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PREFACE

It is our honour to present Volume 16 of the Hong Kong Journal of Legal Studies to you.

Since its establishment in 1994, our esteemed Journal has maintained its prominent position as the leading student academic law journal in Hong Kong. It is entirely edited and published by law students at the University of Hong Kong, reflecting our commitment to academic excellence and fostering the next generation of legal scholars.

The Journal has the tradition of having a skilled editorial board from diverse backgrounds and prestigious law programmes. This year is no exception to this tradition of excellence. We are grateful for each member's insightful perspectives, rigorous review process, and meticulous editing, which make it possible for us to present this year's Journal issue.

This year's publication comprises four scholarships, each delving into multifaceted legal issues and challenges within Hong Kong and their implications on the global stage. In the inaugural article, the Hong Kong Immigration (Amendment) Ordinance 2021 is subjected to rigorous evaluation against the well-established international principle of 'non-refoulment'. The author compellingly argues that Hong Kong's new law 'should be worth public attention' because it will likely perpetuate Hong Kong's 'anti-refugee rhetoric. The second article depicts China's Guiding Case system, aiming to

achieve consistent adjudication by analysing its legal nature and challenges in a broader application and proposing solutions for effective implementation.

The third article brings forth a timely issue. Amidst the emergence of the Uber economy, the legal status of Uber drivers in Hong Kong is situated in a grey area, affecting Uber drivers 'bargaining power'. The author contends that this is due to the large corporation's 'lengthy' and 'legalistic' contracts and their propensity to retain a disproportionate share of the profit margin, leaving little for negotiation for Uber drivers. The author calls for a 'reflexive labour law' in Hong Kong to protect Uber drivers' rights. Finally, the fourth article warrants a robust corporate rescue process in Hong Kong. Compared with the insolvency regimes from the United States, the United Kingdom, and Singapore, the author compellingly argues that Hong Kong needs to address the existing loopholes in its corporate insolvency regime.

Our journal takes pride in its diverse and extensive readership. We aim to grow our readership and uphold our standing within the legal community. We intend to make our publications readily available in both local and international university libraries and accessible on platforms like Westlaw and HeinOnline.

We sincerely thank all contributors for presenting us with cutting-edge legal research and analysis that resonates with the legal community and beyond. We thank our dedicated editorial team for their unwavering efforts and hard work, which has enabled us to publish this Volume successfully.

We hope you enjoy this Volume and continue to support our future issues.

Sangita F. Gazi
Stanley U. Nweke-Eze
Editors-in-Chief

CONTENTS

Preface		i
1	Hong Kong's Harsh Asylum Policy: New Deterrent and Barriers to Asylum Seekers *Stacy Lau*	1-20
2	China's Guiding Cases System: Binding Effect and Challenges *Chloe Chan*	21-45
3	Through the Lens of Employment Law: Regulating Uber Drivers in England and Hong Kong *Chiu Tsz Wai Natalie*	46-71
4	The Future of Corporate Rescue Legislation in Hong Kong: Cross-Border Issues and Solutions *Wai Hiu Chun Alston*	72-96

HONG KONG'S HARSH ASYLUM POLICY: NEW DETERRENT AND BARRIERS TO ASYLUM SEEKERS

Stacy Lau*

The Hong Kong government has a long history of hostility towards those seeking asylum in the city. In line with this anti-refugee stance, amendments to the Immigration Ordinance were passed and enacted in 2021, creating a new deterrent by giving the authorities sweeping detention powers and adding new procedural barriers for those seeking protection. This article discusses how the new law, with the expansion of detention powers, breaches the established principles under the International Covenant on Civil and Political Rights and common law. It also argues that the new procedural changes must meet the 'high standards of fairness' set by the Hong Kong Court of Final Appeal.

INTRODUCTION

The Immigration (Amendment) Ordinance ('Immigration Ordinance') took effect in August 2021, affecting numerous vulnerable asylum seekers and torture claimants who seek protection from persecution or torture in their countries of origin.

For a long time, individuals who have come to Hong Kong to seek non-refoulement protection have been depicted as 'fake refugees'[1] or 'criminals' who pose a security threat to

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[1] See, for example, Rhea Mogul, 'Rights Groups Slam Hong Kong Lawmaker for 'Biased, Racist and Xenophobic Remarks' on Refugees' (*Hong Kong Free Press*, 30 April 2021) <www.hongkongfp.com/2021/04/30/rights-groups-slam-hong-kong-lawmaker-for-biased-racist-and-xenophobic-remarks-on-refugees/> accessed 20 January 2022.

society.[2] This anti-refugee rhetoric gave rise to the amendments of the Immigration Ordinance and ultimately resulted in its passage. Not only does the new amendment introduce several procedural changes setting new barriers hindering claimants from having a fair claim, but an expanded detention power is also granted to immigration authorities creating a new deterrent to individuals from coming to seek protection and negatively affecting their decisions in appealing or filing judicial challenges.

While no empirical example confirms the anti-refugee rhetoric, the new statute targeting vulnerable migrants and violating their fundamental human rights, should be worth public attention. The first part of the article begins with an overview of refugee protection under international human rights treaties and the obligations shouldered by the government of Hong Kong. This is followed by the examination of the implications of the newly enacted legislation in two aspects: (1) the incompatibility of the expanded use of detention power as they are contrary to the established principles enshrined in the international human rights law and common law, and (2) the failure to meet 'high standard of fairness' with the new procedural changes. This article concludes with future judicial review challenges that the Hong Kong government is likely to face as a plausible consequence of this amendment and the role courts should take in protecting vulnerable asylum seekers and torture claimants.

I. OVERVIEW OF REFUGEE PROTECTION

A. The General Nature

Refugees are protected by international treaties, regional instruments, and customary international law. As individuals are subject to protection from persecution, one of the very core principles of refugee protection is the prohibition of refoulement. It means states are forbidden to return, expel, deport, or extradite

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[2] See, for example, John Lee, '修例強化免遣返聲請措施　增大潭峽懲教所作羈留設施' (Chinese Only) (19 January 2021) <www.sb.gov.hk/eng/articles/articles_2021_01_19.html> accessed 20 January 2022.

a person to the country of origin where they face persecution or a threat to life or freedom.[3]

The obligation of non-refoulement includes not only direct refoulement but also indirect refoulement.[4] That is, states are prohibited from sending a person directly back to their home country and are forbidden to send a person to an interim country where they are likely to return to the land of origin.

The principle of non-refoulement was first codified in the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'). In particular, it protects refugees from expulsion or return to 'where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[5] Importantly, the non-refoulement protection under the Refugee Convention applies to refugees and asylum seekers whose refugee status has not been determined.[6]

The notion of non-refoulement was further crystallised into customary international law.[7] Even when a state is not a signatory of the Refugee Convention, it must protect refugees from refoulement. In other words, all nation-states are bound by the principle of non-refoulement. The non-refoulement principle is also enshrined in two other international human rights treaties. First, the Convention against Torture and Other Cruel, Inhuman

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3 For reference, see United Nations Human Rights Office of the High Commissioner (OHCHR), 'The Principle of Non-Refoulment Under International Human Rights Law' (*OHCHR*, 17 April 2023) <www.perma.cc/NXE3-74X2> accessed 17 April 2023.

4 United Nations High Commissioner for Refugees (UNHCR), 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol', 3 (*refworld*, 26 January 2007) <www.refworld.org/docid/45f17a1a4.html> accessed 20 January 2022.

5 Refugee Convention, art 3(1).

6 Alice Edwards, 'International Refugee Law', in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017).

7 UNHCR, 'Declaration of States Parties to the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees' [2002] UN doc HCR/MMSP/2001/09, para 4.

or Degrading Treatment or Punishment ('Torture Convention') prohibits the removal of a person to a country where 'there are substantial grounds for believing that he would be in danger of being subjected to torture'.[8] Second, the International Covenant on Civil and Political Rights ('ICCPR') also implies non-refoulement as stipulated in Article 7, providing that 'no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment'. As further interpreted by the Human Rights Committee, state parties are prohibited from returning a person to a place where they face the risk of serious human rights violations.[9]

Therefore, there are two bases of non-refoulement.[10] The first category of non-refoulement is protected by the Refugee Convention, under which only refugees are protected from refoulement in accordance with the refugee law. The latter is guaranteed by the Torture Convention and the ICCPR, under which all individuals are protected by human rights law from being returned to face any form of torture and inhumane treatment. And both bases of non-refoulement are reaffirmed by customary international law.[11]

B. Refugee Protection in Hong Kong

Hong Kong is neither a signatory of the Refugee Convention nor its 1967 Protocol, and thereby, it has a long-established policy of not recognising any individual as a refugee. All asylum claims before 2014 were processed by the UNHCR. Refugees approved to undergo this determination process by the UNHCR would receive protection from being refouled while waiting for resettlement in a third country. Those with rejected asylum claims would be subject to removal. Nevertheless, Hong Kong is a state party of the Torture Convention and has incorporated the ICCPR

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8 Refugee Convention, art 3(1).

9 United Nations, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treat Bodies' [2004] HRI/GEN/1/Rev.7, 150-151.

10 UNHCR (n 4) paras 5 – 12,17 – 20; Edwards (n 6) 549.

11 UNHCR (n 4) paras 14 – 16, 21 – 22.

into its domestic law, the Hong Kong Bill of Rights Ordinance 1991 ('Bill of Rights Ordinance').[12] As such, Hong Kong still has the legal obligation not to remove a person to where they may face torture or cruel, inhuman, or degrading treatment or punishment. Hong Kong had no formal domestic policy for years in implementing its non-refoulement obligation under both human rights instruments. Without an independent screening mechanism, it eventually led to legal challenges.

In the case of *Prabakar v Secretary for Security*, the Court of Final Appeal ('CFA') ruled that Hong Kong must apply 'high standards of fairness' to torture claimants under the Torture Convention as one's 'life and limb are in jeopardy'.[13] Further, in *Ubamaka v Secretary for Security*, the CFA held that individuals might also seek protection under Article 3 of the Bill of Rights Ordinance as the right not to torture and inhumane treatment is absolute.[14] It is a 'universal minimum standard'.[15] In *C and Others v. Director of Immigration and Another*, the CFA ruled that the Director of Immigration was required to determine whether a refugee claim was well founded and to satisfy a high standard of fairness due to 'the gravity of the consequence of the determination'.[16]

Against this backdrop, Hong Kong established a government-led refugee status determination ('RSD') mechanism in 2014, namely, the Unified Screening Mechanism ('USM'). Under the USM, individuals can lodge non-refoulement claims if they fear that the removal by the Immigrant Department will expose them to the substantial risk of (1) torture;[17] (2) torture or cruel, inhuman, or degrading treatment or punishment;[18] or (3)

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12 Cap 383.

13 *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187 [44].

14 *Ubamaka Edward Wilson v Secretary for Security and Another* (2012) 15 HKCFAR 743 [7].

15 ibid [110].

16 *C and Others v Director of Immigration and Another* (2013) 16 HKCFAR 280 [56].

17 Immigration Ordinance (Cap 115) Part VIIC.

18 Bill of Rights Ordinance, s 8, art 3.

persecution.[19] If one's claim is rejected at first instance, an appeal to the Torture Claims Appeal Board ('Appeal Board') can be lodged. Finally, if the appeal fails, the claimant can lodge a judicial review challenging the decision.

The USM provides dual protection, which, ideologically, shoulders refugee non-refoulement and human rights non-refoulement obligations. Nevertheless, it is important to note that the USM only provides negative protection to prevent individuals from being sent to countries where they could face torture or persecution. Put differently, there are no durable solutions for those whose claims are sustained on the ground of torture or inhumane treatment under the USM. Only claimants whose non-refoulement claims are sustained under persecution can be referred to the UNHCR for resettlement. Therefore, the asylum policy in Hong Kong is merely a non-refoulment policy that operates in the sense that it gives no affirmative protection to asylum seekers or torture claimants.[20]

II. THE INCOMPATIBILITY OF THE EXPANDED USE OF DETENTION POWER WITH THE INTERNATIONAL HUMAN RIGHTS LAW AND COMMON LAW PRINCIPLE

For a long time, the Hong Kong government has been openly hostile to the individuals who seek protection within the territory. The anti-refugee rhetoric includes the use of 'overstayers' or 'illegal immigrants' to depict the non-refoulement claimants, giving the authorities grounds to detain the migrants.[21] Notably, under the current system, individuals who show up at the border

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19 With reference to the non-refoulement principle under Article 33 of the Refugee Convention.

20 Referred to as 'non-refoulement claimants' hereafter.

21 Immigration Department, 'Immigration Department Reiterates that Detention of Illegal Immigrants Overstayers or Persons Refused Permission to Land in Hong Kong is in accordance with the Law' (24 December 2020) <www.immd.gov.hk/eng/press/press-releases/20201224.html> accessed 22 January 2022.

control points are often refused entry.[22] The only way to lodge a non-refoulement claim is to overstay the visa or enter illegally. Indeed, nearly 90% of non-refoulement claimants made their claims through these two means.[23] The flawed protection system forces non-refoulement claimants reluctantly to become lawbreakers.

By law, the immigration authorities are granted the power to put those individuals violating the immigration policies under immigration detention. As of February 2022, there were more than 300 non-refoulement claimants detained and awaiting the final result of their claims at the two main detention facilities, Castle Peak Bay Immigration Centre ('CIC') and Tai Tam Gap Correctional Institution ('TGCI').[24] Even before the amended ordinance, the detention power held by the immigration officers had already been broad, in which detention could be subject to no time limits.[25] The public barely knew the average length of immigration detention faced by non-refoulement claimants as the authorities were reluctant to release the relevant data.[26] However,

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22 Justice Centre Hong Kong, 'Submission to the Constitutional and Mainland Affairs Bureau on Hong Kong Special Administrative Region's Upcoming Review under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (2021) para 1.1 <www.justicecentre.org.hk/framework/uploads/2021/04/Justice-Centre-Hong-Kong-Submissions-to-CAT-March-2021.pdf> accessed 22 January 2022.

23 Immigration Department, 'Torture/Non-refoulement Claim Cases <www.immd.gov.hk/eng/facts/enforcement.html> accessed 23 January 2022.

24 Legislative Council Panel on Security, 'Proposed Retention of a Supernumerary Post of Assistant Director of Immigration and Upgrading of one Permanent Post of Principal Immigration Officer to the Rank of Senior Principal Immigration Officer in the Immigration Department' (1 April 2022), LC Paper No. CB (2)165/2022(03) para 15.

25 Immigration Ordinance (Cap 115), ss 32(3A) and 37ZK (1).

26 Amnesty International, 'Hong Kong: Submission to the UN Human Rights Committee 135th Session', ASA 17/5663/2022 (31 May 2022) 23 <www.amnesty.org/en/documents/asa17/5663/2022/en/> accessed 24 June 2022; Chris Law, 'Data on Asylum Seekers Detained in Hong Kong Should be Disclosed More Proactively, Legal Expert Says' (*South China Morning Post*, 13 June 2022) <www.scmp.com/news/hong-kong/society/article/3181420/data-asylum-seekers-detained-hong-kong-should-be-disclosed> accessed 24 June 2022.

as reported by the media, a Vietnamese asylum seeker was held for five years at different detention centres during his appeal against refoulement.[27] The longstanding problem of prolonged immigration detention finally received public attention when tens of immigration detainees at CIC went on a hunger strike to protest against the indefinite detention.[28]

The amended statute, under Section 32 and Section 37ZK, stipulates various factors which further justify a more extended detention period: (1) the number of claims or appeals pending screening; (2) manpower and financial resources allocated; (3) whether the claim is directly or indirectly prevented or delayed by actions or lack of actions by the claimant; (4) whether the claimant poses, or is likely to pose, a threat or security risk to the community; and (5) factors that are not within the control of the Director of Immigration. This part discusses the incompatibility of expanding the detention power with international human rights law and the common law principle.

A. Under the ICCPR

Very often, asylum seekers throughout the world are subjected to indefinite detention.[29] While there are various political justifications, incarceration has become weaponized as a means to create an intentioned chilling deterrent effect on migration. However, a person's right to liberty and security is well protected under international human rights instruments. The ICCPR Article 9(1) prohibits arbitrary detention, and Article 9(3) further stresses that anyone detained 'shall be entitled to trial within a reasonable time or to release'. The right to liberty of a person is not absolute, however. As to the principle of legality, the Human Rights

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27 Selina Cheng, 'Vietnamese Refugee Abandons Fight Against Deportation After 27 years Behind Bars in Hong Kong' (*Hong Kong Free Press*, 4 December 2021) <www.hongkongfp.com/2021/12/04/vietnamese-refugee-abandons-fight-against-deportation-after-27-years-behind-bars-in-hong-kong/> accessed 26 June 2022.

28 Amnesty International (n 26).

29 Alfred de Zayas, 'Human Rights and Indefinite Detention' (2005) 87 International Review of the Red Cross 15, 21.

Committee ('the Committee') held that 'it is violated if an individual is arrested or detained on grounds which are not established in domestic legislation'.[30] Nonetheless, detention authorised by domestic law may still be arbitrary. The Committee stated:

> The notion of 'arbitrariness' is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality.[31]

Holding individuals in custody, in other words, must be not only lawful but also reasonable, necessary, and proportional. With regard to detaining asylum seekers, the Committee believed it was 'not *per se* arbitrary' and could be justified for the administrative reason in processing them into the territory.[32] The Committee emphasised that the detention should be temporary and could become 'arbitrary' if it happened when asylum seekers were waiting for the results of the asylum claims:

> Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual.[33]

Hong Kong has been a signatory of the ICCPR since under the rule of the British government. Under the Sino-British Joint Declaration, both governments agreed that the ICCPR, as applied to Hong Kong, would remain in force after the transfer of

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30 United Nations, 'Report of the Human Rights Committee (Volume II)', Communication No. 702/1996.

31 UN Human Rights Committee, 'General comment no. 35, Article 9 (Liberty and security of person)', UN doc CCPR/C/GC/35 (16 December 2014) para 12.

32 ibid para 18.

33 ibid.

sovereignty over Hong Kong from Britain to China in 1997.[34] The ICCPR is then incorporated into the Basic Law[35] and guaranteed through local law, the Bill of Rights Ordinance. Therefore, Hong Kong's domestic laws must be compatible with international standards.

Expanded power to use immigration detention under the new amendments clearly goes against the established principles of international human rights law. While immigration detention can now be 'lawful' as it is 'established by law', the 'arbitrariness' casts doubt. Among all the justifying factors mentioned above for prolonging the detention period, only the fourth factor, relating to posing a risk to the community, might provide the reasonableness of detention.

The other newly enumerated factors involving bureaucratic inefficiencies and uncontrollable forces should not constitute the element of necessity in justifying the deprivation of liberty. In considering claimants who pose no harm nor risk to others or society, giving greater power to the immigration authorities to hold them at detention facilities while waiting for their claims to be determined is neither reasonable nor necessary. Even if claimants violate the immigration policy for overstaying their visa or illegal entry, detaining them for an extended period of time without committing any violent crimes is not proportional either, as it severely limits one's liberty but fails to provide a compelling social interest. Not to mention it is the only means by which claimants can seek protection under the existing system. With the lack of reasonableness, necessity, and proportionality, the use of immigration detention is, thus, potentially unlawful.

It is worth noting that the human rights protection claimed by non-refoulement claimants under the ICCPR could be subject to challenge in Hong Kong. While the provisions of the ICCPR have been implemented through local legislation, the British

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[34] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (1984) 1399 UNTS 61, annex 1, s XIII.

[35] Basic Law, art 39.

government made an important immigration reservation that remains applicable today.[36]

This reservation is now reflected in Section 11 of the Bill of Rights Ordinance, giving an exception of not applying this human rights instrument concerning persons not having the right to enter and remain in Hong Kong. Such reservation has been repeatedly accepted by courts in Hong Kong.[37] Under the Vienna Convention on the Law of Treaties and the Guide to Practice on Reservations to Treaties adopted by the International Law Commission, however, reservations that are against the object and the purpose of a treaty are impermissible.[38] Indeed, in considering Article 9(1) of the ICCPR and its emphasis that no one shall be subjected to arbitrary detention, whether the immigration reservation amounts to the violation of the object and the purpose of the treaty by excluding the non-Hong Kong residents could be disputable.

