

# CHINA MATTERS

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## Hong Kong: Still a Leading International Dispute Resolution Venue

A variety of developments during 2006 have highlighted Hong Kong's continued importance on the international stage as a leading dispute resolution venue.

1. A Court of Appeal judgment and the production of a third party's confidential bank documents pursuant to that judgment had a decisive impact on multi-billion US dollar legal proceedings in the US. This case illustrates the effect that cross-border judicial co-operation can have on even the most complex of matters.

2. The Hong Kong International Arbitration Centre administered more arbitrations than ever before and a significant proportion of these involved exclusively non-Hong Kong parties. This highlights the important role played by Hong Kong as an arbitration venue for overseas companies investing into Mainland China.

3. Hong Kong and Mainland China signed an agreement in principle for the reciprocal enforcement of judgments in certain civil and commercial matters - when the arrangement comes into force, it will represent a significant but cautious step forward.

4. The consultation period ended in respect of the Final Report issued by the Chief Justice's Working Party on Civil Justice Reform. It is likely that extensive civil justice reforms will be introduced in 2007 or early 2008 with a view to ensuring and improving access to justice at reasonable cost and speed.

5. A pilot scheme was introduced for the mediation of cases in the Construction and Arbitration List of the High Court.

### **Court Orders Production by a Third Party of Confidential Bank Documents for Use in Overseas Proceedings**

The Judgment handed down by the Court of Appeal in October 2006 in *PrediWave Corporation v New World TMT Limited and Modern Office Technology Limited v New World TMT Limited* and the production of confidential bank documents pursuant to that judgment had a decisive impact on multi-billion US dollar legal proceedings in the US. The case has received extensive coverage in the international news media.

In May 2004 lawyers in Paul Hastings' Los Angeles office commenced legal proceedings on behalf of New World TMT Limited ("New World") in the Superior Court of the State of California, County of Santa Clara (the "US Court") against PrediWave Corporation and related entities ("PrediWave"), claiming in excess of US\$700 million. The US proceedings included a sale of goods claim and a fraud claim.

On New World's motion the US Court issued a letter of request to the High Court of Hong Kong requesting the production by a Hong Kong bank of documents relating to accounts maintained by Modern Office Technology Limited ("MOT") with the bank. PrediWave had held MOT out as being an independent

third party supplier and New World had not included MOT as a defendant in the US proceedings. However, New World had come across evidence which suggested that MOT was, in fact, a dummy company used by PrediWave to hide the level of mark-ups applied to parts that it supplied to New World.

Lawyers in Paul Hastings' Hong Kong office filed an application on behalf of New World with the Hong Kong Court seeking an order pursuant to the letter of request for production of the bank documents. The Court made the necessary order but PrediWave applied for it to be set aside and MOT intervened with its own setting aside application. In August 2006 the Hong Kong Court of First Instance dismissed the applications by PrediWave and MOT, each of whom then filed appeals.

The Hong Kong Evidence Ordinance does not permit pre-trial discovery of documents or "fishing". An order for production of documents pursuant to a letter of request should be made only if particular documents are specified and they are required as evidence to prove matters that will be in issue at the trial of the foreign proceedings. PrediWave's lawyers and MOT's lawyers argued that the documents sought pursuant to the letter of request were not relevant to the matters in issue in the US Proceedings and that the letter of request amounted to a fishing exercise.

Under the "docket system" in the US the trial judge had been involved with the US Proceedings for some time and the Hong Kong Court of Appeal commented on this. In their judgment dated 17 October, 2006 they treated as virtually decisive the fact that he had issued the letter of request and that, based on that document, it was his view that the evidence to be obtained by the letter of request was "directly relevant" to New World's claims in the US Proceedings and that it was to be tendered as evidence at the trial of the US Proceedings.

The case marks a new high water mark in the respect and co-operation given by the Hong Kong Courts to an overseas court and underlines the decisive impact that cross-border judicial co-operation can have on complex international cases. Lawyers in Paul Hastings' Hong Kong office obtained the key documents referred to above and co-ordinated evidence gathering in Asia with assistance from colleagues in Beijing, Shanghai and Tokyo.

## **The Number of Arbitrations in Hong Kong Continues to Grow**

The number of arbitration cases with which the Hong Kong International Arbitration Centre ("HKIAC") was involved increased to 394 in 2006 as compared with 281 in 2005 and 280 in 2004. Amounts in dispute varied dramatically from case to case and parties from numerous different nationalities were involved.

Of the 301 arbitrations (other than Domain Name disputes):

- 99 cases involved at least one Hong Kong entity and one non-Hong Kong entity;
- 42 cases involved exclusively non-Hong Kong entities; and
- 160 cases involved exclusively Hong Kong entities.

