FINANCIAL SERVICES LITIGATION

Hong Kong

LEXOLOGY
Getting The Deal Through

Consulting editor
Stewarts

Financial Services Litigation

Consulting editors

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Stewarts

Quick reference guide enabling side-by-side comparison of local insights into nature of claims; specialist courts and procedures; arbitration, alternative dispute resolution and out-of-court settlements; disclosure, data protection and related case management issues; enforcement and remedies; changes in the regulatory landscape since the financial crisis; and recent trends.

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Hong Kong

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NATURE OF CLAIMS

Common causes of action

What are the most common causes of action brought against banks and other financial services providers by their customers?

It is not uncommon for customers to sue banks and financial services providers in Hong Kong for the mis-selling of financial products.

The most common causes of action in mis-selling claims include breach of contract regarding the client agreement (especially in cases of unauthorised trading on the client's account) and common law and statutory misrepresentation under the Misrepresentation Ordinance.

Section 108(1) of the Securities and Futures Ordinance (SFO) imposes civil liability on a person who makes any fraudulent, reckless or negligent misrepresentation that induces another person to enter into or offer to enter into an agreement to acquire, dispose of, subscribe for or underwrite securities, structured product or participate in a collective investment scheme. Section 107 of the SFO also imposes criminal liability for fraudulent or reckless misrepresentation that results in these consequences.

Note that section 108 of the SFO does not give a right to bring a civil action in any case to which section 40 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (C(WUMP)O) applies (section 108(4)). Section 40 C(WUMP)O imposes civil liability on certain persons (such as directors, those who authorise themselves being named in a prospectus as directors, 'promoters' of the company, and those who have authorised the issue of the prospectus) to compensate investors who have suffered losses having relied on untrue statements in a prospectus and subscribed to shares or debentures. A person seeking to bring such a civil claim must do so under section 40 of C(WUMP)O, rather than section 108 of the SFO.

Law stated - 30 June 2022

Non-contractual duties

In claims for the mis-selling of financial products, what types of non-contractual duties have been recognised by the court? In particular, is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

Generally speaking, financial institutions owe customers standard tortious duties to act fairly and honestly and with due care, skill and diligence in providing financial services. However, these duties have often been excluded by financial institutions through non-reliance or exclusion clauses in client agreements. Such clauses exclude a financial institution's duty to give advice to customers, and even if advice were given, limit the advice to an 'execution-only' basis (even if in practice investment advice was given). This usually prevented customers from relying on the advice and contractually estopped them from asserting that they were induced by or relied upon any representations by the bank.

Hong Kong Courts have confirmed that such clauses can effectively prevent civil claims. Courts have also resisted implying non-contractual terms or duties into a written contract in mis-selling claims. This is consistent with the general principle that a term or obligation which is contrary to an express term should not be implied into an agreement .

However, the Securities and Futures Commission (SFC) intervened to prevent 'intermediaries' relying on one-sided customer agreements. Since 9 June 2017, where a written client agreement is required under SFC regulations (ie, primarily where individual investors and inexperienced corporate investors are involved), a financial institution subject to the SFO regulations must include a mandatory 'suitability clause' in the agreement whereby the intermediary contractually agrees that any financial product solicited or recommended by the intermediary, must be reasonably suitable for the client having regard to the client's financial situation, investment experience and investment objectives. The intermediary must also agree not to derogate from this requirement.

This means that regulated financial institutions are generally no longer able to rely on contractual estoppel or non-reliance clauses to defend mis-selling claims. A financial institution that failed to include the mandatory suitability clause in its customer contract when required would be in breach of its regulatory obligations and it is liable to sanction.

A person who has suffered loss as a result of civil or criminal market misconduct (which includes insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions, or stock market manipulation, each within the meaning of sections 270/291, 274/295, 275/296, 276/297, 277/298 and 278/299 of the SFO respectively) is able to bring a civil claim for compensation under section 281 or 305 of the SFO.

