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FEATURE

PROFESSOR BERNARD HIBBITTS
FOUNDER & EDITOR-IN-CHIEF OF JURIST

Letter from the Editors

Dear readers,

We hope you all had a nice summer break despite the frequent typhoons and rainstorms. After the series of losses and bankruptcies in crypto markets last year, Hong Kong introduced a new licensing regime for virtual asset trading platforms in June 2023 that imposed strict requirements on areas including management fitness and competency, market surveillance and reporting, governance, and internal control. Virtual asset trading platforms should ensure they comply with relevant regulations and are accustomed to regulatory oversight while implementing innovative strategies to outplay the competition. On the other hand, the Hong Kong Court of Final Appeal delivered a landmark decision that marked a major development for recognising same-sex partnerships earlier this month. In view of the absence of such recognition as "essentially discriminatory and demeaning to same-sex couples", the Hong Kong Court of Final Appeal ordered that the government must, within 2 years, provide an alternative legal framework for same-sex couples to meet basic social requirements. Hong Kong has taken a significant step forward in the recognition of homosexual rights.

This edition's featured interview explores the establishment and functioning of JURIST, an esteemed online legal news service led by over 100 law students from 50 law schools worldwide. Professor Bernard Hibbitts, the founder of JURIST, shared his experience in creating and running JURIST, as well as his valuable insights on the development of the rule of law, the impact of generative AI on legal studies and practice, and the importance of law students connecting with the community. This interview not only aims to introduce our readers to the meaningful work of JURIST but also seeks to demonstrate an essential aspect of JURIST: providing comprehensive coverage of the global progression of the rule of law. We are excited to begin our partnership with JURIST this semester in an effort to deepen the interests of students in international legal issues and developments.

As always, students' contributions constitute the backbone of the Gazette. This issue presents an extensive collection of articles covering topics ranging from the legal position of cryptocurrencies to reform ideas for Hong Kong's heritage conservation framework. Our editors also explored exciting social and commercial issues such as Hong Kong's secondary listing regime and the Mandatory Reporting Child Abuse Bill.

This edition of the Gazette has witnessed an exceptional number of article submissions. We extend our gratitude to the writers for their keenness in expressing their ideas and insights through their contributions. Additionally, we acknowledge the tireless efforts and support of our editors in working closely with the writers. Our aim is to furnish our readers with a comprehensive understanding of legal matters through our articles.

We hope you all have a fruitful semester ahead!

Best regards,

Bertha Chui and Tony Lin
Editors-in-Chief

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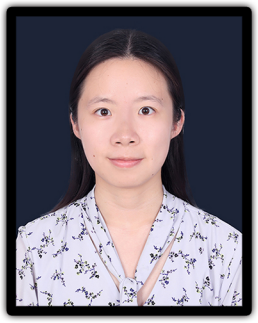

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BANKING LAW

The Fifth Banking Capital Rule in China: A Step Towards Convergence to Basel Accords with Political Consideration

Su Wenjun

INTRODUCTION

The Chinese banking system has undergone significant changes in the past few decades, with the development of banking capital rules being a crucial aspect of this transformation. In 2023, the China Banking and Insurance Regulatory Commission (CBIRC) published the revision of the Commercial Bank Capital Management Measure (<商业银行资本管理办法>), which is the fifth banking capital rule in China. This article will focus on analysing the improvement made by the fifth capital rule, with a particular focus on comparing it to the Basel III regulations. My argument is that the fifth capital rule has taken a big step toward Basel III requirement, which reflects China's commitment to align its banking system with international standards. However, some political considerations can be found within the fifth capital rule, particularly in relation to the standardized credit risk for sovereigns and domestic non-central public sector entities (PSEs). To substantiate, in this article, part one provides detailed comparison between the fifth capital rule and the Basel III accord, examining whether the major deviations identified in the Assessment of Basel III Regulations – China (China Basel III Assessment) have been addressed in the new rule. Part two of this article discusses why some modifications in the new rule may involve political considerations. Part three concludes the discussion by summarizing the key takeaways and discussing the implications of the new rule for China's banking industry.

COMPARISON BETWEEN THE FIFTH CAPITAL RULE AND CHINA BASEL III ASSESSMENT

In 2013, the Basel Committee on Banking Supervision published the China Basel III Assessment report, which assessed China's implementation of Basel

capital standards. ***Table one*** compares the major deviations identified in the assessment with the fifth capital rule.

The China Basel III Assessment rated most of the assessed items as 'compliant'. However, 'Credit Risk: Standardized Approach' and 'Disclosure Requirements' received a 'largely compliant' rating. The assessment identified several material deviations and omissions in these two areas. Item four and six of the credit risk approach in the table were absent from the fourth capital rule, and the remaining items were rated as materially or potentially materially deviant. The fifth capital rule has addressed most of these inconsistencies. For example, for debt securities of foreign commercial banks to be eligible collateral, the fourth capital rule prescribes that the sovereign of incorporation of these foreign commercial banks needs to be rated at least A–. However, there is no such a rating threshold for domestic commercial bank. Under the Basel requirements, commercial banks' debt securities were only eligible collateral after they are rated at least BBB-, regardless of whether they are domestic banks or foreign banks. The differential treatment relating to eligible collateral debt securities between domestic banks and foreign banks no longer exists under the fifth capital rule. If a commercial bank's debt securities are to be considered eligible collateral, it need to be rated at least A. Therefore, despite some items are still not in line with Basel accords, it should be concluded that China banking capital rule is taking a convergent step towards international banking regulations.

Table one

COMPARISON BETWEEN THE FIFTH CAPITAL RULE AND CHINA BASEL III ASSESSMENT

Major Deviations		Does the Fifth Capital Rule Comply?	Articles
Credit Risk: Standardized Approach	1. Claims on sovereigns	Unchanged, Not comply	Art.62
	2. Claims on non-central PSEs	Not comply but with improvement	Art.63, 64
	3. Claims on banks	Not comply but with improvement	Art.66 & Annex two
	4. Past due unsecured portion of any loans	Comply	Art.81(2)
	5. Collateral instruments	Not comply but with improvement	Annex three, Table four
	6. Simple approach for recognizing collateral	Comply	Art.85-88
Disclosure Requirements	1. Quantitative disclosure rules for credit portfolios	Comply	Annex 22, Table CRB
	2. Disclosure rules for securitization exposures	Comply	Annex 22, Table SECA to SEC4
	3. Disclosure rules for remuneration	Comply	Annex 22, Table REMA to REM3

Note: CCP=Central Counter Party
Source: Author's collation

POLITICAL CONSIDERATIONS IN THE FIFTH CAPITAL RULE

The fifth capital rule includes some political considerations. One example is the credit risk for claims on domestic sovereigns, which has been a major deviation between China's banking regulations and Basel accords for a long time. Chinese banking regulations have allowed commercial banks to assign a 0% credit risk to claims on domestic sovereigns since the first banking capital rule in 1994, whereas Basel requirements call for risk-weighting based on the external credit assessment of the sovereign. Chinese regulatory is reluctant to apply the credit risk approach to domestic sovereigns. One possible reason is that over-reliance on external credit rating agencies such as S&P and Moody's cannot accurately reflect the maturity and reputation of the domestic market. Applying the credit risk approach fully to domestic sovereigns could result in domestic commercial banks granting a higher risk weight to domestic claims than foreign counterparts, potentially destabilizing the development of the domestic financial market.

Another example of political considerations in the fifth capital rule is the credit risk for claims on domestic non-central PSEs, which relates to the local government debt crisis. Many local governments in China have accumulated large amounts of debt that they may not be able to repay. For example, Zunyi city's largest urban investment company announced that its 15.594 billion yuan bank loan will extend for 20 years, with only interest payments in the first ten years and repayment of the principal in the next ten years. In early 2023, rumours spread that Kunming city's local government financing vehicles were having difficulty in repaying debts. Besides, according to the Ministry of Finance, the total balance of local government debt was 34 trillion yuan as of the end of 2022, while some financial institutions estimated that the total off-the-book debt of Chinese local governments could be up to 59 trillion yuan.

Arts. 62 to 64 in the fifth capital rule stipulate the credit risk for claims on domestic PSEs. The Chinese regulator takes a nature-based approach to domestic PSEs. For example, if a domestic PSE is financially supported by the central government, the credit risk will be 20%, while if not, the credit risk will be 50%. This arrangement is an improvement when compared to the previous capital rule, which stipulated a one-size-fits-all approach where the risk weight for claims on domestic non-central PSEs was a fixed 20%. However, it still differs from the Basel accords, which requires a credit rating approach to PSEs. One possible reason for the unique approach towards claims on domestic PSEs is that it can help commercial banks save over 1.2 trillion yuan and provide room for the banks to expand their holdings of government debt, further supporting the medium- and long-term expansion of government debt. Additionally, according to art. 63, the credit risk for enterprises invested by PSEs is not subject to the credit risk for PSEs. This means that the credit risk for Local Government Financing Vehicles (LGFVs) is not determined by the local government but based on their own credit ratings. The whole arrangement regarding claims on domestic PSEs is in line with the requirements of Circular No.5 - a document issued by the State Council that aims to deal with the local governments' budgetary management system. Circular No.5 requires local governments, the constituent departments of the State Council, and organizations directly under the State Council to place the settlement of the debt crisis as an important political discipline, urging them to clean up and standardize LGFVs, divest their government financing functions, and reconstruct or liquidate those who have lost their solvency. Therefore, it should be concluded that the main political consideration behind the regulation of credit risk towards domestic PSEs is the settlement of the local government debt crisis.

CONCLUSION

The fifth capital rule marks a significant improvement in the alignment of China's banking system with international standards. While there are still some deviations from the Basel accords, the rule represents a convergent step towards international banking regulations. However, the new rule also contains some political considerations, especially regarding the credit risk for claims on domestic sovereigns and non-central PSEs. The application of a nature-based approach to domestic PSEs may help commercial banks to facilitate its function in providing support to the settlement of the local government debt crisis. Overall, the fifth capital rule reflects China's continued commitment to modernizing and strengthening its banking system, while also addressing political and economic challenges.

COMMERCIAL LAW

The Future of CISG in Hong Kong: Insights into Influencing Factors, Potential Opt-Outs, and Implications for Mainland-Hong Kong Contracts

Liu Xuanxuan Cecilia

INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG) took effect in Hong Kong on December 1, 2022. Incorporated into Hong Kong law via the Sale of Goods (United Nations Convention) Ordinance (Cap. 641), CISG is a multilateral treaty that establishes a uniform framework for the international sales of goods. According to the Trade and Industry Department, six of Hong Kong's top ten trading partners in 2022 were signatories of CISG. These six trading partners together accounted for 69.7% of Hong Kong's total trade in 2022, among which Mainland China, as Hong Kong's top trading partner, contributed 49.1%.

While CISG exists within Hong Kong law, the convention does not – *per se* – govern Mainland-Hong Kong contracts as Hong Kong is not considered a 'different state' from Mainland China under Art. 1(1). Therefore, Mainland-Hong Kong contracts are still governed by traditional private international laws, unless parties expressly opt to apply CISG in their contracts. Given significant economic interplays between the Mainland and Hong Kong, many view incorporating CISG into Hong Kong law to be of limited value unless it mandates default application to Mainland-Hong Kong contracts. In this respect, scholars posit that a reciprocal arrangement between the Mainland and Hong Kong will allow 'the same set of rules [to] be applied whether the dispute is

referred to a court in Hong Kong or Mainland China'. The Hong Kong General Chamber of Commerce has similarly revealed that the Hong Kong government is in discussions with Mainland China's Central People's Government to establish such an arrangement.

This essay explores potential issues that may arise once such a reciprocal arrangement is in place to automatically apply CISG to Mainland-Hong Kong contracts. These issues include the possibility that parties to Mainland-Hong Kong contracts will choose to opt out of CISG, factors that account for such opt-outs, and their potential implications. This essay then concludes by making suggestions in light of the recent ratification of CISG in Hong Kong, and anticipates Hong Kong's opt-out rate in the near future.

CISG vs. SOGO: CHOOSING THE GOVERNING LAW FOR MAINLAND-HONG KONG CONTRACTS

As compared to CISG, Hong Kong businesses are much more familiar with the domestic law – the Sale of Goods Ordinance (Cap. 26) (SOGO). Thus, Hong Kong parties would generally prefer applying SOGO to CISG as they likely arranged their businesses in compliance with SOGO provisions. Nonetheless, as a developing international treaty, CISG is vague and falls victim to inconsistent interpretations. While SOGO is generally perceived to favour buyers, CISG has largely been recognised as a law that provides sellers with a commercial advantage. This is because the legislative purpose of CISG offers sellers with remedies of a more favourable nature – CISG was effected to deal with international sales, in which contract rescission would cost substantial time and resources. A hypothetical scenario below generally illustrates the conflicting considerations for Hong Kong parties in deciding between CISG and SOGO as the governing law of their contracts.

Hong Kong seller vs. Mainland buyer: The pro-seller bias of CISG might reduce Hong Kong parties' inclinations to exclude CISG as the treaty is widely recognised to be providing sellers with considerably more advantageous remedies. However, with challenges such as inconsistent interpretations and limited scope weighing down CISG, the decision to exclude it ultimately depends on whether its pro-seller advantages outweigh its detriments.

Hong Kong buyer vs. Mainland seller: A Hong Kong buyer will likely prefer applying SOGO to CISG because SOGO provides buyers with more advantageous remedies. Additionally, a Hong Kong party would tend to favour SOGO as opposed to CISG as Hong Kong parties are generally more familiar with SOGO. In the event where a Mainland party prefers to apply CISG due to the reasons discussed below, the governing law of the Mainland-Hong Kong contract would ultimately depend on the bargaining power of each party.

As the choice of law in commercial transactions realistically depends on various factors, such as bargaining power and transactional costs, the next sections will discuss two factors that could potentially affect the decisions of Hong Kong businesses to exclude CISG.

MAINLAND PARTY'S PREFERENCE FOR CISG

The extent of Mainland parties' inclination to applying CISG could significantly influence Hong Kong businesses' decision to opt-out. Compared to high opt-out rates of about 50% in jurisdictions such as the US and Australia, surveys indicate that Mainland China has the lowest general opt-out rate of approximately 37%. Such a low opt-out rate in the Mainland may be attributable to several reasons.

Firstly, China has a long history of application of CISG, which has been in effect in its legal system since 1988. Early ratification offered ample time for its economy, legal market, and domestic legal system to integrate this international convention. During this period, China developed its domestic contract laws largely modelling against CISG. This similarity to domestic laws and policy support promoted CISG's adaptation in legal education and gained in familiarity among legal practitioners, businesses, courts, and arbitration tribunals. According to the database of 'China Judgments Online', a website where Mainland courts publish their judgments, 349 Mainland cases referenced CISG between 2013 and 2020. CISG's presence in judicial practice benefits Mainland courts and lawyers through increasing interpretations and clarification of its provisions. In contrast to Australia where there is an established commercial practice to automatically exclude CISG in contracts, a positive cycle has been initiated in Mainland China. As CISG has been frequently applied and litigated in the Mainland, legal practitioners have become more familiar with its provisions; meanwhile judicial guidance and scholarship have grown with increasing clarification. It has thus become a more efficient body of law governing the sale of goods than equivalent domestic laws in other jurisdictions.

Hence, Mainland parties, who are likely to be more familiar with CISG than other foreign laws, are inclined to apply CISG instead of Hong Kong laws. It will likely be relatively easier for Mainland and Hong Kong parties to agree on the default application of CISG to Mainland-Hong Kong contracts, except for cases where the Hong Kong party has a superior bargaining power. If Hong Kong parties are adamant about adopting SOGO, it could result in prolonged negotiation or other unfavourable terms in the contract. This parallels the view that China's increasing economic power is fuelling global acceptance of CISG, as evidenced by the increasing number of "Belt and Road" participants that have acceded to CISG. The total percentage of CISG members that have participated in the "Belt and Road" initiative has reached nearly 50%. Hence, I am of the view that Hong Kong, as a popular trading partner of China, is likely to follow suit.

