

**HONG KONG: THE TRANSFER OF SOVEREIGNTY,  
THE CHANGES TO THE LEGAL SYSTEM AND THE  
THREATS TO ITS FUTURE PROSPERITY**

**BY**

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INTRODUCTION

Hong Kong has been seen through the eyes of many different commentators in many different colours. It has been variously described as "An Economic Nature Reserve", "A Shop Window of the Free Way of Life in Asia", "A Capitalist Paradise", "A Shoppers Paradise", "A Commercial Miracle" and "A Rumbling Volcano". Perhaps more relevant to this discussion, it has also been called "A Living Fossil of Early Imperial Government" and "A Borrowed Place Living on Borrowed Time".

As I am sure you know, that "borrowed time" ran out on 30th June 1997 with the change of Hong Kong sovereignty from Britain to China.

This paper is divided into three parts. First, I would like to explain what exactly changed on 1st July 1997 and what is meant by the concept of "one country, two systems". Second, I will discuss such changes as have taken place to the legal and arbitration systems in Hong Kong and the extent to which those systems are different from China; third, I will comment on what I see as possible threats to Hong Kong's continued commercial success.

THE TRANSFER OF SOVEREIGNTY - 30TH JUNE 1997

1. Background

Prior to the handover, Hong Kong was, technically, a British colony administered by a Governor appointed from London. I say "technically" because no one in Hong Kong has referred to Hong Kong as a "colony" for years. The word disappeared from our bank notes as from 1st January 1985. All legal documentation referred to Hong Kong as a "territory". Be that as it may, Hong Kong was administered by a

Governor appointed by the Queen. The Governor's powers and duties, together with those of the two most senior administrative bodies, the Executive and Legislative Councils were set out in directions given by the British Government, called Letters Patent and Royal Instructions.

The Executive Council consisted of ten members appointed by the Governor together with three permanent members, being the Chief Secretary, the Financial Secretary and the Attorney General. Its function was to advise the Governor on matters of policy. It operated very much as a cabinet to the Governor. The Legislative Council's function was to enact laws, control public expenditure and monitor the performance of the government by putting forward questions on matters of public interest. It had about sixty members. In effect, it was a sort of unelected parliament. Until 1985, all members of both Councils were appointed by the Governor.

"Democratic" the system may not have been, but for Hong Kong it worked well and there was little opposition to it. Hong Kong is a city of merchants where business comes first and, for that matter, probably second, third and fourth. Politics are generally of little interest.

## 2. The Problem of the Lease

The problem for Hong Kong was a lease that had been signed in 1898 for ninety nine years for an area which is known as the New Territories. It was only Victoria Island, the tip of the Kowloon peninsular and a couple of small islands that had been ceded to Britain in perpetuity in 1841.

By the early 1980's, as the deadline approached, it was clear that discussions would have to take place with the Chinese over the issue of the New Territories lease, as the uncertainty was starting to affect business in Hong Kong.

There has been discussion over recent years as to whether Britain could have retained sovereignty over Hong Kong or, if not sovereignty, administrative control. As you can appreciate from the map of Hong Kong, it would not have been practical or

possible for Britain simply to have handed back the New Territories at the expiry of the lease in 1997 and retained Hong Kong Island and the tip of the Kowloon peninsular.

According to Margaret Thatcher in a recent television interview neither sovereignty nor continued British administration were ever negotiable. It was made clear to her, she said, by Deng Xiaoping that if the British did not handover Hong Kong, China would, if necessary, retake the territory by force of arms. There is no doubt that they could have done this at any time without difficulty. In practice, however, I doubt it would ever have been necessary to send the tanks over the border. Hong Kong depends on Southern China for much of its fresh water - there is a large waterpipe which runs across the border - and a large percentage of Hong Kong's fresh food, meat and vegetables comes across the border daily. On the two or three occasions when the border has been closed in recent years for short periods of time, food prices in the markets have risen by 20% to 30% almost immediately. In practice, therefore, all China would have had to do is turn off the water tap and close the border and negotiations would have come to a very rapid and favourable conclusion so far as they were concerned.

### 3. The Joint Declaration

Discussions, therefore, took place between representatives of the United Kingdom and The People's Republic of China. After some two years of negotiations, a Joint Declaration was ratified by both countries on 27th May 1985. Its full name was the "Sino British Joint Declaration on the Question of Hong Kong".

