of the 2-year term on Count 1 would run consecutively to the sentence on Count 2, making an overall sentence of 2 years and 10 months' imprisonment. (See paras. 42, 48–49, 51.)

Counts 3 and 5: D3 and overall sentence

- Count 5 reflected a greater culpability on D3’s part because of the materials for making TATP, which could cause loss of life and serious harm to persons and serious damage to property, and also apparatus for detonation. Further, researching explosive substances was one step away from making them and another step away from using them. Given that D3’s research was limited to general inquiries; there was only a small quantity of acetone and no end product; and there were no mitigating factors, D3 was sentenced to 2 years and 6 months’ imprisonment on Count 3 and 3 years and 2 months’ imprisonment on Count 5. Having regard to totality, 8 months of the 2-year term on Count 1 would run consecutively to concurrent terms on Counts 3 and 5, making an overall sentence of 3 years and 10 months’ imprisonment. (See paras. 45–49, 52.)

Hearing

This was a hearing to sentence the first, second and third defendants for possession of explosive substances and the second and third defendants for conspiracy to make explosive substances. The facts are set out in the judgment.

**Highest Court of Appeal (Civil Division) – 合謀製造爆炸性物質 – 管有爆炸性物質 – 合謀製造用於即將舉行的公眾示威的煙霧彈 – 管有爆炸性物質，包括用於製造煙霧彈、鋁熱劑混合物和triacetone triperoxide - 由於信息、說明和材料易於獲取，判刑需要有阻嚇性**

D2-3被裁定合謀以「能夠產生煙火效果的硝酸鹽混合物」製造爆炸性物質(煙霧彈)(第一項控罪)。D1、D4-5被判第一項控罪無罪。D1、D2和D3被裁定管有炸藥,違反《刑事罪行條例》(第22章)第55(1)條(第4、第2項控罪及第3及第5項控罪)。(2015年5月27日,警方對D1-5進行監視,發現他們先去了一家麥當勞餐廳,然後回到D1家,D1取了一個保溫箱,然後與D4-5前往亞洲電視廠房(ATV)。2015年6月14日,D2-3被發現管有爆炸性物質,用於製造鋁熱混合物(第二項控罪);D3被發現管有用於製造煙霧彈、鋁熱混合物和硝酸鹽炸藥混合物的爆炸性物質(第三項控罪);在ATV獲取的一個麥當勞杯內含有一種物質,當點燃時,該物質會釋放大量煙霧。警方在D3家中發現了包括丙酮在內的材料,用以製造煙霧彈及Triacetic acid triperoxide (TATP)爆炸裝置(第五項控罪),以及關於爆炸物的保箝和電子數據,包括如何使用丙酮製造TATP,陪審團駁回D1-3聲稱他們管有爆炸性物質用於合法用途,包括製造用於焊接和冷卻包裝的鋁熱劑。D1-2年齡分別為36歲和31歲。D3是一名24歲的航空工程畢業生,並無犯罪紀錄。裁決:

- 獲取爆炸品材料及製造爆炸品的信息現可輕易透過互聯網取得,爆炸品的材料一般亦可在工商業和家庭用品中找到,判刑必須發揮重要的阻嚇作用(引用R v. Marcin Kasprzak [2014] 1 Cr App R (S) 20 115)。(見第2-3段)

第一項控罪：D2—3

- D2-3共謀製造有煙火效果的爆炸性物質，於即將舉行的公眾示威使用。煙霧彈很簡單，只是為了發出大量的煙霧，就第一項控罪，D2-3各被判處監禁2年。(見第22、43段)

第二項控罪：D1

- 就第四項控罪，鋁熱劑很危險，因為它會產生高熱，除了由於某種不軌目的，D1沒有理由擁有鋁熱劑。鋁熱劑數量很少，但可能造成很大的傷害和損害。沒有任何減刑因素，D1被判處監禁2年2個月(考慮了R v. Marcin Kasprzak [2014] 1 Cr App R (S) 20 115)。(見第42、48-50段)

第二項控罪：D2 及整體判刑
D1的量刑考慮，包括沒有任何減刑因素，亦適用於對D2的第二項控罪，故D2同樣被判處監禁2年6個月。考慮到整體情況，第一項控罪判處監禁2年，其中8個月與第二項控罪的刑期同期執行，合共監禁2年10個月。（見第42、48-49、51段）

第三及第五項控罪：D3及整體判刑

由於製造TATP的材料可造成人命傷亡、嚴重傷人及嚴重破壞財產，並且還會引爆爆炸裝置，第五項控罪反映了D3的罪行更嚴重。此外，研究爆炸性物質與製造及使用它們只有一線之差。鑑於D3的研究僅限於一般調查，他只管有少量的丙酮，最終沒有製作成品，以及沒有減刑因素，D3就第三項控罪被判處監禁2年6個月，就第五項控罪被判處監禁3年2個月。考慮了整體情況，第一項控罪2年刑期中8個月與第三及第五項控罪的刑期同期執行，即合共監禁3年10個月。（見第45-49、52段）

聆訊

這是指控第一、第二及第三被告管有爆炸性物質，及第二和第三被告共謀製造爆炸性物質的判刑聆計。案情已在判決書詳細列出。

CRIMINAL SENTENCING

HKSAR v. Wan Wai Lun
[2018] HKEC 64
Court of Appeal
Criminal Appeal No. 90 of 2017
Macrae and Pang JJA
16 January 2018

Criminal Sentencing - Dangerous Drugs – previous convictions - very different offences calling for very different levels of punishment and/or types of sentence

D was convicted, on his own plea, of one charge of trafficking in a dangerous drug, namely 22.72 g of heroin. The District Court judge noted D had 10 previous convictions spread over seven court appearances during the past 14 years. Two of the previous convictions were for possession of dangerous drugs, in respect of which he had been sent to Drug Addiction Treatment Centre. The DC judge did not appear to find any aggravating features and said he saw “no reason to depart from the guidelines as set down by the higher court”. He sentenced D to 53 months imprisonment after a 1/3 discount for his guilty plea.

D appealed against sentence on the ground that the DC judge wrongly adopted a starting point of 80 months’ imprisonment, when the appropriate sentence after trial should have been, on an arithmetical basis, no more than 72 months imprisonment under the relevant guidelines in R v. Lau Tak Ming & Others [1990] 2 HKLR 370.

Held, allowing the appeal, quashing the sentence of 53 months imprisonment and substituting it with 48 months’ imprisonment, that:-

• It was agreed by the parties that a strict application of sentencing guidelines would have produced a starting point of just under 72 months imprisonment. The DC judge did not explain why he adopted a much higher starting point of 80 months’ imprisonment. The Court of Appeal considered this a significant increase (11.97 percent) of what would have been a strict arithmetical application of the relevant guidelines to the quantity concerned. Whereas the CA in HKSAR v. Smit Hector Edward [2017] 1 HKLRD 287 has said that a departure from a strict arithmetical starting point, whilst not by itself objectionable, should be explained where it is significant, the DC Judge did not say he found any aggravating features to justify the departure in this case.

• The general principle, that a sentence may be enhanced for previous convictions of the same or a similar kind, is best exemplified where offences of dishonesty, sexual offences or offences of violence are concerned.

• However, the CA found it difficult in treating previous convictions for simple possession of dangerous drugs as aggravating features for a sentence for trafficking. The legislature and the courts have recognised that the offences of simple possession and trafficking are qualitatively very different offences calling for very different levels of punishment and/or types of sentence.

• In any event, it was not strictly necessary for the CA to express a concluded view on whether, in the normal course, previous convictions for simple possession can aggravate a sentence for trafficking. This was because not only did the DC judge not appear to consider there were any aggravating features, but D’s two previous convictions for which he was sent to Drug Addiction Treatment Centre, did not justify an enhancement of his sentence for trafficking.