Similar to the laws of Hong Kong, the Migration Act in Australia also empowers the authorities to detain unlawful non-citizens who enter the country illegally with no time limit.[39] The Human Rights Committee, in *A v. Australia*,[40] held that the immigration detention of asylum seekers pending determination of refugee status constituted arbitrary detention in cases where the Australian government failed to provide any appropriate ground, other than illegal entry, to justify a prolonged detention period. As such, in the matter of the immigration reservation, the courts in Hong Kong may be found to have neglected the examination of its compatibility and the object and the purpose of the ICCPR.

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36 United Nations, 'International Covenant on Civil and Political Rights Declarations and Reservations', Treaty Series, vol. 999, 171 and vol. 1057, 407.

37 *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 [21]-[22]; *Ghulam Rbani v Secretary for Justice for and on behalf of The Director of Immigration* (2014) 17 HKCFAR 138 [97]-[98]; *Ubamaka Edward Wilson* (n 14) [95].

38 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), art 19(c); Guide to Practice on Reservations to Treaties, art 3.1(c).

39 Australia Migration Act 1958, s 189.

40 *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) para 9.4.

B. Under the *Hardial Singh* Principles

Detention powers exercised by immigration authorities should also conform to the common law *Hardial Singh* principle.[41] Under the principle, any statutory power of administrative detention can only be used to deport a person who might be detained only for a reasonable period.[42] If immigration authorities cannot affect deportation within a reasonable period, they should not seek to exercise the power of detention.[43] Otherwise, such detention would be arbitrary and cannot be lawfully justified.[44]

The sweeping detention power granted to the immigration authorities might also be incompatible with the *Hardial Singh* principles. The average time to handle each non-refoulement claim by the Immigration Department was about ten weeks.[45] This handling time does not include the time needed in the appeal process handled by the Appeal Board. It could be even longer if claimants file judicial reviews to challenge the decisions. All these could take up to months, if not years. If a person, who has committed no crime, is being detained during the time appealing the decisions of their claims, this is unarguably beyond the reasonable period. Based on the ruling by the CFA in *Ghulam Rbani*,[46] if the immigration authorities are unable to effect deportation within a reasonable period given the lack of manpower and financial resources or a sudden increase of claims lodged, exercising of the power of detention should be restrained and not expanded.[47] Additional factors to justify the prolonged detention because of the administrative and bureaucratic inefficiency are neither appropriate nor consistent with the due process of law. In this sense, arbitrary detentions under the newly

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41 *Ghulam Rbani* (n 37) [21] – [22].

42 ibid [23] – [24].

43 ibid.

44 ibid [25].

45 HKSAR, 'LCQ9: Non-refoulement claims' (*Press Release*, 20 May 2020) <www.info.gov.hk/gia/general/202005/20/P2020052000659.htm> accessed 23 January 2022.

46 *Ghulam Rbani* (n 37).

47 ibid.

amended legislation can easily result from extending the detention period.

III. THE FAILURE TO MEET THE HIGH STANDARD OF FAIRNESS UNDER THE NEW PROCEDURAL CHANGES

The torture screening mechanism held by the CFA in *Prabakar* should have to meet a 'high standard of fairness' because the torture claimant's 'life and limb' were in jeopardy.[48] Admittedly, this standard is somewhat ambiguous in that the CFA also noted that there was 'no universal set of standards' in determining procedural fairness. The appropriateness of the standards of fairness 'depends on an examination of all aspects.'[49] Aiming at enhancing the efficiency in screening non-refoulement claims and preventing procedural abuses, the new amendments introduce several procedural changes to grant broader powers to decision-makers, both immigration officers and adjudicators at the Appeal Board, to control the process of the claims closely. This part examines how procedural changes risk procedural fairness in the following four aspects: (1) mandating interviews; (2) mandating language use; (3) mandating medical examination: and (4) imposing procedural barriers for appealing.

A. Mandating Interviews

Under Section 37ZAB, non-refoulement claimants must attend all interviews requested by the Immigration Department at the specified date, time, and place without allowing for the exercise of discretion. During the interviews, claimants have to provide information and answer questions relating to the

48 *Prabakar* (n 13).

49 ibid [43].

claimant's torture claim. If a claimant fails to attend an interview, an immigration officer may still decide on the claim.[50]

Conducting asylum screening interviews is undoubtedly a primary means to gather first-hand information from the claimants to determine the credibility of the refugee or torture claim. Conducting interviews is a common practice and is not subject to dispute. The controversy arises in that the amendment does not provide for the exercise of discretion. That is, under no circumstance might claimants be absent from the interviews, not even with the exceptions of illness or a medical condition.

It is, however, important to note that there are always situations where claimants may have vulnerabilities or specific needs that are not suited to be addressed during interviews. For instance, torture survivors may suffer from ongoing trauma and have difficulty describing their stories. A study has indicated that asylum interviews can trigger post-traumatic intrusions, inducing extra psychological stress for traumatised asylum seekers.[51] Forcing claimants to attend interviews at the specified time without considering claimants' physical and mental stature may impose additional psychological stress on the traumatised claimants during the interviews. This might negatively affect the result of the claims, raising procedural fairness concerns.

B. Mandating Language Use

Under Section 37ZAC**,** the immigration ordinance allows the Immigration Department to direct claimants to communicate in a language that an immigration officer reasonably considers understandable and communicative. The language mandate in Schedule 1A, Section 11(2), also applies to the Appeal Board.

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[50] 'Changes to Immigration Law Set' (*news.gov.hk*, 19 July 2021) <www.news.gov.hk/eng/2021/07/20210719/20210719_115517_981.html> accessed 23 January 2022.

[51] Katrin Schock, Rita Rosner, and Christine Knaevelsrud, 'Impact of Asylum Interviews on the Mental Health of Traumatised Asylum Seekers' (2015) 6(1) European Journal of Psychotraumatology 1.

The justification by the Hong Kong government for mandating the language use is to prevent 'delaying tactics'[52] in which some claimants may request an interpreter for a rare language. Currently, eight main interpretation languages are provided by the Immigration Department: Bahasa Indonesia, Hindi, Nepali, Punjabi, Tagalog, Thai, Urdu, and Vietnamese.[53] There is, undoubtedly, always a challenge in finding interpreters of other indigenous languages. Nevertheless, the right to language access is enshrined in Article 11(2)(f) of the Bill of Rights Ordinance, under which everyone has the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court.' Also, the Official Languages Ordinance guarantees the same right, stating that 'a party to or a witness in any proceedings or a part of any proceedings court or testify in any language'.[54] As the Court of Appeal ruled, the screening process is inherently 'inquisitorial'[55] Therefore, the right to language access should also be guaranteed to the non-refoulement claimants.

As of 30 September 2021, there were 1,213 outstanding non-refoulement claims.[56] Most of the claimants were from Southeast Asian countries.[57] In these countries, less common indigenous languages are not officially used. Leading the list of non-refoulement claims is Indonesia, [58] where 700 local indigenous languages are spoken in addition to the official

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52 HKSAR, 'Immigration (Amendment) Ordinance 2021 to Take Effect from August 1' (*Press Releases*, 19 July 2021) <www.info.gov.hk/gia/general/202107/19/P2021071900357.htm> accessed 23 January 2022.

53 Immigration Department, 'Interpretation and Translation Services Arranged from April 2020 to March 2021' (April 2021) <www.immd.gov.hk/pdf/ITS_ImmD_Eng.pdf> accessed 23 January 2022.

54 Cap 5, s 5(3)(b).

55 *TK v Michael Jenkins Esq & Director of Immigration* (2012) CACV 286/2011 [26].

56 Immigration Department (n 23).

57 ibid.

58 Immigration Department (n 23).

language of Bahasa Indonesia. [59] The Philippines – where Filipino and English are the official languages, but there are about 120 languages spoken[60] – were in the second top countries of origin of the non-refoulement claims.[61] India, which is on the fourth list from which the claimants originated,[62] has 22 official languages with hundreds of languages spoken in the country.[63] These figures show the complexity of language use. Without speaking or understanding the languages, it appears unreasonable to vest the authority in the immigration officers or adjudicators to determine what language the claimants should use.

Depriving the non-refoulement claimants of the opportunity to present their claims meaningfully can significantly disadvantage the claimants. Without suitable language access, the screening process can become meaningless for claimants who cannot fully understand and precisely speak the language required by the immigration officer.

C. Mandating Medical Examination

Under Section 37ZC, claimants must consent to undergo a medical examination. If a claimant fails to give consent, the immigration officer or the Appeal Board may decide not to take into account the claimant's disputed physical or mental condition of the claimant.

Regarding torture claims, medical reports can serve as very important and objective evidence to bolster the credibility of the claims. Yet it is not difficult to conceive circumstances where claimants may refuse to undergo medical examinations, such as in

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59 Subhan Zein, *Language Policy in Superdiverse Indonesia* (1st edn, Routledge 2020) 10.

60 Antonio L. Rappa and Lionel Wee, *Language Policy and Modernity in Southeast Asia* (Springer 2006) 65.

61 Immigration Department (n 23).

62 ibid.

63 Cynthia Groff, 'Language and Language-in-Education Planning in Multilingual India: A Minoritized Language Perspective' (2017) 16 Language Policy 135.

cases of sexual abuse or religious objection to medical examinations performed by practitioners of a different gender. While refusing to give consent does not render non-refoulement claims from being rejected, it creates a penalising effect that the decision-makers can consider damaging the claimant's credibility. It might not meet the high standards of fairness required if no exception is allowed, such as for mental health or religious reasons.

Further, it also imposes a strict burden of proof on the non-refoulement claimants. In *Prabakar*, although the CFA held that the burden of proof rests on the torture claimant, [64] it should be subject to the requirement of high standards of fairness as the difficulties of proof faced by claimants should be fully appreciated.[65] The authorities should not sit back and put the claimant to strict proof.[66] In *TK*, the Court of Appeal ruled that there was a role that decision-makers would need to make findings of fact.[67] Without medical proof, the decision makers should still consider the physical or mental condition of the claimants if the oral evidence is coherent and plausible.[68]

D. Imposing Procedural Barriers for Appealing

Under Schedule 1A, Section 19, claimants who wish to present any new evidence to the Appeal Board are now required to submit it within seven days after filing a notice of appeal. Under Schedule 1A, Section 13(1), the notice period for hearings given by the Appeal Board may be shortened from 28 days to 7 days.

This amendment conferring control over timetabling greatly undermines procedural fairness. Under the current

64 Prabakar (n 10) [51].

65 ibid [53].

66 ibid [54].

67 *TK* (n 57) [30].

68 UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998) para 11.

procedure, the Immigration Department must submit relevant papers and evidence to both Appeal Board and the non-refoulement claimant at least five days before the appeal hearing.[69] Restricting the timeframe for submitting new evidence and shortening the notice period for hearings to 7 days imposes extra difficulty and burden on the claimants in securing new evidence and getting legal representatives. The European Court of Human Rights, in *Bahaddar v. The Netherlands*, also acknowledged that it was difficult for an asylum seeker to supply evidence within a short time, mainly when the 'evidence must be obtained from the country from which he or she claims to have fled'.[70] As such, the short time limits could amount to the denial of a realistic opportunity for the claimants to prove their claims.

IV. THE POTENTIAL CHALLENGE FOR JUDICIAL REVIEW AND THE ROLE OF THE COURTS

Foreseeably, judicial challenges will likely lie ahead, given the arbitrariness of immigration detention and the procedural unfairness of the non-refoulement screening mechanism. While the Hong Kong authorities aim to clear the asylum or torture claim backlog and expedite the deportation process, those amendments would potentially result in the opposite effect. Noting that there were around 13,000 claimants remaining in Hong Kong, nearly half of them were applying for judicial review.[71] The new amendments would add further legal grounds for claimants to challenge the decisions taken by the decision-makers, worsening case backlog at courts.

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69 Security Bureau, 'The Principles, Procedures and Practice Directions of the Torture Claims Appeal Board' (7th edn, 1 August 2021) para 9.6 <www.sb.gov.hk/eng/links/tcab/2021.08.01_PPP_eng.pdf> accessed 23 January 2022.

70 *Bahaddar v. Netherlands* App No 25894/94 (ECHR, 19 February 1998) [45].

71 HKSAR, 'LCQ17: Handling of Non-Refoulement Claims' (*Press Release*, 20 November 2019) <www.info.gov.hk/gia/general/201911/20/P2019112000677.htm> accessed 23 January 2022.

It can be argued that expanding the detention power to the immigration authorities creates a new deterrent for migrants from entering the territory to seek protection or make the current claimants withdraw their claims due to the *de facto* indefinite detention. In *Ghulam*, the CFA already ruled that the power of immigration detention should not be exercised if the authorities are unable to effect deportation within that reasonable period under the *Hardial Singh* principles.[72] The same principles also apply to the earlier stage of detention, determining whether to remove a person or not.[73] In this sense, no administrative reason should be able to justify prolonging the detention period. However, the case did not cover factors that are employed by the claimants. Whether the 'delay tactics', either actions or inactions, used by claimants stipulated in the new statute constitute a compelling reason to prolong the detention will be left to review. Further, even though detaining a person who poses a threat to the community is justifiable,[74] the discretion exercised to make such a judgement is subjective and easily invokes challenge. Legal matters may also be incurred; for example, if a claimant has committed a violent crime but finished serving a sentence, would the use of immigration detention be equivalent to *de facto* double jeopardy?

Regarding procedural fairness, the requirement of a high standard of fairness in *Prabakar* only emphasises the protection of the non-refoulement claimants but considers no administrative efficiency.[75] Since the right to be free from torture is non-derogatory, maintaining a high standard of fairness in determining every non-refoulement claim is essential. This principle was made explicit by the CFA. On the other hand, however, the executive authorities also have the constitutional right to make immigration policies. It is reasonable for the executive branch to establish policies to prevent procedural abuses by non-refoulement claimants. Henceforth, to what extent should the measures of

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72 *Ghulam Rbani* (n 37).

73 ibid [36].

74 UN Human Rights Committee (n 30).

75 Michael Ramsden, 'Hong Kong's 'High Standard of Fairness' Principle and New Statutory Torture Screening Mechanism' (2013) Public Law 232.

enhancing the efficiency in the non-refoulement screening mechanism be justifiable remains unclear, giving room for the courts to assess further and consider how to balance procedural efficiency and the high standard of fairness when they come into conflict.

CONCLUSION

Not only does judicial review serve as a remedial function in responding to and preventing the violation of human rights, but it also plays a role in ensuring that future government decisions comply with human rights. [76] Indeed, judicial review has become an increasingly important tool in impacting and pushing for administrative reforms. In *Ghulam* and *Prabakar*, the courts addressed the issues of arbitrary detention and a high standard of fairness and further developed the common law principles. In addition, the establishment of the USM also set a good example of how the court's rulings could shape a more just system to ensure the administrative decisions made by decision-makers are subject to judicial scrutiny.

When the executive proposed new amendments expanding the immigration detention power and giving sweeping powers to immigration officers and adjudicators, it showed that the executive and legislature were unwilling to fulfil their obligation to protect those vulnerable who fled from persecution and torture. More potent judicial remedies may deem necessary as they are the last resort to safeguard these individuals from human rights violations. Having judicial independence, however, is crucial in achieving judicial remedies. If not, judicial decisions would just be subordinate to the political climate or agenda of the other branches of government, rendering judicial review meaningless.

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[76] Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (CUP 2021) 11.

CHINA'S GUIDING CASE SYSTEM: BINDING EFFECT AND CHALLENGES

Chloe Chan*

In determining whether China's Guiding Case System can effectively fulfil the intended purpose of 'enabling similar cases not to be adjudicated similarly', this article first provides an overview of the composition of Guiding Cases and their legal nature. With reference to the legal status of Guiding Cases in China and their practical legal effects, the article then highlights the reasons behind the judiciary's reluctance to apply and explicitly cite Guiding Cases. The general problems concerning the Guiding Cases' application focus on the overarching issues originating from the bureaucratic discipline system and legal incrementalism in China, while the specific problem focuses on issues certain provincial courts face when adopting the Guiding Case system. Ultimately, to combat the obstacles that Guiding Cases face when expanding their scope of application, the article proposes solutions that target each of the problems above. Thus, it offers insight into facilitating Guiding Cases' popularisation in China.

INTRODUCTION

Article 2 of the A Guiding Case is defined as a case that has clearly defined facts, correctly applied laws, sufficient legal reasoning, sound socio-legal effects, and uniform guiding significance.[1] As

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1 Detailed Rules of Implementation of the Supreme People's Court on Case Guidance Work 2015 《最高人民法院关于案例指导工作的规定》, art 2.

enunciated by the Deputy Director of the Research Office of the Supreme People's Court, Judge Guo Feng, the Guiding Case system is a 'judicial system with Chinese characteristics' aiming to alleviate the problem of 'similar cases being adjudicated differently'.[2] Therefore, the system enhances adjudicative consistency and unifies the application of law. Nonetheless, literature is silent as to the extent of the Guiding Case system in fulling its purpose, the challenge it faces when expanding its scope of application, and solutions that can facilitate its popularisation.

This article aims to address these matters in three ways. First, it considers the legal nature of Guiding Cases with reference to precedents in the common law system. Specifically, this article examines whether they are a source of law in China, whether they have any binding effect, and how they are formally manifested. Then, this article addresses the problems of the Guiding Case system in the context of their broader application in the courts in China, which cover the general problems of a) lack of clear guidance for the judges to apply the Guiding Cases ('*xiangyong que buhuiyong*')[3] and b) judicial timidity in applying the Guiding Cases ('*xiangyong que buganyong*').[4] This also includes a number of specific problems, such as the failure of the guiding case to address the provincial judicial differences in China. Lastly, since resolutions of the specific problem are consequent upon the mitigations of the general problems, this article will outline some suggestions to solve the general problems of the absence of application guidance and judicial reluctance to apply the Guiding Case.

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2 Guo Feng, 'The Compilation and Application of China's Guiding Cases' (2017) Stanford Law School China Guiding Cases Project <www.dirittocinesecom.files.wordpress.com/2018/04/commentary-18-english.pdf>, cited in Steven Chong, 'Application of Reference Cases Under the BRI Framework' (The 3rd Singapore-China Legal and Judicial Roundtable, Singapore, August 2019).

3 Haibo Sun, 'Implicit Citing of Guiding Cases and its Rectification' (2018) Global Law Review, 2 <www.globallawreview.org/UploadFile/Issue/nwry5wio.pdf> accessed 14 April 2023.

4 ibid.

I. OVERVIEW OF THE GUIDING CASE SYSTEM

A. From Candidate Guiding Cases to Guiding Cases

The Guiding Case system is constituted by the Provisions of the Supreme People's Court Concerning Work on Case Guidance 2010 ('Guidance Provisions'),[5] the Provisions of the Detailed Rules of Implement on the Provisions of the Supreme People's Court on Case Guidance Work 2015 ('Guidance Rules')[6] , and the Guiding Cases. Thus, the Guiding Case system can be deemed to have been implemented since the issuance of the Case Guidance Provisions in 2010.[7]

Concerning persons who can recommend the Guiding Cases, according to the Guidance Provisions, representatives of the National People's Congress ('NPC'), members of the committees of the political consultative conference, members of the Experts' Committee for the Work on Case Guidance (experts committee),[8] scholars, lawyers, and the general public may recommend any ruling or judgement from a people's court to the Office for the Work on Case Guidance ('Office').[9] Additionally, the Intermediate People's Court, Basic People's Court, Higher People's Court, and the Military Court of the People's Liberation Army may also recommend Guiding Cases to the Office after discussion and determination by their respective adjudication committee. At the same time, the Supreme People's Court's ('SPC') adjudication unit can directly recommend to the Office any ruling or judgement in the SPC or lower court that they deem

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5 Provisions of the Supreme People's Court Concerning Work on Case Guidance 2010 《最高人民法院关于案例指导工作的规定》

6 Guidance Rules (n 1).

7 Sidney H Stein, 'The Growing Significance of Cases in China: The Guiding Case System' (The Guiding Cases Seminar, Washington DC, 2017).