The "Joint Declaration", as it is usually called, was an international legally binding agreement between the British and Chinese Governments. In it, the British Government declared that it would restore Hong Kong to The People's Republic of China in 1997; the Chinese Government declared that it would resume the exercise of sovereignty over Hong Kong "... thus fulfilling the long-cherished common aspiration of the Chinese people ..."; and in order to maintain the prosperity and stability of Hong Kong, the Chinese Government decided that, upon China's

resumption of sovereignty, Hong Kong would become a Special Administrative Region of the People's Republic of China.

The Joint Declaration set out the Chinese Government's policies towards Hong Kong following the handover in broad terms. The most important of these policy statements are:

1. Hong Kong is to enjoy a high degree of autonomy as a Special Administrative Region of the People's Republic of China. Socialist policies applied in the Main Land will not be applied to the Hong Kong SAR which will maintain its previous capitalist system and lifestyle for 50 years after 1997.
2. The Legislature of the Hong Kong SAR will make laws for the Hong Kong SAR.
3. Hong Kong's legal and judicial systems will be maintained. The laws previously in force in Hong Kong will continue to be in force after the handover. The courts will be independent and free from any interference. A Court of Final Appeal will be established in the Hong Kong SAR in place of the Privy Council in London.
4. There will be continuation of employment for members of Hong Kong's public services, including expatriate members.
5. The Hong Kong SAR is entitled to negotiate international agreements with foreign powers on matters relating to trade, transport, shipping, air service agreements and so on.
6. Hong Kong will have fiscal autonomy and no exchange control. The Hong Kong dollar is to remain freely convertible. China is not to levy taxes in the SAR.

7. Recognition of private ownership of property.
8. Freedom of movement of people to and from Hong Kong.

The Joint Declaration provided for the establishment of a Joint Liaison Group to give effect to these policy statements and for an additional body to be formed to start drafting the Basic Law of Hong Kong which would set them out in detail.

With effect from 1st July 1997, therefore, Hong Kong would become a Special Administrative Region of the People's Republic of China. A "Special Administrative Region" is a creature which came into being as a consequence of these negotiations. There was a precedent, of sorts, for this arrangement. Prior to 1978, China had a centrally controlled economy in which decisions involving investment, production and output were all made according to state plans and profits which were in turn remitted back to the Central Government. Following the adoption of the "open door policy" and the major restructuring of China's economy launched by Deng Xiaoping in 1978, the economic system was transformed. One aspect of the "open door" was the establishment of five Special Economic Zones (SEZs) along China's southern coast in the 1980's. The SEZs were established to attract Western technology and expertise which could then filter from these specific locations into the entire Chinese economy. Three of these SEZs (Shenzhen, Zhuhai and Shantou) are located in Guangdong Province, primarily because of the geographical proximity to foreign capital in Hong Kong. Fujian Province established a fourth SEZ in the port to Xiamen across the straits from Taiwan. The fifth SEZ is Hainan Island.

The role played by the SEZs was and is crucial to China's modernisation drive. Their designated objectives are (i) to obtain more direct overseas investment, preferably with a significant component of advanced technology; (ii) to improve Chinese managerial and technical skills in the conduct of international business. The intention being that Chinese personnel, having learned foreign management techniques and technology will then be sent into the remainder of Mainland China to disseminate this knowledge; (iii) to encourage the establishment of enterprises

using foreign investment to export products world-wide, thereby providing a vital source of foreign exchange for the Chinese economy; finally (iv) politically, to favourably impress Hong Kong and Taiwan in order to further China's long term ambition of reunification.

The creation of Hong Kong as a Special Administrative Region ("SAR") can be seen as a part of these objectives.

#### 4. The Basic Law

Hong Kong's position as an SAR was to be defined by the Basic Law or to give it its full title, the Basic Law of Hong Kong Special Administrative Region for the People's Republic of China. Drafting commenced in 1985 and the Basic Law was finally enacted by the People's Congress of China on 4th April 1990.

The Basic Law is a constitutional document rather than a statute. It is frequently referred to as a "mini constitution" for Hong Kong. Its function is as much to separate the various systems of China from Hong Kong as it is concerned with giving Hong Kong autonomy. The Basic Law is the document which gives effect to this separation. It gives authority to the Government of Hong Kong and to Hong Kong's judiciary and it defines the relationship between China and the Hong Kong SAR. It is the document which gives effect to the phrase "one country, two systems".

