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PREFACE

We are honoured to present Volume 19 of the Hong Kong Journal of Legal Studies. Established in 1994, the Journal has long upheld its reputation as a leading student-run law journal in Hong Kong. Managed, edited, and published entirely by law students at the University of Hong Kong, it reflects our commitment to academic excellence and our enduring effort to nurture future legal scholars. This year's editorial board continues this tradition, bringing together a dedicated and talented team of students from diverse backgrounds and academic interests. We are grateful for the insight, diligence, and care they brought to the review and editing process, which helped ensure the quality and coherence of this issue.

Continuing our mission to foster robust academic discourse among aspiring legal practitioners and scholars, this Volume is made available through university libraries across Hong Kong, the High Court and District Court Libraries, and internationally through Westlaw and HeinOnline. We are deeply grateful to our readership and to the wider legal community for their continued support, which remains essential to the Journal's growth and reach. This Volume comprises one article and two case notes, each addressing timely and practically significant legal issues. The topics span from remedies for breach of contract under the Chinese Civil Code, to statutory remedies in corporate law across England, Wales, and Hong Kong, and judicial discretion in applying the child's objections exception under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

The article, *Termination over Modification*, examines the doctrine of change of circumstances under Article 533 of the Chinese Civil Code. It argues that Chinese courts should exercise their discretion by aligning remedies with the impact of circumstantial changes on contractual performance, rather than relying on an unclear notion of substantive fairness alone. In particular, it proposes replacing the 'manifest unfairness test' with a new framework focused on the impact on contract performance, so that courts can more consistently determine when termination or modification is the appropriate remedy.

The two case notes examine the implications of recent international judgments for Hong Kong jurisprudence. The first case note, *Reconsidering* Re Chime *in Light of* Ntzegkoutanis v Kimionis, revisits one of the most contested issues in company law: the relationship between unfair prejudice petitions and statutory derivative actions. The note examines the English Court of Appeal's decision in *Ntzegkoutanis*, which took a more permissive view of allowing corporate relief to be sought through unfair prejudice proceedings, and contrasts it with the approach adopted by the Hong Kong Court of Final Appeal in *Re Chime*. It contends that Hong Kong should remain cautious about departing from *Re Chime*, considering the legislative intent, the procedural convenience, as well as the differences in precedents and legislation between Hong Kong and England and Wales.

The second case note, *Hague Convention Article 13(2)*, considers the implications of *Re M* for the application of the child's objections exception under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The note focuses on the difficult balance between the procedural need for speed and accuracy. It suggests that Hong Kong courts should adopt a balanced approach between *Re M* and the established precedents: one that is sufficiently thorough to capture the child's genuine objections, but not so elaborate as to delay return proceedings or invite a merits-based welfare inquiry better left to the child's habitual residence jurisdiction.

We extend our sincere thanks to our contributors, whose thoughtful scholarship enriches this Volume, and to our editorial team, whose care and dedication refined its presentation. We also thank our patrons, subscribers, and readers for their continued support. It is through this collective effort that we are able to foster legal discussion and contribute to the development of jurisprudence. We hope this Volume will prove both engaging and rewarding, and that it will continue to support meaningful dialogue within the legal community.

Hai Du and Arthur Chan
Editors-in-Chief

TERMINATION OVER MODIFICATION: ADDRESSING CIRCUMSTANTIAL CHANGES IN THE CHINESE CIVIL CODE

Xixi Xiang*

The Chinese Civil Code officially incorporates the doctrine of change of circumstances, conferring on Chinese courts discretion to terminate or modify contracts. This article examines how courts should exercise this discretion. It argues that the guiding principle should be to align remedies with the impacts on contract performance. The current judicial approach to the test of manifest unfairness, which emphasises balancing the parties' interests but obscures assessing the impacts on contract performance, cannot ensure consistent and predictable remedies. This article proposes reframing the manifest unfairness test to focus on the impacts on contract performance, and categorises the impacts into four levels. On this basis, it contends that Chinese courts should prioritise termination over modification

INTRODUCTION

Article 533 of the Chinese Civil Code ('**CCC**') officially accepts the doctrine of change of circumstances by absorbing clause 26 of Judicial Interpretation II.[1] This doctrine provides relief when

* PhD Candidate, City University of Hong Kong. Email: xxxiang2-c@my.cityu.edu.hk. I would like to thank the editors for their comments and suggestions. All errors remain my own.

1 Judicial Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China (II) [最高人民法院关于适用《中华人民共和国合同法》若干问题的解释(二)], art 26. This judicial interpretation came into force on 13th May 2009, but has been repealed. This article 26 was the first provision on the doctrine of change of circumstances.

supervening events impede contractual performance.[2] Specifically, where circumstantial changes render continuous performance manifestly unfair to one contracting party, the doctrine of change of circumstances enables courts, upon the failure of renegotiation and at the request of affected parties, to modify or terminate the contract in accordance with the principle of fairness in light of the circumstances of individual cases.[3] The court's discretion is therefore central to the choice of remedies, termination or modification, under this doctrine.

Notably, the CCC introduces several changes to this doctrine.[4] Three significant changes include removing the exclusion of force majeure by omitting the term 'that does not belong to force majeure', replacing 'continuing performance renders contract purpose unfulfillable or manifestly unfair' ('**dichotomy of tests**') with 'this change shall render continuous performance manifestly unfair to contracting parties' ('**test of**

[2] Both terms 'supervening events' and 'unexpected circumstances' are used interchangeably in the sense of objective unforeseeable events in this article. Chinese law categorizes supervening events into force majeure events and circumstantial changes and provides corresponding rules, namely doctrine of change of circumstances and doctrine of force majeure. Circumstantial changes refer to material changes in the foundations upon which the contract is concluded that are unforeseeable and unforeseen at the time of contracting and occur after the conclusion of the contract; see CCC, art 533. Force majeure events are unforeseeable, insurmountable and uncontrollable events; see CCC, art 180.

[3] CCC, art 533, which stipulates that 'after the conclusion of a contract, if material changes in foundations of the contract are unforeseeable and should not be foreseen by the parties concerned at the time of contract conclusion and not falling under commercial risks and, as a result, continuous performance of the contract becomes manifestly unfair to one party concerned, the affected party may negotiate with the other party; if no agreement is reached upon renegotiation within a reasonable period, the party may request the people's court or the arbitration institution to modify or terminate the contract. The people's court or the arbitral tribunals shall, in light of the actual situation of the case, modify or terminate the contract according to the principle of fairness'.

[4] All legislative changes to change of circumstances emerge from comparing Article 533 with Article 26 of judicial interpretation II on contract law. In addition to the three mentioned changes, article 533 also redefines circumstantial changes by replacing the phrase 'material changes of objective circumstances' with 'material changes to a fundamental condition upon which the contract is concluded'. However, this modification does not constitute a substantial change.

manifest unfairness'), and introducing the renegotiation process. The first two changes indicate an intention to address the notoriously unclear relationship between force majeure and change of circumstances.[5] The third change aims to promote party-autonomous renegotiation and impose limitations on the court's discretion. The successful achievement of these intentions depends heavily on how courts interpret and apply these doctrines.

Despite its significance, this new legal provision does not specify how courts should exercise their discretion. A recent judicial interpretation provides limited guidance by providing that 'the courts should not terminate the contract if both contracting parties request modification'.[6] This approach has been welcomed because it incentivises contracting parties averse to judicial interference to negotiate mutually acceptable modifications, thereby reducing disputes requiring judicial resolution.[7] However, this follows that parties are more likely to claim contract termination in litigation, which diminishes the guidance's utility. Furthermore, the interpretation leaves the court's discretion undefined where only one party seeks modification or where both parties seek termination. In addition, even when both parties request modification, it is impractical for courts to modify contracts given the failure of renegotiation between parties.[8] Therefore, this judicial interpretation cannot provide satisfactory guidance.

Most studies approach the change of circumstances through a literal approach, leaving the court's discretion

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5 Liming Wang, 'On Several Issues of Change of Circumstances: Commentary on Article 323 of the Book of Contract Law of Draft Civil Law Code (Second Draft)' (2019) 3 Studies in Law and Business 3.

6 Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Title One General Provisions of Book Three Contracts of the Civil Code of the People's Republic of China [最高人民法院关于适用《中华人民共和国民法典》合同编通则若干问题的解释], art 32. This is the first judicial interpretation of contract law under the CCC, which came into effect on 12 May 2023.

7 Jiayou Shi, 'On Significant Improvements in the Judicial Application of Change of Circumstances' (2024) 1 Journal of Law Application 79, 90–91.

8 As illustrated, the law has introduced a renegotiation procedure before litigation in change of circumstances; see CCC, art 533.

underexplored.[9] Limited research that has shed light on the court's discretion reached divergent conclusions. One view held that the courts should prioritise the modification and treat termination as a last resort.[10] Another viewpoint was that the termination or modification depended on contract construction without inherent preference for either remedy.[11] Therefore, it remains unclear in which particular situations the courts modify or terminate the contract. To fill this gap, this article attempts to explore the court's discretion by observing the connection between remedies and the impacts of circumstantial changes on contract performance.

Accordingly, this article proceeds in six parts. Following this introduction, Part II reviews different proposals and emphasises that remedies should align with the impacts of circumstantial changes on contract performance. Part III examines the court's practice to assess whether the Chinese manifest unfairness test could ensure consistent and predictable remedies. Part IV suggests a reformulation of the manifest unfairness test and clarifies the assessment of the impact on contract performance. Part V suggests tailoring the modification or termination to the impacts on contract performance. Part VI provides the conclusion.

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9 Commentators overwhelmingly conduct literal interpretation of circumstantial changes and manifest unfairness. Eg see Jianyuan Cui, 'Exploring the Change of Circumstances' (2021) 3 Contemporary Law Review 3.

10 See eg Shuangquan Lyu, 'A Doctrinal Study on the Legal Effects of Change of Circumstances' (2019) 11 Law Science 40, 51; Xiajunqiao Zhao, Liqun Yang and Xia Li, 'Research on the Effect of Rebus Sic Stantibus — Interpretation on Article 533 of the Civil Code' (2021) 6 Open Journal of Legal Science 605; Hengyu Zhou, 'Concerning Several Important Issues of Doctrine of Change of Circumstances Under Chinese Civil Code' (2022) 6 China Journal of Applied Jurisprudence 194, 205–206.

11 *See eg* Lianjie Shang, 'Reshaping the Effects of Change of Circumstances from the Perspective of Risk Distribution: Interpretation of Article 533 of The Civil Code' (2021) 1 Law and Social Development 169, 172–73; Fupeng Han, 'Reconstructing the Doctrine of Change of Circumstances from the Perspective of Filling Gaps in the Parties' Agreement' (2024) 5 Tsinghua University Law Journal 108, 127.

I. ALIGNING REMEDIES WITH IMPACTS ON PERFORMANCE

This part first examines current proposals and then demonstrates that courts should align remedies with the impacts of circumstantial changes on contract performance.

A. Favouring Modification over Termination?

The first proposal is that courts should prioritise modification over termination. This approach appears to gain support from the court in *Reynolds International Freight Forwarding (Shanghai) Co Ltd v Schindler (China) Elevator Co Ltd* ('***Reynolds***'),[12] which stated that 'the court should give priority to contract adaptation and take a cautious attitude to contract termination, so as to preserve the sanctity of contract and encourage trade'.[13] Commentators also argue that comparative law, particularly German law, supports a pro-modification stance.[14]

Admittedly, Chinese law attaches importance to the sanctity of contract.[15] However, similar to other jurisdictions, the sanctity of contract in Chinese law also requires contracting parties to 'strictly honour their obligations and not to modify or terminate their contractual obligations'.[16] Thus, the sanctity of contract cannot support a judicial preference for modification. Similarly, the force of the argument that Chinese courts should prioritise modification because German law prioritises modification is considerably weak. German law does favour adaptation before termination, yet there are different hierarchies

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12 *Reynolds International Freight Forwarding (Shanghai) Co Ltd* v *Schindler (China) Elevator Co Ltd* [雷诺斯国际货运代理（上海）有限公司与迅达（中国）电梯有限公司海上货物运输合同纠纷二审民事判决书] (2022) Hu Min Zhong No 525 [(2020) 沪民终 525 号] (Shanghai HPC).

13 ibid [8].

14 Zhao, Yang and Li (n 10) 607–608.

15 CCC makes it clear that 'contracting parties shall fully perform their obligations in accordance with the agreement'; see CCC, art 509.

16 Jianyuan Cui, 'On the Principle of Sanctity of Contract' (2023) 3 Law-based Society 33, 34.

in other systems.[17] For instance, the 2016 French reform accepts the doctrine of hardship and authorises judicial revision or termination without a formal preference between them.[18] Italian law also accepts an equivalent doctrine, which provides renegotiation but prioritises termination over modification.[19] The UNIDROIT Principles of International Commercial Contracts ('**PICC**') provides renegotiation, modification or termination and does not presuppose a priority between adaptation and termination.[20] It has been observed that there is a trend of limiting modification in the world.[21] The blackletters of the Chinese change of circumstances suggest a model borrowed from PICC.[22] If courts draw on comparative sources, they should treat modification and termination as equivalent remedies, rather than presuming a preference for modification.

Furthermore, commentators argue that prioritising modification could preserve the contract and facilitate trades.[23] Yet practical constraints weigh against a general preference for modification, as courts, while equipped with legal expertise, do not engage in commercial practice and therefore do not fully

17 Concerning the remedy of termination or modification in the change of circumstances and its equivalent doctrine, there are at least four different models. First, an all-or-nothing approach is provided because it is difficult for judges to rewrite a contract for contracting parties. Argentina's civil code is an example. Additionally, prioritising modification or termination. For example, German law provides adaptation and termination but prioritises the modification. In contrast, the Italian civil code prioritises termination over modification. Finally, both modification and termination are treated equally. Both French law and PICC could provide illustrations.

18 French Civil Code, art 1195. See Solène Rowan, 'The New French Law of Contract' (2017) 66 International & Comparative Law Quarterly 805, 820–21.

19 Italian Civil Code, art 1467.

20 PICC, art 6.2.3.

21 Lyu (n 10) 49.

22 Peng Guo and Shu Zhang, 'China's Approach to the Principle of Change of Circumstances Under the New Chinese Civil Code: from the CISG Model to the PICC Model' (2021) 37 Journal of Contract Law 86, 93. This article highlights that the Chinese law of unexpected law has borrowed the binary model from PICC with minor departures, but it remains unclear how both the test of manifest unfairness and the duty of negotiation are applied in Chinese change of circumstances.

