

Newsletter

JAN 23

高露雲律師行

W & G
Wilkinson & Grist
Solicitors & Notaries

2023 Year of the Rabbit



CONTENTS

Message from our Senior Partner	2
New Honours	3
Congratulations.....	3-5
About Us	5-6
Appointment.....	6
Talks and Seminars.....	7-8
Conferences	9
Hong Kong SAR Alert	9
- Gazettal of the Copyright (Amendment) Ordinance 2022.....	9
Hong Kong SAR.....	10-13
- Cross-border winding-up Hong Kong Court emphasized duties of liquidators	10-11
- Amendments to the Money Lenders Ordinance	12-13
China Alerts.....	13
- The first-ever Metaverse trial in China.....	13
- Prioritized examination of patent applications by HKSAR applicants	13
China.....	14-15
- Further amendments to Anti-Unfair Competition Law proposed.....	14-15

Message from our Senior Partner



Happy New Year!

Year 2023 is no doubt an important year as it marks the Firm's 140th anniversary!

The Firm's history dated back to 1883 when it was founded by Mr Daniel Edmund Caldwell who was later joined by Mr Charles David Wilkinson and then Mr Edgar James Grist. These 3 gentlemen were the origin of the present English and Chinese names of the Firm.



Andrea Fong

Since its establishment, the Firm has witnessed and participated in the evolution of Hong Kong with utmost dedication and pride. Up till today, we continue to be one of the very few well established, leading and independent law firms in Hong Kong. With the opening up and ever-growing importance of China, we established our office in Beijing in 2000 and has since been directly serving our clients' interests in both jurisdictions.

We are indebted to our predecessors for laying the good foundation and motto upon which the Firm was built. We are most grateful to our clients and associates round the globe for the unfailing support and trust throughout the years. Moving on, we shall always thrive to upkeep our professional ethics, passion for excellence and commitment to serve our clients and the community.

Celebrations are in the pipeline which we will be sharing in the upcoming newsletters. Do stay tuned!

NEW HONOURS



The Guide to the leading regional and domestic law firms in Asia-Pacific

We are pleased to be named as **Outstanding Law Firm** for Dispute Resolution, Intellectual Property and Restructuring & Insolvency in **Hong Kong** in this Asialaw Profiles 2023 Guide. We are also **Highly Recommended** for Banking & Finance and Construction, and **Recommended** for Banking & Financial Services, Technology & Telecommunications, Consumer Goods & Services, Real Estate, Private Client and Corporate/M&A Practice, and named as **Other Notable Firm** in Labour & Employment.

Congratulations

We are proud of the recognition given to our lawyers and congratulate them on their achievements.



John Budge

John Budge, Consultant of our Dispute Resolution Practice Group, recently received a Gold Award in the 2022 Pro Bono and Community Work Recognition Programme of the Law Society of Hong Kong. John has been very involved in public service in Hong Kong for many years, and this is the fifth time he has received this award.



The definitive guide to Asia's leading law firms
and lawyers – 2023 Edition



Andrea Fong



Raymond Chan



Mena Lo



Michael Ma



Florence Chan



Annie Tsoi



Keith Ho

Andrea Fong, Senior Partner and Head of our Intellectual Property Practice Group, **Raymond Chan**, Head of our Corporate Practice Group and **Keith Ho**, Consultant of our Dispute Resolution Practice Group, have been recognized as **Elite Practitioners** in **Hong Kong** in Intellectual Property, Corporate/M&A and Dispute Resolution in Asialaw Leading Lawyers 2023 respectively. **Michael Ma**, Partner of our Corporate Practice Group, has been named as **Distinguished Practitioner** in Corporate/M&A, whereas **Mena Lo** and **Annie Tsoi**, Partners of our Intellectual Property Practice Group, and **Florence Chan**, Partner of our Dispute Resolution Practice Group, are recognized as **Notable Practitioners** in Intellectual Property and Dispute Resolution respectively.

IP STARS

from Managing IP



KY So



Priscilla Chan

KY So, Partner of our Intellectual Property Practice Group, is named as **Notable Practitioner** and **Priscilla Chan**, Senior Associate of our Intellectual Property Practice Group, is named as **Rising Star 2022**. This MIP Handbook is the indispensable reference guide and directory for global in-house counsel since 1993.

About Us

The
Community
Chest BEA
Charity Golf
Day 2022

We are honoured to be one of the hole sponsors to The Community Chest BEA Charity Golf Day 2022 organized by The Community Chest of Hong Kong.



At the Prize Presentation Ceremony on 8 September 2022, our Managing Partner, **Raymond Chan**, was presented with a certificate in acknowledgement of our generous support towards the event.



