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FEATURE

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Letter from the Editors

Hi friends,

Haven't seen you in a while! We brought you something - a feed that gives a glimpse into some major attention-worthy areas as of the first half of 2021 through two dimensions - "Changes in Hong Kong under Local and Comparative Lenses" and "Exotic Policies and Perspectives."

The former presents from "Commercial World", "Public Health", "Human Rights", to "Data & Privacy Law", while the latter focuses on the policies and their directions. Finally, we shall end our schottische with a classic revisit to one simple yet sophisticated question - what is the role of law? Especially in times of emergency.

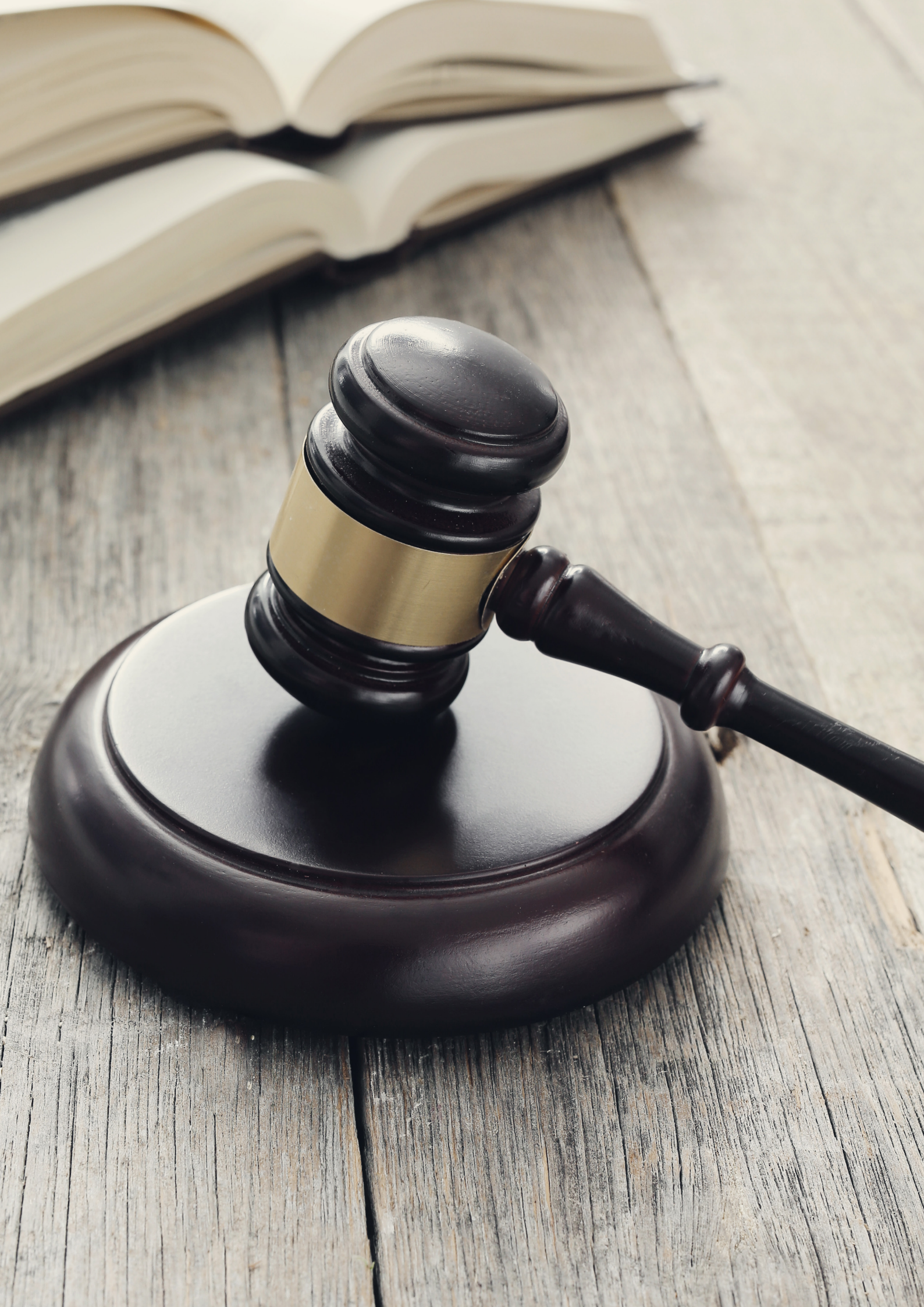
This issue is also dedicated to pointing out a trend for you by offering the feature interview with Commissioner Chung, covering the first "Guidance on Ethical Development and Use of AI" in Hong Kong and possible nudge on the legislative side across existing Data & Privacy issues. In short, with digitalization, we must anticipate convenience with awareness and cautiousness.

This issue has attempted new tricks - we tied the ends of the articles and legal news columns contributed by our editors. Thus, the outcome we hope to achieve is to create continual reading pleasure in which several smooth transitions can be expected.

Ready to spend some hours reading? Get comfortable and flip now, shall we!

Warmest regards,

Amos Xu & James Leung
Editors-in-Chief



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Commercial World

Hong Kong CFA's affirmation of the test in the rare tort of 'inducing a breach of contract'

Alvin Wong

INTRODUCTION

Inducing a breach of contract is a rarely raised but available tortious claim. Claimants often prefer bringing a simple claim for a breach of contract, given the difficulties in raising this tort. Consequently, there has been little Hong Kong judicial guidance on this area of law, with the recent 廈門新景地集團有限公司 *v Eton Properties Limited* decision providing a rare but welcomed clarification on Hong Kong's position regarding this tort. The decision from Hong Kong's highest court provides strong authority for the future application of this tort, highlighting the importance of demonstrating the tortfeasor's intent to cause the breach.

RELEVANT FACTS

In 2003, 廈門新景地集團有限公司 (Xiamen Xinjingdi Group Co Ltd "**Xiamen**") entered into an agreement (the "**Agreement**") with Eton Properties Limited and Eton Properties (Holdings) Limited (collectively referred to as "**Eton**"). The Agreement involved Xiamen purchasing land warranted to be held by Eton's subsidiary (the "**Land**"), Legend Properties Company Limited ("**Legend Properties**"). In exchange for the consideration provided by Xiamen, all shares in Legend Properties would be transferred to Xiamen.

Four months after the Agreement, Eton sought to repudiate the Agreement. Xiamen subsequently brought arbitral proceedings under the arbitral clause in the Agreement, where an award granting damages and specific performance demanding Eton to 'perform its obligations' was issued in favour of Xiamen. When Xiamen sought to enforce the award under the Hong Kong Arbitration Ordinance (Cap 341)Eton resisted and claimed that enforcement of the award would no longer satisfy the specific performance obligations under the arbitral award. At this point, it was revealed that Eton had previously undergone restructuring, effectively diluting Legend Properties' majority shareholding in the land.

Xiamen subsequently began fresh common law actions in the Hong Kong High Court, seeking an alternative claim for damages in lieu of specific performance, as the contract was no longer capable of being performed. Several common law claims were brought, including an economic tort claim that Eton had induced Legend Properties into breaching the contract. This is an uncommon but ever-present source of action that has not previously received judicial clarity from Hong Kong's highest court. This article will focus its discussion on the judiciary's commentary and clarification on Hong Kong's position on this tort.

JUDICIAL POSITION ON INDUCING A BREACH OF CONTRACT

A claim for inducing a breach of contract is unusually stringent, requiring the claimant to show that the respondent actually knew and intended to induce a breach of contract. This is in contrast with many other civil offences that can arise from mere negligence.

The House of Lords in *OBG Ltd v Allan* outlines the principal elements of establishing this tortious claim. In short, there are five elements:

i. the existence of a contract;
ii. that the contract is known to a third party;
iii. the third party does something which induces or persuades a contracting party to break it;
iv. the third party had the intent of bringing about the breach; and
v. such a breach caused the loss.

Lord Hoffman highlighted the particular importance of the fourth (iv) element in establishing this tortious claim:

'To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect.'

An example illustrating the importance of finding intent is *British Industrial Plastics Ltd v Ferguson*, where a former employee of the claimant offered the respondent information on a secret process that the employee had invented whilst under the claimant's employ. Although the respondent knew that the employee was contractually obliged to protect his former employee's trade secrets, the respondent held an honest but incorrect belief that if the process was deemed patentable, then it would be the exclusive property of the employee, and may therefore be rightly taken by them. The honest albeit incorrect belief in the law meant that the defendant could not have intended to induce a breach of contract. Thus, no tort of inducing a breach of contract was found. The alleged offender must have been aware (Element (ii)), and demonstrated the necessary 'intent' (Element (iv)) for the inducement to bring about the breach of a contract, and this has not been satisfied in *British Industrial Plastics Ltd v Ferguson*.

HIGH BAR TO MEET

In the present case, the Court of Final Appeal affirmed the Court of Appeal's decision that there has been no inducement of a breach of contract/the Agreement on two grounds, namely: i) there has been no breach of contract; and ii) there was a lack of intent to induce a breach of contract.

Regarding the first ground, the restructuring of Eton and its subsidiaries occurred two years before the repudiation of the Agreement. Thus, the court echoed Lord Nicholls statement in OBG in finding a lack of 'causative' element in the restructuring.

Regarding the second ground, which is more pertinent to our discussion, the Court of Final Appeal affirmed the Court of Appeal's finding that Eton was found to have honestly 'believed, albeit wrongly, that the contractual obligation to transfer the shares was already at an end once they had already made the decision not to perform it.' Without considering the fact that there was no breach of contract at all, the Court of Appeal found that the evidence sufficed in demonstrating that the restructure was made for commercial reasons unrelated to the Agreement or the dispute. Thus, 'it follows that none of the relevant participants in the reconstruction intended to frustrate the contractual obligation to procure the transfer of the shares, even if that was its effect.' Consequently, no intent was found.

PRACTICAL IMPLICATIONS OF THIS JUDGEMENT

This judgement illustrates the importance of undertaking due diligence and making reasonable enquiries before entering into any commercial transaction. Where Party A enters into a contractual arrangement with Party B ("Party Contract"), sufficient due diligence should be undertaken by Party A to ensure that Party B is not already bound by existing contradictory contracts ("Contradictory contract"). Where a Contradictory Contract exists, independent legal advice should be sought by Party A to understand the precise contractual terms to ensure that appropriate steps are taken to prevent the breach of the Contradictory Contract. Failure to do so may expose Party A to the risk of the tortious claim for inducing a breach of contract. Despite the above, Party A should not be overly worried, since the 廈門新景地集團有限公司 *v Eton Properties Limited* decision remains protective of oblivious parties who demonstrate no intention of inducing a breach.

For example, in an employee-employer context, an employer poaching employees from other companies should ensure that the employees do not have restrictive covenants in their contracts, or that the covenants are properly discharged, lest they run the risk of inducing a breach of contract. Such was the issue raised in *Allen v Dodd & Co Ltd*, where restrictive covenants in an employment contract were held to be enforceable. Consequently, the new employers were exposed to the risk of a claim that they had induced a breach of contract. Ultimately, the respondents were found not liable, as they had obtained legal advice prior to hiring the employee, and honestly relied upon the legal advice in believing that the restrictive covenants were properly discharged. Thus, there was a lack of intent to breach the contract.