23 Xiwei Gu, 'Pre-Application of Renegotiation in Change of Circumstances' (2020) 10 People's Judicature 40, 42; Zhou (n 10) 205–206.

possess commercial information. One supporter of modification also admits that 'it is challenging for courts to craft commercially viable terms across various industries since they cannot know everything about commercial matters'.[24] If parties were reluctant to accept the terms imposed by courts, forcing them to perform a contract would likely result in more disputes. One suggestion is to have the parties submit proposed adjustments at first and then for the court merely to confirm whether the proposed adjustments are 'reasonable'.[25] However, this suggestion does not fundamentally address the concern over the court's ability to rewrite a contract, as deciding whether a proposed adjustment is reasonable still requires the court to exercise essentially the same judgment as modifying the contract itself. Therefore, this article argues the argument for a general priority of judicial revision over termination is unconvincing.

B. Construction of Contracts?

The second view holds that whether to modify or terminate depends on the court's construction of the contract. It treats both modification and termination as tools of risk allocation, contending that courts, when faced with circumstantial changes, engage in gap-filling to determine the appropriate remedy, modification or termination, to ensure a fair distribution of risks.[26] This view rests on the presumption that the parties agreed on how to address unexpected circumstances. However, parties cannot assent to contingencies they did not and could not foresee at the time of contracting. Additionally, if courts could allocate risks by gap-filling, they should follow the rules on contract interpretation, rather than the change of circumstances. Furthermore, given that courts exercise their discretion only after failed renegotiation, if genuine assent existed, the parties would reach an agreement in renegotiation rather than placing the contract in the courts' hands. This approach, in essence, enables courts to construct a hypothetical intention and thereby authorises an unfettered judicial power at the cost of contract freedom and certainty of law.

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24 Lyu (n 10) 44.

25 ibid 51–52.

26 See Shang (n 11); Han (n 11).

Therefore, the interpretation-based proposal is unpersuasive and should be rejected.

C. Depending on Impacts on Contract Performance

Instead, this thesis emphasises that courts should tailor remedies to the impacts of unexpected circumstances on contract performance. This not only aligns with the theory underpinning this area of law but also suits the Chinese binary model.

The law of unexpected circumstances is universally accepted as a way of overcoming supervening impediments to contract performance. The law is to reconcile the principle of sanctity of contract and the counter-principle of changed circumstances.[27] To strike a precise balance, assessing the impacts on promised performance lies at the heart of this area of law.[28] Thus, remedies should be granted in accordance with the impacts on contract performance. Chinese change of circumstances, transplanted from other jurisdictions, follows the same philosophy.[29]

Chinese law governing unexpected circumstances adopts a binary model of force majeure and change of circumstances. This model also determines that remedies should align with impacts on performance. In this model, rules relating to force majeure provide termination 'where force majeure renders contract purpose unfulfillable' ('**test of unfulfillable contract purpose**')[30] and exempt contractual liability 'where force majeure renders contract performance wholly or partially impossible' ('**test of non-performance**').[31] This model thus attempts to

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27 Palmer Vernon Valentine, 'Excused Performance: Force Majeure, Impracticability, and Frustration of Contracts: Preliminary Note from the Reporter' (2022) 70 American Journal of Comparative Law i70, i71.

28 Ingeborg Schwenzer and Edgardo Muñoz, 'Duty to Renegotiate and Contract Adaptation in Case of Hardship' (2019) 24 Uniform Law Review 149, 153.

29 Huixing Liang, 'The Problem of Circumstantial Changes in Contract Law' (1988) 6 Chinese Journal of Law 35, 46.

30 CCC, art 563.

31 CCC, art 590.

distinguish force majeure from change of circumstances in two aspects: classifying the unexpected events into force majeure events and circumstantial changes, and employing different tests to assess their impacts on performance.

However, current studies have illustrated that the distinction between force majeure events and circumstantial changes is artificial.[32] In effect, the binary model depends on tests that measure the impacts of unexpected circumstances.[33] The legal regime could be boiled down to three categories.[34] (See Table 1) On this basis, the binary model provides remedies in accordance with the impacts on contract performance. Therefore, the courts should tailor remedies to impacts on contract performance when exercising their discretion.

Table 1 Chinese Law of Unexpected Circumstances: Three Categories

Events	Impacts on performance	Legal effects
Unexpected circumstances	Test of manifest unfairness	Modification or Termination
	Test of unfulfillable contract purpose	Termination
	Non-performance	Exemption of liability

32 Research on either of both has highlighted that force majeure events and circumstantial changes could be triggered by new laws and administrative regulations, government action and regulation, and natural disaster. See Bradford Olson, 'Force Majeure in China' (2020) 2 Columbia Journal of Asian Law 295, 312–13; Chunyan Ding, 'Retaining Contractual Equilibrium Through the Doctrine of Change of Circumstances: What can be learned from Chinese Experience?' (2023) 3 Erasmus Law Review 139, 144.

33 Qiao Liu, 'Force Majeure or Change of Circumstances: An Enduring Dichotomy in Chinese Law?' in Jiang Hao and Sirena, P (eds), *The Making of the Chinese Civil Code: Promises and Persistent Problems* (CUP 2023) 82.

34 This analysis is supported by the SPC's guidance on addressing disputes concerning COVID-19. The SPC issued three judicial documents, pointing out that courts could qualify COVID-19 as both force majeure events and circumstantial changes, and they should apply force majeure or change of circumstances based on the impacts of COVID-19 on contractual performance.

II. ASSESSING THE IMPACTS ON CONTRACT PERFORMANCE: A SINGLE TEST OF MANIFEST UNFAIRNESS

Chinese change of circumstances employs a single test of manifest unfairness, replacing the dichotomy of the test of manifest unfairness and the test of unfulfillable contract purpose, to assess the impacts on contract performance. Yet, there remains no clear understanding of this test of manifest unfairness. Current studies provided two different understandings of the test of manifest unfairness through comparative law. One prominent perspective, exemplified by Chen, equates the manifest unfairness test with the 'excessive onerousness cost'.[35] A competing view, articulated by scholars such as Ding and Zhu, conceptualises manifest unfairness as constituting a 'fundamental alteration of contract equilibrium'.[36] Given the absence of a clear test, it remains unclear whether the courts' approach to manifest unfairness ensures consistent and predictable remedies. This part first explores the test of manifest unfairness in the judicial process and then assesses whether it ensures consistent and predictable remedies.

A. Test of Manifest Unfairness in Chinese Courts: Two-Limb Reasoning and Substantive Fairness-Centred

An overview of these decided cases finds that the SPC and HPCs develop a two-limb legal reasoning and emphasise the detrimental effects on one contracting party and the fairness of exchange at adjudication.[37]

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35 Lei Chen and Qiyu Wang, 'Demystifying the Doctrine of Change of Circumstances under Chinese Law — A Comparative Perspective from Singapore and English Common Law' (2021) 6 Journal of Business Law 475, 479.

36 Guangxin Zhu, 'Systematic analysis of doctrine of change of circumstances' (2022) 2 Law Science Magazine 1, 5–6; Ding (n 32), 148.

37 To explore how the SPC and HPCs apply the test of manifest unfairness, this article collected judgments from 2009 to 2022 from the database China Judgments Online [裁判文书网]. There are 55 cases in which the doctrine of change of circumstances was approved by the SPC and

1. FIRST LIMB

The first limb examines whether contracting parties are affected in an equivalent manner. On one hand, when circumstantial changes result in adverse effects solely on one party, the court tends to determine that continuing performance is manifestly unfair to this disadvantaged party. For instance, in the Gazette case[38] of *Pengwei Industrial Co v Poyang Lake Sand Mining Management Leading Group Office* (‘***Pengwei***’),[39] the contracting parties concluded a contract for transferring the right to sand excavation from Poyang Lake. However, due to extreme drought weather, the actual sand mining period was shortened to 100 days, which was 60 days fewer than the 160 days both parties reasonably anticipated. The SPC held that continuous performance produced an unfair result, clarifying that ‘the transferor would gain all the benefits, but the transferee would afford all the losses’.[40] Similarly, in *Weijie Trading Co v Lecong Long-term Trade Development Co* (‘***Weijie***’),[41] unexpected circumstances burdened the lessee while leaving the lessor unaffected. In this case, contracting parties had leased land for storing and selling steel, but a subsequent local government ban barred freight vehicles in the district, preventing

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HPCs. Among the 55 cases, 22 cases employed the test of manifest unfairness.

38 Gazette cases［公报案例］refer to cases that are published in the SPC’s official gazette, which is not a formal legal source but may be influential and referred to by Chinese courts in judicial practice. See Qiao Liu, ‘Chinese “Case Law” in Comparative Law Studies: Illusions and Complexities’ (2019) 14 Asian Journal of Comparative Law 97.

39 *Chengdu Pengwei Industrial Co Ltd* v *People’s Government of Yongxiu Jiangxi & Poyang Lake Sand Mining Management Leading Group Office of Yongxiu County*［成都鹏伟实业有限公司与江西省永修县人民政府、永修县鄱阳湖采砂管理工作领导小组办公室采矿权纠纷案］[2010] 4 Gazette of the Supreme People’s Court［最高人民法院公报］.

40 ibid [10].

41 *Foshan Shunde Lecong Town Weijie Trading Co Ltd* v *Foshan Shunde Lecong Long-term Trade Development Co Ltd*［佛山市顺德区乐从镇长远贸易发展有限公司与佛山市顺德区乐从镇伟杰贸易有限公司土地租赁合同纠纷申诉、申请民事裁定书］(2014) Yue Gao Fa Min Er Shen Zi No 1557［(2014) 粤高法民二申字第 1557 号］(Guangdong HPC).

the lessee from transporting steel. The HPC of Guangdong terminated the lease, holding that 'the new ban rendered lessees, who relied on large freight vehicles for their steel business, unable to use large freight vehicles to transport steel, resulting in abnormal operation of their businesses'.[42]

On the other hand, when continuing performance affects both contracting parties equally, the court will deny that the test of manifest unfairness is satisfied. One illustration is *Wang v Lei*.[43] In this case, a share transfer contract agreed that Wang would make payments and increase the productivity of the coal mine from six tonnes to nine tonnes in order to acquire 30 percent of the coal miner's shares (an individual proprietorship enterprise). In return, Lei agreed to transfer the shares in two stages: 20 percent of the shares upon payment and the remaining 10 percent after Wang successfully upgraded productivity from six tonnes to nine tonnes. In performance, Wang made the payment and began operating the coal mine to upgrade its productivity. However, the coal mine was shut down due to a new policy before registering the 20 percent of the shares under Wang's name. Therefore, the transferee brought an action for contract termination. The SPC upheld the first-instance judgment rejecting termination partly on the grounds that the change generated the same impacts on both parties and did not create manifest unfairness, holding that 'the coal mine's closure rendered both contracting parties unable to profit, rather than solely prejudicing the transferee's interests'.[44] The SPC further affirmed the legal reasoning of the Sichuan HPC, reiterating that 'given neither party is at fault for the mine's closure, contract termination and a refund of the 20% transfer payment would result in the transferor alone bearing the losses arising from the mine's closure, which would be manifestly unfair'.[45]

The thread running through these three cases is whether circumstantial changes affect parties in a similar way. The court's practice indicates that this is a necessary limb for the test of

42 ibid [2].

43 *Wang Mingxin* v *Lei Ying* [王明新与雷英股权转让合同纠纷上诉案] (2015) Min Er Zhong Zi No 284 [(2015)民二终字第 284 号] (SPC).

44 ibid [10].

45 ibid [11].

manifest unfairness. This limb focuses on the detrimental effects on one party. By preventing a single party from bearing all the losses, the courts maintain a balance of interests and achieve a fair allocation of losses between the contracting parties.

2. SECOND LIMB

Another limb focuses on the severity of the detrimental effects. To examine how courts assess whether continuing performance places one contracting party in a manifestly unfair position over the other party, these detrimental effects can be further classified into three categories: a decrease in the value of the received performance, an increase in the cost of the promised performance, and changes in the market prices of the subject matter.

A. A DECREASE IN THE VALUE OF RECEIVED PERFORMANCE

The SPC has established different formulations to assess the severity of detrimental effects on the value of one party's received performance. The first formulation could be gleaned from *Pengwei*, in which the stipulated 160-day period for sand mining was reduced to 100 days. The SPC modified the contract by equally allocating the contractual price for the missing 60 days and determined that continuous performance was manifestly unfair to Pengwei Co on the grounds that Pengwei Co bore all the losses and failed to make a profit, stating that 'actual income is 55.34 million yuan, but the payment is 82.28 million yuan, thereby putting Pengwei Co in a state of loss'.[46] Another formulation was established in *Zunyi Bozhou District Land and Resources Bureau v Zunyi Dingsheng Property Development Co* ('***Dingsheng***').[47] In this case, Dingsheng Co intended to develop the property for commercial activities on the first floor and residential buildings

46 *Chengdu Pengwei* (n 39) [9].

47 *Zunyi Bozhou District Land and Resources Bureau* v *Zunyi Dingsheng Real Estate Development Co Ltd* [遵义市播州区国土资源局诉遵义县鼎盛房地产开发有限公司建设用地使用权出让合同纠纷案] (2017) Zui Gao Fa Min Shen No 492 [(2017)最高法民申 492 号] (SPC).

from the second floor above on a plot of construction land, and hence concluded a contract for transferring the land-use right to this construction land with the local Land and Resources Bureau. At the time of contracting, this disputed land was located along No 326 State Road, a main thoroughfare and the busiest road in that district, which was closely tied to this land's commercial value. After the conclusion, No 326 State Road lost its function as the district's main avenue due to a newly built street, significantly diminishing the commercial value of this disputed land. Thereby, Dingsheng Co refused to pay the remaining contractual price and counterclaimed for termination. The SPC approved the termination based on the 'manifest unfairness' test, holding that:

> The foundations on which the contract was established had changed. Continuous performance was possible, but it would render the performance and counter-performance unbalanced [“合同对价不平衡”] and manifestly unfair to Dingsheng Co.[48]

The SPC introduced a third formulation in *Shanxi University of Finance and Economics v Shanxi Yuntian Technology Co and Shanxi Jitong Electric Power Development Co* ('***SUFE***').[49] The university leased its commercial premises to Jitong Co for 10 years, which agreed that Jitong Co's subsidiary, Yuntian Co, would occupy the premises for commercial use. In performance, both parties agreed to terminate the contract but had a dispute over the amount of rent for 2007. According to the contract, the rent for 2007 should have been 3.7 million yuan, but the lessee only paid 3.2 million yuan. When the lessor brought an action to recover the unpaid 0.5 million yuan, the lessee claimed to modify the contract price, asserting that 'he failed to operate his business for about 5 months in 2007 due to a road-widening project, despite possessing the commercial premise'. The SPC upheld the Shanxi HPC's decision, which had modified the rent for 2007. The HPC held that 'it is an objective fact that the lessee

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48 ibid [4].