Mr Bob Chong Hok Hoi, Honorary Adviser of The Community Chest, and our Mr Raymond Chan (from left to right)

Appointment

Through strong participation in major national and international bodies, our lawyers contribute to the community.

Annie Tsoi, Partner of Intellectual Property Practice Group, has been re-elected as Council Member and Secretary of the Licensing Executives Society China, Hong Kong Sub-Chapter (LESC-HK) for the two-year term 2023-2024. LESC-HK is part of an international IP organisation with over 10,000 members around the world involved in the business of IP.

Licensing
Executives Society
China, Hong Kong
Sub-Chapter

Talks & Seminars

We are pleased to be involved in, and contribute to, legal education in Hong Kong SAR, China and other regions.

Business of IP (BIP) Asia Forum

Annie Tsoi, Partner of Intellectual Property Practice Group, presented at the panel discussion on “Evolution of Brand Strategy” during the Business of IP (BIP) Asia Forum on 1 December 2022. This 2-day conference was staged in-person and online, attracting 14,000+ viewers from more than 40 countries and regions to discuss the impact of IP, innovation and business potentials across diverse industries. Annie spoke on behalf of the Licensing Executives Society China (Hong Kong Sub-Chapter) with co-speakers from the IP Committee of respectively The Law Society of Hong Kong and The Hong Kong Bar Association.



Andrea Fong, Senior Partner and Head of our Intellectual Property Practice Group, and **Florence Lam**, Partner of our Intellectual Property Practice Group, attended the Intellectual Property Rights Protection Alliance (IPRPA) Annual General Meeting cum Networking Luncheon organized by the Hong Kong Customs & Excise Department on 14 December 2022. The IPRPA is a platform – comprising legal professionals, brand & industry representatives as well as investigators – established to foster closer co-operation between the Customs and the IPR industry.

Hong Kong
Customs &
Excise
Department



Ms Louise Ho, Commissioner for HK Customs & Excise Department (6th one from the left in the front row)

Ms Phoebe Wong, Head of Intellectual Property Investigation Bureau (IPIB) (4th one from the left in the front row)

our Ms Andrea Fong, Director and Vice-Chair of IPRPA (5th one from the left in the front row) and

our Ms Florence Lam (3rd one from the left in the middle row)

Conferences

Our members will be attending the following conferences and will be delighted to make arrangements in advance for meeting with clients and associates.

LES Annual Conference	Montreal, Canada, 30 Apr – 3 May 2023
INTA Annual Meeting	Singapore, 16 – 20 May 2023
ECTA Annual Conference	Prague, Czech Republic, 28 June – 1 July 2023
MARQUES Annual Conference	Berlin, Germany, 19 – 22 September 2023
FICPI World Congress	London, United Kingdom, 4 – 7 October 2023
AIPPI World Congress	Istanbul, Turkey, 14 – 17 October 2023
APAA Council Meeting	Singapore, 3 – 7 November 2023

Hong Kong SAR Alert

Gazettal of the Copyright (Amendment) Ordinance 2022

The Copyright (Amendment) Ordinance 2022 (“Amendment Ordinance”) was gazetted on 16 December 2022, providing a more robust copyright regime to align with international standards and technological advancement.

The Amendment Ordinance introduces, amongst others, a technology-neutral exclusive communication right to copyright owner to cover works communicated to the public through any mode of electronic transmission with criminal sanction against infringement of such right, and “safe harbour” provisions to limit liability of online service providers. It also provides new copyright exceptions for the use of copyright works for purposes of parody, satire, caricature and pastiche.

The Government will next carry out the relevant preparatory work for implementing the Amendment Ordinance and arrange for gazettal of its commencement date.

Hong Kong SAR

Cross-border winding-up: Hong Kong Court emphasized duties of liquidators

In *Re GTI Holdings Ltd* [2022] HKCFI 2598, the Court of First Instance (“CFI”) found that overseas liquidators breached their duties on the ground of misrepresentations, forum shopping and material non-disclosure in an *ex parte* application. The Court also reaffirmed that it would actively scrutinize the conduct of liquidators to protect creditors’ interests and reminded legal practitioners to pay heed to the statutory winding-up regime in Hong Kong.

Background

In 2021, Linda Chan J made a Winding-up Order against GTI Holdings Ltd (the “**Company**”), a Cayman-incorporated company. The Official Receiver was appointed as the provisional liquidator in Hong Kong. Nonetheless, the provisional liquidators (previously appointed by the Cayman Court) succeeded in applying to the Cayman Court, with the assistance of their legal representatives, to appoint themselves as the joint official liquidators of the Company in the Cayman Islands (the “**JOLs**”) (the “**Cayman Proceedings**”).