Therefore, if a reciprocal agreement mandates CISG's default application to Mainland-Hong Kong contracts, opt-out rates in Hong Kong could decrease as Mainland parties generally prefer CISG. This may, in turn, strengthen Hong Kong's reputation as an international dispute resolution centre. Furthermore, increased application and litigation of CISG in Hong Kong would boost familiarity levels of CISG among courts, arbitrators, and lawyers in the jurisdiction. Incorporating and developing the Hong Kong legal industry's expertise in CISG could enhance the quality of services delivered by its professionals and further solidify Hong Kong's position as a preferred international dispute resolution centre.

THE "HOMEWARD TREND" IN THE MAINLAND-HONG KONG CONTEXT

Another factor that could influence Hong Kong parties' decision to opt out of CISG is the apparent 'homeward trend'. The 'homeward trend' refers to instances where courts, despite their obligation under Art. 7(1), do not apply CISG when they are obliged to or fail to interpret its provisions in conformity with international principles. This is particularly prevalent in the Mainland, although CISG has governed contracts involving Mainland parties since 1988.

Firstly, research has demonstrated that Mainland courts generally lean towards applying domestic law because they are unfamiliar with international treaties and foreign laws. An empirical research conducted in 2017 indicated that 43.8% of cases in the Mainland failed to apply CISG when it should have been applied under Art. 1(1)(a). The homeward trend in the Mainland has been shown in cases where courts have had to decide whether an express choice of Mainland law in contracts denotes the exclusion of CISG. For instance, In *Kim Tong Won and Li Yan v. Jinjiang He Xing Garment Manufacture, Co.* [2009], the Guangdong High People's Court held that while CISG would have been applicable to a contract between a Mainland seller and a Korean buyer, it was unequivocally excluded when both parties agreed that their contract would be governed by "the law of the Mainland." Nonetheless, this approach is inconsistent with the prevailing view in international literature that has been adopted by other signatories. The prevailing view is that, where parties have places

of businesses located in different countries and there is a choice of law in favour of a CISG contracting state, parties may only opt-out of CISG under two situations: either their contract expressly stipulates that only the 'domestic law' of a CISG contracting state will apply, or that the contract expressly excludes the application of CISG. The approach adopted by Mainland courts demonstrates a tendency to favour domestic laws and shows inadequate consideration of international literature and foreign case laws as prescribed by Art. 7(1).

Secondly, when CISG is not of appropriate applicability to certain issues, Mainland courts tend to apply domestic law to 'fill the gap'. For example, in *Korea He Jin A&T Co Ltd v Changhua Hong Clothing Co Ltd* [2014] and *Multi Laser Industrials v Shenzhen Guanyu Electronics Co Ltd* [2016], Mainland courts failed to adequately explain why domestic Mainland law was applied to 'fill the gap' in CISG-governed contracts. Additionally, in cases where the 'proper law approach' is applied according to private international rules, i.e. to apply the law in which the transaction has the closest and most real connection to, Mainland courts often still arrive at domestic Mainland law for gap-filling. This may be because Mainland's private international rules strongly favour its domestic law. This is demonstrated by the fact that only one Supreme People's Court decision held that New York law shall supplement CISG on issues that fall outside the scope of the latter. However, this case is distinguishable from the above as it contained an express choice of law in favour of New York. In other words, this decision is unique as the express choice of a foreign law eliminates Mainland law as an alternative to CISG. Therefore, it is ambiguous as to whether this case is only guidance for cases where parties expressly choose a foreign law to govern their contracts, or whether it equally extends to contracts where Mainland domestic law could be considered as an alternative. Case law of the Mainland generally seems to suggest that courts favour the application of domestic Mainland law to issues that fall outside the scope of CISG.

In Mainland-Hong Kong transactions, disputes are typically settled in either Mainland or Hong Kong courts. However, the homeward trend commonly seen in Mainland cases raises uncertainty as to which law will be applied if contracts are litigated in the Mainland. For reasons discussed above, Mainland courts might fail to apply CISG when it should have, or fail to interpret the dispute in accordance with international principles, as required under Art. 7(1). Even if CISG is applied, parties may choose to apply domestic Mainland law as the alternative law for gap-filling, if required. This uncertainty might dissuade parties from accepting the default application of CISG and encourage them to opt out, especially if Hong Kong businesses are unfamiliar with Mainland laws.

On the other side of the coin, the homeward trend in Mainland courts might further encourage forum shopping between the Mainland and Hong Kong, possibly bolstering Hong Kong's position as an international dispute resolution centre. By acceding to CISG, Hong Kong may become a more sought-after forum for disputes on Mainland-Hong Kong transactions, allowing parties to avoid the uncertainty of the homeward trend. To seize this opportunity, Hong Kong should train legal professionals on CISG as well as develop a progressive judicial approach towards integrating CISG by actively considering foreign decisions and international literature.

In whole, in the current commercial world where transacting with Mainland counterparts is important to Hong Kong businesses, there are conflicting factors that may encourage or discourage Hong Kong parties from excluding CISG once a reciprocal arrangement mandates its application to Mainland-Hong Kong contracts. On one hand, Mainland parties' strong preference for CISG increases the possibility that the contract would be governed by CISG, but on the other the homeward trend in the Mainland might prompt Hong Kong parties to exclude CISG.

CONCLUSION

Although the prevalent 'homeward trend' in Mainland China may pose a concern for Hong Kong parties, the preference Mainland parties have for applying CISG would likely result in lower opt-out rates in Hong Kong, as compared to other common law jurisdictions. While Mainland China's 'homeward trend' may result in greater risks for foreign parties, it could increase Hong Kong's competitiveness as a forum for international businesses to resolve commercial disputes, such as disputes with regards to the sales of goods.

While a large portion of Mainland-Hong Kong contracts may not apply CISG due to general concerns with respect to CISG and pending reciprocal arrangements between Mainland China and Hong Kong, this phenomenon could change once the application of CISG to Mainland-Hong Kong contracts is mandated. This may also result in a significant decrease in opt-out rates of CISG in Hong Kong.

All in all, I recommend Hong Kong to actively promote CISG through legal education and adopting a liberal court approach that takes international scholarship into account. Legal organisations, such as the Department of Justice, the Hong Kong Law Society, and the Bar Association, could provide institutional support in the form of webinars and others. While CISG may have certain limitations, it represents a positive move towards harmonisation in international trade. As CISG gains in prominence worldwide, jurisdictions, such as Australia, that commonly exclude CISG despite having ratified the treaty have gradually integrated CISG into their contracts. Therefore, Hong Kong could benefit from ratifying CISG that would potentially bolster its position as an international dispute resolution centre.

Unhappily Married to Bad Products? Need for No-Fault Consumer's Right of Withdrawal

Ho Shuen Him Gideon

INTRODUCTION

After making a problematic purchase, should a consumer approach the Consumer Council, the Customs and Excise Department (C&ED), or the Small Claims Tribunal? This question often plagues the lay consumer when they are redirected again and again by a tangled web of bodies and departments. The PCLL prerequisite commercial law class may suggest that claiming in the Small Claims Tribunal under the implied terms under the Sale of Goods Ordinance is the solution, but that does not represent the full story. This paper reviews consumers' private remedies for problematic purchases in Hong Kong. Ultimately, enforcing private consumer rights remains inadequate in Hong Kong due to their fault-based nature, requiring lay consumers to prosecute protracted and complicated laws. A no-fault right of withdrawal should be provided to resolve most consumer disputes out of court.

CURRENT PRIVATE CONSUMER REMEDIES IN HONG KONG

Generally, consumer protection law is bisected into public and private protections, where the former refers to regulation by public bodies on traders and the latter is the body of rights where consumers can seek redress when a trader breaches their obligations. Hong Kong has a patchwork system of statutory rights covering different civil actions against traders during consumer disputes. The relevant substantive ordinances include the Sale of Goods Ordinance (SOGO), Supply of Services (Implied Terms) Ordinance (SOSITO), Trade Descriptions Ordinance (TDO), Control of Exemption Clauses Ordinance, and Unconscionable Contracts Ordinance (UCO).

The most long-standing consumer remedies are the implied terms under the sale of goods law and later supply of services law. SOGO enlists a series of implied terms under ss14-17 for title, description, quality or fitness, and sale by sample, while SOSITO includes ss5-7 for reasonable care and skill, time for performance, and consideration. Consumers will find the implied term for s15 description and s16 merchantable quality or fitness most useful, considering that they deal with common problems of mislabelling and product quality with a strict liability approach. However, the goods and services law in Hong Kong had become antiquated and outdated since its introduction. SOGO itself is based on the English and Welsh (EW) Sale of Goods Act 1979, with the implied terms dating back to the Sale

of Goods Act 1893. From a layman's perspective, there may also be difficulties enforcing the implied terms as the solution is founded on predominantly precedent-based contract law principles and concepts. Practically, lay consumers can rarely use the terms as an instant means of negotiation out of court and will often have to visit the Small Claims Tribunal.

Despite being adopted at the recommendation of the Law Reform Commission (LRC) in 1990, the UCO does not solve this issue and only provides an even vaguer mechanism to set aside, limit or vary a consumer contract. Under UCO s5(1), the court only exercises the aforementioned powers where 'the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made'. This condition is further defined by case law, which is notably unrestricted by the common law doctrine of unconscionability. Given the broad, unspecified scope of the term, the legislation is meant to be a litigation-only tool for consumers. A consumer claiming that a contract is unconscionable is unlikely to be taken seriously by businesses, as they would simply take the opposite stance. Furthermore, the consumer may not have the necessary resources to fully satisfy the burden of proof under s5(2) to show unconscionability in the Small Claims Tribunal.

Given the difficulties for lay consumers in the Small Claims Tribunal, consumers may recall that the Customs and Excise Department (C&ED) also regulates consumer issues. While seemingly a public remedy, TDO's regulations have a private dimension to aid consumers when seeking damages. Consumers have a right to sue businesses under TDO s36 for violations of the TDO under ss4, 5, 7, 7A, or 13E-I. In essence, it converts consumer criminal offences into civil rights of action. The most important offences to consider are TDO ss7, 7A false trade descriptions on goods and services and the five Part 2B Unfair Trade Practices offences under ss13E-I.The ss7, 7A offences are classic offences originating from the EW Trade Descriptions Act 1968. These offences are strict liability if the defendant applied, supplied or possessed a good or service with a false trade description and the prosecution need not prove mens rea unless the defendant adduced sufficient evidence to require the prosecution to rebut the general defences under TDO s26 beyond a reasonable doubt. Meanwhile, Part 2B are offences introduced in 2012 based on the EW Consumer Protection from Unfair Trading Regulations 2008 and the Australian Consumer Law in the Australian Competition and Consumer Act 2010. Part 2B offences generally either rely on the element of inducing 'the average consumer to make a transactional decision that the consumer would not have made otherwise' or outlaw specific conduct such as certain baiting tactics. As a result, the TDO offences themselves are powerful in that they cover a wide scope of unfair trade practices normally found in the consumer economy. However, individual consumers under TDO s36 may either have to wait for the C&ED to complete criminal prosecution or theoretically attempt to prove with a criminal burden of proof in a civil action. Accordingly, C&ED had reported that at least 70% of complaints on consumer services were withdrawn or terminated before prosecution was complete. There is an additional layer of ambiguity due to a lack of jurisprudence concerning s36. Outside of litigation, the provisions are easier to understand for laymen as criminal offences, though allegations may similarly be disputed by businesses as with claiming rights under SOGO, SOSITO and UCO.

While not providing remedies of its own, CECO allows consumers to void harsh exemption clauses from contracts when pursuing a claim or defending a claim. While these rights are helpful and may form a basis for declaratory relief, it is impractical for lay consumers to seek declaratory relief over sums that may not exceed the $75,000 jurisdiction of the Small Claims Tribunal.

Overall, the current private consumer rights generally have a common theme: they are fault-based rights, which generally require enforcement procedures by an agency or a tribunal. As an analogy to the family law concept of fault-based and no-fault divorces, the current fault-based nature of the private consumer rights locks remedies behind a need to prove wrongdoing by the trader. No matter if the right is under SOGO, SOSITO, TDO or UCO, a remedy for rescission or damages will require the consumer to show there is a violation of an implied term, consumer offence or unconscionability for there to be a remedy. Given that the natural reaction to allegations of fault is denial whether the business is innocent or guilty, these contentions are liable to opposition by the trader, leading to a need for litigation or ADR methods. This is undesirable for lay consumers, who prefer to have a remedy as soon as possible with the fewest steps needed. Arguably, a no-fault system is more imperative in consumer law than family law. Consumer-trader contracts and relationships are inherently imbalanced in bargaining power and with different purposes for each party, where the consumer seeks pleasure or utility and the

trader seeks profits. As such, no-fault remedies in favour of consumers would balance the bargaining powers of the two parties and benefit an economy where every individual is a consumer of goods and services. No-fault remedies may also save time and resources on both ends used on dispute resolution, leading to a net benefit to the stakeholders involved.

NO-FAULT CONSUMER REMEDY: RIGHT OF WITHDRAWAL

The strongest candidate out of the no-fault remedies is the consumer's right of withdrawal. This refers to a right for the consumer to withdraw from the contract, return and obtain a refund from the trader without providing a reason. Varieties of this right are already in practice in many overseas jurisdictions in both common law systems and the EU, covering sales by mail, phone and internet known as distance contracts, door-to-door sales known as off-premise contracts and other specific types of contracts.

As an example, the EW Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCICACR) provides a right to cancel distance contracts and off-premise contracts within 14 days under rr29-30, where the trader refund and the consumer will return if applicable. To prevent exploitation of the right to cancel, the trader need not refund costs or may deduct from the refund in scenarios listed in r29(1)(a-d), such as enhanced shipping costs, any depreciations of value from consumer handling, costs of returning the goods, or fees of provided services during the period before cancellation.

In their 2018 report, the Consumer Council only advocated for the right of withdrawal for five types of contracts: (1) Unsolicited off-premises contracts; (2) Distance contracts (other than online shopping); (3) Fitness services contracts; (4) Beauty services contracts; and (5) Timeshare contracts. Those types of contracts were particularly chosen based on considerations of studies from other jurisdictions and local high-profile cases. However, the Consumer Council was too conservative, and instead a universal right of withdrawal should be available. Given r29(1)(a-d) covers the major situations where unscrupulous consumers would take advantage of the trader, it is difficult to justify limiting the scope of this right to only the five types of contracts and removing e-commerce from the scope of the right of withdrawal. An excluding provision for common sense reasons would be more appropriate like in CCICACR 2013 r28 to address the sale of perishables or transactions that cannot be cancelled by their very nature like boarding a bus.

POTENTIAL OBJECTIONS TO A BROADER RIGHT OF WITHDRAWAL

Unsurprisingly, a general right of withdrawal would generally draw ire from businesses since the right of withdrawal is a unilateral right in favour of the consumer with few limitations to prevent unfair abuses of the right. As such, opponents may challenge this proposal on several fronts.

Firstly, opponents may argue that the Consumer Council's recommendations in 2018 should be the baseline, where only the five types of contracts should be governed with the right to cancel but without including e-commerce. The position of excluding e-commerce from distance contracts is simply untenable, as almost half (46.8%) of the adult population in Hong Kong had engaged in e-commerce in the past 6 months according to the Census and Statistics Department's survey last year. This number is expected to grow further in the future. The proposed scope by the Consumer Council for distance contracts would only include telephone, mail or fax shopping, where fax, in particular, may no longer regularly be found in consumer households. The limitation is even more surprising when in the very same report, the Consumer Council acknowledged that EW, South Korea, PRC and ROC all had legislated a peremptory right of withdrawal to cover distance contracts, including e-commerce. Given the geographic proximity and cultural similarities between Hong Kong and the three Asian jurisdictions, the only remaining plausible reasons that the Consumer Council provided are the relatively low e-commerce penetration rates of Hong Kong compared to those jurisdictions and high consumer satisfaction with e-commerce. It is also unknown why the Consumer Council viewed these same arguments as exclusive to e-commerce and non-applicable to other distance contracts, where the penetration is likely even lower with unknown satisfaction. As such, the Consumer Council's position is untenable and would simply deprive the right of withdrawal of practical use.