Law stated - 30 June 2022

Statutory liability regime

In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

The following statutes may be applicable in these types of claims:

- the C(WUMP)O; and
- the SFO.

C(WUMP)O

Section 40 imposes civil liability to compensate investors who have suffered losses from relying on untrue statements in a prospectus and thereby subscribed to shares or debentures.

Section 40(1) imposes the liability on every person who:

- was a director of the company at the time the prospectus was issued;
- agreed to be named in the prospectus as a director or who agreed to become a director;
- is a ‘promoter’ of the company (as defined in section 40(5)(a));
- authorised the issue of the prospectus (excluding the SFC or its delegate: section 40(1A)).

Section 40A further imposes criminal liability for untrue statements in prospectuses issued by a company incorporated in Hong Kong. A person who authorised the issue of the prospectus containing an untrue statement will be liable to imprisonment and a fine unless it can be shown that (1) the untrue statement was immaterial; or (2) there were reasonable grounds to believe, and did believe, that the statement was true.

SFO

Sections 277 and 298 of the SFO impose civil and criminal liability respectively where a person discloses, circulates or disseminates, or authorises or is concerned in the disclosure, circulation or dissemination of false or misleading information likely to induce the subscription, sale or purchase of securities or dealing in futures, or increase, reduce, maintain or stabilise the price, if the person knows that, or is reckless or negligent (in civil proceedings only) as to whether, the information is false or misleading. A person who has sustained monetary loss as a result of market misconduct may seek compensation by way of damages from the perpetrators under sections 281 or 305 of the SFO.

Section 384 of the SFO provides that it is also an offence for any person to provide the SFC or the Hong Kong Stock Exchange with information that is false or misleading in a material particular in purported compliance with a statutory requirement.

Sections 107 and 108(1) of the SFO further impose both criminal and civil liability respectively on a person who makes any fraudulent and reckless misrepresentation which induces another person to enter into or offer to enter into an agreement to acquire, dispose of, subscribe for or underwrite securities. Civil (but not criminal) liability is also imposed for negligent misrepresentation. Sections 107 and 108(1) of the SFO are wide enough to cover untrue statements in prospectuses, but if a remedy is available under section 40 of C(WUMP)O, a party will not have a cause of action pursuant to section 108 of the SFO.

Defendants in such cases under C(WUMP)O and the SFO generally include the directors or senior executives of the listed company, the listed company itself, as well as its sponsors.

Law stated - 30 June 2022

Duty of good faith

Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

No, there is generally no implied duty of good faith under Hong Kong law.

Hong Kong Courts have been reluctant to impose implied duties into contracts, recognising the importance of freedom (and privity) of contract, unless there exists some special relationship between the contracting parties, such as a fiduciary relationship.

Law stated - 30 June 2022

Fiduciary duties

In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

Generally speaking, there are no recognised circumstances where a financial institution will owe fiduciary duties to its customers unless there are exceptional circumstances where the bank-customer relationship imposes trustee-like obligations.

The existence of fiduciary duties owed by a bank towards its customer may be excluded through exclusion clauses carving out the specific type of activities. However, these exclusion clauses must be clear and unequivocal and must not seek to exclude intentional breaches of fiduciary duty, fraud or bad faith. They must also not contravene any obligation to include the mandatory 'suitability clause' that intermediaries are required to include in customer contracts under section 6.2(i) of the SFC's 'Code of Conduct for Persons Licensed By or Registered with the Securities and Futures Commission' (the ‘Code of Conduct').

Law stated - 30 June 2022

Master agreements

How are standard form master agreements for particular financial transactions treated?

Standard form master agreements for financial transactions are treated as general commercial agreements. Both are generally respected as commercial bargains, and subject to the general principles of contract interpretation (although using a standard form master agreement may give more certainty to the parties if provisions have already been scrutinised by the Hong Kong Courts).