CONCLUSION

The recent Hong Kong Court of Final Appeal judgment clarified the importance of showing that the tortfeasor had knowledge of the breached contract, and appreciated the legal consequences of said breach. Demanding evidence of 'intention' creates a high threshold that few cases are able to meet. In the absence of raw malice, it is difficult to envisage scenarios where a party will be caught under this tort.

Commercial World

The future of SPACs in Hong Kong

Melissa Leung

At the Financial Leaders Forum held on 1 March 2021, the Financial Secretary Mr. Paul Chan together with the Hong Kong Exchanges and Clearing Limited (HKEX) as well as the Securities and Futures Commission (SFC) noted the possibility of introducing Special Purpose Acquisition Company (SPAC) listing to Hong Kong.

As a trend that started in the 1990s in the U.S., SPACs re-emerged in recent years. In short, SPAC allows a shell company to raise money for Initial Public Offering (IPO) before it acquires any operating private company. Working towards an IPO, the Money raised is usually kept in a trust. In 2019, one notable SPAC example was Virgin Galactic, which successfully merged with Social Capital Hedosophia and might subsequently march audaciously into the edge of space.

SPACs certainly keep lots of future investors on the hook for being speedy towards IPO and efficient. Though facing a tremendous amount of uncertainties out of non-entity, there are still loads of innovative companies that would like to go down this route establishing a SPAC for a quick listing. Companies aiming for fast growth in their "research and development" nevertheless rely on SPAC to raise capital efficiently.

However, SPACs circumvent listing rules and due diligence. The shell companies can easily become a vehicle to perpetrate frauds since there is no track record as a reference. Further, disclosure-wise, the investors may have no idea as to which target company's shares they are purchasing. Therefore, it is exactly the reason why HKEX and SFC have been, regardless of the prosperity the SPACs have brought to beneficiaries overseas, strict in upholding the disclosure requirement - the integrity of the Hong Kong financial market. All in all, Companies' 'backdoor listing' tactics are to be heavily scrutinised before they are allowed to enter the market.

One suggestion is that the target company is required to meet all the existing listing requirements. Rules ensuring disclosure, such as conflict of interest and evaluations of target company should be implemented for greater transparency. Investors' right to share redemption and vote should be safeguarded. The trust where investors' money is kept should also be examined by enforcement agencies. As always, the aim is to ensure both international competitiveness and investor protection.

Public Health

What's next for a COVID-19 Vaccine Waiver?

Wenxin Zhuo

INTRODUCTION

In October 2020, South Africa and India jointly initiated a campaign proposing a request for the World Trade Organization (WTO) to waive certain terms in the Trade-Related Aspects of Intellectual Property Rights (TRIPS), suggesting that the intellectual property (IP) protection in TRIPS slowed the manufacturing and access to COVID-19 vaccines in developing countries. To date, over 100 countries and international organizations including the World Health Organization (WHO) and United Nations AIDS charity (UNAIDS) have participated in the campaign. Earlier in May 2021, the United States, China, and Russia publicly endorsed the COVID-19 Vaccine Waiver (vaccine waiver), thereby significantly accelerating the negotiations for a potential vaccine waiver.

WHAT ARE THE TRIPS PROVISIONS AND WHAT DOES THE COVID-19 VACCINE WAIVER PROPOSE?

TRIPS is an international trade agreement on intellectual property (IP) among 164 member states of the WTO. It aims to protect intellectual property during trade activities to strike a balance between incentivising the creativity of IP owners and enabling public access to IP products. Among the areas that TRIPS covers, it specifically outlines the minimum standards of IP rights that patent owners must enjoy. It permits governments to issue "compulsory licence" under public health emergencies, which allows manufacturers in that country to produce the product or use the process under licence without the IP owner's consent. At first, compulsory licensing was restricted in the domestic market, following the amendment in the 2001 Doha Declaration. The new Article 31bis of the TRIPS Agreement further extended the scope to cover manufacturing and exportation of generic medicines for countries that cannot manufacture those products themselves.

On the other hand, the proposal for vaccine waiver covers a broader scope including waiving IP protection in copyrights, patents, trademarks, and undisclosed information procedures. The proposed waiver not only permits copying and access to the composition of the raw materials of the COVID vaccines, but also enables access to processes and technologies involved in manufacturing the vaccines. More importantly, waiving the undisclosed information procedures may potentially undermine the protection of foreign companies' trade secrets. According to a review on the American Action Forum, Lee & Holt suggested that, if the vaccine waiver proposal is approved, it would be the broadest waiver of TRIPS since 1995.

WHAT ARE THE MAIN ARGUMENTS IN SUPPORT OF OR AGAINST THE VACCINE WAIVER?

According to the report on Nature, the vaccine waiver proposal has not gained support from the pharmaceutical industry or from developed countries such as Japan, South Korea, United Kingdom and the EU member states.

The supporters of the waiver suggest that:

1. U.K. research shows that obtaining compulsory licences is indeed an extremely time-consuming and complicated process. While for developing countries, research and development all by themselves can be worse - by the time the vaccine for one type is put into mass production, there might be new variants spreading due to the previous lack of vaccination. For instance, India has a high infection rate and wide spread of delta variants but a low fully injection rate at 4.4% of 1.3 billion people.

2. Deterrent for a patent waiver generally questioning the manufacturer's capacity and quality in the developing countries. But there is already a collaboration between Western countries and India in generic drug production. Between 1972 and 2005, India adopted process patenting rather than product patenting and led to a growth in its generic industry. Such collaboration showed the pre-existed confidence in India drug manufacturing in the Western countries. Furthermore, it is suggested that countries including Canada and South Korea had shown interest in making COVID-19 vaccines if they can get a patent waiver. It should be noticed that not only developing countries, but certain

developed countries with manufacturing capacity are also waiting for the vaccine waiver.

The opposing parties' counter-arguments:

1. The key issue for vaccine supply is not to waive the IP protection, but to utilise the available manufacturing capacity. Waiving the IP protection would not scale up vaccine production. The research from Duke University's global health innovation center shows that even utilizing the manufacturing utility would not necessarily help scale up the vaccine production. As the necessary technologies and know-how are not shared or even patented, waiving the patent would not enable the patent owners to share their technologies with the manufacturers. Moreover, since manufacturing a batch of vaccines takes 60 – 120 days, waiving the TRIPS protection would not speed up that process.

2. Since the TRIPS agreement already provides for a "compulsory licence" exception which allows the licensing of a patented product under public health emergency without the consent of the IP owner, it is not necessary to impose another broader patent waiver.

3. The International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) noticed that trade barriers, bottlenecks in supply chains, and scarcity of raw materials are all necessarily deterring the manufacturing of COVID vaccines. Similarly, the report from Nature identified that research and development of vaccines are centralised in high and middle-income countries. Pharmaceutical companies in these countries prioritize the sale of vaccines to their own governments or those of other high-income countries. Thus, even a patent waiver may do less in terms of facilitating the manufacture and accessibility in poor countries.

WHAT POST-COVID VACCINE PATENT PROPOSAL RIPPLES IN HONG KONG SOCIETY

Since the announcement of support from the main vaccine IP owner governments, i.e. the United States, Russia, and China; it sparked a tendency to enable the sharing of vaccines from developed countries to developing countries. Such a tendency was salient at the Global Health Summit in Rome in late May, in which European member states promised to share more vaccine doses with low-income countries. There are some remaining issues to be addressed regarding the effectiveness of a vaccine waiver and the scope of the waiver. Furthermore, whether that waiver would potentially backfire the research development of vaccines for COVID variants in the future? Disregard the aforesaid issues, the benefits of a vaccine waiver would still outweigh its impacts on the existing patent protection afforded to vaccine patent owners.

In Hong Kong, vaccine hesitation has been widely discussed among researchers and reports. A pre-vaccine-rollout study showed that vaccine hesitation among the elderly is largely (43.4%) attributable to a lack of confidence in vaccines produced by new platforms. Another study conducted by the Chinese University of Hong Kong reported that the overall vaccine acceptance rate for Hong Kong adults was only 37%. Several reports suggest that low confidence in the manufacturer and the health authorities is a major impediment to vaccine acceptance.

The Hong Kong government has appointed an advisory panel to assist the Secretary for Food and Health in deciding the authorisation of a specific vaccination in Hong Kong under ss 9, 3(3) of Cap.599K. Lam and Wong suggested the lack of specific laws in medical product liability in Hong Kong contributed to the low public confidence in vaccines and health authorities. An advisory panel is so far the ultimate measure to balance the views among health authorities in Hong Kong under time constraints. The potential vaccine waiver would nevertheless enable manufacturers around the world to produce COVID-19 vaccines with cheaper domestic materials. Such production may potentially harm the readily low confidence of COVID vaccines as there is a lack of proven quality and trust in new manufacturers.

CONCLUSION

As the COVID-19 vaccine waiver proposal gains more support from the mainstream developed countries and international organizations, a tendency to share more vaccine doses with the low-income countries is possible. It is necessary to discuss the scope of the waiver, so as to maintain the protection or compensation to the IP owners. Now, with time-consuming centralised vaccine production and exportation among the high to middle-income countries, a vaccine waiver remains the most effective way to expand vaccine production. In Hong Kong, due to vaccine hesitancy and lack of regulations in medical liability, the vaccine waiver may further undermine the public confidence in vaccines produced by new platforms. In addition to further research, it is crucial that the government further enhances its regulation beyond Cap.599K as well as provides more incentives to maintain public acceptance of vaccines in Hong Kong.

Public Health

Medical Law Concerns - Mental Health

Ian Sun

Focus: Mental Health – Guardianship – Court of First Instance
Case: *X v Director of Social Welfare* [2021] HKCFI 25

Can the Hong Kong government undertake the role of a guardian for mentally incapacitated persons? The answer is "YES". Under 59O of the Mental Health Ordinance ("**MHO**"), the Guardianship Board (the "**Board**") may make a Guardianship Order (the "**order**") appointing a guardian in respect of the mentally incapacitated person.

But not just any and everybody can apply for the order. According to s59N(1) MHO only: a relative of the mentally incapacitated person; a social worker; a registered medical practitioner or; a public officer in the social welfare department can make a guardianship application – subject to the satisfaction of the provisions' requirements.

A RECENT ILLUSTRATION

In *X v Director of Social Welfare* [2021] HKCFI 25, the Court of First Instance affirmed the rule that a guardianship application will remain valid unless it can be shown there has been a breach of legal procedure.

Mrs.Y was an 85-year-old elder who suffered from Alzheimers, Dementia, Diabetes, and Hypertension. In 2018, she was put in a rehabilitation centre and was confirmed to be mentally incapacitated in late 2019. Plaintiff, her third son, was in charge of her welfare needs. Despite this, Mrs.Y was suitable for discharge and the government also offered a residential care place for her. Plaintiff rejected both counts. The Director of Social Welfare applied to the Board for an order citing reasons to protect Mrs.Y's welfare. Plaintiff now appeals to cancel this order.