The second argument is that an overly broad right of withdrawal may burden businesses with compliance costs or worse cash flow. Specifically, small/medium enterprises (SMEs) may have additional difficulties meeting those costs. However, the Consumer Council had also rightly pointed out that ethical and quality traders would not be likely to have high

cancellation rates, as their customers would be satisfied with their products or services. Moreover, the free market principles of the Hong Kong capitalist system would suggest that this tightens the competition amongst businesses when consumers have more freedom to choose the ideal trader before being bound. Ultimately, heightened competition would lead to better quality goods and services in a race to the top for the benefit of everyone else in the economy. If businesses close due to many customers cancelling or returning, they have no one to blame besides themselves for offering subpar goods and services. Difficulties for businesses should not bar the introduction of a right that already exists in many jurisdictions. However, SMEs may still validly argue that they do not yet have the opportunity to grow, whereas conglomerates are already well-equipped to handle compliance. In such a case, a spending threshold of the cancelled transaction may be imposed, like CCICACR 2013 r27(3)'s threshold of £42, where the trader is not obligated to refund the consumer if they do not spend more than £42 in the transaction. SMEs that mainly deal with small transactions will therefore be exempt from compliance costs overtaking the transaction itself.

CONCLUSION

In current Hong Kong consumer law, troubled consumers often find themselves stuck in unhappy marriages with unscrupulous traders, who may engage in maximally obstructionist tactics to deter consumers from exercising their statutory rights in litigation or negotiations. Consumers may have to navigate the complex workings of a tribunal or cooperate with a C&ED investigation before getting a remedy to their problems. For lay people in a consumer economy, the best solution would be for Hong Kong to adopt a general peremptory right of withdrawal, with only limitations on practicalities, undue costs, and compensation to the traders. The right must be sufficiently broad for the right to be meaningful at all, and any burden or stress will be a catalyst for competition amongst traders, though SMEs and their small transactions may be accounted for with spending thresholds.

COMPETITION LAW

No-poach and Wage-fixing Agreements — Should They be Actively Investigated?

Leung Man Hei Anson

INTRODUCTION

Recently, there has been a major concern on the no-poach and wage-fixing agreements that those agreements may amount to anticompetitive behaviour on the labour market. The no-poach and wage-fixing agreements broadly refer to agreements entered into by undertakings not to 'poach' or 'entice' each other's employees by fixing wages. In the meantime, concern is raised over whether these sorts of agreements may undermine the employees' welfare. A further question is raised as to whether the Hong Kong Competition Commission (Commission) should or should not investigate the matter actively. My view is that the Commission should not actively investigate such issues.

This article is mainly divided into 4 parts. First, it will briefly discuss how anticompetitive elements may potentially arise in no-poach and wage-fixing agreements. Then, it will analyse why the Commission should not take active investigations. Next, it will provide a rebuttal argument against the opposite stance and, finally, conclude by adopting a comparative approach to further support the stance that such agreements should not be actively investigated.

THE ANTICOMPETITIVE ELEMENTS INVOLVED

As mentioned, no-poach and wage-fixing agreements are agreements between the employer undertakings to restrain themselves from soliciting employees from each other. These agreements, however, may involve multiple anticompetitive factors that may harm the market competition. The US Department of Justice in *United States v Adobe Systems, Inc., et al.* (2010) argues that no-poach agreements are anticompetitive, as the entities who entered into such agreements would share sensitive information about the employment market, such as wages, with each other. The undertakings concerned, as a result, need not promote their employees to disincentivize

them from being 'poached'. This behaviour would then eliminate the competition among the employers in the labour market, and eventually diminish the opportunity for employees to receive better employment benefits. As such, the employees' welfare will generally be undermined.

Moreover, in Hong Kong, the Commission pointed out that agreements or concerted practice entered into by undertakings relating to conditions of employment can be anticompetitive. It also emphasises that business entities which engage in anti-competitive behaviour in the labour market may contravene the First Conduct Rule. Indeed, the no-poach or wage-fixing agreements are capable of depriving employee's opportunity of getting a better job offer (including better salary payment and getting into higher positions) because, under those agreements, employees lack motivation to move to other companies due to concerted fixed-wages. The original employer may make use of the agreements to cut down the employee's benefits in order to reduce business costs. As the employees should know nothing about the agreements, their labour welfare is therefore being undermined. It is nonetheless important to note that the position of the Commission does not necessarily align with that of the courts in Hong Kong.

'NOT ACTIVE' DOES NOT MEAN 'DO NOTHING'

While this article argues against active investigation by the Commission, it does agree that the above behaviour should be regulated by the competition law as the purpose of the law is to encourage competition and discourage any behaviour which could undermine one's welfare. In the labour market, the role of employees is similar to a customer which should fall within the ambit of the competition law's protection. It should be noted that 'not actively investigating' does not mean the Commission should keep away from those matters completely. Rather, the Commission should regulate the anticompetitive behaviour in a passive way rather than actively initiate inspection into every single behaviour. Specifically, it should refrain from starting active investigations until sufficient evidence inferring the anti-competitiveness of the undertaking's behaviour has been shown. Reasons will be discussed in the following sections.

• *JUSTIFICATION OF NO-POACH AGREEMENTS ARE HIGHLY DEPENDENT OF THE BUSINESS NATURE AND SHOULD BE GIVEN A GREATER TOLERANCE*

The anti-competitiveness is highly dependent on the nature of the employment market. No-poach agreements are especially vital to some industries which require post-employment training or professional qualification, where the labour mobility is highly inflexible. In aviation, for example, pilots are generally trained to operate a specific model of aeroplanes and the airline companies will provide their pilots with a series of long-term training to reach the qualification requirement. Once vacancy occurs, it would impose a substantial amount of time and training costs on the airline company to fill up the space. Rival companies may make use of this market inflexibility to sideline their competitors by poaching their well-trained employees. No-poach agreement can, therefore, be justified as a necessary measure to protect the undertaking's investment on their employees.

As illustrated above, due to the high dependence on the position and the nature of the employment industry, it is very hard to draw a line as to when a no-poach agreement is justifiable merely based on a single fact. If the Commission is to actively investigate the issue, it would impose an enormous burden, in terms of time and monetary costs, on them to prove anti-competitiveness by scrutinising every agreement. Thus, it is not suitable for the Commission to label the no-poach agreements as anti-competitive at the beginning. Instead, it should act in a passive way, taking into consideration the factor of working efficiency.

• *PRACTICALITY AND CONFLICT WITH MARKET FREEDOM*

Furthermore, active investigation may not be practical due to the potential conflict with market freedom. It is recognised that Hong Kong has long adopted a positive non-interventionism approach in the labour sector. In the business world, it is a practical matter that the daily business affairs are generally not expected to be intervened and would be left to the undertakings for self-regulation. It is a very common day-to-day practice for most of the enterprises to block their employees in a certain extent from moving to competitors, by imposing some restrictive covenants in order to safeguard their business interests (such as preventing business secrets like customer lists and business operational schemes from leaking out). These kinds of restrictive covenants are so common in the commercial world that it is impracticable for the Commission to

actively investigate every single one of them. Rather, it should be left to the market as a matter to be dealt with between the undertakings.

• *NO-POACH AGREEMENTS COULD ENHANCE COMPETITION, THE 'PRE-SET LABEL' SHOULD NOT STAND*

Furthermore, the phrase 'actively investigate' suggests that the agreements had already been labelled as culpable in the first place and that positive measures are needed to prevent it from happening. Objectively, this 'pre-set label' may be considered as biased because it is not appropriate to presume the 'anti-competitiveness' of those agreements at the beginning particularly as the no-poach agreements may, otherwise, encourage competition.

Competition and restrictive agreements are not mutually exclusive. Sometimes, such agreements are even necessary for enhancing competition. In the case of wage-fixing between undertakings, on surface it looks like that the competition among the employment market is restricted. However, wage-fixing agreements only restrict the wages of the employees. Other employment benefits and remunerations such as leaves, working conditions, bonuses, allowances, and working subsidies are generally not fixed. Also, it should be noticed that no-poach agreements do not restrict the employees themselves from resigning a job. Employees still have the option and right to switch jobs at their own will. Therefore, under the restrictive agreements, companies still need to passively compete with others by improving employment benefits and working conditions. As the arena of employment competition shifts from wages to other layers such as labour benefits, employees may even gain greater welfare due to the enhancement of those remunerations.

BALANCE BETWEEN EMPLOYEE'S AND EMPLOYER'S WELFARES

Competition law should not only focus on employee's welfare, as employer's welfare should also be considered. Most of the time, people who support active investigations may have ignored the employer's benefits. We should, instead, take a holistic approach to balance the welfare between both parties.

• *EMPLOYEE RAIDING*

Some companies with greater market power may want to maintain their dominant position on the market. They may utilise employee-poaching as a means to sideline their competitors. Giant companies with solid capitals may recruit opponents' employees by offering extortionate wages in a rival way. Those smaller companies with less capital may not be able to offer such high wages and, as a result, may suffer from the loss in man-power and fall into the risk of shutdown. Through signing no-poach agreements, undertakings promising not to steal each others' employees may be a solution to protect the small companies from being squeezed by the giants. If the Commission regulates the no-poach agreements actively, those small undertakings with a very little margin of risk-taking may not enter into any no-

poach agreements so as to avoid exposure to the risks of violating the law. Hence, the welfare of those small companies will be seriously jeopardised and the total welfare as a whole will decline. The proper way for the Commission to achieve a balance is, therefore, to keep being passive and conduct no intervention unless significant evidence shows that the no-poach agreements are purely anti-competitive in nature without any plausible justification.

COMPARATIVE ANALYSIS

Some may argue that many other jurisdictions such as the US and the EU do actively investigate the no-poach agreements. Especially in the US, the Justice Department's Antitrust Division in 2010 filed a series of investigations and lawsuits against the technology giants in the Silicon Valley for violations of the Section 1 of the Sherman Act due to the fact that those giants pledged not to poach employees from each other. The US Justice Department took a very aggressive role to enforce the antitrust law in a big scale of action. In 2019, the US Department of Justice even went further to file a statement to clarify that any 'naked' no-poach agreement should be assessed under the *per se* illegal rule but subject to the rule of reason. That means if there are reasons to justify that the no-poach agreements are for ancillary purpose, there would be no violation.

It may be argued that Hong Kong cannot simply adopt the US approach, that is, to actively investigate into the agreements first and then release the alleged wrongdoers from liability once it is justified. To address this argument, we should first clearly identify the differences between Hong Kong and the US competition laws. We should realise that the US antitrust law was established a century ago, and had already built up a very sophisticated jurisprudence and developed many solid principles for addressing various kinds of antitrust issues. However, the Hong Kong competition law is still very young as it is still in the early stage of development. As of now, there are just only a very limited number of judgments from the Competition Tribunal as precedents, where the very first two competition cases in Hong Kong made extensive reference to the law and practice of overseas jurisdictions such as the EU. We can see that the competition law in Hong Kong at this stage is not sophisticated enough and may not have sufficient resources to expand the jurisprudence. Furthermore, the Japanese competition law, established in 1947, should have a very solid background to deal with no-poach agreements. However, the Japan Fair Trade Commission published a report in 2018 about Competition Policy in Human Resources, without mentioning at all what stance the Trade Commission would take as to the restrictive covenants.

CONCLUSION

To summarise, based on the current developing stage of the Hong Kong competition law, it may not be practical to actively scrutinise every single no-poach agreement due to the limited resources. For the sake of efficiency, the Commission should assume that all the no-poach agreements are justified and shall investigate only when there is cogent evidence showing that the anti-competitive behaviour could in fact distort the labour market. At this moment, acting passively on this issue would be the right track. However, it may leave for further discussion when the Hong Kong competition law becomes more sophisticated.

CRYPTO-ASSETS

Recognition of Cryptocurrency as the Third Category of Property

Lo Koon Kit Dragon

INTRODUCTION

The question of whether cryptocurrency is a form of property is a crucial one. This is because the answer has important consequences for the application of several legal rules, including those relating to succession, the vesting of property in bankruptcy, and the rights of liquidators in corporate insolvency, as well as in cases of fraud, theft, or breach of trust. Whether cryptocurrency is considered property significantly affects the remedies available to the cryptocurrency's users, and the value carried by said cryptocurrency.

This essay explores the property status of cryptocurrency, of which Bitcoin is the most well-known example.

WHETHER CRYPTOCURRENCY IS PROPERTY

The Legal Statement on The Legal Status of cryptocurrency and Smart Contracts (the Legal Statement), published by the UK Jurisdictional Taskforce in 2019, stated that cryptocurrency should be recognised as property under English law.

It discussed the characteristic features of cryptocurrency, namely intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, and rule by consensus. The Legal Statement concluded that cryptocurrency possessed all the characteristics of property.

It cited the Singaporean case *B2C2 Limited v Quoine PTC Limited* [2019], where the Court ruled

that cryptocurrency possessed the fundamental characteristics of intangible property as being an identifiable thing of value. It discussed that cryptocurrency met all the criteria of property right outlined in the House of Lords decision of *National Provincial Bank Ltd v Ainsworth* [1965], namely that 'it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability.'

THE TRADITIONAL VIEW – WHAT FORM OF PROPERTY DOES CRYPTOCURRENCY FALL INTO?

Under English law, property is categorized as real or personal property. Real property is interest in land, whilst personal property is everything that is the subject of ownership that does not come under the definition of real property.

Personal property can be further categorised into 'thing in possession' and 'thing in action'. Thing in possession is thing of which a person may have physical possession and thing in action is thing recoverable by action.

Traditionally, English law has been quite insistent that these two categories of personal property are exhaustive. In *Colonial Bank v Whinney* [1885], Fry LJ said: "all personal things are either in possession or action. The law knows no tertium quid between the two."

Cryptocurrency is not a 'thing in possession,' because such assets are not tangible - possession cannot be taken of an intangible. For example, in *Your Response Ltd v Datateam Business Media Ltd* [2014], the Court of Appeal held that an electronic database could be subjected to practical control, but not possession.

As to whether cryptocurrency is a 'thing in action', some commentators and Courts have expressed the answer is no, since cryptocurrency does not carry the right of action against anyone. Cryptocurrency does not embody any right capable of being enforced by action; thus, holding cryptocurrency does not give the holder a right against anyone. Therefore, there is no intermediate category of property to cover other forms of intangible property that cannot be analyzed as things in action.

THE CREATION OF A THIRD CATEGORY OF PROPERTY

On the above analysis, cryptocurrency would not fall into the traditional definitions of property.

Conversely, however, the Legal Statement expressed the view that cryptocurrency was property, and could be classified as a new, third kind of 'thing'. In the English case of *AA v Persons Unknown, Re Bitcoin* [2019] (Comm), the Court suggested that Bitcoin could be considered as 'other intangible property,' that is, neither a thing in possession nor a thing in action.

The third category of 'other intangible property' was suggested by Lord Bridge in the case *Attorney General of Hong Kong v Nai-Keung* [1987]. The case concerned export quotas; it was held that even though the export quota did not give rise to an enforceable right to obtain a license to export textiles from Hong Kong, it was a form of other intangible property.

Justice Morris in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] was also open to the existence of a third category of intangible property, and was not confined to traditional classifications.

Accordingly, although cryptocurrency may not fall into the traditional definition of property, it is possible to consider cryptocurrency as *other* intangible property.

In a New Zealand case of *Ruscoe v Cryptopia Ltd (in Liquidation)* [2020], Gendall J in the High Court held that cryptocurrency is a form of property that is capable of being held on trust. This decision is significant because it is the first decision in the Commonwealth to offer a comprehensive analysis of this issue, as opposed to a judgment following interim proceedings or without the issue being disputed.

Recently, Linda Chan J in the High Court of Hong Kong has officially confirmed the proprietary nature of cryptocurrency in the case of *Re Gatecoin Ltd* [2023]. The case concerned whether cryptocurrencies held by a cryptocurrency exchange platform were property that could be held on trust and made available to the creditors in liquidation. The court decided that it was appropriate to apply and follow the reasonings in the Legal Statement and *Ruscoe v Cryptopia Ltd* [2020], and their conclusion that cryptocurrency is 'property', which is capable of forming the subject matter of a trust.