Law stated - 30 June 2022

Limiting liability

Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

Financial institutions have commonly limited their liability through standard non-reliance or exclusion clauses in client agreements and relied on them to defend mis-selling claims. A long line of cases demonstrated the Hong Kong Court's willingness to uphold exclusion clauses in favour of financial institutions.

However, in Li Kwok Heem John v Standard Chartered International (USA) Limited (2016) , the Court of First Instance held that non-reliance clauses in the client agreement did not protect the bank as they did not cover the client's investments, which were high risk. The Court held that the bank could not rely on its non-reliance clause to exclude or restrict its liability, because the risk disclosure statement failed to satisfy the reasonableness requirement under the Control of Exemption Clauses Ordinance (CECO), and the bank employed a team of investment advisors to advise on and recommend investments to clients so any argument that they were not giving investment advice was (on the facts) untrue. Nonetheless, the bank was not held negligent as against the client because it had done reasonable due diligence in light of the available facts at the time.

In Chang Pui Yin v Bank of Singapore Limited (2016) , the Court of Appeal held that the bank could not rely on the non-reliance and non-advisory clauses in its client agreements. The Court found that the bank owed a contractual duty to advise the plaintiff, that the relationship between the parties was not merely 'execution-only', and that the bank had breached its contractual duty by offering products to the plaintiff that were unsuitable for it and had failed to warn of the risks. The non-reliance clauses were held unconscionable under the Unconscionable Contracts Ordinance and unreasonable under the CECO.

Since 9 June 2017, the SFC has required that a mandatory suitability clause be incorporated into every client agreement pursuant to paragraphs 6.2(i) and 6.5 of the Code of Conduct. Financial institutions must now include an overriding contractual provision that negates the legal effect of any non-reliance clause if it solicits or recommends financial products, and by which the institution agrees not to derogate from the clause. This suitability clause requirement applies to securities, futures contracts or leveraged foreign exchange contracts as defined under the SFO. The practical effect is that financial institutions are now only allowed to solicit and recommend financial products that are 'reasonably suitable' for clients.

Law stated - 30 June 2022

Freedom to contact

What other restrictions apply to the freedom of financial institutions to contract?

The mandatory incorporation of the suitability clause (under paragraph 6.2 of the Code) into client agreements, which came into effect on 9 June 2017, is the only specific restriction inhibiting the freedom of financial institutions to contract. However, penalty clauses are generally void under Hong Kong law if they require payment of more than a genuine pre-estimate of loss.

The suitability clause reads:

If we [the intermediary] solicit the sale of or recommend any financial product to you [the client], the financial product must be reasonably suitable for you having regard to your financial situation, investment experience and investment objectives. No other provision of this agreement or any other document we may ask you to sign and no statement we may ask you to make derogates from this clause .

'Financial product' is defined as any securities, futures contracts or leveraged foreign exchange contracts as defined under the SFO.

The now compulsory suitability clause imposes a regulatory obligation on intermediaries to agree a contractual responsibility to ensure that any recommendations or solicitations are suitable to the client even if no duty to advise would otherwise arise. The suitability clause limits the ability of financial intermediaries (and their representatives) to rely on non-reliance or exclusion clauses in mis-selling claims to argue that they are acting on an 'execution-only' basis even where financial advice is provided to an investor client. There are, however, exemptions to the suitability requirement when dealing with certain professional investors.

Law stated - 30 June 2022

Litigation remedies

What remedies are available in financial services litigation?

The remedies commonly granted in litigation are also available in financial services litigation. These include (for example):

- damages;
- declarations;
- specific performance;
- account of profits;
- tracing;
- garnishee orders;
- vesting orders (in particular in fraud-related claims); and
- injunctive relief.

Law stated - 30 June 2022

Limitation defences

Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

No issues in relation to limitation defences have arisen in financial services cases. Statutory limitation periods prescribed by the Limitation Ordinance (LO) applicable to any contractual or tort case apply to financial services cases.

Limitation periods vary for different causes of action:

- breach of contract claim: six years from the date of the breach (section 4(1) LO);
- breach of a deed: 12 years from the date of the breach (section 4(13) LO); and
- torts: six years from the time when the cause of action accrues (section 4(1) LO).

