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Selected and edited by

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Bonnie Lai Gary Chan Cristina Zhang Wenhan Gao
Brian Sunwoo Yoo Ronny Or Jinkai Ye Cheryl Chan Ben Lew
Arthur Chan Angel Wu Ran Tao Louis Zhao
Du Hai Pergrin Hui Illeana Li
Yijia Chen Long Kiu Chan Zeth Chan Charmaine Wong

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Address: Room 403, Cheng Yu Tung Tower, Centennial
Campus, The University of Hong Kong, Pokfulam
Road, Hong Kong

Email: hkjls@hku.hk

Website: <https://hkjls.law.hku.hk>

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Deputy Executive Director, LL.M.
University of Hong Kong

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FOREWORD

It is with maternal pride in the students that I am accepting to foreword Volume 18 of the Hong Kong Journal of Legal Studies (HKJLS). The HKJLS is the oldest student-run academic law journal in Hong Kong. Its first volume hails back to 1994, a turbulent year in Hong Kong's academic life. Then, like everybody in Hong Kong, the students were preparing for the handover and their legal minds in particular were put to the novel, cutting-edge issues of statehood and sovereignty. From then onwards, every volume of the HKJLS has showcased just how engaged, innovative, and courageous the student community in Hong Kong really is.

There is no greater honour than to be able to observe the young minds as they find their voice and forge ahead in their pursuits. This is a particularly meaningful year for me to review the 2024 submissions and to author the foreword. This year marks my ten-year anniversary of teaching arbitration at the HKU. Throughout the years that I spent on intense educational journeys with the various cohorts of students at our master's degree programme in Arbitration and ADR, I have learned to accept that each student will challenge the status quo, that each student will look at how to improve, to streamline, and to innovate, and that each student will strive for excellence in his and her own way.

Academia plays a particularly important role in shaping the society we live in as it lays the foundation for intellectual curiosity, academic discipline, empathy, and resilience going forward. It is against this premise that I acknowledge that each piece the students submit for publication is a testament to a long journey of discovery, research, challenge, rejection, resilience, perseverance, and ultimately, success.

While the editorial board selected only five pieces for publication for this volume, I commend the efforts of all those who put their pens to papers and approached the HKJLS, and I encourage them to continue researching, writing, and submitting.

With that, the current volume features a set of five publications on cutting-edge topics in the theory and practice of contemporary law in Hong Kong.

The first piece focuses on one of the 2019 judgments emerging from the Hong Kong Court of Appeal in *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873. There, obiter, the Court of Appeal questioned the previously existing test that a statutory demand is to be dismissed in the presence of an arbitration clause. The authors look at the correct approach that the Courts should take so as to balance the competing interests and to achieve a fair and reasonable outcome.

The second piece deals with criminal law. It focuses on three landmark sentencing cases in drug trafficking matters (*Herry Jane Yusuph*, *Lee Ming Ho*, and *Raman Kapusamy*), in looking at the six-step sentencing approach that the case law has set out. In the author's view, the trio of the trafficking cases chart a course for Hong Kong's move away from a prescriptive arithmetical drug sentencing policy towards a more discretionary, structured and individualised assessment of culpability.

The third piece looks at civil partnerships in Hong Kong in reviewing the Court of Final Appeal's judgment *Sham Tsz Kit v Secretary for Justice* [2023] HKCFA 28. It analyses what the Government of the HKSAR may propose to put in place as an alternative legal framework that recognises same-sex partnerships with appropriate rights and protections attendant on such recognition.

The fourth piece focuses on trademark law in offering a comparative analysis of various judicial approaches to curbing "trademark bullies" through compensation liability. This piece looks at the mainland China and compares how other jurisdictions, such as the USA, deal with trademark bullies.

The final piece is dedicated to animal rights. It reviews four common law jurisdictions and offers recommendations on how to expand Hong Kong's animal law rights regime.

This 18th Volume with its five very diverse pieces will be of interest to fellow students, to those who are active in academia, but also to civil servants, the legislature, and generally to practitioners within and outside Hong Kong.

I conclude my foreword with heartfelt, warmest wishes of success to the HKJLS, to its editorial board, as well as to the students, and I look forward to further volumes in the future.

Olga Boltenko,
Barrister, Arbitrator and Mediator,
Deputy Executive Director, LL.M.
University of Hong Kong

PREFACE

We are honoured to present to you Volume 18 of the Hong Kong Journal of Legal Studies.

Since its founding in 1994, the Journal has remained the only student-run academic law journal in Hong Kong, edited and published entirely by law students at the University of Hong Kong. This year's editorial board continues that tradition, bringing together a team of dedicated and talented individuals from diverse backgrounds and disciplines.

As with previous volumes, we are committed to fostering meaningful academic discussions on contemporary legal issues. Our Journal continues to be widely accessible, with copies available in university libraries across Hong Kong, the High Court and District Court Libraries, as well as internationally through Westlaw and HeinOnline. We are grateful for the growing readership and the continued support from the legal community.

This year's Volume covers a wide array of legal topics, reflecting the complexity and breadth of contemporary legal challenges. From insolvency law and arbitration to sentencing for drug trafficking, from civil partnerships to trademark infringement and the intersection of animal law with domestic violence, the articles in this edition exemplify the depth and diversity of legal scholarship. Each contribution reflects rigorous research and analytical insight, addressing key developments in Hong Kong, Asia, and beyond. The variety of perspectives represented in this Volume underscores the ever-evolving nature of law and its impact on society.

We are honoured to have Professor Olga Boltenko provide the foreword for this Volume. Professor Boltenko serves as Deputy Executive Director of the Master of Laws in Arbitration and Dispute Resolution at the University of Hong Kong. Her support for this Journal highlights its role in advancing critical legal discourse and its relevance to scholars and practitioners alike.

The publication of this Journal would not have been possible without the collective efforts of many individuals. We

extend our sincere gratitude to our contributors for their invaluable insights and dedication to academic excellence. We also wish to express our deepest appreciation to our Senior Editors and Associate Editors for their hard work and commitment in ensuring the successful publication of this Volume. Finally, we are immensely grateful to our patrons for their generous support, which continues to make this Journal possible.

As we reflect on the journey of the Hong Kong Journal of Legal Studies, we take great pride in the role it has played in shaping legal discussions and fostering intellectual engagement. We hope that this Volume continues to serve as both a valuable academic resource and an inspiration for further legal inquiry.

Megan Louie and Prakritee Yonzon
Editors-in-Chief

RETHINKING *LASMOS*: THE EFFECT OF ARBITRATION CLAUSES ON INSOLVENCY PROCEEDINGS IN HONG KONG

Zhang Jiaqi*

When the Companies Court in Hong Kong examines a winding-up petition on insolvency grounds, and the debt that is relied on contains a valid arbitration clause, what is the correct approach for the Court so as to balance all competing interests and achieve a fair and reasonable outcome? This seemingly vanilla question has given rise to enormous debates and uncertainties in a variety of common law jurisdictions, including Hong Kong, Singapore, and the UK. This paper aims to present the development on the area of law, reconcile the competing values underlying arbitration and insolvency, and propose an ideal standard to be adopted by the Hong Kong courts. It also makes observations on judicial practices of Hong Kong courts on this issue since 1997, which may offer some insights to practitioners when drafting agreements which are governed by Hong Kong law and contain an arbitration clause.

INTRODUCTION

Against the backdrop of COVID-19, the number of winding-up petitions filed in Hong Kong against some otherwise economically sustainable firms has been steadily on the rise.¹ In the meantime,

* BBA(Law)&LLB, The University of Hong Kong. The author is most grateful to Ms. Eva Sit SC and Dr Stefan Lo for their support and guidance.

¹ 419 winding-up petitions presented in 2019, 449 in 2020 and 493 in 2021. See Official Receiver's Office, 'Statistics on Compulsory Winding-up and Bankruptcy for the period 1-2018 to 1-2022' (*Official Receiver's Office*), <https://www.oro.gov.hk/eng/statistics/compulsory_winding_up_and_bankruptcy/stat.php?stat_type=W&chart=A&W1=W1&W2=W2&W3=W3&W4=W4&W5=W5&B1=B1&B2=B2&B4=B4&B5=B5&start_

an increasing number of overseas parties are electing Hong Kong as the seat of arbitration and Hong Kong International Arbitration Centre as their designated arbitration institution,² thanks to the ease of enforcing Hong Kong awards in the PRC,³ and the arbitration-friendly judicial attitude of Hong Kong courts. It can readily be anticipated that the two separate regimes of insolvency law and arbitration law may collide and give rise to complex legal and policy issues. This paper aims to elucidate one of them, namely how the court should exercise its discretion when a winding-up petition is presented on insolvency ground, and the debt underlying the petition is governed by a valid arbitration clause, specifically within the context of the landmark decision *Re Southwest Pacific Bauxite (HK) Ltd*⁴ (more commonly known as “*Lasmos*”). Section 2 states the significance of the research topic. Section 3 presents a thorough overview of the development of law and landscape of arguments on the issue. Section 4 makes observations on the practice of Hong Kong courts in applying the decision of *Lasmos*. Section 5 aims to answer what should be the proper standard to be adopted, by placing all existing standards on a spectrum. Section 6 concludes.

I. RESEARCH SIGNIFICANCE

This research will be significant to the understanding of this area of law, both normatively and pragmatically, from two material aspects. On one hand, the position of Hong Kong courts is largely unsettled, as till the date of this paper, there has been no appellate level decision which directly rules on the correctness of the *Lasmos* approach. Hence a systematic overview of judgments before and after *Lasmos* will help clarify the picture of how the controversies first arose and consolidate all legal and policy arguments presented in court. In *Re Lam Kwok Hung Guy, ex p*

year=2018&start_month=1&end_year=2022&end_month=1&Search=Search> accessed 13 April 2023.

² HKIAC, ‘HKIAC Releases Statistics for 2022’ (*HKIAC*) <<https://www.hkiac.org/news/hkiac-releases-statistics-2022>> accessed 9 February 2023.

³ See generally, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region.

⁴ [2018] HKCFI 426, [2018] 2 HKLRD 449.

*Tor Asia Credit Master Fund LP*⁵ (“*Guy Lam CFA*”), the Court of Final Appeal has brought the arguments over the same issue in the context of an exclusive jurisdiction clause (“*EJC*”) to an end.⁶ However, French NPJ has again left open the question on arbitration clauses.⁷ On the other hand, as arbitration is becoming a more favoured dispute resolution mechanism and Hong Kong continues to serve as a regional arbitration hub in Asia, this issue has been frequently presented before the court by counsel and asking for the court’s determination. Six years since the *Lasmos* decision was handed down in March 2018, there were more than ten instances where the *Lasmos* approach was raised as a ground to support the debtor’s contention that the winding-up petition should be dismissed without considering merits. As both the UK⁸ and Singapore⁹ have “winded up the mess” on this area of law, it is imminent for the Hong Kong courts to pronounce its stance on this much litigated yet most controversial matter.

II. *LASMOS* PAST AND PRESENT: DEVELOPMENT TRAJECTORY OF THE HONG KONG POSITION

This section serves as a foundational section which aims to present the development trajectory of relevant case laws in Hong Kong. The author is aware that all notable cases before *Lasmos* have been summarised in a most learned judgment *Re Asia Master Logistics Ltd*¹⁰ (more commonly known as “*Dayang*”). The classic narrative is that the authorities before *Lasmos* were abundantly clear on this issue, namely that the arbitration clause does not alleviate the debtor-company’s onus to show a *bona fide* dispute on substantial grounds in its application to dismiss a winding-up petition.¹¹

⁵ [2023] HKCFA 9, (2023) 26 HKCFAR 119.

⁶ *ibid* [107] (French NPJ).

⁷ *ibid* [91]. Nonetheless, whether the ratio of *Guy Lam CFA* could extend to arbitration clauses is still a contentious matter. See Section 3.3.

⁸ *Salford Estates (No. 2) Ltd v Altomart Ltd (No. 2)* [2014] EWCA Civ 1575, [2015] Ch 589 (“*Salford Estates*”).

⁹ *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 (“*AnAn Group*”).

¹⁰ [2020] HKCFI 311, [2020] 2 HKLRD 423.

¹¹ *Dayang* (n 10) [57] (Deputy Judge William Wong SC).

Lasmos represents an anomaly in the authorities and since *Lasmos*, there has been a divergence in judicial approach.¹²

To avoid repetition, the purpose of this section is to put forward two propositions that have oftentimes been overlooked by judges and commentators. Firstly, it is argued that it would be somewhat misleading to equate the *Lasmos* approach with the UK approach laid down in *Salford Estates*, as there exists fundamental differences in the underlying standards between the two. Secondly, the *Lasmos* approach has only been subject to criticisms by the CFI and CA on an *obiter* basis. Only recently, in *Re Lam Kwok Hung Guy, ex p Tor Asia Credit Master Fund LP*¹³ (“**Guy Lam CA**”) and *Guy Lam CFA*, did the court make reservations on the criticisms of *Lasmos*, albeit in the context of an EJC.

A. *Lasmos*: The Turning Point

Lasmos represents a departure from the long-standing approach in Hong Kong.¹⁴ It apparently tilted the balance of the competing values of pro-arbitration attitude of courts and protection of creditors’ rights in favour of the former. This section aims to discern the precise test laid down in *Lasmos*, to distinguish the *Lasmos* standard with its UK counterpart and to present the reasoning process of the judge, which serves a useful point of reference when evaluating the appropriateness of the approach.

Under various contexts,¹⁵ the *Lasmos* approach is cited only as the paragraph below at [31] of *Lasmos*:

- (1) If a company disputes the debt relied on by the petitioner (the “**first limb**” of *Lasmos*).
- (2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any

¹² *ibid* [56]–[57].

¹³ [2022] HKCA 1297, [2022] 4 HKLRD 793.

¹⁴ David Smyth and Warren Ganesh, ‘Winding-up Petition Dismissed in Favor of Arbitration’ (2018) HKL 146 <<https://www.hk-lawyer.org/content/winding-petition-dismissed-favour-arbitration>> accessed 13 February 2023.

¹⁵ *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] HKCA 1220, [2019] 5 HKLRD 646 (“**Sit Kwong Lam**”) [33] (Kwan V-P); *Guy Lam CA* (n 13) [54] (G Lam JA).

dispute relating to the debt (the “**second limb**” of *Lasmos*); and

(3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) and files an affirmation in accordance with r. 32 of the Companies (Winding-Up) Rules (Cap. 32H) demonstrating this (the “**third limb**” of *Lasmos*).

The petition should generally be dismissed.

It is submitted that the passage which immediately follows the above quote shall also form part and parcel of the *Lasmos* approach. Under circumstances where the appointment of provisional liquidators (including a risk of misappropriation of assets, or the necessity to engage in referral back provisions) is justified, the court should stay, rather than dismiss, the petition pending determination of arbitration.¹⁶ This creates an exception that the creditor may resort to even if the above three limbs of *Lasmos* approach can be fulfilled by the debtor-company. The recognition of exceptions in the UK approach is arguably narrower than the one in *Lasmos*.¹⁷

In addition, Harris J also stressed the necessity to file an affidavit to demonstrate the commencement of arbitration according to r 32 of Companies (Winding-Up) Rules (“**CWUR**”),¹⁸ namely within 7 days after the affidavit verifying the petition is filed. Failure to do so will lead to the same consequences regardless of the existence of an arbitration clause. This demonstrates that the third limb of the *Lasmos* approach is intended by Harris J to be strictly abided by the debtor company, and the proof of commencement of arbitration is material, yet such a requirement is not a prerequisite in the *Salford Estates* approach. Therefore, combining the *Lasmos* approach and the *Salford Estates* approach as the “*Salford-Lasmos*” approach may be to some extent misleading,¹⁹ as the underlying standards are

¹⁶ *Lasmos* (n 4) [30].

¹⁷ *Salford Estates* (n 8) [39] (Sir Terence Etherton C).

¹⁸ In personal bankruptcy cases, the debtor should file affirmation in pursuant to r. 47(4) of the Bankruptcy Rules (Cap. 6A). See also *Lasmos* (n 4) [31].

¹⁹ *Dayang* (n 10) [59].

substantially different. They are more properly treated and assessed differently.

Returning to the analytical journey of *Lasmos*, Harris J premised his reasoning before formulating the *Lasmos* approach on four grounds. Firstly, a creditor presents a petition for the purpose of recovering his own debt, not out of some altruistic concern for the creditors as a class.²⁰ Therefore, there is no point making a distinction between an action initiated by writ and a winding-up petition. Secondly, Harris J made a distinction between the issue of whether a petitioner belongs to a member of the class of creditors, and whether the class remedy should be granted. The first one is an anterior question related to the petitioner's standing and does not influence the class generally.²¹ Thirdly, to dismiss the petition in favour of arbitration is merely upholding what the parties have contracted for.²² Finally, the creditor is not conclusively barred from presenting a winding-up petition if the circumstances justify it.²³ Indeed, the first three arguments have been a heated battlefield of debate and criticisms, which will be revisited in the latter part of the paper.

B. Post-*Lasmos*: Criticisms And Debates

The fate of *Lasmos* was far from plain sailing thereafter. This section will provide a summary of the reservations and observations made by the CFI and CA in cases after *Lasmos*, to present a full picture of the landscape of debate which will facilitate the normative analysis hereafter.

In *But Ka Chon v Interactive Brokers LLC*²⁴ (“**But Ka Chon**”), Kwan VP made three observations on *obiter* basis. Firstly, to exercise the discretion of whether to dismiss or stay a petition only in one way as suggested in *Lasmos* amounts to a substantial curtailment of a creditor's statutory right.²⁵ Secondly, it is acknowledged that considerable weight should be given to the

²⁰ *Lasmos* (n 4) [25].

²¹ *ibid* [26].

²² *ibid* [28].

²³ *ibid* [29].

²⁴ [2019] HKCA 873, [2019] 4 HKLRD 85.

²⁵ *ibid* [63].

factor of arbitration in the exercise of discretion.²⁶ Thirdly, the court was not powerless to deal with tactics by creditors to exert pressure on the debtor and bypass an arbitration agreement by presenting a winding-up petition.²⁷ She also questioned whether it is legitimate to disregard the writ-petition distinction altogether.

The issue soon returned to court in *Sit Kwong Lam*, where Kwan VP made two further clarifications. Firstly, the purpose of the third limb of *Lasmos* is to assure the court that the debtor-company has a genuine intention to arbitrate.²⁸ Secondly, the debtor-company should refrain from making opportunistic attempts to invoke the *Lasmos* approach.²⁹

In *Dayang*, DHCJ William Wong SC conducted a comprehensive examination on the existing authorities³⁰ and commented on *obiter* basis that the traditional approach as in *Hoo Cheong Building Construction Company Ltd v Jade Union Investment Ltd*³¹ (“*Jade Union*”) shall be the outlet for Hong Kong. In particular, he made two arguments against the *Lasmos* approach. Firstly, an arbitration agreement only obliges the parties to such agreement to have their disputes determined in another forum, and the presentation of a winding-up petition is not a determination or resolution of dispute.³² Secondly, the comparative justification in *Lasmos* also lacks merit as the legal positions were also far from settled under Singapore law and UK law.³³

In the three cases above, the judges neither expressly overruled *Lasmos* nor did they apply *Lasmos* in any real sense. As illustrated, numerous counterarguments, both on law and policy, were mounted against the *Lasmos* approach. It was only until the recent case of *Guy Lam CA* and *Guy Lam CFA* did the line of arguments in *Lasmos* itself receive some recognition. The clause in dispute in this case was an Exclusive Jurisdiction Clause

²⁶ *ibid* [70].

²⁷ *ibid* [71].

²⁸ *Sit Kwong Lam* (n 15) [37].

²⁹ *ibid* [36].

³⁰ *Dayang* (n 10) [57].

³¹ [2004] HKCFI 21.

³² *Dayang* (n 10) [79]–[80].

³³ *ibid* [116]–[117].

(“EJC”) in favour of New York. In *Guy Lam CA*, Lam JA, delivering the majority judgment, held that the court shall not make a writ-petition distinction when exercising its discretion on whether a winding-up petition should be stayed or dismissed.³⁴ In other words, the “strong cause” approach for EJCs in *Donohue v Armco*³⁵ shall be applied in winding-up petitions as in ordinary actions started by a writ.³⁶ Lam JA disapproved the contractual interpretation argument in *Dayang*, as the Companies Court may also be said to have determined the dispute if a *bona fide* dispute is not established by a debtor-company.³⁷ He further disagreed that an EJC amounts to an impermissible fettering of statutory rights.³⁸ Although it was not expressly spelt out in the judgment that the *Lasmos* approach is preferred, what is apparent from the order of dismissing the petition pending determination of dispute in a foreign court³⁹ is nothing different from applying the *Lasmos* approach in the context of an EJC. In the *Guy Lam CFA* decision, French NPJ made it amply clear that the majority approach in *Guy Lam CA* is correct.⁴⁰ When making such holdings, the court considered that the public policy underlying the insolvency regime may be significantly diminished if there is no evidence of a creditor community at risk.⁴¹ However, throughout the judgment there was no unequivocal endorsement of the *Lasmos* approach, and the correctness of the approach is still not conclusively settled.⁴² In short, the *Lasmos* approach sits as an anomaly in a host of authorities, became a target of criticism hereafter, and only received landslide support recently in cases related to EJCs.

C. Post-*Guy Lam CFA*: Further Divergence

The decision of *Guy Lam CFA* brings long awaited clarity to the area of law related to EJCs, but unexpectedly, the CFI diverges

³⁴ *Guy Lam CA* (n 13) [86]; *Guy Lam CFA* (n 5) [56].

³⁵ [2002] 1 All ER 749, [2002] 1 LLR 425, [2002] 1 All ER (Comm) 97, [2002] 1 Lloyd's Rep 425, [2002] CLC 440, [2001] UKHL 64.

³⁶ *Guy Lam CA* (n 13) [86].

³⁷ *ibid* [68], [77].

³⁸ *ibid* [92]–[94].

³⁹ *ibid* [105]–[106].

⁴⁰ *Guy Lam CFA* (n 5) [107].

⁴¹ *ibid* [102].

⁴² *ibid* [91].

further on whether the *ratio* of *Guy Lam CFA* could be extended to arbitration clauses as well. In *Re Simplicity & Vogue Retailing (HK) Co Ltd*,⁴³ Linda Chan J held that the application of *Guy Lam CFA* is limited to EJsCs. Therefore, the court should be guided by principles laid down in *But Ka Chon* and *Sit Kwong Lam* when exercising its discretion to dismiss a petition where the contract is governed by an arbitration clause. However, as a stark contrast, in *Re Shandong Chenming Paper Holdings Ltd*,⁴⁴ the court decided that the principles laid down in *Guy Lam CFA* would equally apply to an arbitration clause. This issue was not disputed by counsel for both parties. Notably, both cases are now under appeal⁴⁵ and the decision by the CA shall determine the correctness of *Lasmos* approach and the applicability of *Guy Lam CFA* approach to arbitration clauses.

III. *LASMOS* IN PRACTICE: ALWAYS HERE, NEVER APPLIED

In light of how *Lasmos* positions itself in the voluminous case authorities in Hong Kong, this section turns to the empirical aspect of this research. It aims to make two observations regarding the court's attitude in the actual application of *Lasmos* approach, which may offer some insights to practitioners on how the court is likely to exercise its discretion if a similar issue arises in the future. The first observation relates to the interpretation of the third limb of *Lasmos*, and the second one concerns the court's reluctance to follow *Lasmos* which is manifested from the precedents.

Firstly, it can be observed that the third limb of *Lasmos* has been most stringently construed and diligently applied in a series of first-instance cases.⁴⁶ Most debtor-company cannot benefit from *Lasmos* due to failure to fulfil the third limb. It seems that the yardstick used by the court is whether a notice of arbitration

⁴³ [2023] HKCFI 1443 [37] (Chan J).

⁴⁴ [2023] HKCFI 2065, [2023] 4 HKLRD 359 [4] (Harris J in Chambers).

⁴⁵ *Re Shandong Chenming Paper Holdings Ltd* [2023] HKCFI 273.

⁴⁶ Darius Chan and Sidharth Rajagopal, 'To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes' (2021) 38(4) *Journal of International Arbitration* 457, 467.

has been served.⁴⁷ As an illustration of how rigid the court has interpreted the third limb in practice, a letter sent by the solicitors of the debtor-company to the creditor's solicitors requesting a reply on whether they had been instructed to accept a notice of arbitration was held to be insufficient,⁴⁸ nor was a request form which was only in draft and not sent to the creditor.⁴⁹ An ongoing arbitration with a third party was also not an excuse as the court held that the debtor-company could have applied to join the creditor in the proceedings.⁵⁰ However, this stringent application by the court has left the counsel for the debtor-company with no alternatives but to invite the court to waive the third limb of *Lasmos*,⁵¹ although all such submissions were firmly rejected. This begs the question of whether such application is what Harris J had really suggested in *Lasmos*, as the original text reads the third limb as only requiring the parties to "take the steps required under the arbitration clause to commence the contractually mandated dispute resolution process".⁵² The *Lasmos* approach itself makes no reference to a "notice of arbitration" as being necessary. Wordings such as "take the steps" also seem to imply that preparatory work done for arbitration may suffice. Nonetheless, the practical implication from this observation is that the third limb is a high hurdle and not a mere matter of formality. A debtor-company is suggested to serve a valid notice of arbitration to the creditor if it wishes to invoke the *Lasmos* approach.

Secondly, there has never been a case that applied the *Lasmos* approach in the strict sense, namely, the debtor-company can prove to the court the three limbs are satisfied and in absence of any exceptional circumstances, and the petition was dismissed because of *Lasmos*. Sixteen cases subsequent to *Lasmos* can be broadly categorised into the following five classes. None of them was a straightforward application of *Lasmos*.

⁴⁷ *But Ka Chon* (n 24) [52]. Note that s 49(1) of AO, giving effect to UNCITRAL Model Law Article 21, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

⁴⁸ *ibid.*

⁴⁹ *Dayang* (n 10) [46].

⁵⁰ *Milestone Builder Engineering Ltd v Yau Kwong Contractor Ltd* [2020] HKCFI 2669 ("*Milestone Builder*") [29] (Recorder Jason Pow SC).

⁵¹ *Sit Kwong Lam* (n 15) [38].

⁵² *Lasmos* (n 4) [31].

The first class of cases are those which do not accept the *Lasmos* approach altogether and proceed to determine the merits of the case. They are *Re Hongkong Bai Yuan International Business Co Ltd*,⁵³ *DCKD & another v JPWL*,⁵⁴ *Re Pan Sutong & Re Proman International Ltd*,⁵⁵ *Re Simplicity & Vogue Retailing (HK) Co Ltd*⁵⁶ and *Sun Entertainment Culture Limited v Inversion Productions Ltd*.⁵⁷ In all five cases, the court found no *bona fide* dispute on substantial grounds and granted the winding-up order. It shall be noted that the final two cases were decided after the decision of *Guy Lam CFA*.

The second class of cases include those concluding that one or more limbs of the *Lasmos* approach is not satisfied, and hence *Lasmos* is not applicable. They are *But Ka Chon*⁵⁸ (third limb not met, bankruptcy order made), *Re Golden Oasis Health Ltd*⁵⁹ (second and third limb not met, summons to stay petition dismissed), *Sit Kwong Lam*⁶⁰ (no arbitration clause, bankruptcy order made), *Dayang*⁶¹ (third limb not met, winding-up order made), *Milestone Builder*⁶² (third limb not met, summons to restrain petition dismissed) and *Re Dai Yumin*⁶³ (second limb not met, bankruptcy order made). This also corroborates the first observation as it is self-evident that a majority of cases failed on the third limb.

The third class of cases are those in which the debtor-company successfully establishes a *bona fide* dispute, or some other valid grounds of opposition, and hence the application on *Lasmos* is unnecessary. They are *Lam Ka Yuk James v Easy Mount Group Ltd*⁶⁴ (not liquidated sum, petition dismissed) and *Madison Lab Ltd v Pu Yan*⁶⁵ (*bona fide* dispute established, injunction to

⁵³ [2022] HKCFI 960 [28] (Linda Chan J).

⁵⁴ [2022] HKCFI 1059 [35] (Linda Chan J) .

⁵⁵ [2022] HKCFI 1450 [58] (Linda Chan J).

⁵⁶ *Re Simplicity* (n 43) [35].

⁵⁷ [2023] HKCFI 2400 [50] (Deputy Judge Le Pichon) .

⁵⁸ *But Ka Chon* (n 24) [52]–[56].

⁵⁹ [2019] HKCFI 2173 [27].

⁶⁰ [2019] 5 HKLRD 646 [29].

⁶¹ [2020] 2 HKLRD 423 [41]–[50].

⁶² [2020] HKCFI 2669 [31]–[32].

⁶³ [2022] HKCFI 950 [68].

⁶⁴ [2018] HKCFI 1182 [31].

⁶⁵ [2020] HKCFI 382 [31].

present petition granted). These involve earlier cases on the timespan which tend to consider merit first and then the appropriateness of *Lasmos* approach, rather than the reverse.

The fourth class of cases are those related to EJC's, which are slightly different from the arbitration context, but the court adopted the reasoning in *Lasmos* and dismissed the petition. They are the two cases discussed extensively above, namely *Guy Lam CA* and *Guy Lam CFA*.

The fifth class of cases comprise only of the recent decision of *Re Shandong Chenming Paper Holdings Ltd*⁶⁶ by Harris J. This post-*Guy Lam CFA* case is almost a direct application of the *Lasmos* approach, as it was not in doubt that all three limbs have been fulfilled. However, the court exercised its discretion to stay rather than dismiss the petition as the matter litigated has been "long and torrid" to preserve the commencement date of the winding-up.⁶⁷

Nothing other than the above categorisation of cases can be better evidence of the court's reluctance in applying the *Lasmos* approach. Had there not been the decision of *Guy Lam CA* and *Guy Lam CFA*, it would be almost certain that the traditional *bona fide* standard will still be favoured by the court. Through a harsh interpretation of the third limb, or bypassing the *Lasmos* approach altogether, the court tends to avoid the necessity of considering or applying the *Lasmos* approach. Notably, almost all cases discussed above have involved an extensive assessment of merits of the dispute, which was precisely what the court should refrain from doing so as to respect the parties' choice to arbitrate,⁶⁸ as held by French NPJ in *Guy Lam CFA*. Therefore, in a world without *Guy Lam CA* and *Guy Lam CFA*, it would be reasonable for practitioners representing the debtor-company to anticipate that the onus to show a *bona fide* dispute is inevitable.

However, the ripple effect of *Guy Lam CA* and *Guy Lam CFA* over arbitration clauses is bound to be far-reaching and the above practical implication may no longer be intact. That being

⁶⁶ [2023] 4 HKLRD 359.

⁶⁷ *ibid* [19].

⁶⁸ *Guy Lam CFA* (n 5) [102].

said, the correctness of the *Lasmos* approach is still reserved for a case for another day. There are still “battles to be lost and won”.⁶⁹ Debtor-companies will continue to carry the burden of demonstrating a *bona fide* dispute, until there is an official departure from the *bona fide* standard in an arbitration context, through case law followed by consistent judicial practice thereafter. As shall be clear in the below section, it is most likely that that day is soon to come.

IV. IN SEARCH OF A BALANCED MIDDLE GROUND: A SUGGESTED APPROACH

This section proceeds to the most important question that awaits an answer: what should be the way forward and what is the suggested approach? It starts by identifying all the conflicting policies of the arbitration and insolvency regimes, which have been described as “like oil and water”.⁷⁰ Then this section will present a spectrum on which most of the existing standards are placed and compared. Finally, it is submitted that the optimal approach that could possibly balance competing values of the two regimes lies closer to the approach adopted in Singaporean courts and the approach in *Guy Lam CFA* pronounced recently.

A. The Underlying Policies and Aims

Arbitration law and insolvency law cater to different or even contrasting values in the commercial world. Arbitration allows parties to resort to extra-judicial tribunals to resolve their disputes based on agreement, which represents a “decentralisation of dispute resolution”. On the other extreme, insolvency emphasises collectivism and centralised distribution of available assets to creditors when companies are in financial distress.⁷¹ This section outlines the cardinal policy considerations underlying the two

⁶⁹ Richard Yip, Samantha Lau and Keith Cheung, ‘Exclusive Jurisdiction Clauses and Insolvency’ (*Denis Chang’s Chambers*, 4 May 2023) <<https://dcc.law/exclusive-jurisdiction-clauses-and-insolvency/>> accessed 5 May 2023.

⁷⁰ Kubi Udofia, ‘Nigeria: Insolvency Law and Arbitration: Like Oil and Water’ (2016) <<https://ssrn.com/abstract=2878863>> accessed 17 April 2023.

⁷¹ *Larson Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 [1].

regimes, which serves an overarching guidance in the exercise of locating an optimal suggested approach.

The predominant policy consideration in arbitration law in most common law jurisdictions is to respect party autonomy and *pacta sunt servanda*.⁷² Hong Kong's arbitration regime is largely governed by the new Arbitration Ordinance (Cap. 609) (the "AO"), which unifies the domestic and international arbitration regime and incorporates the UNCITRAL Model Law considering the high volume of cross-border business activities in Hong Kong.⁷³ The purposes of the promulgation of the new AO is to make the law on arbitration more user-friendly, align with international standards⁷⁴ and to reduce the extent of judicial intervention on arbitrations.⁷⁵ It is expressly stipulated under s 3 of the AO that parties to a dispute should be free to agree on how the dispute should be resolved and the court should interfere in the arbitration of a dispute only as expressly provided for in the Ordinance. The oft-cited judgement by Madam Justice Mimmie Chan in *KB v S*⁷⁶ further fortified the judicial attitude in favour of an arbitration-friendly approach to be adopted in Hong Kong. To respect the party's autonomous choice on how they would resolve disputes would necessarily require the court to uphold the parties to their contractual bargain, which may mandate the court to grant an anti-suit injunction⁷⁷ and/or to refuse jurisdiction to hear a case if one party to the arbitration clause acts in breach of the agreement. S 20 of the AO⁷⁸ is a statutory restriction to that effect, limiting the court's jurisdiction and mandating the court to refer the parties to arbitration for an action brought before it unless it finds that the agreement is void, inoperative or incapable of being performed. Although it is a settled understanding in Hong Kong that presenting a winding-up petition is not an "action" under s 20,⁷⁹ the existence of an

⁷² Shaun Matos, 'Arbitration Agreements and the Winding-up Process: Reconciling Competing Value'(2023) ICLQ 1, 10.

⁷³ *Arbitration in Hong Kong: A Practical Guide* (5th edn, Sweet & Maxwell 2021) [1.013].

⁷⁴ Department of Justice, *Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill*, para 3, 10.

⁷⁵ *Arbitration in Hong Kong* (n 73).

⁷⁶ [2016] 2 HKC 325 [1].

⁷⁷ AO, s 45(2).

⁷⁸ Incorporating Article 8 of the Model Law.

⁷⁹ *Dayang* (n 10) [55].

arbitration clause informs the court to exercise its discretion to decline jurisdiction.⁸⁰ By doing so, the court gives effect to the arbitration clauses in a proscriptive sense, namely, not to resolve disputes in a forum that is not contractually agreed to.⁸¹ This forms the gist of the pro-arbitration policy and the party autonomy argument in *Lasmos*.

Policies underpinning the insolvency regime are fundamentally different. The essential function of Hong Kong insolvency law is to ensure a fair and orderly process of disposing the financial affairs of an insolvent company.⁸² Two policy considerations are most relevant to our context, namely maximising the creditors' return as a class⁸³ and protecting the wider public interest.⁸⁴ On the first policy to maximise creditors' return, it is noteworthy that the creditors are protected "as a class" rather than individually, which is closely intertwined with the fundamental principle in insolvency law that individual interests must give way to the collective interests of the creditor community.⁸⁵ This principle can be evidenced by the fact that after a winding-up order is made, or a provisional liquidator is appointed, all pending actions against the company shall be stayed to preserve the status quo.⁸⁶ Otherwise, the liquidation process would be a race of which creditor could recover his debt most swiftly, which goes against the idea of a "fair and orderly" distribution process.⁸⁷ It is due to this collectivist principle that the insolvency process is often labelled as embodying a strong public dimension,⁸⁸ and the right of presenting a winding-up petition as a "class right"⁸⁹ and the winding-up order as a "class remedy".⁹⁰ As a "class right", the creditor who presents the winding-up

⁸⁰ *Guy Lam CFA* (n 5) [85].