Perhaps the two most important provisions of the Basic Law are:

Article 5

"The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

and Article 8:

"The laws previously in force in Hong Kong, that is the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

The Basic Law also provides that Hong Kong will maintain:

1. An independent taxation system (Article 108). China will not levy taxes in Hong Kong.
2. An independent monetary and financial system (Article 110); its own currency, the Hong Kong dollar (Article 111), no foreign exchange control policy (as in China) (Article 112) and a freely convertible currency (Article 112).
3. Its status as a free port (Article 114).
4. Its status as a separate customs territory and its right to participate independently in international organisations and international trade agreements such as G.A.T.T. (Article 116).
5. Existing property rights and private ownership of property will be recognised.
6. Its independent judiciary (Article 19) and an independent court system (Article 85).
7. The pre-1997 court system, save that a "Court of Final Appeal" will be set up to replace the Privy Council in London as the Final Court of Appeal. One of the five judges sitting on the Court of Final Appeal will be from another common law jurisdiction or a non-permanent Hong Kong judge.



8. Its own legislative power although legislation enacted by the SAR "must be reported to the Standing Committee of The National People's Congress "for the record" (Article 17). The Standing Committee has the right to "return the law" if it considers that it is "... not in conformity with the provisions of the Basic Law". Any such law which is returned in this way is invalidated.

In addition to Chinese, English may be used as an official language by the executive authorities, the legislature and the judiciary of the Hong Kong SAR.

The only two areas for which the Central Government of The People's Republic of China is to be responsible are Defence (Article 14) and Foreign Affairs (Article 13). In addition, the power of interpreting the Basic Law and the power of amendment to the Basic Law are both vested in the National People's Congress in Beijing (Articles 158 and 159).

In the terms of the administration, Hong Kong would continue to be run by a Legislative Council (Article 66). The composition of the Legislative Council was set out in Annex II to the Basic Law. It provided that the Council should be composed of sixty members. Permanent residents of the Hong Kong SAR not of Chinese nationality or who have the right of abode in a foreign country could be elected as members of the Legislative Council provided that the proportion of such members did not exceed 20% of the total membership of the Council (Article 67).

The number of members who would be elected was left to negotiation between the British and Chinese Governments. They subsequently agreed in 1990 that one third of the members would be directly elected at the time of the handover and that the elected proportion would increase to thirty by 2003, with the possibility of full direct elections by 2007. Further, and perhaps most important, it was intended that members elected in 1995 to the Legislative Council would continue in office over the 1997 handover until 1999 so there would be no legal or political vacuum on the change of sovereignty. This became known as the "through train" policy.

Surprising, therefore, as it may sound what was intended by the Basic Law and the subsequent Agreement in 1990 was that Hong Kong would continue to operate with its existing systems, laws, dual language and capitalist society for the next fifty years. China's position under the Basic Law would not be dissimilar to that of Britain prior to the handover in that its responsibilities would be limited to defence and foreign affairs and it would have an overriding right to review legislation.

The "through train" policy meant that the administration would run smoothly over the handover period with progressively greater elected representation being introduced to Hong Kong's Legislative Council or quasi parliament. Unfortunately, the "through train" came off the tracks in 1995.

5. The Introduction of Limited Elections to the Legislative Council

In 1985, limited elections were introduced to the Legislative Council. "Functional constituencies" were established for the main business and commercial sectors of the community as part of an initial tentative step towards greater representation in the Legislative Council. These functional constituencies replaced nominated members who had previously been appointed by the Governor from the business and professional sectors. Originally, there were twelve such functional constituencies, five of whom represented business sectors; the other seven went to the professions, most of whom like lawyers and engineers, were expected to ally with business. Only two constituencies went to labour.

By 1991, the number of functional constituencies had increased to 21, largely by subdividing the existing business and professional constituencies. However, although each functional constituency elected a representative, the electorate in most functional constituencies was small. It has been calculated that the total eligible voters for the 21 functional constituencies was 104,609, of whom only 69,825 had registered, a proportion of less than 0.2% of the population. Thus, although some 21 of the 60 Legislative Council's members were elected, the democratisation process had not proceeded very far as they were elected by a tiny fraction of the population. There is little doubt that this is the system which the Chinese wished to inherit after the

handover and it was in the context of such a system that the Chinese had been prepared to agree to the election of a progressively larger proportion of Legislative Council members as set out in Annex II of the Basic Law.

