Is the Hong Kong Courts' Ability to Refer to Foreign Authorities Unrestrained?

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Abstract

Once in a while there is a debate on whether Hong Kong courts should be freely able to refer to foreign authorities, indicating the lack of firm consensus. In light of the need for clarifications, this note affirms the court's ability to refer to foreign authorities for three main reasons. *Constitutionally*, this note is the first to raise that Hong Kong courts have a unique 'constitutional assurance' of their ability to refer to foreign cases. By comparison, other jurisdictions, like England & Wales and Singapore which do not share the same assurance, have even further restrained their power with Practice Directions. *Professionally*, the courts will not blindly rely on foreign authorities given the jurisdictional differences. *Practically*, Hong Kong has a relatively smaller case pool, so the practical insights from the foreign authorities are very useful. Given these three justifications, there should not be any doubt over the courts' power and practice for such.

Keywords: common law; Singapore; English law; comparative law; case law; precedent; India; judiciary; legal method.

[A] INTRODUCTION

Hong Kong (HK) is an international hub which widely welcomes and recognizes foreign common law practitioners (including judges) and qualifications. It is therefore often taken for granted that there are minimal jurisdictional differences, so foreign common law is flexibly applicable.

However, former Justice of the Hong Kong Court of Final Appeal Henry Litton criticized the reliance on foreign authorities. In his Honour's words:

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> The judges, at all three levels of the courts, seem drawn to overseas case law as moths to naked light: apparently brushing aside the inconvenient truth that the common law system operates under the principle of One Country Two Systems. Such mindset spells disaster in the long run. This is not a formula for the long continuation of the common law (Litton 2020).

It is wrong, or 'troubling' in Litton's own words, to adopt a 'Eurocentric view' (Litton 2020). To uphold 'One Country, Two Systems', Litton is of the view that HK's common law should develop based on its local context, not the Western context.[1]

Litton's critique was made in the context of a public law case. However, for the sake of academic discussion, Litton's view can be framed more broadly, and it raises crucial questions: is the courts' power or ability to refer to foreign authorities unrestrained? Should it be restrained?

This article studies the legal basis of referring to foreign authorities. When compared with other jurisdictions, the article pioneers the view that HK courts have a unique 'constitutional assurance' of their ability to refer to foreign cases. HK is an interesting common law jurisdiction where there is no restraint on the reference to persuasive common law authorities. It is common practice for HK courts to carefully select and adopt cases and arguments from other common law jurisdictions. Furthermore, such a practice is amply justified by practical considerations and benefits.

This article focuses on the basis for the citation of foreign authorities. It will not explore any underlying social or political developments that promote or restrain such a practice. However, as a matter of background, it is helpful to note that there exist these kinds of socio-political objections against the reliance on foreign law. First, some contend that it is inappropriate for unelected judges to incorporate foreign laws, and there is also distrust of foreign cases (Balakrishnan 2010: 6-7).

Second, the openness to foreign precedents may—directly or indirectly as a side effect—be affected by political developments in favour of nationalism, isolationism, or other ideals that promote independence or self-reliance. The reliance on foreign authorities may be perceived as indicating susceptibility to external influences, culture and forces. For example, the former Chief Justice of India K G Balakrishnan noted that the citation of foreign authorities can be 'a conscious strategy of social transformation' (Balakrishnan 2010: 15). Instead of merely borrowing the

[1] Litton's views sparked widespread debate. According to Cullen's understanding, Litton's 'bedrock position advanced is that the common law we have is the common law specific to Hong Kong … Influences may be taken into account from other jurisdictions—but there is no such thing as international common law' (Cullen 2020).

underlying reasoning or arguments from the foreign precedents without quoting the cases, the citation signifies the explicit consideration of the foreign laws. Depending on the context, it could denote recognition, acknowledgment, appreciation, or disapproval of the foreign approach, its standing and its value. This is why the former Chief Justice of India Balakrishnan warned that 'the practice of referring to international instruments and foreign decisions cannot be carried on in an undisciplined manner' (Balakrishnan 2010: 15).

[B] THE CONSTITUTIONAL ASSURANCE OF THE ABILITY TO REFER TO FOREIGN CASES

Article 84 of the Basic Law (BL) provides that the courts 'may refer to precedents of other common law jurisdictions'. The Court of Final Appeal (CFA) described article 84 as a 'constitutional *approval* of stare decisis … which specifically recognizes the right to refer to the precedents of other common law jurisdictions' (*Democratic Republic of The Congo v FG Hemisphere Associates LLC* 2011: para 441, emphasis added).

