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On 25 March 2009, China's State Council (the country's cabinet) issued an Opinion to *Promote Shanghai Becoming an International Financial and Shipping Centre by 2020* ("Shanghai Opinion").

The government's plan to turn Shanghai into an international financial centre aims at restoring the city's past financial splendor (in 1949, Shanghai was Asia's leading international financial centre), and is also the first step toward internationalizing the Chinese Renminbi ("RMB"). Chinese leaders consider that it is now time for the national currency to play a more significant role in the world market, especially after the recent global financial crisis, which has demonstrated the vulnerability of the U.S. dollar. In this respect, there can be little doubt that a larger and more sophisticated financial market will facilitate the internationalization of the RMB.

**The Blueprint**

After years of fierce competition among Shanghai, Beijing and Shenzhen, the issuance of the Shanghai Opinion can be seen as a strong signal that Shanghai has emerged as the government's preferred choice to become the country's main financial centre. Over the last few years, Shanghai has progressively asserted itself as the most serious challenger. The city is home to many financial institutions and houses the national foreign exchange trading centre and national bond trading centre. It also is the location of the country's largest stock market in terms of market capitalization, turnover and capital raised. However, Shanghai is still behind the world's major financial centers. Therefore, the government's plan consists of progressively turning Shanghai into Asia's leading international financial centre, with the ability to compete with New York and London.

The general consensus is that by 2020, Shanghai should have:

- A pool of internationally competitive financial institutions
- A multi-functional and highly internationalized financial market system
- A pool of financial professionals
- A compatible system of taxation, credit, regulation and law

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As is often the case in China, provisions of the Shanghai Opinion can be described as being rather broad and unclear. Nevertheless, this “policy statement” is regarded by many experts as the first step toward a new economic era for Shanghai.

Many implementing regulations can be expected in the coming years/months, and foreign investors should look for the opportunities they will present. Indeed, in view of indentifying itself as an “international” centre and attracting talent from all over the world, Shanghai and China will have no choice but to provide foreign investors with increased access to the finance, shipping/logistics and related sectors.

Implementation - First Developments

a) Shanghai as pilot RMB settlement centre for international trade

On 8 April 2009, Shanghai was, together with a few other cities, approved as one of the Pilot RMB Settlement Centres for International Trade.

Eligible companies registered in the city will, therefore, be progressively entitled to use RMB as the settlement currency for import and export transactions (instead of USD, Euro or other currencies), thus avoiding risks of currency exchange fluctuation. This policy marks a significant change in the way export companies/banks will carry out business.

The RMB settlement trade volume, however, remained very low during the first few weeks that followed the launch of the program. Many experts have blamed incomplete and unclear supporting policies and relatively complicated procedures. The widespread expectation of RMB appreciation has also served to dissuade foreign investors from making settlement using RMB.

Notwithstanding initial difficulties, there is little doubt that the progressive generalization of RMB settlements will mark a major step in the internationalization and convertibility of the RMB.

b) New rules for growth capital firms in Shanghai

Over the last few weeks, foreign private equity firms have rushed to set up in Shanghai following groundbreaking measures introduced by the Shanghai Financial Services Office (the organ leading the city’s move toward becoming a financial and shipping hub) and new rules issued by local authorities of the Pudong District.

The Shanghai Financial Services Office announced that foreign growth capital firms are from now on entitled to set up entities that are allowed to make investments using RMB raised from domestic investors.

Thus far, foreign private equity and venture capital firms that have been in China for years have operated exclusively using money raised overseas. Many have experienced problems getting deals done due to resistance in letting foreigners take over prominent local companies. However, by authorizing growth capital firms to raise funds locally and in RMB, domestic investors will now be able to share in the profits. Foreign firms, therefore, hope to be treated like domestic investors, with subsequent freedom to invest in a broader range of sectors, subject to lighter administrative supervision.

Some of the biggest buyout firms, including Blackstone, Carlyle and KKR, are already lining up to establish RMB denominated funds.