Pursuant to s59W MHO, when reviewing a decision made by the Board, the Court will look at a question of law or any other question with leave from the court. The Court also reminded that permission to appeal is only granted to arguments that have a reasonable chance of success. In this case, Plaintiff's arguments were purely based on facts – they did not raise any legal issues against the Board nor was any evidence of a breach of procedures or unfairness presented.

Since there was no legal error in the Order, The Court of First Instance dismissed the Plaintiff's appeal. The Director of Social Welfare was allowed to be the guardian of Mrs. Y. Noteworthy though: if the appeal were successful, this could have had the effect of cancelling the Order made by the Board – effectively revoking the guardianship status.

LESSON LEARNT

When appealing against the decision of the Guardianship Board, like any administrative body, the Plaintiff has to seek permission to appeal to raise either a question of law or other questions with permission granted. Where permission is not granted, Plaintiff may not raise an argument with respect to those facts. A strong reminder that the public appeals process is a review of legality as opposed to merits.

Human Rights

Reforming Maternity Protection in Hong Kong

Zoe Kum

INTRODUCTION

Hong Kong finally aligns with international standards when maternity leave ("**ML**") is extended from 10 to 14 weeks in December 2020. While it is a welcoming amendment to our current laws, it inevitably prompts us to think broadly about how Hong Kong can strengthen its maternity protection regime to meet the needs of modern-day Hong Kong working women.

To balance the interests of both employers and employees, this article proposes two possible legislative reforms tailored to the economic and cultural landscape of Hong Kong, namely (1) enshrining the right of reinstatement and (2) extending the maternity protection period against dismissal by 6 months.

BACKGROUND

To stimulate the local economy, the colonial Hong Kong government adopted a laissez-faire, non-interventionist economy that had always favoured employers, even at the expense of employees. Measures perceived as threatening the maximization of profits or competitions were resisted among the business sector. The colonial government was also half-hearted in lobbying for any legislative reform.

Not only were there historical factors obstructing Hong Kong from reform, but the monetary burden is also another issue. While many argue that Hong Kong should reference its global counterparts of similar economic status in expanding its maternity protection regime, it is important to bear in mind the fundamental differences that have barred Hong Kong from reforming.

For instance, Singapore and the United Kingdom ("**UK**") stipulate 16 weeks and 52 weeks of ML respectively, in which ML is fully or partially funded by social security systems. Lacking an equivalent system, coupled with the fact that Hong Kong has a significantly lower tax rate, it is difficult to convince employers to support extending ML beyond 14 weeks as ML pay is solely borne by employers.

Any legislative reform must therefore be checked against this backdrop. At present, it is wiser to implement reforms that can benefit employees but at the same time avoid incurring extra costs for employers.

POSSIBLE LEGISLATIVE REFORM FOR MATERNITY PROTECTION IN HONG KONG

1. The Right to Return to the Same Work

While section 15 of the Employment Ordinance (Cap. 57) ("**EO**") protects pregnant employees from termination once she has served her notice of pregnancy and intention to take ML to the employer, there is no equivalent statutory provision for post-ML. In fact, the Equal Opportunities Commission ("**EOC**") reported 21% of working women who failed to return to the same work position after childbirth felt compelled to resign due to losing their former job title, being transferred to a poorer working environment or given menial work.

The Chingtai Case

Lam Wing Lai v Y. T. Cheng (Chingtai) Limited (hereafter "**Chingtai**") is an example of how a female employee lost her work position and seniority upon returning from ML. The plaintiff formerly worked as an executive secretary to the chairman of a Board of Directors. She earned a decent income and was well-respected. She suffered pregnancy complications requiring hospitalization even before taking ML and the defendant hired a permanent secretary to replace her. When the plaintiff returned to work after ML, the defendant wished to terminate her contract due to her bad health. She resisted, but was subsequently moved to a downgraded workstation with menial work instructions coming from a human resources manager instead of the Chairman himself.

In assessing the case, Judge Wong recognized the adverse impacts on a female employee when her pre-ML position is not preserved:

"I accept that she enjoyed working in that position at the defendant company and was worried she would lose

that position when a permanent secretary was engaged to replace her after she went on maternity leave. The dismissal had cost her the friendship of her colleagues and a job in a respected position."

Although the Judge found the plaintiff to have been unfairly dismissed and awarded her substantial damages (including injury to feelings), it could not compensate for the effort she had invested over the years to attain her seniority. While this judgment was handed down more than a decade ago, the case would still be decided the same way today as there is no provision in place to ensure a woman's seniority, pension, contractual terms and conditions remaining intact upon returning to work from ML.

Why should Hong Kong enshrine the right to return?

The answer is straightforward - women should not have to seek another job or a comparable employment package just because they have a dual identity of employee and mother. EOC also proposed the same legislative reform in its 2016 recommendations to the government, acknowledging the need to expand maternity protection.

Codifying the right to return to the same work position is easier than prolonging ML because it basically incurs no additional costs or effort for the employer. It also makes economic sense to retain an employee who is already accustomed to the job, or even excelling at it, than to hire and train a replacement worker.

Hong Kong may take reference to both English and Australian legislation to formulate its own. In the UK, section 71(7) of the Employment Rights Act 1996 stipulates that an employee who has taken ML is entitled to return to her job with her seniority, pension, contractual terms and conditions and other similar rights intact, as if she has not been absent. In Australia, section 84 of the Fair Work Act 2009 stipulates the same where the right to return is applicable to both mothers and fathers. Both jurisdictions specify that an alternative and equivalent position must be arranged for the female employee in case her pre-ML position is no longer available.

As the Australian provision provides a higher threshold, perhaps Hong Kong should take incremental steps by adopting provisions of the UK with the goal of working towards the Australian standard.

2. Extending Maternity Protection Period

Prohibition against termination of the contract ceases when a woman has given birth or undergone an abortion. In other words, the employer can dismiss a female employee once she returns from ML. In reality, many women face discrimination and differential treatment post-ML as they are presumed to be less ambitious or career-driven after having a child.

Take *Chingtai* as an example. The employer made use of the loophole in our legislation to circumvent the consequences of EO s.15 and instead chose to terminate the plaintiff post-ML. If there had been a provision in place, such an incident would not have happened.

As the Legislative Council proposed in 2018, this article also calls for extending the maternity protection period against unreasonable dismissal by 6 months upon the employee resuming duty post-ML. The rationale is to allow a new mother to re-establish herself in her workplace without fearing dismissal or discriminatory treatment.

The proposed Pregnancy and Maternity (Redundancy Protection) Bill in the UK

The UK faces a similar situation as Hong Kong where annually around 54,000 women lost their jobs as they became mothers. The UK government announced in 2019 its decision to extend redundancy protection by 6 months upon the employee's resumption of work duties. Hong Kong may reference this Bill to amplify its existing protection. Extending maternity protection by 6 months also does not incur additional costs on employers; yet, it is going to benefit new mothers tremendously as they adapt to their new roles.

Again, any decision must be checked against Hong Kong's unique economic and social landscape in determining the appropriate length of protection period post-ML. It does not matter at present whether the Legislature considers 6-month or 3-month to be an appropriate length; either way, our current laws have to take incremental steps to afford greater protection for working women.

CONCLUSION

This article acknowledges the fact that the legislation alone is insufficient to reinforce maternity protection. However, legislative reform can be the first step to prompt both employers and employees to re-think their current positions. To avoid resistance from employers, this article proposes two possible additions to our laws, namely (1) the right of reinstatement and (2) the extension of the maternity protection period. This article argues for their applicability and feasibility to Hong Kong for they strike a balance between employers and employees' interests (i.e. do no harm to the employers while benefiting the employees).

Human Rights

Hong Kong Immigration Amendment Bill

Rachel Law

IMPLICATIONS OF THE IMMIGRATION (AMENDMENT) ORDINANCE 2021

Since 1 August 2021, asylum seekers and refugees in Hong Kong filing non-refoulement claims or appealing to the Torture Claims Appeal Board (TCAB) are subject to the new arrangements introduced by the Immigration (Amendment) Ordinance 2021. The amendments mainly concern screening interviews and medical examination requirements, the appeal mechanism, and detention policy and enforcement. Civil society organizations like Justice Centre Hong Kong have expressed immense concern over these amendments, especially since there had been no public consultations or amendments made before the Ordinance was passed, despite multiple requests by these organizations.

Under the amended Ordinance, screening interviews are now mandatory upon the Immigration Department's request, even though the Department can proceed to review a claim without such interviews. In terms of the interview's language, while publicly-funded interpretation services are still available, the Ordinance now allows the Department to mandate a language that it considers the claimant to be able to understand and communicate in. The Department has also been granted the power to arrange medical examinations where the claimant's physical or mental condition is in dispute. Such power is arguably unrestrained by the claimant's consent, for the failure to consent to arranging, conducting, or undergoing a medical examination, or disclosing the full medical report, will now give the Department discretion to disregard the disputed condition.

Asylum seekers and organizers have challenged the procedural fairness of these requirements. Rachel Li, an organizer with Justice Centre, sees such language requirements as a possible breach of the Bill of Rights Ordinance and the Official Languages Ordinance, the latter of which stipulates 'a party to or a witness in any proceedings or a part of any proceedings may— (a) use either or both of the official languages; and (b) address the court or testify in any language." (s 5(3), Cap. 5). The procedural fairness of the medical examination requirement has also been called into question: Dr. Beh Swan Lip, Co-Director of the Centre for Medical Ethics and Law, contends that consent clouded by the threat to disregard the disputed condition is, in effect, similar to coercion and puts claimants in a disadvantaged position.

The changes to the appeal mechanism, detention policy, and inception enforcement similarly prioritize expediting the removal of claimants from Hong Kong. The appeal process is condensed through a shortened notice period for oral hearings, along with the granting of the aforementioned powers relating to language and medical examinations to the TCAB. Detention, deportation, and heightened inception at source are now clear enforcement priorities. Particularly, the Ordinance calls to expand Hong Kong's detention capacity through existing facilities, such as the recommissioned Tai Tam Gap Correctional Institution, as well as encourages the removal of claimants by allowing the Department to make repatriation arrangements even when appeals are still awaiting handling.

The move to increase detention is especially contentious given numerous reports of abuse and arbitrary detention at the Castle Peak Bay Immigration Centre, which had already prompted multiple hunger strikes over the years, including a 178-day one in 2020. At the same time, allowing the Department to contact claimants' countries of origin before appeals' conclusion puts claimants in danger by disclosing their whereabouts and exposing them to possible persecution.

Given Hong Kong's policy is already one that does not take in refugees but merely processes applications for third-country resettlement, it is questionable whether there is urgency in expediting the removal of claimants at the expense of their welfare and safety. Beyond the immediate measures, the fact that these changes were passed without any public consultations or amendments is perhaps yet another reminder that, in today's Hong Kong, it is ever more important to work outside traditional institutions, build solidarity between different movements and groups, and root our work in communities to truly support each other.