Instead of a mere 'approval', it is arguably more accurate to describe it as a 'constitutional *assurance*' of the judicial power. This is because, although the ability to refer to foreign cases may sound like something taken for granted as part of the inherent judicial powers, other jurisdictions do not share the same freedom and ability. For example, in France—a civil law jurisdiction—the citation of foreign cases can become a ground for annulment (Atwill 2010: 33).

In other common law jurisdictions such as Australia, Canada, England & Wales, and India, the courts commonly refer to foreign cases.[2] Yet, there is no constitutional backing to recognize and entrench such practice. Rather, the former Chief Justice of India Balakrishnan mentioned that the practice 'cannot be carried on in an undisciplined manner', which signalled that it is legally possible and desirable to restrain this practice (Balakrishnan 2010: 15). Theoretically, it is possible for these common law jurisdictions to impose a rule limiting or prohibiting the referral to foreign cases.

Such a potential limitation is not groundless. In England & Wales, there is a Practice Direction providing that the citation of foreign cases must be justified (Practice Direction (Citation of Authorities) 2001; see also Practice

[2] For Australia, see Lefler 2001: 170; Smyth 2008: 415. For Canada, see Macdougall 1991: 23; McCormick 2009: 91, 108. For England & Wales, see Reed 2008: 259; Mak 2011: 431. For India, see Balakrishnan 2020: 11. For Singapore, see Goh & Tan 2011: 209. For the US, see Waters 2008: 638.

Direction: Citation of Authorities 2012; Fordham 2012: para 11.2.7). This threshold is not low, requiring that 'there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish' (Practice Direction (Citation of Authorities) 2001: rule 9.2(iii)). In other words, if the English courts have a domestic binding authority in place, they cannot freely rely on foreign cases.

Similarly, although Singapore is not as restrictive as the English counterpart, a counsel cannot cite a foreign case unless it is 'of assistance to the development of local jurisprudence on the particular issue in question' (State Courts Practice Directions 2021 (Singapore): 74(5)(b)).

By striking contrast, there is no rule or restriction in HK over the reliance on foreign cases by courts and counsels.

Replying to Litton's concern on 'One Country, Two Systems', it is interesting to refer to Professor Yash Ghai's opinion that article 84 BL 'may be cited to show that the Hong Kong common law was intended to be contrasted with other systems, including the English' (Ghai 1999: 368). From this perspective, the flexibility afforded by this BL provision—arguably as a reflection of HK's orientation as an international hub—marks the crucial difference between HK and its past before China's resumption of the exercise of sovereignty because HK courts can, theoretically, more freely rely on common law authorities than the English courts. Contrary to Litton's view, the difference with the English system arguably upholds 'One Country'; whilst the constitutional power to flexibly refer to foreign precedents represents exactly the significance of 'Two Systems'.

Non-common law authorities

The HK courts have generally been liberal on human rights issues. Apart from relying on common law cases that support liberal interpretation of human rights provisions (eg *HKSAR v Ma Wai Kwan David* 1997: para 192, which cited the English case of *Minister of Home Affairs v Fisher* 1980: 328), they have also quoted international and European Court of Human Rights (ECtHR) authorities. However, the jurisprudence of the ECtHR does not constitute common law authorities, so they are not within the ambit of the constitutional assurance in article 84 BL.

Nevertheless, there are currently no restrictions on referring to these authorities. In fact, the HK courts frequently refer to ECtHR cases on novel human rights issues, such as *W v Registrar of Marriage* (2013) and *Leung Chun Kwong v Secretary for the Civil Service and Another* (2019)

which referred to English case law and ECtHR authorities on same-sex marriage. The HK courts have maintained a liberal approach and are very open to ideas derived from ECtHR case law, for example most recently in *HKSAR v Fu Man Kit* (2021) on whether the rule against double jeopardy applies to prison disciplinary proceedings. The better view is that cases from the ECtHR represent persuasive arguments and counter-arguments—as opposed to binding law—for HK courts to peruse. This was affirmed by the CFA:

> The appropriateness of the Hong Kong courts taking account of established principles of international jurisprudence, including that of the ECtHR, in interpreting fundamental rights in the Basic Law and the BOR was acknowledged by this Court in *Shum Kwok Sher v HKSAR* (2002). The decisions of the ECtHR on provisions of the ECHR in the same or substantially the same terms as the BOR, though not binding on the courts of Hong Kong, are of high persuasive authority and have been so regarded by this Court (*ZN v Secretary for Justice* 2020: para 60).