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c) Attracting finance talents to the city

Chinese officials are well aware of the fact that the country's financial system remains relatively basic and that attracting foreign talent will be a key element to building up a truly sophisticated and credible financial centre. Historically, China's high income tax rate (up to 45 percent) has resulted in finance specialists being based in tax friendly jurisdictions, such as Hong Kong or Singapore, rather than relocating to Shanghai. Therefore, local authorities have decided to react to this by announcing the upcoming launch of a program designed to attract top-notch professionals. Among the multiple incentives to be offered, are those to assist these professionals to reduce their tax obligations.

Details of the incentives should be made available soon.

What to Expect in the Coming Months

Foreign investors can expect numerous rules and regulations, which will be aimed at turning Shanghai into a financial hub, to be issued in the near future. Many observers agree that some of these measures will include:

- Increase the number of courts dedicated to dealing with financial disputes
- Extension of international RMB settlement capabilities to more banks and companies
- Progressive modernization of rules governing mergers and acquisitions
- Development of over the counter markets for unlisted companies
- Progressive authorization for enterprises from outside China to issue RMB denominated bonds in China
- Progressive authorization for enterprises from outside China to issue RMB denominated shares

Conclusion

Many observers remain skeptical about Shanghai's capacity to become a credible international financial centre anytime soon. Concerns regarding the rule of law in China, the lack of transparency when dealing with officialdom, as well as the government's direct and discretionary control over the national economy are all perceived as obstacles to Shanghai (and China's) development into an international financial centre.

How Shanghai can close the gap between itself and the world's leading financial centers will depend on how fast China will deal with these constraints. Judging by the government's ability to turn China into one of the world's leading economies within less than 30 years, there is certainly hope for Shanghai and for those foreign investors who hope to seize opportunities presented by this new era in China's economic development.

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Recent AML Developments and the Impact on China Merger Control

The China Anti-Monopoly Law (“AML”), which came into effect in August last year, requires particulars of mergers, acquisitions and joint ventures (collectively, “M&A”) meeting certain financial thresholds to be notified to the Anti-Monopoly Bureau of the Ministry of Commerce (“MOFCOM”) and for their potential impact on competition in China to be reviewed, in advance of such transactions being consummated. Three recently released regulations provide greater clarity for companies planning M&A transactions in China.

Revised Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors

On 23 July 2009, MOFCOM released the revised Regulations on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (“M&A Regulations”) to bring the 2006 M&A Regulations into compliance with the new regulatory regime under the AML. The revised regulations remove the relevant provisions from the 2006 Regulations relating to antitrust filings for M&A deals. Under the 2009 M&A Regulations, foreign companies are required to comply with the AML and the Provisions on the Reporting Threshold for Concentrations of Business Operators (“Concentration Reporting Provisions”). This clarifies the definition of “concentration” under the AML, and states that foreign companies that meet concentration thresholds must report their M&A activities to MOFCOM.

Measures for Calculating the Turnover of Financial-Sector Business Operators

On 15 July, MOFCOM, the People’s Bank of China, the China Banking and Regulatory Commission, the China Securities Regulatory Commission and the China Insurance Regulatory Commission jointly issued the Measures for Calculating the Turnover of Financial-Sector Business Operators, which took effect on 14 August 2009. The new measures make it clear that a range of banking, insurance and other financial institutions are also subject to the filing requirements provided in the AML and the Concentration Reporting Provisions. In addition, they provide sector-specific thresholds to be used when determining whether a filing is required.

The measures provide further detail on how turnover thresholds are determined in the financial sector. Thresholds – outlined in the Concentration Reporting Provisions – remain the same, but the formula used to calculate turnover in the financial industry is new.

For all financial entities, other than insurance companies:

- Turnover = 10% x (sum of the turnover elements - business taxes and surcharges)

For insurance companies:

- Turnover = 10% x (premium income - business taxes and surcharges)

The measures also provide other details about what is included under turnover elements and how to calculate premium income. Prior to the revised measures, the AML requirements for financial institutions were unclear, making compliance difficult.

Guidelines on Defining Relevant Markets

On 7 July 2009, the Anti-monopoly Committee of the Chinese State Council published the long-awaited Guidelines on Defining Relevant Markets (the “Guidelines”). Although issued on July 7, the Guidelines are dated 24 May 2009 and do not specify the date on which they became operational.