6. Democratic Reforms - 1992-1995

This was the system which The Right Honourable Chris Patten inherited when he was appointed the 28th and last Governor of Hong Kong on 9th July 1992. It is said that, when he reviewed the electoral process for the Legislative Council, he was appalled and he determined to change the position to introduce far greater democracy. What is quite clear is that Patten intended to introduce greater democracy in Hong Kong out of personal conviction rather than because the majority of Hong Kong people wanted it. With his team of advisors, he scrutinised the Basic Law to find a loophole by which he could achieve this. The loophole he found was to alter not the composition of the Legislative Council, but the way in which its members were elected. He very considerably broadened the electorate for the functional constituencies to about 2.7 million, thereby diluting the dominance of the commercial and business sectors.

The Chinese Government objected to these proposals, which were announced in October 1992 and which were to come into effect for the Legislative Council elections in September 1995. They considered that these changes represented a greater degree of democratisation that was envisaged in the Joint Declaration, the Basic Law and the subsequent agreement reached between the British and Chinese in 1990 which resulted in the "through train" policy, as they were a disguised form of direct elections. The Chinese argument was that Patten's democratic reforms were contrary to the spirit of the Basic Law and it is certainly arguable that, by broadening the electorate for Legislative Council members, Patten had indeed pushed democratisation beyond what must have been the understanding in 1990 and the assumptions upon which the Basic Law was formulated.

Patten further infuriated the Chinese by announcing these constitutional amendments in Hong Kong and without prior discussion with mainland Chinese officials. He

seriously under-estimated the strength and depth of Chinese opposition to these proposals and when he persisted in introducing them for the Legislative Council elections in 1995, relations between the Hong Kong and Chinese Governments deteriorated badly.

When after a series of meetings between China and Britain, the differences could not be resolved, the National People's Congress of China decided on 31st August 1994 that it would terminate the Legislative Council elected in September 1995 together with a number of other administrative bodies (the Urban and Regional Councils and District Boards) on the grounds that the arrangements for their composition contravened the Joint Declaration and the Basic Law. At the same time, it authorised arrangements for an alternative form of government to be known as the Provisional Legislature.

The consequences for Hong Kong were far reaching. In retaliation for the introduction of these political reforms, the Chinese delayed approval for the financing arrangements for Hong Kong's new airport, Chek Lap Kok. As a result, the airport is now about a year late. Similar problems arose over the construction of further terminals for Hong Kong's container port which was badly over-stretched.

A potentially more serious consequence was the effect on the "through train" policy. The Chinese stated that they would abolish the Legislative Council on the stroke of mid-night on 30th June 1997 together with a number of other local administrative bodies. To take the place of the Legislative Council, the Chinese set up their own Provisional Legislature. The Provisional Legislature would consist of sixty members, who would be "selected" rather than "elected" by a special Selection Committee, although thirty four of the ultimately "successful" members were existing members of the Legislative Council elected in 1995. As a result, for about six months before the handover, Hong Kong had a sort of Government in waiting which usually met just across the border from Hong Kong in Shenzhen to avoid legal action being taken against it. On the stroke of mid-night on 30th June 1997, the Legislative Council

was duly abolished and shortly afterwards, the Provisional Legislature formally took over the business of government.

Further problems have arisen, as there have been a number of challenges in the Hong Kong courts to decisions made by the Provisional Legislature on the basis that it was not a properly appointed body under the terms of the Basic Law and its decisions were, therefore, illegal. The problem will, hopefully, disappear when the term of the Provisional Legislature comes to an end, which must be by no later than 30th June 1998, and a new Legislative Council is appointed following limited elections probably, similar to those that would have taken place prior to Patten's introduction of greater democracy.

While these political developments are unfortunate, it is encouraging for the rule of law in Hong Kong that challenges to the legality of the Provisional Legislature, a body set up under China's guidance, could take place in the courts of Hong Kong without interference from China.

#### THE LEGAL AND ARBITRATION SYSTEMS OF HONG KONG AND CHINA

The second issue I would like to address is whether as a result of the handover there is any real difference between dispute resolution in China and Hong Kong.

##### 1. Hong Kong - The position prior to 1st July 1997

One of the most important factors in Hong Kong's success as a financial and commercial centre has been its legal system. Prior to the change in sovereignty, that system was a common law judicial system, broadly English based. The judges applied the law based on statutes - in Hong Kong called Ordinances - by reference to the precedents of previous legal decisions.