Litton's critique of the *Leung Kwok Hung* case[3]

As mentioned above, this article wishes to focus more broadly on the *general* ability to cite foreign authorities, so it will not dwell into the details of the case and Litton's critique.

In brief, Litton's commentary involves the CFA case of *Leung Kwok Hung v Commissioner of Correctional Services* (2020). The legal issue was whether there was discrimination when male prisoners were required to cut their hair short. When applying section 5 Sex Discrimination Ordinance (SDO), the CFA quoted the four-step test from the English case of *R (European Roma Rights) v Prague Immigration Officer* (2004), which was based on a comparable English statutory provision.

Litton thought the quotation was unnecessary and doubted its helpfulness because section 5 SDO has a 'plain ordinary meaning' (Litton 2020). Litton also objected to the citation of a bundle of authorities on 'less favourable treatment'. This article does not agree with this view.

[3] It is helpful to take notice of three observations when reading Litton's commentary. First, Litton is not against adopting a liberal approach on public law issues. During Litton's judicial service, his Honour endorsed that 'common law rules of construction themselves have a high human rights content' and interpreted the statutory provision in question liberally in order to comply with human rights (*The Attorney General v Mak Chuen Hing & 71 Others* 1996: para 16). Second, Litton is not necessarily against the reference to foreign common law authorities in all circumstances. In the commercial case of *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* (2009), his Honour referred to a Singaporean precedent and post-reunification English cases. Third, on other occasions, Litton has made other suggestions that are highly insightful but unfortunately beyond the scope of this article, such as whether the HK courts tend to cite an excessive amount of foreign authorities (Litton 2017).

First, the four-step test helpfully supports a more organized analysis. When applying section 5 SDO on whether there is a difference in treatment that is less favourable (which corresponds to Steps 1 and 3), section 10 SDO further supplements section 5 by requiring a comparison of whether the circumstances are materially different. Step 2 of the 4-step test conveniently refers to section 10. Step 4 logically follows after establishing section 5's less favourable treatment as it looks at whether there is another satisfactory explanation that is irrelevant to the protected traits (*R (European Roma Rights) v Prague Immigration Officer* 2004: para 73). Therefore, the arrangement of the four-step test is well and logically structured.

Second, whilst referring to foreign authorities can be burdensome, it offers many arguments and counter-arguments for the CFA to consider the issue. The CFA's liberal approach towards public law cases (mentioned in the above subsection) would also call for a thoughtful and holistic consideration of more perspectives. The general benefits derived from foreign authorities will be further discussed below.

[C] THE PROFESSIONAL SCEPTICISM TOWARDS FOREIGN CASES

Common law authorities

HK courts will not follow foreign cases blindly or arbitrarily, and will evaluate carefully the merits of the foreign cases' arguments, developments and applications.[4] Foreign cases are treated as persuasive only and are not binding (Yap 2014: 477-478). The courts will deal with foreign cases 'with caution' and are 'keenly aware' of the legal and societal differences with the foreign jurisdictions, in order to develop HK law 'that best suits the needs of the local circumstances' (*Secretary for Justice v Wong Ho Ming* 2018: para 56). The courts' professional scepticism justifies the great power to refer to foreign authorities.

Non-common law authorities

The courts are acutely aware of the jurisdictional differences with the ECtHR. Reminding itself to be extra careful, the CFA acknowledged the following observations of the Privy Council (*ZN v Secretary for Justice* 2020):

[4] See e.g. *Citic Pacific v Secretary for Justice* 2015 (which refused to follow *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* 2003 on the matter of legal advice privilege).

> different jurisdictions may develop the law in ways that reflect their own constitutional traditions, legal procedures and collective values … the [European Convention of Human Rights] is a regional human rights instrument and … the values which it seeks to apply are those of the member states of the Council of Europe … This means that the scope for inconsistency between the decisions of the court as an international court and the values and practices of individual jurisdictions is necessarily increased (*Lendore v Attorney General of Trinidad and Tobago* 2017: para 60)
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> …
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> The decisions of the European Court of Human Rights are *not a source of law* … [but] *valuable persuasive authority* on the general principles underlying the protection of particular rights … (*Lendore v Attorney General of Trinidad and Tobago* 2017: para 61, emphasis added).