The Guidelines generally contain the principles and methods for defining a “relevant market,” as well as a definition and points of clarification regarding certain terms and concepts commonly used in this area. The Guidelines provide that when defining a relevant market, it is usually necessary to define the relevant product market and the relevant geographic market, which is the case in many other jurisdictions. The Guidelines also provide the theoretical bases for defining a relevant market, (*i.e.*, “demand substitutability” and “supply substitutability”), as well as guidance regarding the practical factors to be considered when defining a relevant market. In line with international practice, the Guidelines provide that the demand substitutability analysis should be used as the first and major option. The supply substitutability analysis should only be used when the facts requires or merits it. In case none of these methods clearly define the scope of the relevant market, the Guidelines allow the use of a third method, *i.e.*, the hypothetical monopolist test, (mostly known as the Small but Significant and Non-Transitory Increase in Price (SSNIP) test), for which a detailed explanation is given in the Guidelines. In any event, the Guidelines encourage the use of economic analysis and economic data. When defining the relevant market, factors may include demand changes due to price of the goods, the product’s appearance, quality, technical features, general use, distribution channels and cost of transportation, and regional market barriers.

Since the definition of relevant markets is usually the “starting point” in any antitrust proceeding (*i.e.*, monopoly agreement, abuse of dominant position or merger control), the Guidelines should be considered an important step toward the actual implementation of the AML. The Guidelines may help to ensure that PRC regulators use a common standard for determining relevant market definitions. This is important because MOFCOM, the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC) all have a regulatory role under the AML.

Case Study of the PRC Antitrust Filing

While the vast majority of transactions are cleared unconditionally, the Chinese merger control regime has gained considerable publicity as a result of a number of recent high-profile cases, which according to MOFCOM, raised significant issues.

Most famously, Coca-Cola’s proposed acquisition of Huiyuan Juice was blocked by MOFCOM in April 2009, the only acquisition to be prohibited to date under the AML. In this case, MOFCOM defined the relevant market as the juice drink market, including 100 percent pure juice drinks, 26 to 99 percent concentrated juice and below 25 percent concentrated juice. According to the market investigation and evidence collected, MOFCOM asserted that the substitutability between juice drinks and carbonated soft drinks is low, while substitutability between three different types of juice drinks is greater and, thus, regarded the relevant market in this case to be the juice drink market. The decision to block the transaction was made on the basis that Coca-Cola would have control over two strong brands in the juice drink market in China – HuiYuan and MinuteMaid – and could pass its dominance in the carbonated drink market through to the juice drink market, and thus impair competition within the juice drink market, especially for mid-to-small scale juice makers in the PRC.

In another case decided on 23 April 2009, MOFCOM’s Anti-Monopoly Bureau imposed rigorous conditions for the clearance of the acquisition of Lucite International Group Limited by

Mitsubishi Rayon Company Limited. These conditions included the possible divestment of one party's Chinese plant. The conditions are intended to address competition concerns MOFCOM had identified in certain chemicals markets in China. This decision shows that MOFCOM is fully prepared to take a strong stance in applying the AML, not only in transactions centred close to home (as in the prohibition of Coca-Cola's attempt to buy Huiyuan Juice), but also in relation to regional or global deals, where China may not be the only country that is impacted by the transaction.

Some Practical Observations

- Under the AML, it is possible for penalties and sanctions to be imposed on the parties to a transaction and their corporate groups for failing to make antitrust filings. In particular, where a transaction has been implemented and raises significant competition concerns, MOFCOM can require the transaction to be unwound.
- While transactions involving Chinese companies will certainly be affected, foreign-to-foreign ("offshore") M&A transactions may also be subject to the Chinese antitrust regime if the filing criteria have been met (*i.e.*, if the parties do sufficient business in China).
- Where significant issues in China are identified, the *Mitsubishi Rayon* case has shown that MOFCOM will not hesitate to conduct a thorough review and seek to extract substantial divestment undertakings.
- Where significant competition issues are likely to be identified, parties should actively engage with MOFCOM in proposing potential solutions. As in other jurisdictions, the burden is on the parties, not the regulator, to put forward solutions.
- Unlike jurisdictions such as the European Union and Canada, there is no official system for fast-track filings in China, even in uncomplicated cases. Parties should, therefore, budget adequate time for preparing the filing and dealing with the subsequent governmental review.