⁸¹ *ibid* [102].

⁸² Stefan HC Lo and Charles Z Qu, *Law of Companies in Hong Kong* (3rd edn, Sweet & Maxwell 2018) [20.005].

⁸³ Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) [2-04].

⁸⁴ Derek French, *Application to Wind-Up Companies* (4th edn, OUP 2021) [1.12].

⁸⁵ Goode (n 83).

⁸⁶ Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUMPO"), s 186.

⁸⁷ Goode (n 83).

⁸⁸ *Guy Lam CFA* (n 5) [63].

⁸⁹ *Lasmos* (n 4) [7].

⁹⁰ *ibid* [24].

petition only exercises its rights on behalf of the general creditor community, and the court will also take into account the majority creditor's views when exercising discretion to grant a winding-up order.⁹¹ As a "class remedy", the creditor who invokes the insolvency jurisdiction may end up not recovering its full debt amount, as it still needs to rank *pari passu* with other creditors of the same priority for dividends to be paid out of the company's assets.⁹² Most judges premised their reasoning on distinguishing an action started by a writ and a winding-up petition on this collective nature of the winding-up process, hence refusing to adopt the *Lasmos* approach.

On the second policy to protect wider public interest, it relates to another function of insolvency law, which is to prevent massively insolvent companies from trading.⁹³ As a company in financial distress can be detrimental to creditors, employees and governmental bodies,⁹⁴ an insolvent trader shall be stopped from incurring new liabilities as soon as practicable. Directors may even be held personally liable for insolvent trading if they have actual or constructive knowledge on the company's insolvency under the current Companies (Corporate Rescue) Bill.⁹⁵ Relying on this policy, in *Sit Kwong Lam*, the concern of a clearly insolvent debtor-company making opportunistic attempts to point to arbitration clauses as a delay tactic was raised by Kwan VP,⁹⁶ and hence became a practical concern on the application of the *Lasmos* approach.

Are the policy considerations underpinning two regimes necessarily conflicting? It shall be noted that efficiency is a value that is shared by both regimes.⁹⁷ For the remaining ones, on the face of it, arbitration law values party autonomy and minimises judicial intervention, while the insolvency process is heavily supervised by the court. The exercise to be done by the court is as

⁹¹ Lo and Qu (n 82) [20.082].

⁹² *Jade Union* (n 31) [18].

⁹³ *Re Shop Clothing Ltd* [1999] 2 HKLRD 280, 284.

⁹⁴ Goode (n 83) [2-06].

⁹⁵ Company Law in Hong Kong – Insolvency (2022) [1.041].

⁹⁶ *Sit Kwong Lam* (n 15) [36].

⁹⁷ Arbitration values swift dispute resolution while insolvency law generally avoids delay in the winding-up procedure.

difficult as “walking on a tightrope”.⁹⁸ However, for the present purpose, it suffices to say that the policy considerations may not be as confrontative as it seems, which will be elaborated below.

To summarise, the ideal approach to be adopted by the court should achieve the following goals:

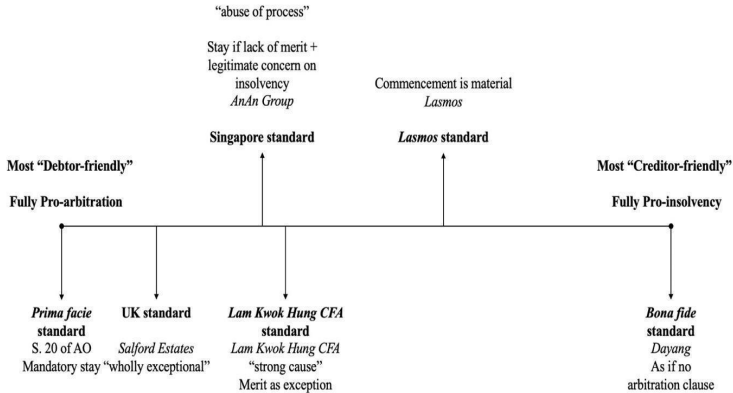
- (1) From a policy perspective, to achieve a fair balance between the policy considerations under arbitration law (party autonomy and *pacta sunt servanda*) and insolvency law (maximising creditor’s return as a class and protecting public interests), in case of any conflicts.
- (2) From a practical perspective, to prevent creditors from exerting improper pressure over the debtor by invoking insolvency jurisdiction, and to prevent debtors from making opportunistic attempts to delay the insolvency proceedings.
- (3) To promote efficiency and cost-effectiveness in judicial proceedings and enhance coherence in law.⁹⁹
- (4) To ensure certainty of the law and call the divergence in judicial approach to an end.

B. From “Pro-arbitration” to “Pro-insolvency”: Standards on a Spectrum

Having the above aims as higher-level guidelines, this section turns to the micro aspects and the nuances of different existing standards. The following visual aid aims to present all possible standards on a continuous spectrum and facilitate the finding of an ideal approach.

⁹⁸ Timothy Haynes, Callum McNeil & Charlotte Howell, ‘Walking the Tightrope Between Agreements to Arbitrate And Winding Up Proceedings: Differing Approaches In Onshore And Offshore Jurisdictions (2019) HKL 85 <<https://www.hk-lawyer.org/content/walking-tightrope-between-agreements-arbitrate-and-winding-proceedings-differing-approaches>> accessed 1 April 2023.

⁹⁹ *AnAn Group* (n 9) [61]–[65].



As demonstrated above, the far end on the left represents the purely "pro-arbitration" approach by adopting the *prima facie* standard (the "**prima facie standard**"). The standard is the same as if it is an action started by the writ and s 20 of the AO is applicable, namely, as long as (1) the debt is *prima facie* disputed, and (2) the arbitration clause is valid and engaged, the court is mandated to dismiss the petition whatsoever. Merits are not considered. A *prima facie* dispute exists unless there is a clear admission of both liability and quantum.¹⁰⁰

Moving towards the other end of the spectrum, it is the UK standard in *Salford Estates* (the "**UK standard**"). Under this standard, the court is not mandated to dismiss the petition. However, it will only exercise its discretion not to do so under "wholly exceptional circumstances" which are difficult to envisage.¹⁰¹ No subsequent cases in the UK have ever successfully relied on such exceptional circumstances.¹⁰² Therefore, this standard is only theoretically less "pro-arbitration" than the *prima facie* standard as it leaves the door open for the court to exercise its discretion otherwise.

The next notable standard is the current Singaporean approach in *AnAn Group* (the "**Singapore standard**"), which largely mirrors the UK standard but for two differences. Firstly, *AnAn Group* clarifies what amounts to "exceptional

¹⁰⁰ *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418 [51].

¹⁰¹ *Salford Estates* (n 8) [39].

¹⁰² See for example *Fieldfisher LLP v Pennyfeathers Ltd* [2016] EWHC 566.

circumstances”, namely situations that involve an “abuse of court’s procedure”.¹⁰³ Merits are not relevant at this stage. Secondly, this standard is a multi-layered one. The court may grant a stay (as opposed to dismissal) if the creditor can prove a legitimate concern on the debtor’s solvency and there are no *bona fide* issues raised by the debtor. Merits again become relevant in granting a stay. Examples of legitimate concerns include (a) the debtor-company is balance sheet insolvent; or (b) there are pending winding-up petitions by other creditors.¹⁰⁴ As this standard recognises a wider range of exceptions, it is arguably less “pro-arbitration” than the UK one.

The most recent judgement in *Guy Lam CFA* has come up with a multi-factorial standard for EJC’s (the “**Guy Lam CFA standard**”).¹⁰⁵ If applied to arbitration clauses, it should be placed on the right of the Singapore standard. The court will not dismiss the petition in absence of a strong cause.¹⁰⁶ What may constitute a strong cause includes (a) the evidence of a creditor community at risk or (b) an obvious lack of merit.¹⁰⁷ Note that merits are still relevant as they become captured under the “strong causes” against dismissing the petition. The difference between this standard and the Singapore standard is slim but still existent. A frivolous or hopeless defence raised by the debtor-company may qualify as “strong cause” in *Guy Lam CFA*, leading the court to proceed with winding-up. However, in the Singapore standard, the best that the creditor can get is a stay of proceedings. Therefore, “lack of merits” is a more powerful tool to the creditors in *Guy Lam CFA* standard than in the Singapore standard, which entitles it to be placed on the right to Singapore standard as a slightly more “creditor-friendly” standard.

Lasmos is the one closer to the “pro-insolvency” end. What justifies the standard to be placed on the right side to *Guy Lam CFA* is the notorious third limb of *Lasmos*, which requires the debtor-company to take steps to commence arbitration proceedings.¹⁰⁸

¹⁰³ *AnAn Group* (n 9) [99].

¹⁰⁴ *ibid* [111].

¹⁰⁵ *Guy Lam CFA* (n 5) [104].

¹⁰⁶ *ibid*.

¹⁰⁷ *ibid* [105].

¹⁰⁸ *Lasmos* (n 4) [31].

Finally, the far end on the right polar depicts the purely “pro-insolvency” approach by adopting the *bona fide* standard (the “*bona fide* standard”). The standard is the same as if there is no arbitration clause at all, namely, the debtor-company must prove a *bona fide* dispute on substantial grounds, otherwise the court will proceed to consider whether it is appropriate to make a winding-up order. By referring to “*bona fide* dispute on substantial grounds”, the court will examine whether there exists precise and believable evidence and disputes on frivolous or fanciful grounds are ignored.¹⁰⁹ In other words, merits are considered as if in a claim for summary judgement. This *bona fide* standard is the traditional approach applied in *Jade Union*, *Dayang*, and *Re Hongkong Bai Yuan International Business Co Ltd* line of cases.

The following sections will perform the exercise of locating the “suggested approach” on the spectrum demonstrated above.

C. Departure from the “Bona Fide” Standard

Starting from the right side of the spectrum, the long-standing *bona fide* standard has been the *de facto* standard in Hong Kong. However, this section aims to demonstrate that it is time to depart from this standard towards a more pro-arbitration one. The short reason is that in the latest *Guy Lam CFA* judgment, all arguments in support of a *bona fide* standard and against the *Lasmos* standard have been effectively disapproved, as captured in the table below. It is submitted that the latest judgment represents the correct position of law, and the reasons are provided as follows.

Argument against <i>Lasmos</i> and in favour of <i>bona fide</i> standard	Origin	Status
Contractual interpretation argument	<i>Dayang</i>	Disapproved in <i>Guy Lam CA</i>

¹⁰⁹

Company Law in Hong Kong – Insolvency (2022) [4.012].

Fettering of statutory right argument	<i>But Ka Chon</i>	Disapproved in <i>Guy Lam CA</i> and <i>Guy Lam CFA</i>
Comparative jurisdiction argument	<i>Dayang</i>	Not yet rejected

The contractual interpretation argument in *Dayang* stands as the most forceful proposition in support of the *bona fide* standard. With respect, this argument is fallacious despite its apparent attractiveness. The crux of the contractual interpretation argument is that the arbitration clause is not relevant at all because the Companies Court, when exercising its jurisdiction to grant a winding-up order, does not in itself “resolve” or “determine” any disputes between the parties, and hence does not contravene the proscriptive obligation of the arbitration clause.¹¹⁰ Instead, it is the liquidators who perform a quasi-judicial function that determines the disputes through a proof of debt process.¹¹¹ This argument is rejected in *Guy Lam CA* on two grounds: Firstly, when the court decides against the company, namely holding that there is no *bona fide* dispute, there is no reason why this should not be a “determination” of the dispute, even in its strictest sense.¹¹² Secondly, a decision by the court to uphold a statutory demand may give rise to an issue estoppel confirming the existence of a debt,¹¹³ and cases cited in *Dayang* which suggest otherwise are beside the point. The power of liquidators to go behind judgments in possibilities of fraud or collusion should not be overstated as a power of “determination” of disputes.¹¹⁴ Ultimately, a creditor who is dissatisfied with the liquidator’s adjudication may appeal to the court.¹¹⁵

In addition to the above guidance from the court, two further reasons are advanced below to supplement why the contractual interpretation argument should be rejected. Firstly, DHCJ William Wong SC, by framing the arbitration agreement as one which precludes parties from having the disputes

¹¹⁰ *Dayang* (n 10) [79]–[80].

¹¹¹ *ibid* [76].

¹¹² *Guy Lam CA* (n 13) [68].

¹¹³ *ibid* [69].

¹¹⁴ *ibid*.

¹¹⁵ CWUR, r 95.

“determined” in any other forum, is probably overgeneralising the problem.¹¹⁶ Arbitration clauses may vary from contract to contract and this argument may quickly collapse if a well-drafted clause expressly includes a disputed debt in a winding-up petition into the ambit of arbitration.¹¹⁷ Moreover, the exercise conducted in *Dayang* seems to be contrary to well-established principles of construing an arbitration clause, namely, not to draw fine distinctions based on legal technicalities that may be beyond the contemplation of the parties.¹¹⁸ Secondly, the argument in *Lasmos* suggests that the matter to be decided by the court is the anterior question of whether the petitioner is indeed a creditor and has the *locus* to present the winding-up petition.¹¹⁹ A positive answer to the anterior question is the prerequisite of invoking the insolvency jurisdiction. Therefore, even if the contractual interpretation in *Dayang* is adopted, the subject matter of the “determination” may well be the anterior question of locus, and it is difficult to see why this question should be outside the scope of arbitration.

The fettering of statutory right argument, which arises from the public policy underpinning the insolvency regime, has also been rejected in *Guy Lam CA* and *Guy Lam CFA*. It is submitted that the court’s reasoning is opposite. Firstly, in *Guy Lam CA*, it has been made clear that creditors’ rights are creatures of contract, not creatures of statute.¹²⁰ The statutory provision confers a right on creditors to present a winding-up petition if they can prove the debtor-company is unable to pay its debts,¹²¹ and deeming provisions can be relied on to prove “inability to pay its debts”.¹²² However, the arbitration clause neither deprives the benefit of the deeming provisions from the creditors, nor prevents them from presenting winding-up petitions. It only stipulates that in cases where the applicability of deeming provisions is in

¹¹⁶ Shaun Pereira, ‘Disputed Debts, Winding up Petitions, and Arbitration: AnAn Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Company) [2020] SGCA 33; BWG v. BWF [2020] SGCA 36’, (2019) 40(1) Civil Justice QJ 9, 15.

¹¹⁷ Amanda Joan Lees and Eric Chan, ‘Does an Arbitration Clause Get You out of a Winding-up Petition?’ (2020) 22(4) Asian Dispute Review 155, 160.

¹¹⁸ *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd’s Rep 254 [13].

¹¹⁹ *Lasmos* (n 4) [27].

¹²⁰ *Guy Lam CA* (n 13) [93].

¹²¹ CWUMPO, s 177(1)(d).

¹²² CWUMPO, s 178(1).

question, parties shall refer the dispute to their agreed forum. Moreover, Hong Kong and UK courts have ordinarily upheld the effect of no-action clauses which do curtail creditors rights to present winding-up petitions.¹²³ Therefore, the fettering of statutory rights, if any, is not impermissible. Secondly, in *Guy Lam CFA*, French NPJ observed that the policy considerations underlying the two regimes are not necessarily conflicting due to the issue of timing.¹²⁴ If the debt is disputed in a petition, the insolvency regime has not yet come into play and public policies underlying the regime are only relevant in an “attenuated form”.¹²⁵ It may be further argued that another fundamental principle of insolvency law shall be more prevalent at this stage, which is to preserve the rights accrued before liquidation occurs.¹²⁶ The right to refer a party’s dispute over a debt to arbitration is undoubtedly one of them. Therefore, public policy considerations should be unified before the insolvency jurisdiction is invoked, which is to uphold the party’s contractual bargain as rights accrued before liquidation.

Supplementing the court’s reasoning, the curtailment of creditors’ rights by an arbitration clause is often exaggerated. The petitioner may rely on other debts that are not governed by any arbitration clauses. They may also choose to prove the actual balance sheet or cash flow insolvency of the debtor company.¹²⁷ Other creditors may substitute this petitioner.¹²⁸ There remains much room for the creditors as a class to invoke the insolvency jurisdiction notwithstanding one arbitration clause in one specific contract.¹²⁹

This leaves us with the only argument in support of the *bona fide* standard, which is the comparative jurisdiction argument. This is clearly unmeritorious as of today simply because both the UK courts and the Singapore courts have already abandoned the *bona fide* standard. Therefore, it is justified for

¹²³ Claudia Quek, ‘The insolvency versus arbitration conflict: determined, resolved and finally settled?’ (2021) LQR 137 (Jan) 34, 36.

¹²⁴ *Guy Lam CFA* (n 5) [101].

¹²⁵ *ibid* [99].

¹²⁶ Lo and Qu (n 82) [20.005].

¹²⁷ CWUMPO, s 178(1)(c).

¹²⁸ CWUR, r 33.

¹²⁹ *Pereira* (n 116).

Hong Kong courts to finally depart from the *bona fide* standard that has been practised for decades on the land.

D. Rethinking the Third Limb of *Lasmos*: Keep it or Discard it?

If the *bona fide* standard is not the ideal one, it is necessary to move to the left side of the spectrum, where the *Lasmos* standard stands. *Lasmos* standard, though not enthusiastically applied, has been applauded by overseas commentators as an innovative middle ground.¹³⁰ However, this section aims to argue that the third limb of *Lasmos* standard should not form part of the conditions for the court to dismiss the petition.

The requirement of the debtor-company to file evidence of commencement of arbitration has been discussed in Section 3.2. Its rigidity in application has been discussed in Section 4. Looking into the theoretical foundation of this limb of *Lasmos* standard, one can hardly find a satisfactory answer. Specifically, the justification in *Hollmet AG v Meridian Success Metal Supplies Ltd*¹³¹ (“*Hollmet AG*”) is misplaced. Roger J held that once arbitration proceedings have commenced, the matter is different because then “there may not be a debt owing”.¹³² It is submitted that whether there is a debt owing depends on whether there is a *bona fide* dispute on substantial grounds. The commencement of arbitration is neither here nor there.¹³³ One possible explanation could be the need to deter debtor-companies from “putting up their hands and pointing to the clause”.¹³⁴ This is to some extent justifiable as the court should only uphold parties to their contractual bargain only if they have a genuine intention to arbitrate their disputes,¹³⁵ and commencement of arbitration can be indicative of such intention. There would be no point enforcing the clause if it has turned into a vehicle of the debtor-company to “put off the evil day”.¹³⁶ However, it is contended that the third

¹³⁰ *Matos* (n 72) 22.

¹³¹ [1997] 4 HKC 343.

¹³² *ibid* 347D.

¹³³ *Jade Union* (n 31) [19].

¹³⁴ *Hollmet AG* (n 131) 347I.

¹³⁵ *Sit Kwong Lam* (n 15) [37].

¹³⁶ *Guy Lam CFA* (n 5) [99].

limb should be discarded or reduced to a weaker form for the two reasons elaborated below.

Firstly, commencement of arbitration may be indicative of a genuine intention to arbitrate by the debtor-company at the time of presenting the winding-up petition, but it should not be a necessary condition or a conclusive factor. There is no good reason why the debtor-company should serve a notice of arbitration before the limitation period ends, especially considering that the usual burden lies on the creditor who wishes to recover a debt to start arbitration.¹³⁷ Moreover, in certain arbitration rules, it would be difficult for the debtor-company to seek a negative declaration on liabilities.¹³⁸ Secondly, the third limb of *Lasmos* will, as a matter of practice, compel a massively indebted debtor-company with hopeless defence to commence arbitration howsoever.¹³⁹ This could lead to wasted costs and further delay in proceedings. Therefore, in the suggested approach, whether the contractually mandated dispute resolution mechanism has been commenced should ideally be only one of the relevant considerations that the court takes into account when evaluating the weight given to the policy consideration of party autonomy, rather than a necessary condition to dismiss the petition.

E. Exceptional Circumstances: Leaving Merits Outside the Door

Considering that the third limb of the *Lasmos* approach still imposes too heavy a burden on the debtor, the ideal standard should again, be on the left to *Lasmos* standard, where the *Guy Lam CFA* and the *Singapore* standard lies. Neither standard requires commencement of arbitration proceedings and both recognise a range of exceptions that justify the court to proceed with the winding-up order, such as evidence of assets gone

¹³⁷ Dantes Leung, 'Lasmos and Beyond: Have the Cake and Eat it Too?' (2020) HKL 152, <<https://www.hk-lawyer.org/content/lasmos-and-beyond-have-cake-and-eat-it-too>>, accessed 31 January 2023.

¹³⁸ *ibid.*

¹³⁹ Ernest Leung and Alvin Cheung, 'To stay or not to stay – asking the right questions: Re Guy Kwok-Hung Lam' (2022) 8 JBL 653, 665–666.

missing or a creditor community at risk. While the two standards differ on what a low-merit defence raised by the debtor-company would entail, it is submitted that the merits of the case shall not be one of the factors considered by the court in exercising its discretion, otherwise it would be bordering on a logical tautology.

Merit itself cannot be a factor for the court to consider when exercising its discretion on whether or not to examine merit. It would be a clear defiance of logic if otherwise. However, this is a pitfall that has trapped both the Singaporean standard and the *Guy Lam CFA* standard. The court's declining jurisdiction based on merits manifests its lack of respect to the party autonomy, which is arguably the prevailing consideration when the insolvency regime is yet to come into play. As explained in *Guy Lam CA*, citing *Euromark Ltd v Smash Enterprises Pty Ltd*,¹⁴⁰ there is no logical basis to conclude that stronger cases should be decided in the forum agreed by the parties, but weaker cases should not. Despite continuous efforts on cautioning the parties that the exceptions are not a "backdoor to bring back merits" in *AnAn Group*,¹⁴¹ the Singapore standard formulated therefrom has done exactly so, which is a clear contradiction. As long as merits form any part of the exception, in practice, the court's role is bound to descend into looking at the minute details of the dispute, although the court is proclaiming an aspiration to refer the case to the appropriate forum.¹⁴² Therefore, it is submitted that merits should be removed from the non-exhaustive list of exceptions.

V. THE SUGGESTED STANDARD

Finally, this section illustrates the suggested standard that Hong Kong courts shall follow in light of the above analytical exercise. The standard is modified from the *Lasmos* standard and should operate as follows:

If

(1) A company disputes the debt relied on by the petitioner; and

¹⁴⁰ [2013] EWHC 1627.

¹⁴¹ *AnAn Group* (n 9) [112].

¹⁴² Look Chan Ho, 'Arbitration vs. Winding-up Petition: Who wins? What is the law now?' (2020) 9 HKDVC 16.

(2) The contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt,

the petition should generally be dismissed, save for situations where the dismissal of such a petition will result in prejudice to the creditors as a class to an extent which is unjustified to uphold the party's contractual bargain. The burden of proving exceptions should lie on the creditors.

When conducting the balancing exercise, a few factors may be relevant. If the debtor-company clearly has no intention to arbitrate, this would be a factor against upholding the party's contract. If the creditor can show that there is a risk of dissipation of assets,¹⁴³ or there is a legitimate concern on the debtor-company's solvency¹⁴⁴ which may fall short of proving actual insolvency, these would be prejudicial to the creditor's interests as a class. The list should not be closed but merit itself must be excluded. If the court exercises its discretion not to dismiss the petition notwithstanding that condition (1) and (2) is satisfied, it may make any order, including a short adjournment for parties to commence arbitration with appropriate undertakings to the court,¹⁴⁵ or proceed with the winding-up process.

This standard would, to the greatest extent possible, fix the deficiencies identified in various standards on the spectrum, while achieving the primary aims listed in Section 5.1, namely:

- (1) From a policy perspective, to achieve a fair balance between the policy considerations under arbitration law and insolvency law, by prioritising the former given that insolvency only comes at a later stage.
- (2) From a practical perspective, to prevent creditors from exerting improper pressure over the debtor by adopting a standard closer to the *prima facie* end, and to prevent debtors from making opportunistic attempts by creating the exceptions as a flexible tool if creditors' interests are in danger.
- (3) To promote efficiency and cost-effectiveness in judicial proceedings by saving costs for the debtor-companies to comply

¹⁴³ *Lamos* (n 4) [30].

¹⁴⁴ *AnAn Group* (n 9) [111].

¹⁴⁵ *Hollmet AG* (n 131) 347H.

with the third limb of *Lasmos* and enhance coherence in law by abolishing the writ-petition distinction to a great extent.

(4) To ensure certainty of the law and conform to the common law world's standard.

A. Limitations

The above standard suggested is not without limitations. The most glaring one is the risk of circularity, as the balancing exercise itself involves the two sides of policy concerns. However, given that the two regimes' inherent conflicting nature and the need for flexibility, it suffices for the standard to enjoin the court to ask the right questions before exercising its discretion.

Another limitation is a practical one, namely adopting a more debtor-friendly standard will discourage creditors from choosing arbitration as the dispute resolution mechanism, especially in contracts which give rise to regular and uncomplicated payment obligations.¹⁴⁶ Nonetheless, this would be a matter of the parties and their bargaining positions.

CONCLUSION

The interplay between arbitration and insolvency has presented a vexed question to courts in most common law jurisdictions. Through a systematic examination of cases in Hong Kong, the *Lasmos* standard is compared and contrasted in light of the UK, Singapore and the latest *Guy Lam CFA* standards. Though not without limitations, it is submitted that the standard approach advanced above represents a proper balance between the two regimes and leaves room for some flexibility to be exercised by the court, which shall be the outlet of future legal development in Hong Kong.

¹⁴⁶

Sarah Thomas and Jessica Chan, 'The Effect of Arbitration Clauses on Winding-up Petitions: Arbitration Come What May?' (2019) HKL 268, <<https://www.hk-lawyer.org/content/effect-arbitration-clauses-winding-petitions-arbitration-come-what-may>> accessed 4 April 2023.

Post-script

This paper engages with the legal developments up to January 2024. Since then, there have been two seminal updates which are worth highlighting in the form of a short post-script. First, in April 2024, the CA handed down the decision *Re Simplicity & Vogue Retailing (HK) Co Ltd*,¹⁴⁷ which clarifies that the *Guy Lam CFA* approach should apply by analogy to an arbitration clause. However, it seems that Kwan V-P, in her judgement, has not ruled on the correctness of the *Lasmos* approach, especially whether its third limb should be kept, discarded or modified as requiring a debtor to “demonstrate a genuine intention to arbitrate”.¹⁴⁸ Second, in June 2024, the UK Privy Council in *Sian Participation v Halimeda International Ltd*¹⁴⁹ (“*Sian*”), an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court, restored the *bona fide* standard and largely adopted the reasoning of DHCJ Wong SC in *Dayang*. Notably, the Privy Council decided that because the reasons given for their decision involved a direct contradiction with *Salford Estates*, it would issue a direction pursuant to *Willers v Joyce*¹⁵⁰ that this decision should prevail as the law of England and Wales.¹⁵¹ In Lord Briggs and Lord Hamblen’s joint judgement, their lordships emphasised that the *bona fide* standard only applies to a “generally worded” arbitration clause or EJC.¹⁵² This leaves the question open as to how “specific” a dispute resolution clause should be to form an exception to this general principle. The implications of the two updates remain to be tested by future cases and explored by academic commentaries.

¹⁴⁷ [2024] 2 HKLRD 1064.

¹⁴⁸ *ibid*, [42].

¹⁴⁹ [2024] UKPC 16.

¹⁵⁰ [2018] AC 843.

¹⁵¹ *Sian* (n 149) [125]–[126].

¹⁵² *ibid* [99].

**THE ANATOMY OF THE SIX-STEP
SENTENCING APPROACH FOR DRUG
TRAFFICKING: CONSOLIDATING *HERRY
JANE YUSUPH, LEE MING HO, AND RAMAN
KAPUSAMY***

Jonathan Chung Wa Ho, Justin Chan Wan*

The recent cases of HKSAR v Lee Ming Ho and HKSAR v Raman Kapusamy contribute crucial clarity to the six-step sentencing approach formulated in HKSAR v Herry Jane Yusuph. This trio of trafficking cases chart a course for Hong Kong's move away from a prescriptive arithmetical drug sentencing policy, and towards a more discretionary, structured and individualised assessment of culpability. By offering a consolidation of these three cases, we analyse the core rationale adopted by the Hong Kong Court of Appeal, and the potential extension of such to subsequent cases when the six-step approach operates in tandem with pre-existing sentencing principles. We focus our analysis on the delineation between 'role and culpability' and 'aggravating factors', the availability of mitigating factors, and the overall proportionality assessment required by the principle of totality.

INTRODUCTION

The criminal offence of trafficking in a dangerous drug, prescribed

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by sections 2 to 4 of the Dangerous Drugs Ordinance,¹ incurs a maximum penalty of HKD 5 million and imprisonment for life.² The Hong Kong Court of Appeal, as the apex court in criminal sentencing, lays down ‘fundamental sentencing guidelines according to the nature and quantity of dangerous drugs’,³ and specifies guideline sentencing bands for lower courts to determine the appropriate sentence for a defendant convicted of drug trafficking.⁴ These guidelines⁵ assist sentencing judges in reducing inconsistency and increasing systematic fairness⁶ amidst similar and recurrent fact-patterns⁷ in drug trafficking cases. Yet recent discussions and developments⁸ have emphasised the responsibility of judges to arrive at sentences more tailored and commensurate with the culpability of each offender. Discretion and proportionality are hence key themes found in the judgments of *HKSAR v Herry Jane Yusuph* (“**Herry**”),⁹ *HKSAR v Lee Ming Ho* (“**Lee**”),¹⁰ and *HKSAR v Raman Kapusamy* (“**Kapusamy**”).¹¹

¹ Dangerous Drugs Ordinance (Cap 134). Ss 4(1)(a) and 3 are the offence-creating provisions, whereas s 2 defines trafficking to include the acts of ‘importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drug, or possessing the dangerous drug for the purpose of trafficking’.
² *ibid* s 4(3).

³ *HKSAR v Tsang Ka Man* [2018] HKCA 277, [2019] 2 HKLRD 602 [27] (Yeung VP and Pang JA). The guidelines are devised specific to each type of trafficked narcotic, then categorical sentencing lengths are specified based on numerous ranges of narcotic weight: see Kevin Kwok-Yin Cheng, Sayaka Ri and Natasha Pushkarna, ‘Testing the Drugs’ Sentencing Guidelines: A Comparison between England and Wales and Hong Kong’ (2022) 17 Asian JI of Comparative Law 167.

⁴ *Mark Anthony Seabrook v HKSAR* (1999) 2 HKCFAR 184 [20] (Li CJ, Ching and Bokhary PJJ and Lord Nicholls NPJ); Cheng, Ri and Pushkarna (n 3) 581.

⁵ Also known by the misnomer of ‘sentencing tariffs’, see *HKSAR v Herry Jane Yusuph* [2020] HKCA 974, [2021] 1 HKLRD 290 [39] (Yeung and Macrae VPP and Zervos JA).

⁶ *HKSAR v Leung Wai Man* [2009] HKCA 390 [11] (Stock VP, Yuen JA and McMahon J); *Wong v The Queen* (2001) 207 CLR 584 [6] (Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ).

⁷ *HKSAR v Conde Nassou* [2016] HKCA 42 [37] (McWalters JA and Pang JA).

⁸ Karen A Joe-Laidler and others, ‘The Legal Response to Drugs and Social Supply: The Case of Hong Kong’ (2023) 53 HKLJ 915, 920.

⁹ *Herry* (n 5).

¹⁰ *HKSAR v Lee Ming Ho* [2024] HKCA 150, [2024] 1 HKLRD 1186 (Macrae ACJHC, Zervos and Anthea Pang JJA).

¹¹ *HKSAR v Raman Kapusamy* [2024] 2 HKLRD 955 (Macrae VP, Zervos and M Poon JJA). In these consolidated appeals, we refer to the Court of Appeal judgment as “*Kapusamy*”, and to the facts of the two cases by the defendants, Kapusamy and Oliinyk respectively.

The Court of Appeal in *Herry* formulated a more discretionary six-step approach that went beyond the prescriptive application of solely arithmetical sentences and defined incremental enhancements. Following the heavier emphasis on the role and culpability of each offender, *Lee* and *Kapusamy* offered the court a much-needed opportunity to resolve tensions between the six-step approach and pre-existing case law, and those post-*Herry*. This pair of cases also served to solidify the position of *Herry* as the leading sentencing authority with regard to drug trafficking.¹²

Our aim is to provide a consolidated summary of the six-step approach pronounced by these three cases. First, the origin of the approach is explored together with the relevant facts of the titular cases. We focus on three issues relating to the operation of the approach and its interactions with relevant sentencing case law. These issues are (1) the delineation between ‘role and culpability’ indicators and ‘aggravating factors’; (2) the availability of relevant mitigating factors; and (3) the overall proportionality assessment concluding each sentencing process.

I. OVERVIEW OF SIX-STEP SENTENCING APPROACH

Drug trafficking is viewed as an extremely serious crime in Hong Kong and carries ‘appalling consequences which the proliferation of dangerous, addictive drugs has on families, communities, the workplace, and on the whole fabric and functioning of society’.¹³ The courts have observed Hong Kong’s strong and punitive sentencing regime as an effective policy for containing the spread of drugs,¹⁴ entrenched by a long-standing prohibitionist policy since the 1940s,¹⁵ and fuelled no less by recent ballooning in the range of types, weight and total value of imported narcotics¹⁶ and

¹² Editor’s Note in *Lee* (n 10) [2024] 1 HKLRD 1186, 1189.

¹³ *Herry* (n 5) [44].

¹⁴ *HK SAR v Kilima Abubakar Abbas* [2018] HKCA 602, [2018] 5 HKLRD 88 [71] (Lunn and Macrae VPP and McWalters JA).

¹⁵ *Joe-Laidler and others* (n 8) 922.

¹⁶ Note the 20-fold weight increase in drug seizures between 2019 and 2022: see also Research Office, ‘Recent situation of drug abuse in Hong Kong’ (*Legislative Council Secretariat*, 2023)

growing ‘hidden drug abuse’ trends.¹⁷ This forms the backdrop in front of which current government and judicial attitudes translate into harsh sentences embodying denunciation, deterrence and punishment.¹⁸

Apart from the severity inherent in the offence, the textbook facts of the titular cases demonstrate the other feature of sentencing drug traffickers — the similar and recurrent fact patterns of each case:

There is often little to differentiate between the facts of different cases, save for the quantity of drug involved and, where it can be established, the role played by a defendant. ... It is because of these two particular facets of sentencing [deterrence and recurrency] for offences of this nature that consistency in sentencing in trafficking cases becomes so important.¹⁹

In *Herry*, the defendant was a foreign national intercepted on arrival at Hong Kong International Airport. After physical examinations testing positive for narcotics on her body, she was detained by Customs officers and later discharged packets of cocaine amounting to around HKD 58,000.²⁰ The defendant pled guilty to a single charge of trafficking, and was sentenced to 5 years and 8 months imprisonment²¹ which was upheld on appeal.²²

https://app7.legco.gov.hk/rpdb/en/uploads/2023/ISSH/ISSH26_2023_20231109_en.pdf accessed 10 April 2024.

¹⁷ Gloria Hongyee Chan and others, ‘Social Capital and Social Networks of Hidden Drug Abuse in Hong Kong’ (2020) 17 Int J of Environmental Research and Public Health 6231, 1–2 .

¹⁸ *HKSAR v Nwadiuto Samuel Joseph* [2017] HKCA 64 [41] (Lunn VP and McWalters JA); *R v Lau Tak Ming* [1990] HKCA 96, [1990] 2 HKLR 370, 386F–G (Silke VP and Kempster and Power JJA). See also Cheng, Ri and Pushkarna (n 3) 171.

¹⁹ *Herry* (n 5) [41], [45].

²⁰ *Herry* (n 5) [5].

²¹ The sentencing judge referred to the total weight of the cocaine and adopted a starting point of 8 years, enhanced the sentence to 8.5 years for the aggravating factor of ‘international element’ (‘the bringing of dangerous drugs into Hong Kong’), and applied the only mitigating factor of a guilty plea at the earliest chance to arrive at the final sentence of 5 years and 8 months: *HKSAR v Herry Jane Yusuph* [2018] HKCFI 2853 (DHCJ Lugar-Mawson).