Potential judicial oversight

That said, this does not mean that judicial mistake will never occur.[5] Incomplete understanding of foreign law may occur in practice, often due to lack of time and capacity to thoroughly review the jurisdictional and contextual differences. In the words of the former High Court of Australia judge Kirby J:

> in the nature of their lives as problem solvers, judges and the advocates who appear before them *often lack the time* to analyse a legal problem *with a full understanding* of the history of the relevant branch of the law, the conceptual weakness of past authority, and *the social and economic context in which the law must operate* (Kirby 2002: 7) (emphasis added).

In this regard, Litton's view could be seen as a warning against inadequate review. Naturally, 'the appeal and normative value' of foreign cases could at times be 'irresistible' (Yap 2014: 471). 'The mere luck that an issue had attracted judicial comment (or had been litigated in another jurisdiction) could tilt the balance of reasons i*n favor of deferring to an erroneous view*, just because there were more persuasive sources in its favor' (Lamond 2010: 29 emphasis added).

For example, in the case of *Kowloon Development Finance Ltd v Pendex Industries Ltd* (2013), the HK CFA adopted the English test in *Chartbrook Ltd v Persimmon Homes Ltd* (2009) for determining rectification of contract for common mistake. The HK court did not conduct much of a review, with only two paragraphs of supporting analysis (Kwan 2020: 34).

[5] Other common law courts have made the same mistake. See eg Saunders 2006: 72; Smith 2006: 223; Reed 2008: 264; Bell 2014: 975.

By contrast, the English Court of Appeal held that *Chartbrook* was wrongly decided as a matter of 'principle and policy' (*FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* 2019: para 176). The English court reached this conclusion after a careful review of and balance between the competing '(1) principles, (2) precedent, (3) policy, (4) the approaches taken in other common law jurisdictions such as the Australia and New Zealand, (5) benefits and limits of the objective approach, and (6) whether injustice will be created by the two approaches' (Kwan 2020: 35).

After *FSHC Group*'s ruling that *Chartbrook* is wrong *in principle*, it is uncertain whether the HK case remains legally sound and if it should be followed. Being wrong *in principle* means that the doctrinal error could have been revealed much earlier had a more thorough review been done (Kwan 2020: 36).

This issue, however, should not be overstated for two reasons. First, it can be avoided with enough attention. The courts should always remind themselves of the legal requirement to have a *sufficient* judicial reasoning.[6] It was long held that 'a judge should give his reasons *in sufficient detail* to show … the principles on which he has acted, and the reasons which led him to his decision' (*Eagil Trust Co Ltd v Pigott-Brown* 1985: 122 emphasis added). In pinpointing the gist of adequacy, Beck suggested that 'the essential element of adequate reasons is disclosure of the path of reasoning leading to the decision' (Beck 2017: 934). Having an elaborated opinion can help 'minimising the likelihood of appeal', because it ensures the legal disposition has been properly and adequately justified (Waye 2009: 276).

Second, even if the HK court accidentally relied on a wrong foreign authority, it would not destroy the long continuation of the common law. This is because there are many remedial measures safeguarding against flawed reasoning. The common law and appeal systems are designed to constantly evaluate and mend any flawed decision. In fact, the very search for *ratio decidendi* itself involves a consideration of '*the strength and persuasiveness* of the reasons expressed in the judgment(s)' (*Youngsam v Parole Board* 2019: para 58, emphasis added). When assessing the *ratio decidendi* and its strength, it is trite that the court will, *inter alia*, take into account 'whether the ruling or its underlying reasoning *has been criticised by commentators or by judges in later cases*' (*Youngsam v Parole Board* 2019: para 59, emphasis added).

[6] This norm has been widely adopted in many common law jurisdictions, see eg *Doyle v Banville* 2012: para 2.3; Wellman 1985: 53, 54; Bencze & Ng 2018: 4; McIntyre 2020: 27.

[D] THE PRACTICAL NEED AND BENEFITS OF REFERRING TO FOREIGN CASES

There are pragmatic considerations which justify the courts' practice of referring to foreign authorities. The courts are not Eurocentric 'as moths to naked light'. The biggest benefit is that it allows HK courts to learn from the wealth of experience from other jurisdictions. This is perfectly described by former Chief Justice Li:

> it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence … Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them … (*A Solicitor (24/07) v Law Society of Hong Kong* 2008: para 16).