As a broad generalisation, the majority of the legislation was English based and as a general rule less developed than English law. There were, however, exceptions. Hong Kong, for example, has adopted the UNCITRAL model law in respect of arbitration which England is only now considering. Hong Kong had an independent

judiciary and a legal profession split between solicitors and barristers in the same way as the English system.

2. Hong Kong - The position after 1st July 1997

Following the handover, there have been very few changes to the legal and arbitration systems.

The Courts

In the courts, there have been a small number of minor, largely cosmetic, changes. The Queen's name, not surprisingly, has been removed from all court documents and the High Court has been renamed "The Court of First Instance". The only major change has been the abolition, with effect from 1st July, 1997, of the Privy Council in London as the highest appellate court. In its place, we now have the Court of Final Appeal, based in Hong Kong, comprising five judges one of whom must be from another common law jurisdiction, i.e. a jurisdiction outside Hong Kong, or a non-permanent Hong Kong judge. On 23rd July this year, eleven non-permanent Hong Kong judges and four judges from other common law jurisdictions were appointed as the body from whom the fifth judge will be selected. None of these judges are Chinese.

The second area of change is the greater use of Chinese in the legal system. This has actually been a continuing process for many years. Since 1989, all new laws in Hong Kong have been enacted bilingually, in both Chinese and English. In July 1985, a working party was set up to arrange for all previous legislation which existed only in English to be translated into Chinese. All statutes, or Ordinances as they are termed in Hong Kong, were translated by 16th May 1997 - a total of some 20,500 pages of legislation. In addition, a database providing a bilingual legal glossary has been set up which to-date has some 23,000 entries.

There had been a progressive shift in the Lower Courts from English to Cantonese, not so much because of the impending handover, but more as a matter of common sense. The Lower Courts, as you will appreciate, tend to deal with straightforward

legal disputes rather than complex commercial issues. It made little sense in such circumstances to have the parties to these proceedings, the barristers, the Magistrate or District Court judge and the witnesses almost all of whom would usually speak Cantonese as their first or possibly only language being required to conduct the entire proceedings in English with the use of interpreters. In the High Court and Court of Appeal restrictions on using Chinese were removed by stages in view of the impending handover. Cases in the Higher Courts can now be heard in either language, although it is anticipated that the predominant language for determining complex commercial disputes is likely to remain English.

Problems are clearly going to arise and are already arising, as a result of slight differences in interpretation between English and Chinese versions of the law.

One of the more celebrated cases to-date involved a Mrs. Tam, a fish shop owner. Mrs. Tam had been fined HK\$3,000 for breaching Urban Council by-laws relating to the sale of food. Her offence was to place three metal trays, a chopping block and a table outside her shop. The prosecution claimed that she was in breach of Section 35 of the Urban Council's food business by-laws because an approved plan of Mrs. Tam's shop did not include the outside area. The English version of the relevant law prohibited "Any alteration or addition which would result in a material deviation from the plan". The Chinese version of the same Ordinance referred to any "building additional construction or building works". Mrs. Tam was acquitted on the basis that no one would construe the placing of equipment outside a shop as "building works" or "construction". The Judge commented that Mrs. Tam could have been guilty under the English version of the Ordinance, but was clearly innocent under the Chinese version. He ruled that the Chinese version should take priority because it provided a clearer definition. This was the first occasion on which a court had used differences between the English and Chinese versions to quash a conviction.

One might, however, question whether the original conviction on the basis of the English wording was sound as Mrs. Tam's action hardly amounted to an "alteration" or "addition" which resulted in a "material deviation" from the plan of her shop.

At a rather more intellectual level, there was an interesting article published by the Chinese Drafting and Translation Unit of the Legal Department (Hong Kong Lawyer - September 1996) regarding the problems which they were encountering in translating English Ordinances into Chinese. The problem concerned the word "attempt". The most common Chinese translation denotes an idea of "intending" or "proposing" and is essentially a term about one's mental state. "Attempt" in English denotes not only a mental state, but usually action or endeavour. Perhaps if I quote one short paragraph, you will realise the complexity of the problem:

"The semantic values of the Chinese character and "attempt" are, therefore, not completely equivalent. "Attempt" can be a "real" verb denoting concrete action itself and can function as a full transitive verb taking a substantive noun as its object, e.g. "attempted the fortress" or "attempted his life". The lack of the "action" element in the Chinese character is demonstrated by its inability to discharge linguistic functions similar to those of the word "attempt".

As you can see, we may have an interesting time ahead in the courts.