²² The appellant contended that the starting point of 8 years exceeded by around 6 weeks a strict mathematical application of the guidelines in

In *Lee*, the defendant was convicted of a count of trafficking by a unanimous jury.²³ He instructed two co-defendants²⁴ to follow and assist him in collecting narcotics arriving by speedboat at Repulse Bay. Thereafter, he conducted reconnaissance exercises and formed a convoy to transport the drugs to Yau Ma Tei. The group was intercepted and the total value of the seized ‘Ice’ was estimated to exceed HKD 10 million. The defendant was originally sentenced to 37 years for the trafficking count,²⁵ which was lowered to 33 years on appeal.²⁶

Like *Herry*, the two defendants in *Kapusamy* arrived in Hong Kong by air. After being intercepted with nearly 3,000 grammes of ‘Ice’ in his luggage, *Kapusamy* was sentenced to 26 years’ imprisonment.²⁷ The other defendant *Oliinyk* arrived at Chek Lap Kok airport and was intercepted with cocaine amounting to around HKD 2.1 million hidden in her suitcase

Lau Tak Ming (n 18) and *Attorney-General v Pedro Nel Rojas* [1994] HKCA 54, [1994] 1 HKC 342 [13] (Silke and Macdougall VPP and Bokhary JA). The court did not find it necessary to make observations on this apparent miscalculation when dismissing the appeal. See also *Herry* (n 5) [34]–[35], [38].

²³ The defendant also pled guilty to a count of failing to surrender to custody without reasonable cause, contrary to ss 9L(1) and (3) of the Criminal Procedure Ordinance (Cap 221).

²⁴ The original indictment contained the defendant and three other co-defendants. The defendant absconded during the first trial, after which two co-defendants (surnamed Chu and Li) were convicted and the last (surnamed Fung) was acquitted. Chu and Li later gave evidence against the defendant (*Lee Ming Ho*) when the latter had been apprehended and stood trial alone: *Lee* (n 10) [3].

²⁵ The sentencing judge referred to the total weight of the ‘Ice’, adopted a starting point of 33 years, and enhanced the sentence to 37 years, 2 years each for the ‘international element’ and the ‘significant position’ occupied by the defendant in the trafficking enterprise: *HKSAR v Lee Ming Ho* [2019] HKCFI 1150 (Campbell-Moffat J).

²⁶ The Court of Appeal accepted the appellant’s ground and adopted the starting point of 31 years, which was approved in Chu and Li’s separate appeal. While preventing double-counting in aggravating factors, a combined enhancement was applied which brought the sentence to 33 years: *Lee* [28], [89]–[90]. See also *HKSAR v Chu Ho Wa* [2021] HKCA 1896, [2022] 1 HKLRD 359 [28]–[31] (Macrae VP, Zervos and A Pang JJA) for the separate appeal.

²⁷ The sentencing judge adopted an arithmetical starting point of 24 years, and enhanced it by 2 years for the international element: *Kapusamy* (n 11) [5]–[8].

lining. She was sentenced to imprisonment for 22 years and 4 months.²⁸ Both sentences were upheld by the Court of Appeal.²⁹

Faced with a strain of cases demonstrating discretion-less sentencing exercises,³⁰ the court in *Herry* placed emphasis on the judicial discretion of discerning the different roles of individual offenders in determining a just and fair sentence.³¹ The case was heard by a full bench of the Court of Appeal,³² which laid the current six-step approach:³³

- (1) The first step requires the sentencing judge to identify the relevant guideline band gauged by the weight of drugs trafficked;³⁴
- (2) The second step requires the judge to individually assess the role and culpability of the trafficker based on the available evidence;³⁵
- (3) In step three, the sentencing judge places the defendant at a point in the guideline band in relation to their role

²⁸ The sentencing judge adopted an arithmetical starting point of 22 years and 4 months. The judge considered the international element, but elected to not enhance the sentence as this was offset by Oliinyk's suffering from cancer: *HKSAR v Oliinyk Alla* [2022] HKCFI 57 (DHCJ Bruce SC).

²⁹ *Kapusamy* (n 11) [78]–[81].

³⁰ *Herry* (n 5) [56]; see eg *HKSAR v Manalo* [2000] HKCA 265, [2001] 1 HKLRD 557, 560F–H (Stuart-Moore ACJHC, Leong and Stock JJA), sub nom *HKSAR v Burnales* [2000] HKCA 265, [2001] 1 HKLRD 557 (Stuart-Moore ACJHC, Leong and Stock JJA).

³¹ *Nwadiuto Samuel Joseph* (n 18) [40]; see also *Kilima* (n 14) [45] (Lunn VP), [144]–[148] (McWalters JA) ('it was a matter of concern that the current sentencing regime ... might not enable courts to adequately distinguish the culpability of the courier from that of the organiser'). The Court in *Herry* (n 5) (at [39]) began its discussion thus, 'It should be remembered that sentencing guidelines are exactly that: they are lines to guide a judge in sentencing. They are not fixed, compulsory or arbitrary straitjackets, nor should they be slavishly applied.'

³² *Lee* (n 10) [47]. The bench consisted of a Justice of Appeal, together with the then Vice-Presidents of the English and Chinese divisions. This differed from the usual practice of sentencing appeals being heard by two members of the Court of Appeal. The court comprehensively examined sentencing authority from Hong Kong and from the United Kingdom, Australia and New Zealand, stretching back for more than 40 years, and considered the practical difficulties faced by overseas approaches: *Herry* (n 5) [41]–[43], [81]; *Kilima* (n 14) [74]–[75].

³³ *Kapusamy* (n 11) [23], footnote 21.

³⁴ *Herry* (n 5) [57].

³⁵ *ibid* [49], [58]–[61], [64]–[68].

and culpability.³⁶ This forms the ‘starting point’ for sentencing;³⁷

- (4) Step four asks the judge to consider aggravating factors that justify enhancement of the sentence³⁸ by a discretionary amount. This forms the ‘notional sentence after trial’;³⁹
- (5) The fifth step is to consider all mitigating factors simultaneously when assessing the overall discount from the notional sentence;⁴⁰
- (6) The last step refers to the principle of totality. This asks the sentencing judge to stand back and arrive at an overall sentence that is proportionate to the criminality of the defendant. Where there are multiple charges or multiple aggravating factors involved, the judge should consider combining an effective total of enhancements or order sentences of imprisonment to be served partly or wholly concurrently.⁴¹

Considering the various nature of the different steps, clear guidelines are especially needed where judicial discretion is a key factor. By briefly describing the discretionless exercise to be conducted under step 1 and the factual analysis drawn on a case-by-case basis under step 3, we focus our discussion on the various legal factors under steps 2 (role and culpability), 4 (aggravating factors), 5 (mitigating factor), and 6 (totality). These are the discretionary exercises that are indispensable for a just and proportionate sentence in each case, and to which judicial findings continuously contribute guidance.

II. STEP 1: APPLYING CONSISTENT ARITHMETICAL GUIDELINE BANDS

The court in *Herry* noted overseas courts upholding narcotic

³⁶ *ibid* [69].

³⁷ *ibid* [70].

³⁸ *ibid* [70]–[72].

³⁹ *ibid* [70].

⁴⁰ *ibid* [73]; *Lee* (n 10) [68].

⁴¹ *Herry* (n 5) [79]; *Lee* (n 10) [84]; *HKSAR v Ngai Yiu Chung* [2011] HKCA 233, [2011] 5 HKLRD 690 [13]–[27] (Stock VP, Fok JA and McWalters J), cited in *HKSAR v Mohammed Tofael Ahmed* [2020] HKCA 33 [18]–[23] (Macrae VP and Zervos JA).

quantity as the first, but not sole, determinant for sentencing, and a reasonable proxy for social harm and illicit trafficking gains. Thus, respective guidelines pertaining to specific types of narcotics are issued by the Court of Appeal through individual cases by revisiting previous guidelines. These sentence bands equate ranges of narcotic weight to imprisonment length.⁴²

When the sentencing court is faced with several types or ‘a cocktail’ of drugs, it might adopt the ‘individual approach’ or the ‘combined approach’.⁴³ The former looks at each component of the batch and then sums up the different sentences pertinent to each component. The latter asks one to calculate a sentence for the more potent, ‘base drug’, and then adjust the sentence upwards to account for significant quantities of other drugs. The court might adopt the combined approach if the result from the individual approach becomes excessive and oppressive.⁴⁴ If the combined approach is adopted, the court would obtain the arithmetical starting point from the quantity of the base drug with the subsequent adjustments.⁴⁵ This result would then be reviewed by comparing the starting point with three checking tests: the ratio test, the conversion test, and the absurdity test.⁴⁶ After checking

⁴² As a result of the arithmetical exercise, online calculators or predictors for drug trafficking sentences have been devised by academia and the legal profession. One of these predictors, made available under the Hong Kong Legal Information Institute (HKLII) website (<https://ai.hklai.hk/dt-predictor/>), was developed by the Law and Technology Centre of the University of Hong Kong; see Tien-Hsuan Wu and others, ‘Integrating Domain Knowledge in AI-Assisted Criminal Sentencing of Drug Trafficking Cases’ in Serena Villata and others (eds), *Legal Knowledge and Information Systems* (Frontiers in Artificial Intelligence and Applications, IOS Press 2020). However, readers are reminded such predictors are helpful only for step 1 but not the subsequent steps. The results provided by calculators are by no means conclusive of the final sentence.

⁴³ *HKSAR v Islam SM Majharul* [2020] HKCA 300, [2020] 3 HKLRD 146 (“*Majharul*”) [20] (McWalters and Zervos JJA); see also *HKSAR v Ko Ka Hing* [2009] HKCA 477, [2009] 4 HKLRD 856 [3] (Cheung JA and Tong J).

⁴⁴ *Majharul* (n 43) [22].

⁴⁵ *ibid* [24], [27].

⁴⁶ The ‘ratio test’ calculates the weight of the different drugs according to the relevant sentencing guidelines of each drug, multiplies each component with the respective weight ratio of the total cocktail before adding component sentences together; the ‘conversion test’ uses the length of imprisonment of each component as an equivalent to convert lesser types into the equivalent total weight of the base drug, so that a single tariff is applied to the total quantity; the ‘absurdity test’ applying the sentencing guidelines of the most serious drug to the total quantity of various drugs: *Majharul* (n 43) [13], [27]; *HKSAR v Cheung Wai*

that the starting point is reasonable, the court proceeds with step 2.⁴⁷

III. STEPS 2–4: ASSESSING ROLE AND CULPABILITY VS AGGRAVATING FACTORS

A. Step 2: Assessment of Role and Culpability

As the arithmetical sentencing bands are designed for the courier, who delivers, distributes or conveys drugs, or the storekeeper, who stores the drugs on behalf of himself or others, the court might consider the defendant's position within the hierarchy of the trafficking enterprise in order to adopt an increased or decreased sentencing starting point for that defendant.⁴⁸ The Court of Appeal in *Herry* identified six common classifications of these defendants. They are, in increasing order of hierarchical position, (i) the courier or storekeeper;⁴⁹ (ii) the actual or direct trafficker who deals in dangerous drugs with others;⁵⁰ (iii) the manager or organiser, who manages and instructs actual or direct traffickers;⁵¹ (iv) the operator or financial controller making substantial gains from the trafficking;⁵² and (v) the international operator or financial controller having a large and lucrative trafficking business transcending jurisdictions.⁵³

While these six categories constitute a convenient summary of roles in a trafficking enterprise, the Court of Appeal made it clear that the involvement of a defendant need not fit neatly into any of the six categories.⁵⁴ One illustration is when

Man [2018] HKCA 731, [2019] 1 HKLRD 817 [30]–[33] (Macrae VP and Zervos JA).

⁴⁷ See eg *HKSAR v Lee Wai-kin* [2024] HKCFI 935 (DHCJ Woodcock); *HKSAR v Wong Shing-ming Hendy* [2024] HKCFI 867 (DHCJ Woodcock); *HKSAR v Ng Ka Kin* [2024] HKDC 347 [51]–[54] (HHJ Tam).

⁴⁸ *Herry* (n 5) [58]–[68]; *Lee* (n 10) [53] (Macrae ACJHC) ('Thus, an offender's position in the hierarchy of a drug trafficking enterprise is obviously a matter which goes to his role in the offence and the seriousness of his culpability.').

⁴⁹ *Herry* (n 5) [59].

⁵⁰ *ibid* [61]–[64].

⁵¹ *ibid* [65].

⁵² *ibid* [66].

⁵³ *ibid* [67].

⁵⁴ *ibid* [68].

what the defendant does is comparatively less culpable than being a courier, such as moving cartons of cannabis resin from the corridor outside a flat into a particular unit.⁵⁵ The court should not stretch the term ‘courier’ and label a defendant as such if in fact, he is not.⁵⁶

The elaboration on different hierarchical positions in *Herry* may create a false impression that they are the only set of indicators illustrating defendants’ role and culpability. However, as expressly stated in *Herry*, ‘not all couriers and storekeepers may be as culpable as each other, even though they are trafficking in the same quantity of dangerous drugs’.⁵⁷ The labels of positions in the enterprise do not ‘mask a true assessment of the individual’s culpability’.⁵⁸

Apart from hierarchical position in the trafficking enterprise, there are various other factors that could be considered when assessing a defendant’s role and culpability. Two of these were identified in *Herry*: cross-border carriage of drugs, and the use of minors or young people to carry or deal in drugs.⁵⁹ This view was echoed in *Lee*.⁶⁰ Notably, *Lee* explicitly did away with the *Abdallah* list of enhancements, pursuant to which a maximum two-year enhancement could be imposed.⁶¹ The Court of Appeal stated that the ‘international element’, and the factors of ‘being a mastermind or senior player’ and ‘engaging a young person to assist in the trafficking’⁶² should normally be dealt with in step

⁵⁵ *ibid* [59]; *HKSAR v SK Wasim* [2020] HKCA 269, [2020] 2 HKLRD 1139 [5]–[6] (Macrae VP and Zervos JA); see also *Chu Ho Wa* (n 26).

⁵⁶ *Herry* (n 5) [59].

⁵⁷ *ibid* [51]. A similar message is delivered in [80].

⁵⁸ *ibid* [50]; *R v Yavuz* [2018] SASCFC 24 (Full Court of the Supreme Court of South Australia) [72] (Kourakis CJ, Blue and Hinton JJ).

⁵⁹ *Herry* (n 5) [71]. Drug trafficking involving minors is a statutory aggravating feature under s 56A of the Dangerous Drugs Ordinance. As the statute does not stipulate how exactly the court should ‘pass a sentence on the person for that offence that is more severe than the sentence’ (s 56A(1)(b)(ii)), the court is at liberty to consider it under any sentencing approach, including in the step 2 of the six-step approach.

⁶⁰ *Lee* (n 10) [53], [74].

⁶¹ *HKSAR v Abdallah* [2009] HKCA 115, [2009] 2 HKLRD 437 [40]–[43] (Stuart-Moore VP, Stock JA and McMahon J).

⁶² The defendant himself as a minor has no impunity against the sentencing enhancement based on engaging a young person to assist in the trafficking: *HKSAR v Ho Pak Hong* [2022] HKCA 176 [39].

2.⁶³ Specific to the ‘international element’ is its varied expression in different cases, and thus defendants’ role and culpability and the corresponding extent of enhancement differ, as stated in *Lee*,⁶⁴ *Kapusamy*⁶⁵ and related precedents.⁶⁶

B. Step 3: Adopting a Proper Starting Point

With the role and culpability of the defendant in mind, the sentencing court would decide where the defendant should be positioned within the band identified in step 1.⁶⁷ Sometimes in view of particularly serious or lesser culpability identified in step 2, the court should go outside, either above or below, the relevant band.⁶⁸ In essence, step 3 is an application of the conclusions of steps 1 and 2 to the facts,⁶⁹ and the result of step 3 largely depends on the findings made in steps 1 and 2. This exercise is extremely fact sensitive — the individual’s role and culpability, and thus his position in the band, differs between every case. Hence, it suffices to note that judges, as observed by the Court of Appeal in *Herry*, need only elaborate their factual conclusions on step 3.⁷⁰

C. Step 4: Considering Aggravating Factors

Step 4 determines the ‘notional sentence after trial’. In this step, the court would consider whether there are further aggravating factors which have *not* been given due weight in previous steps.

⁶³ *Lee* (n 10) [69], [70].

⁶⁴ *ibid* [58].

⁶⁵ *Kapusamy* (n 11) [60], [62]–[65].

⁶⁶ For example, *Secretary for Justice v Pastana Carvalho Andreza Narely* [2022] 5 HKC 674 [38] (Macrae VP, M Poon and A Pang JJA) (in which the court expressed that circumstances including the defendant’s impoverishment and motive of earning money for family member’s medical expenses could be reasons to reduce the extent of ‘intentional element’ enhancement).

⁶⁷ *Herry* (n 5) [69].

⁶⁸ *ibid*. There have been several cases following *Herry* that went beyond the mathematically calculated band in step 3, see *HKSAR v Lam Yat Chin* [2021] HKCFI 2650 (Yeung and Macrae VPP and Zervos JA) (in which the court considered the defendant’s role of directly distributing drugs to consumer as a street seller and the weight of ‘ice’) and *HKSAR v Chu Yick Yin* [2021] HKCFI 2939 (in which the court considered the defendant’s role and culpability and the weight of heroin).

⁶⁹ *ibid*.

⁷⁰ *ibid*.

The relationship between steps 2 and 4 is simple: if a material fact has been taken into account in step 2, the same fact should not be considered again in step 4. Judges should not allow, in substance, an ‘overlap’ when the two steps are applied in practice. Essentially, courts should guard against the risk of double-counting material facts in different steps, and thus imposing unfair and excessive punishment.⁷¹

Two of these aggravating factors were stated in *Lee*: previous convictions of drug trafficking⁷² and the status as a Form 8 recognizance holder.⁷³ Whilst sentencing judges always retain discretion on whether to enhance the sentence based on previous criminal convictions,⁷⁴ the court in *Lee* stated that there are many other aggravating features which ‘do not strictly attach to the role and culpability of the offender’ and thus should be handled in step 4.⁷⁵

Whether an aggravating factor should normally be dealt with in step 2 (the assessment of role and culpability) or in step 4 (separate aggravating factors) is a question not explicitly answered in either *Herry* or *Lee*. In the following, we venture to provide further guidance and clarity on this issue.

D. Step 2 or Step 4 – A Principled Delineation?

This section starts with a caveat: the court always exercises the discretion to give weight to an aggravating feature either in step 2 (role and culpability) or in step 4 (separate aggravating factors).⁷⁶ For example, sentencing courts are expressly permitted to address a normally ‘step 2 factor’ in step 4 in order to highlight the seriousness or significance of a specific feature in a case, as long

⁷¹ *Herry* (n 5) [70]; *Lee* (n 10) [76].

⁷² *Lee* (n 10) [70], [87].

⁷³ *ibid* [71], [87].

⁷⁴ For example, *Chu Yick Yin* (n 68) (in which the court did not consider the less serious offence committed while the defendant had been very young), and *Lam Yat Chin* (n 68) (in which the court did not consider drug-related conviction record as it did not involve drug trafficking).

⁷⁵ *Lee* (n 10) [72]. Moreover, it is worth noting that although personal record and status might be considered in step 4, seemingly the status of being a drug user per se does not constitute an aggravating factor: *HKSAR v Tang Wing Han, Sean* [2021] HKCFI 2528.

⁷⁶ *Herry* (n 5) [72]; *Lee* (n 10) [70].

as the court caters for the risk of double-counting in both steps.⁷⁷ As the most important consideration here is to prevent double-punishment and an unfair and excessive sentence, confusion regarding the categorisation of steps itself could hardly be a ground for alleging that the sentence is manifestly excessive or wrong in law.

That said, it is always better to provide reasonably clear guidance or standards for practitioners advising their clients, as well as sentencing courts to (at least preliminarily) categorise various aggravating features across different cases. Ambiguity or insufficient assistance regarding an approach used routinely in the criminal justice system will do no good, judicially and administratively. Unfortunately, the Court of Appeal resorted to descriptions of the categorisation being ‘naturally’, ‘rationally’, ‘logically’ and ‘relevantly’ done,⁷⁸ as well as whether the categorisation is too ‘strained’ or not,⁷⁹ than providing explicit guidance. This gap is what we venture to fill.

Nonetheless, it would be unfair to say the court in *Herry* omitted any means of categorisation. Introducing step 4, the court quoted the following from the special supplement to the United Kingdom Archbold 2021 concerning Sentences & Orders on Conviction (Sentencing Code):

[aggravating factors are] those factors which indicate a higher level of culpability on the part of the offender or greater degree of harm *than that inherently present in the offence*. ... Aggravating factors must always be considered in the context of the offence itself, *and factors indicating harm or culpability which form an inherent part of the offence should not be “double-counted”*.⁸⁰

Although the phrase ‘aggravating factor’ in United Kingdom Archbold 2021 is generally applicable to all crimes and does not make reference to drug trafficking cases, the above quotation

⁷⁷ *Lee* (n 10) [75]–[77].

⁷⁸ *ibid* [52], [87].

⁷⁹ *ibid* [70].

⁸⁰ Archbold 2021, Chapter 5A, *Sentences & Orders on Conviction (Sentencing Code)*, 5ASC-41 cited in *Herry* (n 5) [70] (Macrae ACJHC) (emphasis added).

forms the basis for a clear and easy yardstick for the ‘step 2 versus step 4’ categorisation. It is to ask: *Whether the relevant aggravating feature is ‘an inherent part’ of the offence?* If yes, it should normally be put in step 2. If not, it should normally be put in step 4.

The correctness and applicability of this yardstick can be derived from previous trafficking cases. Firstly, the test is consistent with the already categorised factors in *Herry* and *Lee*. The hierarchical level⁸¹ occupied by the defendant is plainly inherent to the offence as it reflects the severity of the culpable participation in a trafficking enterprise and its contribution to the dissemination of narcotics. The factors of ‘international element’, ‘being a mastermind or senior player’ and ‘engaging a young person to assist in the trafficking’, which have been expressly categorised as step 2 factors,⁸² relate to the role played by the defendant and are hence inherent parts of the offence. Indeed, this delineation is arguably supported by the wording in *Lee*:

[The three factors abovementioned] are more logically and relevantly to be taken into account when assessing the gravity of the offending and the offender’s involvement in the offence.⁸³

On the contrary, the factors of ‘conviction record’ and ‘Form 8 recognizance holder status’, which were considered step 4 factors,⁸⁴ are patently not inherent to (or arguably not even part of) the specific offence for which the court must determine sentence. It is worth noting that the meaning of ‘inherent part’ should not be confused with ‘elements of offence’ — the elements of offence are related to whether an offence is committed, not sentencing.

Secondly, the yardstick is consistent with the distinction between the inherent gravity of criminal conduct and other aggravating factors in the general (non-drug trafficking) context of sentencing. The Court of Appeal in cases of other types of crime⁸⁵ cited *Herry* and contrasted the term ‘aggravating factors’

⁸¹ *Herry* (n 5) [58]–[68].

⁸² *Lee* (n 10) [69], [70].

⁸³ *ibid* [52] (Macrae ACJHC) (emphasis added).

⁸⁴ *ibid* [71], [87].

⁸⁵ *Secretary for Justice v Chung Pui Kit Billy* [2023] 2 HKLRD 825 (Macrae VP, Zervos and Anthea Pang JJA) (an internet fraud case);

(used in step 4 in *Herry*) with ‘the seriousness of the criminality involved’ and ‘the facts of the case and the details of the criminal acts’.⁸⁶ The court viewed ‘step 4 factors’ as something *other than* the criminality and the criminal acts themselves. Indeed, when dealing with sentences other than for drug trafficking, it is a common practice that practitioners would start by searching for cases with similar seriousness and material facts in the offence (in other words, inherent parts of the offence) to ascertain the sentencing starting point. Factors not inherent to the offence, such as personal record of conviction, are usually not yet involved at this stage. While the practice is slightly different in drug trafficking cases because there are sentencing bands to be applied (in step 1), the spirit of determining the starting point remains the same: the court considers all and only facts that are inherent to the offence. Hence, in tandem with broader sentencing practice, inherent features should be considered in step 2 (and strictly speaking also in step 1, as the quantity is also an inherent factor), with other non-inherent factors to follow in later steps. Indeed, in the drug trafficking context, the Court of Appeal (for example, in *HKSAR v Leung King Hung*⁸⁷) described aggravating factors in contrast to the criminality of offence per se.⁸⁸ The yardstick we proposed is consistent with the sentencing practice for other offences.

Thirdly and relatedly, the yardstick is consistent with the deliberate choices of words by the court in *Herry* — ‘starting point’ versus ‘notional sentence after trial’. It is clarified in *Herry* that ‘starting point’ is the phrase used *before* step 4. This demonstrates the underlying consistency between the approach and the sentencing practice for other crimes, discussed in the preceding paragraph — non-inherent factors do not help determine the starting point but only enhance the resultant sentence.

The practical significance of having a clear and easy yardstick is that when lawyers and judges encounter aggravating features yet been covered in *Herry*, *Lee* or other authoritative

HKSAR v Lee Ping Hei [2021] HKCA 293 (an assaulting police officer case).

⁸⁶ *Chung Pui Kit Billy* [37]; *Lee Ping Hei* [16]–[19].

⁸⁷ *HKSAR v Leung King Hung* [2024] HKCA 69.

⁸⁸ *ibid* [33]–[36].

cases, they have a basic idea when these features are ordinarily assessed — in step 2 or step 4. These provide crucial clarity and predictability to an approach which is founded upon and instilled with judicial discretion. For the sake of convenience, we submit a non-exhaustive list of relevant factors categorised between the two steps. The following features are suggested to be inherent to the offence as it relates to the contribution to the dissemination of narcotics. The following factors are thus suggested to be ordinarily addressed in step 2:

- (1) Sharing of drugs free of charge with friends in private premises, offered by the defendant (as correctly categorised in *HKSAR v Wong Antony Wai Ming*⁸⁹);
- (2) Whether the trafficking is aimed at financial gain or based on non-financial reasons such as intimate relationships (as hinted in *Herry* itself),⁹⁰
- (3) Any trafficking conduct involving minors such as the displaying of drugs to them;⁹¹

⁸⁹ *HKSAR v Wong Antony Wai Ming* [2021] HKCFI 2996 (DHCJ McWalters) ('Notwithstanding these circumstances, the defendant was nevertheless directly involved in the dissemination of a variety of drugs to others and in providing a place for their consumption. By providing the drugs free of charge and by having available a variety of drugs and a place in which they could be consumed in privacy, his actions were only likely to encourage rather than discourage drug use by others. In my view, this places him at a more serious level of culpability than the mere storekeeper or courier.').

⁹⁰ *Herry* (n 5) [49] (Macrae VP) ('[W]e contrasted the examples of the mother of a drug addict who permits her son to store 50 grammes of Ice in her home, knowing that he is trafficking in those drugs, partly to satisfy his own habit, with the home owner or tenant who permits another to store the same quantity of drugs in his home for the purposes of trafficking for a fee of \$2,000 per month, and posed the question, who is the more culpable? We could ask the same question of the courier who, on a single occasion, is asked to take a parcel of 50 grammes of Ice from one part of Hong Kong to another without fee for her boyfriend and the defendant who, on the instructions of a dealer, delivers 10 packets of 5 grammes of Ice each to different customers in different parts of Hong Kong during the course of a day for a fee of \$2,000.' (emphasis added).

⁹¹ A common aggravating feature. See, inter alia, *HKSAR v Yeung Lung and Anor* [2017] 2 HKC 566, 568; *HKSAR v Chor Lui* [2001] 3 HKLRD 95 (Lugar-Mawson J). It is also noted that drug trafficking involving minors is a statutory aggravating feature under s.56A of the Dangerous Drugs Ordinance. As the statute does not stipulate how exactly the court should 'pass a sentence on the person for that offence that is more severe than the sentence' (s 56A(1)(b)(ii)), the court is at liberty to consider it under any sentencing approach, including in the step 2 of the six-step approach.

- (4) Use of social media for sale;⁹²
- (5) Location of trafficking;⁹³
- (6) Use of trusted positions such as being a pharmacy employee;⁹⁴
- (7) Use of other business as cover;⁹⁵
- (8) Use of undue pressure and intimidation against others;⁹⁶
- (9) Trafficking within a custodial institution such as prisons;⁹⁷
- (10) Use of violence in trafficking if not charged as a separate offence.⁹⁸

The following factors are suggested to be not inherent to the offence, arguably not even part of the offending conduct per se, but render the commission of the offence by that particular offender more deserving of punishment and denunciation. These factors proposed to be addressed in step 4 are more about the defendant's background or behaviour, and are not part of the offence:

- (1) Offence committed on bail for other offences;⁹⁹
- (2) Failure to comply with current court orders;¹⁰⁰
- (3) Attempt to conceal or dispose of evidence, if not separately charged.¹⁰¹

We specifically note that the 'committed on bail' and 'non-compliance with court order' factors are analogous with the 'conviction record' factor discussed in *Lee* in step 4, and relates to the non-offence behaviour of the specific offender.

There are instances where we beg to differ from the courts' categorisation. For example, 'provision of a variety of drugs' is categorised into step 4 in the Court of Appeal's decision

⁹² A common aggravating feature. See eg *HKSAR v Cheung Fai Ho* [2022] HKCFI 223.

⁹³ A common aggravating feature. See eg *HKSAR v Au Yeung Chuen Yee* [2013] 5 HKC 1 (V Bokhary J).

⁹⁴ A common aggravating feature. See eg *HKSAR v Lau Shui Kwan* [2003] HKCFI 714, *R v Siu Yuen Fong and Anor* [2002] 4 HKC 699, 710 (Stock J).

⁹⁵ One of the criteria for the 'Leading role' category, in United Kingdom Sentencing Council, *Drug Offences Definitive Guideline*.

⁹⁶ *ibid.*

⁹⁷ One of the 'factors increasing seriousness', *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

in *HKSAR v Rhaman Md Motaleb*,¹⁰² and the Court of First Instance's decisions in 香港特別行政區 訴 張嘉希¹⁰³ and *HKSAR v Leung Kwok Man*.¹⁰⁴ Explanation of any specific need to single out this factor due to its particular seriousness or significance in the factual scenario¹⁰⁵ is not readily observed in the said cases. As the rationale for aggravation is that a variety of drugs facilitate trafficking by catering to a wider market,¹⁰⁶ it is clearly something inherent to the offence of trafficking. These features are more analogous to step 2 factors than to step 4 factors. By revising the classification of recurrent features, a clear and easily understandable yardstick could facilitate the production of more coherent and consistent judgments and result in a fairer and more transparent sentencing regime.

IV. STEP 5: CONVENTIONAL MITIGATING FACTORS AND ITS OUTLIERS

A. Conventional Mitigating Grounds

A less discussed aspect in *Herry* is the application of conventional mitigating factors notwithstanding the underlying sentiment of deterrence against the recruitment of vulnerable individuals for trafficking.¹⁰⁷ The grievousness of this offence dictates that meaningful mitigation, apart from the plea of guilty, is rarely available,¹⁰⁸ and personal circumstances, unless exceptional, will count for very little.¹⁰⁹ In this vein, common mitigation such as age, clear criminal records, personal or family background, financial difficulty, or physical or mental illnesses are usually

¹⁰² *HKSAR v Rhaman Md Motaleb* [2023] HKCA 91.

¹⁰³ 香港特別行政區 訴 張嘉希 (translit: *HKSAR v Cheung Ka Hei*) [2022] HKCFI 2044.

¹⁰⁴ *HKSAR v Leung Kwok Man* [2024] HKCFI 667 (DHCJ Vinci Lam SC).

¹⁰⁵ A practice encouraged in *Lee* [75]–[77].

¹⁰⁶ *HKSAR v Islam Azharul* [2020] 1 HKLRD 644 (“*Azharul*”).

¹⁰⁷ *Lee* (n 10) [70].

¹⁰⁸ *Abdallah* (n 61) [32]. This expresses a similar sentiment as the reference of a guilty plea as the ‘high watermark’ for sentencing discounts from mitigation: *Herry* (n 5) [75]–[77].

¹⁰⁹ *Herry* (n 5) [44], [73]; *Lau Tak Ming* (n 18) 386F–G; *Kilima* (n 14) [23].

inapplicable under step 5.¹¹⁰ The fact that the defendant was under the influence of narcotics,¹¹¹ that seized narcotics are not intended to be locally distributed,¹¹² or that the defendant is a foreigner or that they are ignorant of the law,¹¹³ are not accepted mitigation for drug traffickers.

Whereas *Lee* was silent on the availability of mitigating factors, exceptional grounds were only discussed in *Herry* and *Kapusamy*.¹¹⁴ Listed below are mitigating factors which are expressly confirmed or are likely to remain operational:¹¹⁵

- (1) Guilty plea: Depending on the juncture when a guilty plea is entered, it offers at most a one-third discount.¹¹⁶
- (2) Assistance to authorities: This could increase the one-third guilty-plea discount, to between 40% and two-thirds, depending on the nature and practical use of assistance rendered.¹¹⁷

¹¹⁰ But they may properly be taken into account when applying totality (step 6): *HKSAR v Pau King Kong* [2013] 3 HKLRD 676 [37]–[44] (Lunn JA and McWalters J).

¹¹¹ *Secretary for Justice v Ko Wai Kit* [2001] 3 HKLRD 751, 757 (Stuart-Moore ACJHC, Stock JA and Lugar-Mawson J).

¹¹² *Pedro Nel Rojas* (n 22).

¹¹³ *HKSAR v Hong Chang Chi* [2002] 1 HKLRD 486 (Stuart-Moore VP, Stock JA and Lugar-Mawson J); *HKSAR v Garcia Palacios Marco Antonio* [2008] 3 HKC 213 (Stock and Yeung JJA).

¹¹⁴ *Herry* (n 5) [73]–[74], [77]; *HKSAR v Yan Wai Ming* (CACC 417/2002, 26 February 2003) [12].

¹¹⁵ See also Stefan HC Lo, Ian Dobinson and Wing Hong Chui, ‘Sentencing for Drug Offence in Hong Kong: An Overview’ (2004) HKLJ 13.

¹¹⁶ *HKSAR v Ngo Van Nam* [2016] 5 HKLRD 1 (Yeung and Lunn VPP and Macrae JA) (For discounts depending on case progress: one-third for plea entered on or before committal to Court of First Instance or District Court plea day; 25% for plea entered up till dates are fixed in the Court of First Instance; 20–25% for plea entered after trial dates are fixed, but before first day of trial; 20% for plea entered on first day of trial; less than 20% for plea entered past the first day of trial).

¹¹⁷ *Kilima* (n 14) [77], [81], [83]–[86]. For levels of assistance: see eg *HKSAR v Cheung Chi Yuen* [2018] 2 HKLRD 1396 (McWalters and Poon JJA) (Two-thirds discount for ‘super-grass’ category, or assisting with considerable personal risk); *HKSAR v Lee Yat Fan* (CACC 414/1999, 30 May 2001) (50% for ‘leading to arrest and testifying against others’); *HKSAR v Ng Shek Yu* (CACC 178/2000, 1 March 2001), *HKSAR v Cheng Weiguang* [2018] 6 HKC 158 (Yeung ACJHC and Pang JA) (Upward adjustment to 45% for serious hardship suffered due to rendering assistance; 40–45% for those assisting less than a ‘super-grass’, where assistance rendered without testifying against others); *HKSAR v Ilmayanti* [2019] 4 HKLRD 1 (Macrae VP and McWalters JA) (up to 40% for limited, unfruitful help eg unsuccessful controlled delivery).

- (3) Self-consumption: A significant portion of seized drugs intended to be consumed by the trafficker could warrant a 10-25% discount in addition to a guilty plea. No reduction could be granted if the factor of self-consumption is counterbalanced by the finding of a latent risk of dissipation of the drugs intended for self-use.¹¹⁸
- (4) Positive good character: Substantive evidence more than a clear criminal history that showcases the defendant's personal character could warrant an exceptional discount.¹¹⁹
- (5) Participation in Father Wotherspoon's Campaign: Evidence of practical assistance to the drug-discouragement campaign may warrant a discretionary, 'token' discount of no more than 3 months.¹²⁰
- (6) Unconscionable delay in prosecution: For delays through no fault of the defendant, a discretionary discount in the range of months could be granted.¹²¹
- (7) Entrapment: Whether a discount is given depends on the degree of encouragement given by an undercover officer and whether there is a real likelihood that the trafficking offence was instigated by such encouragement.¹²²
- (8) Extreme youth: The principles of retribution, deterrence and prevention dictate that the young age of a defendant

¹¹⁸ *HKSAR v Fong Yau Heung* [2022] 2 HKLRD 99 [32] (Macrae VP and Zervos JA); *HKSAR v Wong Suet Hau* [2002] 1 HKLRD 69 [34] (Stuart-Moore and Mayo VPP, Stock JA) (main factors for 'significant portion'); *Wong Suet Hau* (n 118) [34(4)]; *Tsang Ka Man* (n 118) [40]. See eg *HKSAR v Pon Chao Kang Jason* [2023] HKCFI 3284 (Barnes J); *HKSAR v Lai Ka Yin* [2020] HKCFI 776 (Campbell-Moffat J); *HKSAR v Tam Chiu Ho* [2024] HKDC 244 (HHJ Tam). Note: participation in Father Wotherspoon's campaign was expressly excluded under this head: *Kilima* (n 14) [88], [91], [221].