49 *Shanxi University of Finance and Economics* v *Shanxi Yuntian Technology Co Ltd & Shanxi Jitong Electric Power Development Co Ltd* [山西财经大学与山西云天科技有限公司等房屋租赁合同纠纷再审审查与审判监督民事裁定书] (2018) Zui Gao Fa Min Shen No 520 [(2018)最高法民申 520 号] (SPC).

was unable to operate its business for five months. An additional payment of 0.5 million yuan would result in manifest unfairness, especially considering the lessee had already paid 3.2 million yuan'.[50] The rationale underlying the courts' approach is that it would be unfair to require the lessee, who was not at fault, to bear the entire loss and effectively pay for nothing during the five-month period.

The SPC recognised the decreasing value of the received performance in these three cases. All these cases weigh one party's costs and gains at adjudication without a consistent and precise threshold for 'manifest' unfairness. *Pengwei* established the 'failure of profit' standard, whilst *Dingsheng* adopted the 'imbalance between contractual price and counter-performance' without specifying the degree of imbalance. The standard in *SUFE* resorts to 'paying for nothing' exchange during a short period in a long-term contract.

B. AN INCREASE IN THE COSTS OF PERFORMANCE

In cases involving increased performance costs, courts also assess whether the affected party's costs are disproportionate to the benefits it receives, paying closer attention to profit failures. For example, in *Danzhou Agricultural Technology Promotion Service Centre v Ling* ('***Ling***'),[51] a long-term lease for a commercial premise was concluded. When the leased property was zoned as a dilapidated house, requiring extra costs for reinforcement and maintenance in performance, the HPC of Hainan terminated the contract on the ground that continuous performance would be manifestly unfair to the lessor, holding that 'the cost for reinforcing and maintaining the dilapidated house exceeds the total rent the lessor could obtain from this contract'.[52] The

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50 This statement was quoted in the appellate judgment of *SUFE*. See (2015) Jin Min Zhong Zi No 74 [(2015)晋民终字第 74 号] (Shanxi HPC) [15].

51 *Danzhou Agricultural Technology Promotion Service Centre* v *Ling Shilong* [凌石龙诉儋州市农业技术推广服务中心房屋租赁合同纠纷案] (2015) Qiong Min Kang Zi No 18 [(2015)琼民抗字第 18 号] (Hainan HPC).

52 ibid [9].

required standard is that the extra costs are higher than the entire stipulated rent.

By contrast, the courts employed a different approach in construction contract disputes to modify contractual prices. For instance, in *Shenyang High-Grade Highway Construction General Co v Sun* ('***Sun***'),[53] a construction contract for an expressway was invalidated, and therefore the courts determined that the calculation of the contractual price should take reference to the contract term. The SPC adjusted the oil price based on actual payments on the ground that the stipulated price was manifestly unfair. The court noted that the actual performance costs had significantly exceeded the stipulated costs, as the price of oil had nearly doubled, surging from 550 yuan per tonne at contracting to 1250 yuan per tonne. Admittedly, the doctrine of change of circumstances might be untenable in *Sun,* given that the contract was deemed never to have been formed following its rescission under Chinese law. The HPC of Hunan adopted a similar approach in *Baimaqiao Construction Co v Yuxing Real Estate Development Co* ('***Baimaqiao***').[54] In this case, the parties entered into a construction contract featuring a fixed contract price. However, the actual performance period was prolonged to more than five years, during which the cost of raw materials, labour, and equipment rose sharply due to unforeseeable weather conditions and disruptions from local residents. When the builder sought a modification of the contract price, the HPC calculated the payments for work completed within the contractually agreed working period based on the stipulated fixed price, but adjusted the payment for work performed during the extension period to align with the 2006 standard consumption costs for engineering. The HPC clarified that enforcing the fixed contractual price term

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53 *Shenyang High-Grade Highway Construction General Co Ltd* v *Sun Jianfa* [沈阳高等级公路建设总公司与孙建发公司建设工程施工合同纠纷再审案] (2017) Zui Gao Fa Min Shen No 3108 [(2017)最高法民申 3108 号] (SPC).

54 *Changsha Baimaqiao Construction Co Ltd* v *Chenzhou Yuxing Real Estate Development Co Ltd* [长沙白马桥建筑有限公司与郴州市裕兴房地产开发有限责任公司建设工程施工合同纠纷案] (2015) Xiang Gao Fa Min Yi Zhong Zi No 68 [(2015)湘高法民一终字第 68 号] (Hunan HPC).

would be manifestly unfair to the builder, stating that 'the actual cost was excessively higher than the stipulated fixed price'.[55]

All three cases satisfy the test of manifest unfairness, yet they provide two different standards. In *Ling*, the court assessed the increase by comparing the lessor's costs and gains. Instead, the other two cases evaluated the increase by the stipulated cost and the actual cost. The precise extent of the increase in both courts' approaches remains ambiguous.

C. MARKET PRICE CHANGE

The third category pertains to changes in the market price of the subject matter, including price inflation and fluctuations. Attention to fair exchange at adjudication is clear in this category.

In cases involving price inflation subsequent to the conclusion of long-term rural land leases, HPCs modify or terminate these contracts on the ground that the stipulated price is obviously low in contrast to the market price, rendering continuing performance advantageous for the lessee but disadvantageous to the lessor.[56] For example, the Heilongjiang HPC affirmed the first-

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55 ibid [6].

56 Termination: see eg *Wuya Gacha Committee* v *Zhu Yongjiu* [朱永久与扎赉特旗图牧吉镇乌雅嘎查委员会农业承包合同纠纷申请案] (2014) Nei Min Ti Yi No 29 [(2014)内民提一字第 29 号] (Inner Mongolia HPC); *Jiang Rongxu & others* v *Yang Zhizhong & others* [杨志忠等与蒋荣绪等土地承包经营权纠纷案] (2015) Qian Gao Min Shen Zi No 175 [(2015)黔高民申字第 1745 号] (Guizhou HPC); *Zhang Zhihua* v *Dong Genhua* [董根华诉张志华农村土地承包合同纠纷案] (2017) Zhe Min Shen No 2343 [(2017)浙民申 2343 号] (Zhejiang HPC); *Liu Chunyan & others* v *Zhang Dongshan* [张东山与刘春艳等农村土地承包合同纠纷再审案] (2020) Hei Min Shen No 1349 [(2020)黑民申 1349 号] (Heilongjiang HPC);. Modification: see eg *Liu Hongguo* v *Liu Hongbin* [刘洪彬与刘洪国农业承包合同纠纷审查案] (2016) Ji Min Shen No 749 [(2016)吉民申 749 号] (Jilin HPC); *Poshe Village Committee & others* v *Cenxi Forest Industry Commerce United Company* [岑溪市林工商联合公司、岑溪市南渡镇坡舍村民委员会、杨庆惠等农村土地承包合同纠纷再审审查与审判监督民事裁定书] (2019) Gui Min Shen No 4006 [(2019)桂民申 4006 号] (Guangxi HPC); *Lichong Village Committee* v *Tan Yongwei & Tan Yongning* [谭用伟、谭用宁林业承包合同纠纷再审

instance decision and upheld contract termination in *Liu Chunyan v Zhang Dongshan* ('***Zhang***').[57] In this case, the parties concluded a long-term rural land lease at a fixed price of 400 yuan per year. When the market rent for the leased land soared to 17,266 yuan per year in performance, the court of first instance noted that 'the total market rent from 2019 to 2027 alone would amount to 155,394 yuan', exceeding the total contractually stipulated payment by more than 15 times, and accordingly terminated the lease on the ground that continuous performance was manifestly unfair to the lessor.[58]

Similarly, the Guangxi HPC upheld an adjustment of contract prices in response to significant price inflation on grounds of manifest unfairness test in both *Lichong Village Committee v Tan and Tan* ('***Tan***')[59] and *Cenxi Nandu Town Villagers Committee of Poshe Village v Cenxi Forest Industry Commerce United Company* ('***Cenxi***').[60] In *Tan*, a 40-year lease was concluded at a fixed price of 50,000 yuan, equivalent to approximately 1.27 yuan per mu per year,[61] yet the market rent sharply increased to 50-80 yuan per mu annually in performance. When the lessor claimed to raise the rent to 80 yuan per mu annually, the HPC adjusted the disputed rent to an annual increase of 60 yuan per mu, holding that 'continuous performance would be manifestly unfair as the originally contracted rent is significantly low given contemporary socio-economic development'.[62] The same reasoning could be gleaned in *Cenxi*, which involved a 60-year lease with a fixed price of 2 yuan per mu. With market rents having increased to a comparable range of 50-80 yuan per mu in performance, the HPC again intervened,

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审查与审判监督民事裁定书] (2019) Gui Min Shen No 4411 [(2019)桂民申 4411 号] (Guangxi HPC); *Wang Zhonghai* v *Changfa Village Committee* [王中海与前郭尔罗斯蒙古族自治县海勃日戈镇长发村民委员会农业承包合同纠纷民事申请再审审查民事裁定书] (2021) Min Shen No 3877 [(2021)吉民申 3877 号] (Jilin HPC).

57 *Zhang* (n 56) [2].

58 This statement was quoted in the appellate judgment of *Zhang*. See (2019) Hei 02 Min Zhong No 2369 [(2019)黑 02 民终 2369 号] (Heilongjiang IPC) [5].

59 *Tan* (n 56) [3].

60 *Cenxi* (n 56) [3].

61 'Mu', or '亩' in Chinese, is a unit of area measurement that is about 1/15 of a hectare.

62 *Tan* (n 56) [3].

approving an adjustment to 42 yuan per mu and emphasising that 'given the local market rates for the lease of similar rural mountainous woodlands, continuous performance would create a significant imbalance, resulting in manifest advantage to one party at the other's clear detriment'.[63]

The Inner Mongolia HPC went further by considering the lessor's benefits from using the leased land in *Wuya Gacha Committee v Zhu.*[64] In this case, a long-term lease for a reed pond was concluded for planting reeds. The HPC terminated the contract, holding that 'continuous performance generated obvious imbalance between the rent and the profits from operating the pond (including the sale of reeds) due to the radically increased market price of land and reeds in performance'.[65]

In contrast, the courts showed a different stance regarding price fluctuations. A notable example is *Sinovel Wind Power Technology (Group) Co v Zhaoyuan Xinlong Shunde Wind Power Co.*[66] In this case, a sale contract for wind power generators at a fixed price of 4520 yuan/KW was concluded. Subsequently, the market price of generators experienced a 21.23% decrease, and therefore, the purchaser claimed contract termination, alleging that 'it is manifestly unfair to perform the contract at the stipulated price'. The SPC rejected this claim, holding that:

> 'Continuing performance would not impose extra costs on the purchaser. Manifest unfairness could not be measured by comparing the price at contracting with the price in performance, as the price fluctuation merely indicated that the purchaser could obtain the subject matter at a lower price from a third party, which did not justify the contract termination.'[67]

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63 *Cenxi* (n 56) [3].

64 *Wuya Gacha* (n 56).

65 ibid [6].

66 *Sinovel Wind Power Technology (Group) Co Ltd* v *Zhaoyuan Xinlong Shunde Wind Power Co Ltd* [华锐风电科技（集团）股份有限公司与肇源新龙顺德风力发电有限公司买卖合同纠纷] (2015) Min Er Zhong Zi No 88 [(2015)民二终第 88 号] (SPC).

67 ibid [8].

Similarly, the Shanghai HPC was reluctant to apply the test of manifest unfairness in *Reynolds*.[68] In this case, the parties concluded a contract for transporting cargo from Shanghai to Genoa at a fixed contract price, but the market price of transportation increased due to the pandemic. The HPC clarified that 'whether it is manifestly unfair depends on the impacts on the overall contract performance, rather than the effects during a certain period'.[69]

It could be seen that the courts sought to maintain a fair exchange with reference to market prices at adjudication in cases involving price inflation, but the courts respected the contracting parties' intentions at contracting in cases of price fluctuation. Why do the courts treat price fluctuation and price inflation differently, given that contract performance is not adversely affected in either scenario? Two reasons may explain this distinction. First, the nature of the contracts involved differs. Cases of price inflation typically involve long-term civil contracts, whereas price fluctuations often occur in commercial contracts. Parties in commercial contracts are generally better equipped to foresee, allocate, and bear risks. Second, Chinese courts evaluate fairness by weighing the overall balance of interests between contracting parties throughout the entire contract. For example, the court employing the test of fair exchange in *Tan* provides a robust statement that 'the price has surged significantly, and it is unlikely to fall back to the price at the time of contracting within reasonable foresight'.[70] This suggests that continuous performance would ultimately disadvantage the lessor. In contrast, in cases of price fluctuation, the overall exchange is likely to remain fair, even if one party experiences temporary disadvantage during performance.

B. A Satisfactory Approach?

The Chinese test of manifest unfairness comprises three categories and seeks to maintain a substantial balance of both parties' interests by assessing the detrimental effects on one party and

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68 *Reynolds* (n 12).

69 ibid [11].

70 *Tan* (n 56) [2].

emphasising the fairness of exchange. This echoes the assertion that, in contrast to English common law, the Chinese doctrine of change of circumstances places a high importance on substantive fairness.[71] While achieving substantive fairness is one of the ultimate goals of every jurisdiction, it is doubtful that the Chinese test yields consistent and predictable remedies. Three points emerge from the above analysis.