Some legal issues have seldom been litigated in HK, thus limiting the case law development.[7] The wealth of foreign authorities provides a diversity of solutions to choose from (Reed 2008: 259). It is especially useful for cases of first impression.[8] In this sense, they can be seen as a source of arguments (Benvenuto 2006: 2741), which saves counsels' and courts' time in developing a line of reasoning from scratch (Reed 2008: 268).

Furthermore, citing and learning from foreign cases is a form of 'judicial dialogue' or 'transjudicial communication' (Slaughter 1994; Benvenuto 2006: 2724, 2726; Balck & Epstein 2007: 793).[9] There is an interesting example of judicial dialogue, with two courts improving a legal principle together. *Shum Kwok Sher v HKSAR* (2002) dealt with the offence of misconduct in public office, and it suggested a number of factors for determining the seriousness of the misconduct such as the nature and extent of the departure from public responsibilities. The English Court of Appeal not only agreed with *Shum Kwok Sher*, but it also added a new factor on the seriousness of the consequence of the misconduct (*Attorney General's Reference No 3 of 2003* 2004: para 46). These two cases were then explored again in *HKSAR v Tsang Yam Kuen Donald* (2019), where

[7] See eg *Dr Yeung, Sau Shing Albert v Google Inc* 2014: para 54 (regarding the novel issue of libel by search engine).

[8] See eg *Dr Kwok-Hay Kwong v The Medical Council of Hong Kong* 2006: para 50 (where there is no domestic case law on whether certain restrictions against practice promotion imposed on doctors by the Medical Council contravene the freedom of expression).

[9] For the contrary view which argues 'dialogue' is not a good metaphor and it should be better described as a 'monologue' in the constitutional law context, see Law & Chang 2011: 529.

the CFA utilized all factors for determining the adequacy of judicial directions to the jury on this offence (Kwan 2019: 313).

Moreover, the foreign experience of picking a particular path of legal development provides valuable empirical insights for avoiding undesirable consequences or unsuitable paths (Scalia 2004: 306; Benvenuto 2006: 2727). In other words, foreign cases can be used as counter-arguments when evaluating potential lines of reasoning (Lefler 2001: 171). They help enrich and refine courts' reasoning (Lefler 2001: 166).

Besides, foreign authorities can offer refreshing perspectives (LaForest 1994: 220; Rajah 2010: 827). These assist judges to refine and reflect on *existing* principles or domestic solutions.

Finally, it also helps upgrading HK laws to prevailing standards in the common law world, especially in relation to commercial laws in order to maintain HK's reputation as an international financial centre (Mason 2007: 302).

The defamation case of *Jigme Tsewang Athoup v Brightec Ltd* (2015) demonstrates how the development of private law in HK is fostered by this practice. The HK court was able to adopt *swiftly*—at the stage of First Instance—the English defence of reportage as formulated in *Roberts v Gable* (2007: para 53). The defence of reportage is basically a defence based on neutral reporting by journalists of 'defamatory allegations which are neither adopted nor embellished' (Armstrong 2009: 441; *Jigme Tsewang Athoup v Brightec* 2015: para 78).

It actually took English law a long period of time of around eight years and a number of litigations to come up with this defence. It originated from the 1999 English case of *Reynolds v Times Newspapers Ltd* (2001), which provided for the defence of qualified privilege. The *Reynolds* defence of qualified privilege then continued to develop incrementally through *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* (2002) and *Galloway v Telegraph Group Ltd* (2006). It ultimately became the defence of reportage in *Roberts v Gable* (2007) (Armstrong 2009: 446-447). By contrast, HK had not encountered as many disputes as the United Kingdom, and the HK court was able to harvest the end product of this string of cases.

The HK court notably remarked that it had 'no reservation in accepting that such kind of defence is available in the Hong Kong courts' because 'the human rights considerations taken into account by the English courts are also applicable here' (*Jigme Tsewang Athoup v Brightec* 2015: paras 64-65). The court further observed the relevance of foreign insights:

> Like the United Kingdom, the freedom of expression and the freedom to receive information are rights guaranteed in the constitutional legislations in Hong Kong, and so the courts in both jurisdictions should likewise adopt a liberal approach in the development of the law relating to the doctrine of *Reynolds* privilege (*Jigme Tsewang Athoup v Brightec* 2015: para 71).