Limitation periods may be extended by agreement of the parties or in limited circumstances, such as where the claimant was under a disability at the time the cause of action accrued (section 22 LO), where there is an acknowledgement of the cause of action in writing or part payment by the defendant, their predecessor or agent (section 23 LO), or where the action involves fraud by the defendant, concealment of the right of action or a claim for relief from the consequences of a mistake (section 26 LO).

Law stated - 30 June 2022

PROCEDURE

Specialist courts

Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

There is no specialist Court for financial services disputes in Hong Kong. However, a party may choose to list its claim under the 'Commercial List' (instead of the general High Court List), which handles complex commercial matters. Cases listed on the Commercial List will be heard before a Commercial List judge, who has experience in commercial cases.

Individual investors may also opt to resolve disputes with financial institutions through the Financial Disputes Resolution Scheme (FDRS) operated by the Financial Disputes Resolution Centre. For a dispute to be resolved via the FDRS:

- the claimant must be an 'eligible claimant', namely, an individual, sole proprietor or small enterprise who had or has a customer relationship with a member of the FDRS, or has been rendered any financial services by any member of the FDRS;
- the financial institution must be a member of the FDRS;
- the dispute arises from a contract between the parties entered into or which arose in Hong Kong, or any act or omission of the financial institution in connection with the provision of a financial service to the claimant where it acted as an agent; and
- the dispute must be monetary in nature:
  - where the claimant's first knowledge of loss falls on or after 1 January 2018, the amount in dispute may be up to HK$1 million (or its foreign currency equivalent) or within the 24 month limitation period from the date the claimant first had knowledge of his or her loss; and
  - for claimants whose first knowledge of loss was before 1 January 2018, the maximum claimable amount is HK $500,000 and the limitation period is 12 months.

Claims that are subject to ongoing court proceedings will also be accepted under the FDRS – a claimant need not withdraw from those proceedings.

Law stated - 30 June 2022

Procedural rules

Do any specific procedural rules apply to financial services litigation?

No specific procedural rules apply only to financial services litigation. The general procedure in the Rules of the High Court applies to financial services litigation.

Law stated - 30 June 2022

Arbitration

May parties agree to submit financial services disputes to arbitration?

Yes. Arbitration is used widely in Hong Kong for contracts with counterparties in other Asian jurisdictions.

Law stated - 30 June 2022

Out-of-court settlements

Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

Parties are not required to refer financial services disputes to alternative dispute resolution before commencing court proceedings.

Practice Direction 31 – Mediation (PD 31) provides that parties who have commenced court actions by writ must consider mediation unless there are proper reasons for not doing so.

A party who unreasonably refuses to engage in mediation to the required 'minimum level of participation' may face an adverse costs order even if it succeeds in the litigation. While there is no compulsion to mediate under the court rules, the courts have imposed adverse costs orders against parties proven to have unreasonably failed to engage in mediation. PD31 came into effect in 2010 and has since been revised. Going forward, it may be difficult to persuade a court that mediation is not worth attempting at some stage in a case governed by PD31.

Law stated - 30 June 2022

Pre-action considerations

Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

No. General pre-action considerations apply to financial services litigation, including the following.

Pre-action letter

Although not a pre-condition to commencing litigation, pre-action letters are encouraged prior to commencing court proceedings. Failure to do so could attract a costs order (even for a successful plaintiff).

Pre-action disclosure against a likely party

Under section 41 of the High Court Ordinance, a party may seek pre-action discovery from others who are likely to be parties to subsequent civil proceedings. This is intended to assist an applicant to consider whether there is sufficient evidence that its legal rights have been infringed. Pre-action discovery is confined to documents that the applicant knows exist or which must exist, and are directly relevant to the dispute and necessary for disposing fairly of proceedings or saving costs.