Subsequently, in order to implement a proposed scheme of arrangement in Hong Kong (the “**Scheme**”), the JOLs made an *ex parte* application before Harris J to recognize their appointment and to seek various powers to act for the Company in Hong Kong (the “**Recognition Application**”).

The Judgment

In the Judgment of the CFI dated 19 August 2022, Linda Chan J held that the JOLs had fallen short of standards expected of them.

Her Ladyship started by discussing the general principles of the role and duties of (provisional) liquidators. As fiduciary to the company, creditors and the Court, liquidators must act honestly and exercise powers for the purposes for which they are conferred, but not for private or collateral purposes. They must act with complete impartiality between parties interested in the winding-up, and not allow private interests to conflict with such duties. Further, they must be seen to be independent.



Florence Chan



Charlie Lau

The Court found that, regarding the Cayman Proceedings, the JOLs breached their duties by making various misrepresentations to the Cayman Court. It was opined that the JOLs only put forward the views of investors, whom they had a funding agreement with, to the Cayman Court. Those views, which concerned, *inter alia*, the feasibility and creditors' support of the restructuring scheme, were found to be untrue and contrary to previous findings of the Court.

Further, Her Ladyship found the Cayman Proceedings to be against the principles of issue estoppel not to re-litigate issues already determined by the Hong Kong Court, and thus was an attempt by the JOLs to bypass her previous decisions. It was also held that the Cayman Proceedings and subsequent applications could have been avoided, if the JOLs and their legal representatives had paid heed to the statutory winding-up regime in Hong Kong, instead of trying to bypass it. In this case, for the specific purpose of pursuing the Scheme, they should have informed the Cayman Court that the JOLs could request the Official Receiver to appoint them as her special managers. Had the Cayman Court been told by the JOLs about the availability of this avenue, it would have no difficulty in concluding that there was no justification for the JOLs to take the elaborate (and costly) steps of seeking orders from the Cayman Court for the purpose of pursuing the Scheme.

As for the Recognition Application, the Court found it an instance of forum shopping, as the JOLs withdrew the application after it was transferred from Harris J to Her Ladyship, who had ruled against them previously. It was held that the application should have been made in the same winding-up proceeding, as it would have the effect of undermining the Winding-up Order. Furthermore, it was held that the JOLs had breached their duty of full and fair disclosure of all material facts in the *ex parte* Recognition Application. The Court held that materiality is to be decided by the Court, but not the applicants or their legal representatives. Thus, applicants must make proper inquiries and disclose any additional facts they would have known. Accordingly, the JOLs had breached this duty by putting forward representations inconsistent with the Court's previous findings. Meanwhile, their legal representatives failed to bring such inconsistencies to the Court's attention. The Court was also concerned that the legal representatives had failed to inform the JOLs of their duties of full and frank disclosure and allowed them to act in breach.

Implications

Liquidators are under strictly enforced duties. The Court will readily examine their conduct to ensure compliance with their duties and to uphold the statutory scheme of winding-up in Hong Kong.

Amendments to the Money Lenders Ordinance

The Money Lenders Ordinance (Cap 163, the “Ordinance”) was amended with effect from 30 December 2022, with newly adjusted interest rate limits namely:-

- the statutory interest rate cap under Section 24(1) was lowered from 60% to 48%; and
- the presumed-extortionate rate under Section 25(3) was lowered from 48% to 36%.

The statutory interest rate cap is the interest rate over which a loan is deemed illegal and unenforceable. A lender offering a loan with an interest rate beyond the statutory cap commits an offence and shall not be granted civil remedy to recover the loan.

The presumed-extortionate rate is the interest rate range under which a loan arrangement is presumed extortionate, which grants the courts power to re-open the transaction to do justice between the parties.

These amendments came following a study by the Consumer Council in 2019 that advocated for better safeguard of borrowers, especially those who were of low-income. The study was based on research on the behaviour of money borrowers and trade practice of money lenders, and issues with the existing regulatory framework.

Apart from strengthening the protection of borrowers, the new interest rate limits have the following implications for the money lending sector in Hong Kong:-

1. Although authorised institutions (“AIs”) are not subject to the provisions of the Ordinance and their subsidiaries are exempted from obtaining money lender licences, these entities are expected to observe the amended interest rate limits starting 30 December 2022. This is because (i) AIs are recommended to not charge effective interest rates higher than the presumed-extortionate rate under the Code of Banking Practice, or they need to justify why such rates are not unreasonable or unfair; and (ii) subsidiaries of AIs remain subject to Sections 24 and 25 of the Ordinance.