8 Guidance Rules (n 1), art. 5.

9 ibid art. 5; see also Guidance Provisions (n 5), art. 5.

capable of being a Guiding Case.[10]

The Office established by the SPC is responsible for the selection, review, and submission for approval to the Adjudication Committee of the SPC.[11] The compilation of Guiding Cases is done annually.[12] With voluntary assistance from the expert Committee, scholars, and other society members,[13] the Office will forward Candidate Guiding Cases meeting the requirements of Article 2 of the Guidance Provisions and Guidance Rules to the Adjudication Committee of the SPC for review.[14] Guiding Cases that the said Committee determines will be released in the *Gazette* and website of the SPC and the People's Court Daily, allowing public access.[15]

B. Composition and Requirements of Candidate Guiding Cases and Guiding Cases

A Candidate Guiding Case should comprise the Guiding Cases' recommendation forms, an explanation for the recommendation, and the related judgement. A Candidate Guiding Case has to fulfil the following criteria to be selected as a Guiding Case, namely: a) of widespread concern to society; b) involve legal provisions that are relatively general; c) of a typical nature; d) are difficult, complicated, or of new types; or, e) have guiding effect.[16] It must be mentioned that the original Chinese provision is silent as to whether all requirements must be met. Yet, given the requirement of a Guiding Case to have a 'guiding effect' that can capture a wide array of cases, it is more likely that only one of all requirements has to be satisfied to become a Guiding Case.

With respect to the formation of a Guiding Case, it is usually composed of the title, keywords, main points of the

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10 Guidance Rules (n 1), art. 4; see also Guidance Provisions (n 5), art. 4.

11 Guidance Provisions (n 5), art 3.

12 ibid art 8.

13 Guidance Rules (n 1), art 7.

14 Guidance Provisions (n 5), art 6.

15 ibid

16 Guidance Rules (n 1), art 2; see also Guidance Provisions (n 5), art 2.

adjudication ('MPA'), related legal rules, basic facts of the case, results of adjudication, reasons for adjudication, and names of the adjudicators.[17] The structure can be exemplified by Guiding Case 91, titled *The People's Government of Huashan District, Ma'anshan Municipality, A Case of Administrative Compensation for Compulsory Demolition of Housing*.[18] The keywords are similar to the catchwords in the English case reports, which are 'administrative', 'administrative compensation', 'compulsory demolition', 'burden of proof", and 'reasonable market value' in the said case.[19] The MPA is similar to the holding of the case, as coined by SPC's former top researcher Hu Yun Teng; it is the 'deciding rules that were abstracted out of guiding case'.[20] In Guiding Case 91, its MPA can be analysed from two aspects.

First, the 'holding' can be construed as a more general and abstract rule confirming the court's validity to impose and calculate compensation for items inside an illegally demolished house by determining whether the plaintiffs' claimed value exceeds its market value and whether their claims are reasonable.[21] Another aspect of the 'holding' is more case-specific in the sense that where both the plaintiffs and defendant (which is an administrative organisation) failed to adduce evidence as to the loss of items inside the house due to the defendant's failure to notarise the property and register them in accordance with the law, the people's courts should support the plaintiffs' requests for compensations based on the calculations above.[22] In light of this, the MPA is similar to the idea of ratio in the common law system. The notion of related legal rules refers to the relevant legislation. In Guiding Case 91, the legal rule is enshrined in Article 38(2) of

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17 Guidance Rules (n 1), art 3.

18 *Sha Mingbao et al v. The People's Government of Huashan District, Ma'anshan Municipality* (Administrative Compensation for Compulsory Demolition of Housing)《沙明保等诉马鞍山市花山区人民政府房屋强制拆除行政赔偿案》

19 ibid.

20 Hu Yunteng, 'Several Questions Concerning the Case Guidance System' (*The Guangming Daily*, 29 January 2014) <www.perma.cc/BTC7-C3ZU> accessed 15 May 2023. (author's translation).

21 Guiding Case 91 (n 18).

22 ibid.

the Administrative Litigation Law of the People's Republic of China. It postulates that the defendant should bear the burden of proof of whether there was a loss and the specifics when the plaintiffs failed to adduce evidence.[23]

Regarding the facts and results of the adjudication, Guiding Case 91 refers to the amount of compensation. Lastly, the reasons for adjudication explain the court's reasoning. It states that since the department in charge of land administration failed to notify the plaintiffs of the date of demolishment, nor did they apply for compulsory enforcement, the plaintiffs could not prepare a list of items to seek compensation. The defendant failed to discharge his burden of proof by proving the inexistence of the claimed goods in the illegally demolished houses. Hence, the plaintiffs were entitled to compensation. Notably, the judges sought to rely on the principle of 'leaning toward the higher, rather than the lower end' in determining the value of a wooden carved bed in the house, of which the plaintiffs failed to adduce evidence of its historical significance. Despite this, the judges exercised their discretion to protect the plaintiffs' infringed rights and merely reduced the claimed value of the bed from RMB 50,000 to RMB 30,000.[24] Thus, arguably, the 'reasons for adjudication' are akin to the concept of *obiter dicta* in the common law system.[25]

II. THE LEGAL NATURE OF GUIDING CASE

A. Are Guiding Cases a Source of Law in China?

Like other civil law systems, China's legal system has historically been code-based, in which legal codes precede over and further supplement legal cases. The origin of case law can trace back to the 1980s when the SPC issued its first bundle of decided cases to

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23 Administrative Litigation Law of the People's Republic of China 1989 《中华人民共和国行政诉讼法》

24 Guiding Case 91 (n 18).

25 Mark Jia, 'Chinese Common Law? Guiding Cases and Judicial Reform' (2016) 129 (8) HLR 2213.

regulate decisions of the lower courts.[26] Thus, systemised codes have long been recognised as the primary source of law, while the judgments themselves do not constitute a new source of law.[27] As such, given that Guiding Cases are products of judgements, it may be difficult to suggest that it is a formal source of law. This viewpoint is further reinforced as we consider Guiding Cases' relationship with the 'typical cases' ('*dianxin anli*') and the Guidance Rules.

The rise of typical cases and Guiding Cases in China can be considered a response to fill in the gaps in adjudication since civil codes and statutes may not be able to formulate concrete legal principles to resolve legal disputes at all times. In 1985, SPC published the typical cases to the *Gazette* with other guiding instruments, such as judicial interpretations and regulations, to promote the application of commonly accepted legal doctrines.[28] Thus, they do not have the effect of setting new case precedents like the common law system. Given that Guiding Cases are typical cases whose status is being promoted by SPC,[29] it is arguable that they merely have guiding effects. This supports the view that Guiding Cases are not a source of law in China. The fact that both Guiding Cases and typical cases are under the Guiding Case system is evidenced by Guiding Case 38, which originates from an administrative case 16 years ago.[30] More specifically, the prototype of the Guiding Case can be seen as SPC's extraction of legal rules from cases, which are subsequently added to the section of typical cases in SPC's *Gazette* in 2004. Despite the suggestion that these rules focus more on filling statuary lacuna instead of merely reiterating or publicising well-accepted doctrines,[31] the extent of it being a 'case-precedent-like' authority is still

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26 Jia (n 25) 2216.

27 ibid 2230.

28 ibid.

29 Gao Fengping, 'China's Guiding Case System as the Instrument to Improve China's Case Guidance System, Which Includes Both Guiding Cases and Typical Cases' (2017) 45(3) IJLI 230.

30 *Tian Yong v The University of Science and Technology Beijing* (Refusal to Award a Graduation Certificate and a Degree Certificate) 《田永诉北京科技大学拒绝颁发毕业证、学位证案》

31 Jia (n 25) 2214.

somewhat limited under the overarching theory of 'jurisprudence constant' in civil law. This theory postulates that higher-level courts bestow authority on cases that consistently apply the same laws. These cases are said to be less authoritative than case precedents.[32] Against this backdrop, it seems complicated to argue that Guiding Cases are a source of law as they are founded upon recognised legal codes and mainly serve to crystallise settled rules through the judge's legal actions.[33]

Support for the said proposition can be sought from Article 10 of the Guidance Rules, which states that '[w]here a people's court at any level refers to a Guiding Case when adjudicating a similar case, [it] should quote the Guiding Case as a reason for its adjudication, but not cite [the Guiding Case] as the basis of its adjudication'.[34] Since Guiding Cases are not the source of law, they cannot be cited as a legal basis in reaching the final adjudication. However, they can only be included in the reasoning part of the judgement. Besides, as required by Article 3 of the Guidance Rule,[35] the compulsory inclusion of related legal rules in Guiding Cases further supports the view that any legal authority of Guiding Cases must stem from the codified statutes, thereby upholding the code supremacy in the Chinese civil law system. Therefore, Guiding Cases are more likely *not* a source of law in China.

B. The Legal Effects of Guiding Cases

Sun argued that a Guiding Case has a unique position in the Chinese legal system because its legal status is between ordinary judgements ('*putong anli*') and case precedents (*pan li*).[36] It follows that it is more influential than ordinary judgements, given its referential value in similar cases. Yet, unlike case precedents, Guiding Cases are not a source of law.[37] This legally uncertain and

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32 ibid 2231.

33 ibid.

34 Guidance Rules (n 1), art 10.

35 ibid art 3.

36 Sun (n 3).

37 Sun (n 3) 151.

equivocal status is echoed by the conflicting status outlined in Article 7 of the Guidance Provisions, which suggests that: '[p]eople's courts at all levels should refer to the Guiding Cases released by the Supreme People's Court when adjudicating similar cases'.[38] The phrase 'should refer' is translated from '*yingdang canzhao*'. In Chinese, '*yingdang'* connotes 'obligation', whereas '*canzhao*' denotes 'refer'. This conflicting definition poses whether judges must refer to Guiding Cases. According to Article 9 of the Guidance Rules, the People's Court should refer to the MPA of Guiding Cases in similar cases.[39] Judge Guo describes MPA as 'extracting important adjudication rules that are of guiding significance' and 'summarising adjudication concepts or methods that are *of guiding significance*' (emphasis added).[40] This further suggests that Guiding Cases bear a guiding effect in adjudicating similar cases.

Additionally, it is argued that a Guiding Case has a *de facto* but not *de jure* binding effect on lower courts' adjudication of similar cases. Unlike ordinary judgement, its impact goes beyond explaining legal theories ('*shuoli gongneng*'). Unlike case precedents, it does not have the status of a source of law and thus provides little guidance ('*zhidao gongneng*'). Therefore, Sun suggested that the legal effect of a Guiding Case lies between non-binding and legally binding. It is *de facto* binding in that a Guiding Case must possess accurate legal reasoning of adjudication and pass SPC's review, thus constituting the persuasiveness and guiding effect within the judicial system. Hence, its binding effect ('*yue su li*') is *de facto ('shishi shang de zuoyong')* and internal ('*neizaide*') but cannot be cited as the adjudication basis.[41] Judge Guo also supports the proposition that a Guiding Case is *de facto* binding in arguing that a Guiding Case is of an authoritative and normative applicable nature.[42] Therefore, it is sensible that some will describe Guiding Cases as *stare-decisis*-like authorities. However, unlike case precedents in the common law system,

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38 Guidance Provisions (n 5), art 7.

39 Guidance Rules (n 1), art 9.

40 Feng (n 2) 6.

41 Sun (n 3) 152.

42 Feng (n 2) 3.

Guiding Cases do not have *de facto* and *de jure* binding power on lower courts in all future cases.

C. The Extent of Guiding Cases' Binding Effect and the Legal Formalities of Applying Guiding Cases

The *de facto* binding effect of Guiding Cases can be understood by considering Articles 9 to 11 of the Guidance Rules, which outline the processes of referring to the Guiding Cases. Article 9 states that if a case is similar to a Guiding Case, it should refer to it. The similarity is being determined 'in terms of basic facts and application of the law', and MPA is the specific section that the adjudicator should resort to and take reference.[43] Article 11 suggests that where a court case refers to Guiding Cases, the serial number and MPA should be quoted; where any parties are citing Guiding Cas as the basis for litigation or defence, the adjudicator should 'respond as to whether they referred to the Guiding Case in the course of their adjudication and explain their reasons for doing so'.[44]

III. PROBLEMS OF GUIDING CASES TOWARD WIDER APPLICATION IN THE COURTS OF CHINA

A. Overview

As of Beida Statistic's publication date, the SPC has released 178 Guiding Cases, of which roughly 72% have been referred to and cited. They are primarily cited in civil cases (6691 cases), followed by administrative and criminal cases (each accounting for 1609 cases).[45]

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43 Guidance Rules (n 1), art 9.

44 ibid art 11.

45 Annual Report on the Judicial Use of the Supreme People's Court's Guiding Cases 2021 《最高人民法院執行指導性案例》

Citing can be further categorised into explicit ('*mingshi huanyin*') and implicit ('*yinshi huanyin*') citing. Implicit citing refers to situations where, despite the adjudicators having taken the reference of the Guiding Cases, they do not explicitly mention it in the judgment.[46] Although the adjudicated case resembles the legal reasoning and final decision with the Guiding Cases to the extent that practically they have *de facto* confirmed and reinforced Guiding Cases' guiding effect, these adjudicators will not mention the serial number, keywords, or MPA of the Guiding Cases.[47] This has caused the problem of oversimplification or even deliberate bypass of the complex legal reasoning process in adjudicating cases, thus deviating from Guiding Cases' initial aim of establishing consistency in adjudication.[48]

The reasons behind the judicial reluctance to apply and explicitly cite the Guiding Cases can be understood from two aspects: the general problems faced by all judges and a specific problem faced by certain provincial judges.

B. The Lack of Clear Guidance for the Judges to Apply the Guiding Cases[49]

1. When Should Judges Refer to Guiding Cases

The titled problem is dissected into three issues: when, what, and how judges should refer to Guiding Cases. This section will discuss the first issue. According to Article 7 of the Guidance Provisions, '[p]eople's courts at all levels should refer to the Guiding Cases released by the [SPC] when adjudicating similar cases'.[50] According to Article 9 of the Guidance Rules, the similarity is being determined in terms of 'basic facts and

46 SPC Annual Report (n 45).

47 ibid.

48 Sun (n 3) 155.

49 ibid 145.

50 Guidance Rules (n 5), art 7.

application of the law'.[51] However, these are arguably vague concepts and are vulnerable to judicial extrapolation. For instance, the MPA of Guiding Case 24 states that the plaintiff's physical conditions before the traffic accident can affect the degree of physical consequences, not mitigating factors to the defendant's liability.[52] In essence, it is similar to the thin skull rule in the common law system in which you take the victim as you find him. On the notion of 'similarity based on basic facts'; adjudicators have applied the rule in an insurance dispute case where the traffic incident triggering the dispute is similar to the facts of the traffic accident in Guiding Case 24. Adjudicators had also applied the rule in a transport contract dispute ('*yunshu hetong jiufen*') case based on its 'similarity' with a motorcar traffic accident ('*jidongche jiatong shigu zeren jiufen*') since they both concern transportation matters ('*jiatong yunshu wunti*').[53] However, this 'similarity' is rather farfetched and might amount to facts alterations to conform with and apply the Guiding Cases.[54]

2. What Should Judges Refer to in the Guiding Cases

According to Article 9 of the Guidance Rules, the People's Court should refer to the Guiding Cases' MPA in similar cases.[55] Summarising and extracting the MPA is the essence of compiling Guiding Cases. MPA are rules deduced from a Guiding Case for handling similar cases, yet it is argued that the ideas and content of MPA are too thinly defined. For instance, the judges must obtain a holistic view of a Guiding Case, including its factual matrix, circumstantial situation, and policy implications, instead of merely referring to the main points to understand how to apply

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51 Guidance Provisions (n 1), art 9.

52 *Rong Baoying v. WANG Yang and Alltrust Insurance Co., Ltd. Jiangyin Branch* (A Motor Vehicle Traffic Accident Liability Dispute) 《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》

53 Sun (n 3) 146.

54 Jinting Deng, 'An Empirical Research on the Effects of China's Guiding Cases' (2014) SSRN Electronic Journal <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2423746> accessed 14 April 2023.

55 Guidance Rules (n 1), art 9.

them to their adjudicating cases. Besides, Judge Guo also suggested that MPA are innovative in that 'they summarise innovative determinations about the application of law and other issues from rulings or judgements'.[56] This rhetoric mirrors the idea of judicial activism ('*sifa nengdong zhuyi*') and may explain the judicial reluctance to refer to the Guiding Cases, especially their MPA. As will be further elaborated in the following sections, such an innovative judicial process connotates a court-led system of case guidance, which will possibly interfere with NPC's law-making authority and thereby undermine its constitutional supervisory power over SPC.

3. IMPLICATIONS

With uncertainty over when and what to refer to in the Guiding Cases, it is not difficult to envisage that judges in China will find it confusing to apply them in their cases. When referring to the Guiding Cases, Article 11 of the Guidance Rules only requires judges to include the number of the Guiding Case and the MPA.[57] It is uncertain whether judges should go beyond mere referencing and endeavour to elaborate on the similarity of factual matrixes.

B. Judicial Timidity in Applying the Guiding Cases

1. BUREAUCRATIC DISCIPLINE SYSTEM WITHIN THE COURTS IN CHINA

Under the above discussion, it is argued that given the ambiguities in interpreting and applying Guiding Cases, judges are hesitant when referring to and using them, thus providing another explanation for why they are *de facto* binding but not *de jure* from a legal-political context. This section will focus on the problem from a more practical and narrower context, followed by a discussion in relation to the Chinese-characteristic legal system.

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[56] Feng (n 2) p 6.

[57] Guidance Rules (n 1), art 11.

From a narrower perspective, it is argued that rigorous bureaucratic control exists within the courts in China, such that trial judges often have to obtain layers of approvals before arriving at a decision.[58] This understanding aligns with the notion that courts in China follow a more centralised decision-making process in which judges are hesitant to arrive at individualised decisions. To avoid their decisions being overturned on appeal, judges usually consult the appellate bodies before arriving at their judgements.[59] This is mainly due to the risks that judges will be sanctioned for reaching incorrect outcomes, which are signified by the overturning or altering of such judges' cases on appeal.[60] The prevalence of such a disciplinary system is unconducive to the adoption of Guiding Cases, which are, as mentioned, innovative in nature and may bring about a risky breakthrough in law such that decisions based on Guiding Cases are more prone to being overturned by higher courts.

2. Legal incrementalism and application of Guiding Cases as a constrained judicial power

Analysing from a broader perspective, as briefly highlighted in previous sections, the ambiguities in applying Guiding Cases create a possibility of judges indirectly and implicitly making laws, which is against the spirit of the Chinese-characteristic legal system, namely, NPC's legislative authority prevails over judicial authority.[61] This coincides with the phenomenon that most Guiding Cases are from less contentious areas of law. For instance, civil cases (which include company, contract, and patent infringement disputes) account for over 58% of all Guiding Cases. In contrast, cases concerning administrative laws and state

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58 Hualing Fu, 'Building Judicial Integrity in China' (2016) 39 HICLR 167, 169.

59 Jia (n 25) 2226.

60 'Beijing Court Announces Reform of Judicial Disciplinary System', (*Congressional-executive Commission on China*, 4 October 2006) <www.cecc.gov/publications/commission-analysis/beijing-court-announces-reform-of-judicial-disciplinary-system> accessed 14 August 2021.

61 Jia (n 25) 2228.

compensations only account for about 11% of all Guiding Cases.[62] This may reflect that judges in a Chinese-characteristic legal system are generally cautious in delivering judgments that may undermine NPC's authority and the Chinese Communist Party's ('the Party') interests. The following section highlights the example of Guiding Case 91 to demonstrate how the application of Guiding Cases, particularly its MPA, may foster the proliferation of judge-make laws.

It is argued that MPA has an intricate relationship with the reasons for adjudication. As such, when judges seek to rely on the MPA extracted from the Guiding Case, it inevitably involves a high degree of uncertainty about the application of MPA and bestows discretionary power over the judges, which they have repeatedly tried to avoid. As suggested in the previous section, an MPA can be considered the *ratio* of Guiding Cases, whereas reasons for adjudication can be deemed the *obiter dicta* of the Guiding Cases. The suggestion that they have a close relationship is supported by Judge Guo, who argued that MPA is extracted and summarised based on the reasons for adjudication.[63]

In the 'reasons for adjudication' section in Guiding Case 91, judges rely on 'leaning toward the higher, rather than the lower end' as the basis for formulating a pro-plaintiff method of compensation calculation by adopting a more open guiding concept of reasonableness, which was later being extracted as its MPA. The inextricable relationship between the MPA and the judge's reasons for adjudication further poses the problem of whether the rule of 'leaning toward the higher, rather than the lower end' can be applied to other contexts. For instance, whether the rule extracted from Guiding Case 91 applies to a broader context involving 'calculating the damages of anyone wronged by the administrative organ's illegal actions'. There are also issues, such as the appropriate caveats in applying the rule and how far-reaching the court's power to protect the interests of such plaintiffs is. These questions are unlikely to be solved by merely relying on the MPA. Hence, the case illustration highlights the possibility of

62 SPC Annual Report (n 45).

63 Feng (n 2) 6.

judges filling the legal vacuum and attracting scepticism of judicial over-empowerment.