International Tribunal Rules That Hong Kong Investor May Assert Claim Under Chinese Bilateral Investment Treaty



An international tribunal has issued the first arbitral award ever rendered under a Chinese bilateral investment treaty (BIT).

In *Tza Yap Shum v. Republic of Peru*, the tribunal convened under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) recently issued its Decision on Jurisdiction and Competence.¹ The tribunal held that a Hong Kong resident could assert a claim against the Government of Peru under the BIT between China and Peru. The tribunal also broadly interpreted several provisions of this treaty, while adopting a more restrictive interpretation of the treaty's most-favoured-nation (MFN) clause.

Although this ruling is not binding as a matter of precedent, it will undoubtedly have a significant impact in any future cases brought under Chinese BITs. Moreover, given the increasing amount of "outbound" investment originating from Hong Kong and mainland China, the decision confirms the broad treaty protections available to such investors. In particular, the decision suggests that Hong Kong investors may assert claims not only under the 16 BITs to which Hong Kong is a party, but also the approximately 130 BITs that China has signed.²

In this briefing, we discuss some of the salient holdings in the decision.

Standing of Hong Kong Residents

By way of background, the claimant – Mr. Tza – brought his claim before ICSID under the Peru-China BIT. He argued that Peruvian tax authorities had, by virtue of a tax lien, destroyed the value of his investment in a Peruvian food products company. Peru lodged several jurisdictional objections to the claim.

In particular, Peru argued that, by virtue of his residency in Hong Kong, Mr. Tza lacked standing to assert a claim under the Peru-China BIT. The treaty only protects "natural persons who have nationality of the People's Republic of China in accordance with its laws . . ."³ As a Special Administrative Region (SAR) of China, Hong Kong exercises a high degree of autonomy, with a distinctive set of laws and practices. Indeed, Hong Kong can enter into international treaties.

¹ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, dated 19 June 2009 ("Decision"). Although the decision was rendered on 19 June 2009, it was not made public until August 2009.

² According to one source, China had signed 126 BITs and two free trade agreements (FTAs) with investment chapters as of July 2008. Norah Gallagher & Wenhua Shan, *Chinese Investment Treaties: Policies and Practice*, App. I (2009). The number of such instruments has grown significantly since that time. However, several of China's BITs have not yet entered into force.

³ Peru-China BIT, Art.1(2) (emphasis supplied).

The tribunal rejected this argument, observing that, under China’s Nationality Act, Mr. Tza is a Chinese national.⁴ His residency does not change this fact, as the Nationality Act applies equally in Hong Kong.⁵ Nor could the tribunal find any evidence that the Peru-China treaty was intended to exclude Hong Kong residents from its scope.⁶

This decision thus suggests that Hong Kong residents who are Chinese nationals may – depending on the language of the BIT in question – bring claims under Chinese BITs with third countries. We note that, by contrast, Hong Kong residents who are not Chinese nationals would not be able to invoke Chinese BITs, just as Chinese nationals who are not residents of Hong Kong could not invoke Hong Kong BITs.⁷

The ruling does not address whether corporate entities established in Hong Kong may bring claims under Chinese BITs. However, we believe that entities incorporated under the laws of Hong Kong are properly regarded as being incorporated under Chinese law. This being so, there is good reason to expect that Hong Kong companies would indeed have standing to pursue claims under Chinese BITs.⁸

Indirect Claims

The tribunal also held that the Peru-China BIT protects individuals who invest *indirectly* in the host State’s territory.⁹ Mr. Tza had invested through a shell company incorporated in the British Virgin Islands, which in turn owned 100 percent of the shares in the Peruvian subsidiary. Such “indirect” investment vehicles are quite common, and reflect tax and other objectives.

By permitting individuals to assert claims based on such arrangements, the tribunal confirmed the broad universe of investors that are protected under Chinese BITs.

Scope of Expropriation Claims

In addition, the tribunal broadly interpreted the scope of the treaty’s protections in cases of expropriation.¹⁰

Like many of the Chinese BITs signed before the new millennium, the Peru-China BIT only permits the arbitration of disputes “involving the amount of compensation for expropriation.”¹¹ However, the tribunal held that this language did not limit its jurisdiction to the mere quantification of damages. After examining the wording of the provision, its surrounding context, the object and purpose of the treaty, and jurisprudence interpreting similar provisions, the tribunal found that its jurisdiction extended to related matters, including whether or not an expropriation had occurred in the first place.