Data & Privacy

"The Right to be Forgotten"

Tanya Parmanand

INTRODUCTION

"Be careful with what you put online" is what many have heard but tended to ignore. As posts are searchable and the Internet is always there, the right to be forgotten by the Internet, or those using it, seems to be something practically unrealistic. The right to be forgotten concerns an individual's claim to have their personal information removed from online search results. Beyond the freedom of expression, speech and publication that is enshrined in the Basic Law, it is desirable that individuals should also have the autonomy to control the information shared about them online, especially if the information could affect the person's life in an unjustifiable negative way. The right to be forgotten was recently derived from a landmark ruling of the European Court of Justice (the "**ECJ**").This right sets two conflicting rights - an individual's right to privacy and the public's right to access information - against each other, arguably causing implications for which right should be valued more. This article will address the difficulty of balancing these two rights and provide further insight into how different jurisdictions aim to strike this balance, the experience of which may apply to Hong Kong in the future.

THE RIGHT TO BE FORGOTTEN

The European Parliament's legislative resolution dated 12 March 2014 includes the "right to be forgotten" as a significant component of the proposal, advocating for individual's to have more efficient control over their personal data. The ECJ's landmark decision of Google Spain SL, *Google Inc v. Agencia Espanola de Proteccion de Datos, Maria Costeja Gonzalez* (Case C-131/12) concerns Mr. Costeja Gonzalez, a Spanish national, who requested Google to remove or conceal the search results of some 1998 newspaper announcements regarding the sale of properties arising from social security debts in his name. Although the debt had been resolved, Mr. Costeja Gonzalez's information was still present online and thus was irrelevant and misleading to the public. The ECJ adopted a test to establish the 'right to be forgotten', specifically whether the personal data is "inadequate, irrelevant or no longer relevant, or excessive" regarding (1) the original purpose of which the data was collected and (2) the time elapsed since the original date of publication. The ECJ ruled in favour of Mr. Costeja Gonzalez and upheld that an individual should have sufficient control over what could be searched about him or her on the Internet.

However, the ECJ also stated that the right should only be exercised on a 'case by case' basis, which means that a court should always consider whether the public interest in accessing the information overrides the individual's right to privacy. In doing so, a working party composed of the European Union (the "**EU**") data protection authorities released a set of Guidelines on how "the right to be forgotten" should be enforced across the EU. The Guidelines include 13 criteria to assess whether a request for information to be delisted should be granted. Among all, the most significant criteria are highlighted as follows:

- whether the person plays a role in public life and whether public access to that information will protect the public against the person's improper conduct
- whether the information relates to the exercise of a public figure's official functions rather than genuinely private information such as information about their health or family members; and
- whether the information is sensitive and thus has a greater impact on the data subject's private life

The United Kingdom (the "**UK**") adopted a similar approach by applying the 13 common criteria set out in the EU Guidelines, in *NT1 & NT2 v. Google LLC* [2018] EWHC 799 (QB). In *NT1 & NT2*, Google's search results featured links to third party reports regarding the Claimants' criminal convictions. The Claimants requested for the removal of their past criminal convictions on the basis that it was out of date and irrelevant. Whilst the first Claimant's claim was dismissed on the basis that he did not show remorse for his actions and that his conviction information was still relevant with regard to his dishonesty, the second Claimant's links were ordered to be delisted and deemed to be of no sufficient legitimate interest to Google users to "justify its continued availability".

One caveat should be noted: the right to be forgotten

concerns the delisting of Internet search results only. This means that the delisted information could still be accessed directly through the source or through other search terms besides the individual's name. The spectrum is quite broad, with one end emphasising how privacy will prevail due to the individual nature of the circumstances such as a victim of rape requested the removal of a link to a newspaper article about the crime. In sharp contrast, a British doctor had 50 links removed on his previous botched medical procedures and a German court once ruled that murderer Paul Termann had the right to be forgotten. Despite such removal could lead to the public making uninformed decisions, Google responded that it had considered both the individual and public interests. Whilst the right to be forgotten empowers individuals to have some control over the information published about them, the scope of the deletion is restricted and the right is not absolute. For European Union subjects, the doctrine is now enforced in Article 17 of the General Data Protection Regulation but is not absolute and is to be exercised on a discretionary basis. Domestically, France values this right as it has been enforced within their legislation in 2010.

APPLICABILITY TO HONG KONG

The ECJ decision on the right to be forgotten does not bind Hong Kong courts. Commenting on the ECJ decision on his blog, the Privacy Commissioner noted that "prima facie, the approach [the ECJ] has taken is not applicable under the Ordinance [Personal Data (Privacy) Ordinance (Cap.486) (the "**PDPO**")]". Currently, Google only abides by the requests from nationals of EU-countries and five other non-EU countries, which are Iceland, Liechtenstein, Norway, Switzerland and now the UK. However, in *Google LLC v CNIL* (Case C-507/17) highlighted an inadequacy in the law, as Google does not have to delete the names of individuals from all of its international versions, only the EU-abided ones. Hong Kong's constitutional right to privacy is enshrined in Article 14 of the Hong Kong Bill of Rights Ordinance, which is identical to Article 17 of the International Covenant on Civil and Political Rights (the "**ICCPR**"). The right to privacy is further implied under Articles 4 and 30 of the Hong Kong Basic Law to safeguard citizens ability to communicate freely and privately. As it is an international treaty, Hong Kong has an obligation, as a member, to develop the law consistently with the international standard of the ICCPR, in particular the protection of privacy. Constitutionally, under Article 39 of the Basic Law, Hong Kong must ensure its domestic legal system complies with the provisions of the ICCPR to protect the rights and freedoms enjoyed by Hong Kong citizens.

Currently, the PDPO is Hong Kong's main regulatory regime of data privacy issues. Hong Kong has recently clarified in *X v. Privacy Commissioner for Personal Data* (Administrative Appeal No. 15/2019, 7 August 2020) whether data victims do indeed have the right to be forgotten against operators of internet search engines. X, the data subject, was arrested by police for his involvement in the '2014 Umbrella Movement' in Hong Kong. His arrest was reported in various news articles, including his name, post title and the information on his arrest. Consequently, X lodged a complaint against Google to delist the links, complained to the Privacy Commissioner, and lastly appealed to Hong Kong's Administrative Appeals Board (the "**AAB**") on the basis of the right to be forgotten. The Privacy Commissioner dismissed the complaint, deciding that because Google LLC is a United States entity, which is legally different from Google Hong Kong and its operations have no presence in Hong Kong, thus the PDPO could not be extended to regulate the conduct of a foreign company. X clarifies the PDPO's scope of jurisdictional applicability, emphasising that PDPO is not applicable to data users and subjects whose operations are out of Hong Kong. This is despite the fact that the personal data collected concern the subjects in Hong Kong and are displayed on the browser's screen in Hong Kong. However, this does align with the structure of the Westphalian international system, whereby each country's jurisdiction is restricted to the parameters of their geographical territory.

IMPLICATIONS OF THE RIGHT

The AAB decision highlights inadequacy of the PDPO, suggesting that even if the data subjects are physically situated in Hong Kong, foreign companies with no operation in Hong Kong can be exempted from compliance with such legislation provided that the operation is not controlled within or from Hong Kong. Nevertheless, as online interactions are independent of the geographical location and span across several jurisdictions, it does to some extent render the traditional structure of the Westphalian system redundant. Whilst some argue that this renders the right to be forgotten irrelevant, the PDPO states that data can be removed if (1) personal data is inaccurate (Data Protection Principle 2); or (2) there is no longer any purpose (including directly related purpose) to keep the data (Section 26 of the PDPO).

Similarly, this criterion aligns with the criteria set out in the *Google Spain* case when considering the principles governing data privacy.

Similarly, in *Eastweek Publisher Ltd. and Another v. Privacy Commissioner For Personal Data* [2000] HKCA 442, Riberio JA stated that the PDPO does not purport to protect "personal privacy" as opposed to "information privacy" concerning a complainant's request to have the unauthorised photograph of herself removed from a published magazine.

Taking a perspective in the banking context, the Privacy Commissioner published a specific code of practice on consumer credit data, that a credit provider must inform its data subjects of their right to instruct the credit provider to delete account data relating to a terminated account. Additionally, the Code of Banking Practice published by the Hong Kong Association of Banks requires institutions to have appropriate control and protection mechanisms that acknowledge the rights of customers to obtain prompt correction and/or deletion of inaccurate, or unlawfully collected or processed data.

Hong Kong does not have a stand-alone right to be forgotten because whilst delisting information encourages individuals' autonomy, it arguably decreases the quality of the Internet through censorship and denialism. By essentially removing information, if it is relevant such as NT1's case, this would affect the public's full scope of understanding of that particular information. For instance, if NT1's criminal conviction was removed, lawyers and litigants could be unwary of certain facts surrounding criminal conspiracy and business activities. This can indeed impact the ability and validity of businesses to carry out procedures such as due diligence regarding anti-corruption, theft and anti-bribery laws. This will impact the execution of the business activity, such as in mergers and acquisitions without any legal oversight. Essentially, the purpose of the Internet is to further increase our understanding of knowledge and information. By limiting the amount of available resources, especially information that could assist the public in future investigation, it could impact one's knowledge in finding that information. Additionally, as noted by the Commissioner, the right to be forgotten shouldn't "take precedence over freedom of expression or freedom of the media". This essentially is a form of censorship which can distort the information accessible by rewriting the course of history and encouraging the dissemination of misinformation. So whilst many argue that the individuals' right to information privacy should be favoured, it needs to be decided on a discretionary basis to protect and safeguard the public's right to information as well.

CONCLUSION

These cases, especially the AAB decision, provide Hong Kong citizens with guidance as to when they can request for the removal of personal data. Although the right to be forgotten in Hong Kong does not exist on the same spectrum as that of the EU and UK. The right to be forgotten is a relevant, evolving issue that should be adopted in Hong Kong, on the basis of the Guidelines released by the working party of EU data protection authorities.

Balancing the right to access information against an individual's right to privacy is difficult because the balance is subjective in nature. I appreciate that there may be information online that would be of public health and safety interests. But when setting the two rights against each other, one must be careful to ensure an objective, rational approach to preserve the individual's right to privacy without compromising the public's right to the freedom of information. If the data is truly irrelevant and no longer serves any purpose, then an individual's right to privacy should be of greater importance because the victim should control what they wish to share publicly. Otherwise, it undermines the role, accountability and responsibility of search engines and the Internet as a whole. Truly, if it is important to the public and their understanding of certain issues, then the right may not be enforced.

For more insights, please see from next page for feature interview with the incumbent Privacy Commissioner of the PCPD - Ms. Ada Chung Lai-Ling, JP.

Data & Privacy

ICT Revolution: Hong Kong's Shield of Personal Data Privacy in the Era of Big Data

Feature interview with the Privacy Commissioner - Ms. Ada Chung Lai-Ling

I. ROLE AND RESPONSIBILITIES:

1. WHAT IS YOUR TYPICAL DAY LIKE? WHAT ARE THE MAIN RESPONSIBILITIES YOU CARRY SINCE ASSUMING THE POSITION AS THE PRIVACY COMMISSIONER FOR PERSONAL DATA ("PRIVACY COMMISSIONER")?

I have a very tight schedule almost every day rushing in and out of meetings.

To start my morning, I would read the news highlights prepared by my media team because very often there are issues related to privacy with which we have to keep track and deal. We receive and handle quite a lot of enquiries relating to various aspects of life, such as the LeaveHomeSafe App ("安心出行") and the use of social media and instant messaging apps. We also hold media briefings on our work, and recently we have hosted one on the topic of Artificial Intelligence ("AI") in August. [1]

In terms of daily routines, I supervise in person the handling of more complicated complaints and compliance work. With the basic groundwork done and prepared by my colleagues, I would look at the complicated or more sensitive cases before a final decision is made.