Morley Chow Seto
刑事判處

HKSAR v. Wan Wai Lun [2018] HKEC 64

上訴法庭
刑事上訴 2017年第90號
上訴法庭法官麥機智、彭偉昌
2018年1月16日

刑事判處 – 危險藥物 – 先前定罪 – 極為不同的罪行在處罰程度及/或判刑類別方面存在重大區別

法庭基於D自行承認控罪，裁定他一項販運危險藥物（即22.72克海洛英）的罪名成立。審理該案的區域法院法官注意到，D過去曾有10次被定罪的紀錄（包括在過去14年間曾經7次出庭）。他有其中兩次定罪，是因為管有危險藥物，被法庭判入戒毒治療中心。該區域法院法官看來並未發現任何可加重刑罰的因素，並指出他“找不到有任何理由，可偏離較高層級的法院所作出的指引”。在考慮到D認罪而作出1/3刑期的扣減後，D被判入獄53個月。

D就刑期提出上訴，理由是該區域法院法官錯誤地，以80個月監禁作為判刑起點，而事實上，根據R v. Lau Tak Ming & Others [1990] 2 HKLR 370一案的相關判刑指引，經過審訊後而作出的適當判刑，於計算後，應當是不超過72個月監禁。

裁定 - 上訴得直，撤銷原來的53個月刑期，改以48個月監禁取而代之，理由如下：

- 不管如何，如果被告人過往純粹因管有危險藥物而被定罪，在一般情況下，法庭是否可據此加重其在販運危險藥物方面的刑罰呢？上訴法庭並非必須對此提出決定性的看法，這不僅因為該區域法院法官看來並沒有考慮案中是否存在加重刑罰的因素，也基於該等導致D被判進入戒毒治療中心的兩項先前定罪，並不能構成將他在販運危險藥物方面的刑罰加重的理由。

麥樂賢周綽瑩司徒悅律師行

FAMILY LAW

NPYJ v. SMRC [2018] HKEC 36

Court of Appeal
Miscellaneous Proceedings No 50 of 2017
Lam V-P and Bebe Chu J
5 January 2018

Family law — children — access — interim interim order granting access — appeal against exercise of discretion not appropriate, unless extremely plain decision was wrong

The Judge granted F an interim interim access order, but declined unsupervised access to the children. F applied for leave to appeal, arguing that the Judge erred in according undue weight to the concerns of the previous supervisor and not accepting the recommendation of the expert for unsupervised access.

Held, dismissing the application, that:

- Interim interim arrangements concerning children were in the discretion of the judge and meant to be temporary, provisional and very short-term pending a full inquiry. (See paras. 3–7.)
- The Court of Appeal was not the forum for the parties to make a second attempt when they failed at first instance. That was not a proper use of an appeal. Unless it was extremely plain that the judge had gone wrong, the parties should not appeal against the exercise of discretion (Edwards v. Edwards [1986] 1 FLR 205, Re J [1989] 2 FLR 304 applied). (See paras. 6, 8.)
- On the facts here, the appeal had no reasonable prospect of success. It was not reasonably arguable that the Judge had gone plainly wrong. The weight to be attached to the concern in light of the other evidence was very much a matter for the Judge. (See para. 9.)

Application

This was an application by the respondent-husband for leave to appeal against an interim interim order of the Judge for supervised access to the children. The facts are set out in the judgment.
LAND LAW

First Mate Development Ltd v. Gee Wing Chung [2018] HKEC 86
Lands Tribunal
Land Compulsory Sale Main Application No 8000 of 2016
Judge Angela Kot, Presiding Officer and Member Lawrence Pang
5, 19 January 2018

Land law — compulsory sale for redevelopment — valuation of lot — “marriage” value — whether open market value of subject lot should include redevelopment potential of adjoining lots on a merged site basis — reserve price qualified by requirement in Sch.2 para.2 to take into account redevelopment potential of lot “on its own” — Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) Sch. 2 para. 2

Words and phrases — “on its own” — Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) Sch. 2 para. 2

X, the majority owner of land (‘the Subject Lot’), applied for the compulsory sale of all the undivided shares thereof for redevelopment under s. 3(1) of the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545). X also owned 100% of various lots (‘1st Adjoining Lots’) and 80% of other lots immediately adjoining the Subject Lot (‘2nd Adjoining Lots’). The 2nd Adjoining Lots were the subject of another compulsory sale application by X. R2 applied for an extension of time to file and serve inter alia a supplemental report on marriage value, arguing that as there was evidence that the Subject Lot would be redeveloped with the 1st and 2nd Adjoining Lots as one merged site, the open market value of the Subject Lot should take into account the redevelopment potential of the 1st and 2nd Adjoining Lots in determining its reserve price. Under para. 2 of Sch. 2 of the Ordinance, “The lot the subject of the auction shall be sold subject to a reserve price — (a) which takes into account the redevelopment potential of the lot on its own (or where 2 or more lots are the subject of the auction, on their own) ...”. Section 4(1)(b)(i) provides for the making of an order for sale concerning “all the undivided shares in the lot the subject of the [s. 3(1)] application”. Under s. 5(1), if an order for sale of all the undivided shares is granted, and the parties cannot agree on other means of sale, the lot in question shall be sold by public auction in accordance with the conditions specified in Sch. 2.

Held, dismissing the application, that:
• Given the wording of para. 2 of Sch. 2, ss. 4(1)(b)(i) and 5(1) of the Ordinance, only the lot the subject of the application itself should be considered when deciding the reserve

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price and the order for sale. The words “the lot on its own” and “2 or more lots ... on their own” refer to the subject of the application, no more, no less. The legislative language was plain and left no room for arguing that in attached rows of lots, the redevelopment value of other lots not the subject of the application should also be considered (First Kind Ltd v. Liu Keng Chor [2016] 3 HKLRD 39 applied). (See paras. 14–19.)

 Accordingly, the reserve price was qualified by para. 2 of Sch. 2 which requires that the Tribunal to take into account the open market value of only the lot the subject of the application “on its own”, which phrase must be given its purposive meaning (Trocette Property Co Ltd v. Greater London Council (1974) 28 P & CR 408, Director of Lands v. Yin Shuen Enterprises Ltd (2003) 6 HKCFAR 1, Capital Well Ltd v. Bond Star Development Ltd (2005) 8 HKCFAR 578, [2005] 4 HKLRD 363, Dragon House Investment Ltd v. Secretary for Transport (2005) 8 HKCFAR 668 applied). (See paras. 25, 27–28, 34.)

 • R2’s suggestion regarding marriage value was inconsistent with the requirement under para. 2 of Sch. 2 and its application to adduce a supplemental expert report must be dismissed. (See para. 35.)

 Application
This was an application by the second respondent for an extension of time to serve a rebuttal valuation report and a supplemental report on marriage value for the compulsory sale for redevelopment of certain lots of land. The facts are set out in the judgment.
Legal profession — solicitors — legal aid — assigned solicitor — permissible to act on private basis for aided person for part of proceedings not covered by legal aid certificate — obligations owed

Civil procedure — discovery — specific discovery — appeal against dismissal of application

This was an appeal to the Judge against the Master’s refusal of the specific discovery sought by a legally aided plaintiff in a personal injuries action. Legal Aid not having been extended to cover the appeal, the assigned solicitor acted in the appeal on a private basis for the aided person.

Held, dismissing the appeal, that:

• It was permissible for an assigned solicitor to act on a private basis for the aided person for the part of the proceedings not covered by the legal aid certificate. (See paras. 5–14, 17.)

• The obligations owed by a solicitor so acting included: ensuring that he had his client’s instructions to act on a private basis; explaining to the client the costs implications and the lack of costs protection without legal aid; and informing the Legal Aid Department, the court and the other parties that he was acting on a private basis. (See paras. 15–16.)

• He was also under an obligation not to put himself in a position of conflict with his client’s interests (as happened in the present case since the Master who refused specific discovery was contemplating making a wasted costs order). Initially acting for a fee, the solicitor subsequently indicated that he would act pro bono and, moreover, would personally bear the costs of the appeal awarded to the defendants. (See paras. 18–22, 39.)

• The specific discovery sought was of a very wide scope and was neither proportionate nor necessary, either fairly to dispose of the case or to save costs. (See para. 37.)

Appeal

This was an appeal against the decision of Master Harold Leong dismissing the plaintiff’s application for specific discovery. The facts are set out in the judgment.

裁決 — 駁回上訴：

• 指派的律師是可以法律援助未涵蓋的部分訴訟程序以私人方式代表受助人。（見第5-14、17段）

• 如是者，律師承擔的義務包括：確保客戶指示他以私人方式作為其代表；向客戶解釋在不獲法律援助的情況下所需訟費及缺乏訟費保障；通知法律援助署、法院和與訟另一方他是以私人方式代表當事人。（見第15-16段）

• 他也有義務避免處於與其當事人利益有關衝突的位置（正如在本案中，拒絕特定文件透露聆案官考慮虛耗訟費命令）。律師最初有收費，隨後表示會無償服務，而且會親自承擔被告的上訴費用。（見第18-22、39段）

• 所尋求的特定文件透露範圍非常廣泛，對公平地處理案件或節省成本既不公平也不必要。（見第37段）

上訴

這是一宗針對梁國安法官駁回原告申請特定文件透露的裁決而提起的上訴。案情已在判決書詳細列出。

For full summaries and judgments, please refer to Westlaw and Hong Kong Law Reports & Digest at www.westlaw.com.hk.

就完整的摘要和判決書，請到 www.westlaw.com.hk 參閱Westlaw及《香港法律彙報與摘錄》。
LegalTech: eDiscovery Explained and Analytics Analysed

By Sebastian Ko, Regional Director and Senior Legal Counsel
Michael Yuen, Manager

The volume of electronically stored information (‘ESI’) kept by businesses and individuals is growing exponentially as storage costs plummet, while the types of ESI and velocities at which they are exchanged over networks increase prolifically (See eg Global Yellow Pages Limited v. Promedia Directories Pte Ltd and another suit [2013] SGHC 111, para 1). As Justice Lee of the High Court of Singapore opined, “[t]he sheer volume of electronic information, as well as the difficulty of accessing some types of electronic information, presents considerable practical challenges in the area of discovery in litigation.” These developments have triggered great demand for sophisticated technologies and techniques to facilitate complex and large-scale document disclosures in litigation, arbitration, and internal and regulatory investigations (“eDiscovery”) today.