Firstly, a close review of these cases indicates that the Chinese manifest unfairness differs from both ‘excessively onerous cost’ and ‘fundamental alteration of contractual equilibrium’. In contrast to the latter two taking the promised contract as the benchmark,[72] the Chinese approach adopts a totally ex-post approach that assesses the balance of contracting parties’ interests at adjudication. This ex-post approach is particularly evident in cases of price inflation, in which the performance does not change, but the courts evaluate whether the exchange is fair with reference to the market price after the conclusion of the contract. This difference is also clear in *SUFE*, in which Chinese courts focus on substantive fairness by weighing the lessee’s situation of ‘paying for nothing’ during a 5-month business shutdown in a 10-year lease caused by a road-widening project. If the tests of ‘excessive onerous cost’ or ‘fundamental alteration of contractual equilibrium were applied, neither would be satisfied, as these five months amounted to only about 2 per cent of the lease term and the lessee would ordinarily be expected to bear such risk.[73] Additionally, the Chinese approach provides two different standards for assessing manifest unfairness. For instance, in *Pengwei, Ling* and *SUFE*, the courts compared one party’s costs and gains in the contract. In contrast, in *Sun* and *Bimaqiao*, the courts compared the actual performance with the promised performance. The first standard is in line with the philosophy of substantive fairness, yet there is no clear guidance on which standard should be applied.

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71 Ewan McKendrick and Qiao Liu, ‘Good Faith in Contract Performance in the Chinese and Common Law’ in L A DiMatteo and Chen Lei (eds), *Chinese Contract Law: Civil and Common Law Perspectives* (CUP 2018) 109.

72 See eg Schwenzer and Muñoz (n 28) 155–58.

73 Neither the doctrine of impossibility nor the doctrine of frustration was applicable in this case. See Chen and Wang (n 35), 483–84.

Secondly, the court's approach to manifest unfairness fails to provide clear guidance on termination or modification. This is starkly illustrated by *Zhang* and *Tan*. Despite both involving sharp increases in the market prices of leased land, the courts terminated the contract in *Zhang* but modified the contract in *Tan*. Similarly, when the cost of performance significantly increased, the court terminated the contract in *Ling* but modified the contractual price in the other two cases. It is also difficult to reconcile the different remedies between *Pengwei* and *Dingsheng*. In both cases, both plaintiffs received performance of lower values, but the court in *Pengwei* clarified that the affected party's claim for returning the contract price was a request for contract modification, which the court then granted, while the court in *Ding* directly terminated the contract. Admittedly, the party's claim might be a relevant factor in determining remedies in these cases. However, the party's claim may not provide guidance on modification or termination when one party claims termination and the other claims modification.

Thirdly, the court's substantive approach does not provide clear instructions on contract modification either. Instead, the courts modify contracts based on the impact on contract performance. For instance, in *Baimaqiao*, the court modified the fixed price for work during the extension period. In *Pengwei*, the court equally allocated the contractual price for a missing 60-day performance period. Similarly, in *SUFE,* the courts adjusted the rent for 2007 when the lessee could not use the leased property. The factor of contract performance is particularly clear in the recent model case of *Focus Jingshi Advertising Co Ltd v Guangzhou Xijiewei Film City Co Ltd* ('***Focus***').[74] In this case, contracting parties entered into an advertising contract, under which the film company was bound to present the advertising company's advertisements on its screen from 1 October 2019 to 31 December 2021, for a total of 27 months. However, the actual performance period was shortened to 14 months due to the COVID-19 pandemic, which included four months of full performance, six months of non-performance, and four months of

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74 *Focus Jingshi Advertising Co Ltd* v *Guangzhou Xijiewei Film City Co Ltd* [广州某影城公司深圳福田分公司诉某广告公司、上海某信息技术公司广告纠纷案] (2021) Hu 01 Min Final No 16356 [(2021)沪01民终16356号] (Shanghai First IPC).

partial performance. In adjudication, the courts modify the contractual price by reference to the different impacts on contract performance. Specifically, the court left the four-month full performance unchanged, exempted payment for the six-month non-performance, and modified the price for the four months of partial performance to reflect the shortfall in the number of actual and promised screenings and theatres. Given that the impact on performance is the established benchmark for designing a modification, it is logically inconsistent to exclude this factor when choosing between modification and termination. To ensure a coherent and consistent remedial approach, courts should be directed to weigh the impacts on performance in their discretion.

In summary, the courts' practices suggest that the manifest unfairness test pursues substantive fairness at adjudication but obscures the impacts on contract performance. Assessing imbalances in the parties' positions does not ensure consistent and predictable remedies, especially when choosing between modification and termination. However, the court's method of tailoring modification to performance impact provides a clear and consistent standard and should be extended to guide the choice between modification and termination. Courts, therefore, need a test that focuses on the impact on contractual performance rather than on substantive interests and tailor remedies to the impact on performance.

III. MEASURING THE DISCREPANCY BETWEEN ACTUAL AND PROMISED PERFORMANCE

To build a test that focuses on the impact on contract performance, this article suggests shifting the emphasis from a narrow evaluation of consequential substantive fairness during litigation to a broader assessment of how actual performance deviates from what was promised. Notably, this shift neither rewrites this area of law nor entirely disregards the balance of contracting parties' interests. Rather, it directs courts to first adopt the promised performance as a benchmark, using the intensity of the gap between the actual and promised performance as the primary measure.

Following this, the 'unfair exchange' test should be removed, as the market price inflation does not alter the parties' obligations under the contract.[75] For cases involving a manifest increase in the cost of performance, courts should assess the gap between the actual cost incurred and the cost contemplated for the promised performance. In such instances, the standard in *Sun* and *Baimaqiao* should prevail. The court in *Ling* should decide whether the obligation to renovate the property lies with the lessor and then assess the gap between the actual cost of performance and the cost contemplated at contract formation.

Similarly, in cases where there is a manifest decrease in the value of received performance, courts should measure the gap between the promised performance and what was actually delivered. In *Pengwei*, extreme drought made sand mining impossible, resulting in a substantial reduction in the value of the received performance. In the other two cases, performance remained possible, but the transferee received a performance that was markedly less valuable than what had been promised. In *Dingsheng*, the performance of transferring the land-use right and property development remained possible, but the commercial value of land significantly decreased. Similarly, in *Weijie*, the performance of the lease remains possible, yet continuous performance left Weijie Co unable to transport steel, thereby frustrating its contractual purpose.

These cases demonstrate that the impacts on contract performance could at least be further divided into categories, including the impossibility of performance, a manifest increase in the cost of performance, a decrease in the received performance, and one party's unfulfillable contractual purpose. This means that the test of unfulfillable contractual purpose continues to operate implicitly within the manifest unfairness test, although the legal provision replaced the dichotomy of tests (test of unfulfillable contractual purpose and test of manifest unfairness) with a single test of manifest unfairness. Consequently, some contracts may be

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75 The test of unfair exchange could be retained as an application of the principle of fairness and limited to exceptional situations. The principle of fairness is a legal principle in Article 6 of CCC and could bridge the gaps of law.

subject to both the change of circumstances and force majeure. Admittedly, these impacts are not mutually exclusive. In *Pengwei*, for instance, the extreme drought both made continuous performance impossible and substantially reduced the value of Pengwei Co's received performance. This overlap creates uncertainty about which threshold governs the remedy when relief is tailored to the impact on performance. To address this, the article recommends using the possibility of performance as a standard. Courts should first assess whether the contract performance remains possible. If it does, they should proceed to evaluate the cost of performance, the value of received performance and the achievement of the contractual purpose.

Through shifting the focus to the discrepancy between actual and promised performance, this article identifies four categories of impacts on contract performance, including the impossibility of performance, the frustration of one party's performance, the manifest decrease in the value of performance and the manifest increase in the value of performance. Consequently, remedies should be tailored to these four categories of impacts on contract performance while maintaining consistency between the doctrines of change of circumstances and force majeure.

IV. REMEDYING THE CIRCUMSTANTIAL CHANGES: TERMINATION OVER MODIFICATION

As illustrated, the courts should align the remedies with the impacts on contract performance and ensure consistency between the doctrines of force majeure and change of circumstances within the Chinese binary model by providing identical remedies for similarly impacted contracts. Chinese change of circumstances provides three remedies: renegotiation, modification, and termination. While renegotiation is a relatively new and somewhat ambiguous remedy, two points are uncontroversial.[76] First, the

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76 The nature of renegotiation, the liability arising from a violation of the duty to renegotiate, and the practical operation of renegotiation remain controversial and unclear in existing literature. See eg Gu (n 23); Bing Xu, 'The Specific Construction of Change of Circumstances: Accurate

failure of renegotiation suggests that contracting parties are reluctant to cooperate with one another. Second, the failure of renegotiation within a reasonable period is a prerequisite for the court's discretion. Once renegotiation has failed, the courts should exercise their discretion to modify or terminate the contract. In this context, this article contends that courts should give priority to termination over modification (see Table 2).

Table 2 Aligning Remedies with Performance Impacts

Events	Impacts on performance	Contracting party's claim	Legal effects
Circumstantial changes	Manifest increase in the cost of performance; or Manifest decrease in the value of the received performance	Both claim modification	Modification
		Other scenarios	Termination
	Failure of one contracting party's contract purpose		Termination
	Impossibility of performance		Termination

This article specifically argues that when circumstantial changes render contractual obligations impossible to perform or frustrate one party's contractual purpose, courts should terminate the contract rather than modify the contract. Termination is preferable not only because of the severe impacts on contract performance but also to maintain coherence and consistency

Application of Article 533 of the Civil Code from the Perspective of Standardizing the Exercise of Judicial Power' (2022) 2 Journal of Law Application 94.

within the Chinese binary model of unexpected circumstances. In this model, the doctrine of force majeure has granted termination when unexpected circumstances render one party's purpose unfulfillable or unexpected circumstances make performance impossible. There is no rationale for treating similar scenarios differently. Providing termination in these situations ensures that similarly impacted contracts receive uniform remedies, thereby enhancing predictability and stability in commercial transactions.

Additionally, when unexpected circumstances result in an excessively high cost of performance or significantly diminished value of received performance, the court should prioritise termination over modification. This argument is based on two considerations. Firstly, courts have limited competence in rewriting a contract. Although the law provides that they should follow the fairness principle to terminate or modify the contract, there remains no specific guidance on what constitutes fairness. It is highly possible that the courts will seek substantive fairness as demonstrated in the test of manifest unfairness. However, courts lack the specialised technical knowledge of market conditions, nor do they have access to the private cost-benefit assessments that inform the parties' decisions at the time of contracting and performance.[77] Therefore, it is difficult to imagine how a court's modification could achieve a balance of the contracting parties' interests. Additionally, litigation is a notoriously lengthy process, often delivering decisions long after circumstantial changes have occurred.[78] Market conditions can drastically change during this lengthy process, further complicating the judicial modification. Secondly, the contracting parties' willingness must be considered. The failure of renegotiation already indicates the contracting parties' reluctance to modify the contract. This reluctance is reinforced when one party explicitly claims termination, given the guidance of judicial interpretation. On the other hand, if both contracting parties claim contract modification, suggesting they are willing to leave the dispute to the court, then the court may modify the contract. Therefore, in cases of manifest increase of performance cost and manifest decrease of received performance

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77 Luca E Perriello, 'Terminating or Renegotiating? The Aftermath of COVID-19 on Commercial Contracts' (2020) 11 Comparative Law Review 73, 99.

78 Schwenzer and Muñoz (n 28) 168–69.

value, the court should prioritise termination for predictable remedies and better protection of contract freedom.

CONCLUSION

The doctrine of change of circumstance is widely recognised as a relaxation of the sanctity of contract. To strike a balance, it is essential to strictly but effectively measure the impacts of circumstantial changes on contract performance and tailor remedies to contract performance. Through a review of judicial practices, this article highlights that the Chinese manifest unfairness test gives weight to the balance of contracting parties' respective interests but fails to adequately assess the impacts on performance. This approach could not ensure consistent and predictable remedies. To address these shortcomings, this article suggests assessing the severity of impacts on the contract performance and categorises the impacts into different levels: an increase in the cost of performance, a decrease in the value of the received performance, frustrating one party's contract purpose, and the impossibility of performance. It contends that the courts should terminate the contract in the event that the performance is impossible or that one party's purpose is frustrated. Furthermore, this article suggests prioritising termination over modification in cases where the circumstantial changes result in a manifest increase in performance costs or a manifest decrease in the value of received performance. Through aligning remedies with contract performance in the change of circumstances doctrine, this article also contributes to enhancing coherence and predictability of the Chinese binary model for unexpected circumstances under CCC.

RECONSIDERING *RE CHIME* IN LIGHT OF *NTZEGKOUTANIS V KIMIONIS*

Holly Leung* and Kenneth Ip†

The relationship between unfair prejudice petitions ('UPPs') and statutory derivative actions ('SDAs') has been discussed in various case law. The longstanding principle enunciated by the Hong Kong Court of Final Appeal in Re Chime *is that a UPP should not be brought when the same claim can be brought via an SDA. However, in the recent case of* Ntzegkoutanis v Kimionis*, the English Court of Appeal rejected the* Re Chime *approach in favour of assimilation between UPPs and SDAs. This article considers,* de lege ferenda, *whether the Hong Kong Court should depart from* Re Chime *in favour of* Ntzegkoutanis, *and ultimately answers in the negative*: *First, the court in* Ntzegkoutanis *has failed to give sound justification for assimilation in the fact of such being contrary to legislative intent; Second, the differences between Companies Act 2006 and the Companies Ordinance suggest that even if assimilation is suitable for England and Wales,* Re Chime *should remain the position in Hong Kong.*

INTRODUCTION

The interaction between unfair prejudice petitions ('**UPPs**') and statutory derivative actions ('**SDAs**') has been a much-debated topic in both England and Wales and Hong Kong. UPPs refer to claims brought by shareholders (usually the minority shareholders) to seek relief where they have suffered unfair prejudice due to the conduct of other shareholders (usually the majority shareholders) in the company.[1] UPPs in England and Wales are governed by

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section 994 to 996 of the Companies Act 2006 (‘**CA 2006**’) while UPPs in Hong Kong are governed by sections 724 to 725 of the Companies Ordinance (Cap. 622) (‘**CO**’). The language of section 994(1)(a) of the CA 2006 and section 724(1)(a) of the CO are almost identical: both require the petitioner to show ‘that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or [any of its members, including the petitioner]’ to mount a successful UPP.[2] In contrast, SDAs are not brought by an individual member but brought by relevant persons in the name of and on the behalf of a company against a person who has wronged the company, hence ‘derivative actions’.[3] As suggested by its name, SDAs are governed by statute. In England and Wales, SDAs are governed under Part 11 of the CA 2006, with sections 260(2)-(3) specifying that an SDA may only be brought ‘in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company’[4] or when directed by the court in UPP proceedings.[5] In Hong Kong, an SDA can be brought for ‘misconduct’ against the company,[6] which is defined as ‘fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law’.[7] Leave of the court is required for an SDA to proceed, whether in England and Wales or Hong Kong,[8] but there is notably no such requirement for bringing a UPP.