⁴ Decision, ¶¶ 58, 61.

⁵ Decision, ¶¶ 54, 60.

⁶ Decision, ¶ 71.

⁷ With respect to individuals, Hong Kong BITs generally protect “physical persons who have the right of abode in its area.” *See, e.g.*, Thailand-Hong Kong BIT, Art. 1(4)(b)(i). “Area” is defined as including “Hong Kong Island, Kowloon and the New Territories.” *Id.*, Art. 1(1)(b).

⁸ *See, e.g.*, Gallagher & Shan, at 91-93. Hong Kong corporate entities are, in principle, covered by Chinese BITs unless expressly excluded, as in the 2006 Russia- China BIT (which has not entered into force). *Id.*

⁹ Decision, ¶¶ 94-111.

¹⁰ Decision, ¶¶ 187-188.

¹¹ Peru-China BIT, Art. 8(3).

Restrictive Reading of MFN Clause

By contrast, the tribunal adopted a restrictive interpretation of the MFN clause contained in the Peru-China BIT.¹² This provision calls for treatment that “shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.”¹³ The claimant sought to use this MFN clause to take advantage of the more favourable protections afforded in another treaty – the Peru-Colombia BIT, which allows claimants to initiate arbitral proceedings under legal theories other than expropriation.

The tribunal rejected this approach. It relied, in part, on the particularly restrictive language contained in the Peru-China BIT, which only allows claimants to arbitrate expropriation claims. The tribunal reasoned that this specific language (permitting arbitration of only expropriation matters) should prevail over the more general language of the MFN clause. The tribunal also examined the divergent jurisprudence relating to MFN clauses, and cited in support the more restrictive approach taken by tribunals in cases such as *Plama v. Bulgaria*.¹⁴

This aspect of the decision could be problematic, as it limits Chinese investors pursuing arbitral claims under many earlier generation BITs to expropriation theories. It is often more difficult to prevail under an expropriation argument than, for instance, an argument that the host State failed to provide the investor with fair and equitable treatment.

Conclusion

On balance, the decision in *Tza Yap Shum* broadly interprets the protections available under the Peru-China BIT. This could be a valuable precedent for Chinese investors – including those in Hong Kong – who seek the protections afforded under any of China’s approximately 130 BITs.

Now that the jurisdictional phase of the proceedings have concluded, the merits phase will commence. We recommend that outbound investors in Greater China closely monitor this case, including any final award.

A copy of the tribunal’s jurisdictional decision can be found at <http://ita.law.uvic.ca>.

Hong Kong Exchange Proposes to Expedite Rights Issues and Open Offers

In July 2009, the Hong Kong Stock Exchange issued a consultation paper on proposals to accelerate rights issues and open offers. The consultation period lasts until 30 September 2009 and any interested parties may submit their comments to the Stock Exchange before the consultation period ends.

Since the outbreak of the financial tsunami in 2008, the popularity of rights issues and open offers have increased, and they have become important recapitalization tools. In order to facilitate the fund-raising activities of listed corporations in Hong Kong, the Hong Kong Stock Exchange is soliciting views on a proposal to shorten the timetable for rights issues and open offers.

A rights issue is a pre-emptive issue. It offers shareholders rights to subscribe new shares in proportion to their shareholdings. Under a rights issue, a shareholder may exercise his rights to maintain his proportion of shareholding in the issuer, or sell them in market or strike

¹² Decision, ¶¶ 193-216.

¹³ Peru-China BIT, Art. 3(2).

¹⁴ Decision, ¶¶ 217-220.

a combination of both. Rights issues protect investors by providing shareholders with the opportunity to participate in the share offering (and thus afford protection against dilution), as well as compensation for non-subscription.

An open offer is similar to a rights issue – it is an offer to existing holders of securities to subscribe shares. It differs from a rights issue primarily in that the shares offered in an open offer may or may not be allotted in proportion to the shareholders' existing holding and, unlike a rights issue, shareholders are not usually allowed to sell the subscription rights.