Pre-action disclosure against third parties (common in financial services litigation)

- Norwich Pharmacal orders grant discovery against innocent third parties (eg, banks) before proceedings are started to enable a victim to obtain information (eg, the identity of the wrongdoers) or trace assets in order to identify the correct defendant to the proceedings or to apply to preserve assets.
- Bankers Trust orders (generally obtained against banks or professional advisers) can be sought where information is protected by confidentiality and the applicant claims a proprietary interest in assets or the

application is in support of an interlocutory application for Mareva (injunctive) or Anton Pillar (seizure) orders. This is used to discover, for example, the names of alleged wrongdoers, bank books and documents such as account opening documents, signature cards, bank statements and transaction instructions.
- Bankers' Book orders under section 21 of the Evidence Ordinance require banks to provide the applicant with access to entries in a banker's record.
- Ancillary disclosure orders may be obtained pursuant to Mareva (injunctive) relief.

Law stated - 30 June 2022

Unilateral jurisdiction clauses

Does your jurisdiction recognise unilateral jurisdiction clauses?

Yes, unilateral jurisdiction clauses are recognised and used in Hong Kong. Hong Kong Courts have considered jurisprudence on the Hague Convention on Choice of Court Agreements and English case law.

Law stated - 30 June 2022

DISCLOSURE

Disclosure obligations

What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

In writ actions, litigants are subject to discovery obligations under Order 24 of the Rules of the High Court. Parties must disclose all documents relevant to the matters in question in their possession, custody or power. The Peruvian Guano test for relevance (from the landmark English case Compagnie Financiere du Pacifique v Peruvian Guano Company (1882)) applies, requiring disclosure of every document that it is reasonable to suppose contains information that may directly or indirectly enable a party to advance his or her own case or damage the other party's case. This allows 'train of enquiry' disclosure.

A party that suspects the other party has not disclosed documents relevant to the case can apply for a specific discovery order for those documents, although the court will not allow 'fishing expeditions'. If the court considers a specific discovery request is too wide, it may limit the scope of specific discovery (rather than rejecting the application outright).

There are no banking secrecy, blocking or other similar laws in Hong Kong. However, section 378 of the Securities and Futures Ordinance (SFO) prohibits disclosure of information relating to SFC investigations without the Securities and Futures Commission (SFC)'s consent.

Law stated - 30 June 2022

Protecting confidentiality

Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

All documents relevant to the dispute that are within a party's possession, custody or power must be disclosed during the discovery stage of court actions, even if they are unfavourable to the disclosing party's case.

Exceptions to this general rule include documents subject to legal professional privilege, privilege against self-incrimination, public interest immunity and statutory secrecy under section 378 of the SFO.

A party who receives documents through discovery gives an implied undertaking that they will use them only for the purpose of that action. A party may apply for release from the undertaking where they can demonstrate rational and persuasive reasons for being released. Such applications turn on their individual facts.

Information that is confidential and not relevant to the issues in the case may be redacted from documents disclosed in court proceedings.

Law stated - 30 June 2022

Disclosure of personal data

May private parties request disclosure of personal data held by financial services institutions?

Yes, data access requests submitted by the data subject themselves are permitted under the Personal Data (Protection) Ordinance (PDPO) using the data access request form and are used against financial services institutions.

Data users must comply with a data access request within 40 days after receipt unless there are valid grounds for refusing to comply. Any such grounds should be provided to the data subject within 40 days from receiving the request.

The courts have indicated that data access requests under the PDPO are not intended to supplement or broaden parties' discovery rights in legal proceedings (Wu Kit Ping v Administrative Appeals Board (2007)).

Law stated - 30 June 2022

Data protection

What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

A Pilot Scheme for Discovery and Provision of Electronically Stored Documents for Commercial List Cases (Practice Direction SL1.2 (PD SL1.2)) was introduced on 1 September 2014 to promote proportionate discovery of electronic documents in complex commercial cases.