Despite the aforementioned differences between SDAs and UPPs, it may be unclear which proceedings should be taken given that the facts of a particular case could involve both unfair prejudice towards a member as well as wrongdoing by a director. For example, an allegation that a director is in breach of duty by authorizing unlawful distributions to the benefit of the majority members and to the disadvantage of the minority[9] consists of both an allegation of breach of duty by a director, which can be brought

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1 Geoffrey Morse et al., *Palmer’s Company Law* (Sweet & Maxwell 2025), 8.3802.

2 CA 2006, s 994(1)(a); CO, s 724(1)(a).

3 Morse et al. (n 1), paras 8.3704-8.3704.1.

4 CA 2006, ss 260(2)(a) and (3).

5 CA 2006, s 260(2)(b).

6 CO, s 732.

7 CO, s 731.

8 CA 2006, s 261; CO, s 732.

9 *Gill v Thind* [2020] EWHC 2973.

as an SDA, and an allegation of unfair prejudice towards the minority members, which can be pursued by a UPP. Both the English courts and the Hong Kong courts have made attempts to clarify whether an SDA or a UPP should be pursued if the facts can give rise to both actions. The approach taken by the Hong Kong Court of Final Appeal almost two decades ago in *Re Chime* is that where a claim can be brought by way of an SDA, the court will only allow it to proceed as a UPP in 'rare and exceptional circumstances'.[10] The Hong Kong courts have since followed *Re Chime* as a matter of *stare decisis*. The English courts have been less consistent; in *Cullen Investments v Brown*, the court granted leave for an SDA where the claim was that the director/shareholder breached his duties to the company to secure a benefit for himself and at the expense of another shareholder.[11] Yet, in *Gill v Thind*, where there were similar allegations of the director being in breach of his duties by favouring one member over the other in the distribution of monies, the court found that a UPP, rather than an SDA, would be the appropriate action.[12] Further, in *Re Nexbell*, SDA proceedings were allowed notwithstanding that the case involved issues and facts commonly seen in UPPs, such as the nature of the company as a quasi-partnership.[13] The approach to the interaction between SDAs and UPPs in England and Wales had thus harboured ambiguities—which have now been dispelled by the English Court of Appeal in *Ntzegkoutanis v Kimionis.*[14]

Ntzegkoutanis, handed down by the English Court of Appeal on 12 December 2023, brings marked clarity to the interaction between UPPs and SDAs in England and Wales. Rejecting the approach taken by the Hong Kong Court of Final Appeal in *Re Chime,* the English Court of Appeal held that a claim can be brought by way of a UPP under Part 30 CA 2006 even if the same claim could have been brought via an SDA because relief can be sought and granted in favour of the company even under a UPP.[15] Given the similarity in the language of the CA 2006 and the CO, as canvassed above, the judgment in *Ntzegkoutanis* begs

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10 *Re Chime Corp Ltd* (2004) 7 HKCFAR 546, [27].

11 *Cullen Investments Ltd v Brown* [2016] 1 BCLC 491.

12 *Gill v Thind* (n 9), [89]-[91].

13 *Re Nexbell Ltd* [2021] EWHC 1258, [48].

14 *Ntzegkoutanis v Kimionis* [2023] EWCA Civ 1480.

15 ibid [55](iv).

the question: Notwithstanding that *Re Chime* remains binding in Hong Kong as of present, should the Hong Kong Court depart from *Re Chime* in the future in light of the findings in *Ntzegkoutanis*? We argue that the Hong Kong Court has no reason to depart from *Re Chime* given the deficiencies in *Ntzegkoutanis* and the differences between the CA 2006 and the CO.

I. SUMMARY OF *NTZEGKOUTANIS V KIMIONIS*

Ntzegkoutanis v Kimionis concerned a shareholder dispute between Ntzegkoutanis, the Appellant, and Kimionis, the Respondent, in respect of their cryptocurrency business. Coinomi Limited ('**the Company**') was incorporated in 2016 with Ntzegkoutanis and Kimionis as 50% shareholders and directors.[16] The Company was supposedly formed as a vehicle for a joint venture to exploit a cryptocurrency application ('**App**') which Ntzegkoutanis had devised.[17] Ntzegkoutanis alleged that he transferred his intellectual property concerning the App to Coinomi when it was established.[18] According to Ntzegkoutanis, over time, he was excluded from the management of the Company while Kimionis had misappropriated the Company's business and assets by, among other acts: transferring the intellectual property in the App to Coinomi Cyprus, a company incorporated in Cyprus in 2018 on Kimionis's instructions;[19] and directing Coinomi Cyprus to license Coinomi BVI, a subsidiary of Coinomi Cyprus incorporated in the British Virgin Islands in 2019 on Kimionis's instructions, to use the source code of the App.[20]

Ntzegkoutanis thus commenced a UPP against Kimionis pursuant to Part 30 of the CA 2006.[21] Among the relief sought by Ntzegkoutanis in the petition was: in para 32.2, an order for Kimionis, Coinomi Cyprus, and Coinomi BVI to account to and/or compensate the Company; and in para 32.3, declarations of

16 ibid [2].
17 ibid [3].
18 ibid.
19 ibid [4].
20 ibid.
21 ibid [1].

constructive trust in favour of the Company in respect of property belonging to the Company currently held by Kimionis, Coinomi Cyprus, and Coinomi BVI.[22] HHJ Klein of the High Court held in his judgment on 21 December 2022 that paras 32.2 and 32.3 of Ntzegkoutanis's petition should be struck out as against Kimionis[23] as the claims in paras 32.2 and 32.3 should have been brought by way of a derivative claim. Applying the approach in *Re Chime*, HHJ Klein found that bringing the claims by way of UPP would constitute abuse of process.[24]

Ntzegkoutanis appealed to the Court of Appeal, which considered the issue of when relief in favour of the company can be claimed under a UPP.[25] The Court of Appeal unanimously allowed the appeal. In his leading judgment, Newey LJ found that the provisions on SDAs in Part 11 of the CA 2006 were not intended to have any effect on UPPs under Part 30 of the CA 2006.[26] Further, Newey LJ found that the Court has power to grant relief to the company in a UPP provided that such relief would correspond with relief which the company would have received under an SDA.[27] It is possible for a petitioner to claim both relief in favour of the company and in favour of himself and/or other minority shareholders provided that he 'appears to be genuinely interested in obtaining the latter' given that it is possible for the acts complained of to constitute both misconduct and mismanagement.[28] Lastly, Newey LJ rejected the approach in *Re Chime*, where the Hong Kong Court of Final Appeal found that the Court will not permit claims by way of a UPP if the same claims can be brought by way of an SDA, on the basis that *Re Chime* does not represent the law of England and Wales.[29]

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22 ibid [6].
23 ibid [11].
24 ibid [20].
25 ibid [1].
26 ibid [33]-[34].
27 ibid [55(i)]-[55(ii)].
28 ibid [55(iv)].
29 ibid [55(v)].

II. DEFICIENCIES IN *NTZEGKOUTANIS*

The central difference between *Ntzegkoutanis* and *Re Chime* can be summarised as whether a UPP that also seeks monetary compensation payable to the company should in principle be struck out as an abuse of process for effectively running an SDA through the backdoor, so that the Court will only allow such a UPP to proceed in a 'rare and exceptional' case.[30] While *Ntzegkoutanis* represents a marked departure from *Re Chime*, it does not necessarily follow that *Re Chime* is wrongly decided or should no longer be applied. As this part will demonstrate, the major difficulty with *Ntzegkoutanis* lies in its failure to adequately consider the distinction, or a lack thereof, between a UPP and an SDA.

The reasoning in *Ntzegkoutanis* is contained in Newey LJ's leading judgment at paras 55(iii) to 55(vi) by way of a summary of the legal position in England and Wales. The brief reasoning raises more questions than answers. His Lordship took the view that as long as the petitioner is genuinely interested in seeking some personal UPP remedy, it is not an abuse of process to commence a derivative action under the UPP procedure. This holding develops the law by weakening the misconduct-mismanagement distinction between UPPs and SDAs.[31] Albeit having acknowledged that UPPs and SDAs are conceptually distinct (notwithstanding that there can be some overlap),[32] his Lordship made no attempt to justify his decision to assimilate the two. It is surprising for the Court to make significant changes to the law without doing so expressly and offering full reasons. The obvious points can be shortly stated: **(1)** The uncontroversial proposition that a Court hearing a UPP has the power to grant remedies that are ordinarily sought in an SDA[33] is no answer: the width of the Court's power offers no guidance on when the power to grant such remedies should be exercised. The existence of the Court's wide power is equally consistent with the *Re Chime* approach; **(2)** It is not the legislative intent to assimilate the two

30 *Re Chime* (n 10), [27].

31 *Ntzegkoutanis* (n 14), [45], citing *Waddington Ltd v Chan Chun Hoo Thomas* (2008) 11 HKCFAR 370, [77].

32 ibid [53], citing *Re Charnley Davies Ltd (No 2)* [1990] BCC 605, 624.

33 ibid [55(i)].

causes of action. Quite the contrary, Newey LJ at para 33 and Snowden LJ at para 66, both citing the Law Commission, reached the same opposite conclusion that the express legislative intent is to keep them separate;[34] **(3)** The potential overlap of UPPs and SDAs is not a good reason to elide two causes of action which have different legal bases.[35] The same set of facts may fit into more than one legal formulation, but assimilation of different causes of action is often unhelpful and only serves to distort the law in both areas.[36]

Why then should UPPs and SDAs remain separate? Two principled objections arise out of the weakening of the misconduct-mismanagement distinction. First, the rule in *Foss v Harbottle* barring shareholder claims of reflective loss is undermined by the assimilation of UPPs and SDAs. While UPPs can be regarded as a statutory exception to the common law *Foss v Harbottle* rule,[37] it is another thing to turn an exception in 'rare and exceptional' cases into a norm. Following *Ntzegkoutanis*, shareholders will be able to personally pursue causes of action vested in the company by seeking compensation payable to the company in a UPP, without prior leave of the court. The jurisdiction binds not only co-shareholders but also non-members of the company who will be joined as defendants in a UPP[38] as in an SDA. This is precisely what UPPs are not suited to achieve as they are intended to resolve disputes among shareholders.[39] Insofar as the Court wishes to significantly curtail the rule in *Foss v Harbottle,* which was consistently applied by the Courts and upheld by the legislature, that should be done by legislation. Both section 996(2)(c) of the CA 2006 and its Hong Kong equivalent section 725(2)(a)(ii) of the CO empower the Court to *inter alia* order proceedings to be brought in the name of the company i.e. to commence an SDA. The legislature did not intend that SDAs be subsumed into UPPs for the majority of cases, nor did they

34 Law Commission, *Shareholder Remedies* (Law Com No 246, 1997), para 6.11.

35 *Waddington Ltd v Chan Chun Hoo Thomas* (2008) 11 HKCFAR 370, [77].

36 See for example *Byers v Saudi National Bank* [2023] UKSC 51, [150].

37 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC (CA) 14, 18.

38 *Re a Company (No 5287 of 1985)* [1986] 1 WLR 281, 284; *Apex Global Management v Fi Call* [2013] EWHC 1652 (Ch), [125].

39 *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137, 138.

envisage non-members to be regularly joined as defendants in UPPs: otherwise there is little utility in maintaining two separate causes of action and creating two stages for SDAs as the legislature chose to. This is all the more so in Hong Kong where there is no equivalent of section 260(2) of the CA 2006 which provides that a derivative action may be brought as an SDA or a UPP.

Second, *Ntzegkoutanis* circumvents the statutory filtering mechanism for SDAs. Where statute creates a filtering mechanism for a particular type of cases, save in exceptional cases it is an abuse of process to initiate proceedings in any other manner. This is known as the procedural exclusivity rule in the sphere of public law where applications for judicial review must be brought under Ord 53 with leave of the Court, instead of any other procedure that does not contain the procedural safeguards e.g. the leave requirement to protect a public body from unmeritorious claims.[40] Newey LJ himself approved in a later case that the principle in public law is 'comparable' with *Ntzegkoutanis* on this procedural exclusivity point.[41] The leave requirement for SDAs under section 732 of the CO is to filter out unmeritorious claims and claims which it is not in the company's interest to pursue.[42] The Court's blessing is required as SDAs are an exception to the established principle in company law that ordinarily the board of directors is the best judge of a company's commercial interest, including whether to pursue claims.[43] The company may be in a position to approve or ratify the conduct complained of, which may be taken into account under section 734(2) of the CO for the Court to refuse leave and is even fatal under section 263(2) of the CA 2006.[44] Even where the personal action is later found to be properly brought and compensation is paid to the company, the company has to pay a price when ordered to indemnify the plaintiff for its costs.[45] If litigants were allowed to easily bypass the statutory leave mechanism for SDAs, directors and non-members dealing

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40 *O'Reilly v Mackman* [1983] 2 AC 237, 285; *Next Digital v Commissioner of Police* [2021] HKCFI 1677, [24]-[28].

41 *Ahmet v Tatum* [2024] 1 WLR 3630 (CA), [27]-[28].

42 *Re Shun Tak Holdings Ltd* [2009] 5 HKLRD 743, [42].

43 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 (CA), 218-219; 223-224.

44 *Waddington* (n 35), [50].