It is noteworthy that the courts of Hong Kong have previously granted injunction and other equitable remedy as a way of protection. For example, in *Nico Constantijn Antonius Samara v Stive Jean Paul Dan*

[2022], the court granted proprietary remedies over bitcoins.

ARGUMENTS AGAINST CRYPTOCURRENCY BEING PROPERTY

Some argue that cryptocurrency should not be recognised as property, as such 'assets' are just digitally recorded information, the owner has only the information on the private key, and neither the common law nor the equity recognizes property as information. For example, in the English Court of Appeal case of *Your Response Ltd v Datateam Business Media Ltd* [2014], the Court held that there could be no property in a database.

However, it is too simplistic and wrong in context to regard cryptocurrency as mere information. First, the purpose behind cryptocurrency is to create an item of tradeable value not solely to record or impart in confidence knowledge or information. Thus, it is far more than merely digitally recorded information. Second, unlike information, cryptocurrency is readily definable and identifiable by third parties. Therefore, cryptocurrency is more than merely digitally recorded information.

There are also public policy arguments against cryptocurrency being property. Some cryptocurrencies are used by criminals for the transmission of funds across borders to pursue criminal activity and as a means of laundering the proceeds of past criminal activity.

However, blockchain technology is widely used in the traditional banking sector, so the unlawful usage was not exclusive to cryptocurrency. Moreover, if general law does not recognize cryptocurrency as property, it will hinder honest commercial development, and affect honest people investing in cryptocurrency. Accordingly, the public policy questions should not harm the status of cryptocurrency as property.

CONCLUSION

Cryptocurrency does not 'behave' like traditional assets, but there is increasing acceptance that cryptocurrency is a type of property.

The traditional focus on the categories of things under property law has led to a formal test that is overly restrictive, so the centuries old legal categories and classifications of 'things' are out of date and inadequate.

Although there are no ready-made rules specifically designed for cryptocurrency, the old binary rule of personal property shall not be an obstacle to recognizing it as property since the common law grows by a process of principled analogy between the old and the new.

DOMESTIC REVIEW

The Judgement of the Court is in its Judgment: The Law of Judicial Copying in Hong Kong and Abroad

Mateusz Slowik

INTRODUCTION

The Oxford Dictionary defines plagiarism as, 'the practice of taking someone else's work or ideas and passing them off as one's own'. Students are careful not to over-rely on others' work and to acknowledge the material they use to craft their work. A similarity score higher than 25% usually flags out potential plagiarism. However, plagiarising – copying-and-pasting of counsel's submissions without attribution – is not rare in court judgments. Different jurisdictions have dealt with procedural complaints arising from judges substantially copying verbatim the parties' written submissions. This article seeks to explore the positions of different jurisdictions on judicial copying. First, it presents the court positions of the United States, the United Kingdom, Canada and Singapore. Second, it discusses the position of the Hong Kong courts, and analyses *Wong To Yick Ointment Limited v Singapore Medicine Co. & Ors* [2021], the most recent local case related to judicial copying.

THE LAW OF JUDICIAL COPYING ABROAD

UNITED STATES

Even for a simple act of copying, the US courts look at the nature of the judicial copying and draw distinctions between copying of *facts and opinion*. While copying of *facts* may be accepted, copying of a proposed *opinion* is unlikely to pass muster with the US courts. It should be noted that the adoption of proposed findings of facts is an established practice in the US. This had been recognised back in 1893 in *Howard v Howard*: '[i]t is not an uncommon practice', and more recently in the 1970 judgment in *re Las Colinas*, '[t]he practice of inviting counsel to submit proposed findings of fact and conclusions of law is well established as a valuable aid to decision making'.

In the seminal case of *Anderson v City of Bessemer City* (1985), the US Supreme Court held that 'when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed *only if clearly erroneous*'; meaning that the court considered any part written by the parties' counsels its own once that is being copied verbatim into the judgment. But this decision should not be lightly applied to any instance of copying. Coming to this decision, the Supreme Court observed that the trial judge had set the framework for the parties to propose their findings and offered them the chance to provide responses. Therefore, *Anderson* has made an important contribution to the fairness of the procedure regarding the adoption of proposed facts by the courts.

On the other hand, judicial copying of a proposed opinion is unlikely to pass the muster. In *Bright v Westmoreland County* (2004), the judge adopted verbatim the appellants' proposed opinion, and the US Court of Appeals rebuked the concerned judgment. The Court of Appeals explained that '[w]hen a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions', and '[a]ny degree of impropriety, or even the appearance thereof, undermines our legitimacy and effectiveness'.

Thus, there is a distinction between copying of *facts* and *opinion*. Since judicial opinion serves to prove to an aggrieved party the fairness of the judgment, it is particularly important for a judge to weigh the parties' submissions with an independent mind. Whereas, it is unlikely that a wholesale adoption of facts, context or background will give rise to the presumption that a judge abdicated their judicial function, unless it is erroneous.

UNITED KINGDOM

In *Crinion and another v IG Markets Ltd* [2013], judicial copying amounted to 94% of the submissions made to the judge. Whilst the UK Court of Appeal

found that the judge had shown independence of judgement, the copying was considered by the Court as 'thoroughly bad practice'. The appeal was dismissed. Critical to the Court's decision was the fact that the judge had set out reasons, albeit briefly, as to why he rejected the respondent's arguments. However, the Court of Appeal emphasised that 'appearances matter' and that the function of a judgment 'is to explain to the unsuccessful party why they have lost'.

The position in the UK seems much more tolerant towards copying, although the courts have emphasised that appearances matter. It seems that as long as a judge provides her own reasons – no matter how long – for rejecting the other party's submissions, the UK courts will generally find it sufficient to dismiss a ground based on judicial copying.

CANADA

The Canadian Supreme Court in *Cojocaru v British Columbia Women's Hospital and Health Care* [2013] had to determine whether it had to dismiss a judgment of 368 paragraphs in length, of which, 321 were copied from the plaintiff's written submissions. While the Supreme Court reckoned that extensive judicial copying could cast doubt upon a judgment, it did not think that the judgment had to be dismissed simply because the judge had made a relatively small contribution to it. The Court opined that the correct question to ask in instances of judicial copying is whether the wholesale incorporation of the plaintiffs' submissions meant that the judge did not decide the issues impartially and with an independent mind. The Supreme Court decided not to dismiss the judgment because it found that the judge had made some findings against some of the plaintiff's key submissions.

That being said, it does not mean that the Supreme Court was indifferent about extensive copying as long as there was an independent judgement of the issues. The Court discouraged judges from extensive copying and not attributing to original sources. But copying alone was insufficient to undermine the presumption of judicial impartiality and integrity. As the Supreme Court said, '[t]o set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment writing'.

In *Cojocaru*, the Canadian court, like the UK courts, is quite tolerant of judicial copying. It was ready to accept a judgment given a judge has considered the *key* submissions of the losing party and provided reasons for rejecting them. But the Canadian position is problematic in that, on one hand, the Supreme Court seeks to set the tone of discouraging judicial copying, but *Cojocaru* is merely a gentle slap on the wrist.

SINGAPORE

In *Lim Chee Huat v Public Prosecutor* [2019],

the appellant challenged a decision in which the operative part of the judgment was made of copying 27 out of 43 paragraphs from the prosecution's closing submissions. Allowing the appeal, the High Court set out the expectation for a trial judge to outline the evidence and arguments in her judgment, and that judicial copying 'should not be undertaken' because it gave rise to the appearance of bias towards one party and brought question to the judge's independent state of mind.

Particularly, in *Lim Chee Huat*, the extensive copying constituted a critical part of the judgment. This informed the High Court that the trial judge had failed to weigh the submissions of the parties. The High Court harshly criticised the trial judge, as it said 'the judgment was not merely insufficient. Here, the exercise of judgment was entirely absent. Here, the judge at least as can be seen from his written judgment, did not judge at all' notwithstanding that the trial judge had written certain parts of the judgment.

There are two ways to make sense of the Singaporean courts' position. Considering the amount of copying involved (*Lim Chee Huat: 62.79%; Cojocaru: 87.23%; Crinion: 94%*), the Singapore High Court seems to hold the harshest position on judicial copying amongst the jurisdictions discussed. However, considering that the copying involved the operative part of the judgment, the Singapore High Court was not excessively harsh. It was simply doing what the US, UK and Canada courts have done – that is, ensuring judges have given due consideration to the losing party's arguments, instead of slavishly adopting the prevailing party's submissions as their own.

THE HONG KONG LAW OF JUDICIAL COPYING

The approach of Hong Kong courts has been quite consistent following the years of growing jurisprudence on judicial copying. The starting point for the analysis of judicial copying is to determine whether the presumption of judicial integrity and impartiality is displaced, which requires cogent reasons to prove. This is a high threshold to surmount.

It is unlikely that the adoption of facts, context or background will be sufficient for the court to conclude that a judge abdicated their judicial functions. For instance, in *Leung Chi Ching Candy v Yeung Hon Sing* [2019], the Hong Kong Court of Final Appeal found it acceptable for the trial judge to incorporate verbatim the complaints pleaded in the defence, as well as the background and context of the case into the judgment.

In general, the presumption will not be rebutted where a judge accepts the submissions of a party and incorporates them in the judgment without attribution. Therefore, in *Leung Chi Ching Candy* [2019], the limited scale of copying and the judge's application of his own approach and reasoning demonstrated that he exercised independent judgement.

However, extensive copying may lead to an appearance that a judge has not adequately considered the issues independently. This is because '[a] judgment informs the litigants and the appellate court how the judge assesses the issues and the evidence before the court'. Whilst, in *Choi Yuk Ying v Ng Ngok Chuen* [2019], notwithstanding extensive judicial copying, the judge had assessed the parties' arguments and provided commentary on the evidence presented to her, which meant that she applied her own judgement to the issues. Excessive copying may lead to a legitimate conclusion that a judge has not applied their independent mind and considered the issues adequately. In *Nina Kung v Wang Din Shin* (2005), the court pointed out that '[t]he fundamental point is that a judge must bring an independent mind to his judicial function and be seen to do so'. Therefore, the greater the level of copying the greater the scrutiny the court's judgment will be subjected to.

Nonetheless, the courts in Hong Kong have also consistently emphasised that judicial copying is bad practice because of the dual issues that it gives rise to. First, whether a judge considered the issues before her with an independent judicial mind; second, whether the arguments raised by the other side were adequately weighed in her judgment. Interestingly, however, in *Choi Yuk Ying* the Court of Appeal acknowledged, albeit obiter, the strains on the Hong Kong judiciary, including 'caseload and complexity of modern litigation', and 'suggest[ed] that it is not necessary for a judge to set out the parties' respective submissions on factual issues, and it would be adequate to only refer to relevant paragraphs in the parties' respective written submissions on any factual issue being discussed'. Nonetheless, trial judges have been encouraged to adhere to good judgment writing practices. For instance, in *Chan San v Hans Li* [2020], Hon Lam VP noted that judges should provide their conclusions and reasoning in their own words, which would enable the judge to 'refine his

reasoning and explain the same in a more pertinent and coherent manner'.

WONG TO YICK WOOD LOCK OINTMENT LTD V SINGAPORE MEDICINE CO. AND OTHERS [2023]

Most recently, two cases involving excessive judicial copying received a lot of publicity because they were handed down on subsequent days and involved the same judge. *Wong To Yick* is one of the cases concerned. It is worth a closer look as it provides an example of which the court may consider the copying unacceptable and the consequence of that.

In *Wong To Yick*, the judge had incorporated 98% of the plaintiff's submissions into his judgment. Apart from stylistic changes, the judge had not written a single sentence in the judgment. The appellant argued that the judge had failed to exercise independent judgement as he did not reasonably consider their submissions. Conversely, the respondent argued that extensive copying did not displace the presumption of judicial integrity and impartiality; and notwithstanding, the transcript of the trial proved that the judge had engaged with the parties' submissions during the hearing.

While judgments are presumed to be independent and impartial, the judge shoulders the responsibility to demonstrate that he had reasonably and properly considered the issues before him. This is particularly important when a court is faced with complex issues involving disputed facts and legal principles, where the expectation is that a judge will use her independent mind to adjudicate the parties' submissions critically. In *Wong To Yick*, the wholesale copying of the plaintiff's submissions informed the Court of Appeal that independent judgment was absent in the decision. The Court commented that the judgment was one that 'would leave a reasonable person with a justified sense of grievance'.

Having found that judicial copying did indeed occur, the Court of Appeal considered whether to order a retrial of the case or whether it could conduct reconsider the merits of the case. While an appellate court is able to determine issues of *law* without the need for a retrial, it may not be apt for making findings of *facts*. When cases concern findings of fact, the court will further need to look at the extent to which factual disputes go directly into the essence of the case. Thus, '[i]f the factual disputes relate to expert opinions (for which full transcripts of the experts' oral testimony are available), or arise from the interpretation of objective evidence such as survey sheets or aerial photographs, then a retrial may not be necessary'. In *Wong To Yick*, the credibility of a witness was important for the resolution of factual disputes between the parties, which could not be discerned from the transcript, and a retrial was ordered. Hence, the case demonstrates the negative implications of judicial copying on the administration of justice; a setback for the parties to the litigation as well as for the courts which are already too strained.

CONCLUSION

Plagiarism is strictly prohibited in academia, journalism, and the arts industry, to name a few. However, judicial judgments are a different kind of prose – they are 'usually collaborative products that reflect a wide range of imitative writing practices, including quotation, paraphrase, and pastiche'. They must, therefore, be entitled to a more lenient view, given the constrains on judicial time. Nonetheless, proper administration of justice demands that judges adhere to good practices when writing judgments, because 'justice must not only be done, but must also be seen to be done'. In the end, the *judgement* of the court is in its *judgment*.

A Reflection on the Antiquities and Monuments Ordinance (Cap.53) and the Way Forward

Li Ka Hang Vanessa

INTRODUCTION

Historical assets are valuable and unique assets that shall be entitled to a supreme position over the development of Hong Kong. Nonetheless, the main legal instrument governing Hong Kong's historical assets, the Antiquities and Monuments Ordinance (Cap.53) (the A&M Ordinance), has been criticised for 'lagging behind public sentiment toward heritage values and constraining the former colony's scope and nature of heritage conservation'.

In light of the controversial demolition of famous heritages, such as the Star Ferry Terminal and the Queen's Pier, this essay (i) argues that the A&M Ordinance fails to strike a balance between heritage preservation and protecting private owners' interest; and (ii) calls for a reform of Hong Kong's heritage conservation framework with reference to the heritage laws in the United Kingdom.

HONG KONG'S CURRENT HERITAGE CONSERVATIVE FRAMEWORK

Historic assets in HK are classified into (1) monuments, and (2) graded historical buildings. The importance of the classification lies in the varying degree of protection guaranteed under the A&M Ordinance.

Monuments declared by the Secretary for Development (the Authority) enjoy statutory protection under A&M Ordinance. Unless permitted by the Authority, demolition and removal works on declared monuments are prohibited. Historical assets that have not been declared as monuments may be accorded a graded historical building as per the three-tier grading system employed by Antiquities Advisory Board (the AAB). Unlike monuments, they do not receive statutory protection. Owners may conduct work on them as long as they comply with relevant requirements. Further, the Authority may declare a Grade 1 building as a proposed monument if it is under demolition threat. Although the proposed status does not offer permanent protection, it gives a period of time for the Authority to consider whether it should be declared as a monument.

THE ARBITRARINESS OF THE A&M ORDINANCE

Given the wide discretion owned by the Authority

and the uncertainty generated therein, it is argued that the statutory regime of the A&M Ordinance of declaring monuments and the grading system is arbitrary.

Firstly, the grading system is administrative in nature and it has 'no statutory standing'. As revealed in a legislative paper submitted to Home Affairs, one of the aims of the system is to 'justify' the Authority's decision to declare a monument. It reveals that the power of making a decision is always vested in the Authority, while AAB only plays an advisory role. This is further evidenced by noting that the Authority is not statutorily required to consult AAB if it decides not to declare a monument. Hence, the grading system is merely an 'internal mechanism' of AAB and a factor for the decision-maker, i.e. the Authority, to take into account while making a decision.