Under the current regulatory regime in Hong Kong, a rights issue or an open offer normally takes at least five to six weeks (from the date of announcement of the rights issue or open offer) to complete. This period is made up as follows:

- a) The issuer is required to give not less than two weeks notice before closing its register of members – the book closure date;
- b) It usually takes approximately one week for the issuer (i) in the case of a rights issue, to prepare to dispatch Provisional Allotment Letters to shareholders whose names are registered on the register of members of the issuer and credit nil paid rights to stock accounts in the Central Clearing and Settlement System (CCASS); and (ii) in the case of an open offer, to dispatch subscription forms;
- c) The rights issue and the open offer must be open for subscription by shareholders for not less than two weeks; and
- d) It usually takes about one week to prepare to dispatch new share certificates and credit the new shares to shareholders' CCASS accounts.

Where the rights issue or open offer will result in an increase in either the share capital or market capitalization more than 50 percent, shareholders' approval will be required. In such case, the whole process will be extended to more than two months. The additional time will be required to allow for the issuer to prepare a circular to shareholders and to give the requisite notice of the shareholders' meeting.

As illustrated above, one of the main reasons for the protracted process of a rights issue or an open offer is the requirements of the notice period regarding the book closure and the subscription period. Therefore, the Hong Kong Stock Exchange is considering to shorten these periods.

Book closure

A listed issuer maintains a register of members or transfer book to record the identities of its shareholders. Although most share trading takes place through CCASS¹⁵, shareholders of a listed company are free to register the shares in their own names on the register or transfer the shares registered on the register. When it is necessary to identify the shareholders at a particular point in time for a corporate action (e.g., determining who is entitled to vote at a general meeting of the company), the listed company will usually close its shareholders' register temporarily to allow the registrar to update the register of members and to disallow any changes of shareholders to take place during the period of closure.

¹⁵ Securities deposited with brokerages are held in the custody of CCASS and registered under the name of HKSCC Nominees Limited, a wholly owned subsidiary of Hong Kong Securities Clearing Company Limited, which provides nominee services for CCASS participants.

At present, the Listing Rules require a listed issuer to issue a notice regarding the closure of its transfer books or register of members at least 14 days before such closure. The notice period allows time for shareholders holding shares through nominees or brokers to re-register the shares in their own names.

In a rights issue or an open offer, the book closure notice period allows shareholders to trade the shares with subscription rights (“cum-right”) attached. Hong Kong adopts a T+2 settlement system, (*i.e.*, settlement must occur on the second day after trading). Therefore, the last day for trading shares cum-rights is usually set as three business days before the book closure date. In effect, shareholders will usually have at least seven business days to trade shares cum-rights.

In the Consultation Paper, the Stock Exchange proposes to reduce the book closure notice period from 14 days to 5 business days. The proposal, if adopted, will reduce the effective book closure period of 10 business days to 5 business days. The proposal will also place the book closure notice requirement in Hong Kong on a par with that in Singapore, which is shorter than the period permitted in Australia where issuers are required to give not less than 7 business days notice of a proposed record date or any change to a proposed record date.

The proposed shorter notice period will expedite the process for a rights issue or an open offer which is not subject to shareholders’ approval. The proposal will shorten the period of a rights issue or an open offer, which requires shareholders’ approval as the Listing Rules require an issuer to give at least 14 days’ notice before it may convene a shareholders’ meeting.

In conjunction with the proposal to shorten the notice period of the book closure for a rights issue or an open offer, the Stock Exchange also proposes to amend the notice period for book closure (in cases other than rights issues or open offers) from 14 calendar days to 10 business days. If the proposal is adopted, there will be two different book closure notice periods. It is not apparent why the notice period for book closure cannot be changed to 5 business days for all cases instead of distinguishing the case where a rights issue or an open offer is involved. This may create confusion.

Subscription Period

Another major component of the timeline of a rights issue or an open offer is the subscription period. Under the Listing Rules currently in force, a rights issue and an open offer must have a minimum subscription period of 14 days. During the subscription period, investors can evaluate the investment options available to them and take such actions as they consider appropriate following the offer of securities by the issuer. For investors who are granted subscription rights, they may take one of the following courses of actions:

- a) Elect to exercise in full their subscription rights;
- b) Sell their subscription rights on the market (in the case of rights issue); or
- c) Conduct “tail swallowing,” (*i.e.*, sell part of the entitlement to fund the acquisition of the remaining part).