45 *Wallersteiner v Moir (No 2)* [1975] QB 373 (CA), 403.

with a company will be vexed by unmeritorious litigation based on causes of action which the company (with the Court's concurrence by refusal of leave) would not have pursued. As the leave mechanism is not merely a procedural device but a rule of substance,[46] the approach in *Ntzegkoutanis* has the impermissible and undesirable effect of reversing the legislative act to codify the leave procedure.[47]

With these legal difficulties and the Court's failure to grapple with them, it is fair to conclude that *Ntzegkoutanis* is a decision based on convenience rather than principle. Indeed this is clear from para 55(iv), which heavily relies on Hoffmann J's dicta in *Re a Company (No 5287 of 1985)* that it is practically inconvenient to strike out a UPP claiming SDA remedies and insist on there being separate claim forms.[48] While convenience may well inform judges on judicial policy-making, convenience as a procedural economy concern cannot trump substantive law, much less statutes, which is not discretionary in the free hand of the Court. This was accepted in *Re a Company*[49] which itself should now be read with caution when the legislature has subsequently created the leave mechanism for SDAs and manifested its intention to separate the two causes of action. The Court's extensive case management powers offer no support as well because the Court can only consolidate proceedings after separate proceedings have been issued.

Even where convenience is concerned, it is questionable whether the *Ntzegkoutanis* approach is any more convenient than *Re Chime*. The genuine interest in seeking personal UPP remedies test propounded by the court is illusory. Most cases will satisfy the

46 *Prudential Assurance* (n 43), 224.

47 *See Waddington* (n 35), [54]. The leave requirement stems from the requirement in *Prudential Assurance* for a *prima facie* case to be shown at the interlocutory stage. The requirement was later included in Ord 15 r 12A of the Rules of the Supreme Court and thereafter r 19.9 of the Civil Procedure Rules. It gained statutory status by s 260 of the CA 2006.

48 *Re a Company* (n 38), 284.

49 Hoffmann J remarked at 284 that 'I would be reluctant to come to the conclusion that this form of duplication was necessary unless it was clear that the jurisdiction under sections 459 and 461 did not permit the whole matter to be dealt with upon the petition'. Surely this caveat applies to restrictions imposed by substantive law.

test as SDA claimants can easily include UPP complaints based on the controlling shareholder's failure to cause the company to pursue its claims. There is no meaningful safeguard against abuse of the *Ntzegkoutanis* approach which will be an inconvenience to defendants. As a catch-all reservation, *Ntzegkoutanis* also mentioned that the Court should deal with case management issues in each particular case.[50] As observed by Bokhary PJ in *Re Chime*,[51] whether the UPP and the SDA should be tried together has no bearing on the anterior issue of what is the correct originating procedure. Finally, as the Court in *Ntzegkoutanis* acknowledged,[52] a buy-out order in UPP will have to await the result of the SDA for the shares to be properly valued. The consolidation of UPP and SDA does not speed up the proceedings as relief of either kind can only be granted at a substantive hearing, and under its general case management power, the Court would already have ordered the UPP and the SDA be heard together where the factual issues overlap. Again, this is precisely what Bokhary PJ and Lord Scott NPJ envisaged in *Re Chime* when they called for restraint in adopting what is now the *Ntzegkoutanis* approach.[53] Is it not meaningless to remove the 'rare and exceptional case' caution in *Re Chime* and consolidate most UPPs and SDAs, only to order their separation later (worse still, with additional pleadings ordered - back to pre-*Ntzegkoutanis*) under the Court's case management powers? All in all, not only is convenience a bad justification to start with, the benefits of the *Ntzegkoutanis* approach are also doubtful. The Court's attempt in *Ntzegkoutanis* to refine its decision with reference to the case management powers is ineffective and ironically exposes its weaknesses and similarities with *Re Chime*.

III. *RE CHIME* AFTER *NTZEGKOUTANIS*

Building on the aforementioned criticism of *Ntzegkoutanis*, Hong Kong courts should not be inclined to depart from *Re Chime* in favour of the *Ntzegkoutanis* approach

50 *Ntzegkoutanis* (n 14), [55(v)].
51 *Re Chime* (n 10), [23].
52 *Ntzegkoutanis* (n 14), [55(v)] and [57].
53 *Re Chime* (n 10), [23] and [61].

considering the differences in the judicial trends and legislations of the two jurisdictions.

A. Distinct Approaches to UPP

Even prior to *Ntzegkoutanis,* the English courts and the Hong Kong courts have gone down diverging paths in their approaches to UPPs. As exemplified by the jurisprudence emanating from the two jurisdictions, the English courts have been moving towards assimilation while the Hong Kong courts have consistently deplored any attempts to obtain corporate relief in a UPP.

1. THE ENGLISH COURTS

The English courts have always regarded flexibility to be embedded in sections 994 to 996 of the CA 2006. The English courts have acknowledged that the purpose of sections 994 to 996 of the CA 2006 is to confer the court with 'a very wide discretion to do what is considered fair and equitable in all the circumstances of the cases.'[54] This purpose suggests that the court can grant any remedy in dealing with a UPP and was indeed expressed so in *Grace v Biagioli*: '[o]nce unfair prejudice is established, the court is given a wide discretion as to the relief which should be granted.'[55] The English courts have expressly stated that the 'wide and flexible remed[ies]' for UPP includes granting 'relief [...] to remedy wrongs done to the company'[56] despite the conventional understanding, as stated in *Re Chime*, that a UPP should not be brought for wrongs against the company rather than the individual shareholder. From the precedents analysed here, it is evident that the English courts have long deviated from the principle in *Re Chime* in their interpretation of remedies provided under sections 994 to 996 of the CA 2006.

The flexibility in sections 994 to 996 of the CA 2006 seems to extend beyond remedies for a UPP to the nature of the petition itself. In *Clark v Cutland*, Arden LJ found that 'although

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54 *Re Bird Precision Bellows* [1986] Ch 658, 669.

55 *Grace v Biagioli* [2005] EWCA Civ 1222, [73].

56 *Apex Global Management* (n 38), [125].

the relief sought is claimed under section 461 [of the Companies Act 1985], it is sought for the benefit of the company and [...] it is, therefore, open to [the petitioner] to seek an order against the company for payment to him of any costs incurred by him on this appeal.'[57] Arden LJ's comment suggests that section 461 of the Companies Act 1985, the predecessor of section 996 of the CA 2006, can be used to claim relief for the benefit of the company notwithstanding that it is intended to provide the shareholder, rather than the company, with a remedy in respect of conduct that is unfairly prejudicial to the shareholder's interests enjoyed *qua* member.[58] *Clark v Cutland* highlights that it may be 'open to a shareholder to bring a section 459 petition [under the Companies Act 1985] in order to obtain corporate relief in relation to conduct which took place before they were a shareholder.'[59] Given the implication of *Clark v Cutland* in allowing a UPP to be brought to pursue what is essentially the company's claim and hence what should have been brought under an SDA, it is unsurprising that assimilation has been suggested in subsequent cases before the English courts[60] and has now been set out in clear terms in *Ntzegkoutanis*.

2. THE HONG KONG COURTS

In contrast to the English courts, the Hong Kong courts have not interpreted sections 724 to 725 of the CO to contain the same flexibility as (what may loosely be called) their counterparts in sections 994 to 996 of the CA 2006. Section 725(1)(a) of the CO allows the court to 'make *any* order that it thinks fit for giving relief' (emphasis added) for a successful UPP, which can, in theory, include corporate relief such as an order for the wrongdoers to pay compensation to the company. However, this possibility was rejected by the Court of Final Appeal in *Waddington v Chan Chun Hoo*, which instead cited *Re Chime* to find that an SDA would be 'the proper vehicle for obtaining such

57 [2003] EWCA Civ 810, [35].

58 Robert Goddard, 'Taming the Unfair Prejudice Remedy: Sections 459–461 of the Companies Act 1985 in the House of Lords' (1999) 58(3) CLJ 487, 488.

59 Jennifer Payne, 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64(3) CLJ 647, 656.

60 *Apex Global Management* (n 38); *Biagioli* (n 55).

[corporate] relief where the plaintiff's complaint is of misconduct rather than mismanagement'.[61] Given that sections 724 to 725 of the CO (and its predecessor) have been interpreted strictly to only provide personal relief for mismanagement, there is little room for assimilation of the UPP and the SDA under the CO, unlike that under the CA 2006. It would thus be contrary to legislative intention for the approach in *Ntzegkoutanis* to be applied to sections 724 to 725 of the CO.

Furthermore, other than *Waddington*, Hong Kong courts have affirmed and applied *Re Chime* on multiple occasions. For example, Hong Kong courts have repeatedly cited Lord Scott in *Re Chime,*[62] commenting that pursuing relief for the company through a UPP in circumvention of the rule in *Foss v Harbottle* would constitute an abuse of process.[63] The consistent affirmation of *Re Chime* in Hong Kong implies that departing from *Re Chime* would involve a drastic overturning of precedents. The same implication does not hold true for English authorities, which, as mentioned above, have acknowledged the possibility of assimilation (and hence departure from *Re Chime*) even before *Ntzegkoutanis*.

The affirmation of *Re Chime* does not mean that Hong Kong courts are blind to the possibility that certain conduct can constitute both misconduct and mismanagement. Instead of accommodating for such overlap through assimilation, the Court has suggested that it can grant leave to commence an SDA by way of a UPP. As suggested in *Yu Yuchuan v China Shanshui*, '[i]f a breach of duty is a manifestation of mismanagement [to be remedied under section 725(1) of the CO,] the appropriate procedure is a [UPP]' which can be brought as a 'proceeding' under section 732(1) of the CO, the statutory provision regulating SDAs, despite the fact that section 732(1) of the CO refers to 'misconduct'.[64] Through this procedure, a UPP can still be brought without circumventing the requirement of leave as is

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61 *Waddington* (n 35), [77].

62 *Re Chime* (n 10), [63].

63 *Re Shun Tak Holdings* (n 42), [39]-[42]; *Re L & A International Holdings Ltd* [2020] HKCA 687, [68].

64 *Yu Yuchuan v China Shanshui Investment Co Ltd* (HCMP 360/2015, 17 March 2015), [45].

necessary for commencing an SDA.[65] The current approach to UPPs and SDAs in Hong Kong thus accommodates any overlap between the two without the need to resort to assimilation.

B. Differences in Legislation

The difference between the CO and the CA 2006 in terms of the threshold for obtaining leave for an SDA further explains why it is unnecessary to adopt the assimilation approach in Hong Kong. Under sections 733(1)(a) and (b) of the CO, leave may be granted to the member where such 'appears to be in the company's interests' and where 'there is a serious question to be tried'. This is a low threshold where the member only has to show an arguable, not necessarily *prima facie*, case;[66] the Court will only find against the member and reject the application to commence an SDA if the defendant can demonstrate that the claim has no real substance or has a serious flaw.[67] In contrast, the higher threshold of a '*prima facie* case' is required under section 261(2) of the CA 2006. Given the relative difficulty of obtaining leave for an SDA under the CA 2006, it may make more sense for a member to obtain relief for the company via a UPP, for which no application for leave is required. The higher threshold for obtaining leave under section 261(2) of the CA 2006 makes it easier to invoke convenience as a justification for assimilation, though the persuasiveness of this justification remains doubted as argued above. In contrast, in light of the lower threshold for obtaining leave in Hong Kong, it is difficult to justify assimilation on the inconvenience or difficulty (if any) of obtaining corporate relief through an SDA.

A last key difference between the CO and the CA 2006 is in their treatment of the requirement of 'misconduct' for SDAs. As mentioned above, the distinction between misconduct and mismanagement is one of the determining factors for whether an

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65 CO, ss 732-733.

66 *Waddington* (n 35), [55].

67 *Re Primlaks (HK) Ltd* [2016] 2 HKLRD 31, [7]-[9]; *Lam Kin Chung v Soka Gakkai International of Hong Kong Ltd (No 2)* [2018] 2 HKLRD 769, [5]; *Liu Chun Kau Andy v Hung Lee Construction Engineering Ltd* [2019] HKCFI 1269, [9].

SDA or a UPP should be brought.[68] This distinction can be clearly seen in the CO, which expressly allows ‘a member of the company [to], with the leave of the Court [...], bring proceedings in respect of the misconduct before the court on behalf of the company’.[69] In contrast, the requirement of ‘misconduct’ is nowhere to be found in the CA 2006, which only states in section 260(3) that a derivative action can be brought ‘in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director’.[70] Although the definition of misconduct in section 731 of the CO, being ‘fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law’, appears similar to the language in section 260(3) of the CA 2006, the former is of a wider scope since the misconduct giving rise to the SDA can be by any person, not restricted to directors,[71] while section 260(3) of the CA 2006 only allows derivative actions for acts and omissions by a director. Hence, albeit the similarity in the language of section 260(3) of the CA 2006 and section 731 of the CO, the concept of misconduct, as well as the distinction between misconduct and mismanagement, is only enunciated clearly in the CO but not the CA 2006. Although the distinction between misconduct and mismanagement is acknowledged in English case law,[72] given that this distinction is not firmly set out in the CA 2006, the blurring of this distinction in *Ntzegkoutanis* may not be contrary to legislative intent. However, the same cannot be said for Hong Kong, where the distinction between misconduct and mismanagement persists in both legislation and case law.

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68 *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760; *Re Chime* (n 10); *Waddington* (n 35).

69 CO, s 732(1).

70 CA 2006, s 260(3).

71 ELG Tyler and Stefan HC Lo, *Butterworths Hong Kong Company Law Handbook* (26th edn, LexisNexis 2024), para 732.07.

72 The distinction originates from the comment of Millett J (as he then was) in *Re Charnley Davies Ltd (No. 2)* (n 68), where he expressed doubts on the ‘propriety of seeking [relief for the company] on an unfair prejudice petition if the essence of the complaint was not of mismanagement of the company but of misconduct by the director’.

CONCLUSION

This piece re-examines *Re Chime* in light of the latest judgment of *Ntzegkoutanis* and concludes that *Ntzegkoutanis* is not without its own difficulties. *Ntzegkoutanis* has a weak legal foundation and although the re-calibration of the scales may be welcomed by some, the practical difference from *Re Chime* may be more apparent than real: under *Re Chime*, the court could already have ordered a UPP and an SDA to be heard together in appropriate cases. Having said that, authorities show that the courts of Hong Kong and England have chosen the approach which best suits the legislative framework and jurisprudence in the respective jurisdictions. As far as Hong Kong is concerned, *Re Chime* should remain as good law, but *Ntzegkoutanis* comes as a timely reminder that where the circumstances clearly so demand, the Hong Kong Court has power to allow an SDA to proceed by way of a UPP.