¹¹⁹ *Kilima* (n 14) (Lunn VP) [66]–[67], (Macrae VP) [71]. The court noted emphatically that this ground is to be realistically assessed and with common sense: *Herry* (n 5) [126]. Consideration may be had as to whether efforts towards the campaign were 'genuine and extensive' and whether a 'positive and major contribution' is made: *HKSAR v Osinaga Banegas Maria Isabel* [2022] HKCA 1233 (Macrae VP).

¹²⁰ *HKSAR v Chiu Chi Wing* [2013] HKCA 557 (guiding principles). See eg *Secretary for Justice v Lee Ying Tung* [2023] 3 HKLRD 667; *HKSAR v Lin Ling* [2023] HKCFI 2791 (DHCJ Anthony Kwok); *HKSAR v Ahmed Shamir* [2023] HKCFI 1361 (DHCJ Woodcock).

¹²¹ *R v Siu Yuen Fong* [2002] 4 HKC 699 (Stock JA) 711 (general principles and considered factors); *HKSAR v Cheung Yun Kei* [2001] 4 HKC 52 (Keith JA) 59. See eg *HKSAR v Limbu John* [2021] HKCFI 2022 (DHCJ McWalters).

¹²²

is of insufficient mitigation unless exceptionally, the defendant is of extreme youth.¹²³

The court in *Herry* observed that the mitigating value of these features should be assessed holistically when determining the overall discount from the notional sentence after trial. Other grounds of mitigation should thus not be considered before the discount for a guilty plea.¹²⁴ Though sentencing judges are sometimes recorded to grant discretionary reductions after applying the guilty-plea discount,¹²⁵ this is seldom tinkered upon appeal unless the reduction lacks explanation to the extent that it exceeds discretion or renders the resulting sentence manifestly inadequate. Indiscriminate comparison between sentences and sentencing discounts passed on different facts on divers occasions by different judges, has been held to denude the meaning of discretion, and would not justify adjustment of proper sentences by appellate courts.¹²⁶

One predominantly debated area is whether the lack of a profit-motive can serve as mitigation. This non-commercial criterion is predominantly argued in cases involving social supply of drugs between acquaintances for mutual consumption in social or recreational settings, and those where a foreigner is convicted as an international trafficker and pleads that they had been exploited as a ‘drug mule’. As Hong Kong courts shoulder the active responsibility of determining our own policy for combatting trafficking,¹²⁷ these discussed grounds demonstrate how courts grapple with Hong Kong’s prohibitionist policy,¹²⁸ the need for a

¹²³ *Lau Tak Ming* (n 18) 386E–G; *HKSAR v Bugaay* [2008] 6 HKC 326 [17] (Stuart-Moore VP, Yuen JA and Suffiad J); 香港特別行政區 訴 潘有志 (translit: *HKSAR v Poon Yau Chi*) [2022] HKCFI 1335. See also *HKSAR v Tang Sik Man* [2022] HKCFI 3291; *HKSAR v Yeung Kwok Leung* [2022] HKCFI 1577; *HKSAR v Lau Kai Fung* [2022] HKCFI 495; Gordon Chung, ‘A Re-evaluation of “Incarceration Strategy” by Hong Kong Courts The Overuse of Incarceration in Sentencing Juvenile Drug Offenders’ (2017) HKLJ 324, 328–32.

¹²⁴ *Herry* (n 5) [78].

¹²⁵ See eg *Kapusamy (n 11)* [13]–[19], [79]–[81]; *Pon Chao Kang Jason* (n 119); *Tang Sik Man* (n 123); *HKSAR v Chu Yick Yin* [2021] HKCFI 2939.

¹²⁶ *Herry* (n 5) [48]; *Osinaga Banegas* (n 120) [16].

¹²⁷ *Kapusamy* (n 11) [71]; *Kilima* (n 14) [70]–[72].

¹²⁸ *Kapusamy* (n 11) [69]–[70]; Joe-Laidler and others (n 8) 929–30.

just, fair and individualised sentence for each offender, and issues of international comity.

B. The Mitigative Value of Social Supply of Narcotics

Recent academic discussions have noted the fluid, non-commercial social supply of narcotics as a subset of ‘hidden drug use’.¹²⁹ Joe-Laidler and others referred to the United Kingdom’s standard of a less culpable trafficker who has the ‘expectation of limited, if any, financial or other advantage’¹³⁰ or ‘absence of any financial gain, for example, joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis’.¹³¹ The social supply of narcotics between traffickers and users is seen in a gratuitous, reciprocal light, propagated by current drug use realities¹³² found in both the United Kingdom and Hong Kong. These permit a shorter sentence due to lesser culpability.

Yet this trend does not seem to afford mitigation in this jurisdiction. The courts stand by their duty to deter the supply of narcotics to the public, and previously observed that ‘social traffickers’ pose the same threat to society as people who peddle their drugs for gain. Hence the courts are very hesitant to dilute the culpability of trafficking by proscribing a blanket policy or otherwise.¹³³ Putting aside the policy-heavy value judgment of whether the trafficking of drugs in a recreational, peer-to-peer setting warrants either aggravation or mitigation, the mitigative value of social supply is rarely recognised when these fact patterns are advanced.

Were a defendant to rely on facts indicating social supply conventionally through the ground of self-consumption, this mitigation would be rejected as social supply patterns indicate a

¹²⁹ Chan and others (n 17) 6233, 6236–38.

¹³⁰ United Kingdom Sentencing Council, *Drug Offences Response Document* (United Kingdom Sentencing Council 2021) 10; Joe-Laidler and others (n 8) 919.

¹³¹ United Kingdom Sentencing Council, ‘Drug Offences Definitive Guideline’ (2012) 11.

¹³² Joe-Laidler and others (n 8) 917–18.

¹³³ *HKSAR v Lam Kai Chi Ernie D* [2011] HKCFI 1302; *Wong Suet Hau* (n 118) [47]–[49].

large latent risk of dissipation.¹³⁴ Were a defendant to plead social supply as a discrete mitigating factor, little assistance is derived from case law, as the leading legal conception is a narrow, *obiter* one:

While some of the “social” or “non-commercial” trafficking cases involving small quantities of drugs can properly be regarded, when all the circumstances are examined, as falling into the lower end of the sentencing scale applicable to the dangerous drug in question, we are firmly of the view that this factor should not, in itself, provide a general basis for imposing a lighter sentence, than would have been imposed for commercial trafficking. The “friend” who starts off or perpetuates another’s abuse of drugs, is as dangerous to the community as the commercial supplier of small quantities, who will generally traffic in drugs with those already addicted.¹³⁵

We contend that this narrow test, save for subsequent judicial scrutiny or legislative reforms, would operate in tandem with the six-step approach. Where on the restrictive set of facts, a less culpable, individualised assessment could be reached in step 2, social supply would remain an unlikely mitigating factor in step 5.¹³⁶

C. Trafficking due to Exploitation and Human Trafficking

The same principles of deterrence and protection of the vulnerable are also relevant in cases involving ‘drug mules’. Based on facts similar to those pleaded by *Kapusamy*¹³⁷ and *Oliinyk*,¹³⁸ the key issue is whether a discount can be given to couriers if it is shown

¹³⁴ *Wong Suet Hau* (n 118) [34(4)]; *HKSAR v Chan Kwok Sang Pitak* [2023] HKCFI 1326.

¹³⁵ *Wong Suet Hau* (n 118) [51].

¹³⁶ See also *HKSAR v Man Ka Yan* [2018] HKCFI 1884; *HKSAR v Holguin Sanchez Diana Milena* [2015] HKCA 465.

¹³⁷ *Kapusamy* (n 11) [6].

¹³⁸ *Kapusamy* (n 11) [12].

upon sufficient evidence that they are ‘coerced or tricked into transporting drugs across an international border but who have no further commercial interests in the drugs’.¹³⁹ Notably, European research indicate that ‘heavy sentences on mules have little deterrent impact as criminal organisations can easily replace them and bear the economic costs’.¹⁴⁰ Hence the effectiveness of heavy sentences against exploited couriers is currently being reassessed worldwide. The United Kingdom, through its reformed sentencing guidelines, tackled the problem that vulnerable couriers, who experienced coercion or exploitation of their poverty, received sentences at the same level as more serious, organised traffickers.¹⁴¹

In Hong Kong, early observations discouraged the recruitment of and risk-taking by persons from desperate circumstances.¹⁴² Under the six-stage approach, step 2 does extend much-needed room for sentencing judges to delineate between international couriers who aim to profit, and those who are coerced or tricked into transporting across borders.¹⁴³ Yet this is incorporated as a discretionary assessment of culpability. The case of ‘drug mules’ pertains to two noteworthy aspects of sentencing: (i) whether Hong Kong courts, in developing its sentencing policy, shoulder protective duties against victims of human trafficking as a matter of international comity, and (ii) whether courts should recognise and elevate the status of ‘past coercion or inducement from an element of culpability to ‘very special factors’ warranting mitigation.¹⁴⁴

¹³⁹ Gloria Lai, ‘Drugs, crime and punishment: Proportionality of sentencing for drug offences’ (2012) Series on Legislative Reform of Drug Policies Nr 20, 9; European Monitoring Centre for Drugs and Drug Addiction, ‘A definition of ‘drug mules’ for use in a European context’ (2012).

¹⁴⁰ Lai (n 139) 9.

¹⁴¹ United Kingdom Sentencing Council, ‘Assessing the impact and implementation of the Sentencing Council’s Drug Offences Definitive Guideline’ (2018). The court in *Kapusamy* (at [53]) heard submissions relying on overseas authorities from England and Wales, Australia, New Zealand, and Canada, which allowed mitigation for drug mules’ limited decision-making power, lack of a real idea how much drugs they carried and the scale of the operation, and their assumption of risks far more significant than the reward they were to receive.

¹⁴² *HKSAR v Daresa Mariam Guma* [2012] HKCA 414 [8], [11]; *Abdallah* (n 61) [32].

¹⁴³ See *obiter* comments of McWalters JA: *Kilima* (n 14) [148]. Cf United Kingdom Sentencing Council, *Drug Offences Response Document 12*.

¹⁴⁴ *Herry* (n 5) [76]–[77]; *Yan Wai Ming* (n 114) [12].

In *Kapusamy*, the Court of Appeal heard submissions that, pursuant to the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children,¹⁴⁵ sentencing courts should factor in the vulnerability of drug mules.¹⁴⁶ This was argued as a matter of consistency with the post-accession legal position in neighbouring Mainland China,¹⁴⁷ or could be based on international comity when developing the local sentencing regime. However, Hong Kong's anti-drug policy seems to prevail as the issue of drug importation by trafficked persons is notably absent from her 'multi-legislation' approach for combating human trafficking.¹⁴⁸ Given that the Hong Kong government is reluctant to extend the Protocol to Hong Kong,¹⁴⁹ it is not surprising that the prosecution in *Kapusamy* submitted against the 'back-door' application of the Protocol by way of sentencing policy.¹⁵⁰ The Court of Appeal refrained from addressing this issue of international law and concluded that it

¹⁴⁵ The Palermo Protocol was adopted on 15 November 2000 ("**the Protocol**") and supplemented the United Nations Convention against Transnational Organised Crime (adopted on 15 November 2000). See *Kapusamy* [22].

¹⁴⁶ Relevantly, art 3(a) of the Protocol refers to 'human trafficking' as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include ... forced labour or services'. Part II of the Protocol also establishes legal requirements of State Parties to offer protection to victims, in the form of confidentiality, legal aid, physical sustenance, counselling, medical and employment assistance, etc.

¹⁴⁷ *Kapusamy* (n 11) [22]. The Protocol was expressly not extended to Hong Kong upon accession of the People's Republic of China on 8 February 2010: United Nations Treaty Collection, 'Status of Palermo Protocol (15 November 2000)' (*United Nations Treaty Collection*, 2024)

<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtid_g_no=XVIII-12-a&chapter=18&clang=_en#1> accessed 10 April 2024.

¹⁴⁸ Eg human trafficking for the purposes of prostitution, human organ trade, illegal workers etc; see Home and Youth Affairs Bureau, 'Prostitution and trafficking of women: Measures against women trafficking and girl-child prostitution' (*HKSARG*, 2021) <https://www.hyab.gov.hk/CEDAW/4th_report/en/article06.html> accessed 10 April 2024.

¹⁴⁹ *ibid.*

¹⁵⁰ *Kapusamy* (n 11) [38].

defies the belief that traffickers do not realise the risks of trafficking, particularly into this part of the world.¹⁵¹

Putting aside whether this mitigation factor should arise as a matter of international convention, the Court of Appeal in *Kapusamy* crucially described ‘very occasional’¹⁵² circumstances where the coercion, inducement, or exploitation experienced by traffickers could be taken into account. The court prefaced that Hong Kong had to determine its own sentencing policy and consider the attitudes of her neighbours on the seriousness of offences. Drug mules who might not have known what they had been carrying, or had been the subject of duress, would expect to be acquitted. The remainder of cases involving forms of exploitation short of duress, would relate to exceptional traffickers who,

because of physical or mental disability, infirmity or frailty, or because he has been genuinely scammed or tricked ... comes to realise at some late stage what is required of him but nevertheless carries on with his part in the crime knowing what he is doing, however reluctantly, but in circumstances falling short of duress.¹⁵³

The Court of Appeal held that judges would approach claims of ‘disability, infirmity or frailty’, or ‘genuine deception’ with realism, fairness and common sense, knowing that these claims could be easily made after apprehension, but are ‘less easy to substantiate and withstand scrutiny’.¹⁵⁴ Where the defendant relies on exploitation after being convicted after trial, like in *Kapusamy* and *Oliinyk*, the court would consider the defence raised during trial, and that this version of facts had been disbelieved by the jury. New evidence tendered during mitigation would also incur judicial suspicion as to why this had not been a part of the defence.¹⁵⁵

¹⁵¹ *ibid* [69]–[70]; see also *Kilima* (n 14) [71] (penalties for trafficking in neighbouring regions).

¹⁵² *Pastana Carvalho Andreza Narely* (n 66) (the fact that some traffickers are ‘drug mules’ may not warrant a wholesale mitigating factor).

¹⁵³ *Kapusamy* (n 11) [72].

¹⁵⁴ *ibid* [73].

¹⁵⁵ *ibid* [76]–[77] (an unsigned letter from a foreign embassy purporting to certify that *Oliinyk* was a victim of human trafficking).

Hence this mitigation factor is generally exclusive to defendants tendering guilty pleas. The court stated that traffickers relying on this ground would be expected to immediately advance to the arresting authorities a full and frank explanation of their involvement and provide evidence of them being ensnared into, and being unable to extricate themselves from, the commission of this offence.¹⁵⁶ These traffickers would then normally plead guilty, whereby the sentencing court would consider the agreed summary of facts.¹⁵⁷

The sentencing discount upon the finding of exploitation was not expressed in *Kapusamy*, indicating that the amount of discount would likely be subject to judicial discretion. Given the overarching prohibitionist policy that trafficking under exploitation is still trafficking,¹⁵⁸ we suggest that a realistic discount under this ground would stand between a nominal ‘token’ discount, comparable to participation in Father Wotherspoon’s campaign, and the discount for self-consumption, which is usually 10–25%.

The Court of Appeal has on numerous occasions observed that the sentencing regime in other common law jurisdictions is not of direct relevance to sentencing in Hong Kong,¹⁵⁹ and Hong Kong has to develop her own sentencing regime for trafficking. We simply note that this affords ever more reason for policy surveys and reform consultations to be conducted. With more evidence on the effectiveness of the current deterrent regime, the courts and society at large can better evaluate social needs and views.¹⁶⁰ Crucial questions have to be asked and

¹⁵⁶ *ibid* [73].

¹⁵⁷ Or conduct a Newton hearing to ascertain the facts of exploitation.

¹⁵⁸ *Kapusamy* (n 11) [69]–[70]; *Lee* (n 10) [58].

¹⁵⁹ *Kilima* (n 14) [51]–[52].

¹⁶⁰ See Singaporean surveys regarding the effectiveness of the death penalty for severe trafficking cases: Mai Sato, ‘Singapore’s death penalty for drug trafficking: What the research says and doesn’t’ Academic Views Academic SG, <<https://www.academia.sg/academic-views/review-of-death-penalty-research/>> accessed 10 April 2024; Carol Soon and Shawn Goh, ‘IPS Study on Attitudes towards the Use of Capital Punishment’ (*Institute of Policy Studies*, 2022) <<https://www.mha.gov.sg/docs/default-source/default-document-library/ips-2020-study-on-attitudes-towards-capital-punishment.pdf>> accessed 10 April 2024; Jasmin Kaur and others, ‘The Impact of

solutions searched as to how the full force of the law should come to protect both the society from the ills of narcotics, as well as individuals who fall victim to exploitation and responsibly admit their wrongdoing.

The exploitation ground enunciated in *Kapusamy* is a fresh, realistic first step in striking this fair balance. Yet administrative reforms and measures would be necessary to ensure that genuine victims of coercion could make these claims upon arrest. Thought must also be given to how enforcement agencies could better allow exploited traffickers, especially those entering Hong Kong escorted by their abductors or controllers, to seek protection and reveal their involvement at the earliest opportunity. This sets Hong Kong on the right path to doing both justice to society and individualised justice to each disadvantaged offender, whose personal circumstances already count for very little.

V. STEP 6: THE TOTALITY REVIEW AND THE EVENT HORIZON FOR SENTENCING

A. An Expressly Required Totality Review

The application of the totality principle (as summarised in the Overview above) requires the sentencing judge to take an overall view of the resultant sentence, ensure that the sentence is fair, just and balanced in *all the circumstances of the offence and the offender*, and mind that the ultimate sentence is proportionate and not excessive to the offender's criminality.¹⁶¹ Leading cases from the court also dictate the need for a sentence to be passed for each offence on a multi-charge indictment and to prevent double punishment. Multiple drug trafficking sentences can be ordered to be served (partly) consecutively or concurrently if one offence adds to the criminality of another.¹⁶² Where there are multiple aggravating factors, the court should make a proportionate,

Deterrence on the Decision-Making Process of Drug Traffickers' (2020) Home Team J 65.

¹⁶¹ *Herry* (n 5) [79]; *Lee* (n 10) [82]; *Azharul* (n 106) [20].

¹⁶² *Ngai Yiu Chung* (n 41); *Mohammed Tofael Ahmed* (n 41); *HK SAR v Tse Ming Kwan* [2023] HKCA 1022.

effective total of enhancements instead of a mere arithmetical total.¹⁶³

The issue of totality appeared throughout the Court of Appeal's judgment in *Lee*. This was first, due to the sentencing judge's erroneous method of arithmetically adding up individual enhancements for multiple aggravating factors, and secondly, due to a misapplication of the six-step approach in cases where judges discretionarily reduced long prison sentences.¹⁶⁴ The first of these two aspects has been rectified by applying the approach in *Islam Azharul*¹⁶⁵ to prevent double-punishment. We therefore turn to the second aspect which merits further discussion of judicial observations.

B. The (Purposefully) Loosened Approach to Totality

Earlier in *Kilima*, McWalters JA in His Lordship's *obiter* considered that:

The sentencing regime must allow for the possibility that there will be large seizures of dangerous drugs and also for the possibility that persons, other than couriers, who are more heavily involved in this criminal activity, will be prosecuted. When these possibilities coincide, I fear that courts may find that the sentencing range available to them to reflect these aggravating factors may not enable them to adequately distinguish the culpability of the courier from that of the organiser.¹⁶⁶

Herry has catered for the need to distinguish between the involvement of different traffickers. Yet the theme of large seizures of drugs had remained unaddressed. Established long before *Herry*, the totality principle is one that the courts 'have

¹⁶³ *Lee* (n 10) [81]–[82]; *Azharul* (n 106) [17], [20] ; *HK SAR v Islam Shafiqul* [2020] HKCA 871, [2020] 5 HKLRD 471.

¹⁶⁴ This was relied upon by the appellant in *Lee* (n 10) (at [39], [83]) and the respondent in *Oliinyk (Kapusamy (n 11))* [40], [82]).

¹⁶⁵ *Azharul* (n 106) [17], [20]; *Lee* (n 10) [90].

¹⁶⁶ *Kilima* (n 14) [148].

themselves developed to ensure proportionality of punishment in a multi-charge case'.¹⁶⁷ The requirement of a sentencing judge to review and reduce the overall sentence applied only where several sentences or enhancements were ordered.¹⁶⁸ After *Herry* expressly included a totality review,¹⁶⁹ the problematic approach espoused in *HKSAR v Cheng Man Kit*¹⁷⁰ and recurrently applied by sentencing judges¹⁷¹ arose not from prevention of double punishment, but rather the notion of a fair, just, balanced sentence in general.

In *Cheng*, the sentencing judge understood *Herry* to permit reductions outside of cases involving multiple offences:-

The defendant is only 26 years of age. A sentence as long as 20 years and 1 month will mean that even if he receives a further discount from the Commissioner for Correctional Services for good behaviour while serving his sentence, he will not be discharged from custody until he is close to 40 years of age. This will make it difficult for him to be competitive when applying for jobs as he will have had no recent experience in any field in which he becomes qualified whilst in prison.

I am satisfied that in these circumstances, the final sentence will not be a just sentence but will rather be a crushing one. What this defendant needs is not just punishment but, equally importantly, encouragement to pursue the path of rehabilitation and to believe that if he does so, society will give him a chance. I believe that these considerations justify me exercising my

¹⁶⁷ Cross and Cheung, *Sentencing in Hong Kong* (11th edn, Lexis Nexis) [49-3].

¹⁶⁸ *Attorney General v Dominic Cheung Kai Man* [1987] HKCA 121, [1987] HKLR 788, 795 (Cons VP); *R v Lui Shu Tong* [1961] HKLR 129, 136.

¹⁶⁹ We put aside the question whether the expressly worded totality review in *Herry* (n 5) (at [79]) led to the false impression that reductions could be made whenever the resultant sentence is deemed unbalanced, unjust or crushing on the defendant.

¹⁷⁰ *HKSAR v Cheng Man Kit* [2021] HKCFI 3032 (“*Cheng*”).

¹⁷¹ *Lee* (n 10) [86].

sentencing discretion to reduce the final sentence...¹⁷²

Long sentences of imprisonment and the need to distinguish roles were precisely the issues discussed in *Lee*. The respondent submitted, six years after *Kilima*, that very large quantities of dangerous drugs had come before the courts, resulting in starting points in excess of 30 years being regularly adopted. This also significantly narrowed any room to cater for the difference in roles within the criminal hierarchy.¹⁷³ The court accepted the real concerns that as various sentencing guidelines have been extended to cater for larger seized quantities since 1991, the ability to distinguish between roles has become limited and restricted.¹⁷⁴ Supported by recent seizures of increasing weight, the court's observation aligns with that of the academic community: the guideline bands begin to level off as ever-increasing narcotic weights are presented. On the high end of the guidelines, each increasing unit of weight is penalised to a diminishing degree,¹⁷⁵ and hence deterrence weakens as larger amounts are trafficked.

Faced with this narrowing room for deterrence and delineation of culpability, *Lee* seems to resolve this foundational issue by relying on judicial discretion. While the rehabilitative tenor of *Cheng* attempted to reclaim more sentencing room for heavy sentences to be reserved for more culpable traffickers with heavier roles, this was held to be a misunderstanding of the totality principle.¹⁷⁶ The court reasoned that allowing discretion to be exercised in that manner would promote inconsistency and unnecessary and unhelpful comparisons. Yet the exercise of discretion in this regard should be justified on each set of facts while inconsistency is an accepted feature to be minimised through guidance and elaboration. As such, the court's reasoning is rather perplexing as judges could still conduct an individualised

¹⁷² See also *Pau King Kong* (n 110) (at [37]): 'What the totality principle does is to invest the judge with 'a broad discretion to ensure that the final sentence he imposes on a defendant does justice in the case before him; justice to the offender and justice to the victims and the community'.

¹⁷³ *Lee* (n 10) [41]–[42].

¹⁷⁴ *ibid* [65]–[67].

¹⁷⁵ *Cheng, Ri and Pushkarna* (n 3) 186.

¹⁷⁶ *Lee* (n 10) [84].

exercise, and the general warning subsists against indiscriminate comparisons between discretionary discounts featured in various cases.¹⁷⁷

The court declined an invitation to prescribe further guidelines for heavier amounts as it considered that sufficient guidance had been given. Unfortunately, this remains quite unclear as it begs the question of when discretion can be exercised. Having already prohibited discretionary sentences achieved through totality, the weight given to personal circumstances is also minimal within the realm of mitigating factors. The viable option thus is the notional sentence after trial (steps 1 to 4). However, allowing more room for discretion in these steps means a simple comparison of narcotic weight, or the comparison of role and culpability in each large-amount case. The former fails to create more room for deterrence and delineation. The latter relies on comparisons of the case-by-case exercise of discretion, which may be even more difficult given the evidential difficulty of ascertaining role and culpability, or the myriad characterisations of culpability that are exhibited by different cases. Therefore, as true as it is that *Cheng* took a wrong turn in the law of totality, *Lee* provides an unsatisfactory solution to the fundamental question of the six-step approach: the legal balance between deterrence, distinguishing culpability, and increasingly long sentences. *Kapusamy*¹⁷⁸ sets this position of the law in stone.

C. Facing the Event Horizon of Long Sentences

We conclude this section by considering a few routes forward from this dilemma. It was suggested that the step 1 guidelines could be reformulated to present an exponential curve — where the length of sentence increases proportionally for lower weights, while on the heavier sentencing bands, the same unit weight of narcotic could lead to a much larger increase in sentence.¹⁷⁹ The guideline bands would act as a composite of both the risk of harm from narcotic weight, as well as the heavier roles played in transporting large amounts. This approach lends some confidence

¹⁷⁷ *Herry* (n 5) [48]; *Osinaga Banegas* (n 120) [16].

¹⁷⁸ *Kapusamy* (n 11) [82].

¹⁷⁹ *Cheng, Ri and Pushkarna* (n 3) 188–89.

for deterrence but seems to be a more theoretical solution: it is too unclear and assumptive to automatically render arrested traffickers fully responsible for the criminality of complex, multinational enterprises. While large shipments are said to be deterred, the practical implementation of this model means decreasing the guideline bands for lower weights, or quickly pushing heavier weights towards the sentencing ceiling of life imprisonment. Both are undesirable in reality.¹⁸⁰

We contend that a solution would be to make marked reforms to totality principles and allow the rehabilitative considerations found in the series of cases beginning with *Cheng Man Kit*,¹⁸¹ which are not premised upon multiple charges or aggravating features. As observed in *R v KM*:

[T]he totality principle is not to be disregarded for the converse purpose of assessing whether the overall effect of the sentences is sufficient having regard to the usual principles of *deterrence, rehabilitation and denunciation*.¹⁸²

When balancing all circumstances relating to the offence and the offender, there is a need for sentencing room to deter and identify those occupying the highest ranks of a trafficking enterprise to not conflict with the availability of personal characteristics. While certain comparisons could be made as to discretionary discounts, these cannot disturb the exercise of discretion in cases. Exceptional defendants who warrant mercy and rehabilitation could be given discounts if it properly serves the sentencing policy of deterring the most culpable.¹⁸³

True as it may be that this signifies a drastic and unlikely turn in the law of totality and is an affront to the entrenched prohibitionist sentencing policies. The principles of totality are likely to remain as they are explained in *Lee*, where sentencing

¹⁸⁰ *Kilima* (n 14) [71].

¹⁸¹ *Lee* (n 10) [86] (footnote 81).

¹⁸² *R v KM* [2004] NSWCCA 65 (Court of Criminal Appeal of New South Wales) [55] (emphasis added).

¹⁸³ *Lau Cheong v HKSAR* [2002] HKCFA 46, (2002) 5 HKCFAR 415 [131]–[132]: ‘[T]he approach to assessing disproportionality is the same in each case, with the court not being confined to considering individual culpability but factoring in also other legitimate penological aims and giving due weight to the legislative choice of sentence’.

discounts are only permitted to prevent double punishment. At the very least, this discussion has highlighted the underlying, persistent issue of the narrowing sentencing room when large amounts of narcotics are presented to courts. Amidst local sentencing concerns and international recommendations calling for rehabilitation and proportionality,¹⁸⁴ this discussion echoes the need for reform consultations driven by ‘empirically-informed conversations about maintaining and improving law and order in just, effective and proportionate ways’.¹⁸⁵ This includes answering the question of whether a discretionary element of rehabilitation could be added to our six-step sentencing approach.

CONCLUSION

Given the predominant need for deterrence and a capacity for properly distinguishing the culpability of different drug traffickers, *Herry*, *Lee* and *Kapusamy* have ventured to guide sentencing courts in applying a six-step approach. The Court of Appeal stands by the importance of quantity-based guidelines, emphasises the role and culpability assessment, and specifically distinguishes it from other discrete aggravating factors. We proposed a practical yardstick that aims to create a more predictable delineation. We also reviewed available mitigating factors and the correct application of the totality principle, against the relative insignificance of personal circumstances and rehabilitative ideals.

By discussing the underlying, open issue of a narrowing sentencing room induced by ever-increasing amounts of trafficked narcotics, the court has yet to arrive at a satisfactory long-term solution. A multi-faceted policy on drug abuse cannot be detached from deterring trafficking as a facet of international organised crime, as well as the rehabilitation of drug users and traffickers alike. Consultation and reform in this area of the law would be welcomed in assessing overarching policy goals in combating illicit drugs. This also helps us consider whether further adjustments to the six-step approach are necessary.

¹⁸⁴ Lai (n 139).

¹⁸⁵ Sato (n 160).

THE NEXT STEP AFTER *SHAM*: WHY AND HOW WILL CIVIL PARTNERSHIPS BE INTRODUCED IN HONG KONG? FURTHER, WILL SAME-SEX MARRIAGE BE RECOGNISED IN HONG KONG?*

Ip Chin Victoria*

Pursuant to the Court of Final Appeal’s judgment Sham Tsz Kit v Secretary for Justice [2023] HKCFA 28, it is the responsibility of the HKSAR Government to put in place an alternative legal framework that recognises same-sex partnerships with appropriate rights and protections attendant on such recognition within two (2) years. This essay aims to explore questions in relation to how might the Government propose the alternative legal framework, and eventually whether same-sex marriage will be legalised in Hong Kong by comprehensively analysing the judgment of Sham, as well as social and political factors that may influence the Government’s decision.

INTRODUCTION

5th September 2023 was the day that “brighten[ed] Hong Kong’s journey along the rainbow-coloured road”.¹ The Court of Final Appeal (“CFA”) reached a three-to-two majority, declaring that

* BSocSc (Government and Laws) & LLB, University of Hong Kong (2025). She/they have a huge passion and interest in LGBTQ+ issues and is developing her legal career with a focus in public law. The author is grateful to Professor Johannes Chan for his comments and guidance on this essay. The author would especially like to mention to all public law and human rights petitioners in Hong Kong who have inspired her/them to pursue this career and contributed to the progress of human rights protection in Hong Kong.

¹ Hong Tran, ‘CFA brightens Hong Kong’s journey along the rainbow-coloured road’ Mayer Brown (Mayer Brown, 3 October 2023) <<https://www.mayerbrown.com/fr/insights/publications/2023/10/cfa-brightens-hong-kongs-journey-along-the-rainbow-coloured-road>> accessed 28 April 2024.

the HKSAR Government (the “**Government**”) has failed to fulfil its positive constitutional obligation to provide an alternative legal framework that recognises same-sex partnerships and ordering the Government to fulfil its positive obligation in 2 years. It is now for the Government to step in and ideate a proposal for same-sex partnerships.

This article aims to explore the Government’s next step on how civil partnerships would be introduced in Hong Kong in the near future, including the Government’s considerations and the content it may propose. This article also attempts to answer questions such as what if the Government’s proposal cannot pass through the Legislative Council (the “**LegCo**”), and whether same-sex marriage will eventually be recognised in Hong Kong.

This article consists of a mixture of sociological, political and legal analysis, as recognition of same-sex partnerships concerns the development of society in Hong Kong, and relies heavily on policy decisions by the Government and LegCo. The article will first thoroughly analyse the landmark judgment *Sham Tsz Kit v Secretary for Justice* (“**Sham (No.1)**”)² and its cost order (“**Sham (No.2)**”),³ then discuss considerations that the Government should take into account for its proposal of the alternative legal framework, and finally comment on arguments as to whether same-sex marriage will be recognised in Hong Kong.

I. WHY WILL CIVIL PARTNERSHIPS BE INTRODUCED IN HONG KONG?

The direct answer to the reasons why civil partnerships *have to be* introduced in Hong Kong stems from a recent CFA judgment *Sham (No.1) & (No.2)*. The CFA ruled that the Government’s failure to provide an alternative legal framework to recognise same-sex partnerships had violated its positive obligations under Article 14 of the Hong Kong Bill of Rights (“**HKBOR**”), and had directed the Government to provide such a legal framework within the suspension period of 2 years (“**Suspension Period**”) to recognise same-sex partnerships and provide for appropriate

² (2023) 26 HKCFAR 385.

³ (2023) 26 HKCFAR 478.

rights and obligations, unless the CFA extends the Suspension Period upon the Government's application, supplemented with compelling reasons on the necessary extension period sought. While the Government and the dissenting CFA judges had provided reasonable explanations, a close reading of the CFA judgment from both theoretical and practical perspectives reveal that there could be other compelling reasons justifying the need for civil partnerships.

A. CFA Judgment *Sham*

Jimmy Sham is a gay man who married his husband in New York in 2013.⁴ In 2018, he applied for judicial review on the grounds that (1) the exclusion of same-sex couples from the institution of marriage constitutes a violation of the right to privacy and equality protected by HKBOR 14 and Article 25 of the Basic Law of the HKSAR (“**BL**”) (“**Ground (1)**”); (2) the failure to provide any alternative means of legal recognition of same-sex partnerships by the laws of Hong Kong constitutes a violation of rights protected by HKBOR 14 and/or the right to equality protected by HKBOR 22 and BL 25 (“**Ground (2)**”); (3) the failure to recognise foreign same-sex marriages by the laws of Hong Kong constitutes a violation of the right to equality protected by HKBOR 22 and BL 25 (“**Ground (3)**”).⁵

The Court of First Instance (“**CFI**”) dismissed the judicial review. Grounds (1) and (2) were dismissed as the Court was bound by the judgment of *MK v Government of HKSAR*,⁶ which held that the denial of same-sex couples' right to marriage under the laws of Hong Kong did not constitute any violation of their constitutional rights because BL 37 only protects heterosexual marriage under proper construction, and under the doctrine of *lex specialis*, the claims of constitutional rights to marriage under HKBOR 22 and BL 25 were also denied.⁷ Moreover, under a proper reading of HKBOR 14, the Government had no positive legal obligation to provide an alternative legal framework to recognise same-sex partnerships as well as to provide them with

⁴ *Sham (No.1)* (n 2) [79].

⁵ *ibid* [80].

⁶ [2019] 5 HKLRD 259.

