

Discovery, Disclosure, and Data Transfer in Asia: China and Hong Kong

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DISCOVERY, DISCLOSURE, AND DATA TRANSFER IN ASIA: CHINA AND HONG KONG

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I. CIVIL LITIGATION IN HONG KONG AND CHINA: OVERVIEW

A. *Hong Kong*

Previously under United Kingdom control, Hong Kong has been a Special Administrative Region of the People's Republic of China since 1997. Under the "one country, two systems" principle, today Hong Kong is part of China but maintains significant autonomy in all areas except defense and foreign affairs. Most Chinese laws do not apply in Hong Kong.¹

Hong Kong's legal system is separate and distinct from that of mainland China. For example, the Basic Law (Hong Kong's constitution) provides that the common law applies in Hong Kong,² whereas civil law governs the People's Republic of

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1. *Legal System of Hong Kong*, DEP'T OF JUSTICE, GOVERNMENT OF HONG KONG (Apr. 23, 2014), <http://www.doj.gov.hk/eng/legal/index.html>.

2. XIANGGANG JIBEN FA art. 8 (H.K) [hereinafter BASIC LAW].

China (PRC).³ Hong Kong accordingly has its own civil procedure rules, called the Rules of the High Court and Rules of the District Court, depending on the court involved. These rules cover discovery, codified in Order 24 in each set.⁴ As Hong Kong is a common law jurisdiction, case law also plays a role in developing these discovery rules by creating binding precedent.

B. *China*

As the PRC transitioned to a market economy in the 1980s and 1990s, its civil litigation system developed from limited origins.⁵ Before that time, Chinese officials felt that legal obligations or rights were not needed as conflicts could be resolved via mediation or administratively.⁶ As China shifted to a market economy, this sentiment became increasingly anachronistic, and many new laws entered into force to meet the growing need for civil litigation.⁷

China today is a civil law jurisdiction, drawing influence from continental Europe, Soviet socialism, and imperial China. Unlike common law countries which rely on precedent, China's laws are codified and passed by the National People's Congress, the Standing Committee of the National People's Congress, and

3. *Introduction to China's Legal System*, LIBRARY OF CONGRESS (Mar. 7, 2014), <http://www.loc.gov/law/help/legal-research-guide/china.php>.

4. *See* The Rules of the High Court (Gazette Number 25 of 1998 s.2) [hereinafter Rules of the High Court]; The Rules of The District Court (2009) Cap.336H, 67, O. 24 (H.K.) [hereinafter Rules of the District Court]. The two bodies of rules do not differ in substance and their numbering is identical. For clarity's sake, only the Rules of the High Court are cited in this paper.

5. Donald C. Clarke, *The Chinese Legal System*, GEO. WASH. U. L. SCH. (July 4, 2005), <http://docs.law.gwu.edu/facweb/dclarke/public/Chinese-LegalSystem.html>.

6. *Id.*

7. *Id.*

administrative agencies.⁸ The Supreme People's Court, the State Council, the Central Military Commission, the Supreme People's Procuratorate, and the standing committees of people's congresses in subnational regions all have the power to submit bills to the National People's Congress,⁹ to obtain legal interpretations from the Congress,¹⁰ or to request that the Congress review a law's constitutionality.¹¹ However, none of these bodies make law in their own right.

II. GENERAL DISCOVERY OBLIGATIONS

A. *Hong Kong*

1. Party Discovery

Parties to civil litigation in Hong Kong are subject to broad disclosure and document inspection obligations designed to enable courts to address cases justly using all relevant materials. The Rules of the High Court, mainly Order 24, govern discovery in Hong Kong for paper documents and electronically stored information.¹² These rules encourage parties to be realistic about their prospects of success in the litigation and thus facilitate settlement because they require the disclosure of both harmful and helpful documents.

8. Lifa Fa (立法法) [Legislation Law of the People's Republic of China] (promulgated by the National People's Congress, March 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 112 (China).

9. *Id.* at art. 12.

10. *Id.* at art. 43.

11. *Id.* at art. 90.

12. CSAV Group (Hong Kong) Ltd. v. Jamshed Safdar [2007] 10 H.K.C.F.A.R. 629 (C.F.A.). *See also* Derby & Co. Ltd v. Weldon (No. 9) [1991] 2 All E.R. 901 (Eng.).

Under the Rules of the High Court, parties must exchange lists of relevant documents within 14 days after the close of pleadings.¹³ When serving the list on an opponent, parties are also required to serve a notice to inspect, which states a time and place for the opponent to inspect the disclosed documents. The time of inspection must be within 7 days of the day the list is served.¹⁴ The Rules of the High Court provide, however, that parties to an action may agree to dispense with or limit the discovery of documents which they would otherwise be required to make to each other.¹⁵

The duty to disclose under the Rules of the High Court extends to all relevant documents that are or have been in a party's "possession, custody or power."¹⁶ This includes documents a party has or had the legal right to inspect or copy even if not in the party's possession (e.g., documents held by third-party agents).