Litigants in Hong Kong, Singapore, and several other common law jurisdictions are subject to court rules concerning eDiscovery. For example, Practice Direction SL1.2 of the High Court of Hong Kong requires parties and their legal representatives in certain Commercial List and other actions to discuss eDiscovery before the first case management conference, including, where appropriate, “the tools and techniques (if any) which should be considered to reduce the burden and cost of discovery of Electronic Documents” and “the preservation of Electronic Documents”. Compliance with these rules require parties to understand eDiscovery technologies and techniques, and to employ them in reasonable and proportional ways.

In common law and civil law jurisdictions, parties increasingly employ eDiscovery to conduct complex, large-scale document disclosure projects. Again, the parties could only do so in cost-effective and forensically-sound manner, while managing legal and operational risks suitably, if they understand the pertinent issues of running eDiscovery projects. This article provides an overview of eDiscovery project considerations and current technologies and techniques.

Planning for Review and Production

A key objective of eDiscovery is to identify and produce non-privileged documents that are responsive to a subpoena, document disclosure request, or internal investigative needs, and to withhold documents that are non-responsive and/or are legally privileged. Case teams should take time to consider carefully the legal, operational, and technological requirements of document review and production. Relevant questions include: Is the production of native files required? Must image files containing text be rendered searchable, and is this even feasible? Is the preservation of metadata required?

ESI collected in breach of forensic principles or improperly processed and analysed could waste substantial costs and time, especially when the problems are discovered much later (resulting in the need to repeat eDiscovery procedures). In a worse-case scenario, the case team could miss production deadlines, inadvertently produce privileged documents, or withhold relevant documents that should have been disclosed.

Traditional Techniques and Tools

When the project commences, ESI must be collected, processed, and hosted in a well-organised database. Hardcopies should be converted...
into ESI by scanning and made text-searchable using optical character recognition software. Processing involves aggregating and unitising diverse types of ESI (e.g. emails, chat messages, Word documents, PDFs, and audio files), rendering them structured and searchable data. Processing tools could also cull out duplicative and corrupted files, and files containing computer-generated content. After creating the pool of documents for manual review, but before the review actually begins, the pool could be split into different batches and work streams, prioritised, and further refined in scope to enhance efficiency and ultimately reduce review costs.

Pools of potentially responsive and non-responsive documents are created by filtering documents based on their custodians and time of creation and modification, among other attributes, and by applying keyword searches using combinations of keywords likely to be responsive to particular legal and factual issues. Documents can be categorised by language to help the case team staff reviewers with appropriate language skills and to manage review work streams. Documents can be reviewed contextually with greater consistency and speed by grouping documents with over 50 percent similarity, and by grouping emails within the same thread of communication, including branches of these threads. Language detection, near-duplicate analysis, and email threading are tools commonly packaged with eDiscovery review platforms available today, which help to accelerate and automate certain review procedures.

**Automating and Accelerating Review with Analytics**

Traditional techniques and tools have their limitations. In searching by keywords, reviewers are essentially guessing the words that authors of responsive documents have used. But, these keyword searches yield both under-inclusive results (e.g. documents are omitted because the reviewer is unaware of certain variations and regionalisms adopted by the author, and there might be misspellings) and over-inclusive results (e.g. keywords picking up non-responsive documents because the words were used in contexts that are likely irrelevant). For example, documents containing “apple” could relate to both the company and the fruit with the same name, but only the company might be responsive to the case.

Latest analytics software can sharpen the search results and minimise false positives and negatives. The software could group documents that have been self-identified, categorised, and conceptualised by certain repetitive patterns of words contained therein – patterns that traditional Boolean strings and fuzzy searches would have difficulty identifying. Reviewers could show documents already manually identified to be responsive to the software as samples to find “conceptually” similar documents. Likewise, reviews could “teach” the software using abstracts and excerpts of responsive text passages.

Several kinds of advance eDiscovery software provide “predictive coding” capabilities, which Australian, English, Irish, and U.S. courts have recognised as tools appropriate in discoveries involving significant ESI volumes (See eg Pyrrho Investments Ltd & Another v. MWB Property Limited & Others [2016] EWHC 256 (Ch); McConnell Dowell Constructors (Aust) Pty Ltd v. Santam Ltd (No 1) [2016] VSC 734.). Using machine-learning algorithms, based on the analytics framework discussed above, predictive coding software identifies and prioritises documents responsive to the case. Manual review of document samples are used to train the software to recognise textual patterns or “concepts”. The software is trained sufficiently after several rounds of manual review and adequate sample sizes are reviewed. The software will then rank the documents according to their responsiveness to certain “concepts”. Reviewers may then manually check/review highly-ranked documents and de-prioritise or even ignore lowly-ranked documents.

Through a combination of traditional and advance eDiscovery technologies and techniques, case teams could conduct large-scale ESI review and production, while ensuring the quality and consistency of the analysis, minimising risks of error, and managing costs and timelines efficiently.
法律科技：
eDiscovery 解释及分析

作者 Sebastian Ko，区域总监兼高级法律顾问
Michael Yuen，经理

存储成本下降，企业和个人电子存储信息（ESI）数量大幅增长，而ESI的类型和网络流量速度也大大增加（例如Global Yellow Pages Limited v. Promedia Directories Pte Ltd and another suit [2013] SGHC 111, para 1）。正如新加坡高等法庭法官李兆坚所说：「电子信息量大，某些类型的电子信息难以获取，对诉讼查证领域带来相当大的挑战。」这些发展触发了对先进科技的巨大需求，以便利现今的诉讼、仲裁及内部和规管调查中复杂的文件透露工作（eDiscovery）。

香港、新加坡以及一些其他普通法司法管辖区的诉讼人受到有关eDiscovery的法院规则约束。例如，香港高等法院《实务指示》SL1.2条要求商业案件审讯表的诉讼各方和他们的法律代表在首次案件管理会议之前商讨如何运用科技进行电子文件透露，包括「为了减轻进行电子文件透露的困难和费用而应考虑使用的工具和技术（如有有的话）」及「保存电子文件」。要遵守这些规则，各方必须了解eDiscovery科技和法律，并以合理的方式和比例使用它们。

越来越多普通法和大陆法司法管辖区采用eDiscovery来进行复杂的大型文件披露工作。双方只能以符合成本效益和法律规定的方进行，同时适当地管理法律和操作风险，如果他们了解eDiscovery操作的相关部门。本文概述eDiscovery项目须注意的事宜及当期的科技和法律。

计划审阅和制作

eDiscovery的主要目标，是识别和制作非特权文件，回应传票、文件披露请求或内部调查需求，并保留非相关和/或具有法律特权的文件。案例小组需仔细考虑文件审查和制作的法律、操作和技术要求。相关问题包括：是否需要制作原本文件？包含文本的图像文件是否必须转换为可搜索格式？这是否可行？是否需要保存元数据？

违反法证原则收集的ESI，或未经正确处理和分析的ESI，可能会浪费大量成本和时间，尤其是太迟才发现问题，导致需要重複进行eDiscovery程序。在更糟糕的情况下，案例小组可能会错过截止日期，不慎制作了特权文件，或者保留了
應該披露的相關文件。

傳統技術和工具

項目開始時，ESI必須收集、處理並管理一個組織良好的數據庫。將實體文件掃描、轉換為ESI，並使用光學字符識別軟件，令文本可作搜索。處理涉及聚合統一不同類型的ESI(例如電子郵件、聊天消息、Word文檔、PDF和音頻文件)，使它們成為結構化和可搜索的數據。處理工具還可以剔除重複和損壞的文件，以及包含電郵生成內容的文件。建立文件庫供人工審閱後，可以將文件庫分為不同的批次和工作流程，確定優先次序，進一步細化以提高效率，最終降低審閱成本。

潛在的響應性和非響應性文件庫，是根據其保管人及創建和修改時間及其他屬性過濾文件，並使用可能具響應性的特定法律和事實的關鍵字搜索的案例小組。文件可按簡短分類，以助具適當語言技能的案例小組人員管理審閱流程。手動審閱文件作業，超過50%相似度為一組，並將同一對話的電子郵件通信組合起來(包括對話的分支)，以使審閱達至更高的的一致性和速度。語言檢測、接近重複分析和電子郵件往來是當今eDiscovery審閱平台常見的工具，有助於加速和自動化某些審閱程序。