Apart from Litton's view on 'the Eurocentric leaning of the judgments' (Litton 2020), some have further contended English cases are more preferable to HK courts due to the historical connection (Lau & Young 2009: 190; Jiang 2013: 41). However, this is not true (*Secretary for Justice v Wong Ho Ming* 2018: para 56). Such a limited view fails to capture HK's position as an internationally open (financial) city. It is common for HK courts to refer to cases from other common law jurisdictions such as Australia, New Zealand,[10] Canada[11] and Singapore.[12]

How does the doctrine of precedent practically affect the citation of foreign authorities?

The trite doctrine of *stare decisis* needs no repetition here. There is the theoretical issue as to whether the doctrine will limit such practice to only dispositions involving novel legal issues when no binding precedent exists. Otherwise, the HK courts will have to apply domestic binding precedents. In other words, the doctrine functions like the English and Singaporean Practice Directions, thereby limiting the actual flexibility afforded by the constitutional assurance.

Obviously, the doctrine has no bearing on the appellate courts' discretion because the CFA can depart from its previous decisions (Lo & Ors 2019: 166); whilst the Court of Appeal can do so when its previous decision is plainly wrong (Lo & Ors 2019: 169). How about situations where the courts cannot depart from a binding precedent?

Contrary to the above *theoretical* view, there are—in *practice*—broadly three other situations where the courts refer to foreign authorities, despite the fact that they are not dealing with cases of first impression. Overall, the HK courts have maintained a very high degree of flexibility, sometimes as if the doctrine has been subdued.

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[10] See eg *Secretary for Justice v The Oriental Press Group Ltd* 1998: para 48, applying *Solicitor-General v Radio Avon Ltd* 1978 on contempt of court.

[11] See eg *Chan Ching Yuk v Otis Elevator Co (HK) Ltd* 2007: paras 38-39, citing Canadian cases regarding negligence involving lifts; *HKSAR v Tam Lap Fai* 2005: paras 17-18 on the issue of obstruction of police officer.

[12] See eg *Akai Holdings Ltd v Ernest & Young* 2009, where the court referred to *Skandinaviska Epskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* 2007.

First, foreign precedents have been used to *legally* supplement existing binding authorities. The HK courts in effect add a gloss derived from the foreign insights. This is best illustrated with an example.

In company law, directors' duties are owed to the company during normal times. However, 'where a company is insolvent the interests of the creditors intrude' (*West Mercia Safetywear Ltd v Dodd* 1988). This rule has become binding law in HK, and the CFA very clearly stated that the principle will apply where 'the company is insolvent, or near insolvent, or of *doubtful solvency*, or if a contemplated payment or other course of action would jeopardise its solvency' (*Tradepower v Tradepower* 2009: para 130, emphasis added).[13]

Subsequently in *Remedy Asia Ltd v Patrick Tong Hing Chi* (2020: paras 68, 71), the highly reputable judge Coleman J, with the assistance of leading commercial law counsels, did not let go of the opportunity to consider the latest English law development. Coleman J applied *BTI 2014 LLC v Sequana SA* (2019: para 220), which clarified that the trigger point of creditors' interests duty—namely 'doubtful insolvency'—should be understood as 'when the directors know or should know that the company is or is likely to become insolvent'.

The primitive view is that Coleman J did not adhere to the doctrine of precedent because his Honour based the decision on the English case *Sequana SA* (2019), rather than the HK case *Tradepower* (2009) which was not mentioned in the judgment. However, the better view is that this is consistent with the doctrine of precedent because the legal disposition was still centred on the notion of 'doubtful insolvency'—namely, the binding principle established in *Tradepower* (2009). The new English case assists the application of existing legal principles.

The practice of supplementing binding HK law with foreign precedents is common. The *Sequana SA* (2009) case was also applied by another HK judge as the 'leading authority' (*Wing Hong Construction Ltd v Hui Chi Yung* 2020: para 158). This practice is also observable in relation to other areas of law, such as tort law.[14]

[13] See also *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* (2014: paras 35, 41).