#### Arbitration

Hong Kong has an established arbitration system; it is one of the leading arbitration centres in the Asia Pacific region. There has been no change to the arbitration system as a result of the handover. In 1990, Hong Kong adopted the Uncitral Model Law, that is the model law adopted by the United Nations Commission on International Trade Law. Awards made in Hong Kong can be enforced in more than eighty other jurisdictions which are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The only problem which has arisen concerns the enforcement of Hong Kong arbitration awards in China. Previously this was possible under the New York convention as China and Hong Kong were separate jurisdictions. Following reunification with China, this convention is no longer applicable. It is intended that legislation will be drafted shortly to resolve the problem.



3. Dispute resolution in China - How does it differ from Hong Kong?

In a recent article in Lloyd's List, when discussing the wording of arbitration clauses, Bill Packard, a leading London arbitrator, commented:

"There is a school of thought that compares an arbitration clause to a will. Sooner or later someone needs to refer to it, although if it is your will or your arbitration clause, you hope it will be not just yet."

The same comments could apply to dispute resolution in China. If you trade with China or if you are the legal adviser to businesses trading with China, there is a high probability that sooner or later you are going to be involved in a dispute which is subject to Chinese arbitration or legal proceedings, but like your will, you hope it will not happen to you or at least not just yet.

There is no doubt that there has been a considerable increase in dispute resolution in China in recent years. There are probably three reasons for this. They are:

1. The dramatic increase in trade with China following the economic reforms which commenced in the late 1970s.
2. The majority of Chinese documentation provides for dispute resolution by Chinese arbitration or the Chinese courts.
3. PRC organisations are much more willing than they were, say, fifteen years ago to enforce their legal rights.

China has established an international arbitration system, under two international arbitration bodies, China Maritime Arbitration Commission (CMAC) and China International Economic and Trade Arbitration Commission (CIETAC). Both Commissions publish arbitration rules and have panels of arbitrators. There is also an established court system with nine special maritime courts located in the major maritime centres. Following the introduction of the Chinese Maritime Code in July 1993 - a Code which incidentally took some forty years in preparation and, unusually

for China, involved consultation with a number of foreign maritime law experts in its preparation - China has given effect to the provisions of the majority of the international maritime conventions.

The Chinese judicial system is inquisitorial. Both arbitrators and judges take a more proactive role. In both arbitration and court proceedings, much greater emphasis is placed on factual rather than legal issues. The most common statement you will hear in respect of Chinese judicial activities is that the proceedings should "seek truth from facts". This means that the court or arbitration tribunal must use investigation and thorough fact finding to "draw a clear line between right and wrong, to ascertain liability, to be fair and reasonable and truth seeking."

I do not propose to discuss Chinese dispute resolution in any detail. My purpose is to demonstrate that the legal and arbitration systems in Hong Kong are very different from those in China. By way of example:

1. Proceedings both in arbitrations and in the courts are conducted by exchange of written submissions or pleadings supported at each stage by those documents upon which each party wishes to rely. Hearings, however, tend to be limited to one or more short one or two day hearings. The dates of these hearings and their length are usually fixed without reference to the parties. Thus, even if you were able to agree with your opponent that, say, ten days would be necessary for the disputes between the parties to be heard, given perhaps the number of factual or expert witnesses, the chances are that the court or tribunal would still fix a one or two day hearing.
2. Directions as to the conduct of proceedings as they progress are limited. Whilst both arbitrators and judges are usually receptive to a request for an extensive of time in appropriate cases, it is usually very difficult to get a Chinese court or arbitrator to sanction a party who is in default. It is also not at all unusual to find a party presenting substantial additional documentation, or indeed presenting his case in an entirely new way, immediately before a

hearing and being allowed to do so without sanction or criticism from the court or tribunal.

3. There is no discovery process in Chinese court or arbitration proceedings. Each party puts forward only such evidence as they wish to rely upon.
4. Both Chinese judges and arbitrators place undue reliance on documents issued by Chinese bodies such as CCIB and CCIC. By way of example, in a recent claim we were handling concerning alleged transit damage to a cargo of steel, the Chinese cargo receivers produced a survey report from CCIB which stated:

"All the cargo was rusty of which most was rusted or corroded seriously and a little was rusted slightly. A layer of rust pieces and rust powder peeled from the cargo was found in the bottom of the holds. Based on the above conditions we assess the depreciation on sale to be 35%."