Another important part of our work is advising other government departments, private and public entities on their services or new initiatives. A case in point is the Government's Cash Payout Scheme where privacy issues were raised as to whether the data collected from the last exercise should be used to effect payment this time.

Other than that, more recently, I have been very engaged in a legislative amendment exercise. The 2021 Personal Data (Privacy) (Amendment) Bill (the Amendment Bill) was introduced on 21st July by the Government into the Legislative Council of Hong Kong ("LegCo"). Therefore, I am required to attend the bill's committee meetings at LegCo from time to time.

On top of these, I also oversee the office management, the handling of personnel matters and promotion projects of my office. Indeed, I have a lot on my plate.

2. HOW AND WHY DID YOU DECIDE TO TAKE UP THE APPOINTMENT AS THE PRIVACY COMMISSIONER?

It is primarily because of a firm conviction that the work of the Privacy Commissioner is interesting and challenging.

Owing to the rapid technological development and the rising expectations of privacy from the public, I do believe that privacy issues and related laws and regulations will be in the spotlight for the next decade.

In the Mainland, the Personal Information Protection Law, the first piece of legislation dedicated to the protection of personal information, was passed by the Standing Committee of the National People's Congress on 20 August 2021 and will be effective from 1 November 2021. Globally, you have to handle and consider privacy issues in the light of AI development. We have just issued the "Guidance on Ethical Development and Use of AI". In terms of legislative development, various countries are also tightening up the regulations - that's why Hong Kong should also review and amend our privacy law

- the Personal Data (Privacy) Ordinance ("PDPO"), for one thing, to combat doxxing. After the current amendment exercise, we would proceed to carry out an overall review of the PDPO.

3. WHAT ARE SOME ELEMENTS YOU HAVE BROUGHT FROM THE COMPANIES REGISTRY TO THE OFFICE OF THE PRIVACY COMMISSIONER FOR PERSONAL DATA (PCPD)? IF ANY, WHAT PART(S), IN YOUR OPINION, HAD TRANSPLANTED WELL?

The most related aspect would be my experience in legislative amendment as head of the Companies Registry ("CR"). While serving as the Registrar of Companies, I engaged heavily in the rewriting of the Companies Ordinance. For law students, you might be very familiar with Cap. 622 (Replacing Cap. 32), which now includes over 900 sections. It took me and my fellow members in the whole team over 6 years to rewrite the entire Companies Ordinance. Furthermore, we worked on 12 pieces of new subsidiary legislation all together on top of the primary legislation. From the very beginning till the end, I participated in all the consultations and the drafting work and oversaw a team of lawyers to work on the project. We managed to complete the whole project on time and implemented it smoothly in 2014 (7 years ago), without major complaints. With this background, I am confident to say that I have abundant experience and expertise in handling a mammoth legislative exercise, and I do believe that this expertise would be of help if I were required to carry out any reviews or amendment of the privacy law.

Another angle would be my familiarity with complex IT systems in the CR that catered for the needs of electronic incorporation of companies, electronic search of company information, and electronic filing. CR was one of the first departments that introduced mobile filing, meaning that company filing can be done on your mobile phone nowadays.

It might come as a surprise to many that technological advancement always poses risks to privacy. That's because the collection, processing, storing, and erasure of data by electronic means often involve personal data, and therefore the provisions of the PDPO have to be complied with.

4. WHAT ARE THE MOST ENRICHING AND DISTINCTLY THE MOST CHALLENGING ASPECTS OF YOUR CURRENT ROLE?

The PCPD's work in combating doxxing is a very challenging aspect of my work. The Amendment Bill would confer criminal investigation and prosecution power on the Privacy Commissioner. Therefore, it is an entirely new area of work for most of our colleagues. We must do quite a lot of preparation and internal training and enhance our collaboration with the police for the enforcement of the new law. Admittedly, it is a daunting task. Yet I firmly believe that we can rise to the challenge.

Another piece of challenging work is to amend the privacy law in a very short period – to enhance protection against doxxing. You may recall that the Chief Executive announced in February this year that the privacy law should be amended. We provided support to the Government and burned the midnight oil over the past few months to produce the Amendment Bill in July - in the hope of having the Amendment Bill enacted within this legislative session.

II. SPECIFICS ABOUT DATA & PRIVACY ISSUES AND DEVELOPMENT:

5. THE INTERNET IS A PERMANENT PLACE IN THE SENSE THAT IT IS HARD TO TOTALLY ERASE ONE'S HISTORICAL INFORMATION ONCE IT GETS POSTED. WHAT'S YOUR VIEW ON THE "RIGHT TO BE FORGOTTEN"? MAY THE DATA SUBJECT REQUEST TO HAVE HIS/HER "BAD HISTORY" REMOVED?

I entirely agree that once a piece of data is posted on the internet, it actually becomes a permanent footprint. Therefore, I always advise netizens to think twice before they disclose or post any information on the Internet.

On the "Right to be Forgotten", it was formulated by the Court of Justice of the EU in the Google Spain case. In 2014, the court affirmed an individual's right to compel a search engine to de-list certain search results related to that individual in question as the search links would compromise his position. After the ruling, there were subsequent questions and issues as to whether the "Right to be Forgotten" is an absolute right and whether it should be balanced against some other rights. In 2018, it was enshrined in Article 17 of the General Data Protection Regulation 2016/679 ("GDPR") as the "Right to Erasure".

There are several points to note regarding the "Right to be Forgotten":

1. It is not simply de-listing or deleting certain search results but the removal of a data subject's information. Given that the right is not absolute, it is subject to such conditions as "the data is no longer required for processing" and "the relevant data subject has already withdrawn his or her consent so as to evoke the "Right to be Forgotten". That said, there are many other exemptions based on "public interest" as provided for in the GDPR.

2. The "Right to be Forgotten" per se is quite controversial, and should be exercised carefully on a case-by-case basis.

3. Although we do not have such express right in Hong Kong, personal data should not be kept longer than is necessary under the PDPO, as provided in section 26 and Data Protection Principle 2(2) of the PDPO.

6. WHEN WRITING THE NEW COMPANIES ORDINANCE, WHAT WERE THE MAIN FACTORS YOU TOOK INTO CONSIDERATION? IN PARTICULAR, WHICH ISSUES DOES THE NEWLY DRAFTED VERSION ADDRESS REGARDING THE DATA AND PRIVACY ASPECT?

In re-writing the Companies Ordinance, we had four main objectives in mind:

1. Ensure better regulation	For instance, one of the proposals then was to modify the inspection regime of the Companies Register, so that sensitive personal data of a company's officer would not be subject to unrestrained access by the general public.
2. Facilitate business	Various administrative procedures of companies were streamlined.
3. Enhance corporate governance	New provisions on director's duties to clarify the law were introduced.
4. Modernise the law	The new law has been re-written in plain and simple language.

The provisions which introduced a modified inspection regime were not brought into operation in 2014 owing to controversy at the time. However, given the heightened concerns about personal data privacy, the Government revived the proposal earlier this year, and the modified inspection regime has been brought into effect in phases starting from 23 August 2021.

7. EACH COMPANY HAS ITS OWN PROTOCOL FOR STORING AND CONSERVING CUSTOMER OR CLIENT INFORMATION. IN YOUR OPINION, WHEN HANDLING SUCH DATA, WHAT ARE THE KEY CHARACTERISTICS THAT MAKE A STRONG AND SECURED "DATA AND PRIVACY POLICY' THAT MIGHT BE IMPLEMENTED BY A PRIVATE FIRM?

The way I see it, there is not a single solution that fits all. We have to look at the type of business in question and consider what type of personal data privacy policy they should adopt. But I would say that there are some overarching principles which companies should take into account, and which I strongly encourage them to implement.

First, I strongly appeal to companies to adopt a Personal Data Privacy Management Programme (PMP) which includes appointing a Data Protection Officer ("DPO") and establishing and maintaining a personal data inventory. Companies should also cultivate a corporate culture that respects and protects personal data right from the board room, and incorporate, for example, privacy-by-design and privacy-by-default in developing any new products or services.

Companies should also formulate data retention and data erasure policies. From our experience, some organisations do not have any data retention policy at all. Once they receive personal data, it ends up being stored in the organisation forever – a practice clearly in breach of the Data Protection Principles under the PDPO. Recently, we have released an inspection report on two major public utility companies, namely The Hongkong Electric Company, Limited and CLP Power Hong Kong Limited. After examining their personal data systems, we were glad to find that both companies had implemented a PMP and adopted good practices in safeguarding data. To further enhance the protection of personal data privacy, we advised those two companies to enhance the control on the access to their database system.

Last but not least, we strongly encourage companies

to appoint a DPO, as the DPO will act as the central coordinator and responsible officer in implementing the PMP.

8. RECENTLY, WHEN USERS DOWNLOAD NEW APPS, THEY RECEIVE A MESSAGE IF THEY WOULD LIKE TO HAVE THEIR ACTIVITIES TRACKED OR NOT. NOW, IN RELATION TO YOUR ARTICLE TITLED "USE OF SOCIAL MEDIA AND INSTANT MESSAGING APPS – A PERSONAL DATA PRIVACY PERSPECTIVE", YOU STATE: "ALTHOUGH MOST OF THE SOCIAL MEDIA PLATFORMS AND INSTANT MESSAGING APPS PROVIDE THEIR SERVICES FOR FREE, IT IS IMPORTANT FOR THE USERS TO KNOW, AND RECOGNISE, THAT ALMOST INVARIABLY THEY ARE GIVING UP OR SHARING THEIR PERSONAL DATA, INCLUDING INFORMATION ON THEIR ONLINE BEHAVIOUR AND BROWSING HABITS, ETC., TO THE RELEVANT PLATFORMS OR APPS IN RETURN FOR THE USE OF THE SERVICES." AS A FOLLOW-UP, WHAT TYPE OF "PERSONAL DATA" ARE WE GIVING UP WHENEVER WE DO USE THESE APPS SUCH AS SNAPCHAT, FACEBOOK, OR INSTAGRAM ETC., THAT WE OURSELVES MIGHT NOT BE AWARE OF?

I wrote that article as I am deeply convinced that it is important to raise public awareness of the fact that the use of social media carries inherent privacy risks, especially when even young children are using social media today. The situation is not healthy because people are using social media without an awareness of how much personal data they are giving up.

On an occasion, Mr. Jack Ma claimed that the most valuable asset of Alibaba is the data. Little do users of social media realise that they are giving up all types of data in return for the use of social media. While users might know that they are providing data for the relevant platform in the registration process, they might not be aware of the fact that they are giving up some other data, such as their browsing habits or locations when they surf the Internet. This is particularly true for youngsters, as most of them are more than happy to share their posts or photos online.

In the past two years, there has been a significant increase in telephone scams and online scams. Over the past year, there has also been a surge in online scams targeting children. One of my main focuses this year is children's privacy. Understandably, children are not always vigilant about the protection of their personal data and sometimes might even share their parents' personal data without their consent. They can become easy targets for fraudsters or other people with malicious intentions.