2. Pre-Action Discovery

Pursuant to Hong Kong's Civil Justice Reform on April 2, 2009, prospective parties in civil cases may obtain discovery before an action is filed by submitting an application to the court for pre-action discovery from an intended party.¹⁷ The application must be supported by an affidavit satisfying three requirements. First, the affidavit must identify the grounds on which the applicant and intended party will become parties to proceedings.¹⁸ Second, the affidavit must identify documents the

13. Rules of the High Court at O. 24, r. 2(1).

14. *Id.* at r. 9.

15. *Id.* at r. 1(2).

16. *Id.* at r. 2(1).

17. *Id.* at r. 7A(1).

18. *Id.* at r. 7A(3)(a).

applicant seeks to discover.¹⁹ These documents must be “directly relevant” to an issue that arises or is likely to arise in the case, meaning that either a party in the proceedings is likely to rely on them as evidence or the documents support or harm a party’s case.²⁰ Finally, the affidavit must state why the intended party is likely to have the documents in his possession, custody, or power.²¹

3. Discovery from Non-Parties

Parties to civil litigation in Hong Kong may also obtain discovery from a non-party upon the issuance of a formal court order.²² An application for non-party discovery must be supported by an affidavit satisfying two requirements. First, the affidavit must identify the documents the applicant seeks to discover.²³ These documents must be “relevant” to an issue that arises or is likely to arise in the case.²⁴ Note that this is slightly different from the requirement that documents be “directly relevant” in the pre-action discovery context. Second, the affidavit must specify why the non-party is likely to have the documents in his possession, custody, or power.²⁵

4. Penalties for Discovery Violations

When a party fails to comply with a discovery order, the court has discretion to order any remedy it considers just. This

19. *Id.* at r. 7A(3)(b).

20. *Id.* at r. 7A(3A).

21. *Id.* at r. 7A(3).

22. *Id.* at r. 7A.

23. *Id.* at r. 7A(3)(b).

24. *Id.*

25. *Id.*

may include dismissing the action, striking a defense, or committing the liable party for contempt of court.²⁶ To issue an order for dismissal, courts generally must find that the plaintiff sought to avoid giving discovery and thus made a fair trial impossible.²⁷ If a fair trial is still possible, the court must find that the party willfully disobeyed the court by not complying with the discovery order.²⁸ The order for dismissal may be issued with respect to the entire case or only those parts related to the missing discovery.²⁹ Orders to strike out a defense require a showing of willful default or negligence by the defendant.³⁰ A finding that a party has deliberately destroyed documents before or during the proceedings might also justify such an order.³¹ The court may also order the noncompliant party to pay a fine to the court.³² A party who fails to comply with a discovery order will only in very exceptional circumstances be liable to committal (i.e., imprisonment).³³

5. The Duty to Search, Produce, and Disclose Documents

In September 2014, the Hong Kong judiciary introduced a new pilot scheme for discovery of electronically stored documents through the publication of Practice Direction SL 1.2 (“PD SL 1.2” or “the Direction”), which followed a decision by the

26. *Id.* at r. 16.

27. 90 HALSBURY’S LAWS OF HONG KONG § 556 (48th ed. 2009).

28. *See* LDB Sales Co Ltd. v. German Electronic Ltd. [2006] 4 H.K.C. 602 (C.A.).

29. 90 HALSBURY’S LAWS OF HONG KONG § 556 (48th ed. 2009).

30. *See* Ka Wah Bank Ltd v. Low Chung-song [1989] 1 H.K.L.R. 451 (C.A.).

31. *Id.*

32. The Rules of the High Court (2008) Cap. 4A, 7, O. 2, r. 3 (H.K.).

33. 90 HALSBURY’S LAWS OF HONG KONG § 558 (48th ed. 2009).

Hong Kong Court of First Instance on the same topic.³⁴ PD SL 1.2 is based primarily on the equivalent U.K. rules for e-discovery of documents.³⁵ The new rules are mandatory for all cases for which the claim or counterclaim exceeds HK\$8 million and there are at least 10,000 documents subject to discovery, but the rules can also apply on the court's own motion or on application by a party.³⁶

PD SL 1.2 differs from the pre-existing discovery rules in several key respects. First, the scope of discovery extends only to those documents that are directly relevant to the issues in dispute, defined as "Electronic Documents which are likely to be relied on by any party to the proceedings or Electronic Documents which support or adversely affect any party's case."³⁷ Expansion of the scope of discovery is available only when a party can show that the extension is necessary for the resolution of an issue in dispute.³⁸ Second, the Direction requires the parties' legal representatives to cooperate at an earlier stage of the proceedings. By the time of the first Case Management Conference, the parties must have already discussed the extent and scope of discovery and created finalized Electronic Discovery Questionnaires that address the parties' plans to manage electronic discovery.³⁹

PD SL 1.2 also incorporates the pre-existing requirement that parties must conduct a reasonable search, not an exhaustive

34. *Chinacast Education Corp v Chan Tze Ngon* [2014] HKEC 1381, Court of First Instance, 14 August 2014.