⁷ *ibid* [43]–[44]; *Sham (No.2)* (n 3) [12].

the same rights and benefits enjoyed by opposite-sex married couples.⁸ On Ground (3), Sham’s foreign marriage lacked essential validity (as BL 37 only protects heterosexual marriage), and therefore cannot be recognised as a valid marriage under the laws of Hong Kong.⁹ The Court also rejected Sham’s argument that a general rule can be applicable in all circumstances that opposite-sex married couples and same-sex married couples should be regarded as being in an analogous or comparable position, as well as the argument on proportionality.¹⁰ Sham’s appeal was also dismissed, with the Court of Appeal (“CA”) upholding all the reasonings of the CFI.¹¹

In late 2022, CFA granted leave to Sham’s final challenge, and handed down its decision on 5th September 2023. On Ground (2), CFA reached a three-to-two majority that (i) the Government has a positive duty to provide legal recognition to same-sex partnerships, and (ii) the absence of any alternative means of legal recognition of same-sex partnership constitutes a violation of HKBOR 14 and/or BL 25 and HKBOR 22.¹² In particular, among the dissents, Lam PJ held that the Government has an obligation under HKBOR 14(2) to protect one from *unlawful or arbitrary interference* only,¹³ while Cheung CJ held that the Government has no positive obligations at all. Grounds (1) and (3) were dismissed for the same reasonings as stated above.¹⁴ CFA then (i) declared that the Government was in violation of its positive obligation under HKBOR 14 to establish an alternative framework for legal recognition of same-sex partnerships and to provide for appropriate rights and obligations attendant on such recognition with a view to ensuring effective compliance with the aforesaid obligation; (the “**Declaration**”) and (ii) directed that the operation of the Declaration be suspended for a period of two years from the date of the final order (i.e., 27th October 2023) (the “**Suspension Order**”), with a clarification that parties in *Sham* have the liberty to apply to CFA directly on paper in connection with the implementation or non-compliance of the Order.¹⁵ In particular,

⁸ *Sham (No.1)* (n 2) [10].

⁹ *ibid* [14]–[15].

¹⁰ *ibid* [22].

¹¹ *Sham Tsz Kit v Secretary for Justice* [2022] 4 HKLRD 368.

¹² *Sham (No.1)* (n 2) [260].

¹³ *ibid* [227], [232].

¹⁴ *ibid* [63], [68].

¹⁵ *Sham (No.2)* (n 3) [16].

any application for a necessary extension of the Suspension Period by the Government should be supported by compelling reasons.

It is not necessary to restate the entire reasonings of Ribeiro and Fok PJ here. The main point to note is that as pointed out by Ribeiro and Fok PJ, Sham is not claiming legal recognition of same-sex partnerships with rights mirroring a marriage as the applicant in *MK*, but instead for any alternatives to legal recognition with rights and obligations.¹⁶ This challenge wisely shifted the main arguments on the constitutionality of same-sex marriage, justification of differential treatments,¹⁷ and the correct interpretation of the relevant constitutional provisions to (i) whether the Government has a positive constitutional obligation; (ii) if so, whether the Government has failed to fulfil its positive constitutional obligation, given that there appears to be no viable argument for the constitutionality of same-sex marriage as of now. The two judges took the view that there is no material difference between Article 8 of the European Convention on Human Rights (“ECHR”) and HKBOR 14, as both constitutional provisions guarantee substantive privacy rights against any violation,¹⁸ and proceeded to read with the assistance of the European Court of Human Rights (“ECtHR”) precedents that the proper interpretation of HKBOR 14 imposes a positive obligation on the Government.¹⁹

B. Against the Counter Arguments

Among the dissent, Cheung CJ and Lam PJ were of the view that on a proper reading, the Government did not have a positive obligation under HKBOR 14 to provide an alternative legal framework to same-sex partnerships. While Lam PJ held that the Government’s positive obligation under HKBOR 14 only extends to *protect one’s privacy and family from unlawful or arbitrary interference*,²⁰ Cheung CJ went further to comment that under HKBOR 14, the Government’s duty is only to *protect one from*

¹⁶ *Sham (No. 1)* (n 2) [126]–[127].

¹⁷ *ibid* [189]–[192]. This wise advocacy approach was also acknowledged by Keane NPJ at *Sham (No. 1)* [255].

¹⁸ *Sham (No. 1)* (n 2) [138], [155(4)].

¹⁹ *ibid* [142]–[146].

²⁰ *ibid* [227], [232].

any interference with privacy by relying on the material difference on the literal extent of the protection of rights between HKBOR 14 and Article 8 of ECHR.²¹ Interestingly, Cheung CJ cited *Q and Tse Henry Edward v Commissioner for Registration*,²² a successful challenge against the identity card regime which restricts transgender persons to alter gender markers on their identity cards, and tried to distinguish it from *Sham*: “A wrong gender marker... on one’s identity card is clearly an interference with one’s right to privacy, leading to practical difficulties and embarrassment in real life”.²³ On the other hand, Ribeiro PJ and Fok PJ’s reasonings shed light on the practical difficulties that same-sex couples (regardless of whether they are married overseas) may face when it comes to these situations: firstly, regarding rights, same-sex couples are entitled to the constitutional rights to privacy and private life just as heterosexual couples, and such recognition provides “intrinsic value” to same-sex couples;²⁴ secondly, on a practical level, the absence of such recognition has been seen as essentially discriminatory and demeaning to same-sex couples, and their Lordships gave examples of hospitalisation and disposition of assets.²⁵ While the embarrassment faced by transgender people is arguably greater, especially when it comes to the use of facilities in accordance to their gender markers (e.g., use of public toilets), it is hard to see the line drawn between same-sex couples and transgender people on the ground of interference of right to privacy on “practical difficulties”.

C. The Next Step

As an authoritative CFA judgment has already been laid down, the Government will be bound by *Sham* and prone to societal pressure to at least propose a legal framework with satisfactory coverage of rights and obligations necessary for the protection of privacy and family of same-sex unions in the coming year,²⁶ unless an extension to the Suspension Period is granted by CFA upon the

²¹ *ibid* [25], [40].

²² (2023) 26 HKCFAR 25.

²³ *Sham (No. 1)* (n 2) [69].

²⁴ *Ibid* [130]–[132].

²⁵ *ibid* [133]–[135].

²⁶ As of November 2024.

Government's application supplemented with compelling reasons. A comprehensive analysis of the legal framework that can be adopted by the Government will be explored in the following section.

II. HOW WILL CIVIL PARTNERSHIPS BE INTRODUCED IN HONG KONG?

In this section, the views of different stakeholders will be discussed before exploring the extent of coverage of "rights and obligations" the Government ought to cover in its proposal and some foreign examples of legal frameworks on recognition of same-sex partnerships. Finally, I will consolidate my humble suggestions for the Government to consider.

A. Views of Different Stakeholders

1. THE GOVERNMENT

The first key stakeholder is of course the Government. The Government has submitted that it is facing an unprecedented and momentous development in recognising same-sex partnerships in Hong Kong, and recognises three main challenges ahead of them: firstly, due considerations have to be given to the appropriate rights and obligations attendant on such recognition; secondly, the need to explore societal consensus on same-sex partnership; and thirdly, the resistance that may be faced in the legislative process.²⁷ These concerns were legitimate and considered duly by the CFA when making the final orders. The final orders in *Sham* are binding on the Government, unless they resort to applying for an extension of the Suspension Period with compelling reasons, and CFA may so grant if they are persuaded that the extension sought is necessary and that the Government "will endeavour to complete each step as expeditiously as is practicable".²⁸ As of now,²⁹ which is still within the first year of the Suspension Period,

²⁷ *Sham (No.2)* (n 3) [8].

²⁸ *Ibid* [16].

²⁹ November 2024.

the Government has not submitted any application for an extension, or has expressed that it will do so.

Notwithstanding the Government's concerns, the Government is openly reluctant to explore any expansion of rights and protections afforded to the LGBTQ+ community. The Government has never, on its own initiative, proposed any bills to afford additional rights and protections to the LGBTQ+ community. Since 2013, the year when *W v Registrar of Marriage*³⁰ was laid down, the Government and its departments have expanded LGBTQ+ rights and protections by degrees only subsequent to judgments laid down by the court. The Government's attitude can be seen in a series of incidents subsequent to *Q*: in *Q*, the Commissioner of Registration was required to re-formulate the policy relating to female-to-male transgender persons' gender markers. A year after the judgment was laid down, the Government has not announced any amendments to the existing policy, and Henry Tse, one of the appellants in *Q*, initiated a judicial review against the Government's delayed responses.³¹ Around two weeks later, the Government announced the revision to the policy concerned, which was unwelcomed by the LGBTQ+ community given its limited incremental amendments to the existing policy. The Government's spokesperson gave an additional comment, which may confirm the Government's reluctance to actively reform its policies to be more favourable to the LGBTQ+ community.³² The Government's slow response to policy-making in relation to LGBTQ+ issues could be traced back to *W*. Following the first successful challenge by the LGBTQ+ community — *W* — up to the current date, the Inter-departmental Working Group on Gender Recognition set up by the Government in January 2014 is still yet to propose legislation on gender recognition.³³ One may also see

³⁰ (2013) 16 HKCFAR 112.

³¹ Hillary Leung, 'Hong Kong trans activist launches legal challenge over delay to changing gender marker on ID card despite court win' (*HKFP*, 20 March 2024) <<https://hongkongfp.com/2024/03/20/hong-kong-trans-activist-launches-legal-challenge-over-delay-to-changing-gender-marker-on-id-card-despite-court-win/>> accessed 9 April 2024.

³² HKSARG, 'Policy on change of sex entry on Hong Kong identity card revise' (*info.gov.hk*, 3 April 2024) <<https://www.info.gov.hk/gia/general/202404/03/P2024040300189.htm>> accessed 9 April 2024.

³³ 王寧慧, '同性伴侶平權案. 一 | 性小眾法律改革無影 司法覆核挑戰陸續有來' (*香港01*, 1 March 2024)

that despite the CA's strong opposition in a recent judgment *Nick Infinger v The Hong Kong Housing Authority*,³⁴ where the Government has insisted on appealing to the CFA.

Regarding the Government's expressed concerns, namely (1) due considerations are to be given to the appropriate rights and obligations attendant on such recognition; (2) the need to explore societal consensus on same-sex partnership; (3) the resistance that may be faced in the legislative process, (1) and (3) will be touched upon when the content of the proposal and the legislature are discussed respectively below. On (2), in the previous cases relating to LGBTQ+ rights, we may draw inferences about the Government's concerns over societal consensus [while the actual societal perception will be discussed further below]. In *Leung Chun Kwong v Secretary for Civil Service and Anor*³⁵ and *Ng Hon Lam Edgar v Secretary for Justice*,³⁶ the Government's grounds consist of arguments that the legitimate aims of its policies concerned are to protect "traditional family as constituted by heterosexual marriage"³⁷ and to "support and uphold the integrity of the traditional institution of marriage in Hong Kong". While the courts did not dispute whether the aims put forward by the Government were legitimate, we may see the Government's intention to preserve the integrity and position of traditional heterosexual marriage in society.³⁸ Further, in *Leung Chun Kwong*, the Government supported Cheung CJHC's analysis that allowing same-sex couples to enjoy the benefits or privileges that had long been exclusively enjoyed by married heterosexual couples is one that would undermine the uniqueness of marital status in society, and this would "offend, challenge, question, confuse, or subtly change society's established understanding and concept of marriage ... which ... is rooted in the traditional, historical, social, moral or religious background and values..."³⁹ In fact, the Government, the state of "inclusive and

<https://www.hk01.com/article/947610?utm_source=01articlecopy&utm_medium=referral> accessed 28 April 2024.

³⁴ [2024] 1 HKC 411.

³⁵ (2019) 22 HKCFAR 127.

³⁶ [2023] 5 HKLRD 608.

³⁷ *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 [58].

³⁸ *Ng Hon Lam Edgar v Secretary for Justice* [2023] 5 HKLRD 608 [45].

³⁹ *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 [70].

international”⁴⁰ Hong Kong is also concerned about social and religious reception towards changes that may affect the longstanding meaning of the institution of marriage in Hong Kong.

2. THE LEG CO

On the part of the legislature, one may also see that support towards LGBTQ+ rights is split among members of the LegCo. In fact, as early as 2014, the LegCo could not reach an agreement in passing the Marriage (Amendment) Bill 2014 subsequent to *W*.⁴¹ Nevertheless, as the CFA order ruled that absent any legislative actions the genders of the class akin to the applicant in *W* will be re-assigned, the right to marriage of post-operative male-to-female transgender persons was not affected by the LegCo’s failure to reach an agreement.⁴² In the current LegCo term, LGBTQ+ issues remain a controversial topic among LegCo members. Distinguished LegCo member and ex-government official Regina Ip’s attendance at the Gay Games 2023 sparked resentment among other members of the pro-establishment camp, despite her later clarification that she has never supported same-sex marriage.⁴³ Julius Ho, a LegCo member who has been consistently against same-sex marriage, even criticised that legalising same-sex unions would endanger national security.⁴⁴ Nevertheless, as far as the current LegCo term is concerned, the views of the majority of the LegCo cannot be ascertained as there has not been any bills relating to LGBTQ+ rights laid on the table. The Government’s

⁴⁰ *Sham (No. 1)* (n 2) [74] (Cheung CJ).

⁴¹ HKSARG, ‘Marriage (Amendment) Bill 2014 not passed by Legislative Council’ (*info.gov.hk*, 22 October 2014) <<https://www.info.gov.hk/gia/general/201410/22/P201410220932.htm>> accessed 28 April 2024.

⁴² *W* (n 31) [11].

⁴³ Emily Hung and Fiona Chow, ‘Hong Kong Gay Games: Regina Ip caught in war of words with anti-LGBTQ lawmakers, stresses she has never backed same-sex marriage’ (*SCMP*, 2 November 2023) <<https://www.scmp.com/news/hong-kong/politics/article/3240066/hong-kong-gay-games-regina-ip-caught-war-words-anti-lgbtq-lawmakers-stresses-she-has-never-backed>> accessed 28 April 2024.

⁴⁴ Hillary Leung, ‘Hong Kong lawmaker’s petition opposing Gay Games is prejudiced, activist says’ (*HKFP*, 26 April 2023) <<https://hongkongfp.com/2023/04/26/hong-kong-lawmakers-petition-opposing-gay-games-is-prejudiced-activist-says/>> accessed 28 April 2024.

concern about resistance posed by LegCo is understandable given past traits of opposition.

Notably, CFA only directed the Government to come up with an alternative legal framework without explaining whether the Government is obliged to further attempts if its proposal cannot secure a majority vote in the LegCo, and great deference was given by CFA to the Government and LegCo to sort out the alternative legal framework. One possible situation may arise if the Government's proposed alternative legal framework cannot be passed: *Sham* could apply to CFA against the Government's non-compliance with the Order, and CFA may clarify its meaning of "establish", as to whether a proper establishment of the alternative legal framework includes completion of the passage of the proposed bill in LegCo. Ultimately, the Government has been declared to have a positive constitutional obligation to provide an alternative legal framework to recognise same-sex partnerships and provide for appropriate rights and obligations attendant on such recognition, and thus it cannot easily walk away with an unwelcome proposal unpassed at the LegCo.

3. THE LGBTQ+ COMMUNITY

In the past 10 years, LGBTQ+ rights and protections were only expanded by degrees only subsequent to judgments laid down by the court due to the Government's reluctance to law-making. As Jimmy Sham metaphorised, LGBTQ+ rights are presented one by one like chopped pieces of *char siu* (Chinese BBQ pork). Therefore, the LGBTQ+ community is generally welcoming the final decision in *Sham* that directed the Government to propose an alternative legal framework to protect the rights of same-sex couples, though with slight concerns over whether what the Government proposes would cover the rights and protections necessary as well as address their concerns.⁴⁵

⁴⁵ Cindy Sui, 'Hong Kong's LGBTQ Community Scores Legal Victories' <<https://www.voanews.com/a/hong-kong-s-lgbtq-community-scores-legal-victories/7382153.html>> (*Voice of America*, 2 December 2023) accessed 28 April 2024.

4. THE GENERAL PUBLIC

Ascertaining the general public's reception towards same-sex partnerships is relevant and crucial to the Government's balancing exercise when drafting its proposal. First and foremost, the society of Hong Kong in general has seen a greater acceptance of same-sex marriage over the past 10 years, increasing from 38% in 2013 to 60% in 2023.⁴⁶ 85% of citizens agree that same-sex couples should at least be entitled to some rights enjoyed by married couples.⁴⁷ Secondly, on a family level, an earlier local report shows that the composition of families in Hong Kong has been increasingly diverse and moving away from the traditional concept of family. In particular, it was seen that non-traditional families have become mainstream in Hong Kong.⁴⁸ Thirdly, for corporates and enterprises, hundreds of organisations have pledged to adopt the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation, among which there are listed companies and statutory bodies of the Government,⁴⁹ reflecting that the private sector is also gradually more supportive of the LGBTQ+ community. Fourthly, Hong Kong consists of a wide variety of religious groups, and among these groups, there are highly conservative religions that are against same-sex marriage. Among the population, the lowest support for same-sex marriage is found among Christians (49%) and Buddhists (48%).⁵⁰ In fact, most of the Christian and Catholic

⁴⁶ Holning Lau, Kelley Loper and Yiu Tung Sun, 'Support in Hong Kong for Same-sex Couples' Rights Grew Over Ten Years (2013-2023): 60 Percent Now Support Same-Sex Marriage' <[https://ccpl.law.hku.hk/wp-content/uploads/2018/07/Change%20Over%20Time%20Paper%20English%20\(3%20July%20Final%20for%20Distribution\).pdf](https://ccpl.law.hku.hk/wp-content/uploads/2018/07/Change%20Over%20Time%20Paper%20English%20(3%20July%20Final%20for%20Distribution).pdf)> accessed 28 April 2024.

⁴⁷ *ibid.*

⁴⁸ 王寧慧, '同性伴侶平權案, 三 | 性小眾權益與傳統家庭價值 是碰撞還是共存' (香港01, 4 March 2024) <https://www.hk01.com/article/947879?utm_source=01articlecopy&utm_medium=referral> accessed 28 April 2024.

⁴⁹ Constitutional and Mainland Affairs Bureau, 'List of Organisations that have pledged to adopt the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation' <https://www.cmab.gov.hk/doc/issues/Bilingual_List_of_Organisations.pdf> accessed 28 April 2024.

⁵⁰ Sneha Gubbala and William Miner, 'Across Asia, views of same-sex marriage vary widely' (*Pew Research Center*, 27 November 2023) <<https://www.pewresearch.org/short-reads/2023/11/27/across-asia-views-of-same-sex-marriage-vary-widely/>> accessed 28 April 2024.

churches in Hong Kong have publicly opposed same-sex marriage or other forms of same-sex unions. Members of the LGBTQ+ communities have voiced out against discriminatory acts done to them by some churches.⁵¹ Yet, among conservative religious groups, more LGBTQ+-friendly religious groups have started arising in Hong Kong, and we may look forward to whether Pope Francis' approval of blessings for same-sex couples⁵² would influence Catholic perceptions towards same-sex couples in Hong Kong.

As Cheung CJ observed in his reasonings in *Sham*, European case rulings in favour of same-sex partnerships were heavily influenced by relevant developments in Europe in recent years. The above changes to societal acceptance may also shed light on the possible future LGBTQ+ development on a societal and perhaps legal aspect in Hong Kong.

B. Content of the Proposals

Besides the theoretical analysis discussed in the section above, the CFA judges in *Sham* are split among the content of rights that should be protected in the Government's proposed alternative legal framework. Interestingly and perhaps consequently, CFA did not cover the content of the rights attendant on the recognition in the Declaration.

On their reasonings about the Government's positive obligations, the 5 judges in *Sham* unanimously agreed that the executive and legislative branches enjoy a margin of discretion or appreciation when deciding on the content for the rights contained in the legal recognition of HKBOR 14. Cheung CJ alone took a more deferential view in saying that whether to recognise and protect same-sex partnerships should be a matter left to the

⁵¹ 大學線, '性小眾基督教會內被歧視 彩虹下堅持信仰遇高牆盼爭取平權' (香港01, 17 December 2021) <https://www.hk01.com/article/709500?utm_source=01articlecopy&utm_medium=referral> accessed 28 April 2024.

⁵² Nicole Winfield and David Crary, 'Pope approves blessings for same-sex couples that must not resemble marriage' (*AP News*, 19 December 2023) <<https://apnews.com/article/vatican-lgbtq-pope-bfa5b71fa79055626e362936e739d1d8>> accessed 28 April 2024.

Government and the legislature.⁵³ Meanwhile, Ribeiro PJ and Fok PJ took a further step in discussing the content of the statutory framework that the Government may consider. They commented that the Government should fulfil its obligations by offering protections at least to “a core of rights” for recognising same-sex relationships and defining main incidents.⁵⁴ The features that could be included in the legal framework may include rules on the formation, support and maintenance, separation of property, and dissolution of same-sex partnerships.⁵⁵ On “supplemental rights”, their Lordships were mindful of the need for assessments on a case-by-case basis with proportionality analysis.⁵⁶ While Cheung CJ did not extend his discussion to “core rights”, Lam PJ showed reluctance in transplanting such a concept to arbitrary interference, which is a narrow concept under HKBOR 14 in his opinion.⁵⁷ He also disagreed with Ribeiro PJ and Fok PJ’s suggestions that the Government should protect all the core rights in the framework for same-sex couples, as this may eventually require the Government to put in place a regime with all the core rights and benefits currently enjoyed by heterosexual married couples, and the new regime will be in substance indistinguishable from marriage.⁵⁸ Given the split opinions on the inclusion of “core rights” into the legal recognition, CFA did not include any comments about “core rights” in their Declaration and Order and left a wide margin of discretion to the Government and LegCo.

The idea of distinguishing “core rights” and “supplemental rights” in the legal recognition of same-sex partnerships is first seen in *Oliari v Italy*: ‘... same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership... which would guarantee them the relevant protection—in the form of core rights relevant to a couple in a stable and committed relationship—without unnecessary hindrance.’⁵⁹ The distinction was drawn between “core rights” which are rights relating to “the general need for legal recognition and the core protection”⁶⁰ of same-sex

⁵³ *Sham (No.1)* (n 2) [13].

⁵⁴ *ibid* [181].

⁵⁵ *ibid* [183]–[185].

⁵⁶ *ibid* [187].

⁵⁷ *ibid* [233].

⁵⁸ *ibid* [241]–[242].

⁵⁹ (2017) 65 EHRR 26 [177].

⁶⁰ *ibid*.

couples, and “supplemental rights” which are rights that might be associated with the recognition of same-sex partnership and “linked to sensitive moral or ethical issues”,⁶¹ which may cover the aspects of inheritance, labour, insurance and data protection laws.⁶² The state has a margin of appreciation to decide the exact status conferred by the alternative legal recognition of same-sex partnerships as well as rights and obligations attendant on such partnerships, and a wider margin is given to deciding supplementary rights.⁶³

With the current development of Hong Kong, civil partnerships must be distinguishable from the traditional institution of marriage. On a constitutional level, despite the fact that both would respectively have legal statuses, heterosexual marriages are recognised by BL 37, but civil partnerships are not constitutionally recognised by any constitutional provisions. On rights that could possibly be attached to the right to marriage, the right to form a family protected under BL 37 and the right to adoption still remain exclusive to heterosexual couples. Meanwhile, it was not until *NF v R* could a biological but non-gestational female parent be recognised as a parent “at common law”,⁶⁴ and not until *AA v BB* could guardianship rights be given to a non-biological mother in a same-sex relationship.⁶⁵ It is still yet for different cases to be brought to the court for ruling on the expansion of protections and rights to LGBTQ+ families. Besides, as emphasised by the Grand Chamber in *Fedotova v Russia*, “recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to that term. More broadly, securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples.”⁶⁶ While the alternative scheme for recognition sought by *Sham* does not involve conferment of rights and obligations mirroring those of a marriage, it was also found that the Government’s legitimate aim to protect the traditional institution of marriage does not rationally connect to its

⁶¹ *ibid* [177].

⁶² *Sham (No. 1)* (n 2) [187].

⁶³ *Oliari v Italy* (n 60) [177].

⁶⁴ [2023] 5 HKLRD 58 [146], [161].

⁶⁵ [2021] 2 HKLRD 1225.

⁶⁶ (2022) 74 EHRR 28 [212].

failure to recognise same-sex partnerships and provide rights and protections attendant on the recognition.⁶⁷

C. Foreign Examples

As observed by Ribeiro PJ and Fok PJ, there are numerous existing statutory regimes for same-sex unions as references for Hong Kong. Some of those schemes provide rights and obligations mirroring those of a traditional marriage, while some are mainly focused on rights and obligations of the partners and the recognition of their status.⁶⁸ It would be necessary to go through some established examples around the world to see their similarities and differences.

1. THE UNITED KINGDOM

The Civil Partnership Act 2004, introduced in the United Kingdom, covers the formation, eligibility, as well as dissolution of civil partnerships. Initially, civil partnerships were prohibited from holding ceremonies in religious venues, a provision which was later removed in 2011.⁶⁹ Rights and benefits enjoyed by civil partners are essentially identical to those of married couples, except for certain titles that may not be inherited by or passed to partners of a civil partnership, and some differences in grounds for dissolution and annulment.

2. NEW ZEALAND

The Civil Union Act 2004 was passed by the New Zealand Parliament in 2004 to recognise and establish same-sex and opposite-sex civil unions. The Civil Union Act 2004 contains provisions on establishment, eligibility and cessation. Shortly after, in 2005, the Relationships (Statutory References) Act 2005 was passed in order to provide the same set of rights and

⁶⁷ *Sham (No. 1)* (n 2) [195].

⁶⁸ *ibid* [194].

⁶⁹ The Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011.

obligations to couples in civil unions, *de facto* relationships (usually couples who have lived together in a *de facto* relationship for at least 3 years) and heterosexual marriages. The only difference between civil unions and marriages is that only married couples are allowed to adopt children, despite adoptions by individuals being possible for persons in civil unions.

3. AUSTRIA

In Austria, the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*) came into force in 2010 to recognise and give legal effect to same-sex relationships. It governs the establishment, effects as well as dissolution of registered relationships, with provisions on eligibility and obligations of registered partners in transactions, maintenance etc. It also contains amendments to existing legislations to confer rights and protections to registered partners on inheritance law, labour, social and social insurance law, tax law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as legislation regarding foreigners. The key differences between marriage and registered partnership are that only two persons of the same sex can enter into a registered partnership, registered partners are not allowed to adopt a child or adopt their partners' child, and registered partners are excluded from artificial inseminations.⁷⁰

4. ASIAN COUNTRIES AND TERRITORIES

Currently in Asia, only Taiwan and Thailand recognise same-sex marriage. The only civil union seen is in Cyprus, which is a civil law jurisdiction. India, Israel and Nepal allow limited cohabitation, and other countries in the region remain conservative. Therefore, there is a lack of sound references that we may refer to in Asia.

Essentially, one may see that these foreign statutory regimes all contain the establishment, eligibility, and cessation of

⁷⁰ *Schalk and Kopf v Austria* (2011) 53 EHRR 20, [16]–[23].

same-sex partnerships, along with legal amendments that confer rights and benefits to same-sex couples, which have wide and comprehensive coverage on fields from inheritance and tax to registration and data protection. A common hesitation seems to be on same-sex partners' rights in relation to the formation of families, including the right to adopt a child and claim guardianship of the partner's children.

D. My Observations and Suggestions

Summarising the discussions above, one should not be blindly hopeful towards the Government's proposal.

First and foremost, it is possible that the Government cannot come up with a proposed alternative legal framework within the Suspension Period. On the one hand, CFA provides leeway to the Government to apply for an extension of the Suspension Period; on the other, the Government has expressed its hardship in balancing the concerns among stakeholders in society, including the LegCo, which has long been unable to reach consensus on LGBTQ+-related issues, and different interest groups in multicultural Hong Kong. Even if the Government can come up with a proposal, it is still subject to a bill to pass at the LegCo. However, merely extending the period of stay would never resolve the problem, and the court has the jurisdiction to compel the Government to execute the mandamus order in *Sham*. Further, it is unsure as to whether a majority vote can be secured at the LegCo, and further, if the bill cannot be passed, whether the Government is obliged to persist until a bill is passed.

Secondly, the Government may be unable to propose a regime with coverage of rights and obligations satisfactory to the LGBTQ+ community. Their Lordships did not come to a conclusion on the "core of rights" attendant on the recognition, leaving a wide margin of discretion to the Government and LegCo to figure out what core rights should be included in the recognition. The Government has also shown signs of reluctance to actively expand the rights and protections to the LGBTQ+ communities through its legal arguments, public announcements, and prolonged policy making and implementation. The truth is even the Government is not as reluctant as they seem to be. They

could be split between satisfying the conservative community which would like to reduce the rights of the civil partnership as much as possible, and the LGBTQ+ community which wishes to equate civil partnership as close to marriage as possible.

However, given that the courts have declared a wide array of rights over the years, the following rights are guaranteed to be enjoyed by same-sex married couples, and these rights and protections are likely to be included in the regime: eligibility for a dependent visa (*QT v Director of Immigration*),⁷¹ spousal benefits for civil servants as well as joint income tax return assessment (*Leung Chun Kwong*), rights to public rental housing and subsidised housing scheme (*Nick Infinger*), spouses' inheritance under intestacy (*Ng Hon Lam Edgar v SJ*), and parental rights to both non-biological (*AA v BB*) and biological children (*NF v R*). Perhaps the Government may also consider the suggestion of Ribeiro PJ and Fok PJ on expanding the rights and obligations coverage to the disposition of property, medication and hospitalisation. The Government may consider foreign examples on the basic fundamentals that should be covered, then diligently and wisely investigate the "core of rights" that ought to be covered in order to offer same-sex couples sufficient protection for their privacy and families.

III. WILL SAME-SEX MARRIAGE EVENTUALLY BE INTRODUCED IN HONG KONG?

As we may see in various liberal countries, like the UK and some in Europe, civil partnerships may eventually be considered as an alternative that cannot suffice as same-sex marriage for LGBTQ+ couples, and same-sex marriage is pursued to put same-sex couples in the same constitutional position and afford them the same legal protection as heterosexual married couples. It may be possible to explore whether, at a certain point in the future, Hong Kong will follow Taiwan and Thailand to legalise same-sex marriage.

⁷¹ (2018) 21 HKCFAR 324.

A. Current Development

In *Sham*, whether there is a constitutional right to same-sex marriage was among the questions to be discussed. Their Lordships unanimously ruled against Jimmy Sham on the doctrine of *lex specialis* and upheld the ruling in *MK* that BL 37 only guarantees the right to heterosexual marriages, which are voluntary unions for life between one male and one female to the exclusion of all others. Thus, Jimmy Sham could not rely on HKBOR 22 and/or BL 25 for his argument on the constitutional right of same-sex marriage. Besides, domestic legal and historical contexts also point towards the exclusion of same-sex marriages in Hong Kong.⁷² Cheung CJ further commented that the ruling that the constitution does not require a provision for same-sex marriage does not exclude same-sex marriage in Hong Kong. Nevertheless, it should be a matter for the Government and LegCo to consider.⁷³ Their Lordships also unanimously ruled against the recognition of foreign same-sex marriage in Hong Kong, as such a marriage lacks essential validity in Jimmy Sham's ante-nuptial domicile, Hong Kong.⁷⁴

As explored above, amidst an increasing social acceptance towards same-sex couples and marriages, the Government and LegCo remain conservative in offering protections to LGBTQ+ rights, let alone legalising same-sex marriage. The court is also cautious in expanding the meaning of marriage under BL and HKBOR. While it is embraced that BL is regarded as a "living instrument",⁷⁵ it was held that the drafters of Basic Law were unlikely to intend "marriage" in BL 37 to include same-sex marriage,⁷⁶ and an increasing social acceptance seen in the public is barely enough to persuade the court to liberally interpret "marriage" under BL and HKBOR.

⁷² *Sham (No.1)* (n 2) [92].

⁷³ *ibid* [13].

⁷⁴ *ibid* [122].

⁷⁵ *W* (n 31) [84] (Ma CJ).

⁷⁶ *MK* (n 6) [14].

B. Justification For Marital Recognition in Law and in Practice

The starting point is that same-sex partnerships do not share the same legal recognition as marriage. Not only do same-sex couples not have the constitutional right to marriage, but same-sex partnerships do not also necessarily encompass all the incidents of marriage, despite having intrinsic values.⁷⁷ In fact, the current interpretation of “marriage” in BL is indirectly discriminatory by excluding same-sex couples’ rights to marriage,⁷⁸ especially when “marriage” is capable of re-definition, and that the Basic Law should be regarded as a “living instrument”. It is not to say that BL 37 is discriminatory and ought to be remedially interpreted *per se*, but it is possible that BL 37 could be re-interpreted by the court and lead to amendments to local statutes for legalising same-sex marriage.

After Jimmy Sham’s striving for an alternative legal framework for recognition of same-sex partnerships, the current reading of HKBOR 14 imposes a positive obligation to the Government to provide legal recognition to same-sex couples with rights and obligations attendant on such recognition for the purpose of *preventing same-sex couples from unlawful or arbitrary interferences*. It seems difficult, if not impossible, to expand the Government’s obligation to provide for same-sex marriage, as the court could not, by a liberal interpretation of HKBOR 14, put same-sex couples and heterosexual couples on an equal footing on the right to marriage under the doctrine of *lex specialis*.⁷⁹ The argument on the “right to equality” seems easier to pursue on its face, but it is also fundamentally bound by the doctrine of *lex specialis*. As proportionality analysis is done on a case-by-case basis, the successful proportionality argument in Ground 2 of *Sham* cannot be replicated to the argument that the exclusiveness of the right to marriage in the local laws of Hong Kong is against the right to equality under HKBOR 22. If the

⁷⁷ *Sham (No.1)* (n 2) [131].

⁷⁸ Kai Yeung Wong, ‘An Incomplete Victory: The Implications of *QT v Director of Immigration* for the Protection of Gay Rights in Hong Kong’ (2018) 81 MLR 874.

⁷⁹ Nicholas Bamforth, ‘Same-sex Partnerships and Arguments of Justice’ in Robert Wintemute and Mads Andenas (eds), *Legal Recognition of Same-sex Partnerships: A Study of National, European and International Law* (Bloomsbury, 2001).

Government eventually provides effective protection to same-sex couples, then the Government may argue that effective protection has been given to same-sex couples in a form different from that of heterosexual couples, which could still discharge its obligation under HKBOR 22 to provide for equal and effective protection against discrimination.

An interesting debate in natural law is worth mentioning. It was long held in the natural law perspective that marriage is confined to a man and a woman. The primary and secondary principles of natural law indicate that marriage is an institution for “procreation and rearing of offspring” and “positive mutual relationship that forms part of the union”.⁸⁰ A revisionist view of marriage would focus on the quality of the relationship and cohabitation, which gives a possibility to expand marriage to same-sex couples and other LGBTQ+ couples.⁸¹

In the end, if there is an alternative legal framework to recognise same-sex partnerships and provide for the rights and obligations attendant on such recognition, is there a need to recognise same-sex marriage? The answer to this question rests on the essential difference between marriage and civil partnership in a practical context, which would be highly dependent on the scope and shape of legal recognition of the civil partnership in Hong Kong. In practice, legalising same-sex marriage is proved to bring benefits that are beyond inter-relationship level. The value of a romantic relationship in fact goes beyond what the partners would obtain outside marriage,⁸² and same-sex marriage could in return bring social stability.⁸³ Nevertheless, the necessity of same-sex marriage still largely depends on the value judgment of the Government on the content of the legal framework that will be put into practice.⁸⁴ If the Government puts forward a framework that guarantees same-sex couples a “core of rights” and implements policies without discrimination, legal challenges would only arise

⁸⁰ Lindsay Breach, “Same-sex marriage: Time to reconsider the marriage element of natural law” (2013) 7 NZFLJ 276

⁸¹ *ibid* 81.

⁸² Scott M Delhommer and Daniel S Hamermesh, ‘Same-sex Couples and the Gains to Marriage: The Importance of Legal Environment’ (2021) 40 JPAM 1120.

⁸³ Shuai Chen and Jan C van Ours, ‘Symbolism matters: The effect of same-sex marriage legalization on partnership stability’ (2020) 178 JEBO 44.

⁸⁴ Wong (n 80).

when differential treatments are faced by same-sex couples in reality, and eventually, the only difference that remains is the symbolism of marriage. While the content of the legal framework matters, actual treatments and perceptions received by same-sex couples should not be neglected.