通過自動化並加速審閱

傳統的技術和工具具有其局限。在搜索關鍵字時，審閱者實質上是在猜測響應性文件作者使用的單詞。但是，這些關鍵字搜索結果可能會不足(如因為審閱者不知道作者採用的某些變化和區域用語，及可能拼寫錯誤，而忽略了一些文檔)或過度(如關鍵字搜索得出非響應性文件，因為可能使用了與情況不相干的文字)。例如，包含「蘋果」的文檔可能與同名的公司和水果有關，但只有公司名可能會對案例作出響應。

最新的分析軟件可提高搜索結果的精確度，最大程度地減少誤差。該軟件可將文檔分組，通過其中重複的詞語進行自我識別、分類和概念化，傳統的Boolean strings 和模糊搜索將難以識別。審閱者可以已經手動識別的文件作為樣本，讓軟件找出「概念上」類似的文件。審閱可用摘要和響應性文本段落摘錄來「教導」軟件搜索。

幾種先進的eDiscovery軟件提供「預測編碼」功能，澳洲、英國、愛爾蘭和美國的法院已將確認該工具適用於涉及大量ESI的案件(見例如Pyrrho Investments Ltd & Another v MWB Property Limited & Others [2016] EWHC 256 (Ch); McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1) [2016] VSC 734)。使用機器學習演算法，基於上述的分析框架，預測編碼軟件可識別響應性案例的文檔並設置優先順序。人手審閱文檔樣本用於訓練軟件識別文本的模式或「概念」。審閱人員可以人手檢查／審閱排名高的文檔，然後處理或忽略排名低的文檔。結合傳統和先進的eDiscovery科技和技術，案例小組可以進行大規模的ESI審閱和製作，同時確保分析的質量和一致性，盡量減少錯誤風險，並有效管理成本和時間。
Newly-Admitted Members

CHAN HING YUE
陳慶瑜
CHING MASON & ASSOCIATES 程彥棋律師樓

CHENG NOK MING
鄭諾銘
SLAUGHTER AND MAY 司力達律師樓

CHEUNG HO YEE
張顥頤
DLA PIPER HONG KONG 欧華律師事務所

CHEUNG KWAN YEE
張君宜

CHU YAN YEE
朱恩儀
YU, CHAN & YEUNG 余陳楊律師行

FUNG MUK SHIN
馮睦茜
TSANG, CHAN & WONG 曾宇佐陳遠翔律師行

FUNG TIFANY CONSTANCE
馮可頌
SIDLEY AUSTIN 盛德律師事務所

FUNG YIK CHUNG
馮奕聰
WAI & CO., HENRY SOLICITORS 韋業顯律師行

HE XUAN
何 琪

HO LO LAM
何鸞嵐
MINTER ELLISON 銘德律師事務所

HUANG YUANYUAN
黃媛媛
LI & PARTNERS 李偉斌律師行

IAVORSKYI VIACHESLAV

JIN ZHEN BO
金振博
EVERSHEDS SUTHERLAND 安睿達倫國際律師事務所

KWAN HIU TAK
關曉德
LEUNG & CO., WINNIE 梁鳳慈律師行

LAU SHING YAU
劉誠祐

LEE JOYCE FIANA
李樂妍

LEUNG PUI YIP
梁沛業
HILL DICKINSON HONG KONG
Partnerships and Firms

合夥人及律師行變動

- **CHEUNG PAK HOI**
  became a partner of Lee Chan Cheng as from 01/02/2018.
  張百凱
  自2018年2月1日成為李陳鄭律師行合夥人。

- **HUI KA WAI**
  joined Chak & Associates as a partner as from 05/02/2018.
  許嘉慧
  自2018年2月5日加入翟氏律師行為合夥人。

- **LAU WANG YIP**
  ceased to be a partner of Joseph Chu, Lo & Lau as from 22/01/2018 and the firm closed on the same day. Mr. Lau joined Yip, Tse & Tang as a consultant as from 22/01/2018.
  劉宏業
  自2018年1月22日不再出任朱羅劉律師事務所合夥人一職，而該行亦於同日結業。劉律師於2018年1月22日加入葉謝鄭律師行為顧問。

- **LIN CHING YANG**
  became a partner of Sullivan & Cromwell (Hong Kong) LLP as from 25/01/2018.
  林靖揚
  自2018年1月25日成為蘇利文克倫威爾律師事務所(香港)有限責任合夥人。

- **LO KIN KEI**
  ceased to be a partner of Joseph Chu, Lo & Lau as from 22/01/2018 and the firm closed on the same day. Mr. Lo joined Mike So, Joseph Lau & Co. as a consultant as from 22/01/2018.
  羅建基
  自2018年1月22日不再出任朱羅劉律師事務所合夥人一職，而該行亦於同日結業。羅律師於2018年1月22日加入蘇與劉律師事務所為顧問。

- **NG SHAN YUNG**
  ceased to be a partner of L & Y Law Office as from 19/01/2018.
  吳燦榕
  自2018年1月19日不再出任林余律師事務所合夥人一職。

- **SIT HOI LAM BERYL**
  joined William Ji & Co. as a partner as from 02/01/2018.
  薛凱琳
  自2018年1月2日加入紀曉東律師行為合夥人。

- **SZETO WAI LING VIRGINIA**
  ceased to be the sole practitioner of Virginia Szeto & Co. as from 07/02/2018 and the firm closed on the same day.
  司徒惠玲
  自2018年2月7日不再出任司徒惠玲律師事務所獨資經營者一職，而該行亦於同日結業。

- **THOMAS SARAH JANETTE**
  became a partner of Morrison & Foerster as from 18/01/2018.
  自2018年1月18日成為美富律師事務所合夥人。

- **THOMSON ROBERT LINDSAY**
  ceased to be a partner of Jones Day as from 01/01/2018 and remains as a consultant of the firm.
  湯慕信
  自2018年1月1日不再出任眾達國際法律事務所合夥人一職，而轉任為該行助理律師。
Greater China Legal History Seminar on “The History of a Mystery: The Development of the Law of Unjust Enrichment in Hong Kong, China and Germany”

With more than 110 attendees, this successful full house CPD seminar was delivered by Professor Steven Gallagher, Associate Dean for Academic Affairs; Professor Lutz-Christian Wolff, Wei Lun Professor of Law and Dean of the Graduate School; and Ms. Siyi Lin, Research Postgraduate Student at the CUHK Graduate Law Centre on 2 February 2018. The speakers compared the historical developments, related sources and specific functions of the law of unjust enrichment in Hong Kong, Germany and China, which provided valuable insights regarding this complex, mysterious and confusing area of law.

The next Greater China Legal History seminar on “The Historical Development of the Civil Law Tradition in China” jointly organised by CUHK Law and the Centre for Chinese and Comparative Law of City University of Hong Kong will be held on 16 March at the CUHK Graduate Law Centre. For more information, please visit: http://www.law.cuhk.edu.hk/en/event-page/20180316.php
Event on “IP Protection and Enforcement: from Policy to Strategy to Practice”

CUHK Law organised this half-day CPD event on 26 January 2018 to explore what is currently being done to protect intellectual property in Hong Kong and what should be done in the future in order to best maintain Hong Kong’s current position. The event brought together experts from the government, industry and legal practice to speak and attracted over a hundred participants from different sectors to attend, including representatives from the Consulate Generals of France, Italy, Belgium and the UK, European Union Office to Hong Kong, members from the Hong Kong Judiciary, senior officers from well-known international fashion brands, IP and legal practitioners, academics and students.

The event was divided into two sessions. The first session focused on government intellectual property initiatives and enforcement practices, which was delivered by Ms. Michelle Chong, Assistant Director of Intellectual Property (Advisory) of the Intellectual Property Department; Mr. Guy Fong, Head of Operations Group, Intellectual Property Investigation Bureau of the Customs and Excise Department; and Ms. Rebecca Tse, Senior Product Promotion Manager of the Hong Kong Trade Development Council. The second session focused on current best enforcement practices in the private sector, with speakers include Mr. Alan Chiu, Managing Partner, Ella Cheong & Alan Chiu, Solicitors & Notaries; Mr. Kelvin Ko, Managing Director of Verity Consulting Limited; Ms. Candy Lam, Regional Counsel, Asia of International Federation of the Phonographic Industry; Mr. Mayank Vaid, Intellectual Property Director (Asia Pacific) of Louis Vuitton. The stimulating discussions of both sessions drew positive response from the audience.

Mr. Paul Schmidt, Professional Consultant of CUHK Law, served as Moderator of the second session.

The event drew upon some of the best minds in government, industry and legal practice to address various IP issues.
Inaugural CUHK Law Alumni Cocktail Reception

On 30 January 2018, the Faculty of Law of The Chinese University of Hong Kong (‘CUHK Law’) hosted this cocktail reception as the first major alumni event in the Garden Lounge of the Hong Kong Club. The Faculty was very pleased to welcome the alumni and was honoured to have The Honourable Chief Justice Geoffrey Ma joining and giving an amusing and inspiring address. The Court of Final Appeal Permanent Judges The Honourable Mr. Justice Roberto Ribeiro and The Honourable Mr. Justice Joseph Fok, and Non-Permanent Judge The Honourable Mr. Justice Kemal Bokhary were also present along with Mr. Philip Dykes, Chairman of the Hong Kong Bar Association, members of the Judiciary, legal practitioners, and many other guests who have contributed to the Faculty over the years in so many different ways. A good number of current and former faculty members also attended and took the opportunity to catch up with their students from previous years.