35. Practice Direction 31B, Civil Procedure Rules (U.K.).

36. Practice Direction SL 1.2, ¶1 (H.K.) [hereinafter PD SL 1.2].

37. *Id.* at ¶5.1.

38. *Id.* at ¶5.3.

39. *Id.* at ¶¶9, 13-14.

one, to disclose all relevant data.⁴⁰ In the electronic context, a “reasonable search” includes recovering deleted computer files through computer forensics⁴¹ and extracting electronic information in a form that a counterparty may access.⁴² Parties must employ search terms calculated to produce relevant documents; using terms that produce tranches of irrelevant documents, or leave relevant ones undiscovered, is unreasonable.⁴³ Some factors practitioners consider when conducting a reasonable search for electronic documents include the accessibility of electronic documents, the location of relevant documents and systems, electronic devices or media that contain such documents, the likelihood of locating relevant data, and the cost of recovery and disclosure.

Parties are under an ongoing duty to disclose.⁴⁴ If a party, or a party’s attorney, discovers a relevant document that should have been disclosed (or was produced after disclosure was made), they must immediately share it with their counterparty.⁴⁵

40. *Deacons v. Kevin Richard Bowers*, DCCJ 3046/2007 (D.C. Apr. 15, 2008) (Legal Reference System) (H.K.) (“A party is required to take all reasonable steps and best endeavors to discover relevant documents.”). *See also* *Moulin Global Eyecare v. KPMG*, HCA 118/2007 (C.F.I. Feb. 25, 2010) (Legal Reference System) (H.K.).

41. *Deacons* at para. 20.

42. *Liquidators of Moulin Global Eyecare v. Ernst & Young*, HCCW 470/2005 (C.F.I. June 18, 2008) (Legal Reference System) (H.K.) at para.7.

43. *Id.*

44. 90 HALSBURY’S LAWS OF HONG KONG § 569 (48th ed. 2009).

45. *Id.*

6. The Duty to Preserve Documents

It is the solicitor's duty to ensure that her client preserves evidence.⁴⁶ Hong Kong follows the Commonwealth rule: prior to litigation, parties must not deliberately destroy documents, but there is no duty to preserve them.⁴⁷ Parties' deliberate destruction of documents may subject them to sanctions by the court.⁴⁸ Outside the context of electronic discovery, there is no duty to preserve documents prior to litigation, although it is good practice to do so once litigation is contemplated because the court may compel litigants to explain what happened to lost or destroyed documents.⁴⁹ Within the context of electronic discovery, PD SL 1.2 imposes an additional obligation on each parties' legal representatives to notify their clients of the need to preserve electronic documents as soon as litigation is contemplated rather than after litigation has commenced.⁵⁰

46. *Guess? Inc. and Others v. Lee Seck Mon and Others*, HCA 604/1986 (S.C. April 30, 1986) (Legal Reference System); 90 HALSBURY'S LAWS OF HONG KONG § 568 (48th ed. 2009) ("It is [the solicitor's] duty to take positive steps to ensure that the client appreciates the duty of discovery and the importance of not destroying documents which might have to be disclosed" (citing *Myers v. Elman* [1940] A.C. 282); see *Infabrics Ltd v. Jaytex Ltd* [1985] F.S.R. 75 (Eng.) (solicitor's duty goes beyond instructing clients to preserve documents)).

47. 90 HALSBURY'S LAWS OF HONG KONG § 569 (48th ed. 2009) (citing *British American Tobacco Australia Services Limited v. Cowell* [2002] VSCA 197 (Austl.) (courts may only sanction parties for pretrial destruction of documents if the destroying party's intent was to pervert the course of justice); *Douglas v. Hello! Ltd (No 2)* [2003] 1 All E.R. 1087 (Eng.) (drawing a distinction between destruction of documents before and after proceedings begin).

48. *Id.*

49. Rules of the High Court at O. 24, r. 7(1).

50. PD SL 1.2, *supra* note 36, at ¶7.

7. Discovery Costs

Generally speaking, discovery costs are “costs in the cause,” meaning that the party who ultimately loses the case bears them.⁵¹ Hong Kong courts may allocate costs differently for good reason.⁵² For non-party discovery, the party seeking the discovery typically pays the costs unless the disclosing non-party shared in the wrongful act at issue in the case or obstructed justice, in which case the non-party should bear its own costs and pay the costs of the party seeking the discovery as well.⁵³

Courts may, in their discretion, order one party to indemnify another for costs.⁵⁴ The Hong Kong Rules of Civil Procedure do not differentiate between costs for disclosure of electronic documents and traditional discovery.