All in all, the biggest hurdle to same-sex marriage is the interpretation of the right to marriage under BL 37. As long as the meaning of marriage in BL is still confined to “the voluntary union of one man and one woman”, the right to marriage is still limited to heterosexual marriages and any challenges cannot bypass BL 37 to rely on other constitutional provisions for such argument under the doctrine of *lex specialis*. Given that CFA is still reluctant to liberally interpret BL 37 on grounds of same-sex marriages by adopting BL as a “living instrument”, and that the Government, as well as the LegCo, are seemingly against considering such development, it seems that there is yet some time until same-sex marriage can be legalised in Hong Kong.

CONCLUSION

Looking back, Hong Kong has gone through a tough yet victorious rainbow journey at the courts in the past 10 years. From *W to Sham*, the LGBTQ+ community secured themselves with transgender rights to marriage and for their genders to be recognised in cases where their biological sex is different (subject to certain conditions), a wide variety of spousal rights and benefits, parental rights to a limited extent, and now a legal framework for recognition. The fight for rights does not end here, and possibly cannot end here: the Government is yet to come up with a satisfactory legal framework to recognise same-sex partnerships and provide for rights and protections attendant to such recognition, as well as to execute it properly in reality. Zooming into the present, the laws against discrimination on the grounds of gender identity and sexual orientation are still not in place; the LGBTQ+ community is still facing discrimination, non-acceptance, and misunderstandings. The next step after *Sham* is without a doubt for the Government to take.

CURBING TRADEMARK BULLIES THROUGH COMPENSATION LIABILITY: THE APPROACH OF CHINESE JUDGES IN THE ANTI-COUNTERFEIT BULK LAWSUITS OF TRADEMARK INFRINGEMENT

Junsong Feng*

In mainland China, trademark bullying and anti-counterfeiting campaigns are clearly intertwined and are mainly enforced by professional anti-counterfeiters by filing bulk lawsuits against small businesses at the end of the counterfeiting chain. This strategy distorts the original purpose of anti-counterfeiting efforts. This paper compares this issue to the situation in the United States and analyses the Chinese judiciary's current response through a quantitative analysis of publicly available court documents. The measures envisaged by the judiciary are to utilise the rules of statutory damages and the legitimate source defense to direct the battle of the anti-counterfeiting campaign to the source of counterfeit. This paper analyses this judicial response and makes suggestions for its improvement.

INTRODUCTION

The contemporary legal landscape in mainland China is witnessing a resurgence of interest in a specific facet of trademark law, known as “trademark bullying”. This phenomenon has regained the attention of the judiciary, highlighted by recent

* LLM, University of Hong Kong. Currently working as a lawyer in Eternal Glory Office (Qingdao). The author would like to express his sincere gratitude to my graduate advisors, Professor Haochen Sun, Professor Taorui Guan, and Professor Osella Stefano, for their invaluable guidance and support. He would also like to thank his professors, Professor Shudi Zhu, Professor Lixian Cong, Professor Lamei Yin, and Professor Dudu Dong, whose encouragement and mentorship helped complete this article.

discussions in courts. Trademark bullying, a concept previously discussed in the United States, manifests uniquely in China, intertwining with anti-counterfeiting movements led by professional anti-counterfeiters. These entities profit from bulk litigation, mainly targeting small businesses at the terminal of the distribution chain of counterfeit goods and services, while distorting the anti-counterfeiting movement and creating judicial and social stresses. What measures are currently being taken by the courts to face the judicial problems posed by trademark bullying? What intentions of the Chinese judiciary are reflected in such measures? Are such measures capable of realising such intentions? What should be done to bring the anti-counterfeiting movement, which has been distorted by trademark bullying, back to normal?

To address the above-mentioned questions, the article first explores the concept of trademark bullying in China, contrasting it with discussions in America to better illuminate its distinctive features in the Chinese context. The analysis then shifts to the judicial response, drawing on quantitative analyses conducted by Chinese scholars who utilised publicly available court documents. The section concludes that the Chinese judiciary predominantly relies on the rules of statutory damages and legitimate source defense to curb trademark bullying and discusses how these rules are applied in judicial practice. Following this, this paper examines the stakeholders in the anti-counterfeiting campaign, evaluating the measures taken by the courts from the perspective of balancing interests. It concludes *inter alia* that current measures have neglected the crucial role of professional anti-counterfeiters, and provides suggestions accordingly.

I. THE PHENOMENON OF TRADEMARK BULLYING: AN ANALYSIS OF ITS IMPETUSES AND IMPACTS

“Bully” refers to someone who inflicts harm or intimidates another individual who is smaller or less powerful, often

compelling them to undertake actions against their will.¹ The widespread phenomenon of the “Trademark Bully” in America has profound reasons, closely related to the intrinsic mechanisms of the United States’ Lanham Act. However, in China, “trademark bullying” exhibits unique characteristics, often intertwined with the rights holders’ anti-counterfeiting activities. This section, following a short review of the discussions about the “trademark bullying” phenomenon in the United States, focuses more on analysing the unique causes and the consequences of “trademark bullying” in China’s anti-counterfeit campaign.

A. Trademark Bullying in the United States

The term “trademark bully” has been extensively and persistently discussed within the intellectual property law academic community in America. The term typically refers to a sizable corporation that employs aggressive tactics and prolonged threats of trademark infringement lawsuits to deter small businesses and individuals.² Take the example of Jim Clark, a tiny coffee roaster who chose “Charbucks” as the name of his coffee products. Due to the phonetic similarity of “Charbucks” to “Starbucks”, he was embroiled in a trademark dispute with Starbucks, lasting for over a decade.³ “The National Football League, for another example, is notorious for objecting to any mention of the Super Bowl in non-officially-licensed advertising,”⁴ though many “Super Bowl” references may be protected by the fair use doctrine.⁵

¹ Cambridge Dictionary, ‘bully’ (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/bully>> accessed 18 October 2023.

² Jessica M Kiser, ‘To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions’ (2014) 37 Colum JL & Arts 211, 211.

³ Jonathan Stempel, ‘Starbucks loses “Charbucks” appeal’ Reuters (New York, 16 November 2013). <<https://www.reuters.com/article/us-starbucks-charbucks-lawsuit-idUSBRE9AE0Z120131115>> accessed 11 October 2023.

⁴ Stacey Dogan, ‘Bullying and Opportunism in Trademark and Right-of-Publicity Law’ (2016) 96 BU L Rev 1293, 1316.

⁵ *ibid* 1316.

1. IMPETUSES

The widespread occurrence of this phenomenon in the United States reflects the aggressive trademark strategies of large corporations. Such strategies are adopted largely due to the stipulations in Section 1127 of the Lanham Act, which compels major U.S. enterprises to pursue these tactics to prevent the loss of their own trademarks.⁶ Concurrently, the inherent ambiguities within U.S. trademark law result in corporations being unable to clearly delineate the boundaries of their trademark rights, which encourages and rewards broad claims of trademark rights.⁷ “[T]he standards for nominative fair use and descriptive fair use continue, in most jurisdictions, to turn at least part on subjective inquiries about the risk of confusion”.⁸ Thus, parties using marks in their businesses usually cannot predict in a confident way whether they will infringe others’ trademark rights, and when they become the recipients of the cease-and-desist letters, they tend to surrender without regard to the merits of the claim against them, as they refuse to undertake the cost and the uncertainty of the lawsuits brought by deep-pocketed-plaintiffs.⁹ Such an “easy-to-surrender” response gives the trademark rights holder the false impression that they own the “right” to force these surrenders, although such a “right” is a result from the legal ambiguity and the risk-averse psychological tendencies due to the ambiguity.¹⁰

In addition, there also exists some financial motives in the “trademark bullying” phenomenon. Rights holders, “through cheap and easy cease-and-desist letters ..., attempt to avoid competition, or to maximise licensing revenues associated with their marks.”¹¹ As a result, “trademark bullying” is a rational decision by the trademark right-holders to maximise the value of their trademark assets, not only because they fear losing their trademarks if they do not “police” their trademark, but also their

⁶ William T Gallagher, ‘Trademark and Copyright Enforcement in the Shadow of IP Law’ (2011) 28 Santa Clara Computer & High Tech L J 453, 490; Kiser (n 2) 225.

⁷ Dogan (n 4) 1294; Kiser (n 2) 225.

⁸ Dogan (n 4) 1306.

⁹ James Gibson, ‘Risk Aversion and Rights Accretion in Intellectual Property Law’ (2007) 116 Yale LJ 882, 882.

¹⁰ *ibid* 901.

¹¹ Dogan (n 4) 1316.

rights will increase in value if they are successful in their enforcement actions.¹²

2. IMPACTS

A. FOR SMALL BUSINESSES

The social costs of trademark bullying are borne primarily by small businesses, because they often do not have the sophistication of an intellectual property law department to analyse whether the conduct described in a cease-and-desist letter constitutes infringement.¹³ At the same time, most “trademark bully” activities require the victim to destroy their inventory of products or packaging bearing the mark in question, and require the victim to cease using the mark in their business activities, which means that the capital invested by the small businesses in production and advertisement has gone down the drain, increasing the risk of bankruptcy of those small businesses.¹⁴

B. FOR TRADEMARK RIGHTS HOLDERS

“Trademark bullying”, representing an aggressive trademark strategy on the part of the rights holders, intrinsically incurs significant costs.¹⁵ Trademark holders implementing the aforementioned strategies often need to hire attorneys to issue cease-and-desist letters and engage in licence negotiations with alleged infringers. Should these parties remain unyielding, the rights holders may resort to litigation or file an opposition with the USPTO. Additionally, rights holders frequently subscribe to “trademark watch services” offered by third parties.¹⁶ These procedures can incur substantial expenses. According to the “Report of the Economic Survey” published by the American

¹² Dogan (n 4) 1319.

¹³ Leah Chan Grinvald, ‘Shaming Trademark Bullies’ [2011] Wis L Rev 625, 655.

¹⁴ Leah Chan Grinvald, ‘Resolving the IP Disconnect for Small Businesses’ (2012) 95 Marq L Rev 1491, 1499.

¹⁵ Kiser, (n 2) 221.

¹⁶ Clarivate, ‘Trademark Watching Service’ (Clarivate) <<https://clarivate.com/products/ip-intelligence/trademark-research-and-protection/trademark-watching/>> accessed 19 October 2023.

Intellectual Property Law Association (AIPLA) in October 2023, the section concerning “Typical Charges and Costs for IP Law Services” indicates that licence negotiations typically operate on an hourly fee basis. The median rate per hour stands at 6,000 USD, ranking it at the apex of the list for traditional non-litigious trademark services. Following in second place is “Appeal to the Board,” with an hourly rate of 3,000 USD, only amounting to half of the aforementioned charges.¹⁷

3. TRADEMARK BULLYING IN CHINA: ADMIST ANTI-CORRUPTION CAMPAIGNS

Compared to the United States, the phenomenon of “trademark bullying” in China has its unique causes and manifestations. This section will analyse this phenomenon from three aspects: the characteristics, causes, and impacts of trademark bullying in China.

A. CHARACTERISTICS: IN THE NAME OF ANTI-COUNTERFEITING

The intellectual property environment in China is particularly challenging, exacerbated by the rampant spread of counterfeit goods. Even in the early stages of the 21st century, China was already identified as facing the most severe counterfeiting dilemma in recorded global history.¹⁸ According to the U.S. Special 301 Report,¹⁹ China remains on the United States’ Priority Watch List,²⁰ recognised as a major global exporter of counterfeit products.²¹ Counterfeit in China is not only a domestic issue but also a significant global concern, influencing international markets where counterfeit items originating from China are widespread.

¹⁷ American Intellectual Property Law Association (‘AIPLA’), Report of the Economic Survey 2023 (AIPLA, 2023) 46.

¹⁸ Daniel C K Chow, ‘Alibaba, Amazon, and Counterfeiting in the Age of the Internet’ (2020) 40 *Nw J Int’l L & Bus* 157, 167.

¹⁹ Office of the United States Trade Representative (‘USTR’), 2022 Special 301 Report (Office of USTR, 2022) 4.

²⁰ *ibid* 5.

²¹ *ibid* 47.

This challenging atmosphere is largely due to China's extensive manufacturing sector, regulatory enforcement limitations, and the explosive growth of online marketplaces, which blur the lines of product authenticity and complicate the crackdown on counterfeit goods.²² These elements contribute to a precarious environment where intellectual property rights are continually jeopardised, and authentic products are overshadowed by cheaper, illegitimate replicas.

In this context, “trademark bullying” in China often intertwines with rights holders' anti-counterfeiting measures. In a Chinese judicial report and related news, “trademark bully” frequently takes the name of “bulk claims of trademark infringement”.²³ Trademark infringement bulk claims involve trademark holders, usually sizable corporations, partnering with law firms or professional anti-counterfeiters through formal agreements in the name of anti-counterfeit to identify infringements via market surveys and evidence notarisation, then initiate multiple civil lawsuits against multiple infringers, usually small sellers, occasionally manufacturers.²⁴ Successful litigations or settlement negotiations yield financial compensations, which are distributed based on prior agreements.

Due to the fact that defendants are primarily small-scale sellers of counterfeit products,²⁵ their limited educational background often leads to a lack of understanding of trademarks, intellectual property, and related legal concepts, causing them to feel bullied. This approach, perceived by the defendants as a profit-driven strategy under the guise of anti-counterfeiting, fuels widespread resentment and fosters a sense of victimization due to “trademark bullying”.²⁶

²² Chow (n 18) 168–170.

²³ The Supreme People's Court of the People's Republic of China ('SPC'), Supreme People's Court Intellectual Property Tribunal Annual Report of the Intellectual Property Court of the Supreme People's Court (2020) (SPC, 2021) 18.

²⁴ Shunyi Zhang, ““Fraud-busters” can still help fight shoddy goods’ SHINE (2 April 2018) <<https://www.shine.cn/opinion/chinese-views/1804022530/>> accessed 11 October 2023.

²⁵ Zhengyou Zou, Bulk Intellectual Property Litigation Case Study Report (Jiangxi Provincial High People's Court, 2014).

²⁶ Research Group of The First Primary People's Court of Dongguan City

B. DISTINCT IMPETUSES

i. Low Implementation Costs for Rights Holders

Compared to the United States, the cost for trademark rights holders to initiate the aforesaid aggressive trademark strategies is not high within China's judicial environment. Typically, the costs that trademark rights holders incur when filing trademark infringement lawsuits against small terminal retailers include several aspects: "litigation expenses" paid to the court, the cost of obtaining evidence of infringement, attorney fees, and additional expenses for handling cases, such as travel, accommodation, and meals. However, under the judicial system in China, these costs are relatively low.

Regarding Litigation Expenses, according to Article 121 of Civil Procedure Law of the People's Republic of China, the Litigation Expenses that trademark rights holders need to pay to the court include "case acceptance fees" and "other litigation expenses".²⁷ But in cases of "trademark bullying," these fees rarely occur due to the clear facts and simple case nature.²⁸ As for the "Case Acceptance Fees", it is based on the amount in dispute and is collected on a graded scale.²⁹ For cases with an amount in dispute of less than 10,000 yuan, the acceptance fee is 50 yuan; for cases with an amount between 10,000 yuan and 100,000 yuan, the acceptance fee is calculated as: (amount in dispute - 10,000 yuan) x 0.025 + 50; for cases with an amount between 100,000 yuan and 200,000 yuan, the acceptance fee is calculated as: (amount in dispute - 100,000 yuan) x 0.02 + 2,300. Since the amounts in dispute in bulk lawsuits filed by trademark rights holders are often not large, the acceptance fees for individual cases are generally below 4,300 yuan. Additionally, if the lawsuit is withdrawn through court-mediated reconciliation, the aforementioned litigation fees can be halved.³⁰ In bulk lawsuits

of Guangdong Province ('Research Group'), Research Report on the Adjudication of Intellectual Property Cases: A Sample Based on Data from The First People's Court of Dongguan Over the Last Three Years (Research Group, 2013) 98.

²⁷ Civil Procedure Law of the People's Republic of China (2023 Amendment), art 121.

²⁸ Research Group (n 26) 98.

²⁹ Measures on the Payment of Litigation Costs, art 207.

³⁰ *ibid* art 15.

resulting from trademark bullying, the proportion of cases withdrawn through mediation is very high,³¹ as Chinese courts often regard the “rate of mediation and withdrawal” as an achievement.³² Many courts encourage parties to mediate first. Even if the case does not end with mediation, trademark rights holders often win due to the simplicity of the facts. According to relevant legal rules, the successful party’s pre-paid litigation fees should be refunded by the court, and the losing party should cover these costs.³³ Therefore, the litigation fees that rights holders need to pay to the court for such lawsuits are very minimal.

The cost due to the notarisation of the evidence in China is not expensive either. To ensure that evidence is more readily accepted by the court, trademark rights holders often notarise the infringing actions of the defendant before filing a lawsuit.³⁴ Since these types of trademark infringements typically involve the sale of counterfeit goods bearing the rights holder’s trademark, and the sales channels for these counterfeit goods are primarily through e-commerce platforms like Alibaba,³⁵ the method adopted widely is “Internet purchase notarisation.” This process involves the rights holder using a professional notary organisation to certify the process of purchasing the alleged counterfeit goods on the e-commerce platform and the counterfeit products obtained. Therefore, there are two costs involved in notarising such cases: the purchase cost of the infringing products and the service fee for notarisation organisation. Regarding to the former part, as the counterfeit goods are mainly daily necessities or small household appliances that are not high-priced,³⁶ the purchasing would not incur significant costs. In terms of the service fee, with the

³¹ Xiaoyao Xie, ‘Why Is the Mediation Rate for Intellectual Property Disputes So High?’ Shenzhen Special Zone Daily (Guangdong, 13 May 2014) B11.

³² Hubei Provincial High People’s Court (‘HPHPC’), ‘Willing to Be a Court Without Judgments’ The Paper (Hubei, 22 June 2023) <https://www.thepaper.cn/newsDetail_forward_23585659> accessed 18 October 2023.

³³ Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China (2022 Amendment), art 13.

³⁴ Fei Yu, ‘Report on the Development of Notary Services for Intellectual Property in China’ Legal Daily (25 May 2015) <<https://www.chinacourt.org/article/detail/2015/05/id/1635377.shtml>> accessed 18 October 2023.

³⁵ Chow (n 18) 160.

³⁶ Zou (n 25) 2.

advancement of market reforms in China's notary industry, the price for notarisation services of trademark infringement actions is market-driven.³⁷ Due to intense market competition, the fee for these notarisation services is also affordable.³⁸

As previously discussed, in the United States, the primary cost for trademark owners in initiating trademark bullying tactics is attorney fees which would not transfer to the infringer even if the right holder succeeded in the case.³⁹ Unlike the U.S., in China, pursuant to procedure rules,⁴⁰ attorney fees in trademark infringement lawsuits would be considered as the "reasonable expenditure" for the plaintiff's legal endeavours and were included within the scope of compensation. Moreover, those trademark infringement cases are usually straightforward without complex technical issues or professional barriers, leading to fierce competition among lawyers in that kind of field. Akin to notary fees, attorney fees in such cases are also affordable due to the low-price competition tactics in the Chinese legal market. In China, numerous lawyers tend to offer reduced preliminary fees or adopt the "contingency fee" to attract clients. They would enter into agreements with rights holders, agree to minimal or no initial charges, and sometimes even front the costs for notary services, travel, and other expenses. It is only after winning the case that they receive their remuneration from the court-adjudicated compensation damage, based on the agreed percentage outlined in the contract with their clients.

³⁷ Chongqing Municipal Development and Reform Commission, Notice on Issuing the Catalogue and Fee Standards of Notary Services Subject to Government Pricing in Chongqing Municipality (Chongqing Development Reform Standards, no 13, 2021) para 2.

³⁸ Shanghai Zhangjiang Notary Public Office, 'Catalogue and Fee Standards of Notary Services Subject to Market Adjustment at Shanghai Zhangjiang Notary Public Office' (Shanghai Notary) <<http://www.shnotary.org.cn/service/rest/tk.File/7254a5a318384b6ba73591b11f28b591/download>> accessed 18 October 2023.

³⁹ Robert W Fioretti and James J Convery, 'Attorney's Fees: The Mushrooming Cloud of Litigation' (1985) 34 DePaul L Rev 943, 943–944.

⁴⁰ Opinions of the Supreme People's Court on Fully Strengthening Intellectual Property Judicial Work to Provide Judicial Guarantee for Building an Innovative Country, art 13.

ii. Profit Motives of Professional Anti-Counterfeiting Agents

In China, the widespread participation of professional anti-counterfeiting agents, often lawyers, has infused commercial aspects into anti-counterfeiting activities.⁴¹ These professionals, upon contracting with trademark owners, find the profits for individual cases relatively insubstantial. Consequently, they pursue economies of scale. That is, they hope to identify a sufficiently large number of litigable infringers, enhance the efficiency of resolving each case, and strive for the highest possible court-awarded compensations or settlement amounts. This dynamic serves as a significant factor in the distortion of rights protection activities into “trademark bullying”.

Because the distribution of counterfeit products often needs to be advertised through internet channels, in order to find more actionable infringers, professional anti-counterfeiters in China now use crawlers to collect as many infringing clues as possible about the client’s trademarks on multiple internet platforms such as e-commerce websites like Alibaba, electronic maps, and self-media platforms, which are compiled and collated to determine the target of the counterfeiting together with the client.⁴² In terms of the choice of counterfeiting targets, professional anti-counterfeiters are more inclined to choose small-scale sellers rather than large-scale manufacturers.⁴³ There are several reasons for this: firstly, large-scale counterfeit goods manufacturers are often well-organised and cut off the chain of evidence in various ways to circumvent the supervision of law enforcement. For example, some large manufacturers will set up multiple warehouses in a number of different locations to store counterfeits,

⁴¹ Xiangjun Kong, ‘Innovative Thinking in Protecting Innovation: New Considerations in Current Intellectual Property Adjudication’ [2013] People’s Judicature 31, 33.

⁴² Namu, ‘China Resources Intellectual Property Company and Beijing Zhenyuan Hanqing Company Sign Strategic Cooperation Agreement on Intellectual Property’ IPR Daily (Henan, 25 August 2023) <http://www.iprdaily.cn/article1_34894_20230825.html> accessed 23 October 2023; PECO, ‘PECO Intellectual Property Crawler Software Official Website Introduction’ (PECO) <<http://home.zy-hq.com/#>> accessed October 23, 2023.

⁴³ Zhaojun Deng, ‘The Changing Market: Judicial Perspectives on the Commercialization of Intellectual Property Rights Enforcement’ (2015) 1 Journal of Law Application 23, 26.

and mix with a certain amount of genuine goods in their stock to disguise and create the illusion that they do not have a large scale of production, in order to obstruct the professional anti-counterfeiter or law enforcement agencies in the collection of evidence.⁴⁴ In such cases, in order to obtain sufficient evidence on those manufacturers or wholesalers in the upstream of the counterfeit industry, professional anti-counterfeiters need to make a high level of upfront investment, such as hiring a professional commercial spy, who knows how to obtain the evidence by penetrating into the interior of those counterfeiters in the disguise of various reasonable grounds like job searching and business co-operation.⁴⁵ However, small-scale sellers tend to be more “naïve”, and due to their limited knowledge, it is difficult for them to conduct a due diligence of whether the products may infringe others’ trademark rights, and certainly do not use various ways to impede professional anti-counterfeiters from obtaining evidence as large manufacturers do. In addition, according to Article 27 of China’s E-Commerce Law, e-commerce platform operators are required to verify, register, and maintain records of the identity, address, contact information, administrative licences, and other authentic information of businesses applying to sell goods or provide services on the platform, as well as periodically verify and update these records,⁴⁶ so there is no barrier to detect small sellers’ infringing behaviour by requesting the e-commerce platform to disclose the identity of the small sellers on the platform. In addition, it is difficult for them to make substantive defence in court, which means it would be easy for professional anti-counterfeiters to make quick profits from their lawsuits against small sellers. Besides, they also adopt a strategy akin to “allowing infringements to grow for larger enforcement actions,” intentionally overlooking the source of infringements and letting end-point illicit activities flourish. It is only when these infringements reach a substantial scale that anti-counterfeiters initiate wide-scale legal actions to secure significant financial profits.⁴⁷

⁴⁴ Report (n 19) 47.

⁴⁵ Que Liu, ‘Fighting Fakes’ Lawyer: This Job Has Broken Through All My Perceptions’ *The Paper* (Beijing, 7 April 2021). <https://www.thepaper.cn/newsDetail_forward_12065148> accessed 16 September 2024.

⁴⁶ China’s E-commerce Law, art 27.

⁴⁷ Deng, *The Changing Market* (n 44).

iii. Distinct Impacts

a. Small Sellers' Pushback: Grievance And Resistance

As described above, in China, small counterfeit sellers have become the main targets of trademark bullying. Their discontent and scepticism towards the anti-counterfeiters' tactics often come to light in their defensive arguments and debates in trials. Even though they cannot act as professional lawyers in defending against bulk trademark infringement lawsuits, their rebuttals directly reflect the plight and dissatisfaction of those "victims" in the process of "trademark bullying" cases.

In such cases, the defendants' primary defence is that the compensation amount sought by the plaintiffs is excessive.⁴⁸ Given the difficulty in quantifying the value of intellectual property, under Chinese trademark law, the compensation amount for trademark infringement can be determined based on a reasonable multiple of trademark royalties,⁴⁹ and other costs of rights protection including the plaintiffs' notarisation fees, attorney fees, etc. Therefore, when plaintiffs have difficulty proving the infringement damages they have suffered, the more common evidence they provide mainly includes similar trademark licence agreements, notarisation fee invoices, contracts for hiring the lawyer, and related invoices. Moreover, since plaintiffs often adopt methods of gathering evidence in bulk and entrusting representation in packages, the evidence they provide for their costs of rights protection in a single case, such as notarisation fee invoices, attorney contracts, and invoices, usually overlaps other cases. Therefore, defendants often perceive the compensation amounts sought by the plaintiffs as excessive, leading to outbursts of anger during the trial.

⁴⁸ *ibid* 27. In a study that analysed the grounds for defence in 1,482 cases of intellectual property bulk lawsuits in the Primary People's Court of Tianhe District of Guangzhou City from 2011 to 2015, it was found that in 978 cases, the defendants' primary argument was that the compensation amount sought by the plaintiffs was excessively high, representing the most common defence among all the cases reviewed.

⁴⁹ Trademark Law of the People's Republic of China, art 63.

b. Courts Under Pressure: Beyond Capacity and Morality

As mentioned above, a strategy that coincides with rights holders' bullying involves professional anti-counterfeiters launching numerous lawsuits against small sellers, coupled with various forms of resistance that these "victims", feeling "bullied" have put up. The dramatic increase in the number of cases, the unreasonable extension of trial limits due to the small sellers' resistance, and their anger, all add to the pressure on the judicial system. During the adjudication of these cases, courts have observed that defendants often develop a sense of aversion toward the commercialised rights protection mode employed by professional anti-counterfeiters. This results in a reluctance to engage in negotiation or mediation to resolve disputes. In some instances, those sellers banded together to resist such rights protection efforts, employing various methods to delay the resolution of these conflicts. This behaviour is a significant reason for the high appeal rate and extended adjudication periods seen in similar cases at the primary court level. Although a considerable number of cases are relatively straightforward, with clear facts, still, the resolution is hindered purely because of the parties' strong antipathy towards "trademark bullying".⁵⁰ As a result, judges do not have enough energy to deal with such a large number of messy cases.

On the other hand, judges critique the legitimacy of the "trademark bullying" that uses the judiciary as a means of profit-making. Judges argue that civil entities, as the rights holders of intellectual property, are entitled to protect their interests in a legal and reasonable way. The prevailing theoretical framework perceives trademarks as tools that enable the precise dissemination of product information, ultimately aiming to enhance market competitiveness.⁵¹ If "rights protection" in intellectual property is distorted into a tool for profit-making and "litigation" is viewed as

⁵⁰ Report (n 26), "The First People's Court of Dongguan concluded a number of intellectual property cases, with 963 judgments rendered. Out of these, 427 cases were appealed, indicating an appeal rate of 44.3%. Among these appealed cases, only 7 were remanded for retrial, making the remand rate [the ratio of cases sent back for a new decision] 1.6%. Compared to other civil and commercial cases, the appeal rate for intellectual property case judgments at the primary court level tends to be higher."

⁵¹ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163–64.

a pathway to profiteering, it does not align with the objectives of intellectual property protection. Furthermore, it is detrimental to the stability of market transaction order and also constitutes a waste of judicial resources to a certain extent. Such behaviour should not be encouraged or promoted.⁵²

c. Anti-Counterfeiting Efforts: Misdirected and Ineffective

The “trademark bullying” strategy, driven by anti-counterfeiting activities, targets small-scale sellers while indulging large-scale producers, failing to combat the source and resulting in counterfeit goods continuing to circulate in the market. This approach does not effectively curb counterfeiting. Such an outcome is also a result of the profit-driven motives of professional anti-counterfeiters under the trademark bullying strategy. Besides, the actual implementers of trademark bullying are not the trademark rights holders themselves who are merely licensing the right to sue to one or several professional anti-counterfeiters, without much involvement in the selection of litigation targets or the implementation of litigation strategies.⁵³ Actually, the real manipulators in trademark bullying are the professional anti-counterfeiters.

Constrained by their business models, as mentioned earlier, professional anti-counterfeiters gain minimal profit from individual cases. Besides, they are also unwilling to make substantial preliminary investments. In this context, initiating bulk lawsuits against small sellers becomes their best dominant strategy. The original intention of anti-counterfeiting activities is to purify the market environment, strengthen the connection between the trademark and the rights holders’ products, and safeguard the reputation of the rights holders and consumers’

⁵² ‘Civil Retrial Judgment on the Trademark Infringement Dispute Between Tianjin Zhongzhuang Supply Chain Management Co., Ltd. and Kabushiki Kaisha Nai Yi Qi Er,’ Case No.: (2022) Supreme Civil Retrial 274. [天津众妆供应链管理有限公司、株式会社纳益其尔等侵害商标权纠纷民事再审民事判决书 案号：(2022)最高法民再274号].

⁵³ Weiwei Dong and Haichao Tong, Hubei Provincial High People’s Court, ‘Defining and Regulating Litigation of Commercial Intellectual Property Rights Protection,’ (2014) 1 *People’s Judicature* 14.

welfare. However, under the manipulation of professional anti-counterfeiters, this goal is distorted, and anti-counterfeiting efforts are led astray.

II. CURBING TRADEMARK BULLIES THROUGH COMPENSATION LIABILITY: THE APPROACH CHINESE JUDGES ADOPTED

Facing the distortion of anti-counterfeiting activities driven by the profit motives of professional anti-counterfeiters, and to properly deal with the helplessness and anger of small sellers in the predicament of “trademark bullying” as well as give full play to the value-orientation role of judicial trials on anti-counterfeiting activities, Chinese judges tend to rely on the adjustment of the compensation liability in bulk cases of trademark infringement. This section will examine the rules on compensation liability for trademark infringement in mainland China and analyse how the judges apply them in their judgment against trademark bullying.

A. Reviewing the Rules for Calculating Trademark Infringement Compensation

The effectiveness of trademark infringement remedies often depends on the determination of compensation liabilities. Different from tangible property suffered “damage” of the “visualization”, trademark as intangible property, the infringement damage often demonstrates in the form of market competition. On the one hand, if the amount of compensation liability is decided too low, considering the cost of monitoring, detection and enforcement, the infringer is more likely to profit from the infringement, which will induce counterfeiting activities. On the other hand, if the amount of compensation liability is decided too high, considering the uncertainty of the scope of the trademark right, it may limit the freedom of the rightful implementer to carry out lawful commercial activities.

Article 63 of the current Trademark Law clearly lists five

ways of calculating damages, i.e. actual loss,⁵⁴ infringement benefits,⁵⁵ reasonable multiple of the royalties,⁵⁶ punitive damage,⁵⁷ and statutory damage.⁵⁸

1. ACTUAL LOSS

The purpose of calculating “actual loss” in civil law is to fill the gap between “the level of benefits that the right holder would have achieved if there had been no infringement” and “the lost benefits due to the existence of the infringement”.

In trademark rights cases, the plaintiff must prove a causal relationship between the decrease in sales and the infringing act as well as demonstrate that “there is no evidence of other significant factors leading to a severe decline in the plaintiff’s sales, thus the alleged infringement is the most important cause of the plaintiff’s reduced income.”⁵⁹ Such a standard of application makes the “actual loss” method of calculation less likely to be upheld by the people’s courts, except in the most exceptional cases.⁶⁰

⁵⁴ China’s Trademark Law, art 63 (a).

⁵⁵ *ibid* art 63 (b).

⁵⁶ *ibid* art 63 (c).

⁵⁷ *ibid* art 63 (d).

⁵⁸ *ibid* art 63 (g).

⁵⁹ *Baroque Flooring v Baroque Wood Industry*, The High People’s Court of Jiangsu Province (Case No.: (2017) Su Min Zhong 1297) [巴洛克地板诉巴洛克木业 江苏省高级人民法院 案号：(2017)苏民终1297号]. The judgment serves as a precedent for applying actual losses. The judgment stated: “The plaintiff proved that the defendant was not qualified to engage in export business, so its infringement would not affect the plaintiff’s exports but only its domestic sales. This explains why the plaintiff’s export revenue significantly increased while its domestic sales significantly decreased. The defendant argued that the decline in the plaintiff’s sales was unrelated to them, attributing it to the plaintiff’s internal management chaos and a deteriorating market environment; however, this defense was not supported. Both parties’ stores were located in the same shopping center or nearby areas, and the defendant sold the alleged infringing products at a lower price.”.

⁶⁰ Yanyang Tian, ‘Actual Losses Suffered by Right Holders in Trademark Infringement Cases from the Perspective of Judicial Practice’ (2020) 156 *China IP Magazine* 106. This article tallied data on 6,003 civil first instance trademark infringement cases from 2014-2017, in which actual losses were applied in only one case.

2. INFRINGEMENT BENEFITS

Similar to the “actual loss” rule, the judges also need to focus on the causal relationship between the “benefit” and the “trademark infringement behaviour” when applying the “infringement benefits” as a calculation method for the amount of compensation. In judicial practices, judges usually rely on the “contribution rate”, which means the portion of the infringer’s revenue due to the trademark infringement behaviour, to make their decision on the final compensation liability in the specific case. The “contribution rate” is an abstract concept that has no clear criteria and is always challenged by the party feeling that the judgment is partial to the other party in the appeal procedure.⁶¹ As the rate of appeal is always highlighted by the judges as an element which may affect their career, this calculation method is also applied at a low rate in reality due to the difficulty to ascertain the “contribution rate” in a reasonable and impartial way.⁶²

3. REASONABLE MULTIPLE OF ROYALTIES

“The courts need to give full discretion on the differences between the normal licensee commercial activities and the infringement activities in the aspect of time span, scales, etc., when the judgment on compensation liabilities would be based on the calculation of reasonable multiple of royalties.”⁶³ However, as

⁶¹ *Lelun Zhou v New Balance*, The High People’s Court of Guangdong Province (Case No.: (2015) Yue Gao Fa Min Sa Zhong Zi No. 444) [周乐伦诉新百伦案 广东省高级人民法院 案号：(2015)粤高法民三终字第444号]. The uncertainty of the “contribution rate” is well demonstrated in this case. In the first instance, the Intermediate People’s Court of Guangzhou City of Guangdong Province decided the “contribution rate” at a level of 50%, however in the second instance, the High People’s Court of Guangdong Province lowered this rate from 50% to 2.5%, therefore the compensation liability was reduced from 98,000,000 yuan in the judgment made by first instance court to 5,000,000 yuan in the final judgment.

⁶² Ying Zhan, ‘Re-investigation and Re-thinking of the Judicial Status of Damages for Intellectual Property Infringement in China--In-depth Analysis Based on 11984 Judicial Cases of Intellectual Property Infringement in China’ (2020) 1 Science of Law 193.