If you look at our publicity materials, we always advise the general public to think twice before they post any materials online, as it would leave a permanent digital footprint.

9. WHAT FACTORS DETERMINE WHEN THE PCPD TAKES ACTION IN RESPONSE TO ACTIVITIES OF A PRIVATE FIRM. SPECIFICALLY, WHENEVER PRIVATE FIRMS OR SOCIAL MEDIA COMPANIES DO INTRODUCE INITIATIVES IN HONG KONG, SUCH INITIATIVES LIKE THE COLLECTION OF PEOPLE'S DATA OR A CHANGE ON THE TYPE OF DATA COLLECTED, WHAT DETERMINES WHETHER THE COMMISSIONER SHOULD ACT OR NOT?

In the past year, we intervened on one or two notable occasions that served to shed light on the criteria we adopted when deciding to act. One was whether the incident affected a huge number of Hong Kong citizens and involved a huge amount of personal data. In those cases, I would need to look further into the matter. If there is prima facie evidence of some irregularity and great public concern, we have to initiate investigations and make enquiries on those alleged irregularities.

10. MANY SOCIAL MEDIA FIRMS DRAFT USER-FRIENDLY PRIVACY POLICIES TO ENCOURAGE YOUNGSTERS TO READ THEM. IN REALITY, THESE PRIVACY POLICIES ARE NOT ALWAYS READ IN THEIR ENTIRETY. WHAT DO YOU THINK ARE OTHER POSSIBLE ALTERNATIVES TO HELP USERS BECOME AWARE OF THEIR PRIVACY RIGHTS AND HOW THEIR DATA WILL BE USED?

I believe that there are many possible approaches today. If you take a look at the data privacy policy of some commonly used apps, you will notice that it is divided into different sections and sometimes presented with infographics or diagrams. Some tech giants are also adopting similar approaches. The privacy policies might be broken down into different sections with different headings, easy-to-read bullet points, supplemented by graphics and tables, or even videos.

These approaches make it much easier for people to understand the privacy policies of these organisations and I always encourage people to read them. I also believe that my office can do more in promotion so as to encourage companies to introduce a variety of means and make their privacy policies easily comprehensible to all users.

11. IN RECENT YEARS THERE HAS BEEN A TREND OF 'DOXXING' ESPECIALLY SINCE MID-2019. DO YOU CONSIDER CURRENT PRIVACY LAWS CAPABLE OF ADEQUATELY ADDRESSING THE THREATS THAT ARISE FROM SUCH A TREND, ESPECIALLY ONLINE? AS WE SURELY NOTICED IN YOUR ARTICLE PUBLISHED IN THE HONG KONG LAWYER'S JULY ISSUE, WHEREIN YOU PROVIDED A NICE DIRECTION OF LIMITING THE SCOPE OF UNRESTRICTED PUBLIC ACCESS, WHAT WOULD BE THE NEXT STEP IN PRACTICE?

The existing privacy law is not adequate in combating unlawful doxxing behaviour. Take, for example, section 64 of the current PDPO, which mainly deals with the disclosure of personal data without a data user's consent. The section covers scenarios where, for instance, personal data was obtained from a hospital without the consent from the hospital (data user). However, when it comes to doxxing in the cyber world, who is the data user as distinguished from the data subject?

In the Amendment Bill, the proposed new Section 64(3A) would make it a criminal offence for a person to disclose the personal data of another without the data subject's consent, instead of the data user's consent, and when the disclosure was made with the requisite intent or recklessness to cause specified harm to the data subject or his/her family members. Apart from these elements for the offence, if any specified harm is actually caused to the data subject or his/her family members, a more serious offence under section 64(3C) might have been committed.

The new foundation would facilitate more effective enforcement. Once we prove that the personal data was disclosed without the consent of the data subject, we can take further enforcement actions. Otherwise, we would have to identify who the data user is in the first place, which is often a very difficult job in the cyber world.

On the question of access to public registers, the Government has a plan to review all the public registers. In 2015, the PCPD published a survey result of ten public registers, and we recommended that access to public registers should not be unrestrained. I welcome the recent move of the Government to tighten up the access to sensitive personal information on public registers, as this move will enhance the protection of personal data privacy. I believe that the Government will strike a reasonable balance between protection of personal data privacy and access to public information.

12. CERTAINLY, THERE IS NO ABSOLUTELY MATURE JURISDICTION TO FOLLOW WHEN IT COMES TO FINDING A PRECEDENT FOR A DATA AND PRIVACY ISSUE AT HAND IN THE CONTEXT OF HONG KONG. YOU MENTIONED THE APPROACHES OF THE UNITED KINGDOM ("U.K."), SINGAPORE, AND AUSTRALIA TOWARDS OFFICER'S PRIVATE INFORMATION CAN BE OF REFERENTIAL VALUE. ARE THERE ANY OTHER JURISDICTIONS THAT ARE ADVANCED AT A CERTAIN ASPECT OF DATA AND PRIVACY LAW WHICH CAN BE OF REFERENTIAL VALUE TO HONG KONG?

In terms of reviewing the current privacy law, we have been looking at the laws of other jurisdictions, including Australia, Singapore and the U.K. On top of that, we also make reference to the GDPR of the European Union from time to time. The GDPR is now widely recognised as the golden standard of personal data protection. Under the GDPR, the data protection authority has the power to impose hefty administrative fines, up to 4% of a company's annual global turnover or 20 million euros, whichever is higher. At the moment, my office does not have such power. If the PCPD had power to impose fines, it would make our enforcement efforts much more effective.

Second, under the GDPR, there is a mandatory notification regime for data breach, which again is absent in Hong Kong. This is really important, because unlike what happened in the past, data breaches today may affect hundreds and thousands of people. We do have a strong case to make notifications mandatory so that my office can be notified in the first place and take remedial and rectification actions. Other than that, under the GDPR, it recognises and gives very specific rights to data subjects, such as the right to erasure and the right to withdraw consent or opt out from being subject to automated decisions. They are very detailed rights given to data subjects, which we can consider and take into account in our legislative review exercise.

13. PERHAPS YOU COULD ALSO TALK US THROUGH THE PUBLICATION PCPD RELEASED RECENTLY ON THE DEVELOPMENT OF AI?

While AI is becoming more and more important in Hong Kong, not too many people are aware that the use of AI carries privacy and ethical risks. We see the need to issue the "Guidance on the Ethical Development and Use of Artificial Intelligence" ("Guidance") to provide some guidelines for organisations when they develop or use AI because at present Hong Kong has no specific legislation governing or regulating the development and use of AI.

In the international arena, the Global Privacy Assembly has already promulgated some ethical principles on the development and use of AI. Back in 2019, Singapore and Japan issued their ethical frameworks in the area. I believe that the Guidance will facilitate the healthy development and use of AI in Hong Kong and empower Hong Kong to become an innovation and technology hub as well as a world-class smart city.

We are set to go further if we can leverage our capability or position as a data hub to develop AI. As to other parts of the world like Singapore and Japan, they have already put this ethical framework in place. There is a need for Hong Kong to do likewise.

Let me give you an example of bias or prejudice. There was a survey in the US concerning the efficacy of facial recognition technique. It was found that the error rate of facial recognition was higher in the proof of dark-skinned population. It was reported that in one incident, a dark-skinned man was mistaken for the defendant of a criminal case and was wrongly arrested and imprisoned. The reason behind was that the system used limited data from dark-skinned people, thereby leading to higher error rates for them.

The Guidance recommends that organisations embrace three fundamental Data Stewardship Values and seven ethical principles when they develop and use AI. We also provide a set of practice guide, structured in accordance with general business processes, and a self-assessment checklist, to assist organisations in managing their AI systems.

III. VISIONS:

14. WHAT DO YOU THINK OF THE PUBLIC'S AWARENESS OF DATA PRIVACY IN HONG KONG TODAY? IF NOT AT AN OPTIMAL STAGE, HOW SHOULD SUCH PUBLIC AWARENESS BE IMPROVED?

In general, the level of awareness is high.

Last year, we commissioned the Social Sciences Research Centre of The University of Hong Kong to conduct a survey on people's attitude towards the protection of personal data privacy. The survey results revealed that around 80% of the respondents were aware of the privacy settings on their social media accounts. Out of this pool, 80% of them had checked the privacy setting. From our survey report, over 50% of them with social media accounts stated that they would share personal photos or personal opinions with "friends" only. You can see that people are very careful and smart with what they share nowadays.

From our survey results, 98% of the respondents, being the vast majority, had instant messaging apps installed in their phones. Out of this pool, an overwhelming majority of 70% considered the access function to their contact lists to be privacy intrusive. 34% even called it a serious intrusion of privacy.

As one of the focuses of our publicity campaigns over the past year, we have been promoting the message of respecting other people's privacy, which I believe will help to build a more harmonious society.

15. BEING A LAWYER YOURSELF, ARE THERE ANY STRONG BENEFITS THAT COME WITH THE LEGAL BACKGROUND YOU FOUND AT WORK?

My legal knowledge and experience in implementing the law are of crucial importance to my present role where I have to monitor, supervise and enforce the provisions of the PDPO. As I have abundant experience in legislative amendments, I am able to provide the necessary support and expert input to the Government in the current amendment exercise to the PDPO. My legal background also helps me to discharge the duties of my new role in respect of criminal investigation and prosecution.

16. ANY WORDS TO OUR STUDENTS WHO HAVE PASSION FOR THE DATA AND PRIVACY PRACTICE? HOW SHOULD THEY BE PREPARED FOR THIS SPECIFIC PATH? WHAT ARE THE REQUIRED SKILLS BASED ON YOUR EXPERIENCE?

Data is getting more and more important nowadays, and its importance is exacerbated by the rapid

development of technology and electronic media.

Some people say that data is the oil of the 21st century. When it comes to personal data and its management, I would say this is an area which presents ample opportunities for students, whether they are from the Faculty of Law, Engineering or Computer Engineering. The global trend is to enhance the security measures of data, especially those regarding the processing, use and storage of online data.

We had the Industrial Revolution in the 18th century. For the past decade, I would call it an "Information and Communications Technology Revolution". In a decade ago, few of us had an iPhone, used instant messaging apps or social media. The advancement of technology and the use of online media have brought about fundamental changes in our lives, and this presents huge opportunities for students from all sorts of disciplines.

If you're talking about skill sets, I think legal knowledge is definitely a fundamental and core element in need. With the rapid development of technology, many jurisdictions are beginning to consider how we should regulate the cyber world.

Meanwhile, I would also encourage students to open themselves up to the development in information technology. The developments in cloud computing, AI and use of facial or voice recognitions are all cases in point. These new developments present a whole range of opportunities in jobs and research capabilities. The 21st century will surely be an era of data and information technology.

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[1] Media Statement on 18 August – 'PCPD Publishes "Guidance on Ethical Development and Use of AI" and Inspection Report on Customers' Personal Data Systems of Two Public Utility Companies' - see https://www.pcpd.org.hk/english/news_events/media_statements/press_20210818.html.