8. Privilege

Privileged documents are not discoverable. The Hong Kong judiciary recognizes privilege protection as a constitutional right.⁵⁵ Parties must disclose the existence of privileged documents, but adversaries may not view them. In contrast, parties may generally view each other’s confidential documents, although in certain situations a court may issue an order providing that an adversary’s counsel, but not client, may view

51. Rules of the High Court at O. 62, r. 3(2).

52. *Id.*

53. See *Cinopoly Records Co. Ltd. v. Hong Kong Broadband Network Ltd.* [2006] 1 H.K.L.R.D. 255 (C.F.I.) (H.K.); see also *Totalise plc v. Motley Fool Ltd.* [2003] 2 All E.R. 872, CA (Eng.).

54. Rules of the High Court at O. 62, r. 3(2).

55. BASIC LAW, *supra* note 2, at art 35; see also *Akai Holdings Ltd. (In Compulsory Liquidation) v. Ernst & Young* [2009] 12 H.K.C.F.A.R. 649 (C.F.A.) (The right to confidential legal advice “is entrenched for all persons in Hong Kong. It is so entrenched by two constitutional provisions.”).

the documents (e.g., commercially sensitive documents). Hong Kong recognizes two main categories of privilege which preclude disclosure: legal advice privilege and litigation privilege.

Legal advice privilege covers written exchanges between a party and her counsel, when those communications are confidential and intended to provide or solicit legal advice. The legal advice privilege protects all such documents, regardless of whether they relate to the instant litigation.⁵⁶ However, only employees whose jobs require them to seek legal advice on behalf of the organization benefit from the privilege. The privilege does not cover factual accounts sent between attorney and client, but a lawyer's notes and opinions related to those factual accounts are privileged.⁵⁷

Litigation privilege covers communications between a client or her lawyers and a third party when the messages aim to conduct the instant litigation, aid its course, or give and receive advice related to it.⁵⁸

In general, privilege rules in Hong Kong favor function over form. Marking documents "privileged" does not necessarily give them that status. Privilege does not extend to documents because they contain confidential information or were generated for internal use.

56. *Axa China Region Insurance Co. Ltd v. Pacific Century Insurance Co. Ltd* [2005] H.K.E.C. 893 (C.F.I.); *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No. 5)* [2003] E.W.C.A. Civ. 474 (Eng.).

57. *Rockefeller & Co., Inc. v. The Secretary for Justice and Lee Kwok Wing Kevin* [2000] 3 H.K.L.R.D. 351 (C.A.).

58. *Akai Holdings Ltd. (In Compulsory Liquidation) v. Ernst & Young* [2009] 12 H.K.C.F.A.R. 649 (C.F.A.).

B. *China*

1. Discovery

China has no system of discovery similar to those of Western legal systems. Instead, parties submit evidence on which they intend to rely to the People's Court and in some cases exchange it with their adversary, as provided for in Chapter VI of China's Civil Procedure Law and the Supreme People's Court Civil Evidence Rules ("Civil Evidence Rules").⁵⁹ Under the Civil Procedure Law, parties are responsible for gathering their own evidence,⁶⁰ although they may seek the assistance of the court.⁶¹ Because parties must already be involved in an active matter to obtain the help of the court (or present their own evidence), pre-trial discovery is impossible in China. While parties are prohibited from withholding evidence in relation to the case without justification, there is no clear sanction for doing so.

Under Article 33 of the Civil Evidence Rules, parties may set the time they have to produce evidence by mutual consent, with approval from the People's Court.⁶² Without such an order, the exchange must occur within thirty days of the second day after the party receives the summons.⁶³ Extensions are possible

59. Zuigao Renmin Fayuan Guanyu Minshi Sussng Zhengju De Ruogan Guiding (最高人民法院关于民事诉讼证据的若干规定) [Provisions of the Supreme People's Court on Evidence in Civil Proceedings] (promulgated by the Judicial Comm. of the Supreme People's Court, Dec. 6, 2001, effective Apr. 1, 2002), art. 10 (People's Republic of China), <http://www.china.com.cn/chinese/PI-c/92700.htm>.

60. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013), art. 65, http://www.gov.cn/flfg/2012-09/01/content_2214662.htm [hereinafter PRC Civil Procedure Law].

61. *Id.* at art. 3.

62. *Id.* at art. 33.