HAGUE CONVENTION ARTICLE 13(2): NEW PROCEDURAL CHOICE AND ORTHODOX USE OF DISCRETION IN *RE M (CHILD ABDUCTION)* [2024] 5 HKLRD 658, [2024] HKCFI 2821

Justin Wan Chan*

The recent case of Re M (Child Abduction) provides significant guidance on the Hong Kong court's application of Article 13(2) of the Hague Convention. This case note first examines the court's unprecedented procedural choice to ascertain a child's views through a judicial meeting alone, substituting for a social investigation report due to urgency. While acknowledging the Convention's demand for speed, the note questions whether this approach adequately ensures accurate assessment, proposing a balancing exercise and a midway solution involving social workers. Second, it explores how Re M reaffirms the orthodox discretionary approach of deferring substantive welfare assessments to the child's habitual residence jurisdiction. This contrasts with recent local cases trending towards merits-based analysis. The note argues for doctrinal consistency and welcomes Re M as a realignment with the Convention's objects.

INTRODUCTION

The 1980 Hague Convention on the Civil Aspects of International Child Abduction ('**Convention**') protects abducted children by promptly returning them to their habitual residence, and Hong Kong ('**HK**') has implemented it since 1997. Under Article 13(2),[1]

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if a mature child objects to the return, the HK court has the discretion not to order the return. The recent case of *Re M (Child Abduction)*[2] sheds light on the procedural and discretionary aspects of Article 13(2).

After briefly introducing the facts and decision of the case in Part 2, Part 3 draws attention to a procedural option unprecedented in HK—ascertaining a child's views by a judicial meeting in substitution for a social investigation report ('**SIR**'). In justifying this choice, it is suggested that the reasoning should be grounded in the Convention itself. Given the concerns about the reliability of ascertaining a child's views through this novel procedure, this Part provides two proposals for the court: a quality-versus-time balancing exercise and a midway solution involving judicial meetings conducted alongside experts. Part 4 examines how *Re M* reaffirmed the orthodox position of deferring substantive welfare assessments to the jurisdiction of habitual residence, despite a recent trend in HK cases suggesting a shift toward merits-based analysis. After examining the rationales for both positions, this Part calls for consistency in HK case law and welcomes *Re M* for its reaffirmation of the orthodox position.

I. FACTS AND DECISION

The facts of *Re M* are relatively straightforward.[3] The Mother ('**M**') married the Father ('**F**') and gave birth to the Child ('**C**') in Germany in 2015. The German Court granted M and F joint custody of C in 2023 after their divorce. From July 2024, M refused to return C to Germany after C spent his summer holiday

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1 The numbering of paragraphs under Article 13 is commonly accepted despite the fact that the paragraphs were not numbered in the official text of the Hague Convention: Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing 2013) 317.

2 *Re M (Child Abduction)* [2024] 5 HKLRD 658, [2024] HKCFI 2821.

3 A comprehensive overview of the facts is available in *Re M (Child Abduction)* (n 2) [2]–[11].

in HK. F applied for C's return under the Convention in September 2024. M relied on Articles 13(1)(b) and 13(2) to oppose C's return, claiming that the return would cause a grave risk of an intolerable situation for C by separating him from M, and C's own objection to be returned.

Mr Justice Herbert Au-Yeung ('**Au-Yeung J**') in the Court of First Instance ruled that M failed to establish the Article 13(1)(b) ground as she could freely enter Germany, if not obtain a permanent status there. About the Article 13(2) ground, Au-Yeung J conducted a judicial meeting with C ('**Meeting**'), without a prior or subsequent SIR, to ascertain C's views. He found C sufficiently mature for the court to take his views into account. He expressed his dislike of F and F's girlfriend, his preference to live with M, and his desire to learn languages in a HK school. Nevertheless, exercising his discretion, Au-Yeung J still ordered C's return as he attached little weight to C's views, which he found inauthentic and presumably a product of M's influence. Eventually, C's opinion was outweighed by other policy considerations, including securing C's swift return, respecting the German court's judicial process, and deterring future abductions.

II. ANALYSIS OF PROCEDURE: JUDICIAL MEETINGS WITH CHILDREN IN SUBSTITUTION FOR SOCIAL INVESTIGATION REPORT

A. Unusual Procedural Choice and Court's Reasoning

According to the author's research, out of the nine previous first instance cases where a party raised the Article 13(2) ground,[4] all cases involved reports (mostly social welfare officers ('**SWO**'))

[4] These cases are *S v S* [1998] 2 HKC 316 (CFI); *RRG v LGR (Hague Convention)* [2006] HKFLR 490 (CFI); *JEK v LCYP* (unreported, HCMP 468/2015, 5 May 2015) (CFI); *LA v L* (unreported, HCMP 1548/2017, 22 August 2017) (CFI); *YYW v HWW* (unreported, HCMP 409/2017, 19 May 2017) (CFI); *BRS v LYY* [2018] HKFLR 372, [2018] HKCFI 1524; *RS v BK* [2018] HKCFI 1814; *FR v MF (Habitual Residence, Grave Risk, Children's Objections)* [2021] HKFLR 314, [2021] HKCFI 1557; *T v L* [2022] 5 HKC 189, [2022] HKCFI 1418.

being prepared before the hearing by experts,[5] and in three of them, which are one-third of the cases, the judges personally interviewed the children *in addition to* expert reports.[6] *Re M* marked the very first time a HK court used a judicial meeting with a child, *in the absence of* an expert report, to ascertain the child's views. As this case might open the door to the same approach for future cases and provide reference value, this specific procedural choice deserves some detailed discussion.

It was urgency which prevented Au-Yeung J from adopting the common practice. More than two weeks had passed from the commencement of the application when M raised the Article 13(2) ground for the first time. To invite a report at that moment, the court must adjourn the hearing for three more weeks. Au-Yeung J proposed holding the Meeting (without an SWO) on the hearing day. Parties agreed to such a meeting to take place, but M insisted on requesting an SIR during the hearing.

After noting (without further elaboration) that adjourning the hearing would prevent him from deciding the case within the 'six-week requirement' under Article 11 of the Convention,[7] Au-Yeung J refused M's request based on (1) the Meeting could completely achieve SIR's purpose of ascertaining C's views, (2) M should not go back on her agreement to the Meeting, and (3) Practice Direction SL 1.3 allowed the Meeting in urgent situations.[8]

B. A More Desirable Reasoning: Back to Hague Convention

With respect, Au-Yeung J's reasoning appeared superficial in the sense that it only explained why he *could* make this procedural

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5 *S v S* (n 4) 333F-H; *RRG* (n 4) [23]–[24]; *JEK* (n 4) [12], [126]–[127]; *LA* (n 4) [25]; *YYW* (n 4) [8]–[9]; *BRS* (n 4) [72]; *RS* (n 4) [4]; *FR* (n 4) [27]–[28]; *T v L* (n 4) [23].

6 *S v S* (n 4) 333F-H; *BRS* (n 4) [25]; *RS* (n 4) [108].

7 *Re M (Child Abduction)* (n 2) [28]. Au-Yeung J did not elaborate on the 'six-week requirement' in Article 11 of the Hague Convention, which is that the court might need to explain the delay if no decision is made within six weeks of proceedings starting.

8 *Re M (Child Abduction)* (n 2) [29].

decision by relying on M's earlier representations (reason (2)) and Practice Direction (reason (3)), but not why he *should* do so. Reason (1) will be challenged later in Part 3.3. This case note submits that an arguably better reasoning is to resort to the fundamentals—this procedure choice is what the Convention demands. Only by turning to the objects and spirit of the Convention could the Court provide a more substantive and persuasive case for why it *should* make the choice in question.

The need for speed of proceedings and decision-making is widely recognised as an overarching theme of the Convention.[9] The term 'prompt' and its synonyms are repeated in the Preamble, Articles 1 and 7, and Article 2 further requires authorities to use the 'most expeditious procedures available', as well as Article 11 demands the authorities to 'act expeditiously'. Article 11 (which Au-Yeung J mentioned in passing) further imposes a six-week timeframe for a decision, requiring the court to explain any delay beyond this period. Several articles, including Article 14, which relaxes the requirement for proving foreign law, were also inferred to be supporting the goal of efficiency.[10]

Turning back to the facts of *Re M*, the court eventually took more than five weeks to make the decision, whereas if the Court had waited for an SIR, the proceeding would have lasted for seven to eight weeks. It is submitted that the reluctance to spend extra time would be more easily and better justified under the broad context of pursuing speed under the Convention.

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9 Elisa Pérez-Vera, 'Explanatory Report on Proceedings of the 14th Session of the Hague Conference Oct 1980', (1980) 3 *Acts and Documents of the Fourteenth Session* 426, paras 104–105, 119; Schuz (n 1) 11; Rania Nanos, 'The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense under the Hague Child Abduction Convention' (1996) 22(2) Brooklyn Journal of International Law 437, 440–441; Peter McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' (2015) 62 Netherlands International Law Review 365, 371.

10 Pérez-Vera (n 9) [119].

C. Caution: Quality Concerns in Ascertaining Child's Views

Although the Convention desires speed in the proceedings, it is not without limitation. Prompt handling does not mean 'over-hasty and insufficient' procedures, as the Australian High Court reflected.[11] It is concerned that the procedural possibility opened in *Re M*, coupled with Au-Yeung J's statement of 'the Meeting could serve the purpose of an SIR', would tempt future courts to resort to this procedural shortcut too readily and frequently. It is submitted that *Re M* was not, and should not be seen as, such a dangerous precedent for the following reasons.

As Article 13(2) allows the court to refuse the return 'if it finds that the child objects to being returned', there must logically be an implicit requirement for the court to *accurately* ascertain the genuine views of the child. While judges are typically experienced in observing and communicating with witnesses, the same may not hold true when dealing with children. While no HK judge has explicitly explained the benefits (if not necessity) of having an SIR in the context of an Article 13(2) dispute, foreign judges' observations might shed some light. Lady Hale in the House of Lords explained that the experts are more 'skilled and experienced in talking with children' than many judges, which is the reason for ordering reports as the default.[12] Referring to an Israeli Supreme Court case, Professor Rhona Schuz observed that 'some judges consider that they do not have the professional tools to be able to assess the maturity of the child and the quality of his views'.[13] In an extra-judicial context, the Chief Justice of the Australian Family Court, Justice Nicholson, pointed to the special feature of 'parental influence or brainwashing' in Article 13(2) cases (which was the determinative factor in the *Re M*). He

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11 *De L v Director-General, New South Wales Department of Community Services and Another* (1996) 139 ALR 417, 430. The context was considering whether the need for speed necessarily disallows children's separate representations. A similar opinion see Paul Beaumont and Peter Mceleavy, *The Hague Convention on International Child Abduction* (OUP 1999) 181-182.

12 *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, [2006] UKHL 51, [60].

13 Schuz, Hague Child Abduction Convention (n 1) 379. Schuz refers to RFamA (SC) 672/06 *TAE v PR,* PD 61(3) 24, [22] at footnote 56 of her work.

indicated that it was sometimes through the expertise in observing children's intonations, body language and other nuances that the report writers assess their authentic opinions.[14] Some experts themselves published papers to explain their techniques.[15] The legal scholars mostly agreed that expert involvement is necessary for extracting children's perspectives.[16] Scholars holding otherwise[17] belongs to an absolute minority, and has been criticised.[18]

At this juncture, one would understand why, with respect, Au-Yeung J flawed his reason (1) above in rejecting M's SIR request, which is that there was *no need* for an SIR due to the existence of the Meeting. Au-Yeung's expectation regarding the need for an SIR would be, in reality, less likely than not. Albeit the HK court has not expressly discussed this matter, it is suggested that the court implicitly accepted the need for expert involvement in an Article 13(2) context. It is supported by the fact that in 100% of Article 13(2) cases in HK the court ordered an SIR (except in *S v S*[19], where reports were prepared by doctors).[20] A family court judge even appraised social investigation officers as 'eyes and ears of the court' because 'they have carried out the

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14 Alastair Nicholson, 'Children and Children's Rights in the Context of Family Law' (Speech at the Law Asia Conference in Brisbane, 21 June 2003) <https://canadiancrc.com/PDFs/Childrens_Rights_Family_Law_Australia_Justice_Nicholson_21JUN03.pdf> accessed 16 March 2025, 6. A similar opinion was shared by Chief Justice Brennan in the Australian High Court case *De L* (n 11), 429.

15 Alberto Yohananoff and Richard Min, 'The expanding role of expert psychological evaluations and testimony in Hague child abduction litigation' (2023) 61(1) Family Court Review 157, 168.

16 eg Michelle Fernando and Nicola Ross, 'Stifled Voices: Hearing Children's Objections in Hague Child Abduction Convention Cases in Australia' (2018) 32 International Journal of Law, Policy and The Family 93, 102; Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (OUP 2008) 48; Michelle Fernando, 'How Can We Best Listen to Children in Family Law Proceedings' (2013) New Zealand Law Review 387, 402; Jane Fortin, *Children's Rights and the Developing Law*, (3rd edn CUP 2009) 283.

17 Linda Silberman, 'The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues' (2000) 33 New York Journal of International Law and Politics 221, 243–244.

18 Schuz (n 1) 348.

19 *S v S* (n 4) 333F-H.

20 See n 5.

background investigation and … details of the family situation which are not otherwise available to the court', despite not in a Convention context.[21] Furthermore, the way drafters drafted paragraph 4(iii) of Practice Direction SL 5—which Au-Yeung J himself referred to—makes the said need evident. There must be a dual precondition for a factor favouring a meeting to arise: 'proceedings as a matter of urgency' and 'there is no SIR'.[22] The judiciary would not have included the second precondition if it had considered a judicial meeting as a competent substitute for SIR.

In *Re M*, the Meeting contributed to the demise of M's Article 13(2) ground because, through the communication between Au-Yeung J and C, he found that 'he was reciting some scripts to me … repeatedly and quite unnaturally.'[23] Accompanied by the inconsistency between C's statements before Au-Yeung J and previously before the German court, Au-Yeung J placed little weight on C's objection, which he believed to be inauthentic.[24] The author does not intend to put forward a positive case to challenge Au-Yeung J's observations, given the limited information available in the judgment. However, it is not unreasonable for someone to doubt the accuracy of his observations on a nine-year-old child, especially to the author's knowledge, *Re M* was the first time Au-Yeung J handled an Article 13(2) case.[25] An Australian judge, without assistance from experts, making factually similar observations on a fifteen-year-old child, including the latter's nervousness and his answers being meticulously rehearsed, was challenged on whether the judge was capable to decipher a child's ways of speaking.[26] It would be unwanted for future HK judges to encounter similar criticisms.