'Electronic document' is defined in paragraph 3 of PD SL1.2 as 'any data or information held in electronic form, including e-mails and other electronic communications such as text messages and voicemail, word-processed documents and files, images, sound recordings, videos, web-pages, and databases, that are stored on any device, including data or information stored on portable devices such as memory sticks and mobile phones.' It includes data readily accessible from computer systems, metadata and electronic data that has been deleted.

PD SL1.2 is mandatory for cases (1) commenced in or transferred to the Commercial List after 1 September 2014, which includes financing disputes and commercial or private wealth bank-customer disputes; (2) where the claim or counterclaim exceeds HK$8 million; and (3) where there are at least 10,000 documents to be searched in discovery.

PD SL1.2 may also be adopted electively in:

- Commercial List cases commenced or transferred after 1 September 2014 if the parties agree, regardless of the amount in dispute and the number of documents involved;
- Commercial List cases commenced or transferred before 1 September 2014 which have not reached the discovery stage; and
- any non-Commercial List cases where the court otherwise directs.

Only directly relevant electronic documents must be produced (instead of the usual Peruvian Guano test for relevance). A party may apply to the Court for discovery of electronic documents that are not directly relevant after discovery and exchange of all other evidence.

Where parties give discovery electronically they often do so using protocols agreed in writing between their legal representatives, to supplement the court rules and PD SL1.2.

Law stated - 30 June 2022

INTERACTION WITH REGULATORY REGIME

Authority powers

What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

The SFC and the Hong Kong Monetary Authority (HKMA) can seek various orders from the Hong Kong Courts against a wide range of parties under the SFO.

For example:

- The SFC may apply for orders and injunctions where a person appears to have contravened any SFO provision or the prospectus requirements under (C(WUMP)O), including freezing orders or restoration orders to seek redress for those affected by the alleged offender's breach (section 213 SFO).
- The SFC may also apply to the court for an order to wind-up a company under C(WUMP)O if it is in the public's interest and just and equitable to do so (section 212 SFO).

Compared to disciplinary proceedings (which the SFC can bring against persons licensed by or registered with the SFC), the above orders may be sought against a much wider range of parties.

Law stated - 30 June 2022

Disclosure restrictions on communications

Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

Disclosure restrictions imposed by regulators

Section 378 of the SFO imposes statutory secrecy over information regarding the SFC's work.

Section 378 requires the SFC, its staff, agents and advisers to:

- preserve the secrecy of any information obtained by them by virtue of their appointment or performance of their functions under the SFO;
- not communicate any such information to any other person; and
- not permit any other person to have access to any information coming into their possession as a result of their appointment or performance of their functions.

The secrecy obligation in section 378 also applies to financial intermediaries, their employees and anyone who comes into contact with the SFC as a result of assisting the SFC in its investigations or informal requests for information.

Breach of the statutory secrecy obligation is a criminal offence with a maximum penalty of HK$1 million fine and up to two years' imprisonment.

Exceptions to the statutory secrecy obligation include:

- information that is already publicly available;
- information disclosed in connection with court proceedings to which a person is a party;
- where disclosure is required under a court order or other law;
- disclosure to professional advisers acting in connection with the investigation;
- where the SFC has given consent in writing to disclose the matter; and
- where the SFC's consent can be assumed, which is limited to disclosing:
  - the fact that the person is bound by the secrecy obligation;
  - the general nature of the matter giving rise to the secrecy obligation, but without revealing anything specific;
  - how the person came to be bound by the secrecy obligation (eg, upon receiving a notice under section 183 of the SFO);
  - the date, time and place at which the person is required to provide documents or attend an interview, but only if being disclosed to:
    - in the case of an individual, the person's employer, spouse, partner or (for regulated persons) his or her firm's responsible, executive or compliance officer; and
    - in the case of a company, its board of directors, holding company or indemnity insurers.

Section 120 of the Banking Ordinance also imposes a statutory secrecy obligation, binding only the HKMA, its employees and agents, but not those who are responding to the HKMA's enquiries.