63. *Id.* at art. 35.

if applied for within the time limit and in special circumstances.⁶⁴

Parties must submit original objects or documents, or copies authenticated by the court.⁶⁵ Evidence from outside of the PRC must be notarized and legalized.⁶⁶ Furthermore, Article 12 of the Civil Evidence Rules requires any foreign language evidence to be translated into the Chinese language and the translations, as well as the original documents, must be submitted to the court.⁶⁷

2. Preservation of Documents

There is no general duty to preserve documents in China. Article 74 of the Civil Procedure Law provides that “when there is the likelihood that evidence may be destroyed or lost or difficult to obtain later on, the participants in proceedings may apply to the People’s Court for the evidence to be preserved. The People’s Court may also on its own initiative take measures to preserve such evidence.”⁶⁸ Evidence preservation orders are therefore a valuable method of obtaining evidence controlled by a counterparty. Requests for these orders must be filed within seven days of the court-imposed deadline for evidence production.⁶⁹

Litigation holds may be difficult to implement in China because Chinese employees commonly use personal email or

64. *Id.* at art. 36.

65. *Id.* at art. 10.

66. *Id.* at art. 11.

67. *Id.* at art. 12.

68. *Id.* at art. 74.

69. *Id.*

social media accounts to conduct business and collecting information from such sources requires the employee's consent under Chinese data privacy law.⁷⁰

3. Judicial Investigation

When a party faces difficulties searching for or producing evidence, it may request a court to investigate pursuant to Article 64 of the PRC Civil Procedure Law to facilitate obtaining evidence from other entities. These applications are granted subject to the court's discretion and belief that the evidence is "necessary for adjudicating the case."⁷¹

As a backstop to the writ, Chinese courts retain the authority to investigate *sua sponte*,⁷² but rarely do so in civil cases. Should a court undertake its own inquiry, it would be far more powerful than a writ of investigation, because any serious uncooperative action could violate criminal law.⁷³

4. Privilege

Chinese law does not formally recognize a privilege protecting communications between attorneys and clients. Nevertheless, Article 38 of the Law on Lawyers includes provisions requiring attorneys to preserve the confidentiality of any trade

70. Jiuye fuwu he guanli tiaoli (就业服务和管理条例) [Regulations on Employment Services and Employment Management] (promulgated by the Ministry of Labor and Social Security, Oct. 30, 2007, effective Jan. 1, 2008), art. 13, http://www.gov.cn/gzdt/2007-11/07/content_798826.htm.

71. PRC Civil Procedure Law, *supra* note 60, at art. 64.

72. *Id.*

73. *Id.* at art. 65 ("[Parties of whom a court makes inquiry] may not refuse to provide information and evidence.").

secrets or state secrets they learn.⁷⁴ This provision theoretically obliges lawyers to keep information secret if their clients request them to do so. However, the PRC Civil Procedure Law and the PRC Criminal Procedure Law impose general disclosure duties on “any relevant units or individuals” when a trial is underway.⁷⁵ It remains to be seen how Chinese courts will reconcile these competing regulations.

III. CROSS-BORDER DISCOVERY

A. *Hong Kong*

1. Obtaining Evidence in a Foreign Proceeding

Requests for evidence are made *ex parte* before the Court of First Instance and must include the Letter of Request from the originating country.⁷⁶ The order must then be served on the witness or owner of the evidence; the Chief Bailiff of Hong Kong performs service pursuant to the Hague Convention on International Service.⁷⁷ This process of obtaining evidence from Hong Kong usually takes about two months.⁷⁸ Service may be obtained pursuant to other methods, however, such as registered

74. Zhonghua Renmin Gongheguo Lushi Fa (中华人民共和国律师法) [Lawyer's Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997), art. 38, http://www.gov.cn/flfg/2007-10/28/content_788495.htm.

75. PRC Civil Procedure Law, *supra* note 60, at art. 65; Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., July 1, 1979, effective as amended Mar. 14, 2012), art. 48, http://www.gov.cn/flfg/2012-03/17/content_2094354.htm.

76. Rules of the High Court at O. 70, r. 2.

77. Rules of the High Court at O. 69, r. 4.

78. HCCH | *Authorities*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Aug. 22, 2011), http://www.hcch.net/index_en.php?act=authorities.details&aid=492.

mail or personal service, as long as the server complies with Hong Kong law.⁷⁹ If the witness is unwilling to cooperate, then foreign litigants may make an application under the Hague Convention on Evidence (the “Hague Convention”). If the request requires a deposition or examination of an individual, the requesting party may nominate a person (such as a Hong Kong solicitor) to conduct the examination.⁸⁰ Letters of request are first sent to the designated Hague Convention Authority in Hong Kong, the Chief Secretary for Administration.⁸¹ The Secretary forwards the request to the Registrar, who may execute the request himself if the Secretary determines that the requesting party does not need to execute it through a local agent.⁸² If the request does require execution through a local agent, and none has been named in the request, the Law Officer of International Law, a Hong Kong official, will make the application before a local court and otherwise effect the request.⁸³

Certain restrictions apply to the ability to gather discovery in Hong Kong for use in a foreign proceeding. First, the U.S. proceedings must be instituted or their institution must be contemplated.⁸⁴ Second, the applicant must seek particular documents; fishing-expedition style discovery is not permitted.⁸⁵ Third, the discovery sought must be likely to be in the witness’s

79. *Tow v. Rafizadeh*, 392 B.R. 248 (Bankr. S.D. Tex. 2008).