Turning to the institutional implications that dissuade judges from utilising the Guiding Cases. Some opine that although the people's courts enjoy judicial power, which the Constitution guarantees to be independent and not subjected to any external interference,[64] some judges are members of the Party and may also receive directions from the Party's Central Political-Legal Committee.[65] From a broader picture, as China's highest legislative body, the NPC has the sole legislative power, and the SPC is under the direct supervision of the Standing Committee of the National People's Congress ('NPCSC'). In situations of ambiguities, the resolving power is in the NPC. For instance, the SPC has to consult the NPCSC before issuing legal interpretations concerning a legal lacuna. Thus, this signifies that NPC's legislative authority is superior to the people's courts' judicial authority, implying that judges cannot make laws in their judgement processes. This is essentially the opposite of the common law system in which judges are constantly said to have engaged in making law rather than merely declaring the law.[66] Therefore, common law judges are more decentralised because their judgements are more individualised and tailored to the potential application of a broader array of cases. In contrast, judges' decision-making power is more centralised in the Chinese-legal system. Therefore, since applications of Guiding Cases denote a risk of deviating from the legal norms, judges are more reluctant to apply them.

Further, the selections of Guiding Cases empower the SPC to respond more independently to statutory gaps, as opposed to formally consulting the NPC or other guiding documents such as the NPCSC interpretations or typical cases. Thus, this may imply that NPC becomes less effective in controlling the content and effect of Guiding Cases. In this light, applications of Guiding

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64 Constitution of the People's Republic of China, art 126.

65 Hualing Fu, 'Challenging Authoritarianism through Law: Potential and Limit' (2011) 6(1) NTULR 339.

66 Jia (n 25) 2232.

Cases are likely to attract scepticism of judicial activism ('*sifa nengdong zhuyi*'), and, unsurprisingly, it operates incrementally.

C. Failure to Address the Provisional Differences in China

According to *Beida Statistics*,[67] over 60% of Guiding Cases originate from the judgements in the courts in Jiangsu, Shanghai, Zhejiang, Beijing, and Shandong. Guiding Cases are used mainly by Guangdong, Henan, Shandong, Beijing, and Zhejiang courts. Moreover, as mentioned, most Guiding Cases are civil and commercial cases less concerned with the state's interests. For example, these Guiding Cases cover issues such as counterfeiting a registered trademark,[68] disputes over the infringement of rights to new plant varieties[69] , and an infringement of an exterior design patent.[70] As such, alongside the fact that an overwhelming majority of Guiding Cases derive from the eastern but not central western part of China, a positive relationship between economic development and the judicial application of Guiding Cases can be deduced. The more developed the provinces are, the higher the tendency to refer to these cases when adjudicating similar legal issues arising from market disputes. Besides, the limited variety of Guiding Cases highlights social issues in less-developed provinces, such as demolished housing, agricultural land disputes, and Hukou registration, which the existing Guiding Cases cannot fully address.

The overall effect of the problem of judicial timidity can be briefly summarised as follows: from the supply side, judges are

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67 SPC Annual Report (n 45).

68 *Guo Mingsheng, GUO Mingfeng, and SUN Shubiao* (Counterfeiting a Registered Trademark) 《郭明升、郭明锋、孙淑标假冒注册商标案》

69 *Tianjin Tianlong Seeds Science and Technology Co., Ltd. and Jiangsu Xunong Seeds Science and Technology Co., Ltd*. (Infringement of Rights to New Plant Varieties) 《天津天隆种业科技有限公司与江苏徐农种业科 技有限公司侵害植物新品种权纠纷案》

70 *Grohe AG v. Zhejiang Jianlong Sanitary Ware Co., Ltd.* (Infringement of an Exterior Design Patent) 《高仪股份公司诉浙江健龙卫浴有限公司侵害外观设计专利权纠纷案》

more passive in adjudicating cases that have far-reaching implications on social stability, thereby generating a lesser number of potential Guiding Cases on these subjects; further, judges are more reluctant to apply Guiding Cases outside of the context of civil or commercial cases. Hence, to address the specific problem occurring in certain provinces, solutions concerning the general problem must be addressed first.

IV. POSSIBLE SOLUTIONS TO MITIGATE THE PROBLEMS

A. Solutions to the Problem of Ambiguities in the Interpretation and Application of Guiding Case

This section adopts three approaches to provide a framework that resolves the problem of ambiguities in interpreting and applying Guiding Cases. First, it is suggested in the last part[71] that when judges consider the similarities between the cases being adjudicated and the Guiding Cases, they face difficulty determining the aspects of similarity that should be contemplated. These contemplations are dictated by several factors, such as the required extent of similarity in facts, whether it denotes a fundamental similarity or a high degree of similarity, and what subject matters should be taken into account. Thus, despite the absence of a universal standard in applying Guiding Cases, it is suggested that the idea of similarity must be made clear to the judges to understand better the extent and degree of similarity required.

In determining similarity, judges should go beyond considering the facts of the case and the policy rationale underlying the Guiding Cases.[72] As Article 2 of the Guidance Provision suggests, Guiding Cases must be of widespread concern to society, thereby implying that this case may involve ruling on

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71 *Supra* Section III B (1).

72 Feng (n 2) 8.

matters affecting society.[73] Thus, if a case concerns similar societal interests with a corresponding Guiding Case, the latter should be referred to. For instance, if the policy concern behind the ruling of a Guiding Case is to safeguard plaintiffs whose interests are harmed by the procedurally irregular or illegal actions of governmental bodies at large, then arguably, the MPA of the Guiding Case is capable of a wider application when cases to be adjudicated also concern such situation.

Second, as suggested in the previous section,[74] judges face the problem of a thinly defined MPA, which rarely includes reference to the facts of the case as well as its reasoning. It is suggested that instead of merely considering the MPA, judges should also evaluate the adjudication methods and rules, legal reasoning and concepts, as well as the rule of law inherent in the Guiding Cases.[75] Additionally, MPA should have a 'legal basis, fine accuracy, tight structure, concise expressions, and precise meanings'[76] and comprise legal concepts commonly understood and well-established within the judiciary. The crux is that, ideally, judges should consider Guiding Cases holistically rather than simply referring to their MPA.

Third, against the backdrop of the solutions indicated above, when it has been decided that the adjudicating case is similar to a Guiding Case, judges should identify the focal points of the case as well as the policy considerations behind the decisions. This allows the purpose of the system, which is to ensure that similar cases are being adjudicated similarly, to be achieved. In applying the legal reasoning of Guiding Cases to the adjudicating cases, consistency should be achieved such that the outcome of the cases should not signify an apparent departure from the Guiding Cases.[77]

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73 Guidance Provisions (n 5), art 2.

74 *Supra* Section III.

75 Jia (n 25).

76 Feng (n 2) 6.

77 Guidance Rules (n 1), art 11.

B. Practical Means to Enforce the Solutions

1. Clear Official Guidelines and Judiciary Sanctions

It is argued that referencing a Guiding Case can be encouraged by highlighting it more explicitly in the Guidance Provisions and Rules, thereby suggesting an official endorsement of such an approach. Article 11 of the Guidance Rules states that '[i]n the process of handling a case, the personnel handling the case should inquire about relevant Guiding Cases'.[78]

Nonetheless, adjudicators should actively seek Guiding Cases and determine if they apply to the pending cases. It is arguably vague and lacks concrete guidance regarding its potential application. It is also rather unlikely that the NPC or SPC will compile a clear set of rules in applying Guiding Cases, which will potentially enhance the law-making ability of the judges in China and thereby undermine the legislative supremacy of the NPC and NPCSC.

Regarding the stricter means of imposing judiciary sanctions where judges fail to refer to a Guiding Case when deemed necessary, Judge Guo suggested that if judges do not explain their reasons for doing so, they can be sanctioned for reaching an unfair decision. Also, it is further suggested that if the line of judicial reasoning deviates from a similar Guiding Case, affected parties are entitled to appeal as a different judicial conclusion may be reached.[79] Nonetheless, it may be suggested that sanctions resulting from failure to refer to a Guiding Case are likely to be perceived as less dire when compared with sanctions due to failure to consider directions from the Party or legislative bodies[80] as the Judicial Disciplinary System.

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78 Guidance Rules (n 1), art 11.

79 Feng (n 2) 8.

80 Jia (n 25) 2226.

2. IMPROVEMENT TO THE LEGAL EXAMINATION SYSTEM

It is argued that ambiguities regarding a Guiding Case's application can be resolved through educating and empowering the system's usage in legal practices. Currently, the National Judicial Examination does not include any material pertaining to Guiding Cases; candidates are only required to know how to invoke such cases as opposed to identifying similarity, evaluating applicability, and applying consistently in their practices.[81] Thus, integrating the application of Guiding Cases into the syllabus of the National Judicial Examination can emphasise its importance and enable practitioners to familiarise themselves with the procedures of applying the Guiding Cases.

3. SOLUTIONS TO THE PROBLEM OF JUDICIAL TIMIDITY IN APPLYING A GUIDING CASE

To redress the problem of judicial timidity, particularly in applying Guiding Cases, the crux lies in alleviating judges' concern about facing institutional retaliation. Given that such consideration essentially derives from a legal-political perspective, it is proposed here that the solution must necessarily begin with the institution. As abovementioned, legitimising and consolidating the Party's ruling is a key concern in promoting judicial professionalism. In other words, recognising the Guiding Case system as beneficial to the Party's ruling and social stability is key to promoting a *de jure* binding effect within the judiciary. Thus, the following part of the article discusses two approaches suggesting that the legitimacy of Guiding Cases is beneficial to the Party's ruling.

First, a characteristic of China's legal system is that while the Party is rather incremental in implementing political reform and democratisation, there has been a general proliferation of economic liberalisation, legislative reforms for market activities, and promotion of rights within the economic sphere. This phenomenon has been described as the advancement of the rule of

[81] Fu (n 58) 167.

law without politics.[82] This is important to prevent the politicisation of society while allowing the incremental development of the rule of law. Certainty is crucial in ensuring market stability. Thus, a Guiding Case system that encourages consistency and unification of laws will be beneficial not only for market regulation but also to help boost investors' confidence through consolidating intellectual property protection and establishing a clearly defined set of rules in commercial disputes.[83] For example, Guiding Cases can be useful in competitive behaviours such as abuse of dominant market position,[84] as well as in market price administration and control.[85] Also, theoretically, the acceptance and recognition of Guiding Cases as a means to reinforce order in market transactions align with the general trend of legal dualism in China, which can be manifested by the fact that there are more Guiding Cases in areas concerning social-economic rights as opposed to political rights.[86]

Second, the rule of law without politics is still largely valid and serves as China's guiding principle of legal reforms. To sustain social stability, utilising the Guiding Case system can enhance transparency and uniformity in dealing with social issues. Thus, allowing courts to become a critical apparatus in dispute resolution.

It is recognised that economic development in China is occasionally accompanied by problems such as land extortions, migrant worker exploitations, and environmental pollution.[87] Public hearings or deliberations are sometimes perceived as insufficient in enabling affected members of society to express

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82 Fu (n 65) 344.

83 Fu (n 58) 174.

84 *Beijing Qihu Technology Co., Ltd. v. Tencent Technology (Shenzhen) Company* Limited and Shenzhen Tencent Computer Systems Company Ltd. (Abusing Dominant Market Positions) 《北京奇虎科技有限公司诉腾讯科技（深圳）有限公司、深圳市腾讯计算机系统有限公司滥用市场支配地位纠纷》

85 *Luo Rongrong v. The Price Bureau of Ji'an Municipality* (Handling Price Administration) 《罗镕荣诉吉安市物价局物价行政处理案》

86 Fu (n 58) 181.

87 Fu (n 65) 346.

their demands for compensation. Thus, these members turn to institutionalised channels for redress, with the court system being the first and foremost instrument. This is exemplified by the increasing number of public interest litigations in China, where individuals aggregate their legal actions to protect a particular group's interest. Against this backdrop, the rising number of Guiding Cases that reflect social concerns may connotate the Party's increasing reliance on the judicial processes to maintain legitimacy and pacify societal grievances. For example, Guiding Case 75 concerns a public interest litigation over environmental pollution,[88] and Guiding Case 91 examines the compensation for the compulsory demolition of the house.[89] The rising number of these Guiding Cases echoes the notion that Chinese legal reform is largely incremental.[90] Therefore, the court is becoming an important institutionalised channel in maintaining stability, in which the Guiding Case system can serve as an aid to guide judges and a means to signify the recognition of public interests by officials.

CONCLUSION

Regarding the legal nature of Guiding Cases, according to Article 10 of the Guidance Rules, it is unlikely to be treated as a source of law in China, and it bears a *de facto* but not *de jure* binding effect. In light of the limited application of Guiding Cases and the overwhelming pattern of implicit citing ('*yinxing shiyong*'), this article has further highlighted three problems that the Guiding Case system faces when expanding its application in the people's courts. These include the general problem of a) application and interpretative ambiguities due to the lack of clear guidance in the Guidance Provisions and Rules, such as the uncertain extent and degree of similarity that is required of the pending cases and the thin content of MPA, which makes judges deriving Guiding Cases' line of reasoning difficult; b) judicial timidity in applying

88 *China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Technology Co., Ltd.* (Public Interest Litigation over Environmental Pollution) 《中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案》

89 *Sha Mingbao* (n 18).

90 Fu (n 57) 177.

the Guiding Cases due to the bureaucratic discipline system within the court and the norm of legislative supremacy of the NPCSC, thus affirming the view that issuance of GCs is an exercise of SPC's relatively constrained judicial power; the last problem is specific in the sense that the c) Guiding Case system fails to address the provincial differences in China in terms of their developmental level and the legal norms.

In addressing the general problem of ambiguous instructions in applying the Guiding Case, it is suggested that similarity should also be considered regarding the respective Guiding Case's underlying policy rationale. MPA should strive to be precise enough to cover the legal reasoning and adjudication methods such that the outcome of cases will be largely consistent with the Guiding Case. In relation to the problem of judicial timidity, looking forward, it is projected that the majority of Guiding Cases will still be 'safe cases', which are mainly concerned with civil and commercial matters ('*min shang*'); however, bearing in mind the increasing tendency of Guiding Cases that address matters involving strong public interests, it is likely that courts have increasing potential as an instrument to resolve disputes and maintain ruling legitimacy. A corollary is that instead of utilising traditional channels to resolve societal disputes, such as public hearings or petitions, courts can be an effective institutionalised means for the Party to exercise relative control over the said matters.

Even so, compared with 'safe cases', the expansion and popularisation of Guiding Cases addressing societal concerns will likely be incremental. As judicial independence in China is contextual and case-specific,[91] cases necessary for economic proliferation and demand a high degree of consistency, namely those covering commerce and trade, will be prioritised in legal reforms. In cases involving relatively sensitive areas, such as the constitutionality of governmental actions, judges will likely continue to defer to the Party's or NPC's instructions. Therefore, the Guiding Case system will continue to operate in a submissive judicial environment yet capable of rendering more effective and

[91] Fu (n 57) 181.

consistent decisions in the selective state-prioritised areas, such as civil and commerce.

THROUGH THE LENS OF EMPLOYMENT LAW: REGULATING UBER DRIVERS IN ENGLAND AND HONG KONG

Chiu Tsz Wai Natalie*

Although society has been driven by the trend of the gig economy, Hong Kong's laws are relatively stagnant in this area. This article focuses on Uber – a popular global ride-hailing service. By adopting a comparative approach, this article argues that Uber should be regulated to protect drivers in Hong Kong. First, it compares tests governing employment relationships and 'sham employment' between England and Hong Kong. Then, it scrutinizes the present characteristics of Uber in England and Hong Kong while observing the implication of the major English case, Aslam, in the context of Hong Kong. Ultimately, it investigates the practicality of regulating Uber in Hong Kong and argues this can be achieved by three pillars. These are: (i) upholding the decision of Aslam; (ii) legalising Uber; (iii) including the 'workers' status under the legislation and adopting the approach of reflexive labour law.

INTRODUCTION

Society has been driven by an economic change recently – the gig economy, warranting a discussion on the implications of the gig economy in the context of a country's employment law. This article explores a nuanced analysis of Uber – a popular ride-sharing application, on Hong Kong's labour law, particularly from the aspect of labour protection instead of section 52(3) Road Traffic Ordinance.[1] England has just ruled on the status of Uber

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1 Road Traffic Ordinance (Cap 374), s 52(3).

drivers as 'workers' in *Uber BV v Aslam (hereafter 'Aslam')*.[2] Meanwhile, in Hong Kong, Uber housed nearly 220,000 drivers (including registered Uber and Uber Taxi driver-partners) from 2014 to 2021,[3] about 6% of the average labour force in this period.[4] Yet Uber drivers were classified as 'self-employed'. They are deprived of labour protection. This article compares employment law between England and Hong Kong and explores the possibility of applying England's model to Hong Kong. It argues that Uber should be regulated to protect drivers in Hong Kong. This can be achieved by (i) upholding the decision of *Aslam*, (ii) legalising Uber, (iii) including the 'workers' status under the legislation and adopting the approach of reflexive labour law. First, the article lists tests governing employment relationships and 'sham employment'. Second, it focuses on the present developments of Uber in England and Hong Kong. Third, it investigates the practicality of regulating Uber in Hong Kong.

I. THE LEGAL FRAMEWORK OF EMPLOYMENT AND SELF-EMPLOYMENT

A. Definition of 'Employees' and 'Workers'

Employment status affects the scope of employment rights and compensation for workers in case of accidents. Below is the classification of employment status in England and Hong Kong.

1. ENGLAND

England has three employment statuses. Section 230 of the Employment Rights Act 1996 defines the 'employees' and

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2 [2021] 4 All ER 209.

3 Uber, 'Uber Celebrates 7 Years in Hong Kong' (*Uber Newsroom*, 16 November 2021) <www.uber.com/en-HK/newsroom/uber-7anniversary-hk/> accessed 30 June 2022.

4 Census and Statistics Department, Labour Force, Employment and Unemployment (*Census and Statistics Department*, 16 November 2021) <www.censtatd.gov.hk/en/web_table.html?id=6# > accessed 11 December 2022.

'workers'. An 'employee' requires a 'contract of employment. As for 'workers', under limb (b) of section 230(3), individuals should (i) enter a contract work or services for another party, (ii) perform the work or services personally, and (iii) the contract is not of a client or customer of any profession or business undertaking.

The classification of contracts would be a matter of law.[5] According to *Montgomery v Johnson Underwood Ltd*,[6] the minimum components constituting a 'contract of employment' are 'mutuality of obligation' and 'control'. 'Mutuality of obligation' operates under the principle of consideration in contract law. *It arises when the worker agrees to provide skills and labour in return for remuneration*,[7] so there is reciprocity. On the other hand, the 'control' test stresses the degree of control by the employer. The person who exercises day-to-day control is not determinative. Rather, the focus is on *who shares the ultimate right to control* and *the extent of control.*[8] Apart from the above two tests, the court considers whether individuals provide their own premises and equipment to run the business and whether separate accounts are kept.[9] Ultimately, the court would generally examine the context and weigh different factors to determine the presence of an employment relationship.[10]

Considering the present context, the 'control' test was criticised as outdated. Kahn-Freund (1951) described it as 'unrealistic and almost grotesque'.[11] He highlighted the situation where a skilled person was hired to perform tasks that the employer was ignorant of, e.g., the captain of a ship. This seemed hard for the employer to exercise control. Although the above situation has become more common with the emergence of professional positions within companies, such as consultants, in-

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5 *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 385E–F.

6 [2001] IRLR 269.

7 *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471, 475B.

8 *White and Another v Troutbeck SA* [2014] ICR D5, D5 F – G, 266G.

9 *Commissioners of Inland Revenue v Post Office Limited* [2003] ICR 546, 546G.

10 *Montgomery* (n 6), 25.

11 Otto Kahn-Freund, 'Servants and Independent Contractors' (1951) 14 MLR 504, 505 – 6.

house lawyers, and IT workers, the 'control' test may still be satisfied. Besides the mode of work, the court would weigh all features of the employment relationship to determine whether the alleged employer carried out his managerial functions, ranging from instructions of the time and place of work[12] to the provision of equipment and protective clothing.[13] Hence, the legal rule arguably could survive modern social conditions.