It was a splendid evening that all participants enjoyed. CUHK Law would like to thank all alumni and distinguished guests for coming along, and looks forward to their participation at the cocktail reception next year – this time on a Friday evening!

The event was a great occasion for the alumni to meet up with teachers and guests who assisted them academically and professionally during their studies at CUHK.

中大法律校友首屆酒會

香港中文大學法律學院於2018年1月30日假香港會花園廳舉辦首屆大型校友酒會，並榮幸邀得首席法官馬道立法官發表有趣而振奮人心的講話。終審法院常任法官李義法官、霍兆剛法官、香港大律師公會主席戴啟思資深大律師、司法機構人員、法律從業人員及多年來為法律學院作出貢獻的嘉賓，均出席了盛會。許多現任和前任教職員亦藉此機會與舊學一聚。

所有嘉賓當晚均盡興而返。中大法律學院感謝所有校友和嘉賓的光臨，並期待他們明年再次撥冗出席酒會。
Dr Marco Wan from HKU awarded the 2017 Penny Pether Prize

Congratulations to Dr Marco Wan of the Faculty of Law at The University of Hong Kong, whose book, *Masculinity and the Trials of Modern Fiction*, was awarded the 2017 Penny Pether Prize of the Law, Literature, and Humanities Association of Australasia. The Prize honours the late Australian scholar Penny Pether, and is awarded to the work which has made “the most significant contribution to the field of Australasian law, literature and humanities”.

Nineteenth-century England and France are remembered for their active legal prosecution of literature, and this book examines the ways in which five novels were interpreted in the courtroom: Gustave Flaubert’s *Madame Bovary*, Paul Bonnetain’s *Charlot s’amuse*, Henry Vizetelly’s English translation of Émile Zola’s *La Terre*, Oscar Wilde’s *The Picture of Dorian Gray* and Radclyffe Hall’s *The Well of Loneliness*.

As the Association commended in the citation, “(the book) is an exceptionally meticulous and beautifully crafted text: alongside its contribution of the fields of law, literature, and masculinity and gender studies, Dr Wan prosecutes his case with clarity and authority, and with the pleasure of the reader in mind.”
We would like to congratulate Kenneth K. K. Mo, Assistant Solicitor, Paul C.K. Tang & Chiu, Solicitors & Notaries, the winner of our Legal Quiz #45.

LEGAL TRIVIA #46

1. Geoffrey Briggs, Chief Justice of Hong Kong, had a fascination with which animal?
   A. Frogs
   B. Birds
   C. Horses
   D. Cats

2. Which Hong Kong judge wrote a book “I’ll Do Better Next Time”?
   A. Ivo Rigby
   B. Denys Robert
   C. John Huime
   D. Joseph Kemp

3. Which Hong Kong High Court judge started his career as a member of the British South Africa Police in Rhodesia (now Zimbabwe):
   A. Michael Lunn
   B. Michael Hartmann
   C. James Findlay

4. Mohamed Saled, a Hong Kong judge, had to flee which country after being threatened with death in his previous role as Chief Justice of that country?
   A. Rhodesia
   B. Uganda
   C. Palestine
   D. Pakistan

5. Which Hong Kong Chief Justice served as Attorney General to British Guiana prior to his appointment in Hong Kong?
   A. Francis Piggot
   B. Fielding Clarke
   C. William Rees-Davies
   D. John Carrington

6. Which current member of the Court of Final Appeal served previously as Chairman of the Hong Kong Bar Association?
   A. Geoffrey Ma
   B. Robert Ribeiro
   C. Robert Tang
   D. Joseph Fok

7. Which Hong Kong judge served on the District Court of Palestine immediately before his appointment to Hong Kong?
   A. Paul Cressal
   B. Roger Lindsell
   C. Atholl McGregor
   D. Michael Hogan

8. Which Hong Kong Chief Justice served with the RAF during WWII?
   A. Atholl MacGregor
   B. Leslie Gibson
   C. Henry Blackall
   D. Michael Hogan

9. Which former Hong Kong judge spoke Chiuchow, Hokkien and Cantonese?
   A. TL Yang
   B. Henry Gompertz
   C. James Russell
   D. Kemail Bokhary

10. Which Chief Justice of Hong Kong sat on the Anglo-Japanese Commission dealing with claims under the San Francisco Peace Treaty?
    A. Henry Blackall
    B. Leslie Gibson
    C. Michael Hogan

Answers to Legal Trivia Quiz #45

1. A. Andy Lau brought a passing off action against Hang Seng Bank for using his photograph on credit cards. (Lau v Hang Seng Bank [2000] 1 HKC 280)
2. C. The photos showed that Faye Wong (referred to in the case incorrectly) as Huang Fei) was pregnant. (Oriental Press Group v Apple Daily [1998] 2 HKLRD 976)
3. D. Nicholas Tse was convicted of perverting the course of justice for agreeing with his driver for his driver to claim he was driving at the time. (HKSAR v Tse HCMA 39/2003)
4. D. Carson Yeung was, at first, a hairdresser.
5. B. Phillipines. Ronald Singson, a member of the Phillipines House of Representatives, was convicted for possession of dangerous drugs in 2011. (HKSAR v Singson DCCC938/2010)
6. A. Soler (made up of Giulio and Dino Acconci) were in a dispute with Hummingbird Music. (Hummingbird Music v Acconci [2007] 4 HKLRD 79)
7. C. Stephen Chan received payment as an appearance fee from Olympian City. This was found by the CFA not to involve breach of the Prevention of Bribery Ordinance. (Secretary for Justice v Chan [2017] HKCFA 33)
8. A. Eva Huang (Huang Shengyi) was sued her former manager in 2007. (Worth Achieve v Huang Shengyi HCA 5301/1990)
9. B. Alan Tam sued for passing off for the use of his photo on Karaoke discs. (Tam v Lex Video Production HCA 5301/1990)
10. A. The first instance trial was before a jury. (Shaw Brothers v Golden Harvest [1972] HKCA 233)
法律知識測驗 #46

在本月，我們再看香港法律界人士的鮮為人知的事情。問題由馬錦德大律師編製。歡迎建議下期問題。

1. 香港首席法官貝里士特別喜歡哪種動物？
   A. 青蛙
   B. 鳥類
   C. 馬匹
   D. 貓

2. 哪位香港法官寫了一本書名稱叫"I'll Do Better Next Time"？
   A. Ivo Rigby
   B. 羅弼時
   C. 晓吾
   D. 金培源

3. 哪位香港高等法院法官以他作為英國駐南非羅得西亞（現在的津巴布韋）警察的一成員開始了他的職業生涯？
   A. Michael Lunn
   B. 夏正民
   C. 范達理

4. 香港法官沙義德在哪一國擔任他以前的首席法官的角色中受到死亡威脅後不得不逃離該國？
   A. 羅得西亞
   B. 烏干達
   C. 巴勒斯坦
   D. 巴基斯坦

5. 哪一位香港首席法官在香港被任命前曾擔任英屬圭亞那的律政司？
   A. 碧葛
   B. 賈樂
   C. 戴華士
   D. 賈靈頓

6. 哪位終審法院現任成員曾擔任香港大律師公會主席職務？
   A. 馬道立
   B. 李義
   C. 鄧國植
   D. 霍兆剛

7. 在香港獲任命前，哪位香港法官在巴勒斯坦地方法院任職？
   A. 麥基利哥
   B. Roger Lindsell
   C. 塔基利
   D. 何瑾

8. 第二次世界大戰期間哪位香港首席法官在皇家空軍服役？
   A. 麥基利哥
   B. 湯卜生
   C. 白高樂
   D. 何瑾

9. 哪位前香港法官會說潮州話、福建話和廣東話？
   A. 楊鐵樑
   B. Henry Gompertz
   C. 羅素
   D. 包致金

10. 哪位香港首席法官加入「英日委員會」處理根據《舊金山和平條約》的申索？
    A. 白高樂
    B. 河卜生
    C. 何瑾

競賽規則:
讀者如欲參加由Global Vintage Wines Centre提供的2007年Ch. Roquettes 2010 (Grand Cru)或Ch. Tour Baladoz 2006 (Grand Cru)葡萄酒，請將問題答案寄交navin.ahuja@thomsonreuters.com。首位能提供最多正確答案（答錯的題目不得多於三題）的讀者將成為優勝者。湯森路透就得獎者所作的決定是最終及不可推翻的。

本刊謹此祝賀毛冠喬，劉林陳律師行律師，在法律知識測驗 #45中勝出。
Sailing Through a Legal Mind

By Bo Lee, Vice President (Senior Counsel)

The last few months have witnessed many firsts for Hong Kong in one of the world’s toughest sporting competitions: the Volvo Ocean Race (VOR). Hong Kong’s first time being a host city, first time competing and first time winning a leg of the race.