80. Rules of the High Court at O. 70, r. 4.

81. *HCCH | Authorities*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Aug. 22, 2011), http://www.hcch.net/index_en.php?act=authorities.details&aid=491.

82. Rules of the High Court at O. 70, r. 1.

83. *Id.* at r. 3(b).

84. Evidence Ordinance (1997) Cap. 8, 32 § 75 (H.K.).

85. *Id.* at § 76(4)(b).

possession, custody, or power.⁸⁶ Fourth, discovery that is privileged under Hong Kong or U.S. law need not be produced.⁸⁷

2. Hong Kong Privacy Laws

Litigants in Hong Kong should be aware of relevant privacy guidelines governing data transfer. Subject to limited exceptions, the Personal Data Protection Ordinance prohibits the transfer of personal data out of Hong Kong, but has not yet been brought into force.⁸⁸ The Ordinance authorizes the Hong Kong Privacy Commissioner for Personal Data to permit data transfers to jurisdictions which have privacy laws similar to Hong Kong.⁸⁹

Hong Kong does not have any blocking statute in force.⁹⁰

3. Hong Kong Bank Secrecy Laws

Parties seeking discovery from Hong Kong may face resistance under the Hong Kong common law of bank secrecy. In Hong Kong, a banker has a common law duty, arising out of the contract between the banker and his customer, to keep the affairs of the customer secret “including the state of the customer’s account and all information obtained by the banker by virtue of the banking relationship.”⁹¹ There are four exceptions to the duty not to disclose including “(i) disclosure under compulsion of law; (ii) disclosure under a duty to the public; (iii) disclosure in furtherance of the interests of the banker; and (iv) consent of

86. *Id.* at § 76(4)(a).

87. Rules of the High Court at O. 70, r. 6.

88. Personal Data (Privacy) Ordinance (2013) Cap. 486, 22, § 33 (H.K.).

89. *Id.* at § 33(3).

90. Rules of the High Court at O. 70, r. 6.

91. *Ssangyong Corp. v. Vida Shoes Int’l, Inc.*, No. 03 Civ. 5014, 2004 WL 1125659, at * 6 (S.D.N.Y. May 20, 2004).

the customer.”⁹² Importantly, there are no independent banking secrecy statutes in Hong Kong.

Deposit-taking entities in Hong Kong are subject to an independent customer confidentiality obligation. The Hong Kong Monetary Authority regulates all banks in the region through its Corporate Governance Code of Conduct (“HKMA Code”). This code requires banks to comply with all statutory, regulatory, and common law duties when handling customer information, even after the bank’s relationship with a customer ends.⁹³ This includes obtaining customer consent before releasing account details to third parties.⁹⁴ However, legal duties to disclose (including court-imposed duties) limit the HKMA Code. Additionally, banks in Hong Kong typically include standard clauses allowing the bank to provide information to regulators and certain third parties in the terms and conditions for opening a new account.

92. *Id.*

93. Hong Kong Monetary Authority, *Code of Conduct (CG-3)* (2002) at 2.9.2, available at <http://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/CG-3.pdf>.

94. *Id.* at 2.9.3.

To date, U.S. courts have rejected arguments that Hong Kong bank secrecy law should bar discovery and have ordered production of documents argued to fall within those laws.⁹⁵

B. China

1. Obtaining Evidence in a Foreign Proceeding

While China is also a signatory to the Hague Convention, it has executed Article 23 which allows signatories to exclude the production of “pre-trial discovery of documents.” Thus, because only documents relevant for the purpose of trial are discoverable, parties seeking discovery pursuant to the Hague Convention should narrowly tailor their requests and specify that the discovery sought is for trial.⁹⁶ Even voluntary depositions may not be taken in China without approval from the Chinese authorities.⁹⁷ In practice, willing Chinese individuals are often flown to a more permissive jurisdiction, such as Hong

95. See *Ssangyong Corp.*, 2004 WL 1125659, at * 6 (ordering production of documents and noting that “Hong Kong has not underscored its interest in bank secrecy by making it the subject of a statute, or of criminal penalties”); *United States v. Chase Manhattan Bank*, 584 F. Supp. 1080, 1084-85 (S.D.N.Y. 1984) (ordering production based on compulsion of law exception and because the allegations of fraud, “if not public danger” required disclosure); *Garpeg, Ltd v. United States*, 583 F. Supp. 789, 796 (S.D.N.Y. 1984) (finding that “interest of the United States in enforcing its tax laws significantly outweighs Hong Kong’s interest in preserving bank secrecy”); *Vanguard Intern. Mfg., Inc. v. United States*, 588 F. Supp. 1229 (S.D.N.Y. 1984) (compelled production of bank records which were subject to a Hong Kong court’s preliminary injunction forbidding disclosure).