The 'mutuality of obligation' test is equally controversial. The test derives from Freedland (1976)'s 'two-tier' structure.[14] The first tier is the primary sense of consideration with contractual exchange and reciprocal promises. The second tier is debatable. It is the 'exchange of mutual obligations for future performance', i.e., the theme of continuity. Cases forming elements of this test are inconsistent.[15]

'Continuity of employment' should not be an element of the 'mutuality of obligations' test. In this regard, McGaughey (2019) provides two reasons: (i) the Parliament has never consented to it; (ii) a lot of legal opinions rejected this argument.[16] The first argument is weak since employment law concerns more than statutes passed by the Parliament. Instead, it is a hybrid of statutes and common law.[17] Sir Bob Hepple said that '*O'Kelly* 'deliberately ignored' Freedland's analysis,[18] while Professor Deakin and Professor Morris stated that it 'cannot function as an indicator of employee status'.[19] To supplement, on a closer look

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12 *Yeung Tin Sum v Wong See Ting* DCEC 1077/2006, [2007] HKEC 694, [11].

13 *Cheung Wai Yick v Lau Kin Wing* DCEC 1164/2007, [2009] HKEC 268, [5].

14 Mark Freedland, *The Contract of Employment* (Clarendon Press 1976) 20 – 21.

15 Nicola Countouris, 'Uses and Misuses of 'Mutuality of Obligations' and the Autonomy of Labour Law' in Alan Bogg, Cathryn Costello, A.C.L. Davies, and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 178.

16 Ewan McGaughey, 'Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status' (2019) 48 ILJ 180.

17 Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 Current Legal Problems 67, 98.

18 Bob Hepple, 'Restructuring Employment Rights' (1986) 15 ILJ 69, 71.

19 Simon Deakin and Gillian Morris, *Labour Law* (Bloomsbury Academic

at Freedland's statement, the second tier is only proposed to understand the law on breach and termination of the employment contract. Freedland said that 'future performance' is necessary to explain the law concerning breach of employment contracts.[20] Therefore, the second tier only addresses the reciprocity required when employees claim unfair dismissal instead of on all employment status.

Courts use two conceptual approaches to shape the mutuality of obligation and control tests. The naturalistic approach is enshrined in the modern test of 'mutuality of obligation'. Freedland (1995) believed that the law on employment contracts is a system of regulation.[21] Parties only agree to trade 'flexibility' for stability and to adopt what the courts suggested to be the structure of an employment contract.[22] Parties decide regulatory structures, and the market determines the rules. However, this logic does not only apply exclusively to the 'mutuality of obligation' test but also to other tests determining employment status. For instance, the control test is a general framework containing relevant factors in finding control. The parties are free to decide the method of control and its extent if the minimum threshold is met.

Meanwhile, the constitutive approach was illustrated in earlier cases, namely *Airfix Footwear* and *Nethermere.*[23] It is generally more pro-worker. Since labour law rules are inevitable results of the market,[24] courts have more power to formulate frameworks and regulations deemed inherent in the market to uphold justice and fairness. On the contrary, for the naturalistic

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2009) 164.

20 Nicola Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (2014) SSRN Electronic Journal, 5-6 <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2416697> accessed 17 December 2022.

21 Zoe Adams, 'Labour Law and the Labour Market: Employment Status Reconsidered' (2019) 135 LQR. 611, 620, citing Lammy Betten, *The Employment Contract in Transforming Labour Relations* (Kluwer 1995) 17.

22 ibid 616.

23 ibid 630.

24 ibid 617.

approach, the law would intervene to correct market failures, so interference is limited to a small extent. As a result, a constitutive approach is preferred, particularly when employees lack bargaining power compared to employers.

On top of 'mutuality of obligation' and 'control', the court considers the 'integration' test. Proposed by Denning LJ, the test concerns whether the work of an individual is 'an integral part of the business',[25] i.e., whether the individual was 'part and parcel' of the organisation or independent of it.[26] McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*[27] criticised it for being ambiguous and queried whether all or only some individuals satisfied this description were employees (called 'servants' then). Currently, the ambiguity of the effect of this test would unlikely be a concern since the 'integration' test is only a test among all factors that the court is concerned with, and the court would weigh the facts to conclude the employment relationship. Another fuzzy area of the 'integration test' lies with the perspective of judging the relationship – whether to view the relationship from the standpoint of parties to the contract or outsiders.[28] Categorisation should ultimately be an objective test instead of ascertaining *inter se* because the tests aim to reflect the realities of the workplace.

Turning to the definition of 'workers', mutuality of obligation is also relevant.[29] As for the meaning of 'personally', it simply means individuals take up tasks by themselves.[30] The right to substitute another individual is consistent with the obligation of

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25 *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101, 111; *Bank Voor Handel on Scheepvaart NV v Slatford* [1953] 1 QB 248, 295.

26 Timothy Brennan, *Harvey on Industrial Relations and Employment Law* (LexisNexis 2001).

27 [1968] 2 QB 497, 524B (McKenna J).

28 Brennan (n 26) [29].

29 *Windle v Secretary of State for Justice* [2016] ICR 721 (CA), 727D, 730D-E.

30 Matthew Taylor, 'Good Work: The Taylor Review of Modern Working Practices' (2017) Independent Report, 33 <www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf> accessed 08 May 2023.

personal performance, where the choice of substituted individuals is restricted to those under identical contracts of the worker's company.[31] Fewer employment rights apply to workers.[32]

It is worth noting that *prima facie*, it would be hard for casual workers to satisfy the 'mutuality of obligation' test. As stipulated in *O'Kelly v Trusthouse Forte plc,*[33] there is no overall or continuous employment contract due to the lack of obligation for the company to supply further work. Also, casual workers are available on a regular basis to earn income for themselves, which is in nature the same as an independent contractor. However, this position seems relaxed after *Prater v Cornwall County Council.*[34] Lord Justice Mummery clarified that *O'Kelly* did not discuss the possibility of individual contracts. More importantly, when *O'Kelly* was decided, the middle ground position, i.e., the category of 'workers' under the Employment Rights Act 1996, had not emerged yet.[35] Therefore, considering recent statutory developments, *O'Kelly* may be decided with a different outcome.

2. HONG KONG

Contrary to England, Hong Kong only divides employment status into two categories: 'employee' and 'self-employed'. 'Employee' is defined in sections 2 and 4 of the Employment Ordinance. It bears the same definition in England, i.e., engaged under an employment contract. This includes a contract of apprenticeship.[36]

Similar to that in England, there is no single test for deciding a contract of employment, which is a matter of fact. In the past, the control test was used. The employer's control included not only the employee's tasks but also the manner of doing them.[37] Nevertheless, nowadays, the control test forms only

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31 *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511 (SC), [24]-[34].

32 Brennan (n 26) 35.

33 [1984] QB 90 (CA), 124[E] – [H].

34 [2006] 2 All ER 1013 (CA), [34].

35 Adams (n 21) 617.

36 Employment Ordinance (Cap 57), s 2(1).

37 *Yuen Mei v Hop Sze Machine Shop (a firm)* [1961] HKDCLR 193 (DC),

a part of the consideration. The modern approach is the 'overall impression' test in *Poon Chau Nam v Yim Siu Cheung.*[38] The court would examine all features of the relationship to see if the individual is like a person in business on his own account. In addition to the control test, the court may look into the worker's interest in any prospect of profit or risk of loss and incorporation as part of the employer's organisation[39].

For the status of casual employees, in *Lee Ting-sang v Chung Chi-Keung*,[40] the court stated that work of a casual nature does not exclude the possibility of an employment contract. Instead, it would examine the purpose of work and whether it is for the employer's trade or business. Nonetheless, casual workers generally have difficulty showing that they are not self-employed since there is no 'workers' category in Hong Kong. Also, to obtain the rights of employees, such as the entitlement to wages in lieu of the Employment Ordinance, individuals often need to show the necessary qualifying period of continuous employment.[41] Therefore, even if casual workers overcome the hurdle and prove their employee status, there is still uncertainty about their eligibility for statutory protection, which is the ultimate goal of establishing their employment status. Yet, for claims raised under the Employees' Compensation Ordinance, an individual has a right of action as long as he is for the employer's trade or business.[42] Even a labour hired for a day was qualified for the compensation.[43] This can be attributed to the aim of the ordinance, which is to provide quick relief and protection to the working force.[44]

195-196.

38 (2007) 10 HKCFAR 156, 144H-145D.

39 *Wong Sham v Chiu Kung Hui and Joseph K A Chiu* (HCA 1418/1996, 29 October 1999) (CFI), [8].

40 *Lee Ting Sang* (n 5) 378.

41 *Ip Pui-wai v Siu Kwok-keung* (HCLA 37/1993, 29 November 1993), [6] – [7].

42 Employees' Compensation Ordinance (Cap 282), s 2(1)(b).

43 *Chan Yiu Man v Sin Kam Tong* (DCEC 46/2006, 28 February 2007), [9], [56].

44 Rick Glofcheski, *Tort Law in Hong Kong* (4th edn, Sweet & Maxwell Asia 2018) 554, 557.

B. Definition of 'Self-Employed'

1. ENGLAND

In England, if an individual's work does not fall within the definitions of 'workers' and 'employees' under the Employment Rights Act 1996, or in other words, the tests for employment are not satisfied, he would be classified as an independent contractor under a contract for services, i.e., 'self-employed'. Similarly, in Hong Kong, if one's employment status does not satisfy the definition of 'employee', he would be 'self-employed'.

2. HONG KONG

Tests between Hong Kong and England are quite similar, but Hong Kong does not share the intermediate 'workers' category as in England, so the law may be harsher on casual workers. Under current law, casual workers can only try to claim under *Lee Ting-sang*, while in England, casual workers can attempt to prove their 'workers' status, which seems to be a lower threshold. Also, since the 'overall impression' test explicitly points out 'business on his own account', it evaluates how workers manage their job and profits. This is related to the extent of control, so Hong Kong's present focus is arguably more on the 'control' test.

II. THE CONCEPTS OF 'BOGUS SELF-EMPLOYMENT' AND 'SHAM EMPLOYMENT'

Apart from the tests in part I, the English court considers the concept of 'bogus self-employment' and 'sham employment'. The concept of 'bogus self-employment' means employees disguised as autonomous independent contractors.[45] Sham employment shares a similar meaning. It arises from *Autoclenz Ltd v Belcher*

[45] Carlos Frade and Isabelle Darmon, 'New Modes of Business Organization and Precarious Employment: Towards the Recommodification of Labour?' (2005) 15 Journal of European Social Policy 111.

('*Autoclenz*').[46] According to the ruling of the court, in order to determine if employment falls under the concept of 'bogus employment', the court will look at the substance of employment contracts but not labels. Instead of relying on written terms, judges determine the parties' objective intention by considering the parties' bargaining power.[47]

Bogg (2012) states that the 'sham' doctrine is against the contractual principle of the parole evidence rule.[48] Mandagere (2017) supplements that this leads to uncertainty and suggests adopting contractual interpretation to arrive at the same conclusion.[49] He argues that external evidence outside contracts should not be adduced. This means the court can construe more correct meanings to absurd terms to ascertain the true agreement between parties and ensure commercial common sense.[50]

I argue that Mandagere's argument neglects the reality of employment contracts and is equally uncertain. First, regarding principles, *Uber* stated that *Autoclenz* clarified the methods to determine the meaning of 'workers' and 'employees'.[51] The court should not judge by contractual doctrines but by statutes. The purposive approach ought to be adopted for statutory interpretation. Since employment regulations are for protecting workers from exploitation, if written contracts are the starting point, it would be counterintuitive to the purpose of employment law. Hence, the more reasonable approach would focus on statutory provisions rather than contractual doctrines. In that way, Mandagere's concerns for the applicability of contract law principles are false as they are not the attention in the first place. Second, logically speaking, Mandagere's interpretation proposal also produces the same degree of unpredictability because the

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46 [2011] ICR 1157 (SC), 1168.

47 *Autoclenz* (n 46) [35].

48 Alan Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328, 334.

49 Anirudh Mandagere, 'Examining Worker Status in the Gig Economy' (2017) 4 ICLJ 389, 393.

50 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).

51 *Aslam* (n 2) [70].

court identifies terms and replaces them with other meanings, which departs from the parties' contemplation. It should be highlighted that courts would not easily evoke sham doctrines. Inequality of power is inadequate as most employment contracts are constructed based on imbalanced bargaining powers. The doctrine would not be introduced automatically and must be coupled with the concern of contractual terms.[52] In fact, with the two elements operating as controlling mechanisms, the sham doctrine has limited application. Furthermore, the court reminded the possibility that the clause reflects the genuine intention of the parties, although it has not been carried out in practice. Therefore, there would not be widespread uncertainty in employment law.

On the other hand, courts cannot fully ascertain the realities of the employment workplace without extrinsic evidence. This undermines the rationale of employment law. Thus, Mandagere's suggestion is flawed.

There is a dispute on when and how to apply the sham doctrine in *Autoclenz*. Bogg and Ford (2019) suggest that attributing to the divergent majority and minority approaches in the Court of Appeal of *Aslam*[53] when interpreting *Autoclenz*, the sham doctrine brings uncertain effects.[54] The majority seemingly focus more on the factual arrangement, while the written contract is deemed evidence. Meanwhile, the minority, led by Underhill LJ, emphasises that the terms reflect the actual practice of the employment relationship. They are abandoned only when they are inconsistent with reality. In *Aslam*, Underhill LJ is relatively restrictive and believes that Uber as the intermediary to connect drivers and passengers is consistent with reality.[55]

The Supreme Court of *Aslam* affirms the majority's interpretation of *Autoclenz* by acknowledging that the written agreement is only a part of the evidence to conclude that the employment relationship and the conduct of the parties are

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52 *Uber BV v Aslam* [2019] IRLR 257, 276 (Underhill LJ).

53 *Uber BV* (n 52) 10.

54 Alan Bogg and Michael Ford QC, 'Between Statute and Contract: Who is a Worker?' (2019) 135 LQR 347, 348.

55 *Uber BV* (n 52) [119] – [149].

relevant considerations.[56] Besides, if the minority is endorsed, the court cannot assess the employment relationship comprehensively. For instance, in *Aslam*, the reality would fit the meaning of 'customer' by using the minority approach, but that neglects the whole picture and fails to evaluate the overall features of the employment relationship. As Bogg and Ford point out, the focus of *Autoclenz* is on the 'true agreement',[57] and, paradoxically, the method of the minority runs counter to the aim of the sham doctrine. In Hong Kong, the position is the same as in England.[58]

III. ANALYZING THE CURRENT CLASSIFICATIONS OF EMPLOYMENT RELATIONSHIPS: PROTECTING THE RIGHTS OF UBER DRIVERS?

Principally speaking, employees lack bargaining power, especially Uber drivers, as they contract with a large corporation using lengthy and legalistic browsewrap contracts, and there is no room for negotiation.[59] As a result, they are more vulnerable. Employment law should step in and protect Uber drivers. Meanwhile, since the first duty of the government is to protect its citizens[60] and preserve social equality,[61] labour law should adopt a more proactive constitutive approach rather than a naturalistic approach.

However, Deakin (2015) argued that Uber should be

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56 *Aslam* (n 2) [45].

57 *Cheung Wai Yick v Lau Kin Wing* (n 12) 348.

58 *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951, 973 – 74.

59 Gordon Hughes, 'Enforcement Problems with Online Contracts: An Uber Case Study (*News and Insights*, 05 October 2016) <www.dcc.com/news-and-insights/enforcement-problems-with-online-contacts-an-uber-case-study/> accessed 10 November 2021.

60 John F Farnsworth, 'Speech on the Reconstruction Bill' (39th Congress, 2nd Session) (1867) Congressional Globe 101.

61 H George Frederickson, *Social Equity and Public Administration: Origins, Developments, and Applications: Origins, Developments, and Applications* (Taylor & Francis Group 2010) 28.

subject to 'permissionless innovation'.[62] This implies that Uber should not be monitored by employment law, and it is unnecessary to bring in regulations as it may hinder the creative development of Uber. The justification behind the complete absence of regulations is the difference between conventional domains and gig economy platforms. Thus, they should not be subject to the same requirements.[63] Looking at England, the government imposes many regulations on taxi companies. Taxi drivers are protected by minimum wages if they are qualified as workers.[64] Also, statutory taxi and private care hire standards are imposed on taxi companies, such as training requirements and wheelchair policies.[65] Uber in England is subject to the same requirements.[66] The Department for Transport includes Uber as a 'private car hire company' in the official taxi and private hire vehicle statistics.[67] Therefore, the operation mode of Uber and taxis in England is not novel since they are both subject to government regulations.

As in Hong Kong, taxi drivers must abide by the Road Traffic Ordinance[68] and its subsidiary legislation, such as safety

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62 Simon Deakin, 'On Uber & Luddism' (*Centre for Business Research: Cambridge Judge Business School Blog*, 28 October 2015) <www.blogs.jbs.cam.ac.uk/cbr/wp-content/uploads/2015/10/uberruling-deakin-article.pdf> accessed 10 November 2021.

63 Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP 2018) 35.

64 HM Revenue and Customs, 'HMRC Internal Manual: National Minimum Wage Manual' (*GOV.UK*, April 2021) <www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual> accessed 10 November 2021.

65 Department for Transport, 'Statutory Taxi & Private Hire Vehicle Standards' (*GOV.UK*, 21 July 2020) 10 <www.gov.uk/government/publications/statutory-taxi-and-private-hire-vehicle-standards> accessed 08 May 2023.

66 Luke Chillingsworth, 'Uber and Taxi Services Face 'Rigorous New Standards', and Rule Changes in Safety Crackdown' (*Express*, 21 July 2020) <www.express.co.uk/life-style/cars/1312373/uber-private-hire-taxi-uk-rules-changes-london> accessed 10 November 2021.

67 Department for Transport, Taxi and Private Hire Vehicle Statistics, England (*GOV.UK*, 16 December 2020) <www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944680/taxi-and-private-hire-vehicle-statistics-2020.pdf> accessed 08 May 2023.

68 Road Traffic Ordinance (Cap 374).

standards on drivers' qualifications and specifications of the vehicle's exterior and equipment.[69] Taxi companies connect passengers and drivers through applications or 'taxi call stations', which provide booking services. Taxi drivers are considered self-employed.[70] As for Uber, customers can request rides through the Uber application.[71] Since taxis and Uber manage drives through app operators, their business models are similar.

Uber's recent acquisition of taxi operation platforms in England and Hong Kong further blurred distinctions between the business models of taxis and Uber. Uber acquired Autocab in England and introduced the Local Cab function in its application.[72] Similarly, Uber acquired HKTaxi in Hong Kong, home to 70% to 80% of the taxi drivers in the city.[73] Uber's expansion in the taxi industry reinforces the similarities between taxis and Uber in operation modes. Hence, Uber should be subject to the control of employment law like taxi companies.

A. Can Uber Drivers be Protected Under the Current Labour Law of England and Hong Kong?

To evaluate whether Uber drivers can be protected under present legal mechanisms, the following examines whether it satisfies the 'control' test, 'mutuality of obligation' test, and 'integration' test. It should be noted that the focus here is mainly on the types of Uber providing driving services, i.e., UberX and Uber Flash. Uber

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69 Research Office Legislative Council Secretariat, 'Measures to enhance the competitiveness of the taxi industry' (IN16/18-19) 2.

70 ibid 2.

71 'Terms and Conditions' (*Uber*, 05 December 2021) <www.uber.com/legal/en/document/?name=general-terms-of-use&country=hong-kong&lang=en> accessed 05 December 2021.

72 Alex Hern, 'Uber Acquires UK Minicab Software Company Autocab' (*The Guardian*, 6 August 2020) <www.theguardian.com/technology/2020/aug/06/uber-buys-uk-minicab-software-company-autocab> accessed 1 September 2022.

73 Kanis Leung, 'Uber Takes Another Big Step into Hong Kong Cab Market with Purchase of HKTaxi App' (*The South China Morning Post*, 20 August 2021) <www.scmp.com/news/hong-kong/hong-kong-economy/article/3145758/uber-takes-another-big-step-hong-kong-cab-market> accessed 1 September 2022.

Eats would be omitted since its business model is more inclined to food delivery platforms that differ from ride-hailing services.