Secondly, the unclear linkage between the grading system and declaring monuments accelerates the possibility of the Authority making an arbitrary decision. Although the Authority would 'actively consider' historical buildings' Grade 1 status in making their decision, the actual amount of its weight remains unspoken in A&M Ordinance. The judgement in *Chu Hoi Dick* [2007] and the actual declaration pattern show that the grading system does not carry heavy weight, and the Court noted that it is not a determinative factor and it is 'by no means binding' on the Authority. Despite the Grade 1 status of Queen's Pier, the Authority still came to the conclusion that it is not a monument and was subsequently demolished. Also, up till 2007, only 28 (18.5%) Grade 1 buildings out of 151 were declared to be monuments.

Further, this essay argues that the Authority has not been reasonably and non-arbitrarily exercising its discretion. Historic buildings are not declared as a monument as they fail to meet the required high statutory threshold. The prevailing standard for declaring monuments is 'very high' with indisputable historical, archaeological or palaeontological significance, and the selection criteria are "very stringent", and were ruled as reasonable and lawful. Protection under s.3 A&M Ordinance would only be invoked "on a highly selective basis".

Indeed, the decision not to declare the Queen's Pier a monument may be argued as an example of the Authority exercising its discretion non-arbitrarily. In making the decision, the Authority has taken 'a holistic approach' where factors such as the Pier's 'relationship to colonial administration' and contribution in different areas were taken into account. However, the approach taken by the Authority is unsystematic and is actually administrative in nature. Firstly, statutory regimes of the A&M Ordinance remain silent on the appropriate yardstick for an s.3 declaration and allow the Authority to decide it. It generates uncertainty as there are no express guidelines for the Authority to follow. Secondly, although A&M Ordinance allows the owner or lawful occupiers of affected properties

to object to a proposed declaration, this remains an 'internal administrative appeal' and the Chief Executive in Council has 'the final say'. Judicial review would be limited to the legality of the decision.

THE WAY FORWARD

To remedy this situation, this essay argues that there is a compelling need to reform the A&M Ordinance. The United Kingdom's Ancient Monuments and Archaeological Areas Act 1979 would be a good starting point for lawmakers to take reference for being 'the most far-reaching piece of legislation' for the protection of antiquities and monuments.

One of the main differences between the heritage laws of the two jurisdictions is the degree of statutory protection provided to historical assets which are not scheduled or declared as a monument. Among the categories of historical assets identified in England, 'scheduled monuments' and 'listed buildings' (categorised in three grades: Grade I, Grade II* and Grade II) in nature resonate with HK's 'declared monuments' and 'graded historical buildings'. Scheduled monuments are governed by the Ancient Monuments and Archaeological Areas Act 1979 and receive legal protection under the Act once they are scheduled. Listed buildings are governed by the Planning (Listed Buildings and Conservation Areas) Act 1990. They receive less legal protection compared to scheduled monuments. The Act states that it is a criminal offence to execute any works for the demolition of a listed building, or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised.

Nonetheless, having a separate ordinance in Hong Kong to govern graded buildings would be impractical since we have far less cultural heritage compared to England. Further, drafting a new ordinance requires a long period of time, and the time cost doesn't guarantee a satisfactory result. Graded buildings may also be demolished for the time being.

This essay hence suggests that a separate provision restricting works on graded buildings should be inserted. The grading system remains a factor for the Authority to consider whether such buildings should be declared as monuments (after meeting the high threshold) and hence receive a high degree of statutory protection. The suggestion is argued to be effective as it brings graded buildings into the ambit of the A&M Ordinance, hence providing legal protection for them. The graded system was kept to ensure that their respective heritage values were reflected.

Further, a clear and non-subject guideline should be set forth to lower the uncertainty lying in the decision-making process. The English Heritage set a good example, who provided 18 'thematically arranged selection guides' on the eligibility for scheduling, while the Secretary of State for Culture Media and Sport provided assessment criteria on the decisions for scheduling.

A problem that remains unsolved would nevertheless be the actual amount of weight of the grading system in declaring a monument. The status of a listed building doesn't play a part in the eligibility and grading criteria in England. This is because the main difference between a listed building and a scheduled monument is a matter of degree. Having buildings to be listed in England aims to regulate the development and usage of land in the public interest instead of facilitating the process of scheduling monuments.

CONCLUSION

As argued above, the outdated A&M Ordinance renders historical buildings of heritage value in Hong Kong to be standing with the threat of being demolished in the near future. The problem becomes imminent when more historical assets are discovered from time to time, although it is foreseen that there will be a limited number of local case laws concerning declaring monuments and litigation for compensation to be raised in the near future. Nevertheless, it is certain that the utmost effort of the Government and concerned bodies is needed to remedy the situation in order to achieve an appropriate balance between heritage preservation, property rights and redevelopment interests.

ENERGY

Analysis on Regulatory Stability Within the Renewables Policy Transition to the Market-Oriented Regime in China

Liu Lin

1.INTRODUCTION

Renewables investments are essential for climate mitigation and energy security through decarbonising the energy sector and diversifying the energy supply. Since 2014, China has adopted a series of renewable support mechanisms to incentivise private and foreign capital into the Chinese renewable energy (RE) industry, facilitating clean technology innovation and infrastructure construction. Feed-in Tariff (FiT) Scheme, initiated in 2014, sends investors a positive signal of regulatory stability at the initial stage.

However, such stability is only sustainable in the short term. With the rapid decline in the cost of renewable investment, governments find it hard to determine a 'reasonable price' to avoid overcompensation. Under the heavy burden of 'tariff deficit' and high rate of delayed payment, the regulatory stability of FiT was proved to be unsustainable. Without controlling over the volume of the new investment, FiT also partly contributed to massive RE curtailment in China. In this context, China started further liberalising the electricity market and replacing FiTs with Renewable Portfolio Standards (RPS) and Tradable Green Certificates (TGCs) systems. China began diverting to market-based mechanisms, providing more flexibility and predictability for regulators and investors. The regulator has better control over the volume, and the market price help balance the supply and demand in the network. Therefore, it is less likely that the regulator would make retrospective changes to the existing regime. However, the EU's emergency cap on the electricity revenue proved that even under the market-based regime, the regulator still can enact public intervention and jeopardise RE investors' confidence in regulatory stability.

Comparing China with the EU shows a risk of supply disruption underlying external energy dependence, ultimately leading to a risk of public intervention.

China and its renewable investors can also draw lessons from the EU's intervention in liberalised market prices in the context of the ongoing policy transition in China. This paper aims to figure out: how to characterise the regulatory stability within the renewables policy transition to the market-oriented regime in China.

2. CHINA'S TRANSITION FROM FIT TO MARKET LIBERALISATION

2.1 PHASING OUT FITS IN CHINA

China adopted the FiT scheme for offshore wind farms in June 2014. National Development and Reform Commission (NDRC) announced that the offshore wind generators were entitled to be paid 0.75 CNY/kWh and 0.85 CNY/kWh for the projects in operation before 2016. It was hard for the regulator (NDRC) to decide on a reasonable level to avoid overcompensation and incentivise RE investments. Some investors argued that the prices were lower than the FiTs in Europe, while others contended that the cost in China was much lower than in Europe.

The grid companies paid the developers local on-grid benchmark price for coal-fired power. The difference between the on-grid tariff and FiT was paid by the National Renewable Energy Fund (NREF), financed through surcharges on the end-users and the public budget. The FiT level remained unchanged and expanded to 2018. The installed capacity expanded rapidly and led to a high Tariff deficit. By the end of 2019, the delayed subsidy for renewables amounted to over 300 billion. The increasing volume of inefficient installation also brought severe renewable curtailment in the past few years. In 2019, the wind power curtailment in China reached 227,000 GWh.

On 7 June 2021, NDRC announced that new onshore wind power and solar power after 2021 would not receive subsidies from the central government budget. Instead, these generators would sell electricity at coal-fired power benchmark or market price formed through actioning or in the market exchanges. The FiT scheme for new wind and solar projects was officially cancelled.

2.2 THE 2015 MARKET REFORM AND RENEWABLE PORTFOLIO STANDARDS (RPS) AND TRADABLE GREEN CERTIFICATE (TGC)

The basic principle of the market reform is 'regulate the middle and liberalise both sides'. The transmission and distribution tariff is under strict regulation. In contrast, the price of the generation and sale side would be gradually liberalised. In 2021, NDRC announced that the coal-fired electricity price in the market trading could float between lower and upper limits of 20% based on the local benchmark prices. Energy-intensive enterprises and entities in the spot market are not subject to this limit when engaged in electricity transactions.

China aims to build a national uniformed electricity market by 2025, including the mid-to-long-term trading market, spot market, and ancillary market (capacity market mainly). Under this proposal, China initiated pilot programs, including the experimental regional and provincial markets. Currently, 20 provincial spot markets are under experimental operation.

The prices in these experimental markets are formed through negotiation or competition. Guangdong Experimental Spot Market Rules documents 'Market contracts are formed by market entities through bilateral negotiation transactions and centralised transactions, forming electricity, price and power curves'.

On 22 November 2022, NEA released the opinion solicitation draft of The Basic Rules of the National Electricity Spot Market. In this draft, the regulator explicitly reserves the power to set price caps on the market price in Section 4: 'Both spot electricity energy and ancillary services transactions should be subject to price caps'. Even though the document states the methodology of the price cap shall base on marginal unit cost, supply and demand, capacity value, and economic and social development, it remains doubts whether the regulators have the accurate information to successfully set a reasonable level in an evolving market, which will not distort the price signal and provide incentives for efficient investment.

Besides the market reforms, Renewable Portfolio Standards (RPS) and Tradable Green Certificates (TGC) were respectively launched in 2019 and 2017 to facilitate renewable integration in the context of Fit reduction and retirement. NDRC and National Energy Administration (NEA) decide the provincial RPS targets, and local energy administrations allocate the portfolio obligations to compulsory subjects. Under the RPS and TGC systems, the subjects can fulfil the obligation by self-generation, purchase and consume RES-E, or purchase TGCs. There are two kinds of TGCs in China: Subsidy TGCs and Parity TGCs. Subsidy TGCs are designed to compensate the

RE generations that receive FiT, with the difference between FiTs and Coal-fired power on-grid tariff. The PV and wind power generators that acquired and sold the Subsidy TGCs would not receive FiTs. The RE generators may want to sell TGCs to hedge the high risk of the delayed payment of FiTs. Parity TGCs are designed for the RE generators that do not receive FiTs. The consumers' and grid companies' perspectives compare the cost of non-compliance, green electricity transition cost, and the cost of purchasing TGCs to design a development strategy. Because China includes indirect carbon emission in ETS, the carbon price can also be considered. In a liberalised market, the carbon price and TGCs price can be reflected in the level of marginal price, helping internalise the positive externality of Renewables cost-efficiently.

3. REGULATORY STABILITY ANALYSIS UNDER THE NEW MARKET-ORIENTED REGIME

3.1 REGULATORY STABILITY UNDER THE CURRENT ELECTRICITY PRICE REGULATION

Compared to the FiT scheme, the current Price regulation mechanism provides sustainable regulatory stability by mitigating the previous FiT deficit, ensuring electricity affordability, and avoiding overcompensation. In 2017, The FiTs of four wind power projects the Guangdong Development and Reform Commission (GDRC) authorised were 0.61 CYN/KWh. After the four-year operation of the spot market, the average price within the 2022 spring festival was 0.42 CNY/KWh. The spot market succeeded in providing more affordable electricity to the end-users but not at the cost of the financial burden on the public budget. Therefore, there is much less risk of public intervention based on price affordability and government deficit.

However, China's national electricity market is not fully liberalised. According to the OSD of *Basic Rules of the National Electricity Spot Market*, the RE generators have the freedom to decide the price based on their calculation of financial viability. The pricing mechanism in the National spot market is marginal pricing formed through competition. Nevertheless, compared to the strict limits of the public intervention Directive (EU) 2019/94, the OSD does not provide specific limits on public intervention. Article 38 provides that the electricity transaction should be subject to price caps. The risk of public intervention is relatively high in China at the current stage.

3.2 REGULATORY STABILITY UNDER RPS AND TGC SYSTEMS

As a substitute approach for the FiTs scheme to subsidise the renewables, RPS and TGC systems provide flexibility for the regulators and mitigate the risk of retrospective intervention on the fixed price. With a combined RPS and TGC mechanism, the regulators (NDRC and NEA) have better control over the investment volume by setting the binding target and ensuring the RE volume is compatible with long-term RE development, network equilibrium, and infrastructure construction. By imposing RPS obligations, the regulators guide the end-consumers and grid companies to purchase green electricity and TGC, making RES-E more competitive against fossil fuel generators. TGC system subsidises the renewables through the market exchanges and alleviates the financial deficit arising from Fits payment.

The TGC price can also help reflect whether the binding target is sufficiently ambitious to incentivise the clean energy transition on the consumption side, which make up for the asymmetric information between the market and the regulator. However, the incentives provided by the RPS and TGC system have remained limited since the program was initiated. By 8 June 2023, about 28.7 million TGCs had been traded while the amount of allocated TGCs had accumulated to 93.7 million, according to the disclosed statistics of the TGCs trading platform.

3.3 RISK OF PUBLIC INTERVENTION UNDERLYING EXTERNAL ENERGY DEPENDENCE

Europe's energy disruption arose from its external dependency on a 'dominant energy supplier,' Russia, and its import pipeline infrastructures. EU is a highly external energy-dependent economy, with 57% to 60% of the energy consumption from fossil fuel imports before the energy disruption. Russia dominated about 45% of the import in the EU gas sector in 2021 among suppliers. China is the largest energy consumer and energy importer globally. In 2021, China's external energy dependence was 20.6%. The total energy import of 2021 exceeded 1.12 billion tons of standard coal, with crude oil import dependence of over 70% and gas over 40%.

Although China has diversified the supply source by cooperating with 49 crude oil exporting countries,

80% of the imported oil is shipped through the Straits of Malacca and Singapore (SOMS). SOMS is a strategic link for the LNG import route, especially after NRDC set a long-term target to replace coal with natural gas.

China has been trying to diversify the import route by constructing alternative transportation projects, including Central Asia to China, Myanmar to China and Russia to China pipelines. However, the substitution effects between the SOMS and pipeline transport are quite weak at present. Once SOMS is blocked, China will face the risk of energy disruption, as in the EU. Based on the liberalisation trend discussed above, the Chinese regulator will likely interfere with the market price and undermine regulatory stability.

4. CONCLUSION

This paper discusses the regulatory stability under the FiT scheme and the Free-market scheme combined with RPS and TGC schemes. It has been demonstrated by the practice in the EU and China that the regulatory stability of the FiT scheme is not sustainable. The consequences of a regulated price are overcompensation, unreasonably high prices, fiscal deficit, and excessive and inefficient investment in the supply side, contributing to the imbalance of the whole network. The regulator will have to reduce or even phase out the subsidy. The stability of the FiT scheme ultimately leads to the instability of the regulatory environment, undermining the predictability of the market. As a result, the investors will delay the RE investment or charge a higher return rate, which will delay the Net-Zero transition agenda and increase the transition cost. EU, China, and other jurisdictions adopted the liberalisation and RPS and TGC system as a more cost-efficient approach to subsidise the RE investment with less impact on the regulatory stability in the long term.

The new regime provides flexibility for regulators and investors in the evolving market. Regulators can control the volume of the investment by setting targets. The price signals can incentivise investors to make long-term investment strategies based on reducing operating costs. Moreover, the end-users can also receive more reasonable and affordable electricity through market competition. However, significant public intervention on electricity prices still exists, which is a threat to RE investors who rely heavily on the regulatory stability and predictability of the market environment.