96. Hague Convention, *Table Reflecting Applicability of articles 15, 16, 17, 18, and 23 of the Hague Evidence Convention* (May 2014), available at <http://www.hcch.net/upload/appl-table20e.pdf>.

97. *Id.*

Kong, to be deposed, and non-Chinese offices of Chinese companies may be able to provide access to documents that are in China.

Foreign litigants seeking discovery under the Hague Convention must submit a Letter of Request to China's Ministry of Justice, which then forwards it to the Chinese Supreme Court. If an order is ultimately granted, discovery will be limited to documents that are closely related to the subject of the litigation. There will not be broader fishing-expedition style discovery or discovery of any documents the disclosure of which would violate Chinese law.⁹⁸

Many U.S. courts evaluating the efficiency of seeking evidence in China through the Hague Convention have found that it is "not a viable alternative of securing information."⁹⁹ Chinese judicial authorities frequently take more than a year to respond to Hague Convention requests, and the eventual production may be limited by privacy and secrecy laws.¹⁰⁰

98. *Id.*

99. *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 557 (S.D.N.Y. 2012); *see also* *Gucci America, Inc. v. Weixing Li*, 2011 WL 6156936, at *9 (S.D.N.Y. Aug. 23, 2011) ("Without concrete evidence suggesting that China's compliance with Hague Convention requests has, in fact, dramatically improved . . . [the Hague Convention is] not a viable alternative method of securing the information Plaintiffs seek"); *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 250 (S.D.N.Y. 2010) ("Each of the relevant factors, with the exception of the location of the information, favors discovery without resort to the Hague Evidence Convention").

100. *Wultz*, 910 F. Supp. 2d at 555 (court did not require Hague Convention recourse, noting that "[w]ell over a year has passed since the submission of [plaintiff's initial Hague Convention request]"); *Weixing Li*, 2011 WL 6156936, at *7 (court citing materials stating that "China typically processes Hague Convention requests within six-to-twelve months and that approximately 50% of such requests are granted"); *Milliken*, F. Supp. 2d at 248 (court relying on State Department circular stating that Hague Convention requests to mainland China "may take more than a year to execute").

2. Privacy Laws in China

The EU model of personal data does not yet exist in the PRC. China also has not enacted a single piece of legislation that specifically addresses the collection, storage, processing, and transfer of personal information. Effective February 1, 2013, however, the Guidelines for Personal Information Protection Within Public and Commercial Information Systems came into effect in China (the “Guidelines”). The Guidelines categorize personal information and set forth guidance for the collection, processing, transfer, and deletion of data. While non-compulsory, the Guidelines require that the subject consent to the transfer of data outside of China unless the transfer is authorized by law.¹⁰¹

3. State Secrets Doctrine

Under the PRC Constitution, Chinese parties are forbidden from publicly disclosing anything that could be considered a “state secret” which is an extremely broad and unpredictable piece of legislation in China.¹⁰² The Law of the People’s Republic of China on Guarding of State Secrets, Article 2, vaguely defines state secrets as “matters that have a vital bearing on state security and national interests.” Chinese authorities frequently designate information as “secret” in the most dynamic sectors of

101. Xinxi anquan jishu gonggong ji shangyong fuwu xinxi xitong geren xinxi baohu zhinan (信息安全技术公共及商用服务信息系统个人信息保护指南) [*Information Security Technology Guidelines for Personal Information Protection on Public and Commercial Service Information Systems*] (promulgated by the Ministry of Industry and Information Technology, effective Feb. 1, 2013) (P.R.C.).

102. XIANFA art. 53 (2004) (China).

the Chinese economy including banking, manufacturing, energy, telecommunications, and electronics.¹⁰³

Courts in the U.S. and Hong Kong have for the most part rejected arguments that documents cannot be produced because of China state secret laws. For example, in a recent decision in which a Hong Kong regulator sought audit information from a firm operating in both Hong Kong and China, the Hong Kong court found that the auditor may not invoke the state secrets doctrine as a blanket defense for nonproduction.¹⁰⁴ Instead, the court stated that the auditor must show the requested documents in question actually contain state secrets and it would therefore violate mainland law to transfer the information to Hong Kong and disclose it there.¹⁰⁵

Likewise, U.S. courts are generally not receptive to arguments based on blocking statutes such as the China state secrecy laws. In *Munoz v. China Expert Technology*, the Southern District of New York rejected defendants' argument that the plaintiffs should proceed through the Hague Convention rather than the Federal Rules of Procedure because of China's state secrecy laws. In so ruling, the court stated "[t]hese laws have a broad

103. See, e.g., *S.E.C. v. Deloitte Touche Tohmatsu CPA Ltd.*, Civil Action No. 11-mc-512, 2013 WL 1720512 (D.D.C. Apr. 22, 2013).