⁶³ The Supreme People’s Court of PRC, Guidance of the Supreme People’s Court on Several Issues Concerning Intellectual Property Trial under the Current Economic Situation, [最高人民法院关于当前经济形势下知识产权审判服务大局若干问题的意见] (2009) art 16.

stated earlier, the licensing method and scale of licensing under the licence agreement proposed by the plaintiffs are often quite different from the scale of operation of a small seller in a trademark bullying case, and thus the rate of adoption of this method is also very minimal in reality.⁶⁴

4. STATUTORY DAMAGE

Statutory damage acts as the main method for Chinese judges calculating the compensation liabilities. In the survey, more than 98% of trademark infringement cases relied on this rule.⁶⁵ However, it is often seen that judges tend to use highly templated, vague, and non-specific language when they rely on this method to ascertain the amount of compensation liability. The majority of courts simply list some factors that should be considered in these cases, including the nature and circumstances of the infringement, the bad faith of the infringer, the scale of operation, the renown of the trademark involved, the market value of the products in question. However, these courts tend not to elaborate on the causal relationship between these factors and the amount of “statutory damage”. As a result of this generalised approach adopted by judges, the determined amount of damage, although not rigorous, is difficult to be overturned by the higher court. In the survey made by a Chinese scholar, in 142 cases which were appealed by the parties against the decision on the amount of statutory damage, only 21, or about 14.8% of them were reversed in the second instance.⁶⁶ This figure is significantly lower than the average revision rate of 19% for intellectual property second-instance cases counted by the Intellectual Property Tribunal of the Supreme People’s Court in 2020.⁶⁷

5. PUNITIVE DAMAGE

Although the punitive damage calculation rule was absorbed into

⁶⁴ Zhan, Re-investigation (n 63).

⁶⁵ *ibid* 196.

⁶⁶ Congying Xu, ‘Reflection on the Statutory Compensation of Trademark Rights in China’ [2015] *Journal of Gansu University of Political Science and Law* 78.

⁶⁷ n 23.

the Chinese trademark law in its amendment in 2013, this rule also applied at a very low rate. In a survey conducted in 2020 by the Primary People's Court of Futian District of Shenzhen City, Guangdong Province, it was found that of the 50,697 judgments counted, only 33 expressly stated that punitive damages were applicable, accounting for only 6.5‰ of the total.⁶⁸ The low application rate may be rooted in two reasons. Firstly, interpreted in accordance with the structure of Article 63 of the China Trademark Law, “punitive damages” calculating method is located after “actual losses”, “infringement benefits”, and “reasonable royalties”, and the rule provides that “the amount of punitive damage shall be the amount, but not more than five times the amount, determined in the aforesaid method.” As the “statutory compensation” method is listed “after” the provisions of the punitive compensation, the “aforesaid method” does not include it. Therefore, the premise for applying punitive damages is that there is a base compensation amount that can be calculated using the other three methods. However, as highlighted before, these three methods are rarely applied in actual adjudication processes due to various reasons, which also indirectly leads to the very low application rate of punitive damage that are contingent on these three. Secondly, “Statutory Damage” often serves a punitive role in judicial practice. As previously noted, judges need to consider a range of factors when determining the amount of statutory damage, which include punitive factors. Judges also stated expressly in their rulings that “when it is not possible to calculate the damage amount and apply punitive damage clauses, the defendant's malice can be considered, and the statutory damage amount can be moderately increased to supplement punitive damage.”⁶⁹ It may be more accurate to say that statutory damage replaces punitive damage rather than supplements it.

⁶⁸ The Primary People's Court of Futian District of Shenzhen City, Guangdong Province, ‘Institutional Construction of Punitive Damages for Trademark Infringement’ (2020) 5 Intellectual Property 41.

⁶⁹ *Kang Cheng Investment Co., Ltd v Da Run Fa Investment Co., Ltd, Shanghai Intellectual Property Court* (Case No.: (2015) Hu Zhi Min Chu Zi No. 731) [康城投资(中国)有限公司诉大润发投资有限公司案 上海知识产权法院 案号：(2015)沪知民初字第731号].

B. Reviewing the Rules for Defending Against Infringement Compensation Liability

Article 64 of the Trademark Law of the People’s Republic of China provides two defences that trademark infringers can use to exempt themselves from damage. These defences are the “defence of non-use for three years”⁷⁰ and the “defence of legitimate source”.⁷¹

1. DEFENCE OF “NON-USE FOR THREE YEARS”

The establishment of this rule primarily aims to reconcile the contradiction between the “procedural right” created by trademark registration and the “property right” acquired through actual use of the trademark.⁷² “Procedural right” refers to the prohibition rights that exist upon trademark registration. In mainland China, the Trademark Law follows a “registration-acquisition model”. In theory, this grants them the right to prohibit others from using identical or similar identifiers on the same or similar categories of goods or services nationwide. Unlike the United States, it does not require trademark owners to provide evidence of actual use of the business identifiers they are seeking to register during the registration stage. Consequently, in China there exists a large number of registered trademarks which are not actually used. These trademarks, despite lacking any market influence or reputation, still possess “procedural right” due to their registration, allowing their owners to prohibit others from using the same identifiers within specific scope.

In contrast, “property right” refers to the protected reputation which a trademark gains through actual use. It enables the trademark owner to claim legitimate damage in trademark infringement cases. In judicial practice, the defendant can invoke the “defence of non-use for three years” to request evidence of the plaintiff’s actual use of the registered trademark within the past three years. If the plaintiff cannot provide such evidence, the

⁷⁰ China’s Trademark Law, art 64 (a).

⁷¹ *ibid* art 64 (b).

⁷² Mingde Li, ‘The Role and Significance of Trademark Registration in Trademark Protection’ (2014) 5 *Intellectual Property* 3.

defendant is only required to cease using the registered trademark and is not liable for compensation. In other words, the registered trademark only possesses “procedural rights” and not “property rights”.

This system is designed to curb the litigation behaviour of trademark owners holding a large number of registered trademarks that are not actually used. However, in cases of “trademark bullying”, the plaintiffs are often the right holders of well-known trademarks, which are characterised by high market reputation. Therefore, in “trademark bullying” cases, the registered trademarks of the plaintiffs usually possess both “procedural rights” and “property rights”. Hence, small sellers do not frequently invoke this defence in trademark bullying cases.

2. DEFENCE OF “LEGITIMATE SOURCE”

The application of the “defence of legitimate source” has become widespread in cases of “trademark bullying” in China. The design of this provision in the Chinese Trademark Law is a result of combining Article 45 (a)⁷³ and Article 47⁷⁴ of the TRIPS Agreement. Article 45 of the TRIPS Agreement states that judicial authorities have the power to order an infringer to pay damages sufficient to compensate the right holder for the harm caused by the infringing activity only if the infringer knowingly, or with reasonable grounds to know, engaged in the infringing activity. Article 47 of the TRIPS Agreement allows member states to stipulate that judicial authorities may require the infringer to inform the right holder of the identity of third parties involved in the production and sale of the infringing goods or services and their distribution channels. To effectively combat the proliferation of counterfeits, Article 64 of the Chinese Trademark Law (defence of legitimate source) provides that merely claiming “not knowing” of the infringement by the seller of the infringing goods is not sufficient to exempt them from the responsibility of paying damages for the infringement. The infringing seller must

⁷³ World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, art 45 (a), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round.

⁷⁴ *ibid* art 47.

concurrently provide evidence to identify the supplier of the infringing goods (as required under Article 47 of the TRIPS Agreement) in order to invoke this defence.

Although judges cannot actively invoke the defence for the defendant, in judicial practice, often for the purpose of clarifying the facts of the case, they will hint at the existence of this defence to the defendant during the trial.⁷⁵ This is beneficial for the victims (small sellers) of trademark bullying, as they often have limited legal knowledge and usually do not hire professional lawyers to deal with the case. Therefore, when judges proactively remind them of this defence, it can alleviate their anger and compensate for their lack of litigation capabilities. Furthermore, the prospect of avoiding damage can also encourage small sellers to disclose larger wholesalers or manufacturers, thereby aiding in the fight against the source of counterfeit goods.

3. CURBING “TRADEMARK BULLYING”: THE APPLICATION OF THE ABOVE RULES BY CHINESE JUDGES

Based on the above review of the two set of rules in China’s trademark law system, it is not difficult to conclude that the most commonly used rules on compensation liabilities in trademark bullying cases are the “statutory damages rule” for the calculation of the amount of the damages and the “legitimate source defence” rule relied on by the defendant to seek an exemption to the damage. This part will focus on how Chinese judges planned to curb the “trademark bullying” through the application of these two rules.

A. CRITERIA AND PRINCIPLES FOR THE RECOGNITION OF “TRADEMARK BULLYING”

The prerequisite for applying the above rules in dealing with “trademark bullying” is to determine the criteria for determining

⁷⁵ The High People’s Court of Zhejiang Province, ‘Research on the Grounds for Defense in Trademark Infringement Litigation’ (2012) 1 Journal of Law Application 85.

the concept of “trademark bullying” and identify the principles for dealing with it. Chinese courts often establish these contents by internally issuing guiding opinions. For example, on 14 November 2023, the Guangzhou Intellectual Property Court issued work guidance to deal with “trademark bullying”. It defines the term as a situation where the same rights holder commissions professional agencies to gather evidence against multiple entities and initiates litigation on a large scale, either filing 10 cases at once or accumulating over 20 cases within half a year. Once the case was recognized as “trademark bully”, the court would take a mediation approach for it at first, preventing it from entering formal trial proceedings.⁷⁶ This measure may aim to avoid unfavourable consequences for the court, such as continuous appeals by small sellers affecting court performance.⁷⁷ Besides, the compulsory mediation before trial may also tend to speed up the resolution of disputes, thereby relieving the court’s pressure of handling the numerous cases with limited manpower. Additionally, the court also clarified the handling principles for “trademark bullying” in the above guidance, stating “courts should not advocate or encourage rights holders to adopt the model of filing bulk lawsuits for profit as a common method of business rights protection”, and “in cases of intentional inducement of the defendant to commit infringement, the court will exclude illegally obtained evidence from trap evidence, and for malicious rights protection and abuse of rights, once discovered, will be effectively regulated by fines, judicial suggestions, interviews, or legal dismissal.”⁷⁸ Through the issuance of such guidance, courts have made the identification of “trademark bullying” operable and unified in its attitude towards such cases. Even if the case enters the trial phase after compulsory preliminary mediation, the handling principles reflected in the guidance will also influence the court’s application of the judicial rules.

⁷⁶ Guangzhou Intellectual Property Court, ‘Guidelines on Intellectual Property Bulk Infringement Lawsuits’ (14 November 2023, art 2).

⁷⁷ Yongkun Zhou, ‘Analysis on the Impact of Mandatory Mediation Undermining the Justice and Law’ (2007) 3 *Journal of Northwest University of Political Science and Law*, 20.

⁷⁸ Guangzhou Intellectual Property Court, ‘Guidelines’, art 3.

B. CRITERIA AND PRINCIPLES FOR APPLICATION OF THE STATUTORY DAMAGE RULE IN TRADEMARK BULLYING CASES

Under the statutory damage rule, the judge has great discretion in determining the amount of damages within the range of 5 million RMB. In order to ensure that the same case is decided in the same way, courts in mainland China often conduct internal research on similar cases, standardise the scale of decisions and publicise typical cases,⁷⁹ enhancing the guiding effect of court decisions in this way.

As mentioned earlier, the implementers of trademark bullying are often professional anti-counterfeiters. The contracts between professional anti-counterfeiters and trademark rights holders often stipulate that the remuneration of professional anti-counterfeiters is determined by the actual damage obtained by the trademark rights holder, that is, the more damage the professional anti-counterfeiter helps to secure, the more they earn. Therefore, to curb the bullying behaviour activated by professional anti-counterfeiters, judges only need to reduce the amount of damage. Judges will also consider a series of factors in the process of applying statutory damage rules to protect small businesses and local industries. For example, some judgments consider the impact of the pandemic, believing that small businesses struggle to survive under the COVID-19 pandemic and should not be pressured into bankruptcy by excessive compensation.⁸⁰

⁷⁹ The Intermediate People's Court of Wenzhou City of Zhejiang Province, 'Getting Intellectual Property Bulk Infringement Lawsuits Back on Track' (2023).

⁸⁰ *Beijing Hualian Hypermarket Co. Ltd. v Pan Fengliang Supermarket*, Beijing Intellectual Property Court (Case No.: (2023) Jing 73 Min Zhong No. 1922) [华联超市股份有限公司诉北京市朝阳区十八里店乡潘丰亮超市商标侵权案 北京知识产权法院 案号：(2023) 北京73民终1922号]. In its judgment of this case, the Court clearly stated that, taking into account the impact of the epidemic, it had ruled that the defendant was ultimately liable for \$8,000, and that the plaintiff's claim for damages amounted to \$50,000, which was 6.25 times the amount ultimately awarded; *Qingdao Park Hotel Management Co. Ltd. v Dongbao Park Hotel*, The Intermediate People's Court of Jingmen City of Hubei Province (Case No.: (2023) E 08 Min Zhong No. 1154) [青岛朴宿酒店管理有限公司诉荆门市东宝区朴宿旅馆商标侵权案 湖北省荆门市中级人民法院 案号：(2023) 鄂08民终1154号]. In this case,

Judgments in different regions also show significant differences in statutory damage amounts due to the variation in regional economic development. In economically backward areas, courts often set lower statutory damage amounts, while in developed areas, the amounts are typically higher.⁸¹ Moreover, facing counterfeit sources, Chinese judges will increase the damage amount through a statutory damage calculation method to exert its punitive effect, thereby cracking down on counterfeit sources and increasing the enthusiasm of professional anti-counterfeiters to investigate and combat these sources. For example, in *SIEMENS v SiMBMC* decided by the Supreme People's Court, the Court broke the upper limit of RMB 5,000,000 set in the statutory damage rule, ruling that the producer of counterfeit goods and its actual operator jointly bear RMB 100,000,000 in compensation.⁸²

C. CRITERIA AND PRINCIPLES FOR APPLICATION OF THE LEGITIMATE SOURCE DEFENCE RULE IN “TRADEMARK BULLYING” CASES

The application of this rule by Chinese judges in trademark bullying cases is reflected in two aspects. Firstly, judges would proactively advise small sellers of the existence of this defence during the litigation process; Secondly, judges would adjust the standard of proof for this defence in their judgments. The former aspect has been stated earlier in this article. The reason for the latter's low standard of proof may relate to the business habits of small businesses in China. In their operations, small businesses often lack the awareness to preserve evidence, and they usually do not use formal commercial contracts in business cooperation with other entities but rely on signed or stamped “purchase orders” and “delivery notes” for business activities. Therefore, it is difficult for small businesses to provide evidence and the court appropriately lowers the proof threshold for them, a strategy that aligns with

the Court also took into account the impact of the epidemic on the opening of the hotel, and ultimately awarded the defendant \$5,000 in damages using the statutory compensation method of calculation.

⁸¹ Zhan, ‘Re-investigation’ (n 63)

⁸² *SIEMENS v SiMBMC*, The Supreme People's Court of PRC (Case No.: (2022) Zui Gao Fa Min Zhong No. 312) [西门子商标侵权案 最高人民法院 (2022) 最高法民终312号].

reality.⁸³

If the seller is a large chain supermarket, the court often believes that such a seller should have a higher duty of care and should review the source of the goods before selling them. Even if these sellers provide evidence of the source of their goods, the court may consider that the wholesaler's evidence does not meet the standard to trigger the "legitimate source defence", thereby making such sellers unable to exempt themselves from infringement compensation liability.⁸⁴

4. CRITERIA AND PRINCIPLES FOR BALANCING THE INTERESTS: UNVEILING PROBLEMS WITH THE CURRENT APPROACH AND POSSIBLE SOLUTIONS

To address the series of problems brought by "trademark bullying" litigation, the approach invented by Chinese judges can be summarised as follows: First, issue internal guidelines to unify the court's attitude towards the social phenomenon, and determine the standards for recognising it. Once a case is identified as "trademark bullying", it will compulsorily enter the mediation stage before court proceedings, thus speeding up case resolution. Second, if the "trademark bullying" case formally enters into the litigation process, the judge will guide the defendant to use the "legitimate source defence" during the trial to reduce their burden and obtain clues about the upstream businesses in the counterfeit chain. Finally, if the professional anti-counterfeiter sues the upstream large wholesalers and manufacturers, the court will consider such lawsuits as efforts to combat counterfeit sources, and will raise the standard of proof for the legitimate source defence and increase the damage amount determined under statutory damage rule, thereby encouraging professional anti-counterfeiters to target counterfeit sources and deter activities in the counterfeit industry. This part will evaluate the above approach

⁸³ Lei Qi, 'Research on Several Issues in Trademark Infringement Cases Involving Small Businesses' (2015) 6 China Trademark 70.

⁸⁴ *Jing De Zhen Ceramics Association v Gold Industry Supermarket*, The Intermediate People's Court of Foshan City of Guangdong Province (Case No.: (2022) Yue 06 Min Zhong No. 14006) [景德镇陶瓷协会诉金业购物中心商标侵权案 佛山市中级人民法院 (2022) 粤06民终14006号].

through the perspective of balancing interests, point out the unresolved and even new problems that the approach may bring, and try to give suggestions.

A. CRITERIA AND PRINCIPLES FOR STAKEHOLDERS INVOLVED IN TRADEMARK BULLYING

According to the above analysis, the stakeholders in trademark bullying activities in mainland China include the following subjects:

i. Small Sellers

In the counterfeit industry, small sellers are usually located at the terminal of the circulating chain. As they are the main defendant or “victim” of trademark bullying, their benefits are considered by the courts and substantially benefit from the aforesaid approach.

ii. Wholesalers and Manufacturers

These two subjects who usually hide in the upstream of the counterfeit circulating chain, are the main targets of the Chinese anti-counterfeit campaign. One of the core objectives of the Chinese judges hearing trademark infringement cases is to trace and combat the source of counterfeit, therefore the courts wish to destruct these two subjects through the enforcement of the aforesaid approach.

iii. Judges and Courts

Except small sellers, judges and courts may be other “victims” in trademark bullying activities. Under the current Chinese judicial system, the career of the judge will be badly affected if their judgment was reversed by the high level court. Courts limited by their manpower could not handle the exploding number of cases inflicted by trademark bullying. Therefore, the aforesaid approach has also taken their interests into consideration.

iv. Trademark Rights Holders

Trademark rights holders concerning their market share and the fame of their brands would commission professional anti-counterfeiters to combat the counterfeit industry. As plaintiffs, their interests were considered by the Chinese court, however in the analysis above, the Chinese court would uphold their claim for high damages only if their lawsuits accurately target the counterfeit sources.

v. Professional Anti-Counterfeiters

This subject usually includes professional IP lawyers and would be commissioned by the trademark right holders to activate the lawsuits towards counterfeiters. As professional litigation agents, they manipulate the litigation strategy and profit from the litigation through the contracts they signed with the trademark right holders. If the courts limit the compensation liability undertaken by the small sellers, those anti-counterfeiters may give up their “trademark bullying” strategy as they cannot profit from it.

In summary, the ideal scenario envisaged by the court that invented the above approach is a harmonious picture: the anger of the small sellers is quelled, the rights holders and the professional anti-counterfeiters unite their fight against the source of the counterfeits, the manufacturers and wholesalers at the source of the counterfeits are deterred, the courts get the achievement, and the judge is praised. But the future may not be so rosy if the interest is not balanced.

B. CRITERIA AND PRINCIPLES FOR POSSIBLE CONSEQUENCES OF WEAKENING THE INTERESTS OF PROFESSIONAL ANTI-COUNTERFEITERS

The Court imagined that by cutting off the commercial benefits that professional anti-counterfeiters might gain from their “trademark bullying” activities, they would abandon that tactic and adopt the strategy of “combating the source”. However, in

reality, manufacturers and wholesalers located in the upstream of the counterfeiting industry chain are often very cunning, knowing that their behaviour is in violation of the law, and therefore they tend to adopt an extremely cautious attitude in the storage and distribution of goods.⁸⁵ As mentioned earlier in this article, professional anti-counterfeiters often need to invest considerable upfront costs in order to obtain evidence from upstream producers, for example, hiring commercial spies, who will infiltrate into the interior of counterfeit goods factories under the guise of co-operation or part-time jobs, etc., and obtaining a complete chain of evidence by such means.⁸⁶

However, a recent court judgment does not seem to have considered the above issue from the perspective of anti-counterfeiters. In the “*NATURE REPUBLIC*” trademark infringement case that has recently been retried by The Supreme People’s Court of PRC, although the Court found that the two sellers of counterfeit goods in the case constituted trademark infringement, it ruled that they were not liable for any damages but only required to pay a litigation fee of RMB 200. In addition, the Supreme People’s Court characterised the plaintiff’s litigation as “trademark bullying”, which led the Court to raise the standard of proof for the plaintiff’s reasonable expenses in its decision, that is considering that the plaintiff’s corresponding expenses had already been covered by the damages awarded in other cases, which ultimately led to the plaintiff’s claim for the costs for this lawsuit not being supported by the court.⁸⁷ This will undoubtedly dampen the enthusiasm of the professional anti-counterfeiters. Instead of gaining profit, they incurred losses due to the cost in the litigation process, which includes the evidence collection fee, travelling expenses, accommodation costs, etc. The rosy picture envisaged by the courts may be naught if the interest of anti-counterfeiters was not taken carefully.

⁸⁵ Liu, *Fighting Fakes’ Lawyer* (n 46).

⁸⁶ China’s E-commerce Law, art 27.

⁸⁷ Dong and Tong, ‘Defining and Regulating’ (n 54).

III. TIME TO CLEAR THE MIST: POSSIBLE SOLUTION TO THE “TRADEMARK BULLYING” DILEMMA

According to the previous discussion in this article, it has to be admitted that “trademark bullying” has indeed brought some social problems. However, as one practical way to gain evidence, there is a need for it to exist. The judges’ discretion should be limited by a principle that the interest of the anti-counterfeiters should be taken care of in a way that can motivate them to keep their anti-counterfeit activities without putting too much pressure on the other stakeholders.

CONCLUSION

Trademark bullying in mainland China is characterised by trademark rights holders launching bulk infringement lawsuits against numerous small businesses and it is a distorted form of the anti-counterfeiting campaign. There are two main reasons for this distortion: firstly, the low cost for rights holders to initiate “trademark bullying” made them tend to select such a strategy, and secondly, the profit-driven motives of professional anti-counterfeiters who actually execute the strategy compels them to adopt a scaled approach to gain profit. This social phenomenon burdens both courts and small businesses, leading the anti-counterfeiting movement astray. To resolve this issue, Chinese courts tend to guide the anti-counterfeiting movement back to its proper track by adjusting compensation liability. Their primary tools are “statutory damage rule” and the rule of “legitimate source defence”. Both of these rules provide the courts with a significant degree of discretion. However, recent documents and cases issued by Chinese courts show that courts have not adequately considered the interests of professional anti-counterfeiters in applying these rules. This is inappropriate, as they play a crucial role in the anti-counterfeiting movement. Given the legal market environment in China, their efforts to target the source of infringement often face high initiation costs. Courts can control their profits to prevent excessive gains to curb trademark bullying, but should also ensure their costs are covered, so they would not abandon their activities. To make the horse run far, one must

neither overfeed it nor starve it to death. A balance must be maintained.

**PETS IN PROTECTION ORDERS: A
COMPARATIVE ANALYSIS OF FOUR
COMMON LAW FRAMEWORKS AND
RECOMMENDATIONS TO EXPAND HONG
KONG'S ANIMAL LAW REGIME**

Shi Tao Zhang^{*}

As women's liberation and animal rights gain more popularity in mainstream discourse, the intersection of intimate partner abuse and animal cruelty has emerged as a novel area of law. What happens when one's significant other hurts their pet during family disputes? If a victim of domestic violence applies for a protection order, can their pet be covered by it as well?

This article focuses on the legal recourses and social resources that are available in four common law jurisdictions: the United States, Canada, the United Kingdom, and Hong Kong. Starting with an overview of the connection between animal abuse and domestic violence, it then explores the legal framework and community resources available to victims of domestic violence who want to include their animal in a protection order against their abuser and who want to be sheltered alongside their trusted pet in the United States, Canada, and the United Kingdom. An analysis of the normative principles that underlie these legal regimes is then used to determine the prevailing attitude of the law towards animals. Finally, an overview of Hong Kong's legal regime on the topic highlights the urgent need for reform and gives way to recommendations formulated through the examination of empirical studies and comparative legal perspectives.

^{*} BCL/JD (McGill, 2025). The author was on exchange at HKU's Faculty of Law in Fall 2023 and is grateful to HKU's professors and students for contributing to her unforgettable experience. The author would also like to thank the HKJLS Editorial Board for their feedback.

INTRODUCTION

As women's liberation and animal rights deservedly gain increased attention, the intersection of intimate partner abuse and animal cruelty has emerged as a novel area of law across different countries in the last two decades. Its real-life implications on both human and non-human victims of domestic violence further cements its status as an urgent topic to be addressed by national lawmakers. What happens when one's romantic partner harms the family pet during disputes? Which legal remedies exist when a victim's partner threatens to kill their animal if they leave? Can a survivor of domestic violence find pet-inclusive shelters to accommodate both themselves and their trusted animal? If a victim of domestic violence applies for a protection order, can their pet be covered by it as well?

This article focuses on the legal recourses and social resources available in four countries: the United States, Canada, the United Kingdom, and Hong Kong. These jurisdictions were chosen because their legal regimes are rooted in the common law system, which enables a more profound comparative analysis due to the similar structure of the legislative, executive, and judicial branches of their governments.¹

This article starts by situating the importance of legal protections for both human and non-human victims of violence in the context of existing links between animal abuse and domestic abuse, and explores different justifications for doing so. Then, it presents the legal framework and community resources available to victims of domestic violence in the United States, Canada, the United Kingdom, and Hong Kong. A discussion of the normative principles that underlie these legal regimes is then used to determine the prevailing attitude of different jurisdictions towards animals follows. Finally, this article formulates recommendations for Hong Kong's legal regime on the intersection of animal protection and protection of survivors of intimate partner violence.

¹ Please note that this article excludes the Canadian province of Québec, which exceptionally employs a civil law system for its private law regime.

In particular, this article contends that the legal remedies available to victims of domestic violence who want their protection order to cover their companion animal in Canada, the USA and the UK, as well as the reform measures recommended by scholarship from these countries, can inspire the expansion of Hong Kong's legal system surrounding protection measures granted to those impacted by situations of domestic abuse, humans and non-humans alike.

This article does not address animal cruelty as a standalone topic, but specifically tackles the intersection of animal abuse and intimate partner violence. The literature reviewed in this context examines the link between domestic violence and animal abuse within heterosexual relationships, and the perpetrators have been overwhelmingly identified as men in the context of such surveys and studies. This article does not seek to diminish survivors of other genders and sexualities. Dismantling patriarchy comes hand in hand with eliminating all systems of oppression, including speciesism, which plays an instrumental role in the conceptualisation and enactment of animal protection measures (or the lack thereof).

I. LINK BETWEEN ANIMAL ABUSE AND DOMESTIC VIOLENCE

The link between animal abuse and intimate partner violence has long been acknowledged by literature. Specifically, academic research has consistently maintained that intimate partner violence is often carried out concurrently with animal abuse within the household.² These forms of violence do not merely exist in

² Michael Roguski, 'Pets as Pawns: The Co-existence of Animal Cruelty and Family Violence' (2012) <<https://communityresearch.org.nz/research/pets-as-pawns-the-co-existence-of-animal-cruelty-and-family-violence/>> accessed 30 November 2023; Atsuko Matsuoka and John Sorenson, 'Inclusive Approaches by VAW Shelters: Respecting Women's Choice to be Together With Companion Animals' (2023) 38(3) *Affilia* <<https://doi.org/10.1177/08861099221097758>> accessed 30 November 2023; Joanna Chiu, 'How accommodating pets in domestic violence shelters is helping save lives' *Toronto Star* (Vancouver, 9 July 2021) <https://www.thestar.com/news/canada/how-accommodating-pets-in-domestic-violence-shelters-is-helping-save-lives/article_e6d6d741-fb31-52d8-8f42-4d9029c3dae3.html> accessed

parallel, but are interwoven and interact with each other, thus affecting both human and non-human victims simultaneously.

Animal cruelty is often weaponised by the abuser as a form of psychological or emotional violence against the human victim.³ Indeed, surveys conducted in New Zealand, the United States, United Kingdom and Canada have revealed that the vast majority of domestic abusers resort to animal cruelty in order to intimidate or coerce their victim. All figures combined, it is estimated that up to 71% of survivors have witnessed their abuser threaten to harm or actually harm their pet, up to 65% remained with the abuser or delayed leaving due to concerns for the welfare of their animal, up to 48% considered returning to their abuser due to fears regarding their pet's safety, and around 25% did in fact return to the relationship because they wanted to protect their animal from further harm.⁴ The inclusion of scholarship from New Zealand highlights that the double issue of intimate partner violence and animal abuse exists beyond the jurisdictions which have been selected for analysis, and further demonstrates the urgency of enacting robust legal protections and policy reforms across countries and continents.

30 November 2023; Mary Lou Randour and others, 'Pet Protection Orders for Domestic Violence Survivors: Are They Being Used?' (2023) 0(0) *Violence Against Women* 12–13 <<https://doi.org/10.1177/10778012231176197>> accessed on 30 November 2023; Mary Wakeham, 'Animal Abuse as a Strategy of Coercive Control' (DPhil thesis, University of Bristol 2021); Sarah May Lindsay, 'The "Problem" of Multispecies Families: Speciesism in Emergency Intimate Partner Violence (IPV) Shelters' (2022) 11(6) *Social Sciences* <<https://doi.org/10.3390/socsci11060242>> accessed 30 November 2023; Catherine M. Tiplady, Deborah B Walsh and JC Phillips, 'The ongoing impact of domestic violence on animal welfare' (2015) 4(2) *Animal Studies Journal* 116 <<http://ro.uow.edu.au/asj/vol4/iss2/6/>> accessed 30 November 2023; Michelle Cleary, Deependra K Thapa, Sancia West, Mark Westman and Rachel Kornhaber, 'Animal abuse in the context of adult intimate partner violence: A systematic review' (2021) 61 *Aggression and Violent Behavior* <<https://doi.org/10.1016/j.avb.2021.101676>> accessed 30 November 2023; Michelle Newberry, 'Pets in danger: Exploring the link between domestic violence and animal abuse' (2017) 34 *Aggression and Violent Behavior* <<https://doi.org/10.1016/j.avb.2016.11.007>> accessed 30 November 2023.

³ Roguski (n 1) v.

⁴ Roguski (n 1) iv–vii; Randour and others, (n 2); Wakeham (n 2); Lindsay (n 2); Tiplady, Walsh and Phillips (n 2); Cleary and others, (n 2); Newberry (n 2).

The figures above clearly showcase that domestic violence and animal abuse are not isolated phenomena, but are often enacted in relation to each other. This occurrence can be explained by different theories. First, feminist legal scholars have looked at jurisprudential history and common law notions of property to suggest that the patriarchy is entrenched in our legal regimes and consequently our society has allowed predominantly male abusers to view both animals and women as lesser and weaker, and thus feel entitled to exert power and ownership over them. Furthermore, the anthropocentric worldview endorsed by our legal systems denies animals their sentience and implicitly legitimises animal cruelty because it is based on the premise that humans have full power over animals as property. Finally, abusers may be aware of their victim's emotional connection to their companion animal and may choose to hurt or threaten the latter in order to manipulate the former into complying and as retaliation for so-called unsatisfactory behaviour.⁵

Being cognisant of the above, it is therefore essential that rigorous and reliable protections for both human and non-human victims of abuse are entrenched in law. The following section examines some normative principles that provide the rationale for the availability of legal protections and social resources for women and animals in various jurisdictions.

II. NORMATIVE JUSTIFICATIONS AND ETHICAL PRINCIPLES

Legislative reforms and policy decisions are motivated by normative principles that underlie each jurisdiction's foundations.

The methodology employed in this paper analyses different normative principles and social theories that support the inclusion of animals in domestic violence protection orders. By grouping these principles and theories into three categories, it seeks to situate the rationale that underlies each jurisdiction along a spectrum.

⁵ Wakeham (n 2).

As shown in Image 1, these three categories of ethical considerations are: (1) anthropocentrism on the left, (2) utilitarianism in the middle, and (3) Critical Animal Studies on the right.



Image 1: Spectrum of justifications for including animals in domestic violence protection orders alongside human victims.

A. Anthropocentrism

Anthropocentrism, which theorises that human beings are the ultimate superior entities in the world, is closely related to the Kantian approach to animal rights. Kant believed that the right that one claims against others must be justified by the duty to which they are owed, and that therefore, only those who are entitled to a duty of care from others can claim a right on the basis of this duty. He further provides that only living beings who are self-conscious are entitled to a direct duty of care.⁶ Since Kantian theory perceives animals to be acting on the basis of primary urges instead of with rationality, human beings have no direct obligation of care towards them because animals are ‘means and instruments to be used at the will’⁷ of men and cannot be equal to humans. In this way, Kantian theory appears similar to anthropocentrism as they both view animals to be things to be owned and discarded at will.

This anthropocentric view of animals as property espouses the perspective that animals are not sentient beings, but

⁶ Emer O’Hagan, ‘Animals, Agency, and Obligation in Kantian Ethics’ (2009) 35(4) *Social Theory and Practice* 531 <<https://www.jstor.org/stable/23562119>> accessed 30 November 2023.

⁷ Samuel Camenzind, ‘Kantian Ethics and the Animal Turn. On the Contemporary Defense of Kant’s Indirect Duty View’ (2021) 11(512) *Animals* 6 <<https://doi.org/10.3390/ani11020512>> accessed 8 August 2024.

merely property. Therefore, in the context of domestic violence, their suffering is not acknowledged and their inclusion in protection orders is justified by property law, which provides that owners have the right to safeguard their property. Although this approach can be a clever remedy that allows for the concrete protection of pets without the weariness of challenging their status consolidated through decades of jurisprudence and normative commodification, it nevertheless negates their ability to feel pain and suffering, as well as the psychological impacts they may experience after being harmed.

B. Utilitarianism

Utilitarianism refers to the prioritisation of a single valuable outcome for the majority over rigid moral considerations — the right course of action in a given situation is the one that leads to the most beneficial result. In the field of animal law, the utilitarian theory as promoted by Peter Singer provides that humans must consider the consequences of their actions on the interests of both animals and humans.⁸ Put simply, Singer believes that advocating for animals is beneficial when the ultimate outcome is favorable to our own interests.

In the context of pet protection orders, the utilitarian justification looks at the beneficial impacts of this policy choice on human victims. Reflecting the views of various shelter staff members, this perspective supports legal and social protections afforded to the animals of human victims, but only because it is harder for the latter to leave abusive relationships if the former are not shielded by the law. Yet, this view is still based on anthropocentrism, as the protection of pets is purely justifiable for the sake of encouraging the victims to leave, and does not consider the inherent victimhood of pets who are targeted by domestic violence. While undoubtedly the most pragmatic argument grounded in concrete evidence that failure to enact safeguards for

⁸ Gary L Francione, 'Animal Rights Theory and Utilitarianism: Relative Normative Guidance' (1997) 3(75) Animal Law <<https://www.animallaw.info/article/animal-rights-theory-and-utilitarianism-relative-normative-guidance>> accessed 30 November 2023.

pets will delay or hinder the survivor from fleeing, this principle implicitly minimises the needs of animals by viewing them as an obstacle to the victim's freedom, instead of survivors in their own right.

C. Critical Animal Studies

Critical Animal Studies refers to a school of thought which advocates for the inclusion of multispecies families in domestic violence shelters; it theorises that companion animals are as much a part of a family as any human person and that they necessarily also suffer when violence is enacted in the home. Introducing the notion of victimhood to animal rights would allow pets to hold a standalone claim against their abusers.⁹ Acknowledging pets as survivors of domestic violence that can be physically, psychologically and emotionally impacted is undoubtedly the most progressive perspective in this regard.

Rejecting the distinction between animal cruelty and domestic violence because it considers both non-human and human parties to be equally part of the family unit, the concept of Critical Animal Studies seeks to include the axis of oppression and discrimination on the basis of one's species — a phenomenon referred to as speciesism — into the analysis of intersectionality. Dismantling the myth that pets constitute obstacles to women fleeing violence, Critical Animal Studies claim instead that 'they [the women] are delayed by exercising agency and taking moral responsibility for family members of different species in violent situations. They do not see nonhuman family members as deterrents'.¹⁰ The notion that human victims have a moral responsibility towards the well-being of their pet testifies to the existence of a direct duty of care towards animals.¹¹ In the context of family violence, this duty reinforces the emotional connection between a human survivor and their pet, and recognises the importance of mutual solidarity among fellow family members in resisting patriarchal oppression.

⁹ Matsuoka and Sorenson (n 2) 471.

¹⁰ *ibid* 470.

¹¹ *ibid*.