Besides, the similarity of external energy dependency to the EU also poses new challenges to the regulatory stability for RE investors under the market-oriented scheme in China. For the regulators, on the one hand, it is essential to perceive the supply risk underlying the dependence and try to prevent such risk by accelerating the pace of energy diversification and energy transition from fossil fuel to clean energy. On the other hand, the regulator also needs to provide more stability and flexibility in the market reform by limiting public intervention to reinforce investors' confidence in the regulatory investment. It is also crucial for investors to realise the risk of public intervention when making long-term investment decisions. Investors may rely on international investment law as an ex-post approach when public intervention occurs. However, it depends

To What Extent Local Content Requirement of Critical Raw Materials as Input to Clean Energy Technology Contributes to Decarbonization?

Otgonzul Bold

1.INTRODUCTION

The energy crisis following Russia's invasion of Ukraine in 2022 presents both an important challenge and an opportunity for international and European climate change mitigation efforts. On the one hand, disruptions of Russian gas exports and exceptionally high gas prices contributed to the renewed competitiveness of coal power, jeopardizing the urgently needed transition away from fossil fuels. On the other hand, the crisis emphasizes the energy security benefits of renewable energy sources, and energy efficiency improvements, in addition to their crucial role in the decarbonization of electricity supply. However, the expansion of renewables also creates new geopolitical dependencies, risks, and vulnerabilities as these resources and technologies depend on an uninterrupted supply of critical raw materials. In response, policies to financially support locally extracted or processed critical raw material as input for domestic clean technology manufacturing (i.e.: US's Inflation Reduction Act (IRA)) which are considered a geopolitical threat are introduced. The EU stated that IRA's domestic content provisions directly subsidizing additional production capacity could steer industrial actors away from Europe and towards North America to be able to benefit from the funding. Apart from this, responses from export-dependent developing countries to local content requirements in IRA should be assumed. This paper aims to project possible responses from export-dependent developing countries and touch on provisions of World Trade Law which IRA probably be challenged.

2. IRA AND EXTRACTIVISM

The IRA provides tax credits for Electric Vehicles (EVs) with batteries of which 80% of the market value of critical minerals input be 'extracted, or processed in the US or any of its free-trade countries (FTCs).' This means that non-FTC exporting countries are preferred to export only non-processed critical raw materials to the US so that the processing of critical minerals and manufacturing of clean technology will be developed to support US's value-added production. For instance, Argentina, a non-FTC country which accounted for 59% of total lithium minerals imported to the US in 2019, does not meet the US requirement of FTCs. To make the cars that contain lithium batteries tax-credit eligible under IRA, the US has to process this imported Argentinian lithium within US territory for domestic battery manufacture. This can be considered an extractivist policy as it forces resource-rich developing countries into exporting their raw materials to foreign factories, thereby limits their ability to reap the benefit of their natural wealth endowment by developing clean technology industries, and processing minerals on their own.

Considering the lack of budgetary capacity to heavily subsidize their clean industries, it may give incentives for export-dependent developing countries to impose export measures, particularly export tax on critical minerals, so that they can encourage their domestic processing by making minerals more expensive for foreign buyers. The possibility of such scenarios can be substantiated by the OECD findings, which 'reflected the increasing demands faced by mining companies of Indonesia, Chile, and Panama to renegotiate taxes, introducing export bans on ore, and asking for greater processing and manufacturing to be done domestically.' This can further increase the price of decarbonization. OECD warned that export restrictions, more than a third of which take the form of export taxes because they are permitted under World Trade Law, could exacerbate the pressure on the price and availability of commodities.

3. JUSTIFICATION UNDER THE WORLD TRADE LAW

There are two provisions of World Trade Law IRA could violate: the Agreement on Subsidies and

Countervailing Measures (SCM); and the National Treatment provision in General Agreement on Tariffs and Trade (GATT) Article III attached with the general exemptions of GATT XX.

Trade agreements typically leave policy space for governments to pursue non-economic objectives. SCM agreement is one of 2 ways to embody policy space. Any government support measure meeting the definitional and specificity requirements under Articles 1 and 2 is prohibited or actionable under the SCM Agreement. The agreement defines a subsidy broadly as a financial contribution by a government or any public body within the territory of a member which confers a benefit. Although the electric vehicle tax credits fall within the definition, the Appellate Body in Canada—Renewable Energy/FIT case construed the concept of 'subsidy' as not necessarily covering government support in the 'clean energy sector'. Thus, tax credits for EV manufacturing with the content of locally processed or extracted minerals may not be considered a 'subsidy' as it is a part of the clean energy sector. However, Canada–Renewable Energy/FIT is one of only 2 cases that has not established a subsidy, and hence, diverted attention away from the call for legal reform by shielding the SCM Agreement from environmental criticism. In other words, the climate-friendly interpretation which construes government support as not a subsidy in clean technology is uncommon in case law. Therefore, the chance of tax credits for IRA's justification being supported under the SCM Agreement is not high.

IRA provides discriminatory subsidies. Although tax credits applied to equipment manufacturing with the inclusion of locally extracted and processed critical raw materials are different from renewable energy subsidies, they are identical in case of discrimination against imported 'like' products. In most disputes regarding discriminatory renewable subsidies, the challenges were brought simultaneously under GATT Article III:4 and Article 2.1 of the TRIMs Agreement. Considering Article III:4, renewable energy support measures with local content requirements stand no, if any, chance of passing WTO scrutiny. The Panels and Appellate Body have made it abundantly clear that such measures are inconsistent with the national treatment obligations in GATT Article III:4 and TRIMs Article 2.1. As it is another way for policy space, the general exception under GATT XX should be examined here. While justification of IRA discriminatory subsidies under GATT Article XX(d) is uncertain, the protection under (j) is unjustifiable given the geographical distribution of critical minerals in the US and its import partners, as the appellate body in India–Solar Cells ruled. Justifications under paragraphs (b) and (g) exceptions are almost impossible according to the ruling in the China-Rare earth case, considering that IRA discriminatory subsidy does not restrict domestic extraction and processing. Therefore, the EV tax credit under IRA is more likely to be unjustifiable under World Trade Law.

4. CONCLUSION

Low-carbon alternatives can help achieve the objectives of energy security and carbon neutrality in a mutually reinforcing way. However, this transformation also poses its own geopolitical risks as new technology, and supply dependencies are created in parallel to the deployment of clean energies. In turn, legal responses to these new dependencies (e.g., in the form of local content requirements under the US IRA) pose a geopolitical threat. For developing economies dependent on mineral export, the local content requirement in critical minerals as input to domestic manufacturing of clean technology, including the one in IRA, can be considered an extractivist policy. This could incentivize these countries to impose higher export taxes. As a result, the price of critical minerals in the global market will increase, and hence DE carbonization may become expensive. Despite this, the chance of discriminatory financial support to local contents in critical minerals as input to domestic manufacturing of clean technology being justified under World Trade Law is not high in case it is challenged in front of international arbitration.

EDITOR'S COLUMN

Proposed Legislations to Regulate Hong Kong's Taxi Industry

Ashley Wong

In order to enhance the quality of personalised point-to-point transport services, the Hong Kong government has proposed two pieces of legislation – the Road Traffic Legislation (Enhancing Personalised Point-to-point Transport Service) (Amendment) Bill 2023 and the Taxi-Driver-Offence Points Bill – to come into effect.

As an increasing number of complaints have been lodged against drivers for being rude and overcharging, the Road Traffic Legislation (Enhancing Personalised Point-to-point Transport Service) (Amendment) aims to implement measures in hope of enhancing the quality of taxi services. These measures include introducing a taxi fleet regime, increasing the maximum passenger seating capacity of taxis, introducing a two-tier penalty system for certain taxi-driver-related offences and amending certain offence provisions, and increasing the penalties for illegal carriage of passengers for hire or reward by motor vehicles.

In addition, the Taxi-Driver-Offence bill aims at regulating 11 taxi-driver-related offences that affect the quality of taxi services. It also imposes higher penalties as opposed to the existing legislation in force. The bill would oblige the Commissioner for Transport to record offenders' Taxi-Driver-Offences and their details in a register. If an offender incurs between eight and 14 points within a two-year period, the Commissioner will serve the offender with advice. If an offender incurs ten or more points within a two-year period, the Commissioner will serve the offender a notice, requiring the offender to attend and complete a taxi service improvement course. If an offender incurs 15 or more points within a two-year period, the offender will be disqualified from driving a taxi.

In light of regulating Hong Kong's taxi industry, Kevin Yeung Yun-hung, Secretary for Culture, Sports and Tourism, said that authorities will crack down on unscrupulous cabbies that engage in taxi malpractice, for example overcharging passengers. Meanwhile, Wayne Yiu Si-wing, a member of the Committee on Taxi Service Quality, proffered that stronger law enforcement measures are necessary if Hong Kong were to enhance the quality of taxi services. He is of the view that a demerit points scheme is essential to deter the unsatisfactory behaviour of taxi drivers. While the effectiveness of the proposed bills has yet to be seen, Hong Kong should unequivocally improve the quality of its taxi services.

Shielding the Vulnerable: Hong Kong's Progressive Leap Forward with the Mandatory Reporting of Child Abuse Bill

Ian Sun Liu

Against the backdrop of rising incidents of child abuse in Hong Kong, legislative discourse has recently spotlighted the welfare of the vulnerable, especially minors and children. Hong Kong's latest proposal, The Mandatory Reporting of Child Abuse Bill (the MRCAB or the Bill), was gazetted on 2 June and was followed by the first reading on 14 June. The Bill establishes a legislative framework mandating specified professionals to promptly report suspected cases of child abuse.

ABOUT THE BILL

The MRCAB sets out statutory duties, defences, and legal protections towards mandated reporters. Under Clause 4 MRCAB, a specified professional is obligated to make a report to the authorities where they have a reasonable ground to suspect that a child is suffering or at real risk of suffering serious harm. Schedule 1 MRCAB lists up to 25 specified professionals to be mandated reporters. The roster of mandated reporters covers a range of occupations, including registered pharmacists, dentists, medical practitioners, teachers, social workers, and various other specialists.

Clause 5 MRCAB sets out the defences. For instance, a specified professional may either establish that they have made a report before being charged. Another ground of defence is where a specified professional 'honestly and reasonably' believes that a delay was in the best interests of the child, given the circumstances. Additionally, Part III MRCAB also offers protection for specified professionals making the reports, such as anonymity of specified professionals and non-incurrence of any civil or criminal liability.

IMPLICATIONS: INTRODUCTION OF THE MANDATORY REPORTING OF CHILD ABUSE BILL

Firstly, in addition to a general duty of care at common law, the Bill introduces a statutory duty for professionals to report child abuse cases. At common law, the English case of *JD v East Berkshire Community Health NHS Trust* [2005] establishes that healthcare and childcare professionals owe a duty of care to act in good faith in the best interest of the child, especially in cases of suspected child abuse. In that case, the House of Lords emphasised the need to strike a proper balance between safeguarding a child from parental abuse and the protection given to

parents from unnecessary interference in their family life. More emphatically, in *HKSAR v KKK* [2011], the Court of Appeal firmly stated that abuse of a child by a parent or similarly situated person was a breach of trust against which the court would proactively seek to protect the child.

However, proponents for the Bills have observed that despite the likely existence of a common law duty for professionals to report child abuse cases, in practice not all report child abuse or have formal training to handle such cases. By introducing the Bill, Clause 4 MCRAB effectively creates a statutory duty for specified professionals to make reports regarding child abuse. As a result, The Bill makes the mandatory duty to report more pronounced and bridges the gap in common law.

At the same time, another implication is that the Bill assists in materialising the mandatory reporting mechanism. Clause 4 implicitly gives effect to reporting mechanisms put in place to deal and process child abuse cases. In anticipation of the Bill, the Government has announced that it would provide mandated reporters with formal training and practice guides. The Legislative Council Brief on the Bill has proposed other supportive measures, including the increase of residential childcare centres for emergency placements and the launching of thematic campaigns on child protection.

Thirdly, the Bill has been introduced to curb the rising number of child abuse cases in Hong Kong in the past few years. The Child Protection Registry, a branch of the Social Welfare Department, has reported a steady increase in newly registered cases of child abuse in 2020, 2021 and 2022 at 940, 1367 and 1439 cases respectively. Additionally, the Legislative Brief also cited concerns about the under-reporting of serious child abuse cases, which have called for current legislative action.

The recent effort echoes a growing development where overseas jurisdictions have similarly established mandatory reporting requirements for child abuse. As of 2018, the statutory duty to report suspected cases of child abuse has been enshrined in the legal framework of approximately 70 jurisdictions worldwide. In a broader context, under s125 Child Youth and Family Services Act, Canada goes a step further by legally requiring anyone who has valid reasons to believe that a child might need protection to quickly report their suspicions and the relevant information to a Children's Aid Society.

EMERGING CONCERNS AND CONSIDERATIONS

As of the present date, the Bill is undergoing consideration by the Bills Committee before its anticipated presentation for the 2nd reading in the Legislative Council. Despite recently being introduced, the Bill has already garnered support from the wider legal community but with some recommendations and concerns over certain provisions.

Preliminarily, one of the many concerns stems from the fact that Schedule 1 MRCAB is an exhaustive but underinclusive list. The Submission of the Law Society observed that the current list of 25 specified professionals may not provide children with the necessary protection. Moreover, the Law Society underscores the omission of individuals, such as babysitters, clergy, and religious workers, who, though not professionally classified, maintain

frequent interaction with children.

A second concern is whether mandated reports should make a report where the harm is caused by a certain class of individuals. The Working Group of the Legislative Council proposes omitting harm caused by another child from the mandatory reporting requirements. This adjustment allows institutions catering to children's services to address cases of peer bullying within the context of prevailing practices and norms. In parallel, based on the same rationale, it is worthwhile to explore whether harms caused by other classes of individuals should be excluded if it may affect other institutions or frameworks. While such an effort may limit the scope of the Bill, it emphasises the need to strike a balance between the comprehensive reporting requirements and ensuring the performance of the current system.

Amid these considerations, it becomes evident that the Bill requires careful recalibration to ensure its efficacy in providing comprehensive child protection before being passed into an Ordinance.

CONCLUSION

In summary, the Mandatory Reporting of Child Abuse Bill represents a pivotal measure in addressing the surge of child abuse cases in Hong Kong. By establishing a legislative framework that mandates specified professionals to report suspected cases of child abuse, the Bill bridges the gap between common law duties and practical action. It introduces a statutory duty that highlights the pivotal role of professionals in safeguarding children's welfare. Moreover, the Bill's potential implications encompass enhanced reporting mechanisms, provisions for defence, and crucial protections for mandated reporters. However, the Bill also requires ongoing recalibration to ensure its effectiveness, including refining the list of specified professionals and addressing concerns about excluded harm categories and other societal concerns.

The Bill signifies a promising stride towards fulfilling Hong Kong's obligations under the UN Convention on the Rights of Children obligations and safeguarding the well-being of children of Hong Kong. The Bill addresses the paramount issue of mandatory reporting requirements while also currently seeking to find the balance between the effect of its provisions and practical implications. However, pending enactment from bill to ordinance, the practical implication of its provisions and the operational mechanism remains to be seen.

Effectiveness of Hong Kong's Secondary Listing Regime

Susan Zou

INTRODUCTION

The topic of secondary listing in Hong Kong is a fast-evolving one. Observers may hold different opinions as to the effectiveness of this regime. On announcing the latest reforms to the listing regime that took effect on 1 January 2022, Bonnie Y Chan, Head of Listing of the Hong Kong Exchanges and Clearing Limited (HKEX), commented that '[t]hese reforms will enhance the Exchange's reputation as the global listing venue of choice and will further broaden investment opportunities for investors in Hong Kong. At the same time, the implementation of the proposals will ensure that Hong Kong maintains its high standards of shareholder protection'.

Indeed, the constant theme is to balance regulatory priorities between Hong Kong's increasing competitiveness as a listing platform and affording adequate protection to shareholders. This article aims to address the effectiveness of Hong Kong's secondary listing regulatory regime, especially in achieving this balance.