EXOTIC POLICIES AND PERSPECTIVES

Environmental Law and Regulation in the PRC

A Critical Analysis of the Administrative Regulations on Small-Scale Coal Mines in China

Fangyuan (Ashley) Zhang

INTRODUCTION

In the first 40 years after the "Reform and Opening-up", China's regulations on small-scale coal mines ("**SCMs**") made a "U-turn", from over-encouragement in the 1970s, while facing an energy supply crisis, to administrative closure at the turn of the 2000s when safety and environmental issues finally drew the attention of regulators. Considering the influence of coal in the energy supply in China, it can be a profound lesson for the country's future energy administration to dig into the regulatory history of the co

POLICIES AGAINST SCMS BY STAGES

Although the definitions of "small-scale" are diverse around the world, Chinese SCMs suffer from many of the same challenges as SCMs in other countries such as low degree of mechanization, power safety protection and health care, and heavy environmental pollution. Moreover, as staggering health and environmental problems mount, Chinese regulators initiated several campaigns against SCMs, despite not being unanimously accepted at the very beginning.

1. The first step: a consensus in the administration

In the golden age of the coal industry in the 2000s, SCMs overmatched large state-owned enterprises ("SOEs") in terms of their market competitive flexibility and low-cost production. Meanwhile, SCMs seldom failed to attract local leaders owing to the jobs and profits they created, which were regarded as their key promotion tactic and their chance for embezzlement. Therefore, the question of whether to close or re-open SCMs had become a heated battleground where the central and local governments in China had generated conflicting motives since 1998.

Luckily, Beijing had found its way to win this political wrestling. An emergency announcement was introduced in August 2005 banning state functionaries and heads of SOEs from investing in coal mines. The previous investors must withdraw by 22nd September 2005. The announcement suffered from heavy resistance and difficulties uncovering silent shareholders. In response, several following documents were issued to put it into execution, and enforcement efforts were advanced. These policies have gradually worked to cut apart the SCMs' way to local political influence. A great number of corruption investigations involving officials in major coal provinces and coal-related departments have also pushed local officers to draw the line and gang up on SCMs.

2. Against SCMs: regulatory mechanisms and implementation gaps

Primarily, mechanisms used in this process fall into the following three categories.

National target and provincial assignment

Most frequently, Beijing set targets for local governments to reduce the number and production capacity("PC") of SCMs. Even though we can hardly tell whether those "targets" are legally binding, the fact that they are often achieved in advance illustrates their influence in the administration.

The Local governments rushed to reduce the number of SCMs as soon as possible owing to the competition among members of the same rank and the pressure passed down. Nevertheless, when the target was handed to the direct enforcement agent against SCMs, usually the county government, it was added layer by layer from top-down. Hence, the level administration had to choose either i) being punished for disobeying orders, or ii) violating the legal procedure and rights of SCMs' owners. For example, Beijing ordered it to close pits with PC below 90 thousand tons per year ("tt/y") and with no safe production conditions in October 2013. The

national target was to close more than 2000 SCMs by the end of 2015. At the provincial level, the war against SCMs with PC less than 90 tt/y and no safety production conditions should be started in June 2014, finished by October, and accepted in November 2014 after the examination. For Yongxing County, the local government was pressed for time and demolished the facilities of Zhong He Wu Kuang, a local SCM before the owner agreed on the compensation. The corrosive demolition was held illegal in 2017 and Zhong He Wu Kuang was awarded damage to the facilities.

The recovery system: award and compensation

The campaign from 1998 to 2002 was carried out in such haste that no plans were drawn up in advance to address the socio-economic impact of the closure of tens of thousands of SCMs. The recovery system was not built up until 2009 when Beijing authorized local governments to use funds from the payment for the transfer of the mining rights to settle the social crisis after the compulsory closure.

But the problem was the pool of funds – with coal prices ballooning, governments and owners of SCMs could hardly make a deal to trade the mining rights. Some provinces offered to compensate for the remaining resources at 1.5-2 times the original price, which was still unwelcomed compared with the investment return at the market price. In the owners' opinion, the compensation was almost a blank check whilst they could easily make a profit by re-opening SCMs secretly. On top of that, it was unrealistic to ask understaffed regulators to keep an eye on the huge number of scattered SCMs constantly.

All these events led to catastrophic effects. The re-opening SCMs caused countless deaths of coal miners for lack of safe production conditions. Except for those major disasters like Meng Nan Zhuang Accident, many deaths that happened sporadically were beyond legal procedure because SCMs owners tended to pay large sums of damages to the families. The willingness to avoid lawsuits gave rise to a pathetic kind of fraud – murdering an average innocent miner inside the mine to blackmail the owner for compensation. For example, after a secret marriage with Zhang Xihua, the 38-year-old migrant worker Han Junhong was killed in an illegal SCM operation in Fangshan District, Beijing. 4 defendants, including Zhang Xihua, used his death to extort compensation from the manager by staging a homicide as a pure accident. Unfortunately, the local government believed that all the SCMs had already been closed till the murder was uncovered by the police. The death of Han Junhong was merely the tip of a substantial iceberg. Since most cases were settled out of court, the real number of lives lost due to the regulatory loophole would have been much more spine-chilling.

Hierarchical management: from closure to the merger

Based on the size and safety conditions of each SCM, Chinese authorities provide different kinds of SCMs with different policies. Whilst the smaller and more dangerous SCMs were closed directly, the merger, based on the coal mining transactions, was introduced to reduce the larger SCMs and encourage normative production in recent years. However, there has been a mismatch between booming coal demands and the less-developed mining rights market. In some provinces, mergers actually allowed SOEs to gobble up private SCMs.

For instance, Henan Province announced its first merger list of SCMs on 4th May 2010, with 466 SCMs to be merged into 6 provincial SOEs. The provincial government wanted to "create" three large coal enterprises with an annual output of 50 million tons before June by nominating both sides of the transaction. Under this circumstance, it was barely possible for the parties to reach a consensus on compensation and other crucial factors on time.

Even though the local government made it "create " large coal enterprises, the actual performance of those administration-made coals by SOEs was not full of hope. Local SOEs actually did not welcome the merger. Those companies must spend a lot to compensate the owners and upgrade their previous safety conditions in these transactions. Unfortunately, safety accidents still occurred. After the local government announced that Shanxi had entered the era of large mines and effectively reduced the death rate from coal production in 2011, journalists discovered there were several accidents concealed by local SOEs. Owing to its strong political influence, accidents screened by SOEs would be much harder to get assessed, which is totally the opposite of the safety production target.

Also, instead of settling the problem, the merger campaign merely postponed it. On 26th October

2020, SOEs in Shanxi decided to get rid of the PC of more than 62000 tt/y through 40 equity transfer projects. 80% of the projects were the result of the previous merger policy. As a traditional coal-mining centre, Shanxi is the bridgehead of the coal-related reforms. When a coal mine with a PC of 62000 tt/y became a burden in Shanxi, the prospects for SCMs in the whole country seemed by no means hopeful.

LESSONS LEARNED

Policies against SCMs have different main purposes at different stages, from safety production, pollution control, to industrial upgrading and sustainable development. We can find both the pleasing side and problems exposed in the regulatory framework and policy mechanisms over the 20 years.

The following efforts should be acknowledged considering the success in reducing accidents and pollution. The foundation is to control the political influence of SCMs and to motivate local government. Additionally, moving towards a market economy in the energy sector, despite being led by the government, is an inspiring trend. The market of mining rights is stressed under the Amendment Draft of Coal Law and more supporting documents are hoped to be introduced. Finally, the enforcement of laws is getting stressed. A public interest litigation system is used to settle the problem. The process is more judiciary-centred instead of administration-centred. Examples can be found in Heilongjiang, where the judiciary strengthens its supervision of administrative law enforcement.

Worries still exist in the problems exposed in this process. The over-enforcement of policies due to tight time limits and competition among local governments comes at the cost of legal procedures and human rights. Loopholes in the compensation system and trading scheme are also key tests for future reforms. Furthermore, we should be alarmed by the increasing imported coal and its potential threat to the delicate energy security of this country. Meanwhile, the increasing market dominance of SOEs in the coal industry can lead to a less transparent decision-making process in the future. It will be crucial to have the future investment willingness in the related industries to compensate the private investors who get squeezed out legally and properly. Last but not least, the market reform in the coal industry still has a long way to go. We can still find governments of various levels using command and order with path dependence 40 years after the market reform.

CONCLUSION

With the taking-off of the Chinese economy, energy security has been the leading consideration for its energy governance for a long time. To fill in the gap between the fast-increasing energy demands and relatively limited energy supplies, various policies were introduced to draw investments into the industry. Numerous SCMs were established to boost energy production in that era. Soon after that, under the pressure of safety regulation and environmental pollution, various policies were introduced in China to reduce small coal mines and inefficient installations.

With a carbon neutrality target by 2060, China's reliance on coal will further decrease, making how to get rid of the existing coal mines an extremely significant topic. What we can learn from the previous policies on SCMs can be inspiring to the way forward. After all, the problems exposed in this process are actually the problems existing in the whole system. We should not be limited to a specific sector or a specific department to find out the solution. Instead, systematic and intensive measures should be used to settle the problem we still face in the coal industry, as well as the reform in the energy sector in China.

What Competition Law Means to the Super Powers

Chinese Competition Law - Didi's IPO Implications in the Digital Era

Amos Xu

Seen as a great actualization for most of the investors and start-up builders, magical initial public offering ("**IPO**") has made a tremendous amount of overnight-wealth stories from being one of the many entities born and grown on Chinese soil to being either a Hong Kong or a U.S. listed company.

However, such collective self-actualization may no longer happen as frequently or imminently to many Chinese tech companies due to foreseeable rounds of tightening of the Chinese national-level regulations on monopoly and data and privacy and stricter VIE scrutiny [1] by the United States Securities Exchange Commission (SEC). With China's top ride-hailing company - Didi Chuxing ("**Didi**") hurried its listing on the New York Stock Exchange (NYSE) on June 30, 2021, the relevant prominent authorities across the pacific raised a high level of alertness.

The antitrust probe had started earlier in April by China's highest market regulator - the State Administration for Market Regulation (SAMR) as Chinese regulators required more than 30 tech companies to submit a self-inspection report regarding their potential violation of anti-monopoly laws through their online platforms. [2] The absence of confidence of such a self-inspection was revealed under the "risk factors" section in its Prospectus [3] as Didi disclosed the regulatory attention and scrutiny should be predicted going forward.

Naturally yet surprisingly, within several days since its listing, such strong regulatory attention didn't come from the competition side but data security. The Cyberspace Administration of China (CAC) initiated a swift review of Didi's existing user's data collection policies and ordered a pause of its App's operation on the ground of "national security" specified in the "Measures for Cybersecurity Review" effective June 1, 2020, provided also in both Art. 35 of the Cybersecurity Law of the PRC and Art. 59 of the National Security Law of the PRC. From the Chinese authorities' perspectives, the review should be thorough and seriously consider how the further disclosure requested by the SEC might trigger leakage of the domestic data subject's personal information, data services providers, or third-party storages' sensitive information. The App was therefore removed from the App stores and restricted from registering any new user.

Since there is never a fair way to assess a set of policies, let the right to judge reside with consumers and investors for they know whether these regulations have favored them or done against them, though much in retrospect.