The Stock Exchange takes the view that the present subscription period allows investors sufficient time to consider the rights issue or open offer and make their investment decisions. If the subscription period is shortened, this will put pressure on the investors and brokers, in particular in cases where shares are held through complex chains of custodians or when shareholders wish to conduct tail swallowing, which requires splitting entitlements of the shareholders and selling part of the subscription rights.

The Stock Exchange, therefore, does not consider it appropriate to shorten the subscription period. However, as a housekeeping amendment, the Stock Exchange proposes to change the 14-day subscription period to 10 business days. This will ensure that investors will have a full 10-business-day period which will not be reduced by intervening public holidays or unexpectedly by typhoon or adverse weather conditions, during which the Stock Exchange may close or suspend trading.

Race Discrimination Ordinance – Full Implementation

The Race Discrimination Ordinance, (RDO), and the Code of Practice on Employment under the RDO, the (Code),¹⁶ came into operation on 10 July 2009.

The Equal Opportunities Commission, is responsible for enforcing the RDO. With effect from 10 July 2009, the Commission is empowered to handle complaints lodged regarding racial discrimination and to conduct investigations into related matters.

Reasons for Having the RDO

Hong Kong has an obligation under the International Convention on the Elimination of All Forms of Racial Discrimination to prohibit and eliminate racial discrimination. Hong Kong also has an obligation under the International Covenant on Economic, Social and Cultural Rights to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race or other status. With the implementation of the RDO, it is unlawful to treat people less favorably based on race.

RDO at a Glance

The RDO prohibits discrimination, harassment, victimization and vilification on the grounds of a person's race.

Definition of Race and discrimination

“Race” is defined by the Ordinance as the race, color, descent, national or ethnic origin of a person. As such, treating people less favourably on the basis of race is now illegal in Hong Kong. It should also be noted that reference to discrimination based on the ground of “descent” means discrimination against members of communities based on forms of social stratification such as a caste system or similar systems of inherited status. However, religion itself is not race and, therefore, a group of people defined by reference to religion is not a racial group under the RDO.

Application of the RDO

The RDO outlaws discrimination in the following areas: to job applicants, employees, contract workers and commission agents who spend the majority of their employment or engagement wholly or mainly inside Hong Kong. The Ordinance also applies to education, the provision of goods and services, the disposal or management of premises, participation in clubs, eligibility to vote for and to stand for election to public bodies.

¹⁶ The Code is a statutory code, which provides recommendations for good employment procedures and practices.

Exceptions under the RDO

There are certain exceptions under the RDO, which include:-

- Genuine Occupational Qualification

Examples are jobs involving participation in a dramatic performance or other entertainment; as an artist's or photographic model in the production of a work of art; visual images or a sequence of visual images for which a person of a particular racial group is required for reasons of authenticity

- Training for skills to be used outside Hong Kong

Employment of overseas persons with special skills, knowledge or experience (the so-called "expat exception")

- Existing local and overseas employment terms

Any existing employment arrangement, one already in existence as of 10 July 2009 will generally be allowed to continue under "grandfathering" provisions, that is, the right of employers to continue employing certain staff on local, as well as engaging other staff on more generous overseas, terms of employment. However, employers should be aware that these exceptions are fairly limited in scope.

Employer Liability

Under the RDO, an employer will be vicariously liable for an employee's acts of race discrimination. In other words, if an employee does something that contravenes the RDO during the course of his or her employment, the employer will be held accountable liable.

Employee Liability

The RDO provides that individuals who engage in unlawful discriminatory practices can be held personally liable.

Enforcement Action

Any individual, for instance, an employee or a job applicant, who feels that he or she has been a victim of racial discrimination may lodge a complaint with the Equal Opportunities Commission. The Equal Opportunities Commission is bound to investigate every such complaint unless a particular complaint is regarded as having no legal basis. While there are limited criminal sanctions under the RDO that operate against employers, an employee or a job applicant who claims racial discrimination, harassment, vilification and victimization may commence legal proceedings against the employer alleging racial discrimination.

What do Employers Need to Do?

The Code emphasizes the need for employers to

- Draw up and implement a policy which covers race discrimination, as well as sex, disability, family status, pregnancy and marital status.
- Implement good employment procedures and practices.