VOR race teams sail more than 45,000 nautical miles across the globe, enduring the harshest elements for weeks on end, and routinely surviving on just two hours sleep. All the while, they are aiming to give their best performance ever. Against this inspiring backdrop, I started to think about my own sail racing, which began three years ago upon the invitation of my then boss. Limited to Hong Kong waters and off terra firma for just hours at most, my experience is certainly much more modest compared to those competing in the VOR. Nonetheless, the same fundamental skills and attributes are required of sailors of all levels to complete a race successfully - an incredibly exhilarating feeling. The more I reflected, the more I also saw the similarities between competitive sailing and working as a lawyer.

1. The rules. Before even stepping onboard a boat, each sailor needs to be aware of the rules governing the race so that their participation counts and, more importantly, to ensure safety. There are many visual and sound signals given throughout the race, each signifying a particular instruction from the race committee. A particular pattern on a flag and accompanying series of blasts from a horn, may indicate a recall or postponement of the start time for the class of boat you are sailing. There are also codes of conduct for specific situations, such as when a boat must give way to another boat. A breach of these rules may result in time penalties or disqualification and, at worst, physical injury. Clearly, knowledge and understanding of an extensive body of rules is at the heart of what a lawyer does and the consequences of not knowing them are equally dire.

2. Scale and time pressures. There are various pieces of equipment spread across a boat which need to be operated at the same time during a race. For example, a typical racing sailboat has numerous colour coded “lines” (ropes to the layman) to raise, lower and adjust sails. These are controlled by grinding winches, which provide the mechanical advantage necessary to overcome the force of the wind in the sails. To gauge the scale of the boats in the VOR, the size of the sails used are larger than two tennis courts. Indeed, all hands, and certainly more than one pair, must be on deck as with any legal project involving consideration of cross disciplinary issues and production of countless documents, all within challenging deadlines. Neither feats are achievable by an individual alone - teamwork is key.

3. Complex environment. The physical conditions at sea can change dramatically in a matter of minutes. I have faced the scorching summer sun as well as violent rainstorms within the same race in Hong Kong. Around the world, changes in the winds, currents and weather patterns are taking place at an accelerating rate due to climate change. Bringing in the right combination of talents at the right time is crucial to navigating through these changes.
過幾個月，香港在世界上最困難的體育競賽之一刷新了第一次：香港首次成為Volvo Ocean Race環球帆船賽的主辦城市、首次參賽並首次贏得一站賽事。

Volvo Ocean Race環球帆船賽的參賽隊伍橫跨世界四大洋，全程45000海里，忍受最惡劣的環境，經常每天只睡兩個小時，盡力交出最佳表現。他們的拼勁令我開始思考自己的帆船經驗。三年前，應當時的上司的邀請，我開始接觸帆船。當然，我的經驗肯定比環球帆船賽輕得多，因為只限於香港水域，最多駕駛幾個小時。儘管如此，想想所有船員似乎都擁有相同的基本技能和屬性，這些技能和屬性有助於成功完成一場比賽，就有令人難以置信的振奮感覺。我越想就越看到帆船比賽和律師工作的相似之處：

4. Preservation. During a race, there are things that can go wrong which are completely out of your control. For example, I have experienced sudden changes in wind resulting in a loss of critical boat speed which the team had spent a long time gaining. In the VOR, a sailor may miss loved ones that they have not seen for weeks while at sea. They may long for sustenance other than the freeze dried food provided in the name of reducing storage space. Meanwhile, the race is ongoing and giving up is not an option. The parallels with life as a lawyer are self-explanatory. In such times, individual grit as well as camaraderie among teammates are essential to getting over the finishing line.

I have found sailing in general immensely humbling, challenging and rewarding. We are privileged in how accessible sailing is in Hong Kong; there are not many cities in the world where you can grab a cab and get onto the water within 20 minutes. For more information on adult beginner sailing courses and/or how to get involved in competitive sailing, please contact the Leisure and Cultural Services Department, Aberdeen Boat Club, Hebe Haven Yacht Club and/or the Royal Hong Kong Yacht Club.
3. 複雑的環境。海洋環境一天的變化可能很大。在同一場香港比賽中，我面對過炎炎夏日和暴雨。在世界性比賽，氣候變化引起的風、氣流和天氣變化就更急促。團隊的專業知識和協調對於成功駕馭這些變化至關重要，就像在不斷變化的法律和經濟環境中，需要專業知識和團隊合作一樣。

4. 生存。在比賽中，有些事情可能會出現，完全超出你的控制範圍。例如，我遇過突然的風力變化，令船隊大大減慢，船隊花費了很長時間才能追回。在環球帆船賽中，船員在海上幾週不能與親人見面，可能侷限於冷凍乾燥食品，可能渴望其他糧食。同時，比賽正進行，絕不能放棄。律師的生活亦一樣，有艱難時刻，隊友之間的勇氣和友誼，是成功走到終點的關鍵。

我覺得帆船比賽總體來說可以令人謙卑、充滿挑戰性和滿足感。我們很幸運，在香港很容易就能享受航行。世界上坐20分鐘的士就能到海邊的城市不多。有關成人初級帆船課程及／或如何參與帆船比賽的更多資料，請聯絡康樂及文化事務署、香港仔遊艇會、白沙灣遊艇會及／或香港遊艇會。
LEGAL PLACEMENT FOR ASIA

PARTNER

HONG KONG, TOKYO, SHANGHAI & SINGAPORE

For a confidential discussion on current opportunities at Wall Street, Magic Circle and elite international firms please contact us. Examples of some practice areas under consideration include investigations, project finance, leveraged finance, corporate M&A, private equity, capital markets (DCM, ECM & US), restructuring / insolvency and general banking. Our clients are interested in all partner levels with Asian businesses and counsel transitioning to partner level. Full or partial team moves will also be considered.

LEVERAGED FINANCE

HONG KONG | 3-6 PQE

Elite US firm. Great opportunity to work with partners with extensive experience in a range of cross-border transactions. Candidates committed in a move to Asia from London or US markets or currently working in north or south Asia. Preference is for an associate that is comfortable working in the leveraged finance space for private equity clients but candidates from a general finance background with strong CVs are welcome to apply. Excellent exposure to tier 1 clients.

CORPORATE M&A

HONG KONG | 2+ PQE

Magic Circle firm requires mainstream corporate lawyer for this leading HK corporate practice. Magic Circle or Wall Street training preferred. Top academics. Strong Mandarin language skills required.

INVESTIGATIONS / FCPA

HONG KONG | 3+ PQE

US firm requires mid-level associates to join this award-winning team in HK. Full Cravath rate. Firm will relocate globally. Mandarin preferred but not essential.

ECM / IPO

HONG KONG | ALL LEVELS

Exciting opportunity to join this tier 1 ECM department out of Hong Kong. Due to strategic growth the firm is hiring in all levels for equity capital markets / IPO work - candidates will also get exposure to cross border M&A and private equity transactions. Hong Kong market experience preferred. Mandarin preferred.

LITIGATION / DISPUTES

HONG KONG | 2+ PQE

Top US firm requires junior to mid-level litigators to work on a broad spectrum of litigation matters including international arbitration, general commercial, white collar, FCPA, life science and pharma investigations. Mandarin preferred.

DERIVATIVES & STRUCTURED FINANCE

HONG KONG | 3+ PQE

Band 1 ranked US firm requires a mid-level associate to join this award-winning team in Hong Kong. Top tier firm experience required. Structured finance experience essential. Mandarin preferred.

BANKING & FINANCE

HONG KONG | 2+ PQE

Elite international firm requires general banking & finance lawyer for this tier 1 banking practice. Excellent in-house training. Overseas candidates encouraged to apply from leading financial markets. HK qualified preferred. Leveraged finance experience preferred. No language requirements.

US CAPITAL MARKETS

HONG KONG | ALL LEVELS

We have various roles suitable for US capital markets & securities attorneys from several band 1 listed firms in north and south Asia. Ideally you will have experience in areas such as equity (HK & US listings), high yield, investment grade debt and derivatives. US rates & CDOA. Please check our website for current vacancies or contact us.

DEBT CAPITAL MARKETS

HONG KONG | 2-5 PQE

Elite firm requires debt capital markets associate to join this collegiate team out of HK. Candidates at the junior level with solid banking and finance experience will also be considered. Strong Mandarin language skills required.