Of the 42 cases involving exclusively non-Hong Kong entities, 38 cases involved at least one Mainland Chinese entity. This highlights the important role played by Hong Kong as an arbitration venue for overseas companies investing into Mainland China. There is already a tried and tested arrangement in place between Hong Kong and Mainland China for the mutual recognition and enforcement of arbitral awards.

Interestingly, 18 cases involved exclusively Mainland Chinese entities/nationals. This highlights the high regard with which arbitration in Hong Kong is held in Mainland China.

## **Hong Kong and Mainland China Take Steps Towards Arrangement on Reciprocal Enforcement of Judgments**

After four years of negotiations, on 14 July 2006, Hong Kong and Mainland China finally signed an agreement for the reciprocal enforcement of judgments in civil and commercial matters (the "Arrangement"). It has been described variously as "a cautious first step" and a "danger for the unwary".

Although there has been considerable press coverage and commentary on the Arrangement, it has not yet come into force although it is possible that it may do so in 2007.

**The Arrangement will only apply to limited judgments:**

1. the Arrangement only covers monetary judgments relating to commercial contracts;
2. the litigants must have submitted in their contract to the exclusive jurisdiction of a court of the Mainland or Hong Kong;
3. for judgments issued in the Mainland, only those by an Intermediate People's Court or above, or a Basic People's Court which has been authorised to exercise jurisdiction in civil and commercial cases involving foreign parties will be covered;
4. Hong Kong judgments must be issued by the District Court or a higher court.

Although the Arrangement is a significant development, it remains to be seen how effective it will be in practice.

Concerns have been expressed about the Arrangement and these stem largely from a lack of confidence in the quality of decisions handed down by some Mainland Chinese Courts. It appears that if parties choose in their contracts to submit to the exclusive jurisdiction of the Courts of Hong Kong or Mainland China, the Arrangement will bite. Parties need to be alert to this and to consider expressly opting out of the Arrangement.

**Civil Justice Reforms Near Introduction**

In July 2006 a consultation closed on proposed civil justice reforms. It is possible that the reforms will be implemented in 2007 or early 2008. Unlike the supposed root and branch "Woolf Reforms" introduced in England in 1999, Hong Kong has decided to adopt only amendments to the existing Civil Procedures Rules. However, many of the aims and aspirations behind the reforms are similar or identical to those which applied in England. At the heart of the reforms are the "underlying objectives":

- increase cost-effectiveness;
- ensure that a case is dealt with as expeditiously as is reasonably practicable;
- promote a sense of proportionality and procedural economy in the conduct of proceedings;

- promote greater equality between the parties;
- facilitate settlement of disputes;
- ensure that the resources of the Court are distributed fairly.

The reforms include a number of tools designed to promote the above objectives including pre-action protocols, the exclusion of "bare denial" defences, the introduction of "statements of truth" in pleadings and other documents, the use of single joint experts and the option of "sanctioned offers". However, the key to the effectiveness of the reforms will be the willingness of the judiciary to exercise their increased case management powers. The amended Civil Procedure Rules, among other things, will specifically encourage the Court to:

- encourage the parties to co-operate;
- identify issues at an early stage;
- encourage parties to use an alternative dispute resolution procedure;
- fix timetables and otherwise control the progress of the case;
- consider whether the likely benefits of taking a particular step justify the cost of taking it;
- give directions to ensure that the trial of a case proceeds quickly and efficiently.

If the judiciary enthusiastically embraces the case management powers, which will include the power to make orders by their own motion, this will potentially mean a restriction on the time available to parties to consider their case strategy (particularly for Defendants at the commencement of proceedings), to prepare pleadings and evidence and to deal with other milestones within litigation such as discovery.

Clients and their lawyers will need to ensure they are sufficiently prepared in respect of document management and identification of witnesses and the individual(s) who will be able to sign the "statements of truth". A failure to do so may incur costs consequences, a disadvantageous position or worse, their cases being restricted or struck out.

## Courts Encourage Use of Mediation in Construction Cases

The general view is that mediation in family law cases has been a success in Hong Kong and in September 2006 the judiciary introduced a pilot scheme for mediation in construction cases in the Construction and Arbitration List. The pilot scheme is due to run until 31 August 2008.

A party may serve a mediation notice upon any other party at any time during the proceedings. Where a party unreasonably refuses to participate in the mediation or fails to meet the minimal level of participation (as determined by the Court), the Court may award an adverse costs order against that party, even if it is ultimately successful in the proceedings.

While the pilot scheme is “voluntary” and does not apply to most commercial cases, given the planned underlying objectives and case management powers outlined at Section 4 above (in particular the consideration to be given by the Court to alternative dispute resolution procedures), it is likely that mediation will play an increasingly important role in dispute resolution in Hong Kong.

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