Owners put forward a detailed 15 page survey report with photographs, analysis and supporting documentation which concluded that the amount of damage could not possibly exceed 10% and that it was almost certainly due to the natural deterioration on the voyage of a cargo that had been loaded wet and rusty. The Chinese maritime court preferred the CCIB report and the owners and their Club went down for 35%.

5. Legal costs. If you are successful, only limited legal fees are awarded to a successful party. In CMAC and CIETAC arbitrations, these are limited to 10% of the amount in dispute and in court proceedings, it is not unusual to find that no legal fees have been awarded to the successful party, although court fees are usually recoverable.

6. Mediation and conciliation. Both the CIETAC and CMAC arbitration rules and the Chinese Civil Procedure Code require the judge or arbitrator as the case may be to attempt amicable settlement through mediation or conciliation before issuing an award or judgment. The problem is that it is invariably the arbitrator or judge who is determining the dispute who attempts the settlement process and whilst there are provisions instructing all parties to disregard any statements or concessions made during conciliation, in the event that the matter is not settled, it is in practice very difficult for concessions that have been made during conciliation to be disregarded subsequently.
  
7. "Without prejudice" communications. There is no concept of "without prejudice" discussions or correspondence in Chinese court or arbitration procedure. This is a point to bear in mind or you will find your "without prejudice" correspondence produced to the court or arbitration tribunal as evidence that liability has been admitted. This can give rise to difficulty where the relevant contract contains an arbitration clause along the following lines:

"All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case in dispute shall then be submitted for arbitration subject to the rules of the CIETAC Commission."

If such a clause is used, the claimant is faced with a dilemma. The clause specifically requires the claimant to attempt settlement before commencing arbitration. If the claimant does not attempt settlement, he runs the risk that the tribunal may decline to commence arbitration until such time as a settlement attempt has been made. Alternatively, if the claimant attempts settlement in accordance with the clause, he runs the risk that any concessions he makes will be referred to in the subsequent arbitration. The best way to avoid this problem is to ensure that all discussions are verbal not written.

8. Finally, and perhaps most important, it is extremely difficult to enforce an arbitration award or judgment against a Chinese party in China. The provisions of CIETAC and CMAC arbitration rules require the parties to comply with the arbitration award promptly and further provide that if the losing party does not pay within a stated period, enforcement can be commenced. In practice, you will experience considerable difficulty in enforcing an award or judgment against the Chinese party unless it has assets outside China. It is fair to say, however, that the Chinese judicial authorities are aware of this problem and have recently issued a directive whereby a local court is required to give an explanation to the Supreme People's Court (which is the highest PRC court) if they are not prepared to enforce an arbitration award or judgment. It is unclear what effect this directive has had.

In summary, in Hong Kong, the court and arbitration systems have not changed as a result of the handover. Chinese court and arbitration proceedings are very different and, whilst there is no doubt that they have developed and improved considerably over the last ten to fifteen years, as a general comment the systems are less effective, more time consuming and more expensive than Hong Kong.

#### AREAS OF CONCERN

Finally, I would like to discuss what I see as the threats to Hong Kong's future.

1. Stability in Hong Kong's relations with China

Hong Kong needs stability in its relationship with China.

There has been considerable debate and there will no doubt be further debate in the future as to whether the Right Honourable Chris Patten was the right choice for the 28th and last Governor of Hong Kong. Chris Patten has put forward his version of events of the negotiations with China in a book written by Jonathan Dimpleby and recently serialised, as you may have seen, on the BBC World Service television as "The Last Governor".

There is no doubt that Chris Patten was popular with many of the people of Hong Kong, who appreciated his more down to earth and accessible style. Some also approved of his democratic reforms. In a recent article in the British Newspaper, the Sunday Times, it was suggested that 'His essential achievement ... was to create just enough democracy in Hong Kong to prevent the democrats from taking to the streets, and to maintain just enough of the status quo to prevent China from ripping up the Joint Declaration. As he said, "The alternative to having the occasional argument with China was never a quiet life in Hong Kong. The alternative was endless arguments in Hong Kong.' Whether it was, however, wise to introduce a politician as governor, and particularly as governor over a period that would involve the detailed negotiations of Hong Kong's handover is more debatable.

Similarly, whether it was wise for Patten to have adopted such an antagonistic stand towards China when he was hardly negotiating from a position of strength is also debatable. In any event, with the appointment of Tung Chee-Hwa, well known as a "favourite son" of China, relations will clearly improve, to Hong Kong's benefit.