1. OVERVIEW OF SECONDARY LISTING

The major reform to Hong Kong's listing regime took place in April 2018, after four years of market consultation. The HKEX added three new chapters to the Main Board Listing Rules (2018 Amendments), permitting listings of (1) biotech companies that do not meet the financial eligibility tests, (2) companies with weighted voting right (WVR) structures, and (3) secondary listing of qualifying issuers. While the 2018 Amendments did not only cater to Chinese companies, one important change it brought is the added category of 'Grandfathered Greater China Issuers', referring to issuers primary listed on a Qualifying Exchange on or before 15 December 2017, and with its centre of gravity in Greater China. The significance is, Grandfathered Greater China Issuers are eligible to be secondary listed in Hong Kong with their existing WVR structures, which may not necessarily comply with the rules for WVR under Listing Rules. A brief overview of WVR is thus needed to fully appreciate the implications of this reform.

1.1. WVR STRUCTURE

Weighted Voting Rights refers to the corporate structure where voting powers granted to shareholders are disproportionate to their equity interests. This is usually done by prescribing different classes of shares. WVR contrasts with the 'one-share, one-vote' (OSOV) rule. While companies in Hong Kong are generally allowed to adopt WVR structures under the Companies Ordinance, the HKEX Listing Rules imposes additional restrictions on the use of WVR by listed companies or companies seeking to be listed.

Prior to the 2018 reform, there was a prohibition on WVR structure in Hong Kong, with only two exceptions. One is that companies with existing WVR structures prior to the introduction of restrictions in 1989 were allowed to maintain that structure. The other is the exemption under 'exceptional circumstances', which has not yet been granted. Indeed, in 2013, China's tech giant Alibaba abandoned its plan to list in Hong Kong, after the regulators refused to exempt its proposed WVR structure. Although this incident later sparked discussions on relaxing WVR rules, it was not until 2018 that reform steps were taken. While the detailed debate over WVR is beyond the scope of this essay, it is fair to say that there is no 'right' or 'wrong' of WVR in absolute terms. Rather, as many jurisdictions including Hong Kong now allow the existence of WVR structures, the focus is rather on how to design a regulatory framework that best suits their securities market.

1.2. CONTINUOUS REFORM

In October 2020, HKEX published yet another important amendment to the secondary listing regime. That is, for Greater China Issuers that are '(a) controlled by corporate WVR beneficiaries (as of 30 October 2020); and (b) primary listed on a Qualifying Exchange (on or before 30 October 2020)', they will

be eligible to be secondary listed in the same manner as Grandfathered Greater China Issuers. Previously, WVR shares could only be granted to natural persons as directors of the issuer.

HKEX, when announcing the changes, emphasised that such Qualifying Corporate WVR Issuers would still need to meet stringent rules as safeguards for investor protection. In addition to being an 'innovative company', these issuers must also satisfy the 'minimum market capitalisation threshold of at least HK$40 billion, or at least HK$10 billion with at least HK$1 billion of revenue for its most recent audited financial year'. The most recent reform by HKEX came in November 2021, with amendments taking effect on 1 January 2022 (2022 Amendments). Under the new rules, for Greater China Issuers without a WVR structure seeking secondary listing, the 'innovative company' requirement is removed, and the market capitalisation threshold is lowered. A significant reform step is that the WVR structures of Grandfathered Greater China Issuers will be maintained following conversion to a primary listing status.

2. CRITICAL EVALUATIONS

Having presented an overview of the secondary listing regime in Hong Kong and the recent regulatory reforms, we now turn to critically evaluating the effectiveness of the regime. The focus will be on two dimensions, one is whether the regime has adequately enhanced Hong Kong's competitiveness as a listing venue, and the other is whether a robust framework for shareholder protections has been put in place.

2.1. ENHANCING HONG KONG'S COMPETITIVENESS

The most visual way of assessing competitiveness is how well this regime has attracted issuers for secondary listings. Whilst there was no new issuer under the concessionary secondary listing route by the end of 2018, in 2019, Alibaba completed its secondary listing in Hong Kong and raised HK$101.20 billion funds, taking up almost one-third of total IPO funds raised in 2019. Alibaba became the first to use the 'Grandfathered Greater China Issuers' route to be secondary listed with its existing corporate WVR structure. Following this, '[n]ine more US-listed Chinese companies, including JD.com and Netease, copied that move in 2020 to raise a combined US$16bn'.

Hong Kong's ongoing reform in its secondary listing regime has coincided with the increasing regulatory scrutiny that China-based companies face in overseas securities markets particularly the U.S., a popular listing destination for Chinese companies. In December 2020, the then-U.S. president signed the Holding Foreign Companies Accountable Act (HFCAA) into law. Under the HFCAA, the U.S. Securities and Exchange Commission (SEC) is empowered to prohibit the trading of securities belonging to an issuer, if U.S. regulators cannot gain access to inspect that issuer's auditing documents for three consecutive years.

The Act is seen as a response to the unresolved conflicts between U.S. and Chinese regulators, with the latter prohibiting the disclosure of accounting records of Chinese companies overseas. Such heightened scrutiny has caused many U.S.-listed, China-based companies (China concept stocks) to consider a 'home-coming' listing in Hong Kong. It is shown that after the passage of HFCAA, as of August 2022, a total of 12 of these companies have completed a secondary listing or dual-primary listing in Hong Kong.

While one might consider it a coincidence that increasing U.S. scrutiny and reforms in Hong Kong occurred concurrently, upon close examination, there is solid evidence that Hong Kong regulators have proactively taken steps to utilise such opportunities. Under the 2022 Amendments, qualifying issuers would now be eligible for a dual-primary listing in Hong Kong with existing WVR structures. The HKEX also issued a guidance letter GL112-22 setting out the clear procedure for companies that are already secondarily listed to be voluntarily converted into dual-primary listing. Following the relaxation, in June 2022, Zai Lab became the first to have completed the conversion. Notably, the approval by Zai Lab's Board of Directors on conversion came in April 2022, only one month after the SEC put it on the list of issuers potentially facing delisting.

This relaxation is crucial for China Concept Stocks. Firstly, under dual-primary listing, the issuer's performances under two markets tend to be relatively independent of one another. Thus, even if facing substantial regulatory risks such as being delisted in one market, its primary listing status in the other market will be largely insulated from major fluctuations. Secondly, dual-primary issuers are eligible for 'Stock Connect' after satisfying certain conditions, which provides more liquidity to its securities. Thirdly, qualifying issuers would still be able to retain their WVR structure, without full compliance with rules under Chapter 8A of the Listing Rules.

Thus, by providing the alternative option of dual-primary listing for new issuers and voluntary conversion for existing issuers, Hong Kong regulators have consciously grasped the window opened by increasing willingness or even urgency by overseas Chinese issuers to be listed in Hong Kong. This in turn has increased Hong Kong's competitiveness as a listing venue, attested by the number of new issuers and the total funds raised. The next question, however, is whether the regulators have gone too far in the relaxation and neglected the need to protect shareholders.

2.2. PROTECTION OF SHAREHOLDERS

The issue of shareholder protection is the most profound when it comes to the listing of companies

with WVR structures. The first aspect to examine is whether there are adequate ex-ante protections, in that such companies would need to meet stringent conditions before listing. Among the key requirements for secondary listing, there is a HK$40 billion minimum market capitalisation test for WVR companies (or HK$10 billion and revenue of at least HK$1 billion for the most recent audited financial year). In comparison, those without WVR structures only need to satisfy a substantially lower amount of HK$3 billion.

Another essential requirement is that for a Grandfathered Greater China Issuer or Qualifying Corporate WVR Issuer to be secondary listed, it must be an 'innovative company'. The HKEX Guidance Letter HKEX-GL94-18 prescribes several characteristics that are normally expected of such companies, such as that 'research and development is a significant contributor of its expected value and constitutes a major activity and expense'. However, there appear to be no quantifiable criteria that are as clear cut as the financial eligibility test. Indeed, the HKEX itself in the Guidance Letter recognises such flexibility, as the innovative company requirement 'depends on the state of the industry and market in which an applicant operates, and will change over time as technology, markets and industries develop and change'. Nevertheless, there is a potential risk of the regulatory regime being overly flexible, which may lead to otherwise unqualified companies being approved. Thus, the HKEX must be very careful in exercising its discretion.

The second aspect is the ex-post protection for investors. Importantly, while Listing Rule 8A.44 mandates the incorporation of relevant safeguarding provisions into the company's articles of association, 8A.46 exempts this mandate for qualifying issuers seeking dual-primary listing or secondary listing. This means that shareholders of secondary listed companies generally would not have a cause of action under breach of contract (i.e. the company's articles). While an individual investor may still bring civil proceedings under s305 of the Securities and Futures Ordinance to recover losses from market misconduct, the non-availability of class action in Hong Kong creates difficulties for general investors who often lack adequate resources. Nevertheless, the Securities and Futures Commission (SFC) may provide effective remedies through s213 and s214 of SFO. In particular, under s214, in cases of unfair prejudice to members of listed corporations, the SFC has standing to bring civil proceedings to bring compensation to such members.

CONCLUSION

Having presented an overview of the latest reforms to the secondary listing regime in Hong Kong, this article evaluates the effectiveness of the regime through two dimensions. It observes that the HKEX has strategically made use of the increasing willingness of China Concept Stocks to have a secondary listing or dual-primary listing in Hong Kong. The continued relaxation of rules has thus strengthened the competitiveness of Hong Kong as a listing venue. However, there are lingering concerns over adequate shareholder protections. In particular, the lack of certainty over key tests such as 'innovative company', and the exemption of incorporating safeguards into articles of association may disadvantage shareholders. Nonetheless, the use of s213 and s214 by SFC in seeking civil compensation on behalf of individual investors can remedy such concerns to some extent.

FEATURE

Feature: Professor Bernard Hibbitts - Founder & Editor-in-Chief of JURIST

1 WHAT MOTIVATED YOU TO CREATE JURIST?

There were a number of reasons for creating JURIST back in 1996.

The first thing that I wanted to do was to connect law students with the outside world. When everybody comes to law school, you come into a professional setting where you're separated from everything else and everybody else. So I wanted JURIST to be a way for law students to stay connected with the outside and keep updated with what was really going on. I thought it was important for them to remain connected so they could be good citizens and be aware of things that were going to affect their lives, and maybe they could learn about things that they could change in the future during the process.

In a more practical sense, I also wanted them to improve their legal research and writing skills by writing legal news in plain English, not legalese. We wanted people in JURIST to learn how to write concisely and clearly for a worldwide audience. It's not client representation, but it's certainly providing legal information and helping people understand what is happening in their world. That was very important for us at the beginning, and it still is.

2 WHAT ARE SOME RECENT LEGAL ISSUES THAT JURIST HAS BEEN FOCUSING ON?

We talk a lot about public law issues, including matters of constitutional law and governance, administrative law, regulatory law, statutory law, and human rights, which are obviously prominent for us because they have an effect on so much that happens. We don't talk a lot about torts or contracts or most private law matters, which are of narrower interest to the profession or to clients.

3 WHAT IS JURIST'S EXPANSION PLAN IN HONG KONG? HOW CAN LAW STUDENTS JOIN AND WHAT ARE THE THINGS TO EXPECT?

We're very excited about coming to Hong Kong and coming to China. It's probably the biggest step JURIST has taken globally since 2020. We actually started to reach out to other jurisdictions around the

world during COVID. The first major international jurisdiction we went into was India, which is huge. Hong Kong and China are each very large but different, so this is still a big leap for us.

Right now, we're recruiting law students from major Hong Kong law schools. We have been very impressed by the quality and energy of the students that we have been talking to. If you are interested in joining JURIST Hong Kong, please go to the JURIST website at jurist.org. You will see a notice in the top right-hand corner of our website, which will take you to an application form, and you can file an application from there. We look for your CV, a writing sample, and an expression of interest in joining JURIST. Hong Kong is a major common law jurisdiction, and it obviously is in a very interesting position as a special administrative region of China. We're very much looking forward to developing our Hong Kong staff and having a bigger presence here.

4 WHAT ARE SOME CHALLENGING ASPECTS OF RUNNING JURIST?

There are so many. Just the size of the thing makes it challenging, right? JURIST has at this point over 100 law student staff and correspondents working from some 50 law schools in 25 countries around the world. We have a tiny US-based professional staff, so it is a challenge to keep up with that size of an organization, but it is fascinating to work with all these students.

When an institution grows very quickly, things change, and you have to structure yourself and organize yourself differently, and we're still adapting to the new reality of being a global operation. One of the things that we have to adapt to is working with and managing law students working in time zones that are literally on the other side of the world. It's wonderful, but it results in some interesting things. When we wake up here in Pittsburgh, we start to work with law students in Europe and the United Kingdom. Then, as we go through the day, we talk to students in Africa and India and then, at the end, Australia and Hong Kong. Again, that is unprecedented. There's no other organization of law students like this anywhere in the world whose members work together in real time, and so we're the only organization that is facing these kinds of challenges, but we're happily facing them.

We're also challenged by the fact that we're covering legal news, which is unpredictable. When we start off every day here, we have no idea what is going to happen. Anything could come to us from anywhere, and we have to try to deploy staff and correspondents to address issues as they arise. So, for example, if something happens in Kenya, we go find the Kenya correspondent to talk to us about something happening there. It's a very dynamic minute by minute type of environment, very different from anything that we have traditionally been prepared to do as law students or even as law professors.

There's one final twist on this, which I'll just offer to you because I think it's important. When you have staff around the world, they're in very different circumstances. Some of them are in stable traditional jurisdictions. Some of them are in extraordinarily difficult positions. We have law students in Myanmar and Afghanistan who are still talking to us and who are still working with us. Their situations are very difficult. We need to understand that to be able to work with them and connect with them. In part this is an exercise in diplomacy. You have to be sensitive to the staff and their situations. That's important if everybody is going to work together successfully.

So there are so many different things that are happening to JURIST we have to adapt to. They're all challenges we can solve. The range of things that we're doing and the range of things we're trying to do means that running JURIST is very difficult, but it's also very rewarding.

*(**HKSLG:** Yes, it's very meaningful that JURIST helps jurisdictions with difficulties to have a voice. It sounds challenging at the same time to run such a big organization and manage staff from all over the world and address some spontaneous legal issues. We think it's great to know that JURIST can have a big development over the past three years.)*

And if I could just add something quickly because you used the exact word I did not use when I was talking, You used the word "voice." It's become very important for us, especially as we have become global, to enable and empower law student voices from around the world. It's one thing to empower American law student voices. But around the world, law student voices are not always heard from different places. They're drowned out in certain jurisdictions, but now on JURIST, you can hear law student voices coming from Africa, coming from Asia, coming from Australia, coming from Europe. For many of these students, it's the first time they have had a chance to talk to an international public and talk to their colleagues in other countries in a serious way about serious issues. It's wonderfully exciting for them, and

you can see how enthusiastic they are in doing all of this. I hope they will continue using their voices for decades to come. They are powerful voices, and we are glad to be putting them forward so that they are heard around the world.

5 WHAT ARE YOUR FAVORITE ASPECTS OF THE LAW?

That's a really good question, and the answer may surprise you. I'm a legal historian here at the University of Pittsburgh School of Law, so my favorite aspects of the law are in the legal past. I've taught everything here from American legal history to the history of the legal profession to English legal history to ancient law. One of my ancient law courses includes a module on ancient Chinese law.

My favorite course right now is a course that I teach on the history of the American legal profession. Law has a deep history, and I love that history. It's really my favorite aspect of law in so many ways. I try to encourage my law students to look back on history and understand that things can be done differently than we do them today.

Lawyers are always changing in a variety of ways. Sometimes we need to remember who we are, and sometimes we need to go back to our roots. Sometimes we can and should go in new and different directions. But we see in all of the courses I teach that law is very versatile, and that it can be very constructive, that it can do great and remarkable things if we let it do those things. Those are some of the things that I like to introduce my students to.

So it's the deep past of law, the intellectual depth of law, and the intellectual side of law that I find most satisfying, although that would seem to have nothing to do with technology. But actually, it has a lot to do with technology. And even what I do on JURIST connects because I'm just working with technology to find out what else we can do with the law, what else we can do with law students, what else we can do as lawyers. Technology is a tool, so all of these things kind of fit together at the end of the day.