1. 'CONTROL' TEST

In England, on the surface, Uber drivers enjoy flexibility and seemingly have autonomy in employment. Working time is flexible - drivers can determine when to log on to the application and when to drive,[74] so they undertake personal financial risks and gains from their own decisions. Besides, Uber drivers use their own cars.[75]

However, on close inspection, Uber controls drivers since the screening stage. First, Uber has intensive sign-up procedures. Drivers undergo an onboarding process by completing the compulsory Edume Course to familiarise themselves with the Uber application and attend the Greenlight Hub.[76] Furthermore, Uber checks drivers' licenses and requires drivers to purchase their insurance.[77] There are rules on the driving experience as well.[78] Hence, Uber's authority is exemplified in its complicated admission process and stringent rules and regulations. Second, when individuals become drivers, although Uber does not supply 'equipment' for work, Uber limits the types of vehicles that drivers can use.[79] Third, Uber exercises its subtle control through algorithms in its application. For instance, Uber dictates drivers' choice of accepting ride requests. Unlike taxi drivers, who can select orders from passengers, Uber forces drivers to accept ride offers by introducing a prescribed 80% to 90% acceptance rate that pops up on its applications.[80] Otherwise,

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74 'Flexible Driving Opportunities with Uber in the United Kingdom' (*Uber*, 10 January 2022) <www.uber.com/gb/en/drive/> accessed 10 January 2022.

75 'The Basics' (*Uber*, 10 January 2022) <www.uber.com/gb/en/drive/requirements/> accessed 10 January 2022.

76 ibid.

77 *Uber* (n 74).

78 *Uber* (n 75).

79 ibid.

80 Alex Rosenblat and Luke Stark, 'Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 10 International

Uber would log drivers off the application.[81] Hence, Uber, in reality, limits the discretion of taking up work with subtle 'sanctions'.[82] Fourth, Uber charges about 20% commission on each ride. Unlike private car hires, Uber drivers cannot set their desired fares.[83] Their remuneration may be deducted after Uber receives complaints lodged by passengers on drivers and decides to refund. In a way, Uber decides drivers' income, in which drivers have no say.[84] Fifth, Uber indirectly controls drivers' manner of service. Though Uber does not force drivers to follow the designated routes generated by GPS on its application, drivers run risks of being reported by passengers, which eventually reduces their pay.[85]

Weighing the features of Uber, Uber shares the ultimate right of control and has more dominant control over drivers than the limited freedom drivers enjoy. The analysis remains that day-to-day control is unnecessary to satisfy the control test; even Uber drivers do not drive daily. This is affirmed by *Aslam.*[86]

On the other hand, in Hong Kong, Uber drivers need to pass the background screening procedure. Drivers need to purchase vehicle insurance and obtain a Full Driving Licence.[87] For setting fares, the level of control Uber drivers setting fares is even higher than that of taxi drivers. Taxi drivers can choose to undercharge passengers,[88] but Uber intercepts drivers' income

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Journal of Communication 3758, 3761.

81 *Aslam* (n 2) [129].

82 Prassl (n 63) 56.

83 Tom Schimmeck, 'Ubers Globaler Feldzug Für Die "Sharing Economy"' (*Germany Radio Manuscript*, 3 July 2015) 28, 30. When asked "Aber Sie können davon leben?", i.e. 'But can you make a living from it?', Erzählerin replied, 'Uber verlangt in Hamburg derzeit 20 Prozent'. In English, 'Uber is currently charging 20 percent in Hamburg'.

84 *Aslam* (n 2) [20].

85 ibid [98].

86 ibid.

87 'Driver Requirements' (*Uber*, 10 January 2022) <www.uber.com/hk/en/drive/requirements/> accessed 10 January 2022.

88 Research Office Legislative Council Secretariat (n 69) 2.

through commissions. Its pricing algorithm generates the price for each drive[89] and collects money on behalf of drivers as passengers pay by credit cards.[90] As for other features, England and Hong Kong are the same.

Although the current situation in England and Hong Kong satisfies the control test, it does not mean that all Uber's control measures in the future point towards an employment relationship. Control is essential to ensure the market is at equilibrium when there is an oversupply of labour in the market.[91] Albeit present mechanisms are not imposed for this purpose, one cannot rule out the possibility of this in the future.

2. MUTUALITY OF OBLIGATION TEST

In England, Uber drivers provide driving services in exchange for wages from Uber. Therefore, there is reciprocity. The test is satisfied. On the other hand, the 'mutuality of obligation' is not a requirement to find an employment relationship in Hong Kong.[92]

3. 'INTEGRATION' TEST

Since Uber cannot run properly without drivers, it relies heavily on Uber drivers, and they are 'part and parcel' of the company.

4. 'SHAM LABELS' OF 'SELF-EMPLOYMENT.'

Uber stipulates that it 'accepts bookings acting as disclosed agents for the Transportation Provider.[93] It tries to show that the platform

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89 Bill Gurley, 'A Deeper Look at Uber's Dynamic Pricing Model' (*Above the Crowd*, 11 March 2014) <abovethecrowd.com/2014/03/11/a-deeper-look-at-ubers-dynamic-pricing-model/> accessed 10 January 2022.

90 'A Guide for How to Use Uber' (*Uber*, 10 January 2022) <www.uber.com/hk/en/ride/how-it-works/> accessed 10 January 2022.

91 Zoe Adams, 'Labour Law, Capitalism and the Juridical Form: Taking a Critical Approach to Questions of Labour Law Reform' (2021) 50(3) ILJ 434, 459.

92 Rick Glofcheski and Farzana Aslam, *Employment Law and Practice in Hong Kong* (2nd edn, Sweet & Maxwell 2016).

93 'Uber Legal: General Terms of Use', (*Uber*, 10 May 2021) <www.uber.com/legal/en/document/?name=general-terms-of-

is an 'agent' rather than an 'employer'. The contract between Uber and customers informs customers that 'Uber does not provide transportation, delivery or logistics services or function as a transportation carrier, implying its denial of similar operation modes as taxis as a potential employer.[94]

Although in England and Hong Kong, terms of the agreement do not characterise Uber as an employer, with the unequal bargaining power between drivers and Uber, it is likely that the 'sham doctrine' would be invoked, so the court would judge Uber drivers' working status by examining the contract instead of treating the agreements as conclusive.

5. DECISION OF *ASLAM*

In 2021, the English court held that Uber drivers are 'workers' rather than 'customers' or 'self-employed'.

B. Can the English Status of Uber Drivers Be Applied to Hong Kong?

Until now, there has been no ruling in Hong Kong on the employment status of Uber drivers. Would it be possible to apply *Aslam* to Hong Kong? There are three potential concerns.

First, in *R (on the application of IWGB Union) v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* (*Deliveroo*),[95] a case concerning the employment status of Deliveroo workers, the Court of Appeal in judicial review proceedings upheld the decision of the Central Arbitration Committee and came to an opposite conclusion. Nevertheless, since sharing economy platforms adopt different contracts and terminologies within them, we should consider the result on a case-by-case basis instead of treating it as an overarching decision

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use&country=great-britain&lang=en-gb> accessed 01 November 2021.

94 *Uber* (n 71).

95 [2021] IRLR 796.

applicable to all gig economy platforms. Besides, workers in *Deliveroo* failed to be classified as 'workers' mainly because they could find substitutes,[96] which yielded the 'personal' limb in the Employment Act. Since Uber drivers do not share the right to seek replacements, it is unlikely that subsequent cases on Uber would be affected by *Deliveroo*.

The second hurdle is Uber's denial of the effect of *Aslam* on current Uber workers.[97] It claimed that the judgment of the case is confined to the drivers in 2016 under that agreement because drivers now have full transparency over the price and destination of their trips. Since 2017, there has been no repercussion for rejecting multiple consecutive trips. Yet, transparency has no impact on the degree of 'control' under the 'control test'. Besides, features in Chapter 3 remain today, so Uber still exercises a significant degree of control. With the doctrine of precedence in common law explained by the Supreme Court in *R (UNISON) v Lord Chancellor,*[98] since the distinguishing features are not strong enough to depart from the previous decision, it is likely the decision in *Aslam* is still applicable.

Third, the Taylor Review in England leaves uncertainty for the definition of employment status. It proposes that the government re-examine current labour legislation considering digital and technological advances. It is essential to review labour laws. Not only are they affiliated with protecting individuals, but they also ensure businesses operate on a level playing field. At the same time, many business groups call for greater clarity in the legislative framework. The Law Society in England commented that present legislation is complex and hard to understand,[99] so the time is ripe to discuss reform in labour law. The rationale for the proposed change is more explicit legislation, which should not be ambiguous and open to interpretation, so ordinary people or

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96 ibid.

97 'An Update on Today's Supreme Court Verdict' (*Uber*, 19 February 2021) <www.uber.com/en-GB/blog/supreme-court-verdict> accessed 10 January 2022.

98 [2020] AC 869.

99 Taylor (n 30) 34.

responsible employers can understand & seek clarity.[100]

There are three proposed reforms. The first suggestion is to replace current categories with a binary choice between 'employment' and 'self-employment'[101]. This recommendation is the present status in Hong Kong and a recession to the current classifications. The status of 'worker' helps apply basic protections to less formal employment relationships, especially for casual, independent relationships when there is increasing casualisation of the labour market, so it is not the ideal approach.

The second recommendation is relabeling the 'workers' category as 'dependent contractors'. Currently, limb (b) 'workers' comprises all employees, but not all 'workers' are employees. 'The meaning of the term 'worker' is ambiguous'.[102] Hence, the two categories of people eligible for 'worker' rights should be distinguished from one another. It recommends introducing a new name to refer to a category eligible for 'worker' rights but not employees[103]. Yet, in terms of effect, this only changes labels but not substance. The content and tests are still the same.

The third idea is to focus more on the 'control' test.[104] There should be a more apparent distinction between 'employee' and 'dependent contractor' as courts currently interpret dependent contractor' with a slightly lower bar. The status of dependent contractors should bear a more precise definition. Even if employees satisfy the 'control' test, they are not 'workers' if they have the right to substitution. Therefore, it is suggested that we should eliminate the barrier of 'to perform personally' and emphasise 'control'. In reality, there is no significant departure from present principles, and employers may find it harder to hide behind substitution clauses. However, the 'personally' test should still be kept, as *Palmco* has already limited the scope of personally, which allows some degree of substitution. Another

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100 ibid.

101 ibid 35.

102 ibid 35.

103 ibid 35.

104 ibid 36.

problem of the Taylor review is it refers to just *Aslam*,[105] which can hardly reflect the present employment law comprehensively. As a result, the decision of *Aslam* is still likely to be applicable in Hong Kong.

C. What rights should be protected?

As to the relevant employment rights, Uber drivers were classified as 'self-employed' globally before *Aslam*. As a result, they are deprived of basic rights and social benefits, including holiday rights, sick pay, and minimum wages.[106] In England, to be eligible for baseline rights such as the National Minimum Wage or the National Living Wage and basic protection, drivers have to be qualified as 'workers', i.e., being an 'employee' or a 'worker' who personally performs work but not for a client nor customer.[107] While in Hong Kong, drivers should be 'employees' to enjoy benefits in the Employment Ordinance.[108] Moreover, since the operation modes between taxis and Uber are similar, the protection for taxi drivers should be extended to Uber drivers.[109]

Because statistics showed that gig economy corporates might disproportionally benefit from giving small wages, especially for those whose income is below the median,[110] Heidorn (2016) opposed applying statutory minimum wages to the gig economy and believed it would be 'counterproductive'.[111]

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105 *Aslam* (n 2).

106 Mandagere (n 49) 390.

107 Employment Rights Act 1996, s 230(3)(b).

108 *Poon Chau Nam* (n 38).

109 Erin Mitchell, 'Uber's Loophole in the Regulatory System' (2015) 6(1) Houston Law Review 75, 77 (online) <www.houstonlawreview.org/article/4354-uber-s-loophole-in-the-regulatory-system>. accessed 28 August 2022.

110 Molly Cohen and Arun Sundararajan, 'Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy' (2015) 82(1) Chicago University Law Review Dialogue 129.

111 Gesche Heidorn, 'Co-Regulating Uber – Why, and How, Should We Regulate?' (*Centre for Comparative and Public Law*, 2016) <www.scholarshipblog.law.hku.hk/single-post/2016/06/08/the-hku-injunction-reimagined-a-case-on-breach-of-confidence-and-free-

There are two problems with his position. First, the study Heidorn relied on did not explain the income 'below median' amounted to but just generically used the word 'median' to classify groups of workers for the whole report, so it is unclear whether 'below median' is equivalent to statutory wage requirements. It may be potentially higher than the income earned under minimum wages.[112] Thus, there may be no direct relationship between minimum wages and gig economy development. Second, even assuming gig platforms gain advantages from paying below statutory minimum wages, it does not suggest that it is legitimate. As in the above, the government must strike a balance between encouraging business innovations and worker protection, so it would be unjustified to limit the expansion of minimum wage to the gig economy merely from evaluating practical business merits.

On the other hand, McKinsey (2016) discovered four types of gig economy workers, among which individuals relying on the gig economy as primary income constitute one of the largest groups.[113] It is a mistake to perceive that all gig economy workers earn income on a casual basis, and it would be unjust under England's employment law to grant minimum wages to taxi drivers but not to Uber drivers who engage in similar business models and work full-time. As a result, gig economy workers deserve fundamental employment rights, including minimum wages.

D. How can the English status of Uber drivers apply to Hong Kong?

Cohen and Sundararajan (2015) proposed to delegate the regulating responsibility to the parties, as gig platforms play a

press> accessed 01 November 2021.

112 Samuel Fraiberger and Arun Sundararajan, 'Peer-to-Peer Rental Markets in the Sharing Economy' (2015) NYU Stern School of Business Research Paper <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2574337>.

113 James Manyika and others, 'Independent Work: Choice, Necessity and the Gig Economy' (*McKinsey Global Institute*, 10 October 2016), 8 <www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> accessed 28 August 2022.

pivotal role in employment law.[114] However, this approach may lead to a conflict of interest. As highlighted in Cohen and Sundarajan's argument, Uber is a stakeholder.[115] As a multinational company, it shares more bargaining power than Uber drivers with more legal expertise. It would inevitably be self-centered and try to circumvent laws to deny drivers' employment status and the potential expenses flowing from labour protection. Eventually, the status quo would remain unchanged. The legal framework loses its purpose. Hence, the best situation would be a concession to a middle ground: government regulation with a balance of interests between Uber and its drivers. There are three approaches to regulating Uber.

1. SETTING UP A MIDDLE GROUND – 'WORKERS'

Hong Kong currently has no middle ground, i.e., 'workers'. To expand protection for both taxi and Uber drivers, Hong Kong can learn from England and create a new employment status category. Then, it can follow the decision of *Aslam*.

2. LEGALISING UBER

Uber is illegal in Hong Kong now. Under the Road Traffic Ordinance, any person who drives without a car hire permit is guilty of an offence for ride-hailing services.[116] Without a hire-car permit, Uber is illegal, and the firm has faced staunch resistance from the taxi industry. In September 2020, 24 drivers were fined for breaching the Road Traffic Ordinance. Hence, the first step for Hong Kong is to legalise Uber. Moreover, since Uber has already acquired one of the largest taxi platforms, the blurred distinction between Uber and taxi drivers prompts the government to clarify which regulations should apply. For effective regulation and protection, the government should establish unified protection and grant taxi drivers the same status as 'workers'.

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114 Cohen and Sundararajan (n 112) 116 – 117.

115 ibid 117.

116 Road Traffic Ordinance (Cap 374), s 52(3).

3. ADDRESSING UBER'S AVOIDING LEGAL RESPONSIBILITY BY 'RELABELING'

The first solution is to utilise inherent legal principles. The 'sham employment' doctrine is useful as the court examines substance. It observes what is practised in reality but not labels.

The second way is to resort to reflexive labour law. The above rights-based approach is passive. It requires workers to realise their rights and litigate in the employment tribunal to obtain a decision to enforce their employment rights. This is inefficient as workers need to go through a tedious process. Furthermore, it ignores the problem of access to justice,[117] which may bar drivers from commencing legal action in the first place. Reflexive labour law endorses regulation through self-regulation.[118] The government only lays out procedural steps and uses legislation as guidance to retain the flexibility of rules.[119] Applying this to Uber, Uber would regulate itself under the government's general standards on procedures.

Meanwhile, rather than Uber deciding all policies and workers playing a passive role, participation is the key as workers determine working conditions with representatives under transparent procedures.[120] At the same time, employers need to live up to their obligations and provide protection to employees in a myriad of aspects, ranging from unfair dismissals to working conditions on health and safety, from discrimination to wages. In Uber's context, there can be disciplinary hearings before dismissal unless there is a severe breach of contract. Besides, as the acceptance rate of rides determines whether drivers would be laid off, there should be procedures to create space for communication and let drivers explain why they fall under the standard. Despite current mechanisms, Uber generally does not delve deeply into

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117 Ralf Rogowski, *Reflexive Labour Law in the World Society*, (Edward Elgar Publishing 2015) 94.

118 ibid 97.

119 ibid.

120 ibid 108.

allegations unless there is corroborating evidence.[121] For working conditions, Uber has to provide insurance for drivers, but the coverage would be negotiated between the company and workers. For discrimination, Uber can consult minorities before setting standards.

Although Able at Uber is dedicated to caregivers and employees with disabilities[122], most efforts are not benefiting drivers. Even though there are socioeconomic initiatives for equality at Uber, Hong Kong has no significant notable accomplishments.[123] For income, there can be a maximum cap for Uber's commission to secure drivers' income. There should be effective internal complaint procedures for Uber drivers to reflect on problems and negotiate pay. Thus, reflexive labour law encourages interactions between parties and facilitates workers in communicating and asserting their needs.[124] Under this approach, employment tribunals are still useful in serious disputes, so they are not replaced. A balance has to be maintained between flexibility and security.[125] To ensure regulation enforcement, Hepple (2012) highlights that there should be an independent agency that can impose deterrent sanctions if voluntary methods fail.[126] To facilitate regulation, state regulators should set legal sanctions, such as fines.

Moreover, an independent department under the Labour Department can be established to supervise Uber's progress. It can

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121 Greg Bensinger, 'When Rides Go Wrong: How Uber's Investigations Unit Works to Limit the Company's Liability' (*The Washington Post*, 26 September 2019) <www.washingtonpost.com/technology/2019/09/25/ubers-investigations-unit-finds-what-went-wrong-rides-its-never-companys-fault/> accessed 30 June 2022.

122 '2021 People and Culture Report' (*Uber*, 2021) <www.uber.com/us/en/about/diversity/> accessed 30 June 2022.

123 Uber, 'Equal at Uber' (*Uber*, 2021) <www.uber.com/us/en/about/diversity/equal-at-uber/> accessed 30 June 2022.

124 *Rogowski* (n 117) 106 – 107.

125 ibid 112.

126 Bob Hepple (2012), 'Agency Enforcement of Workplace Equality', in Linda Dickens (ed), *Making Employment Rights Effective – Issues of Enforcement and Compliance* (Hart Publishing 2012) 50.

require Uber to write regular reports on its measures to protect drivers and submit meeting notes as proof. Besides, a trade union can be set up as representatives for discussions with Uber and internal monitoring. As Dickens (2012) commented, workplace compliance with employees' rights occurs.[127] With a transparent and open mechanism, the interests of Uber drivers can be safeguarded, and Uber would be less likely to shred its employer responsibility since it takes part in drafting details of regulations as well. Therefore, it may be more willing to enforce the regulations. Most importantly, under the unique atypical employment relationship, appropriate regulations corresponding to this employment mode can be formed with laws as guidance and assistance. It can respond to market changes swiftly without undergoing a long legislative process at the same time.

CONCLUSION

Despite possible compensations under the Employees' Compensation Ordinance, Uber drivers in Hong Kong generally enjoy limited labour rights due to their self-employment status. This article debunks some academic arguments against drivers' protection and addresses the limitations of directly delegating regulating responsibility to relevant parties. Since Uber is an extension of current ride-hailing mechanisms, this article suggests that Uber drivers deserve protection. There are three pillars to fill the current void: (i) upholding the decision of *Aslam*; (ii) legalising Uber; (iii) including the 'workers' status under the legislation and adopting the approach of reflexive labour law. Nevertheless, as the effectiveness of the three pillars is somehow subject to legislative attitude and the responses of Uber, there is still a long road ahead to protect Uber drivers.

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[127] Linda Dickens (2012), 'Fairer Workplaces: Making Employment Rights Effective', in Linda Dickens (ed), *Making Employment Rights Effective – Issues of Enforcement and Compliance* (Hart Publishing 2012) 205.