Raymond Chan

2. The amended interest rates have no retrospective effect under Sections 24(3) and 25(9) of the Ordinance, which provide that the interest rates in agreements already in force shall continue to apply. The Hong Kong Monetary Authority has nonetheless recommended AIs and their subsidiaries to migrate customers who are subject to interest rates higher than the amended interest rate limits, as well as offer sufficient notice to both existing and potential customers of the change in interest rate limits and how they may impact upon existing and future credit arrangements.

The consequences for breaching the new interest rate limits under the Ordinance remain unchanged – a lender who commits a Section 24(1) offence is liable to (i) a \$500,000 fine and up to 2 years imprisonment on summary conviction, or (ii) a \$5,000,000 fine and up to 10 years imprisonment on conviction on indictment; whereas a loan transaction that contravenes Section 25(3) may be amended by the courts.

China Alerts

The first-ever Metaverse trial in China

The first-ever Metaverse trial was held in Xiamen of China in September 2022, concerning two traffic-related cases.

In the Metaverse trial, each participant enters the three-dimensional virtual court space via password verification. In the virtual court, participants can place their avatars in different positions to observe the trial, and the trial transcripts and evidence materials can also be viewed. The virtual court has further made effort to recreate every detail of the trial, including simultaneous entry, standing up, sitting down etc to allow participants to have a sense of participation and experience.

This Metaverse trial breaks the constraints of time and space, especially under today's epidemic situation. More trials will possibly take place in the Metaverse in due course.

Prioritized examination of patent applications by HKSAR applicants

With effect from 1 January 2023, Hong Kong SAR applicants filing invention patent applications (meeting relevant criteria) in the mainland China may request for prioritized examination of their applications under a pilot project recently launched by the China National Intellectual Property Administration (CNIPA). Details can be found at https://www.cnipa.gov.cn/art/2022/12/23/art_53_180967.html.

China

Further amendments to Anti-Unfair Competition Law proposed

Further to amendments made in 2017 and 2019, in November 2022 the State Administration for Market Regulation issued the *Draft Amendments to Anti-Unfair Competition Law* 《中華人民共和國反不正當競爭法（修訂草案徵求意見稿）》 for public consultation.



Annie Tsoi

The proposed amendments are largely in response to the new market order arising from the emerging digital economy. Key amendments include:-

Acts of confusion re-defined

- (a) Two new types of *acts of confusion* are proposed (Article 7):-
- i. any unauthorized use of a sign or page being identical or similar to the page design, we media (“自媒體”) name, software application name or icon etc of another with certain influence;
 - ii. any unauthorized use of a commercial sign of another with certain influence as a search keyword to mislead the relevant public.
- (b) The draft amendments prohibit any unauthorized use of a sign being *identical or similar* to the name (including abbreviations and trade names) of a *market entity* (instead of an “enterprise” under the current laws) (Article 7).
- (c) Business operators are prohibited from offering assistance in respect of storage, transportation, mailing, publishing, concealment, business premises etc in implementing any act(s) of confusion.

Use of algorithm, technology and platform rule prohibited

- (d) Business operators are also prohibited from using data, algorithm, technology and platform rules or other means to influence users’ choices in disrupting fair competition and market order (Article 15).

Specifically, business operators are not allowed to implement technical measures to include providing associated keyword(s) or false operation in misleading or luring users to click thereon thereby directing users to business operators’ own products or services (Article 16).

- (e) Business operators are further barred from using algorithm to analyse user preference, transaction habit and other characteristics so as to implement unreasonable differential treatment or unreasonable trade restrictions on others (Article 19).

Trade secret protected

- (f) Business operators are not allowed to improperly obtain, use, disclose or transfer commercial data of other business operators (Article 18).

“Commercial data” refers to data with commercial value that is legally collected by business operators for which corresponding technical management measures have been taken, unless such data is already accessible in the public domain for free.

Factors to be considered by Courts

- (g) In deciding whether an act constitutes an unfair competition act under the newly introduced Articles 13-20, the Court is to comprehensively consider the following factors (Article 21):-
- i. its impact on the legitimate rights and interests of consumers and other business operators as well as social and public interest;
 - ii. whether coercive and fraudulent means are adopted;
 - iii. whether the act violates industry practices and business ethics;
 - iv. whether the act violates the principle of fairness, reasonableness and non-discrimination; and
 - v. its impact on technological innovation, industry development and network ecology.

In view of the ever-changing market condition and business needs, the draft amendments illustrate the Chinese Government's commitment and ongoing efforts to strengthen the market regulatory regime and combat unfair competition behaviour.

Notice: This newsletter is intended for general information only and should not be taken as legal advice of Wilkinson & Grist. For any enquiries, please contact Ms Anita Kwan at anitakwan@wilgrist.com.

© WILKINSON & GRIST 2023