INVESTMENT FUNDS & ASSET MANAGEMENT

HONG KONG | ALL LEVELS

Wall Street firm requires US qualified funds associates to join this growing team in Hong Kong. Experience in fund formations, structuring, restructuring, formation and operation of alternative investment products, including private equity funds, venture capital funds, real estate funds, hedge funds and funds of funds looked upon favorably. Mid to Sr level candidates should have US funds experience.

CORPORATE / PRIVATE EQUITY

HONG KONG | 4+ PQE

Tier 1 firm requires a managing associate to join this close-knit team in Hong Kong. Excellent opportunity to step up and manage transactions in both M&A and PE. Blue chip clients and leading international banks. US pay scale. E&W qualified preferred. Solid execution experience in M&A required. No language requirements.

FUNDS

SINGAPORE | 2-5 PQE

Magic Circle firm requires associate with experience acting for sponsors of and investors in private equity, real estate and infrastructure funds. Top academics. Peer firm experience preferred but not essential. Willingness to travel in Asia and globally.

CORPORATE

SINGAPORE | 5+ PQE

Wall street firm requires mid-level corporate associate to join this collegiate office in Singapore. You will be an ambitious managing associate looking for a pathway to partnership. Top academics. US rates. No language requirements.
MEET THE TEAM

Michael Page Legal services major corporates, international and leading local law firms, as well as financial services institutions on a global scale. Our consultants are strategically specialised in focusing on legal recruitment for different aspects of the job function and industry, diversifying and maximising our recruitment coverage as a team. We have successfully placed candidates across all levels from Associates and Junior Legal Counsels, to Partners and Heads of Legal.

Olga Yung, Regional Director, Financial Services
Olga has been specialising in legal recruitment for over ten years, with a focus on financial services clients. She has an outstanding proven track record in placing all levels of legal professionals, with a stronger focus on mid to senior level hires. Graduating with a Bachelor and Master degree in Law, Olga possesses experience gained from international law firms prior to joining Michael Page. Olga has extensive networks across the in house sector and with in-depth knowledge of legal talent available within the region. She has also successfully recruited within the private practice and in house legal space.

Serina Tang, Associate Director, In House Corporate
Serina has over 7 years of recruitment experience, specialising in the recruitment of in-house lawyers where her industry focus is across in house corporate, assisting all types of commercial clients in Hong Kong. Serina has long standing work relationships with the executive-level private and listed companies in Hong Kong. Serina gained experience in management consulting prior to joining the University of Wisconsin, Serina gained experience in management consulting prior to joining Michael Page in 2010.

Tina Wang, Managing Consultant, In House Corporate
Tina has over 5 years’ recruitment experience within the in house commercial space, specialising in recruitment of in-house lawyers at all levels. She has an excellent track record working with multinationals, state-owned enterprises, as well as domestic private and listed companies in Hong Kong. Tina’s in-depth market knowledge and extensive networks in the region allows her access to high calibre candidates and clients. Tina is CPA qualified with a prior career in PricewaterhouseCoopers prior to joining Michael Page.

Sabina Li, Senior Consultant, Legal Support
Sabina specialises in the recruitment of company secretarial professionals at all levels, with a focus on in house commercial clients in Hong Kong. She has over 3 years of recruitment experience servicing commercial clients across a variety of industries. Sabina graduated from the UK with a Bachelor of Science and a Graduate Diploma in Law. Prior to joining Michael Page, she worked with a law firm and a HK listed company as a paralegal and company secretary.

Marta Verderosa, Manager, Private Practice
Marta has over 5 years of legal recruitment experience, with a dedicated focus on private practice. She has extensive experience in recruitment covering all areas of practices for lawyers, from newly qualified up to partner level, for leading and sizable law firms in Hong Kong. She also oversees legal support hires for financial institution clients, and has recruited within the in house legal space. Marta is a LLM graduate and worked in a leading law firm and a global insurance company before joining Michael Page.

Kamil Butt, Senior Consultant, Private Practice
Kamil joined Michael Page Legal in year 2015 with 3 years’ legal recruitment experience. He specializes in recruitment for private practice and financial services clients, with an excellent track record in successfully assisting legal support candidates including paralegals and company secretaries at all levels. Kamil was born in Hong Kong and speaks both English and Cantonese, he graduated with a Bachelor Degree in Law from University of Bristol.

Soraya Tennent, Consultant, Legal Support
Soraya’s career with Michael Page commenced in Australia in 2015. She has 2 years of recruitment experience in the areas of legal and finance. After moving to Hong Kong, Soraya specialises in the recruitment of legal support staff for all leading and sizable law firms as well as global and local financial institutions. Soraya graduated from Curtin University with a Double Major in Business Law and Journalism.

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FINANCIAL SERVICES

Finance/Debt Capital Markets Lawyer
- 4+ PQE
- Leading Investment Bank
A top tier investment bank is seeking for a finance/DCM lawyer to support their Fixed Income and Global Capital Markets businesses within the region. You will participate in a full range of work including bilateral/syndicated loans, acquisition and leveraged financing transactions, high yield debt offerings and investment grade debt offerings. The ideal candidate will possess at least 4 years’ PQE with relevant experience in the area of DCM or leveraged acquisition finance. Any exposure to US related work or US securities will be useful though not mandatory. Strong language skills required and fluency in Cantonese will be a plus. Ref: 3976037

PROPERTY COUNSEL

Property Counsel
- 6+ PQE
- Tenancy/Leasing Focused
Our client is a Hong Kong based property developer with an impressive portfolio. They have created a new headcount to cope with the expanding business. You will join the legal team to provide legal advice to management and different business teams in regards to sale and purchase of property, property management and property development matters. The review and negotiation of tenancy agreements and general leasing matters will be a priority for this role. The ideal candidate will have at least 6 years’ PQE advising property developers and managers in tenancy matters, preferably with solid experience gained in a sizable Hong Kong developer. Fluency in English and Cantonese are a must. This is a rare opportunity to work with a high calibre team. Ref: 3968059

Partner/Counsel
- Corporate Commercial
- EU Law Firm
Our client is European market leader in the M&A and commercial space with a broad client base including large EU headquartered industrial groups. The firm is registered as a Hong Kong firm and is operating in association with a prominent PRC law firm. They are now looking for a Partner to join the team in Hong Kong. Reporting directly to the Managing Partner, you will focus on growing the firm’s business services and network in Asia. The ideal candidate will possess at least 8 years’ PQE obtained in Hong Kong and with experience in a broad variety of transactions, with an emphasis on joint ventures, mergers and acquisitions and private equity investments. Strong English and Chinese language skills are required. Ref: 3959118

Senior Regulatory/Compliance Lawyer
- 10-15+ PQE
- Global Financial Services House
Taking on a newly created role based in Hong Kong covering the region, you will work in tight knit team providing legal, regulatory and compliance support to the region. Reporting into the US, you will take on an independent role advising on all legal and Anti-Money Laundering issues within the Asia Pacific region, and work closely with senior management in advising on their strategic projects. You will also provide support on new product launches and ensure compliance with regards to local regulatory guidelines. Ideal candidate will be a senior lawyer with strong regulatory/compliance exposure gained within financial services environment. Chinese language skills is useful though not mandatory. Ref: 3977023

Legal Counsel
- 5+ PQE
- FMCG Company
Our client is a well-established leader in consumer goods with recognizable brands in the market. They have growing distribution networks in China and Asia, and are looking to grow regionally and internationally. They are now inviting an experienced general commercial lawyer to join them in Hong Kong. You will be drafting, reviewing and negotiating distribution agreements, managing tender processes and providing a broad range of commercial legal advice to the business. The successful candidate will have a minimum of 5 years’ PQE, preferably with some in-house experience in the FMCG or pharmaceutical sectors, candidates straight from private practice and well versed in commercial agreements are encouraged to apply. Fluency in both English and Chinese languages required. Ref: 3977701

Real Estate Associate
- 3 PQE
- UK Firm
Our client is a well-established international law firm now expanding its real estate capabilities. They are currently looking for an experienced HK solicitor with background in property sale and purchase, acquisition of property holding companies, property development and ideally with some exposure to property related litigation matters. Working in synergy with a highly successful corporate department, the incumbent will have the opportunity to gain experience in all aspects of real estate-related transactions, including development, redevelopment, financing and re-financing, private equity, & mergers and acquisitions. You should be a Hong Kong qualified lawyer with at least 3 years’ PQE and should comfortable with dealing with clients in both English and Mandarin. Ref: 39778223

PRODUCTS LAWYER

Products Lawyer
- 5+ PQE
- Top Tier Investment Bank
Taking on a new lawyer to support key businesses within the bank including Sales & Trading Equities, Fixed Income and Private Wealth, you will look after and advise on all core equities sales and trading matters, brokerage sales and trading involving securities listed in Asian jurisdictions as well as electronic trading. The ideal candidate will possess at least 5 years’ PQE (common law qualification) with experience across structured products, and any exposure in supporting similar businesses is advantageous. Excellent communication skills and stakeholder management skills required. Strong English and Chinese language skills are mandatory. Ref: 3976039