THE FUTURE OF CORPORATE RESCUE LEGISLATION IN HONG KONG: CROSS-BORDER ISSUES AND SOLUTIONS

Wai Hiu Chun Alston*

This article examines the future of corporate rescue in Hong Kong in light of the proposed corporate rescue legislation and recommendations by the Law Reform Commission. There is an apparent neglect of cross-border issues in the local proposals, which casts doubt on the effectiveness of the eventual corporate rescue regime in a global commercial environment. This article scrutinises the proposed mechanism for Hong Kong and compares it with the corporate rescue laws of the United States, the United Kingdom, and Singapore. Additionally, the UNCITRAL Model Law on Cross-Border Insolvency and the EU Regulation on Insolvency Proceedings provides effective guidance for the future of Hong Kong's corporate rescue legislation. In light of these laws and international guidance, this article recommends amendments to the existing proposals for Hong Kong, with an aim for a comprehensive and globally-minded corporate rescue framework that improves upon the foreign systems that have been analysed.

INTRODUCTION

A robust reorganisation process is the staple of every successful corporate insolvency regime. There are many benefits to rescuing a corporation in distress, such as preserving business goodwill, saving jobs, and mitigating losses for both creditors and debtors

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in the long run.[1] Ending the corporate life of a company is not always the preferred course. Unfortunately, Hong Kong has gone decades without formal corporate rescue legislation, and such reform is urgently needed.[2] In light of the recent discourse of an emerging corporate rescue bill,[3] this article presents a comparative analysis between the proposed corporate rescue regime in Hong Kong, which has been in the making for over 20 years, and the rescue legislation of the United States, United Kingdom, and Singapore. These three common law jurisdictions are apt for comparative analysis with Hong Kong. Their rescue laws present a wide spectrum of varying approaches to corporate restructuring and paint a clear picture of international standards. In addition, the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law')[4] and the 2017 European Union Regulation on Insolvency Proceedings 2015 (the 'EU recast')[5] will be analysed in the context of corporate rescue. Hong Kong may learn from previous experiences, identify the flaws of existing systems, and refine its rescue regime to surpass the competition.

Drawing from international jurisprudence, this article argues that the proper way forward for corporate rescue legislation in Hong Kong is to address cross-border issues as an integral part of its corporate rescue regime. Particularly, proposed changes include adopting flexible hybrid approaches to restructuring, which appeal to multiple stakeholders, bringing the law in line with international standards of cooperation and recognition, and mandating satisfaction of cross-border duties to ensure the success of the rescue. It is hoped that this article occupies a niche in the literature, as academic discourse on corporate restructuring

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1 Gerard McCormack, *Corporate Rescue Law - An Anglo-American Perspective* (Edward Elgar Publishing 2008) 21, 22.

2 *Re China Oil Gangran Energy Group Holdings Limited* [2020] HKCFI 825 [9] (Harris J).

3 Legislative Council, *Implementation of the recommendations made by the Law Reform Commission of Hong Kong* (CB (4)715/19-20(01), 2020) 2.

4 United Nations Commission on International Trade Law (UNCITRAL), *Model Law on Cross-Border Insolvency* (UN Sales No: E14 V2, 2014).

5 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19.

legislation in Hong Kong, especially one with a focus on cross-border issues, is scarce.

Part I of this article will examine the proposed rescue framework in Hong Kong and identify the cross-border problems which have been mainly neglected. Parts II, III, and IV analyse and compare the rescue laws of the three chosen jurisdictions with the proposed framework of Hong Kong. Finally, Part V examines international approaches to cross-border corporate rescue and proposes a way forward for Hong Kong to introduce a corporate rescue law which befits the title of one of the leading international financial centres of the world.

I. LEGISLATIVE PROPOSALS IN HONG KONG

The want for comprehensive corporate rescue legislation in Hong Kong is not recent. In 1996, the Law Reform Commission (the 'LRC') recognised the need to solidify Hong Kong's insolvency laws and proposed the rescue procedure known as 'provisional supervision' ('PS').[6] Unfortunately, over two decades later, no progress has been made in enacting a statute.

Under current Hong Kong laws, the procedure most akin to corporate rescue is a scheme of arrangement under section 673 of the Companies Ordinance (Cap 622). However, the section 673 arrangement is entirely voluntary and is not a formal rescue procedure protected by a stay of proceedings. Any creditor can file to wind up the company, thereby defeating any attempt to formulate a rescue arrangement. To cure that defect, companies have attempted to rely on provisional liquidators. Under section 186 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap 32), a debtor is protected from claims by creditors once a provisional liquidator is appointed. However, the Court of Appeal decided in *Re Legend International Resorts Limited*[7] that a provisional liquidator cannot be appointed under section 193 of Cap 32 for the sole purpose of corporate rescue. To

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6 Law Reform Commission of Hong Kong, *Report on Corporate Rescue and Insolvent Trading* (1996).

7 [2006] 2 HKLRD 192.

circumvent this, creative cross-border solutions have emerged. In *Re Z-Obee Holdings Limited*,[8] Mr Justice Harris allowed parallel schemes of arrangement in Hong Kong and Bermuda for the purpose of rescue. Since provisional liquidators can be appointed for rescue under Bermuda law, the *Re Legend* constraint was avoided. However, Mr Justice Harris commented extrajudicially that this is 'not an ideal way to work and called for a formal statutory regime to meet growing needs for restructuring'.[9]

Indeed, relying on a foreign parallel proceeding is not always viable, as it increases time and cost and adds extra hurdles and unnecessary complexity. Moreover, it is not the proper way of recognising foreign proceedings in the cross-border context.[10] Without adequate legislation, corporate rescue remains cumbersome, and companies are disincentivised from pursuing it. There is a concerning gap in the legislation waiting to be filled by the promised legislative bills. This section examines the content of existing proposals and potential issues that may warrant extra attention.

The proposed PS is, at its core, a simple procedure. It is commenced by appointing a certified public accountant or practising solicitor to take the role of provisional supervisor (the 'Supervisor'), who will manage the affairs of the company and formulate a rescue plan.[11] The goal is to produce a voluntary arrangement to rescue the company, which will eventually be voted for by creditors. If no consensus can be reached in the end, PS will cease, and the company will revert to its status before the commencement of PS or be wound up.[12]

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8 [2018] 1 HKLRD 165.

9 Cynthia Claytor, 'Face to Face with Justice Jonathan Harris Court of First Instance of the High Court, Hong Kong SAR' *Hong Kong Lawyer* (Hong Kong, May 2017).

10 *Re Moody Technology Holdings Limited* [2020] 2 HKLRD 187 [16] (DHCJ Wong SC).

11 Legislative Council, *Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure* (CB (1)1536/13-14(01), 2014) Annex B, items 1.1 and 24.1.

12 ibid, item 32.2.

The most distinctive feature of a corporate rescue procedure is a stay of proceedings, also known as a moratorium, which shields the debtor from creditors' claims. Under the 2014 proposals, such a moratorium applies upon the commencement of PS for an initial period of 45 working days, which can be extended to up to 6 months by creditors and beyond that with court sanction.[13] The moratorium bars all proceedings against the company or any of its property unless with the written consent of the Supervisor or the leave of court.[14] This is crucial to the success of the rescue, as the Supervisor can focus on formulating a rescue plan without having to worry about creditors rushing to file their claims. However, as explained later, a local moratorium may encounter difficulties in a cross-border environment.

Before delving into oft-neglected cross-border issues, the proposed regime of PS has a few notable characteristics worthy of discussion. To begin with, PS will apply to any company incorporated or registered in Hong Kong under Cap 622, which includes registered foreign companies.[15] This is a good starting point in building rescue legislation that is conscious of cross-border issues. However, there may be adequate reasons to expand the application to other foreign companies, which will be explored later.

Next, PS can be commenced by a company's directors, members, liquidator, or provisional liquidator, with the consent of the major secured creditor.[16] This means that creditors are precluded from commencing PS, even though the design of PS appears to be pro-creditor, as the debtor surrenders control of the company to the Supervisor. If the procedure is unfavourable to directors, they have little incentive to initiate it, and creditors, who may have more incentive, cannot commence it of their own accord. This may make PS an unpopular procedure, thereby frustrating the purpose of the legislation.

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13 ibid, items 32.3(d) and 33.

14 ibid, item 15.

15 ibid, item 4.

16 ibid, item 5.

In their report, the LRC insisted that a pro-creditor approach is more suitable in Hong Kong. They believe that creditors in Hong Kong will not accept a debtor-in-possession model, as debtors will likely abuse it to delay obligations.[17] The suitability of the debtor-in-possession model will be further discussed in Section II below.

Another potential issue is the requirement of insolvency or likely insolvency before PS can commence.[18] Many companies may encounter financial difficulties without qualifying for likely insolvency. These companies should not be precluded from pursuing restructuring in advance to avoid incurring further losses. Indeed, it may often be too late for corporate reorganisation once a company is insolvent or likely insolvent. The law, as proposed, should go further to permit and encourage prompt corporate rescue.

Beyond substantive issues, the cross-border dimension of corporate rescue cannot be overlooked. For instance, while the moratorium shields the debtor from creditors' claims when PS commences, it may not have extraterritorial reach. If a Hong Kong company commences PS, does the moratorium apply when creditors file their claims in the United States? Will the American courts endorse the Hong Kong moratorium?

On the face of it, the wording of the moratorium is not limited by location, as it refers to 'proceedings against the company or any of its property',[19] without specifying the place. However, purely employing a cursory reading and interpretation may be unreliable. The fact that the 2014 proposals have neglected to consider cross-border issues in this regard is cause for concern, especially considering the global nature of most Hong Kong companies.

Surprisingly, it is the 1996 report that acknowledged cross-border provisions of the rescue laws of other countries, but

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17 Law Reform Commission (n 6), paras 1.11 and 8.3.

18 Legislative Council (n 11), item 3.

19 ibid, item 15.1(b).

the matter was left to be further discussed.[20] The LRC concluded that getting foreign countries to recognise and enforce a local moratorium through multinational treaties is impractical, as countries are reluctant to adopt such treaties.[21] Consequently, the best solution is for Hong Kong to enter into reciprocal arrangements with key jurisdictions so that its local rescue procedures will apply in those foreign jurisdictions.[22] Nonetheless, there are more efficient ways to tackle cross-border issues, and the rescue laws of foreign jurisdictions provide useful guidance, as shown below.

II. UNITED STATES BANKRUPTCY CODE

The statutory reorganisation regime of the United States is mainly contained in the Bankruptcy Code (the 'Code'),[23] particularly Chapter 11 thereof. The debtor or creditor may commence a Chapter 11 rescue,[24] and insolvency is not required. The procedure is the quintessential example of a debtor-in-possession model, wherein the company's current management remains in control to formulate a rescue plan. While debtor-in-possession has been criticised for allowing a debtor to delay obligations, it does not entail unfettered power and discretion afforded to the debtor.

The United States Trustee Program (the 'USTP'), a component of the United States Department of Justice, will monitor the debtors to ensure they perform their functions properly. Under section 341 of the Code, the USTP, along with creditors, may question the debtors under oath concerning their administration of the Chapter 11 case. The USTP may dismiss the case if the debtor fails to fulfil all duties and requirements. This may address the concerns of the LRC, as section 341 presents a mechanism to ensure that the moratorium is not abused to delay obligations without cause.

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20 Law Reform Commission (n 6), paras 1.40 – 1.43.

21 ibid.

22 ibid.

23 United States Code (USC), Title 11.

24 ibid, s 1121.

Moreover, restructuring under Chapter 11 does not have to be confined to the debtor-in-possession model. Under certain circumstances, such as where the debtor is dishonest or incompetent, section 1104 of the Code allows the USTP or creditors to apply to the court to appoint a case trustee to take over the management of the company.

The hybrid model of the Code allows for both debtor-in-possession and 'supervisor-in-possession', which is more attractive to both debtors and creditors than a rigid model. The flexibility of this system caters to the interests of various stakeholders and contributes towards promoting and encouraging corporate rescue.

Leaving aside the hybrid approach, Hong Kong has good reasons to adopt a debtor-in-possession model. First, the debtor has experience managing the company and is more familiar with it than an outsider, such as the Supervisor. Therefore, the debtor is better positioned to design a restructuring plan that best suits the company regarding its financial difficulties, corporate structure, clientele, and future developmental plans. Also, from a cross-border perspective, if the company in question is a multinational corporate group, the debtor will be better equipped to facilitate cooperation among the cross-border branches and subsidiaries of the group. This is something an outsider with no knowledge of the group's corporate structure may struggle to do. Finally, if the debtor requires expertise in insolvency and restructuring, he can always employ a solicitor or other professional advisers. There is no need, and indeed may be undesirable, for the debtor to surrender control.

Another important feature of the Code is the moratorium, which applies as soon as a Chapter 11 petition is filed.[25] Compared to Hong Kong's proposed moratorium, which only commences when the Supervisor is appointed, the Chapter 11 moratorium applies with remarkable immediacy. Not only that, but the Chapter 11 moratorium also purports to have a global reach. This is because the automatic stay covers a debtor's property 'wherever

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[25] ibid, s 362.

located'[26] and has been consistently applied by the American courts as having international reach since the case of *Re McLean Industries*.[27]

Notwithstanding, the purported global moratorium is merely a legal fiction.[28] American courts claim the moratorium applies globally, but foreign jurisdictions may not recognise and enforce it. If the creditor in question, who files an action against the debtor in contravention of the moratorium, has no assets or relations in the United States, the American courts cannot realistically impose any penalties on that creditor. The case of *In re Gucci* illustrates the difficulty of a moratorium that purports to be global, as the court acknowledged the impossibility and logical fallacy of holding the decision of an Italian court invalid, admitting that 'the property in question here is located in Rome, its fate will ultimately be determined by Italian courts'.[29]

Since no local law can bind a foreign court, cross-border issues are a matter of cooperation and reciprocity. In the case of *In re Artimm*, the United States Bankruptcy Court endorsed an Italian moratorium, which also had purported worldwide reach, reasoning that 'the United States cannot expect that foreign courts will recognise the extraterritorial reach of its automatic stay if its courts do not equally recognise a foreign automatic stay'.[30] While this is not a legal rule, it is built on the *quid pro quo* sentiment. It is much more realistic than unilaterally insisting that a local moratorium has a global effect. This theory of reciprocity has a strong logical basis, which may be persuasive to many foreign courts and may be considered for Hong Kong's rescue regime.

II. RESCUE LAWS IN THE UNITED KINGDOM

The United Kingdom has two corporate reorganisation

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26 ibid, s 541(a); Title 28 of the USC, ss 157(a) and 1334(e).

27 74 BR 589 (Bankr SDNY 1987).

28 David P Stromes, 'The Extraterritorial Reach of the Bankruptcy Code's Automatic Stay: Theory vs Practice' (2007) 33 BJIL 277, 283.

29 *In re Gucci* 309 BR 679 (SDNY 2004), 683 – 4.

30 *In re Artimm* 278 BR 832 (Bank CD Cal 2002), 841.

procedures: the former administration procedure and the latest cram-down scheme. The earlier procedure under the Insolvency Act 1986 ('IA 1986') is similar to the proposed PS regime in Hong Kong. The administration procedure involves an administrator appointed to take control of the company and formulate a reorganisation plan.[31] Certain creditors, members, or directors of a company may commence administration.[32] Notably, IA 1986 provides an interim moratorium, in addition to the regular moratorium, which applies when administration formally commences.[33] Insolvency or likely insolvency is usually a requirement,[34] but there are exceptions.

All in all, the administration procedure, while similar to PS, has considerable advantages. While both regimes adopt the supervisor-in-possession model, certain creditors can commence administration, but creditors cannot commence PS. This means that creditors are incentivised to adopt the supervisor-in-possession model, which is seemingly more attractive, thereby fostering a corporate reorganisation culture. Instead of simply filing to wind up the company, creditors have the option of rescue. Where rescue is apt to produce a more favourable outcome for various stakeholders, it may result in a win-win situation. Furthermore, the interim moratorium takes immediate effect upon filing for administration, akin to a Chapter 11 automatic stay. This provides much more expedient protection to companies looking to pursue administration and is a feature that could be implemented in Hong Kong's PS regime. Of course, creditors may worry that an early moratorium will be exploited by debtors too easily and efficiently, and a balance must be struck to cater to conflicting interests.

In response to COVID-19, a new corporate rescue procedure is now available under the Corporate Insolvency and Governance Act 2020 ('CIGA 2020'). The CIGA 2020 rescue adopts a debtor-in-possession model, which has been included as a new species of a scheme of arrangement under the Companies

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31 Insolvency Act 1986, Sch B1, paras 1 & 3

32 ibid, paras 14, 22.

33 ibid, paras 42 – 44.

34 ibid, para 11(a).

Act 2006 ('CA 2006').[35] Much like in the United States, the debtor-in-possession is monitored by an independent third party appointed by the court, simply named the 'monitor'.[36] The monitor is an officer of the court.[37] The monitor is tasked with supervising the duties of the debtor and constantly assessing the likelihood of a successful restructuring.[38] If the monitor is of the opinion that successful rescue will be improbable or that the debtor has not complied with requirements, the monitor can terminate the moratorium.[39]

As aforementioned, adopting a debtor-in-possession model has many benefits, especially in cross-border restructuring. Based on the precedents of the United States and the United Kingdom, the debtor-in-possession model is frequently accompanied by a supervising mechanism, which ensures that the company directors are not simply relying on the moratorium to stall for time. This safeguards the legitimate interests of creditors while allowing a much smoother process of rescue where the existing management of the company can remain to facilitate rescue, which is especially valuable in the case of multinational corporate groups. Drawing from their experience, Hong Kong may consider adopting a similar system.

Additionally, the new rescue scheme introduced by CIGA 2020 applies to companies in 'financial difficulty', meaning that insolvency or likely insolvency is not a requirement.[40] The scheme is also called a cross-class cram-down scheme since the court can bind the dissenting class of creditors to an agreed rescue scheme.[41] Moreover, the new cram-down scheme is open to a company early on when financial difficulties first arise. Therefore, the success rate of rescue under the cram-down scheme is vastly

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35 Companies Act 2006 (CA 2006), Part 26A.

36 Insolvency Act (n 28), s A7; Corporate Insolvency and Governance Act 2020, Ch 5.

37 Insolvency Act (n 28), s A34.

38 ibid, s A35.

39 ibid, s A38.

40 Companies Act (n 35), s 901A (2).

41 ibid, s 901G.

improved as companies are less likely to be wound up before a rescue plan is agreed upon. Consequently, more companies will be motivated to pursue reorganisation in financial distress. Against the backdrop of COVID-19, this is an invaluable improvement to the traditional administration approach. When combined with the ability to bind dissenting creditors, the new scheme represents a shift towards a pro-debtor approach in the United Kingdom, bringing the law in a similar direction as that of the United States. However, to some people, the cram-down mechanism may seem draconian. Given the pro-creditor tendency of existing Hong Kong proposals, it is uncertain whether such a drastic shift will be welcomed in Hong Kong.

Furthermore, the new regime under CIGA 2020 has an obvious flaw in the new moratorium, representing a peculiar downgrade from the existing moratorium design of the administration procedure. Firstly, the new moratorium system is entirely separate from the rescue scheme,[42] which is counter-intuitive and unnecessarily convoluted. Every well-designed rescue regime has a moratorium, and there is no cogent reason why the moratorium must be applied separately. While it is true that the conclusion from the public consultation was in favour of a standalone preliminary moratorium, which can allow businesses time to consider options for rescue,[43] this does not necessitate the exclusion of an automatic moratorium for the new cram-down scheme. Businesses can benefit from this new moratorium, independent of any insolvency proceeding, allowing them time to consider their options. However, if a company is already determined to pursue the cram-down scheme, there should be an automatic moratorium, much like the one available to the administration procedure. This defect will cause the new cram-down scheme to become an inefficient rescue procedure, as debtors must pray that no winding up petition will defeat their attempt at rescue while they apply for the moratorium.

The United Kingdom now offers two restructuring

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42 Insolvency Act (n 28), s A1.

43 Department for Business, Energy & Industrial Strategy, *Government Response: Insolvency and Corporate Governance* (2018) 42, paras 5.6 – 5.9.

options: a debtor-in-possession model and a supervisor-in-possession model. The flexibility is likely attractive to creditors and debtors and is a route Hong Kong can consider. Unfortunately, certain crucial features have been inexplicably locked behind either system. For instance, an automatic moratorium is only available to the administration procedure, whereas companies in financial distress but not yet insolvent can only rely on the cram-down scheme. Learning from these inconsistencies, Hong Kong should adopt a more holistic approach to statutory design.

III. RISE OF SINGAPORE: THE MOST COMPETITIVE CROSS-BORDER RESCUE HUB IN ASIA

The final foreign jurisdiction this article considers is Singapore, which has built a unique system to attract foreign businesses to pursue restructuring in Singapore. Their corporate rescue law is contained in the Insolvency, Restructuring, and Dissolution Act 2018 ('IRDA 2018'), which has elements of the rescue laws of the United States and the United Kingdom. However, among the rescue laws of the three jurisdictions, Singapore's IRDA 2018 is the most globally conscious and ambitiously competitive.