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21 *FJ v DTD* [2020] HKFC 50 [34] (Lam DDJ).

22 PDSL 5, para. 4(iii).

23 *Re M (Child Abduction)* (n 2) [69].

24 *Re M (Child Abduction)* (n 2) [70]–[74].

25 As a clarificatory note, the "Au-Yeung J" handling *LA* (n 4) and *BRS* (n 4) should be Ms Justice Queeny Au-Yeung, not Mr Justice Herbert Au-Yeung in *Re M (Child Abduction).*

26 Michelle Fernando, 'Conversations Between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters' (2009) 23 Australian Journal of Family Law 48, 64.

D. Way Forward: Balancing Exercise in Principle and Midway Solution in Practice

This case note provides two proposals for future courts when facing similar situations as in *Re M*. The first one is that, in principle, the court must honestly admit the inadequacy of the Meeting. Instead of claiming the Meeting eliminated the need for an SIR (Au-Yeung J's reason (1) above in Part 3.1), the court should acknowledge that it actually needs one, because without an SIR the court lacks a more professional and comprehensive understanding of the child's perspectives and thus diminishes the effect of Article 13(2) in practice (Part 3.3 above). However, the court must balance this need against, and sometimes let it be overweighed by, the demand for speed in the Convention (Part 3.2 above). On one side, the younger the child or the more difficult a judge could personally ascertain the child's view, the more likely the court would substitute the Meeting for an SIR. Examples of this difficulty include the situations where parents, in previous correspondence or call-over hearings, disclose the child's status as extremely introverted, reluctant to talk to strangers, or even with (slight) autistic inclinations or speech problems. On the other side, the more urgent the situation is, the more likely the Meeting is to be a substitute for an SIR. In assessing the urgency, the court is suggested to explicitly adopt the Article 11 six-week timeframe as a reference point. By doing so, the court not only recognises the realistic shortcomings of relying solely on the Meeting, but also offers a degree of certainty and guidance to the parties and the child regarding the procedures they can expect moving forward.

There is also a convenient midway solution between the two extremes: a judicial meeting *with the presence of an SWO* despite the absence of a prior SIR. On one hand, it does not take extra time as there would be no preparation and arguments on an SIR—the officer simply needs to come to the Meeting. On the other hand, the officer could facilitate communication between the judge and the child, and tell the judge about his first-hand observations.[27] HK has precedents for judicial meetings that an SWO accompanies. The court used this approach in two out of three Article 13(2) cases involving judicial meetings: *S v S*[28] in

27 ibid 64.

28 *S v S* (n 4).

1998 (the first Convention application in HK) and *BRS v LYY*[29] in 2018. The difference is that, in those two cases, SIRs were also taken before the case, but here, it is a fallback solution when the court cannot obtain an SIR before the Meeting. Although this time Au-Yeung J did not bring another person (except his clerk) with him to the Meeting,[30] future courts in similar scenarios might consider this midway solution.

III. ANALYSIS OF EXERCISE OF DISCRETION: DEFER MERITS EVALUATION

A. Inconsistent Hong Kong Cases

In discussing the use of discretion in *Re M*, Au-Yeung J forcefully clarified that 'the question concerning relocation [should] be decided by the German Court', especially when the German Court had ordered F to hold C's temporary single custody and M to surrender C.[31] Presumably it is for this reason that Au-Yeung J refrained from commenting on some objective factors in HK and Germany which might affect C's welfare, such as his school life and opportunities to learn more languages (even though C himself mentioned these factors in the Meeting).[32] Au-Yeung J deferred to the German court the question of whether C is more suited to Germany or HK.

This deferential or conservative approach in HK could be traced back to the first Convention application in 1998, *S v S*,[33] where in obiter Mr Justice Waung reminded that the United Kingdom (the child's habitual residence) was where his future could be properly decided.[34] Ms Justice Chu ('**Chu J**') adopted a similar approach in *JEK v LCYP* in 2015, and the Court of Appeal upheld her reasoning. She ordered no return mainly by relying on

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29 *BRS* (n 4).

30 *Re M (Child Abduction)* (n 2) [26].

31 *Re M (Child Abduction)* (n 2) [67]–[68].

32 *Re M (Child Abduction)* (n 2) [27].

33 *S v S* (n 4).

34 *S v S* (n 4) 335. As the Article 13(2) ground failed due to the child's immaturity, the discussed part is obiter.

the two children's views (such as their own desire for stability after seeing themselves already settling in HK).[35] What she did not do was to compare *objective* factors that favour and disfavour HK from a bird's eye view as if she were in a family court deciding on relocation matters.

Contrary to the earlier cases, recent cases show a different trend.[36] In *RS v BK*[37] in 2018, arguably, Chu J's reasoning in her exercise of discretion subtly shifted from elucidating the child's views to comparing the relative advantages of the child living in Singapore and HK. She ordered the child's return by considering the child's life in HK with a working mother and little support from maiden family (despite the child subjectively still preferred this kind of life with his mother), his autistic and reclusive characteristics (and thus Chu J assumed that he would make more friends in Singapore than HK because of the language barrier), and the long-term possibility of the mother flying to Singapore to visit the child. However, the most drastic departure from the deferential approach was *FR v MF*[38] in 2019, where Chu J spent 25 paragraphs going through the parents' relative busyness, the child's language ability, relationship with extended families, extracurricular activities, etc.[39] She even explicitly expressed that she arrived at the decision of returning the child to France by 'balancing the pros and cons'.[40] Notably, in both cases, the reminders of leaving the in-depth merits assessment for the habitual residence court have been sidelined. This recent trend of this 'aggressive approach' was not followed by *Re M* in late 2024.

While all the cases addressing Article 13(2) dogmatically used the term 'the child's best interests', different judges applied it in essentially different ways. Under the deferential approach, as there lacks in-depth analysis of objective welfare factors, the judge could not determine the best interests of that *particular* child. Part

35 *JEK* (n 4) [128]–[130], [145].

36 Except the most recent *T v L* (n 4, [110]–[111]) as it did not involve the use of discretion. The Article 13(2) ground failed for the child's immaturity.

37 *RS* (n 4) [114]–[121].

38 *FR* (n 4).

39 ibid [110]–[134].

40 ibid [136].

4.2 will explain what 'best interests' exactly means in this approach. In contrast, under the aggressive approach, the term introduces a freestanding, substantive review of the child's expected lives in two places as illustrated above.

B. The Underlying Tension: Convention Objects versus Modern Reflection

The root of the deferential approach goes to the very core of the Convention—its dominant object, 'to secure the prompt return of children'.[41] The Court of Appeal in *JEK v LCYP*[42] (the only binding authority on the Court of First Instance in the realm of Article 13(2)) elaborated on the *purpose* of the prompt return: 'so that the courts of that country may determine the question of custody and residence of the children on the basis of a full welfare investigation'.[43] The Court of Appeal then noted that Article 16, which demands the HK court 'not [to] decide on the merits of rights of custody until the determination of the question of whether the children should be returned under the *Hague Convention*'.[44] The Explanatory Report of the Convention written by Professor Pérez-Vera indicated the same conclusion on both the purpose and object of the Convention and Article 16.[45] Following this logic, Au-Yeung J was well justified in deferring the welfare enquiry in *Re M* to the German counterpart.

Au-Yeung J also left an ambiguous remark after the said deference, '[M] should not have taken the law into her own hands.'[46] One reading of it is that it hints at the flip side of the aforementioned purpose of the object—the rejection of abductors' illegitimate forum shopping and illegal advantage. Drafters of the Convention observed that it was common for abductors to bring the child to a place with more favourable laws and thus artificially

41 The other object, 'to ensure the rights of custody and or access under the law of one Contracting State are effectively respected in other Contracting States', is in practice subsidiary because 'the only method of respecting rights of custody is by ordering prompt return to the country of origin'. Schuz (n 1) 10.

42 *JEK v LCYP* [2015] 5 HKC 293 (CA) [6].

43 ibid.

44 ibid.

45 Pérez-Vera (n 9) paras 19, 121.

46 *Re M (Child Abduction)* (n 2) [68].

alter the applicable law.[47] What the court should do is therefore to 'deprive his actions of any practical or juridical consequences'.[48] For this reason, Professor Pérez-Vera suggested that an extensive welfare inspection equals a violation of the Convention.[49]

Against the backdrop of the Convention object and its purposes, the child's 'best interests' are understood less directly. The Convention (under the deferential interpretation) presumes that the return *is* in the child's welfare[50] because full investigation of their relocation (or not) in habitual residence, or negating the incentives for abduction, benefits 'the child in general'.[51] Reconciled in that way, the Convention safeguards the child's best interests with little substantive consideration of his interests in reality.

On the other hand, although Chu J did not explicitly provide the basis for the aggressive approach, it could be theoretically supported. The entry point of this approach is its heavy emphasis on children's best interests. The (sole) linkage between best interests and the Convention is the Preamble, which states contracting states are firmly convinced that 'the interests of children are of paramount importance'.[52] In the eyes of proponents of this approach, some underlying assumptions of the Convention drafters were outdated. One example is the identity of abductors. It has shifted from the 'non-primary carers fathers' in the drafters' era[53] to the 'primary carers mother' nowadays (as in most of the HK cases).[54] Logically, the HK court could not be sure whether

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47 Pérez-Vera (n 9) paras 14, 15.

48 Pérez-Vera (n 9) paras 16.

49 Pérez-Vera (n 9) paras 66; Schuz (n 1) 86–87.

50 Wilson Lui, 'Hong Kong' in Anselmo Reyes, Wilson Lui and Kazuaki Nishioka (eds), *Choice of Law and Recognition in Asian Family Law* (Hart Publishing 2023) 70.

51 A term used to contrast the 'particular' or 'individual' child in the proceeding: Charlotte Mol and Thalia Kruger, 'International Child Abduction and the Best Interests of the Child: An Analysis of Judicial Reasoning in Two Jurisdictions' (2018) 14(3) Journal of Private International Law 421, 432.

52 Hannah Loo, 'In the Child's Best Interests: Examining International Child Abduction, Adoption, and Asylum' (2016) 17(2) Chicago Journal of International Law 609, 621.

53 McEleavy (n 9) 370.

54 ibid 375; Nigel Lowe and Victoria Stephens, 'Part I — A statistical analysis of applications made in 2015 under the Hague Convention of

returning the child restores or disrupts the status quo when the child is separated from his primary carer. Furthermore, the popularity of children's rights has nourished the aggressive approach. For example, the Convention on the Rights of the Child ('**CRC**') shaped the narrative and discourse of part of the legal community to focus on the welfare of the 'individual child' in every case, as opposed to 'the child in general'.[55] Therefore, thorough welfare examinations come into play under Article 13(2).

C. Way Forward: Call For Consistency and Welcome *Re M*

To the author's knowledge, HK has no binding precedent deciding on the degree (if any) of delving into the individual child's welfare assessment. The Court of Appeal in *JEK v LCYP*[56] did not recognise any foreign cases relevant to the exercise of discretion. While it clarified that merely hearing and considering the child's views would not allow the abductor to establish any artificial jurisdiction,[57] it did not give any guidance on the permissible degree of merits investigation. Without a unified rule, this case note calls for consistency in future cases. It would be highly undesirable if the two approaches develop in parallel lines in the future because this generates uncertainty for parties and practitioners. Otherwise, the process might become more or less a lucky draw matter, depending on whether parties have Au-Yeung J, Chu J, or others as judges.

This case note ventures to propose that the HK court should incline towards the deferential approach. Although the Vienna Convention on the Law of Treaties ('**VCLT**') does not apply to HK, it provides some insights into the interpretation of international treaties,[58] including the Convention. Article 13 of VCLT states that '[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

25 October 1980 on the Civil Aspects of International Child Abduction — Global report' (Hague Conference on Private International Law, Preliminary Document No 11 A, February 2018), para 10.

55 Mol and Kruger (n 51) 432–433.

56 *JEK v LCYP* (n 4).

57 ibid [9.2(3)], [9.12].

58 Schuz (n 1) 93–94.

the treaty in their context and in the light of its object and purpose'. By ordinary meaning, nothing in Article 13(2) justifies a standalone welfare analysis. The one line in the Preamble (and not even once in the articles) touching on 'the child's best interests' is too weak a foothold for introducing a comprehensive and substantive merits analysis, which essentially defies the Convention objective and the rationales behind, including ensuring expedited return, allowing a full investigation on relocation, as well as mitigating illegitimate forum shopping. A failed reform attempt might be insightful. In 2006, a Swiss expert proposed to add a new provision under Article 13, stipulating that the 'main priority' of the Convention would be the child's best interest.[59] One of the aims was to link the Convention to CRC.[60] Nevertheless, 'a clear majority of experts' opposed the proposal because, among other things, it slows down the proceedings (and the best interest lies in the quick return), promotes forum shopping, oversteps into the relocation jurisdiction of the habitual residence court, and 'erodes the dissuasive aspect of the Convention'.[61] These are essentially the arguments raised above in Part 4.2. It would be bizarre if the Convention could not be amended in one way but could be interpreted (in a backdoor manner) in the very same way. *Re M* should be treated as a welcome decision to get Article 13(2) back on the right track.

CONCLUSION

In an era of globalisation and following the end of COVID-19, single-parent family trips to HK from all across the world (like the

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59 Permanent Bureau of the Hague Conference on Private International Law, 'Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children' (Hague Conference on Private International Law, March 2007), para. 162. In that case, the new provision was proposed to be added under Article 13(1)(b), 'grave risk of intolerable situations'. However, it is submitted that the result would be the same if the new provision was placed under Article 13(2).

60 ibid.

61 ibid paras 163–165.

one M and C had) might keep increasing. The HK court should be more prepared to face child abduction with various unprecedented situations—more urgent, more complicated, more contentious. Through *Re M*, this case note attempts to demonstrate while the court should be creative in manoeuvring between the Convention's goal and realistic constraints (such as by adopting a balancing exercise and midway solution proposed in this case note), the objects and purposes of the Convention demarcate an ambit that the court could not overstep (such as introducing an impermissible merits-based test). Finally, with the number of cases in this area gradually rising, the HK court must attend to coherence among cases.