Disclosure to Regulators

Documents subject to legal professional privilege do not have to be disclosed to regulators.

Privilege against self-incrimination is not an excuse not to answer questions in an SFC interview or information request (section 187 of the SFO). The interviewee or provider of information may, however, claim privilege against self-incrimination when providing the information to prevent the answers being used in criminal proceedings against them.

Law stated - 30 June 2022

Private claims

May private parties bring court proceedings against financial institutions directly for breaches of regulations?

Individuals and companies can bring claims for misrepresentation, breach of contract and for untrue statements in a prospectus causing losses. There are also certain other direct remedies available to private parties under the SFO. Individuals may not, however, bring court proceedings against financial institutions directly for breaches of regulations under the SFO and C(WUMP)O. Private parties may also lodge complaints against financial institutions with the SFO and the HKMA.

Law stated - 30 June 2022

In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

Financial institutions are only required to disclose complaints made by other private parties against it to the extent those complaints are disclosable under the general rules of discovery, namely whether they are relevant to the issues in the case under the Peruvian Guano relevance test.

Law stated - 30 June 2022

Enforcement

Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

There is no regime for private parties to enforce directly the terms of a business review or redress exercise that a financial institution has agreed to conduct.

Law stated - 30 June 2022

Changes to the landscape

Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

Following the global financial crisis and in particular the Lehman Brothers incident in 2008, the main reforms by the SFC concerned the professional investor regime and client agreement provisions.

Professional Investor Regime

During the 2008 financial crisis, individual investors in Lehman Brothers-related products complained that they were classified as professional investors and received reduced investor protections, and some investors alleged they did not realise they had signed a declaration confirming that they wished to be treated as professional investors and understood the risks and consequences of being so treated.

In March 2016, the SFC therefore amended the professional investor regime to revise intermediaries' obligations according to a categorisation of professional investors as institutional, corporate or individual and redefined the criteria for assessing investors' knowledge. In July 2018, the SFC further amended the regime to:

- expand the categories of persons who qualify as professional investors;
- allow the aggregation of certain assets in determining whether professional investor asset tests are met; and
- recognise alternative forms of evidence to show whether a person meets asset or portfolio thresholds to qualify as a professional investor.

Client agreement provisions

In numerous mis-selling claims against financial institutions, the Hong Kong Courts upheld financial institutions' ability to rely on standard non-reliance clauses in client agreements, expressly stating that investment accounts were operated on an 'execution-only' basis and that information given to clients did not constitute investment advice.

In June 2017, the SFC therefore mandated the incorporation of a suitability clause in relevant client agreements under section 6.2(i) of the Code of Conduct. Since then, all client agreements within the scope of that section must contain a suitability clause to ensure the suitability and reasonableness of recommendations or solicitations made to a client, preventing financial institutions from avoiding liability for investment advice or recommendations through a standard non-reliance clause.

Law stated - 30 June 2022

Complaints procedure

Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

Customers may file complaints about financial services firms with the SFC (for potential breaches of the SFO) and the HKMA (for banks regulated under the Banking Ordinance). If there is sufficient evidence of a potential regulatory breach, the SFC or the HKMA will commence an investigation.

Customers may also resolve their disputes with financial institutions through the FDRS operated by the Financial Disputes Resolution Centre. To be eligible, claims have to be monetary in nature, and up to a maximum of HK$1 million (where knowledge of losses came on or after 1 July 2018).

Law stated - 30 June 2022

Recovery of assets

Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

Investor Compensation Fund

The Investor Compensation Fund (Fund) is established under the SFO and administered by the Investor Compensation Company Limited to compensate investors of any nationality who suffer pecuniary losses because of default of a licensed intermediary or authorised financial institution in relation to exchange-traded products in Hong Kong.

Defaults cover insolvency, bankruptcy or winding up, breach of trust, defalcation, fraud or misfeasance of a financial institution, its employee or associated person.