IRDA 2018 provides for two rescue procedures, which include provisions for a scheme of arrangement under Part 5 and judicial management under Part 7. The Part 5 scheme is a debtor-in-possession model similar to Chapter 11 of the Code and the CIGA 2020 cram-down scheme. Section 64(8) provides for an automatic interim moratorium, which applies as soon as a company files for a moratorium under Part 5. By contrast, Part 7 judicial management is largely similar to the United Kingdom's administration procedure and Hong Kong's PS, as it adopts a supervisor-in-possession model. If a company is insolvent or likely to become insolvent, it can be placed under judicial management to rescue the company,[44] and a moratorium will apply when the judicial manager is appointed.[45] The moratorium for a Part 5 cram-down scheme under IRDA 2018 is automatic,

[44] IRDA 2018, s 90.

[45] ibid, s 96(1)(b).

much like Chapter 11 of the Code. On the face of it, Singapore's regime is similar to that of the United Kingdom in that two distinct procedures are available as alternatives. However, IRDA 2018 has avoided the deficiency of the new moratorium system under CIGA 2020. By avoiding the cumbersome moratorium under CIGA 2020, which must be applied separately, IRDA 2018 provides debtors with immediate protection upon filing, thereby encouraging corporate rescue and ensuring its success.

Further, the moratorium has an additional special feature under a Part 5 scheme. Section 65 of IRDA 2018 provides that an auxiliary moratorium may be applied for by the company's subsidiary or holding company in rescue. This extends to associated companies overseas, so long as they play a 'necessary and integral role' in the restructuring process.[46] A multinational corporate group can rely on section 65 to extend protection to overseas entities within the group without initiating a separate rescue procedure, thus saving time and costs. This new feature puts Singapore ahead of both the United States and the United Kingdom in the treatment of cross-border issues.

Another crucial provision under IRDA 2018 focused on cross-border issues is section 246(3), which is likely to spark controversy due to its unorthodox design. Section 246(3) provides that insolvency proceedings under IRDA 2018, including the scheme of arrangement and judicial management, apply to foreign companies with a 'substantial connection' to Singapore. The requirement of 'substantial connection' may be satisfied if Singapore is the centre of main interest ('COMI') of the company, carries on business in Singapore, is a registered foreign company, has substantial assets in Singapore, or has a transaction governed by Singapore law. In short, a wide class of businesses worldwide will be able to qualify for the rescue procedures under IRDA 2018. This was designed to attract foreign businesses to pursue corporate rescue in Singapore, strengthening their economy. However, such a far-reaching provision runs into problems like the ones encountered by the global moratorium of the Code: will foreign jurisdictions recognise and enforce a Singapore rescue and moratorium? To understand how the treatment of cross-border

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[46] ibid, s 65(2)(c).

issues in IRDA 2018 differs from international standards, the next section of this article will examine the Model Law and EU recast before recommending amendments to Hong Kong's proposed regime.

IV. WAY FORWARD FOR HONG KONG: MATCHING INTERNATIONAL STANDARDS

In a corporate restructuring, cross-border issues often arise when a debtor seeks to enforce a local moratorium in foreign jurisdictions to shield themselves from foreign creditors. Many businesses operate globally, and this trend will surely continue to develop. This is especially relevant in Hong Kong, where multinational corporations take their first step to expand into the Chinese market, enterprises of all scales opt to incorporate tax havens around the world, and businesses thrive on the city's reputation as an international financial hub.[47] Hong Kong's corporate rescue legislation will lag a few decades behind if careful consideration and planning are not given to the cross-border dimension of insolvency and restructuring.

The Model Law, adopted by 55 jurisdictions,[48] including the United States,[49] the United Kingdom[50] , and Singapore, is the most widely recognised standard on cross-border insolvency issues.[51] The Model Law differentiates between main and non-main proceedings. A country that has enacted the Model Law will recognise a foreign insolvency proceeding as a foreign main proceeding if it comes from a jurisdiction that is the company's

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47 Clémence Chauvin and Régis Chenavaz, 'The Appeal of Doing Business in Hong Kong, Singapore, and Shanghai' (2017) 37 Global Business and Organizational Excellence 59.

48 United Nations, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' <www.uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 7 April 2022.

49 Ancillary and Other Cross-Border Cases, 11 USC, Ch 15, ss 1501 – 1532.

50 Cross-Border Insolvency Regulations 2006, SI 2006/1030.

51 IRDA 2018, s 252.

COMI and as a non-main proceeding if it comes from a jurisdiction where the company has an establishment.[52] Upon application, a foreign main proceeding will be recognised by a jurisdiction adopting the Model Law, and a moratorium will apply automatically to shield the debtor's assets.[53] Conversely, a foreign non-main proceeding will not have such automatic protection, but discretionary relief may be granted.[54] While COMI is not defined under the Model Law, a company's place of the registered office is presumed to be its COMI unless the contrary is proved.[55] Meanwhile, 'establishment' is 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'.[56]

In the context of the Model Law, it becomes apparent what issues may arise under the far-reaching definitions of 'substantial connection' under IRDA 2018.[57] Cross-border recognition and enforcement is a two-way street. While Singapore ambitiously procures business opportunities through its unorthodox approach, the remarkable deviation from the Model Law will cause complications if a Singapore rescue procedure is to be recognised elsewhere.

To illustrate, suppose a fictional company, Cool Brand Computational Intelligence Limited ('CBCI Ltd'), is incorporated in Hong Kong, has creditors in the United Kingdom, and has a transaction governed by Singapore law. CBCI Ltd successfully initiates rescue and applies for a moratorium in Singapore as the substantial connection test is satisfied. In that event, will the Singapore rescue and moratorium be recognised worldwide? Suppose CBCI Ltd then goes to the United Kingdom to apply for recognition to bind creditors there: when the English courts look at the Model Law, they will find that CBCI Ltd does not have its COMI in Singapore. CBCI Ltd is incorporated in Hong Kong, and

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52 Model Law, art 17(2).

53 ibid, art 20(1).

54 ibid, art 21(1).

55 ibid, art 16(3).

56 ibid, art 2(f).

57 IRDA 2018, s 246(3).

one single transaction under Singapore law is not enough to rebut the presumption of COMI.

Furthermore, CBCI Ltd does not have an establishment in Singapore, as a lone transaction does not qualify as 'non-transitory'. Further, a lone transaction does not involve 'human means' unless CBCI Ltd sets up a place of business there. Accordingly, the English courts have no basis for recognising the Singapore rescue under the Model Law. CBCI Ltd must instead apply for a local rescue proceeding in the United Kingdom.

While the extensive reach of IRDA 2018 might help Singapore attract more business, it is troublesome in cross-border cooperation as it extends too far beyond the scope of international standards, namely the Model Law. Hong Kong is not recommended to imitate this approach. Above all, the sentiment of reciprocity must be borne in mind. The closer Hong Kong's rescue laws are to the global standard, the easier and more likely it is for a foreign court to recognise and enforce a Hong Kong rescue proceeding.

To that end, Hong Kong may look to other benchmarks of cross-border recognition apart from the Model Law for inspiration. In contrast to the Model Law, the EU recast provides for automatic recognition. Much like the Model Law, the EU recast also separates foreign proceedings into two categories: main and secondary. As soon as the main proceeding commences in the COMI of a company, it takes effect in all member states within the European Union.[58] There is no need to apply for recognition like under the Model Law. Additionally, under the EU recast, COMI is defined as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'.[59]

Conversely, recognition and enforcement under the Model Law may be plagued by uncertainty in certain circumstances. For instance, not every foreign proceeding will always be recognised and enforced by a country adopting the

[58] EU Recast, art 19(1).

[59] ibid, art 3(1).

Model Law, as Article 6 provides a ground of refusal based on policy considerations of the country. Public policy has been limited to fundamental concerns such as natural justice or constitutional rights.[60] Nonetheless, the exception remains, and other states adopting the Model Law can interpret the exceptional ground under Article 6 in their own ways. Moreover, the lack of a formal definition of COMI also creates doubt as to whether a rescue proceeding has been commenced in the right jurisdiction. If every state under the Model Law may endorse a slightly different interpretation of COMI, then a chaotic situation may occur in which different courts point to different places, necessitating multiple independent proceedings to be commenced in parallel. This can eventually defeat the purpose of the Model Law.

However, these challenges cannot be overcome simply by championing the EU recast as the superior system. Implementing a network as the EU recast on a global level is idealistic and impractical. Importantly, the EU recast only operates as it does due to its geographical limitation to the European Union. If foreign rescue proceedings are to take automatic effect internationally, as they do under the EU recast, this would mean that every court in every jurisdiction in the world must cross-check whether rescue proceedings have commenced in a foreign jurisdiction before granting relief to a creditor filing a claim against a debtor. The amount of time, resources, and cross-border cooperation required to make this a reality is impossible.

Currently, even the Model Law has limited application across the globe. As the LRC commented in their report, a global treaty is an unrealistic goal.[61] The LRC recommended that Hong Kong make reciprocal arrangements, but that requires a separate arrangement to be enacted with every foreign jurisdiction with which many businesses in Hong Kong may have dealings. This time-consuming and onerous design runs into much of the same practical limitations as a global treaty and thus only provides a

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60 *Micron Technology, Inc v Qimonda AG (In re Qimonda AG Bankruptcy Litigation)* 433 BR 547 (ED Va 2010); *Re Agrokor DD* [2017] EWHC 2791 (Ch).

61 Law Reform Commission (n 6), para 1.43.

limited solution.

To facilitate cross-border corporate rescue in its legislation and promote the region as a leading corporate rescue hub, Hong Kong must adopt a holistic and practical approach. The final segment of this article will outline the recommended changes to Hong Kong's existing PS proposal in light of lessons learnt from the statutory regimes of other jurisdictions, as well as international standards in cross-border insolvency.

A. Flexible Hybrid Model of Corporate Restructuring

Under this proposal, it is hoped that the substantive rescue laws of Hong Kong's PS regime will offer flexibility and cater to the interests of different stakeholders. Firstly, in addition to directors, members, and liquidators, major creditors should also be able to initiate PS. Nothing is lost in opening this option to creditors. As more stakeholders can pursue a corporate rescue, it will foster a healthy culture of restructuring and preserving distressed businesses. Secondly, when the Supervisor is appointed, the party commencing PS will elect whether the debtor will remain in possession, with the Supervisor monitoring his duties (like the USTP or a monitor under CIGA 2020), or if the Supervisor will take over management, as in the original design of PS. Since the commencement of PS is open even to creditors under this proposal, all interested parties can select their preferred approach, making PS a much more attractive option for all parties concerned.

One drawback of this model is that whoever commences PS first will have control over which model to adopt. Thus, a frantic race to file for PS might ensue. However, this will not create the same kind of chaos that usually occurs when a company is insolvent and creditors rush to file their claims. This is because, under the current proposal, a single creditor cannot initiate PS unless their credit constitutes the majority of the company's debt. This is only fair as directors and members must also initiate PS collectively. Indeed, this system's first-come-first-serve design might incentivise stakeholders to pursue rescue earlier rather than later, giving them an advantage. To increase the likelihood of a

successful rescue, encouraging earlier rescue is preferred to allow more time for formulating a rescue plan.

Furthermore, in response to reservations that the debtor-in-possession model will not be acceptable to creditors, the Supervisor will actively monitor the debtor's activities. If the debtor-in-possession model is elected, the Supervisor can apply to the court to convert the procedure to supervisor-in-possession or to terminate PS altogether, provided there are legitimate claims, such as that the debtor is breaching his duties or successful rescue is no longer possible. Thus, the continuous monitoring role of the Supervisor should address any concerns that under the first-come-first-serve system, the stakeholder who manages to commence PS first will gain an unfair advantage. If there is any evidence of unfairness or impropriety, the Supervisor will take over the procedure or terminate it altogether. Moreover, akin to section 1104 of the Code, any other party with interest, such as creditors, can apply to the court in favour of a supervisor-in-possession model if an adequate cause, such as undue delay or lack of prospects, supports it. This ensures that stakeholders who lost the race to commence PS will still have their voices heard and their interests protected.

As to the insolvency requirement, it is also recommended that Hong Kong make the PS procedure available to companies in financial distress so that corporate rescue can be more accessible. However, the extent of financial distress required to qualify for rescue may be a fine line to walk, and further analysis is necessary.

Finally, modelled after the Code, IA 1986 and IRDA 2018, an automatic moratorium is recommended for Hong Kong's PS, which commences as soon as an eligible party files an application. If there is concern that an automatic moratorium will jeopardise the interests of creditors, it may be designed as an interim moratorium that bars a more limited category of claims, while the actual moratorium will take effect once PS formally commences. However, given the increased involvement of creditors under this proposal, such concerns are unexpected. Nonetheless, there are arguments in favour of both approaches. A careful balance must be struck between upholding the legitimate interests of creditors and ensuring an effective and successful

restructuring and rescue. If the interim moratorium approach is preferred, further thought and discourse is required to determine which claims should be barred by the interim moratorium and which should be reserved for the full moratorium.

To conclude, the first proposal aims to balance the conflicting interests of debtors and creditors, ensuring transparency, accessibility, and fairness and ultimately cultivating a healthy environment that encourages and enables corporate rescue in Hong Kong.

B. Conform to International Standards of Recognition

The next proposed change is the adoption of international standards of recognition, either in the corporate rescue legislation or in separate legislation. Hong Kong can consider adopting the Model Law, which is not strictly necessary. The aim is simply to bring Hong Kong's approach as close as possible to the practices of foreign jurisdictions so that bilateral cooperation can be facilitated without formal agreements. It is noted that the full adoption of the Model Law in Hong Kong will have far-reaching consequences beyond the realm of corporate rescue law, which is not the focus of the present article.

For instance, the application of PS to foreign companies can be extended beyond registered foreign companies to reflect the concept of COMI. As for which approach to COMI (Model Law or EU recast or other) should be adopted, further exploration is needed. This is a complex question of international law that is beyond the scope of this article. Nonetheless, on this point, Hong Kong does not want to expand the application too far. The example of section 246(3) of IRDA 2018 serves as a reminder that while an unconventionally wide application may be apt to procure business opportunities, the difficulties it causes in the context of cross-border cooperation make it undesirable. Therefore, while PS can broaden its application to foreign companies not registered in Hong Kong but with their COMI in Hong Kong, care must be taken not to loosen the requirements so that companies with little connection with Hong Kong are included.

The concept of the COMI is, of course, not perfect, and this proposed change may bring new challenges and uncertainties. As aforementioned, COMI is not formally defined in the Model Law, and the courts of different legal jurisdictions may have differing understandings of COMI. Hong Kong may consider adopting its own definition of COMI in favour of certainty, but that may do more harm than good, considering the importance of cross-border reciprocity. If Hong Kong adopts a clear definition of COMI, which differs from the interpretation of another jurisdiction, it may cause any PS proceedings commenced in Hong Kong to not be recognised overseas and thus frustrate the purpose of incorporating a cross-border element into our local corporate rescue laws. On the other hand, if COMI remains undefined, the resulting uncertainty is similarly undesirable. It may deter stakeholders from attempting rescue for fear of causing complications, especially when cross-border elements are involved. It is noted that the presumption that a corporation's registered office is its COMI is rebuttable and thus cannot be wholly relied upon. The approach under IRDA 2018 section 246(3) may be considered appealing. While it is abundantly clear that we would not want PS to apply to companies with a single transaction governed by Hong Kong law, we may extend its application to companies carrying on a substantial part of their business in Hong Kong or having substantial assets located in Hong Kong. This may ease some of the uncertainties surrounding the undefined concept of COMI and boost confidence in the reliability of Hong Kong's corporate rescue regime in the context of cross-border recognition.

Further, another special feature of IRDA 2018 deserves consideration, namely the supplementary moratorium for subsidiaries and holding companies.[62] Even for simpler and smaller corporate structures, this special moratorium can be greatly beneficial and efficient as the need to instigate a separate rescue proceeding is dispensed with. Hong Kong can consider implementing a similar provision under the PS legislation, as many multinational corporate groups operate in Hong Kong. The application of such a moratorium overseas would naturally still

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[62] IRDA 2018, s 65.

depend on the issues of cross-border recognition and is thus merely an ancillary feature.

In addition, concerning the recognition and enforcement of foreign proceedings, Hong Kong can consider adopting the concept of main and non-main proceedings after the Model Law or EU recast. However, this is not integral to the rescue legislation itself and may be more appropriate in separate legislation which deals with wider cross-border issues. Importantly, adopting this crucial feature of the Model Law will increase the likelihood of Hong Kong's PS proceedings being recognised in foreign jurisdictions that adopt the Model Law under the theory of reciprocity.

The second proposal aims to bring Hong Kong in line with international standards of corporate rescue laws in the hopes of a more globally minded corporate rescue regime that will surely benefit the countless multinational corporations operating in Hong Kong. However, cross-border corporate insolvency remains a perplexing area of law; thus, this is not an infallible plan. Moving forward, greater research must be conducted on the substantive corporate rescue laws and cross-border standards recognised by foreign jurisdictions. This is a novel and ever-changing area of law, and Hong Kong must stay at its forefront.

C. Cross-Border Cooperation Responsibilities

Besides conforming to international standards of recognition and cooperation, it is important to recognise that cross-border rescue proceedings are always contentious. The law must address and highlight cross-border issues as an integral part of its procedures to ensure they are actively addressed.

It is proposed that the statute should require satisfaction of cross-border coordination duties by either the debtor-in-possession or the Supervisor, as the case may be. For example, all company creditors must be identified, and where foreign creditors are concerned, the company must apply for recognition of the Hong Kong moratorium in the relevant foreign court. In the case of corporate groups with overseas entities, the debtor or the

Supervisor must ensure adequate and expedient coordination among the connected entities in the group. Care must be taken to determine whether Hong Kong is the proper jurisdiction to commence rescue such that one proceeding will suffice for all jurisdictions involved, considering concepts such as COMI and the company's establishments and assets across the globe. Further, the debtor or Supervisor may need to examine whether multiple rescue proceedings will have to be commenced simultaneously and, in that event, to consider whether rescue will still be feasible and advisable.

In connection with discharging these duties, debtors and the Supervisor may delegate certain tasks to agents and appoint foreign supervisors where necessary. The qualification requirements, duties, and functions of a foreign supervisor will be similar to those of the Supervisor, who will be appointed to oversee the activities of the debtor company in an overseas branch. The foreign supervisor may be necessary or highly beneficial in certain cases where close coordination is needed among multiple foreign entities of the debtor company, and various difficulties arise when applying for foreign recognition and enforcement.

The Supervisor is expected to maintain a continuous monitoring role. If a debtor-in-possession fails to comply with these duties, it may be adequate cause for the Supervisor to take over the proceedings.

These cross-border duties and procedures ensure that the PS regime in Hong Kong integrates cross-border cooperation with the substantive rescue regime itself. When cross-border issues arise, which will be frequent, it is hoped that the debtor or the Supervisor will address them as a priority concern to ensure that the corporate reorganisation process is not compromised. If Hong Kong's legislation can incorporate cross-border elements into the substantive rescue procedures in an intricate system, it will surpass the models of other jurisdictions that have previously been examined and pioneer a direction toward the complete amalgamation of local and global corporate rescue and insolvency laws.

Admittedly, these proposed changes have their

limitations. The extensive cross-border responsibilities the debtors and the Supervisor must meet are potentially time-consuming and costly, and mitigating these added expenses will be a great challenge moving forward. While these duties are put in place to ensure a smooth corporate restructuring and rescue scheme in a cross-border environment, they must not be so onerous that the rescue becomes impractical.

CONCLUSION

It is not the focus of this article to argue for the complete adoption of the Model Law in Hong Kong. Nevertheless, the lack of legislative focus on cross-border insolvency and restructuring in Hong Kong presents a concerning picture. Not only does Hong Kong desperately need substantive corporate rescue legislation, but it also needs to formulate its insolvency and rescue laws going forward with an eye for global issues. This article has not evaluated many specific provisions in Hong Kong's eventual restructuring legislation, such as the parameters of the requirement of financial distress or the position of minority and dissenting creditors. This article intends to stimulate discussion in this niche and neglected area, hoping that increased public discourse will steer the law toward a globally conscious and perceptive model that solidifies Hong Kong's international commercial success.


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