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[1] SEC on July 31 - "Statement on Investor Protection Related to Recent Development in China."

[2] See Issue 17 - ("One Big Step in Competition") subsequently in April 2021, Alibaba was fined a shocking US$ 2.8 billion (representing 4% of Alibaba's 2019 total sales) for its monopolistic "choosing one from two" behavior that excluded merchants from running a second shop on any other platforms.

[3] https://www.sec.gov/Archives/edgar/data/1764757/000104746921001194/a2243272zf-1.htm#da10201_risk_factors. See full statement on page 54-55.

What Competition Law Means to the Super Powers

U.S. Antitrust Law Reform

Bertha Chui

Aiming to maintain market competition for consumers' and companies' benefits, the U.S. enacted Sherman Antitrust Act in the late 1800s to target market-monopolizing companies and anti-competitive cartels. Since then, Antitrust laws have been constantly updated to tackle new market issues. Senator Amy Klobuchar has recently introduced a set of new antitrust laws - the Competition and Antitrust Law Enforcement Reform Act of 2021("**CALERA**") [1] - aiming at taking on Big Tech companies that dominate e-commerce, social network, and online searches.

The CALERA has a central focus on enforcement and standards regarding mergers and acquisitions. By requiring merger companies to prove their deal would not be anti-competitive, it aims to lessen the burdens on the government in enforcement and remove requirements for enforcers in defining the market in pursuant of antitrust actions. It is foreseeable to hinder large tech companies in pursuing mergers and acquisitions deals with their competitors, meanwhile easing antitrust regulatory enforcements. In addition, rather than the traditional antitrust approach in considering whether the prices charged are reasonable for customers' benefits, the Act looks at a broader definition of consumer welfare, namely product quality. For instance, the Federal Trade Commission fined Facebook $5 billion for privacy violations in 2019, when its customers' personal data was evaluated and utilized for targeted ads. "We urgently need to rejuvenate our antitrust laws to meet the challenges of the modern digital economy," says Senator Klobuchar. It would be necessary for the government to revamp laws and therefore equip regulators with more tools restraining the tech companies' powers in the marketplace.

Further, the impacts of this Act are not constrained to just the technology sector. First, a presumption of harm would be found against any companies with exclusionary conduct controlling more than 50% of the market power. Dominating firms with significant market shares may, in return, bring up cases for their limited ability to compete with their competitors. Second, with the lowered requirements on the regulatory side, regulators and private plaintiffs have a less legal burden in proving various previously required elements for antitrust cases, such as quantification of the risk of harm towards competitions, or whether the defendant's conduct consists of no economic sense. The standard of proof on the effect of any acquisitions for plaintiffs also shifted from "may be substantially to lessen competition" [2] to "create an appreciable risk of materially lessening competition", which "materially" is defined as just "more than a de minimis amount". While the plaintiffs would have an easier time proving their cases, the defendants conversely would face additional litigation costs in proving their actions not to be anti-competitive. Companies will also face higher barriers to obtaining clearance on antitrust due to the lower bar provided by the wordings for regulators to block mergers.

While the CALERA has only passed the Second Reading stage, significant amendments on the enforcement of U.S. antitrust laws and increasing volumes of Mergers and Acquisitions deals under scrutiny can be anticipated once it's finalized.

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[1] U.S. Senate Bill 225, the Competition and Antitrust Law Enforcement Reform Act of 2021

[2] 15 U.S. Code § 18.

ROLE OF LAW

Law in Times of Emergency: From Substance to Form

Luca Bonadiman

What is the role of law in times of emergencies? In the present essay, I argue that emergencies are characterised by situations of ignorance. To confront such ignorance, I describe how law and politics react by falling back on formalism. I warn that this reliance on the form is conducive to power-shifts or power-grabs. I thus conclude by suggesting that the role of law should go beyond examining the formal validity of the exercise of government's authority and ensure a fair distribution of power in society.

EMERGENCY AND IGNORANCE

The main assumption of contemporary legal and political systems—as well as a key tenant of the rule of law—is that the power of government must be exercised rationally. One facet of rationality is that decisions must be based on reasonably known facts: decision-makers must *know* what they are doing. Regardless, the ongoing pandemic has exposed how situations of emergency may force governments to act in relative ignorance.

The pandemic, notwithstanding its unpredictability, is not exactly a special or unique case. From terrorism to climate change, there are many areas in which governments, for a variety of different and not always good reasons, seek to intervene despite the presence of both '*known*-unknowns' and '*unknown*-unknowns'. The past decades have shown that when decision-makers are operating based on scarce information or severely imperfect knowledge—that is, ignorance—they resort to various forms of expertise.

For the past year or so, it has become evident how governments have exercised their prerogatives. For instance, closing the borders, mandating the use of surgical masks in public spaces, and/or imposing some degree of surveillance for tracking possible infection in the name of medical expertise. However, no government formally delegated their powers to the medical profession: medical experts act as advisors, not as decision-makers. Medical expertise has provided guidance and legitimacy for a wide array of measures, many of which have proven unprecedentedly restrictive for the rights and freedoms of billions of people all over the world.

EXPERTISE AND METHOD

Unsurprisingly, medical expertise was not the panacea. Like all fields of knowledge, medical expertise is not unitary but vastly fragmented into different currents and views. Indeed, expert knowledge progresses through disagreement and dialectic between the members of a given profession. At the same time, medical expertise is not omniscient: it has lacunas as well. Accordingly, the way any field of expertise insulates itself from internal and external criticism is to rely on the method.

The prevalent scientific method is empirical: it quantifies facts under the assumption that enumeration can purify the reading of reality from biases. At its core, the empirical paradigm regards the world and its reality as the sum of potentially measurable patterns. The aim of empirical methods, therefore, is to identify and 'scan' such patterns in search for '*true*-truths' as opposed to '*dogmatic*-truths'.

Consequently, the power of any contemporary form of expertise lies in its ability to provide governments with statistical models through which they can come to a determination. This may incidentally explain why it has become a common perception that the power of governments is being challenged, displaced, or enhanced—depending on the circumstances—by the rise of technology companies that have turned statistical models into ever more sophisticated algorithms.

THE POWER SHIFT: CONCENTRATING POWERS IN THE EXECUTIVE

The dominance of expert methods in the way governments come to their decisions indicates that *form* takes priority over *substance*. The form—that is, the process, the protocol, the method, and so forth—is a way of coping with situations of ignorance. There may be a psychological aspect: following 'the protocol' insulates decision-makers from responsibilities. However, focusing on the form can also serve as a useful strategy for power-grabbing.

Emergencies potentially provide opportunities for governments to develop their competency in governance and emergency response, as well as to expand their powers, in unprecedented ways. Yet, the danger that comes with emergencies is that a system will typically fall back on special formal procedures to protect its existence and core interests. This over-reliance on formal procedures is what has historically enabled groups or individuals to seize political authority. In many historical instances, the rise of authoritarian leaders or dictators was not the outcome of a coup, but rather the skilful exploitation of existing procedures. [1]

In times of emergency, governments can gain enormous power over the population in two ways. First, it could be an overt exercise of force by seizing the circumstantial opportunity to neutralise or eliminate the opposition to concentrate power. The second path is subtler and less visible. Governments can leverage the fear arising out of the emergency to compel the population to follow 'instructions' that are couched as expert advice (e.g., medical advice).

The use of the term 'instructions', rather than 'orders', is relevant here because governments have not necessarily backed these instructions with punitive measures. In dealing with emergencies, governments can indeed require the public to do their part. To *voluntarily* follow instructions or guidelines, that is, to internalise a set of norms regulating their personal and social behaviour during the time of emergency. The government can then empower itself in the name of protecting the population.

Using expert advice to 'instruct' the population is also a way to reverse the function of a representative or decently democratic political system. The process is no longer one that conveys social demands to the decision-makers (i.e., bottom-up), but instead imparts instructions (i.e., top-down). In other words, power flows in the opposite *direction*: it is not the people who inform the political agenda and action of governments, but rather governments imposing priorities.

This institutional power shift is characterised by the prevalence of *process* over *outcome.* Formal procedures are driven by a functionalist logic, while an efficient process centralises information and powers to facilitate rapid and effective decision-making. On the other hand, the purported function of parliamentary politics is to deliberate and decide, which, to some, is an obstacle to quick decision-making. Over the past decades, many democracies have thus seen a progressive emptying of parliamentary functions at the advantage of executive prerogatives.

The 'institutional reversal' also shows how a focus on the form affects the *separation of powers* doctrine. Formally, the three branches of power remain distinct and separated. However, during emergencies, the executive branch at times encroaches on the functions and prerogatives of the legislative branch under the guise of public health regulations.

In theory, legislatures are supposedly the forum where representatives bring different societal views and interests to open debate and public scrutiny before coming to a deliberation that the government should actualise. Emergencies provide an easy excuse for the executive branch to circumvent legislative deliberation without breaching its formal procedures, thus, it is hard not to regard the legislature as a rubber-stamp for the executive in these instances. While this may partly be the product of other dynamics, such as party politics, the point remains that legislatures have derogated substantive powers to the executive, retaining what is ultimately a formal function: monitoring the executive's exercise of power through interrogations, inquiries, budgets, and so on.

THE ROLE OF COURTS

Reducing the legislature to the role of a rubber-stamper and formal monitoring means that the legislature is partly duplicating the function of the judiciary. At the same time, there has been a visible and contested trend of the growing involvement of courts in what some regard as political issues in the past decades. The simultaneous changes in—or blurring of—these branches' roles might suggest that the problem lies in the expropriation

of legislative functions through formal procedures, which has prompted people to bring substantive claims through the channel of courts.

The concentration of power in the executive has prompted courts to heighten and intensify their scrutiny through what some have applauded and others condemned as judicial activism. However, the law is also a form of expertise that is subject to the same reliance on forms and methods as other fields of knowledge. In situations of emergency, courts tend to be even more attentive to the form rather than the substance, as the subject of the claim—such as specific public health or disaster management policies— is often outside the court's realm.

In situations of emergency, courts generally limit their scrutiny to examining the formal validity of the decision-making process. Indeed, governments can legally suspend or limit rights, and the court's role is primarily to examine its procedural validity. A key factor in this approach is that courts do not regard themselves as possessing the necessary *substantive* expertise to challenge the decisions of the government. Accordingly, courts generally grant broad judicial deference, unless the measure is ostensibly (i.e., Wednesbury) unreasonable.

CONCLUSION

Legal expertise is not unlike any other professional field, except its focus is on the management of how our contemporary societies exercise and distribute power. Emergencies trigger greater reliance on formalism, which can result in an undesirable concentration of power at the advantage of governments. It is during these times that we should be exceptionally cautious of how law can be used to help governments attain efficient management of the situation, instead of fulfilling its role in guaranteeing a fair and sustainable distribution of power in society.

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[1] Historically, the most infamous case is that of Adolf Hitler, who rose to power via democratic elections and subsequently expanded his authority in response to perceived threats and crises. The rise of Benito Mussolini in Italy also occurred via regular parliamentary practices before suppressing democracy. For an introduction, see P. Morgan, Fascism in Europe, 1919- 1945, Taylor & Francis, 2002, pp. 15-158.

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