104. *The Securities and Futures Commission v. Ernst & Young*, HCMP 1818/2012 (C.F.I. May 23, 2014) (Legal Reference System) (H.K.).

105. *Id.*

sweep and can preclude disclosure of a host of nebulously defined categories of information. . . . thus they are viewed with some skepticism in U.S. courts.”¹⁰⁶

4. Bank Secrecy Laws

When the discovery or evidence sought in China involves banking information, several Chinese laws may preclude the disclosure of such information.¹⁰⁷ In cases involving these bank secrecy laws, the party from whom discovery was sought opposed discovery arguing that it was precluded under China bank secrecy laws and the requesting party must proceed through the Hague Convention. Courts in these circumstances have performed a case-by-case analysis to decide whether to order the parties to use the Hague Convention or allow discovery pursuant to Federal Rules. The following factors were considered:

- 1) The documents’ importance to the litigation
- 2) The degree of specificity of the request
- 3) Whether the information originated in the U.S. or overseas
- 4) The availability of alternative means of securing the information (including Hague Convention mechanisms)

106. *Munoz v. China Expert Tech., Inc.*, 07 CIV. 10531 AKH, 2011 WL 5346323, at *1 (S.D.N.Y. Nov. 7, 2011). *See also* *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1471 (9th Cir. 1992) (“While we acknowledge the importance of the interests the State Secrecy statute is designed to protect, we conclude in the circumstances of this case that PRC’s laws limiting disclosure cannot excuse Beijing’s failure to comply with [the discovery order].”).

107. *See Tiffany (NJ) LLC v. Forbse*, No. 11 Civ. 4976 (NRB), 2012 WL 1918866, at *4 (S.D.N.Y. May 23, 2012) (listing provisions under Chinese law which preclude the disclosure of banking information).

- 5) Whether noncompliance would undermine the interests of the U.S. or of the other country involved¹⁰⁸

Southern District of New York courts consider two additional factors:

- 6) Hardship of compliance on the party responding to the request
- 7) The good faith of the party from whom information is requested¹⁰⁹

In examining the above factors, most U.S. courts have found that the Chinese bank secrecy laws do not require parties to obtain evidence through the Hague Convention.¹¹⁰ In *Weixing Li*, the court stated in this regard that:

[w]hile China undoubtedly has an interest in enforcing its bank secrecy laws, “[i]t is clear that American courts are not required to adhere blindly to the directives of [foreign blocking statutes].” *Aerospatiale*, 482 U.S. at 544 n.29. Indeed, bank secrecy laws are entitled to less deference

108. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for Southern Dist. Of Iowa*, 482 U.S. 522, 544 n.28 (1987).

109. *Weixing Li*, 2011 WL 6156936, at *5.

110. *See, e.g., Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548 (S.D.N.Y. 2012) (ordering Bank of China to produce documents it claimed were protected under China’s bank secrecy laws); *Tiffany*, 2012 WL 1918866 (ordering Bank of China to produce documents it claimed were shielded from disclosure under China’s bank secrecy laws but ordering plaintiff to proceed through Hague Convention for other two Chinese banks); *Gucci America, Inc. v. Weixing Li*, 2012 WL 1883352, at *5 (S.D.N.Y. May 18, 2012) (granting plaintiffs’ motion to compel Bank of China to produce documents); *Milliken & Co.*, 758 F. Supp. 2d 238, 250 (S.D.N.Y. 2010) (“Each of the relevant factors, with the exception of the location of the information, favors discovery without resort to the Hague Evidence Convention”). *But see Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D.N.Y. 2011) (directing plaintiffs to request the information they sought in China through the Hague Convention).

when their protections amount to “simply a privilege that can be waived by the customer.”¹¹¹

The *Weixing Li* Court further found that banks doing business in the United States “cannot hardly hide behind Chinese bank secrecy laws as a shield against the requirements faced by other United States-based financial institutions” and the bank resisting discovery had not shown that compliance with a foreign court order would subject it to civil or criminal penalties.¹¹² This reasoning was subsequently embraced by other courts to order the production of documents notwithstanding the Chinese bank secrecy laws.¹¹³

IV. CONCLUSION

As demonstrated above, the discovery regimes in Hong Kong and the PRC present a stark contrast. Hong Kong affords litigants a robust, common law discovery system while China constricts parties’ options for obtaining discovery. The issues which arise in cross border litigation also differ significantly: the process to obtain documents in China through the Hague Convention is fraught with more restrictions and obstacles than Hong Kong law. Accordingly, when seeking discovery in Hong Kong or China, it is recommended that attorneys consult local counsel to ensure that they are properly complying with local law. The importance of working with local counsel is particularly important given the rapidly evolving privacy laws in both China and Hong Kong.

111. *Weixing Li*, 2011 WL 6156936, at *10.

112. *Id.*

113. See, e.g., *Wultz*, 910 F. Supp. 2d 548; *Forbse*, 2012 WL 1918866.