For defaults occurring before 1 January 2020, the Fund also covers investors' losses in relation to securities traded on a stock market operated by the Shanghai Stock Exchange or the Shenzhen Stock Exchange and in respect of which an order for sale or purchase is permitted to be routed through the northbound link of a Stock Connect arrangement. Investors who have sustained such losses can receive a maximum compensation of HK$500,000 (per claimant), with joint account holders each subject to maximum compensation of HK$500,000.

Deposit Protection Scheme

The Deposit Protection Scheme (DPS) established under the Deposit Protection Scheme Ordinance protects depositors (individuals or corporate, single or joint account holders) by paying them a maximum of HK$500,000 in compensation if a bank is a member of the DPS. All licensed banks in Hong Kong including virtual banks are members of the DPS.

Most of the commonly placed deposits with DPS members, regardless of the currency, qualify for protection under the DPS. These include current accounts, savings accounts, secured deposits and time deposits with maturity not exceeding five years.

However, the following types of deposits are not protected by the DPS:

- structured deposits;
- time deposits longer than five years in maturity;
- bearer form deposits such as bearer certificates of deposit;
- off-shore deposits;
- deposits held for the account of the Exchange Fund; and
- deposits held by an excluded person. Examples of excluded persons include a related company of the DPS member, a multilateral development bank, licensed banks, restricted licence banks, deposit-taking companies, a foreign bank, senior management, controllers and directors of the DPS member and its related companies, etc.

Depositors will be notified by the bank if their deposits are protected by the DPS. They are automatically protected by the DPS if eligible without the need for registration, application or payment.

Law stated - 30 June 2022

UPDATE AND TRENDS

Challenges and trends

What are the principal challenges currently facing the financial services litigation landscape in 2022? What trends are apparent in the nature and extent of financial services litigation? Are there any other noteworthy features that are specific to financial services litigation in your jurisdiction?

As with other jurisdictions, financial corporations and their directors and officers face an increased risk of litigation, from market volatility and recession. 'Climate change' investment-related litigation has not yet been seen in Hong Kong, financial institutions and their directors and officers should consider these risks, because of the increased focus on 'green financing' and ESG issues in Hong Kong.

Claims to recover money defrauded from customers through cyberfraud and telephone or online scams have been prevalent in Hong Kong (whether the fraud or scam occurred within Hong Kong or overseas), since Hong Kong is a popular destination for recipient accounts. Where financial institutions are on notice of such fraud (and held or hold an aggrieved account holder's funds in Hong Kong) they face the prospect of complaints and lawsuits. The Hong Kong Courts have recently extended restitutionary relief in these circumstances, against fraudsters or those who hold the proceeds of fraud. Potential claimants are also watching the developing caselaw on Quincecare duties to decide whether to bring claims against banks.

Hong Kong does not have an established, effective class action or group litigation regime, and litigation funding is not allowed for Court litigation. This is in contrast with other jurisdictions, such as the US or the UK. There is a procedure for 'representative actions' under the Hong Kong High Court rules, but this is not well-developed and not often used. In the past, there has been talk about class action reform in Hong Kong SAR, but this has not come to much (to date).

The Hong Kong SAR government is keen to maintain Hong Kong as a leading arbitration centre. Legislation passed in 2019 permitted third party funding for arbitration proceedings seated in Hong Kong and their related court proceedings. Lawyers are not currently able to charge success fees, but legislation has been introduced and is expected to be passed in 2022 or 2023 to allow lawyers acting for parties in arbitrations seated in and outside Hong Kong to charge 'outcome related fee structures' for non-personal injury claims. This will allow, for example, conditional fee agreements, damages-based agreements and hybrid damages-based agreements. These developments may increase claims against financial institutions where the customer agreement includes an arbitration agreement. Investors, customers and financial institutions should stay informed of the latest developments.

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Jurisdictions

Australia	Gilbert + Tobin
Greece	Souriadakis Tsibris
Hong Kong	RPC
South Korea	Kim & Chang
Switzerland	Bär & Karrer
United Kingdom	Stewarts