Senior Legal Counsel – Investment Advisory
- 15+ PQE
- Sizable Hong Kong Group
This is a Senior Counsel position being part of a large high calibre legal team for an established Hong Kong group. Your priority will be in advising investment decisions, working closely with the finance and treasury department. You will provide legal advice on investments agreements including private equity and hedge fund investments, ISDA transactions and custodian services. You will actively participate in strategic business decisions and negotiations for commercial agreements as a business partner. The ideal candidate will have around 15 years’ PQE with experience from sizeable companies. Written and spoken English, Cantonese and Mandarin are required. Ref: 3945629

Corporate Associate
- 3+ PQE
- International Law Firm
Our client’s corporate practice is top-tier with a wide and interesting spectrum of work on offer. They are currently looking for a junior to mid-level Associate with strong experience in Initial Public Offerings, Mergers & Acquisitions, Private Equity, JV transactions and general corporate compliance issues. You will be advising leading investment banks and corporate clients, with the ability to build on these client relationships. The ideal candidate will ideally have at least 3 PQE with hands-on experience. They will need to have strong communication ability with good levels of English, Cantonese and Mandarin. This firm offers clear career development for candidates who are looking to grow with them. Ref: 3961160

To apply, visit www.michaelpage.com.hk quoting the reference number or contact our consultants.
Dispute Resolution
Hong Kong 1-3 PQE
International US law firm seeks a litigator to work with its clients on matters ranging from international commercial disputes, arbitration and regulatory investigations. Candidates should have prior experience in the energy sector, acting for sponsors and/or banks and financial institutions. (HKL 16304)

Project Finance
Hong Kong 1-3 PQE
An excellent opportunity for a junior finance lawyer to join an international firm with an established projects practice. Candidates should have solid experience in the energy sector, acting for sponsors and/or banks and financial institutions. (HKL 16264)

DCM
Hong Kong 1-5PQE
This global law firm seeks a US qualified associate with experience in high-yield bonds, MTN programs and structured debt products. You should have solid experience in US debt/equity capital markets transactions. No language skills needed. (HKL 16229)

M&A/PE
Hong Kong 3+ PQE
A growing corporate team of a US law firm seeks a Hong Kong or US qualified lawyer with solid transactional experience in M&A and private equity matters. You should have experience of managing transactions. Chinese language skills required. (HKL 6306)

Competition/Antitrust
Hong Kong 2-7PQE
An international law firm seeks an experienced antitrust & competition lawyer to join its leading practice. Lawyers with experience in China related competition law, merger control and regulatory work is highly preferred. Chinese language skills not required. (HKL 16297)

Capital Markets
Hong Kong 3-6 PQE
Leading US law firm seeks a Hong Kong qualified lawyer with solid capital markets experience. You will work alongside well-regarded partners on a broad range of capital markets transactions. Fluency in English and Mandarin required. (HKL 16274)

Asset Management
Hong Kong 1-3PQE
Top-tier U.S. law firm seeks a U.S. qualified junior associate to support their Asset Management practice. You will need solid funds experience in either the PE and/ or VC sectors. Interesting opportunity for a dynamic and ambitious lawyer. (HKL 16269)

Corporate Legal Counsel
Hong Kong 4+ PQE
Global financial services firm with a growing presence in Asia has an excellent opportunity for a corporate transactions lawyer. This is a hands-on and autonomous role working closely with the business’ equity and debt capital markets teams. Experience in capital market transactions and M&A projects experience is needed. (HKL 16240)

Commercial Litigation
Hong Kong 1-5 PQE
Leading Construction Company seeks a junior litigation lawyer. You will support a wide variety of litigation/mediation/arbitration cases. You should be a HK qualified lawyer with solid experience gained in a law firm or in-house. Fluency in English and Cantonese required. (HKL 16097)

Trademark Lawyer
Hong Kong 5-10 PQE
A global tech player seeks a trademark lawyer to support the group’s international IP matters relating to trademark, domain name and copyright. You should be a HK qualified lawyer with a good command of both English and Mandarin. Attractive compensation package is on offer. (HKL 16299)

Senior Legal Manager
Hong Kong 5PQE+
A well-known Real Estate development group seeks a mid-senior level lawyer with corporate experience. Work will involve providing legal advice on general corporate, M&A, joint venture, finance, commercial and fund transaction. Experience from international law firms or real estate industry is an advantage. Chinese required. (HKL 16038)

Legal Counsel
Hong Kong 4-6PQE
A leading multinational corporation seeks a mid-level lawyer to support their Business Units in North Asia. You will be involved in a wide range of commercial contracts and agreements and handle legal disputes, employment and company secretarial matters. Fluency in English, Cantonese and Mandarin required. (HKL 16255)

Legal Counsel
Hong Kong 1-5 PQE
A global legal team of an innovative US company seeks a junior commercial lawyer to provide legal support to the regional business. Experience gained at a multinational corporate or international law firm and China experience is preferred. Fluency in both Mandarin and English required. (HKL 16266)

Regional Legal Director
Hong Kong 10-15PQE
Fortune 500 company seeks a senior in-house commercial lawyer with good China and regional experience. Work will involve managing a small legal team and advising senior management on an interesting mix of contract, general commercial, employment and some compliance matters. Fluency in Mandarin is required. (HKL 15097)
This is a small selection of our current vacancies. Please refer to our website for a more comprehensive list of openings.

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www.lewissanders.com
This is a selection of our current vacancies; for more information in complete confidence, please call the Hong Kong office on +852 2503 2500 or email us at sandra@atticus-legal.com or nigel@atticus-legal.com

Funds
4-7 PQE    Hong Kong
This is a stellar opportunity for an ambitious lawyer to join the Funds team, in a tight knit team. The ideal candidate will have prior exposure to hedge funds, PE fund formation work. Corporate M&A lawyers keen to transition will also be considered. You will be admitted in a common law jurisdiction. Chinese required. HKL4839

Corporate
6+ PQE      Hong Kong
Our client is a global law firm seeking a senior lawyer to join their leading corporate finance practice to provide assistance on a variety of capital raising, compliance and governance issues. You will be admitted in a common law jurisdiction with relevant experience in M&A or HK IPO. Candidates with fluency in Mandarin will have a distinct advantage. HKL4779

Disputes Resolution PSL
4+ PQE      Hong Kong
This is an excellent opportunity for experienced lawyers to step away from fee-earning and join a highly regarded global law firm’s Disputes Resolution practice. You will work with a collegiate team and take on a full range of PSL duties including creating a solid precedent system, preparing notes on legal issues and know-how documents. HKL4888

Corporate M&A
5+ PQE      Shanghai
Opportunity in Shanghai for a PRC qualified corporate lawyer with at least 5 years of experience to work with high calibre fee-earners in a collegiate environment on cutting edge corporate M&A transactions advising blue chip corporates and leading investment banks. US admission a plus. HKL4860

International Arbitration
2-4 PQE     Shanghai
This is an excellent opportunity for an international arbitration lawyer keen to develop their career in Shanghai for the long-term. You will work alongside a well regarded partner on ship related disputes. A lot of international arbitration work and therefrom language is not essential. HKL4847

Corporate
2+ PQE      Hong Kong
Global law firm seeking a junior lawyer to join their leading corporate finance practice. You will focus on corporate restructuring, Merger & Acquisitions and IPOs, as well as annual compliance work. You will be admitted in a common law jurisdiction with relevant experience in HK IPO, Listing Rules and Takeovers Code. Mandarin preferred. HKL4875

 Litigation
5+ PQE      Hong Kong
This is a fantastic opportunity for an experienced lawyer to join the market-leading commercial litigation practice. You will work on a mix of large-scale commercial litigation, arbitration and investigations. You will be Hong Kong qualified; the successful candidate will have proficiency in Mandarin language skills. HKL4864

Dispute Resolution
1-5 PQE     Hong Kong
This UK law firm seeks a junior to mid-level associate to join their exceptional team. You will work alongside reputable individuals specialising in litigation matters that are high in profile, value and complexity, and has particular expertise in multi-jurisdictional disputes. Ideal candidate will have fluency in Chinese. HKL4866

Construction Litigation
1+ PQE      Shanghai
Leading international law firm is looking to hire construction litigation associates to join their reputable practice. You will advise major contractors, prominent property and infrastructure owners in project/infrastructure financing. The team also advises on disputes in the building, engineering and resource sectors. HKL4837

Shipping Litigation
Partner Track      Shanghai
Excellent opportunity to get on track for partnership in a growing international firm. You will focus on maritime disputes alongside dynamic partners in a collegiate team. The role will have an international dimension, centred around disputes across APAC; proven marketing and BD skills essential. HKL4853

This is a selection of our current vacancies; for more information in complete confidence, please call the Hong Kong office on +852 2503 2500 or email us at sandra@atticus-legal.com or nigel@atticus-legal.com
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You never actually own a Patek Philippe.

You merely look after it for the next generation.

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