[14] The non-binding Australian case of *Wyong Shire Council v Shirt* (1980) on the tortious standard of care has been cited by at least three HK cases for the proposition of what a reasonable man would do in response to the risk of harm taking into account factors like probability of its occurrence (*Cheng Loon Yin v Secretary for Justice* 2006: para 55; *Wai Yip Hin v Wong Po Kit* 2008: para 63; *Ma Yong Mei v Cheng Muk Lam* 2015: para 46). The HK courts did not cite the existing binding authorities such as *Wong Wai Ming v Hospital Authority* (2001: para 8), which adopted *The Wagon Mound (No 2)* (1966: 642-43); *Cathay Pacific Airways Ltd v Wong Sau Lai* (2006: para 37), which adopted *Bolton v Stone* (1951). Yet, *Wyong* (1980) is just a supplementary gloss building on the same legal basis.

Second, the doctrine of precedent does not prevent judges from using foreign court's *factual* dispositions for reference. For instance, the HK court in *Ma Shun Hung v Chun Wai HK Holdings Ltd and Another* (2009: paras 16-22) referred to the Australian case of *Mugford v Ames* (2000) for (1) determining the factual causation of consecutive car collisions when more than one driver was negligent and (2) apportioning blameworthiness between the drivers. Whilst there are already authoritative guidelines raised by previous cases (eg *Rouse v Squires* 1973: 898; *Lau Shun Hing v Ng Ching Hung* 1991), the reference to the foreign case law instead did not infringe the doctrine of precedent as it was done for mere comparison.

Finally, the third situation is controversial, but is evidently a practice adopted by some judges. Whilst the first situation above involves applying *supplementary* foreign authorities, the third situation concerns the application of foreign authorities that are *inconsistent* with the binding precedents.

Under English law, the *Ghosh* (1982) two-stage test for dishonesty was replaced by *Ivey v Genting Casinos (UK) Ltd* (2017) with only the objective test left. The justification is that *Ivey* eliminates the loophole of *Ghosh*'s subjective limb which 'effectively allowed an ignorance-of-morality answer to liability' (Simester 2021: 47).

Not surprisingly, some judges at the first instance level took the bold step to rely on *Ivey*. It was applied in *Remedy Asia Ltd v Patrick Tong Hing Chi* (2020: paras 82, 282-284). Another judge—again with the assistance from leading senior counsels from both parties—applied the same in *Hing Yip Holdings (Hong Kong) Ltd v Cellmark China Ltd* (2021: para 102). It was also applied in *Americhip Inc v Zhu Hongling* (2021: paras 61, 67, 74, 82). Very importantly, there was no dispute as to the applicability and application of *Ivey* in those cases.

Strictly speaking, *Ivey*, which is in direct conflict with *Ghosh*, has not yet been adopted by HK appellate courts (*Re John David Meredith Wardell QC* 2020: para 11). On the one hand, this practice does not seem to sit well with the doctrine of precedent. On the other hand, the newest foreign authority was applied not because of the judge's personal or arbitrary preference. Rather, it is arguably done based on the understanding that the latest authority is more compelling and has resolved the flaws of the old precedent. This is arguably upholding the *gist* of the common law precedential system, which constantly evolves and improves. After all, 'the great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions' (*A Solicitor v Law Society of Hong Kong* 2004: para 19). Moreover, the swift

adaptation to new legal thoughts also conforms with HK's international standing. Notably, there was no appeal in all of the quoted cases applying *Ivey*, despite the obvious inconsistency with the doctrine of precedent. Very likely, this indicates the pragmatic appropriateness, cogency and acceptance of this less-spoken judicial practice.

Therefore, from the practical perspective, foreign precedents assist judges on both *legal* and *factual* dispositions. It also promptly connects HK with the pioneering legal developments overseas. It can be seen that HK judges are very keen on utilizing foreign authorities.

[E] CONCLUSION

This article affirms the court's ability to refer to foreign authorities for three main reasons. *Constitutionally*, this article is the first to raise that HK courts have a unique 'constitutional assurance' of their ability to refer to foreign cases. By comparison, other jurisdictions, like England & Wales and Singapore which do not share the same assurance, have even further restrained their power with Practice Directions.

Professionally, the courts are keenly aware of the jurisdictional differences, and will not blindly rely on them. This ensures the power to refer to foreign authority will not be exercised arbitrarily or capriciously. Whilst judicial errors sometimes inevitably occur, this should not be overstated as an objection against referring to foreign authorities. *Practically*, given HK has a relatively smaller case pool, the insights from the foreign authorities are very useful, if not essential.

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