6 YOU HAVE SAID THAT LAW STUDENTS IN THE US NOWADAYS ARE DISTRACTED BY MONEY AND PRESTIGE, AND THEY ARE DISCONNECTED FROM THE COMMUNITY AND ARE VERY DISTRESSED. IT IS THE SAME STORY HERE IN HONG KONG. DO YOU THINK WE HAVE ANY SOLUTIONS FOR THIS PHENOMENON?

These problems seem to be universal. In many respects, they have to do with the world in which we live. I was struck by your comment that similar problems exist in Hong Kong, and Hong Kong law students sometimes feel disconnected in various ways and are distracted by financial concerns and things like this. I think what we need to do is to remind law students about why they came to law school and why they wanted to be lawyers.

Certainly, in the US, and I presume it's also true in Hong Kong, students come to law school because they want to help people. They want to change things. They want to use the law to improve people's lives or improve society in some way because everybody understands that law can fundamentally do that. But then somehow, we get to law school, and over three or five years, whatever the program, something changes, and so many students come out in other directions. I wonder whether that's our fault, and I'm pointing at myself here. I wonder whether law schools are perhaps doing a disservice sometimes to law students and suppressing their enthusiasm for certain things by forcing them into certain kinds of streams and certain kinds of subjects that might be lucrative but may not be helpful to individuals or society in a variety of ways. I always wonder what would happen if we taught law students about social problems, history or philosophy, which is what we used to do.

We don't really equip lawyers these days, either in Hong Kong or in the US, to really change the world. We train them in other fashions. We're training them basically to be technicians or technocrats. And that's fine, I suppose - it can work, and it can help certain clients. But if you look back in history, there are so many lawyers who have fundamentally changed the world in so many ways. You've got Lenin, Gandhi, you've got Castro, Nelson Mandela. In the United States, you've got the founding fathers, Thomas Jefferson, and John Adams, who were all revolutionaries who changed their world and done great things. All of them were lawyers. I don't think we are graduating law students who are going to want to do great things just because we're not encouraging them to do that. We're encouraging them to do little things and smaller things. And we're encouraging them to be content sometimes with the way things are, but I don't think we should be doing that. I think many law students want to do something more, and I hope we can encourage them to do more. And maybe if we encourage them in that way, they perhaps won't

be so distracted and bogged down by financial issues and things like this. We need to give them a larger mission.

(***HKSLG:*** *Yes. I feel like there's a dilemma that law students nowadays get into law school. They expect to get more rewards from doing things that are lucrative. If we teach law students more about different options, maybe they can have a broader view.)*

I don't know how this works in Hong Kong, but I know the other factor in the United States is simply the huge cost of tuition these days and the problem of student debt, which is obscene and ridiculous. I mean, the students come out with enough debt for a mortgage on a house or something. They've taken out these huge loans to go through law school, and so they come out with these debts, and they need to repay the debts. That means they almost have to go in a corporate direction to pay the debts. They can't afford to go into public service or government. It's a tremendous shame. It has changed profoundly from when I was in law school decades ago, and that's very unfortunate. I do understand the pressures, but that means something needs to be done to address those pressures. Law schools are not doing enough, universities are not doing enough, and governments are not doing enough. But I think we really need to do that. Otherwise, all law students will simply be enslaved to their debts, and that's not going to be good. You don't want a generation of law students and lawyers who are in that situation.

7 WHAT IS YOUR OBSERVATION OF THE DEVELOPMENT OF THE RULE OF LAW WORLDWIDE IN RECENT YEARS?

I said before that this is one of the things that JURIST focuses on. The rule of law itself has become a greater concern worldwide in the last several decades. You can see concerns about the rule of law and the stability of systems and the predictability of judgments, and all of those things are arising in a variety of jurisdictions. What's most disturbing to me, just because of where I'm located right now, is the situation in the United States. Of course, the United States has presented itself as a champion of the rule of law for a long time. And yet, as you have seen on the news, very bad things are happening here. A variety of political forces have developed over the past decades which seem to disregard the rule of law or have not wanted to respect the rule of law. Obviously, this was most dramatically demonstrated in the January 6 Riots, what they called the Insurrection sometimes. I watched it from here in Pittsburgh, and I was just astonished and horrified by what I saw on TV, which was extremely problematic for the rule of law. Violence happens, but this kind of direct disrespect for the rule of law and the constitutional order is very disconcerting.

So we've got a lot going on here, and that means we have to get our own house in order and address this fundamental issue ourselves. This problem, by the way, is not going to go away in 2024. With an election in 2024, it's still going to continue. Pressures on the rule of law are often reflections of other things, such as social pressures. It's no coincidence that a lot of this stuff happening in the United States now is after COVID, which was devastating to this country in all kinds of unnecessary ways. There is a lot of anxiety here, and that also reflected in the headlines about increased gun violence and mass shootings in the United States. That's another sign of disrespect for the rule of law. I think as law students and lawyers, we need to take a stand and we need to push in the other direction. We need to do that in order to have a better and more stable world. There can be differences in discussions about what the rule of law means, but it doesn't mean attacks on your national institutions, it doesn't mean gunfire in the streets, and it doesn't mean corruption. I mean, that's another thing, right?

So people are not respecting the rule of law, people do not seem to believe in the rule of law, people do not seem to be honoring the rule of law, and so there is a crisis of confidence. It's a worldwide problem, but it's very obvious to us here in the United States. And we hope that we can work together with people around the world, law students and lawyers around the world, in helping to stabilize the system again so that people can live constructive lives, safe lives,

peaceful lives, fulfilling lives, all those things that are undermined when the rule of law is not respected.

*(**HKSLG:** Yes, I think we're all seeing a world that is getting more and more polarized, and views are just getting more and more extreme.)*

What's causing this? Well, technology is largely to be blamed. Technology isn't inherently bad, but it can be used dysfunctionally for bad purposes. Social media is partially to be blamed. If you're going to argue with somebody, it's easier to take blunt positions in 150 characters than in a long, complex, nuanced argument. The technology companies have pushed us in the direction making aggressive and outrageous comments. You've all seen the stories about Facebook and other companies that are doing that because they want to maximize people's engagement. But that isn't necessarily good when that engagement is bad or negative, or people are hurting each other or arguing with each other. So technology has made a lot of this worse, and I think that technology can be controlled. That's another aspect of the rule of law. I think we can impose standards on it, but we haven't done that. And so we've got this absolute war of all against all, which sort of goes on online, and then goes on offline, and makes life in society very difficult in the real world. So we really need to take control of this.

One way to do that, at least in a small way, is to start is to get law students out there into the technology and into the online space. Get them to demonstrate cooperation, get them to demonstrate good judgment, get them to demonstrate responsibility, get them to demonstrate all these habits, which I think are positive and good for everybody, as opposed to developing environments where we just go at each other like this, and do it for our own private purposes. So JURIST represents a very different version of what the world should be, at least as far as I'm concerned.

It always seems like there's a struggle between how much freedom we enjoy and to what extent we need to be aware of the freedom that we can enjoy. There's an expression called "Your right to swing your arms ends just where the other man's nose begins." I mean, I cannot use my freedom of speech to cause harm like that. And yet, these days, we have absolutist views of things like freedom of speech and other so-called "rights", which basically would allow anybody to do anything, which is not freedom. It's anarchy, and there have to be some constraints, limits, and standards. Otherwise, society cannot exist, and everybody would just do their own thing and drive off the road. So again, we have to think about what we're doing and the type of society we're creating. We have to recognize that law needs to play a positive role in setting those parameters and those guidelines so that people can get along with each other.

But coming back to what you said, we need to prepare law students in a more comprehensive way, not just training them to become technicians but bringing them back to the roots of law. Maybe universities and governments can start to think about solutions that can help law students to become more engaged in pursuing the public good. We want to move from a universe where lawyers are technicians to a universe where lawyers are guardians and caretakers and people who think carefully about the larger goals and purposes of society and who are considerate of other human beings. If lawyers don't do that, who's going to do it? Are we going to leave these matters to doctors, engineers, or businessmen? None of those areas have the depth that will allow us to constructively govern our societies. The doctors, let them take care of the health of the body. The engineers, let them build the buildings. The businessman can make money, but somebody needs to be the brains of the outfit and guide the society and think about ethics and responsibility. This is just how people can and should get along. It's not incompatible with what we do. It's very much a part of what we do and have been doing in some way for centuries. We should do more of this.

8 WHAT IS YOUR VIEW ON GENERATIVE AI? HOW WILL IT IMPACT LEGAL EDUCATION AND LEGAL PRACTICE?

First, I think it's going to have a huge impact. I honestly do. I think that a lot of lawyers are going to lose their jobs. I think that we will have to think about how generative AI is going to affect even large structures that you see in legal practice at the moment. Will big firms even be necessary in the way they are now, in a variety of ways, as we outsource a lot of what we do to generative AI?

So I think it's going to have a big impact, and I don't think it's entirely predictable. But I do know that your generation is going to have to put up with it and deal with it. And it's going to be a challenge. Now, having said that, I think that we've kind of set ourselves up to be undermined or be challenged by generative AI because so much of our focus in educating lawyers over the past century or so has been on teaching them basic skills, transactional skills, research skills, things like this, that actually can be done by AI.

So we've put ourselves in a position where we can really be put out of business very easily. But if we were to focus on legal education, and if we were to focus lawyers and law students on other kinds of things, being leaders of their communities, people who negotiate and work on compromises, people who actually give advice to others on how to interact and how to relate to each other, things might be different. If we try to look at the bigger picture and the bigger things that lawyers can do, the AI bots would not be able to follow us so easily. They can find information, they can generate stuff in a variety of ways, and they can come to conclusions, but they don't and won't have ethics, morality, visions, wisdom, or empathy.

We need to push lawyers and law students more in the direction of those capacities. Because if we do that, we're going to do ourselves two favors. Number one, we'll make sure that we have positions that will be secure for us and won't be challenged by computers and robots. But also, we'll be able to make greater contributions to society. So it kind of goes back to what I was talking about before. If we go in a broader direction, if we think about lawyering in a larger sense, we will be more able to protect ourselves and serve others.

If we look at lawyering in a technical, narrow sense, if we train technicians in law schools, they're the ones who are going to be replaced by AI. And part of me says, good, you know, let that happen. Because we shouldn't be teaching that stuff anyway, where at least we shouldn't be putting a priority on it. So maybe this will force us to rediscover who we really are and can be. So that's my hope and passion.

9 WHAT SKILLS DO YOU SEE AS IMPORTANT FOR LAW STUDENTS?

That's a really interesting question. Because it walks right into what we've just been talking about.

I think the skills that lawyers and law students need to develop are bigger skills. Again, we need to be ambitious. Think about your communication skills, not just communicating with each other in writing, not just the skills that you would need to write a brief or something like you would need to argue a case in moot court. Think about the skills you need to develop, the skills you need to talk to people and connect with communities. Those are the kinds of things I would want law students everywhere to learn.

Now we don't teach law students how to talk to people, we don't teach law students how to think big, we don't teach law students how to create and sustain communities in a variety of ways. We don't teach law students to connect with others. We teach them to separate themselves in offices and buildings and things like that. What if we teach them to engage with each other? What would happen if somebody were to decide to open the doors of law school and just take you out into the street? What would you say to the people? What would the people say to you? Do you even know what you would say? Do you know what you would do?

You need to meet people on their level in a variety of ways. You need to understand your own society on the ground. You can't be cut off in fancy buildings or tall office towers and expect to lead a society. You have to connect with people where they are. And I think the skills that I would suggest that law students should develop should be skills that will allow them to more effectively connect with people, understand people, and communicate with people.

Lawyers used to be more focused on these things back a couple of centuries ago. They were trying to understand human nature. And they would be encouraged, they would encourage each other, not just to read the latest cases, they would encourage each other to read history and to read novels, and to understand people's emotions and all that sort of thing. We've lost that inclination. The Chief Justice of the United States, John Marshall, very famous at the beginning of the 19th century, used to read novels. He loved Jane Austen, the British female novelist, which is amazing. He was interested in understanding how people felt about things. He was interested in what people at the time called human sympathy. You know, lawyers were thinking in a larger, broader sense. And now we don't talk about any of those things.

If you go to law school, there's no reference to emotion, there's not a lot of reference to morality, there's no reference at all to wisdom. There's no understanding of people as people at all. We don't focus on human nature, but I think we need to do a lot more of that. So I think we really need to reconstruct what we are doing in law schools, in so many ways, to develop larger human skills for lawyers to do good in their societies.

10 WHAT ADVICE DO YOU HAVE FOR LAW STUDENTS IN HONG KONG?

I think it's important for law students anywhere to not only connect with the community outside but

also connect with their colleagues, connect with like-minded people elsewhere. JURIST is all about connection. That is what we do in so many ways. Yes, we can inform and educate the public. But I think if you're going to make the most of your legal education, connect with other people, connect with other lawyers. Take the opportunities to make connections with other law students in other settings. I'm sure there are associations which link law students with law societies in other universities.

One of the things I have noticed in the United States is that law schools are very insular places. They tend to be pretty cut off from one another, partly because the schools have been programmed, especially recently, with rankings to compete against each other all the time, which separates them and distances them from each other. There are a few national law student societies in the United States, but they're limited. Connect with law students outside your own school and connect with law students outside your own jurisdiction. JURIST is one way you can do that. But there are other ways of connecting as well. Reach out and connect to others like you elsewhere.

Every time we have a large-scale meeting on JURIST with staff, I see faces from every part of the world and I hear the voices of students from all over. They're wonderfully different in so many ways. JURIST is full of differences, but JURIST is also full of similarities because I think we've discovered on JURIST that the law students who come together in that project have a great deal in common. They're young, they're optimistic, they're energetic. They want to improve things, they're dedicated to public service, they want to change their world and make it better. They want to understand each other and they don't want to be cut off.

Polarization is just one way of cutting yourself off from another group. You separate yourself so much that you're going to the opposite pole, the opposite ends of things. Law students can come together. And when law students come together in a jurisdiction or around the world, I think they will see that they have a lot in common, and then they can see perhaps that they can do things together. That could be extraordinarily powerful.

Lawyers are constructive people who favor order and stability. And yes, they can embrace change, and they can do important things and big things that way. But there's a great source for good here. So I would just encourage law students in Hong Kong and everywhere to connect with each other. Don't give in to the polarization, don't give in to the language which talks about decoupling, and don't give in to the negative talk about globalization, separation, and all of that. Remember that we have technology here, and we have a capacity here which can bring law students together.

There are a lot of forces out there in the world right now that want to separate us and tear us apart. Law students can be creative, and law students can be positive, law students can work together to build something which is better for everybody. Use the law as a tool and understand the tool that you have.

U1nderstand the power of that tool, understand the potential of that tool, and connect with others to use that tool together to create a better world.

(***HKSLG:*** *Yes, I agree with that. The competitive nature of legal education separates law students apart, not just from the community but also from their peers. So, I think it's very good that we have a platform like JURIST to help us unify law students, engage and re-engage them with the community, and re-engage them with their peers. Law students in Hong Kong could think of more platforms to reconnect us here in Hong Kong.)*

It's a step in the right direction, but it's certainly not the only thing you can do. I want you to realize the power and potential that you have as a group. You have the capacity to use the law to make changes and to do positive things. And I think it's good for you to understand that capacity. There're lots of historical precedents for using the law to do good and important and positive things. I think law students in every jurisdiction should think about that. JURIST is just one way of doing some of this, but there is so much to be done.

Collaboration is so important. Competition has been indoctrinated into us in so many ways. But collaboration is really important. And I hope that as more students come together, and as more groups come together, and come into law schools, there will be more of an emphasis on collaboration. I can't speak for Hong Kong as much. But I know in the United States, we have more women coming into law schools now than we used to have, which is wonderful and long overdue. But that's good. Maybe they'll encourage collaboration more than the men have.

It's the same when you look around the world. I think students coming from a variety of different areas want to create new ways of doing things which are more collaborative and which allow people to work together more. So I think there's a potential with law students in a lot of places, coming from a lot of different backgrounds, to put more focus on working together, as opposed to just being competitive with each other. We have to overcome structural barriers and encourage them to do that. But I think it's important that we try to create more of these collaborative spaces, more of these opportunities for people to work together, so that law students can discover how much they have in common and to see how much they can achieve if they work together to achieve change.

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