The next section presents an overview of the legal protections and social resources that are available to victims of intimate partner violence and animal abuse in the United States, Canada, the United Kingdom, and Hong Kong.

III. LEGAL REGIME AND SOCIAL RESOURCES IN DIFFERENT COMMON LAW COUNTRIES

A. United States

As early as 2001, American legal scholarship has emphasised the importance of including pets in domestic violence protection orders with the goal of minimising the control exerted by the abuser against the victim, which can persist even after the latter has escaped.¹² The US legal regime regulating the inclusion of companion animals in protection orders, which is separated into state legislation and federal legislation, offers several remedies to victims of intimate partner violence.

In 2006, Maine was the first state to champion legislation to this effect by introducing An Act Amending the Animal Welfare Laws in its legislature.¹³ This Act amended section 5-A of Title 19-A on domestic relations to provide that the court may make an order ‘concerning the care, custody or control of any animal owned, possessed, leased, kept or held by either party or a minor child residing in the household’.¹⁴ In 2013, this provision was further modified to ‘enjoin the defendant from injuring or threatening to injure any such animal’.¹⁵ The protections enacted by Maine to shield animals from domestic violence are therefore twofold: first by awarding interim custody of the animal to the survivor, then by prohibiting the abuser from harming them.

¹² Dianna J Gentry, ‘Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence’ (2001) 13(1) *Yale Journal of Law and Feminism* 5.

¹³ Randour and others, (n 2).

¹⁴ Maine Revised Statutes Annotated. Title 19-A. *Domestic Relations*, 19-A M.R.S.A. para 4108 s 2-C.

¹⁵ *ibid.*

After this first victory by animal welfare and feminist activists in Maine, other states quickly followed suit. As of 2023, 40 states have enacted pet protection order laws — with the exception of Montana, Idaho, North Dakota, South Dakota, Kansas, New Mexico, Mississippi, Alabama, Georgia, and Pennsylvania. Moreover, the majority of states that do not explicitly allow pets to be covered by protection orders have broad legislative language that grants judicial discretion to do so.¹⁶ For instance, prior to the adoption of pet protection orders into law, Delaware had been allowing judges to award temporary custody of pets to survivors of domestic abuse by designating companion animals as the survivor's property, which in turn is allowed to be covered by protection orders.¹⁷

In 2018, the Pets and Women Safety Act (PAWS Act) was passed in Congress with bipartisan support to entrench protection orders for pets into federal law.¹⁸ Amending section 2261A of the United States Code to create the federal crime of stalking across state lines and violating protection orders granted to animals, the bill's preamble aspired to 'protect victims of domestic violence, sexual assault, stalking, and dating violence from emotional and psychological trauma caused by acts of violence or threats of violence against their pets'.¹⁹ Section 3 of the Act also introduced an 'Emergency And Transitional Pet Shelter And Housing Assistance Grant Program'²⁰ for domestic violence shelters to protect their clientele's pets by providing resources for transportation and the development of animal-inclusive spaces.

However, despite the United States' promising legal framework, a study conducted in 2023 has revealed that the number of victims who resort to pet protection orders in practice

¹⁶ Animal Welfare Institute, 'Including Pets in Protection Orders: A State-by-State Guide' (AWI, 2023), <<https://awionline.org/content/including-pets-protection-orders>> accessed 30 November 2023.

¹⁷ *ibid.*

¹⁸ Emanuella Grinberg, 'A new law aims to help the pets of domestic violence victims' (CNN, 21 December 2018) <<https://edition.cnn.com/2018/12/20/politics/paws-act-farm-bill/index.html>> accessed 30 November 2023.

¹⁹ Pets and Women Safety Act of 2017, preamble, H.R.909.

²⁰ *ibid* s 3.

is extremely low. Researchers requested information from protection order registries and databases in 36 states that have enacted pet protection legislation to assess the percentage of petitioners who requested protection for their pets.²¹ The study discovered that ‘the percentage of petitioners who also seek protection for their pets does not seem to correspond to ... the percentage of women who report that their pets had been threatened or killed’,²² the latter of which is around 71%. In fact, only 2.4% of all protection orders issued in the state of New York and 25% of protection order applications in Hawai‘i in 2018 included conditions regarding pets.²³ Although the number of pet-inclusive protection orders in New York has increased rapidly between 2018 and 2019, the study concluded that more reforms can be implemented to facilitate the survivors’ access to judicial resources. Namely, every state should include a specific item in their protection order application form for pets. Governments should also increase funding for initiatives that promote access to information and legal aid.²⁴

Additionally, the grant programme established by the PAWS Act has already enabled domestic violence shelters to accommodate companion animals all over the country. In 2020, six emergency shelters received funds, including the Rose Brooks Center in Missouri. Although the centre had already pioneered an on-site pet housing programme as early as 2012, the money allocated by the federal government allowed them to build closed spaces so that ‘survivors now have the option to keep their beloved pets in their rooms — allowing them to live and heal together in the same secure space’.²⁵ The centre now also offers veterinary services for their boarders’ pets.

Ultimately, despite the apparent gap between legislation and reality when it comes to the use of pet protection orders, the grant given to community organisations through the PAWS Act has allowed more women to receive concrete support when fleeing

²¹ Randour and others, (n 2) 1.

²² *ibid* 10.

²³ *ibid*.

²⁴ *ibid*.

²⁵ Rose Brooks Center, ‘Pet Shelter Program’ (Rose Brooks Center, 2023) <<https://rosebrooks.org/service/pet-shelter/>> accessed 30 November 2023.

violence with their pets in the United States.

B. Canada

There is no Canadian federal legislation that governs the inclusion of pets in domestic violence protection orders, as the issue of protection orders in private law is within the purview of the provinces and territories, as stated by the Constitution Act of 1982.²⁶

Among these 13 provincial and territorial jurisdictions, the province of Newfoundland and Labrador is the only one that explicitly allows for the inclusion of pets in protection orders.²⁷ Indeed, subsections 6(f) and 6(g) of the Family Violence Protection Act provide that an emergency protection order may contain a provision ‘granting the applicant temporary possession of or control over specified personal property’²⁸ and ‘restraining the respondent from taking, converting, damaging or otherwise dealing with property in which the applicant has an interest’.²⁹ Pursuant to subsection 2(j) of the Act, ‘property’ means an interest, present or future, vested or contingent, in real or personal property, including companion animals.³⁰ Therefore, the inclusion of pets in protection orders in this province is based on the rationale that property can be listed in emergency protection orders and that pets are considered property under the law.

In the province of Alberta, there is no legislation that expressly allows for civil protection orders to cover pets, nor is there case law to this effect. In fact, subsection 2(1) of the Protection Against Family Violence Act states that an emergency protection order ‘should be granted to provide for the immediate protection of the claimant and other family members who reside

²⁶ Constitution Act 1982, sub 92(13), being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 30.

²⁷ Tim Battle, ‘Including Pets in Protective Orders’ (LawNow, 2014), <<https://www.lawnow.org/including-pets-in-protective-orders/>> accessed 30 November 2023.

²⁸ Family Violence Protection Act, sub 6(f), 2005 cF-3.1 s 6(f).

²⁹ *ibid* s 6(g).

³⁰ *ibid* s 2(j).

with the claimant’,³¹ and paragraph (1)(2)(d) seemingly rules out that possibility by defining family members as ‘persons’³² and ‘children’.³³ However, legal professionals and scholars have hypothesised that it is theoretically possible for pets to be included at the judge’s discretion,³⁴ as subsection 2(2) allows the judge to consider ‘the best interests of the claimant and any child of the claimant or any child who is in the care and custody of the claimant’,³⁵ as well as ‘the claimant’s need for a safe environment to arrange for longer-term protection from family violence’.³⁶ If the applicant could demonstrate on a case-by-case basis that the inclusion of their companion animal in the protection order is necessary for their own protection, the judge could technically be open to considering this possibility. Supporting evidence, such as research conducted by the Alberta SPCA on this topic, should then be submitted to demonstrate the link between animal abuse and intimate partner violence, as well as to establish the credibility of the applicant’s claim.³⁷ The use of research on the particular nexus of animal abuse and domestic violence as evidence in a court of law highlights that the law does not exist in a vacuum; rather, its materialisation crystallises the dynamic interactions between sound social policy and robust legislative protections for survivors of abuse.

However, in other Canadian provinces like Ontario, the inclusion of pets in protection orders is prohibited. Ontario’s Family Law Act excludes companion animals in its definition of those eligible to be covered by protection orders in subsection 46(1): ‘...if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody’.³⁸ The possibility of doing so through judicial discretion has also been struck down by the case of *Noriega v Litke*, where the judge clearly stated that ‘the Applicant’s request for a restraining order based on her claimed fear that the Respondent may hurt her pets and her property fails because neither

³¹ Protection Against Family Violence Act, s 2(1), RSA 2000, c P-27, s 2(1).

³² *ibid* para (1)(2)(d).

³³ *ibid*.

³⁴ Battle (n 27).

³⁵ Protection Against Family Violence Act (n 31), s 2(2)(d).

³⁶ *ibid* s 2(2).

³⁷ Battle (n 27).

³⁸ Family Law Act, s 46(1), R.S.O. 1990, c. F.3, s 46(1).

are included amongst those potentially entitled to the protection of a restraining order'.³⁹

Despite limited legal remedies, shelters across the country have long adopted a pet-inclusive approach, as Canadian researchers have been among the first to theorise that animal cruelty and intimate partner violence are 'intertwined patterns of behaviour'.⁴⁰ Academic scholarship on the benefits of a 'humans and animals together (HAT)'⁴¹ approach has shown that survivors who escape with their companion animals consider them to be family members, and are therefore happier and less anxious when planning to rebuild their life, as they are certain that their pets will be safe.⁴² Although shelter staff members are predominantly focused on assisting human survivors, they generally understand that animal welfare is an essential component of the well-being of their clients.⁴³ For instance, the Anova Shelter, which incorporates a pet-inclusive approach in the province of Ontario where pet protection orders are not allowed, reported positive reactions from the community it serves when the centre installed an area for animals to play outside, and relocated staff and residents with allergies to an alternative site. The shelter now collaborates with animal food banks, veterinary centres, and local schools to provide free services for survivors' pets.⁴⁴

Where pet-inclusive shelters are not readily accessible or available to those who are contemplating their escape from an abusive relationship, some provinces like Alberta also host Pet Safekeeping Programs. In partnership with the Alberta SPCA, animal welfare centres and veterinary hospitals, the Pet Safekeeping Program provides temporary housing for pets who cannot accompany victims who flee, as well as personalised planning and referral services with the goal of reuniting both

³⁹ *Noriega v Litke*, 2020 ONSC 2970 [30].

⁴⁰ Chiu (n 2).

⁴¹ Matsuoka and Sorenson (n 2) 474.

⁴² *ibid.*

⁴³ Rochelle Stevenson, Amy Fitzgerald and Betty Barrett, 'Keeping Pets Safe in the Context of Intimate Partner Violence: Insights from Domestic Violence Shelter Staff in Canada' (2018) 33(2) *Journal of Women and Social Work* 238.

⁴⁴ Chiu (n 2).

human and non-human survivors as soon as possible.⁴⁵

Despite the absence of a federal legal framework on the topic of pet protection orders, the different types of community resources that are available to survivors in Canada seem robust. A bill that was passed in federal Parliament in 2020, mandating judges to receive training on the connections between animal cruelty and intimate partner abuse, also appears promising for future jurisprudential changes with regard to the inclusion of animals in protection orders.⁴⁶

C. United Kingdom

In the United Kingdom, the Family Law Act of 1996 allows victims of domestic violence to apply for a non-molestation order to prevent their abuser from further harming them and from accessing a part of or the whole matrimonial home.⁴⁷ Pets are not included in the scope of protection orders, as those who can be covered need to be an ‘associated person’⁴⁸ to the applicant, and there is no freestanding legislation to protect animals from abuse within the household. However, this does imply that if the abuser was banned from the matrimonial home, the animal would be safe as long as they stay in the part of the house that is targeted by the protection order. This loophole, although potentially effective to protect a few women and their companion animals, remains limited and cannot serve as a practical substitute for legislative reform because victims of abuse are often the ones who have to leave home.

The adoption of Domestic Abuse Act in 2021 came as a victory for feminist jurists and advocates because it included, for the first time in the country’s history, a statutory definition of

⁴⁵ One Family Welfare, ‘Pet Safekeeping Program’ (One Family Welfare, 2019) <<https://onefamilywelfare.ca/programs-and-services/pet-safekeeping/>> accessed 30 November 2023.

⁴⁶ Chiu (n 2).

⁴⁷ Christina Warner and Marion C Willetts, ‘Protecting Companion Animals from Domestic Abuse: A Comparative Analysis of Legal Developments in the U.S. And the U.K.’ (2021) 9 *Global Journal of Animal Law* 7 <<https://ojs.abo.fi/ojs/index.php/gjal/article/view/1724>> accessed on 30 November 2023.

⁴⁸ *ibid.*

domestic abuse that encompasses coercive behaviour and psychological or emotional abuse.⁴⁹ Although this is not officially part of the legislative text, a statutory guidance document issued by the Home Office on the interpretation of the Act recognises animal abuse as an offence that can constitute domestic violence. Namely, ‘using animals to control or coerce a victim, e.g. harming or threatening to harm, or give away, pets or assistance dogs’⁵⁰ is mentioned as an example of controlling or coercive behaviour. ‘[U]sing violence or threats towards assistance dogs and pets to intimidate the victim and cause distress, including threatening to harm the animal as well as controlling how the owner is able to care for the animal’⁵¹ is also highlighted as a form of psychological or emotional abuse.

In the absence of tangible legislative protections for pets, law enforcement agencies have resorted to referring potential victims of domestic violence to community resources. The Greater Manchester Police’s web page on animal cruelty and domestic violence acknowledges that threats or harm towards a companion animal can constitute domestic abuse and recommends the Cats Protection Lifeline and the Freedom Project and Dogs Trust to those in need. These two organisations provide animal fostering services, as well as other resources for survivors of violence.⁵²

The UK’s legal regime is clearly less robust than the Canadian one, which is in turn less comprehensive and consistent on a federal level than its American counterpart. Nevertheless, with increasing public awareness on the correlation between domestic violence and animal abuse, as well as two petitions submitted to the House of Commons since 2019 to spearhead the inclusion of animals in protection orders in law, there is a real possibility for legislative and jurisprudential progress on this topic

⁴⁹ Domestic Abuse Act 2021 para 1(3)(c).

⁵⁰ Home Office, ‘Domestic Abuse: Statutory Guidance’ (Home Office UK, July 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1089015/Domestic_Abuse_Act_2021_Statutory_Guidance.pdf> accessed 30 November 2023.

⁵¹ *ibid* 37.

⁵² Greater Manchester Police, ‘Animal cruelty and domestic violence’ (Greater Manchester Police UK, 2023) <<https://www.gmp.police.uk/advice/advice-and-information/ac/animal-crime/animal-cruelty-and-domestic-abuse/>> accessed 30 November 2023.

in the United Kingdom very soon.⁵³

D. Hong Kong

In Hong Kong, there is a significant legislative and jurisprudential gap on the intersection of intimate partner violence and animal abuse. Unlike the United States, Hong Kong's legal system does not include a legislation governing the intersection of animal cruelty and domestic abuse. As a matter of fact, domestic abuse currently remains undefined in law and does not constitute a specific offence. Instead, acts that constitute domestic violence may be prosecuted under law as separate criminal infractions, such as indecent assault, wounding, and sexual assault.⁵⁴ However, the website of the HKSAR Department of Justice provides a non-legally-binding overview of what domestic violence may encompass: 'Domestic violence may be broadly described as any criminal offence which arises out of violence, threatening behaviour or physical, sexual or emotional abuse, between adults who are or have been intimate partners, or else between family members.'⁵⁵ While potentially helpful to survivors trying to navigate whether their significant other's behaviour amounts to intimate partner violence, this definition unfortunately does not provide further specification on what can constitute emotional abuse, nor does it explicitly mention animal abuse as a form of domestic violence.

Moreover, animals are excluded from the scope of non-

⁵³ Warner and Willetts (n 40); UK Government and Parliament Petitions, 'Introduce a Pet Protection Order for Domestic Abuse Cases' (Petition, closed on 6 November 2019) <<https://petition.parliament.uk/archived/petitions/272896>> accessed 30 November 2023; UK Government and Parliament Petitions, 'Introduce a Pet Removal/Protection Order for Victims of Domestic Abuse' (Petition, closed on 11 September 2020) <<https://petition.parliament.uk/petitions/300537>> accessed 30 November 2023.

⁵⁴ Alfred Ip, 'Domestic Violence in Hong Kong and Injunctive Relief in Matrimonial Proceedings' (Hugill & Ip Solicitors, 27 February 2019) <<https://www.hugillandip.com/2019/02/domestic-violence-in-hong-kong-and-injunctive-relief-in-matrimonial-proceedings/>> accessed 30 November 2023.

⁵⁵ HKSAR Department of Justice, 'Policy for Prosecuting Cases Involving Domestic Violence' (HKSAR Department of Justice, 2022) <https://www.doj.gov.hk/en/publications/domesticviolence_2.html> accessed 30 November 2023.

molestation orders, the legal framework of which is outlined in the Domestic and Cohabitation Relationships Ordinance (Cap 189). Indeed, subsection 3(1)(c) of the Ordinance provides that only minors who are either the children of or who reside with an applicant can be covered by a non-molestation order.⁵⁶ This provision therefore rules out the inclusion of animals. However, much like the UK, a non-molestation order in Hong Kong can prevent the abuser from entering a part of or the entirety of the matrimonial home, which allows for the protection of the animal if they are kept in an area of the home covered by the order.⁵⁷

Furthermore, Hong Kong's current family law system views animals as chattel property.⁵⁸ During divorce disputes, 'there is no separate rules or laws regulating how to treat pets upon divorce, nor do the courts have power to grant custody, care and control and access regarding pets, as what they can do regarding children'.⁵⁹

In terms of social resources, there are currently no pet-inclusive shelters for victims of domestic violence in Hong Kong at all, although there are emergency housing centres for women and children. Yet, there is an increasingly urgent need for pet-inclusive facilities in Hong Kong. According to a study published in 2021 which analysed 335 cases of animal abuse documented by Hong Kong SPCA from 2013 to 2019, 'domestic violence against the pets of family members'⁶⁰ is a frequent behaviour displayed by offenders. The study further uncovered that 'in 24% of cases

⁵⁶ Family CLIC, 'Domestic and Cohabitation Relationships Violence Ordinance' (HKU Law & Technology Centre, 2021) <<https://familyclik.hk/en/topics/daily-lives-legal-issues/domestic-violence-and-assistance/domestic-and-cohabitation-relationships-violence-ordinance/>> accessed 30 November 2023.

⁵⁷ *ibid.*

⁵⁸ Joshua Chu and Madeleine Booth, 'Pets Are Family Too: Pet's Rights in Divorce Matter' (Law Society of Hong Kong, December 2021) <<https://www.hk-lawyer.org/content/pets-are-family-too-pet's-rights-divorce-matter>> accessed 30 November 2023.

⁵⁹ Lisa Wong and Katherine Ng, 'Hong Kong: Who Gets the Pets Upon Divorce?' (Mondaq, 2 February 2022) <<https://www.mondaq.com/hongkong/divorce/1156410/who-gets-the-pets-upon-divorce>> accessed 30 November 2023.

⁶⁰ Amanda Whitfort and others, 'An Empirical Study of the Nature of Animal Abuse Cases in Hong Kong from 2013-2019' (University of Hong Kong, 2021) 2 <[https://www.hku.hk/f/upload/23201/An Empirical Study of the Nature of Animal Abuse Cases in Hong Kong from 2013 to 2019.docx](https://www.hku.hk/f/upload/23201/An%20Empirical%20Study%20of%20the%20Nature%20of%20Animal%20Abuse%20Cases%20in%20Hong%20Kong%20from%202013%20to%202019.docx)> accessed 30 November 2023.

involving traumatic physical injury, family members targeted family members' pets or neighbors targeted animals in their village'⁶¹ and that 13% of 63 active maltreatment cases 'involved domestic disputes where family members or domestic partners deliberately attacked the pets of other family members'.⁶² These troubling findings indicate that although the intersection of animal cruelty and domestic violence is not currently a widely examined topic in Hong Kong, empirical research on animal abuse as a standalone topic has revealed its prevalence and pervasiveness. The demographic profile of the offenders also shows that 75% of those who are being prosecuted for active maltreatment or neglect against animals are male,⁶³ which seems to confirm on a microscopic scale that patriarchy is deeply intertwined with animal abuse.

It is painfully obvious that although every country's regime has systemic shortcomings and blind spots that fail to unconditionally support survivors of domestic violence, Hong Kong's legal regime is perhaps the most lacking in terms of legal protections and social resources that are available for human and non-human victims of abuse.

The following section will map the normative theories that justify each legal system's animal and family protection regime onto the continuum of ethical considerations presented in section 2.

IV. CLASSIFICATION OF NORMATIVE JUSTIFICATIONS THAT UNDERLIE EACH COUNTRY'S LEGAL SYSTEM ON THE SPECTRUM OF CONSIDERATIONS

On the basis of the three pinpoints of anthropocentrism, utilitarianism and Critical Animal Studies, the different legal regimes and literary works reviewed in the scope of this research have been placed along the spectrum, in accordance with the ethical considerations that underlie each of them. The

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid* 1.

methodology employed examines the language used in each source to justify the extension of protections against domestic abuse to companion animals.

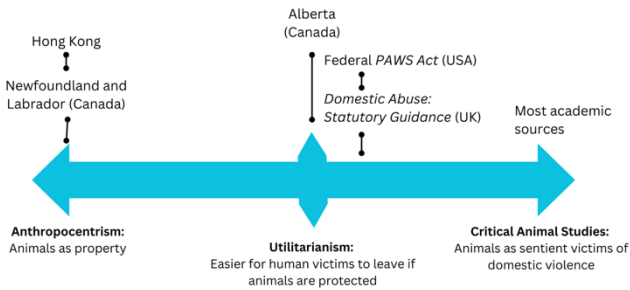


Image 2: Classification of different jurisdictions on the spectrum of justifications

Newfoundland and Labrador’s Family Violence Protection Act governing the inclusion of domestic animals in protection orders is situated on the ‘anthropocentrism’ end, as the existence of this legal remedy is purely justified by a lens of property rights that does not recognise the animal’s sentience. The paradox of affording protections to animals through their commodification showcases the tensions that exist between the efficiency of maximising the available legal remedies by operating within the system’s own logic and the importance of advancing a more egalitarian relationship between humans and animals.

The current legal regime in Alberta is placed on the ‘utilitarianism’ point of the spectrum, as the prevailing theory provides that judges may use their discretion to include pets in protection orders if it can be proven that the safety of the animal is necessary to that of the human survivor. Therefore, the former’s wellbeing only matters in the eyes of the law when it is relevant to that of the latter. The animal’s suffering is not acknowledged on its own terms, but is evaluated in relation to its consequences on the human person.

The American Pets and Women Safety Act is also placed near the ‘utilitarianism’ point because the *Act*’s preamble states that its objective is to ‘protect victims of domestic violence, sexual assault, stalking, and dating violence from emotional and psychological trauma caused by acts of violence or threats of

violence against their pets'.⁶⁴ Although the preamble mentions violence against animals as a standalone issue, the legislative language conveys that this Act's specific purpose is to protect victims against the 'emotional and psychological trauma' that is 'caused by' animal cruelty. Thus, the words used expressly draw a bright-line distinction between the phenomena of animal cruelty and domestic violence by only acknowledging the trauma inflicted upon the human survivor when the former is used as a means to achieve the latter.

The UK Home Office's interpretative guide on the Domestic Abuse Act 2021 is also situated near the 'utilitarianism' point, as it acknowledges animal abuse as a form of coercive behaviour or emotional/psychological violence. Interestingly enough, this document highlights the shared vulnerabilities of the human and non-human victims by describing 'controlling how the owner is able to care for the animal'⁶⁵ as a type of emotional/psychological abuse, which harbours shadows of Critical Animal Studies in its acknowledgment of the emotional connection enjoyed by a pet and their caretaker. However, this source remains closer to the 'utilitarianism' point because it still describes animal cruelty as a manifestation of abuse towards humans. The human survivor is therefore centred and the animal's suffering is relegated to the side.

Hong Kong's jurisdiction would undoubtedly be situated on the 'anthropocentrism' extremity along with Alberta's law, as its family law regime considers pets to be property. As Cap. 189 implicitly invalidates the possibility of including chattel property in non-molestation orders, it is not even possible for protection orders in Hong Kong to cover animals under a 'property rights' lens like in Alberta.

This analysis reflects that the normative considerations behind the legal regime governing animal abuse and domestic violence of each country tend to be situated between the 'anthropocentrism' and the 'utilitarianism' points. In contrast, the vast majority of scholarship advocating for the availability of legal protections and social resources for animals alongside their human

⁶⁴ Pets and Women Safety Act (US), Preamble.

⁶⁵ Home Office (n 50) 37.

caretakers is situated on or close to the ‘Critical Animal Studies’ end of the spectrum. Some scholars use language that explicitly draws parallels between animal abuse and gender-based violence and that supports an inclusive conception of the family unit, such as ‘co-existence of domestic violence directed at humans and other animals in the home’,⁶⁶ ‘co-occurrence of animal abuse and women abuse’,⁶⁷ ‘includ[ing] animals as victim-survivors’,⁶⁸ and ‘women’s oppression is interwoven with that of animals’.⁶⁹ In terms of pet-inclusive shelter policies, many academic sources also encourage the use of ‘human and animals together (HAT)’⁷⁰ approaches that cater to both human and non-human victims by promoting interdisciplinary collaboration between veterinarians, child psychologists, therapists, and social workers. Based on the Critical Animal Studies perspective that animals also have a claim to victimhood when violence is carried out in the home, these academic sources call for both the population and governmental institutions to ‘move away from a humancentric approach to understanding [domestic violence and abuse] to one that includes animals’ direct experiences’⁷¹ by fundamentally transforming our conception of the nuclear family unit to encompass ‘multispecies families’.⁷²

The disparity between the principles that underlie codified laws and those in which scholarly perspectives are rooted indicates that while it is crucial to advocate for legislative progress, it is important that ideas for reform and improvements remain realistically aligned with each jurisdiction’s current underlying principles for the sake of consistency and coherence.

⁶⁶ Matsuoka and Sorenson (n 2) 468.

⁶⁷ Stevenson, Fitzgerald and Barrett (n 43) 246.

⁶⁸ Wakeham (n 2) 48.

⁶⁹ Carol J Adams, ‘Bringing Peace Home: A Feminist Philosophical Perspective on the Abuse of Women, Children and Pet Animals’ (1994) 9(2) *Hypnatia* 63, 70, cited in Tiplady, Walsh and Phillips (n 2) 135.

⁷⁰ Matsuoka and Sorenson (n 2) 473.

⁷¹ Nik Taylor and Heather Fraser, *Companion animals and domestic violence: Rescuing me, rescuing you* (Palgrave Macmillan 2019) 39, cited in Wakeham (n 2) 48.

⁷² Lindsay (n 2) 12.

V. RECOMMENDATIONS FOR LEGAL REFORM AND POLICY CHANGES IN HONG KONG

The legislative, jurisprudential and social gaps on the topic of pet protection orders in Hong Kong highlight the need for comprehensive recommendations where the underlying justifications remain consistent with the current framework's normative principles while pushing for progressive incremental change.

As Hong Kong's current family law regime views animals as property, it is infeasible to introduce legislation justified by a Critical Animal Studies perspective at this stage as to not create inconsistencies within the legislative framework and policy decisions. At best, it is possible to advance the utilitarian argument on the basis that providing protections for animals will protect human victims more easily, and that comprehension of the link between animal cruelty and intimate partner violence will pave the way for the implementation of more domestic abuse prevention policies.

A report commissioned by the Social Work Department of HKSAR and submitted to the Legislative Council in 2005 recommended, even back then, that domestic violence should be defined in the law as 'includ[ing] physical assault, sexual violence, psychological abuse, neglect (for children and elderly), stalking and exposing a child to domestic violence'.⁷³ This report defined psychological abuse as 'involv[ing] psychological harm or trauma, caused by physical or sexual violence, or the threat of physical or sexual violence, or coercive tactics'.⁷⁴ Furthermore, the report's approach of comparative analysis invoked Canada's definition of psychological harassment, which encompasses 'criminally harassing or 'stalking' — which may include threatening a person or their loved ones, damaging their

⁷³ Ko Ling Chan and others, 'Peace at home: Report on the Review of the Social and Legal Measures in the Prevention and Intervention of Domestic Violence in Hong Kong' (LC Paper No. CB(2)2158/04-05(03), 2005) 146 <https://www.legco.gov.hk/yr04-05/english/panels/ws/ws_fvi/papers/ws_fvi0705cb2-2158-3e.pdf> accessed 30 November 2023.

⁷⁴ *ibid* 150.

possessions or harming their pets'.⁷⁵ It is thus possible to see that there has long been a desire among the population for Hong Kong's Legislative Council to recognise psychological harassment as a type of domestic violence, and to acknowledge animal cruelty as a manifestation of the former. With the view of adapting this 2005 report to the current legal framework, amending the Domestic and Cohabitation Relationships Ordinance to include a comprehensive definition of domestic violence that explicitly acknowledges abuse against animals as a form of coercion or psychological abuse towards the human victim would be a relevant reform, as both the public and the legislature have known about the urgency of this issue for a long time.

Recommendation 1: Amending the Domestic and Cohabitation Relationships Ordinance (Cap 189) to include a comprehensive definition of domestic violence that explicitly acknowledges abuse against animals as a form of coercion or psychological abuse towards the human victim.

Hong Kong's framework governing non-molestation orders is practically identical to that of the UK, as both jurisdictions exclude the inclusion of pets in protection orders, but allow them to encompass a part of or the entire matrimonial home. As previously discussed, even though this loophole may allow for the protection of some animals, it is largely inefficient when considering that an overwhelming proportion of victims of domestic violence are also financially exploited by their partners, and the power imbalance between the parties makes it unlikely that it is the woman who remains in the home following the end of an abusive relationship. Echoing the calls for legislative reform in the UK, more robust protections that acknowledge most victims' reality need to be enacted, such as including a written provision that explicitly provides for the possibility of including companion animals in non-molestation order applications.

Recommendation 2: Amending the Domestic and Cohabitation Relationships Ordinance (Cap 189) to add a provision that

⁷⁵

ibid 147–48.

explicitly acknowledges the possibility to include companion animals in non-molestation order applications.

Furthermore, the American PAWS Act's funding scheme for domestic violence shelters may provide inspiration for Hong Kong in terms of developing shelter funding to provide pet-inclusive housing options for women fleeing violence. As there are currently no pet-inclusive shelters in Hong Kong, this could constitute a significant policy progress for the protection of both human and non-human survivors of domestic violence. The utilitarian approach supports the assertion that this would considerably reduce survivor's concerns regarding their pets' welfare, which is known to be a factor that contributes to their reluctance to leave.

Recommendation 3: Amending the Domestic and Cohabitation Relationships Ordinance (Cap 189) to establish a governmental funding scheme that provides resources to domestic violence shelters to host pet-inclusive housing spaces.

The empirical study on Hong Kong's animal abuse cases also issued some reform recommendations that, while mainly formulated to tackle animal abuse as a singular problem, can be beneficial to the protection of animals who are the target of domestic violence along with their human caretaker. For instance, the report recommended that the Social Welfare Department should 'take into account the presence of pets in domestic settings and develop a protocol to ensure signs of abuse or tensions over the keeping of animals are reported at an early stage'.⁷⁶ Another analysis on the typologies of animal abuse in Hong Kong further reported that 'animals are primarily at risk of harm from their owners and their owners' family members',⁷⁷ and that 'the link between family violence and animal cruelty should be considered in protocols developed by the Social Welfare Department for dealing with at-risk families'.⁷⁸ This initiative would enable

⁷⁶ Amanda Whitfort and others, 'A Retrospective Analysis of Typologies of Animal Abuse Recorded by the SPCA, Hong Kong' (2021) 11 *Animals* 1830 <<https://doi.org/10.3390/ani11061830>> accessed 30 November 2023.

⁷⁷ *ibid* 11.

⁷⁸ *ibid*.

governmental agencies to identify any signs of domestic abuse and intervene in de-escalation work within the family or orient victims towards the legal and social resources that are available for them to make a safe exit with their companion animal.

Recommendation 4: Supporting the Social Welfare Department's work in identifying early signs of animal cruelty and intimate partner violence in order to ensure that all parties who are victims of violence have the necessary resources to leave the abusive situation together safely.

The gaps identified between the letter of the law and the on-the-ground reality of the use of pet protection orders and resources for victims of domestic violence, especially in the United States where the amount of pet protection orders requested does not match their level of need, underscores the importance of both strong legislative protections and social resources to ensure that existing remedies and solutions are easily accessible. A strong social safety net, as widely cast as it may be, cannot palliate for the absence of actionable legal remedies for survivors, and vice-versa. Research regarding shelter policy on increasing the legal and social safeguards afforded to both animals and women who encounter domestic violence in Canada and the US all agree on the following initiatives to improve the wider public's awareness towards animals who are victims of violence at home. For instance, it is crucial to promote educational awareness on the links between animal cruelty and domestic abuse, so that both the human victim and their surroundings can identify early warning signs of animal cruelty leading to intimate partner violence. Wider dissemination of the legal and social resources that are available to victims has also been noted by several scholars as vital, since victims of domestic violence are often isolated. Many survivors also have misconceptions about the work of animal welfare organisations, and may be hesitant to ask for help. A report from New Zealand indicated that survivors severely lack information on the animal protection programmes that are available once they decide to plan their exit, falsely believing, for example, that their pet will be euthanised if they are temporarily surrendered to the SPCA while the caretaker focuses on finding housing.⁷⁹ It is of

⁷⁹

Roguski (n 2) 50–51.

paramount importance to debunk these myths, as survivors of domestic violence deserve to have access to accurate information on the resources available to them and their pet. Enhancing public education initiatives on the links between animal cruelty and intimate partner abuse, as well as funding the dissemination of the legal remedies and social resources available to survivors who want to seek a safe haven with their companion animals, are solutions that go hand-in-hand and must be enacted in parallel with each other.

CONCLUSION

Despite the obvious and clear lack of legal remedies and social resources available to human and non-human victims of domestic violence in some common law jurisdictions, it is encouraging to witness the beginning of a strong legal framework that is being implemented in others. However, a robust legal regime must be supplemented by executive policies that grant funding to pet-inclusive shelters and to research initiatives on the importance of preventing both animal cruelty and domestic abuse. Ultimately, collaboration between multiple support sectors to ensure the full recovery and stability of all those who have escaped domestic abuse will pave the way to transform the prevailing perspective that views pets as obstacles to the escape of human victims. Instead, it must be acknowledged that animals are sentient survivors who need to be cared for, supported, and kept with their human companion.

The morality of a society can be measured by how it treats its most vulnerable members. In the context of patriarchal oppression, survivors of domestic violence (which are predominantly women) and animals are incontestably some of the most marginalised groups of society. The state of the law on the scope of pet protection orders reflects our collective view on who deserves to feel safe and heal from traumatic experiences of abuse in peace. Hong Kong's legal regime, as well as other common law jurisdictions on this topic, must urgently be expanded in order to better defend both human and non-human survivors of domestic violence.

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Gall

Mr Rimsky Yuen GBM, SC, JP

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Mr Alan Leong, SC

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With the Compliments of

Sir Oswald Cheung's Chambers

10/F, New Henry House
10 Ice House Street, Central
Hong Kong
Tel: 2524 2156 Fax: 2810 5656
Email: info@siroswald.com
Website: www.siroswald.com

With the Compliments of

SULLIVAN & CROMWELL LLP

20/F, Alexandra House
18 Chater Road, Central
Hong Kong

Tel: 2826 8688 Fax: 2522 2280

Email: king@sullcrom.com

Website: www.sullcrom.com

With the Compliments of

Mr Ronny Tong, GBS, KC, SC, JP

16/F, One Pacific Place
88 Queensway, Admiralty
Hong Kong
Tel: 2523 2003 Fax: 2810 0302

With the Compliments of

Mr Alan Leong, SC

1323A Prince's Building
10 Chater Road, Central
Hong Kong
Tel: 2526 6182 Fax: 2526 6930