2. Will China abide by the Basic Law?

So soon after the handover, it is impossible to draw any conclusion. It is inevitable that key Hong Kong politicians and business people will develop much closer relations with China and they may become conduits through which the policies and preferences of the Central Authorities in China are carried out in Hong Kong. Such a development could affect the way in which Hong Kong is administered and reduce its high degree of autonomy leading to progressive state interference and inefficiency in the economy. It is unlikely, however, that a clear picture will emerge for several years.

3. Freedom of movement of people and money

In order to flourish, Hong Kong must maintain its international character and, particularly important, the freedom of movement without hindrance of both people and money. Both these freedoms are guaranteed by the Basic Law and there has never been any question of their being interfered with. There is no doubt, however,

that Hong Kong's position as an international centre would be destroyed, and in a remarkably short time, if exchange control were introduced or travel to and from Hong Kong became difficult or impossible.

4. The rule of law and independence of the judiciary

Any threat to the independence of the judiciary is likely to have a damaging effect on Hong Kong. The rule of law requires that laws operate separately from the political system and that they are published and accessible. Perhaps most important, that they provide certainty and predictability as to how disputes are to be resolved. An obvious concern for the business community is whether they will get a fair hearing if, as a non-Chinese person or business, they are in conflict with a Chinese business or highly placed individual with strong Beijing connections. To-date, there is no suggestion whatever of any outside interference or bias in the judicial process. The Chief Justice is a well known and respected former Hong Kong barrister; there is a strong independent Bar in Hong Kong. I see no prospect in the present climate of any threat to Hong Kong's legal system.

5. Corruption

There is concern that there will be an increase in corruption. The business community, both local and international, is particularly sensitive to corruption and if it should become endemic in Hong Kong, Hong Kong's position as an international financial centre would be damaged, and quickly.

As a result of problems in late 1960's and early 1970's an independent body, The Independent Commission Against Corruption, was set up in 1974 to fight corruption and prevent bribery. The Commission operates independently of the police and its head, the Commissioner, reports directly to the Governor, now to the Chief Executive.

The Commission and connected legislation was originally designed to counter act widespread bribery of public servants. Its powers are draconian. The legislation makes it an offence for a public official to maintain a standard of living above that

which is commensurate with his past or present government salary and benefits or to be in control of financial resources or property disproportionate to his present or past remuneration unless that public official can give a satisfactory explanation as to how he was able to maintain that standard of living or acquired the relevant assets. As you will have noticed, this is a reversal of the usual burden of proof. Because of the notorious evidential difficulty of proving that bribery has taken place, the onus is on the accused to provide an explanation for his wealth beyond reasonable doubt. If he is unable to do so, he is guilty.

But the legislation goes further and extends to the private sector. It is an offence for any agent without lawful authority or reasonable excuse to solicit or accept an advantage for doing or not doing something in connection with his principal's affairs without the prior consent of that principal. Again, the burden of proof is reversed and it is for the accused to show lawful authority or reasonable excuse.

As you would expect with such legislation, the Commission has wide powers of search and seizure both of documents and of individuals and the right to withhold travel documents.

There was concern expressed a year or so ago that the Commission might not continue through the handover. Fortunately, such concerns were misplaced and no changes have been made to the Commission as a result of the change in sovereignty.

#### CONCLUSION

It is, of course, far too early to say whether "one country, two systems" will be a success and whether Hong Kong will continue to flourish. Present indications are good. Following the departure of the international press corps and large numbers of tourists immediately after the handover, Hong Kong has returned, very much as predicted, to "business as usual". There has been no threat to the considerable degree of independence granted to Hong Kong under the Basic Law and no threat to the independence of the judiciary or legal system. There is no apparent interference with the freedom of Hong Kong's press or the right to demonstrate. Indeed, as of mid-



September there had been some 150 demonstrations since the handover, without a single arrest by the police.

By way of conclusion, one point which should be borne in mind is that China viewed the occupation of Hong Kong by a foreign power as a humiliation. The Chinese term for the change of sovereignty was not the "handover of Hong Kong", but the "giving back of Hong Kong". After having suffered the "humiliation" of 150 years of foreign rule, there really could be no greater humiliation for China, than for Hong Kong to collapse as a financial and commercial centre shortly after the change in sovereignty. On a wider note, it would not bode well for China's aspirations for reunification with Taiwan in due course.

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Hong Kong

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