Applying Law Without Borders? Hong Kong's Curious Practice and Problems of Applying Foreign Authorities From Multiple Jurisdictions Simultaneously

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It is common in Hong Kong courts to apply cases from multiple common law jurisdictions regarding the same principle at the same time—a phenomenon that is less frequently seen in other jurisdictions. The courts adopt suitable ones as applicable law, not just quoting them for mere comparisons. The obvious, tempting benefits of having a greater pool of reference materials have already been well-established by existing literature, so this Article is instead the first to focus on the drawbacks.

In particular, the courts have failed to spot that sometimes the cases are actually inconsistent, which hampers clarity, certainty, and proper development. Three illustrative examples are discussed to show that this pitfall exists and is not one-off.

To avoid this, it is suggested that whenever authorities from multiple jurisdictions are cited concurrently, court and counsels should be skeptical and actively check for inconsistency. No matter how similar the principle may seem, there should never be any rash assumption of consistency. The judiciary should consider introducing a practice direction—which has already been done by Singapore and the United Kingdom—that requires counsels to cite local authority first.

This Article also explains why it is not helpful to limit the number of jurisdictions referred to, hire judicial assistants, and rely on comparative secondary sources. The insights will be helpful to other common law courts that occasionally refer to foreign precedents.

 Member, OBOR Legal Research Centre. Associate in Research, Fairbank Center for Chinese Studies, Harvard University. This Article can be read with another peer-reviewed article on the *overall* power and ability to cite foreign authorities: Martin Kwan, *Is the Hong Kong Courts' Ability to Refer to Foreign Authorities Unrestrained?* 4(1) AMICUS CURIAE 71 (2022). The present Article focuses on the *actual* practice of citing foreign authorities, the problems, and the room for improvements. The author wishes to thank the efficient team of editors.

I. INTRODUCTION

It is common that Hong Kong courts adopt cases from multiple common law jurisdictions regarding the same principle *at the same time*. Yet, courts have sometimes failed to spot that the cases are actually inconsistent, which hampers clarity, certainty, and proper development. Three illustrative examples are discussed in this Article to show that this judicial practice and underexplored pitfall exists, and this issue is not one-off.

To avoid this, it is suggested that whenever authorities from multiple jurisdictions are cited at the same time, court and counsels should be skeptical and actively check for inconsistency. No matter how similar the principles may seem, there should never be any rash assumption of consistency. The judiciary should consider introducing a practice direction—which has already been done by Singapore and the United Kingdom—that requires local authority to be cited first.

This Article also explains why it is not helpful or practical to refer to secondary resources, employ judicial assistants, or prohibit concurrent citations.

With the advancement of research technology[1] and the realization of the value of foreign experiences, citing foreign authorities has become

1. The impact of technology also affects a number of jurisdictions, which arguably in turn mutually affect each other. *See, e.g.,* Rebecca Lefler, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165, 166 (2001); Robert Reed, *Foreign Precedents and Judicial Reasoning: the American Debate and British Practice*, 124 L.Q. REV. 253, 259 (2008); James Allan, Grant Huscroft & Nessa Lynch, *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark—How Much Bite*, 11 OTAGO L. REV. 433, 443 (2007); K. J. Keith, *The Unity of the Common Law and the*

increasingly popular in other common law jurisdictions.[2] Therefore, others may also find these insights helpful.

II. THE PRACTICE OF REFERRING TO FOREIGN CASES

Hong Kong, which is oriented to be an international city, has a relatively small case pool.[3] Hong Kong courts are therefore eager to learn from the wealth of experience from other common law jurisdictions. In light of this, Hong Kong courts are keen and open to learn from foreign authorities—as a judicially and constitutionally approved practice.[4]

Hong Kong courts frequently refer to authorities from other common law jurisdictions in both public and private law.[5] Hong Kong courts will not follow foreign cases blindly.[6] Foreign cases are persuasive only and not binding.[7] They are cited in various circumstances, such as (1) assisting the interpretation of "same or very similar" local statutes or international treaties.[8] They are also used for (2) incorporating new foreign legal

Ending of Appeals to the Privy Council, 54 INT'L & COMP. L.Q. 197, 208 (2005). For problems arising out of this, *see* Roderick Munday, *Transcripts: Bane or Boon?*, 2 LEGAL INFO. MGMT., 32, 32-33 (2002); Stuart Sime, *Appeals after the Civil Courts Structure Review*, 36 CIV. JUST. Q. 51, 66 (2017).

2. After interviewing English judges, one empirical study reported that "[t]he judges of the Supreme Court for the UK *feel* that counsel should bring forward *all* legal materials which are relevant for deciding the case, including *foreign judgments* and *academic resources* concerning foreign law.") (emphases added). Elaine Mak, *Why Do Dutch and UK Judges Cite Foreign Law*?, 70 CAMBRIDGE L.J. 420, 429 (2011).

3. A Solicitor v. The Law Society of Hong Kong, [2008] 2 H.K.L.R.D. 576 (C.F.A.).

4. *Id*. ¶ 16. ("[I]t is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence . . . Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them."); Democratic Republic of The Congo and Others v. FG Hemisphere Associates, LLC [2011] 14 H.K.C.F.A.R. 95, ¶ 441 (C.F.A) ("In Article 84 there is constitutional approval of *stare decisis* with the citing of foreign common law authorities. This underlines an intention that the common law in Hong Kong should continue to apply and develop assisted by foreign, as well as local, precedent. It goes without saying that such development has to be in accord with the Basic Law, applicable statute law and the circumstances of Hong Kong.").

5. For private law, *see, e.g.*, Societe Nationale D'Operations Petrolieres De La Cote D'Ivoire-Holding v. Keen Lloyd Resources, Ltd., [2004] 3 H.K.C. 452, ¶ 13 (C.F.I.) (on arbitration regarding enforcement of awards); Dr Yeung Sau Shing Albert v. Google Inc., [2014] 4 H.K.L.R.D. 493, ¶ 54 (C.F.I.) (regarding the novel issue of libel by search engine). For public law, *see, e.g.*, W v. The Registrar of Marriages, [2013] 16 H.K.C.F.A.R 112 (C.F.A.).

6. *See, e.g.*, Citic Pacific v. Secretary for Justice, [2015] 4 H.K.L.R.D 20, ¶¶ 60, 61 (C.A.) (refusing to follow Three Rivers District Council v. Governor and Company of the Bank of England (No 5) [2003] EWCA (Civ) 474, [2003] QB 1556 regarding legal advice privilege).

7. Po Jen Yap, *A Typography of Constitutional Arguments in Hong Kong*, 44 H.K. L. J. 459, 477-78 (2014).

8. Gotland Enterprises Ltd v. Kwok Chi Yau, [2007] 1 H.K.L.R.D. 226, ¶ 24 (C.A.).

principles,[9] or (3) supplementing the development and application of existing legal principles.[10]

The curious culture of applying foreign authorities from multiple jurisdictions—in the sense of adopting the law, as opposed to merely comparing what other jurisdictions have held[11]—derives from Hong Kong's openness in form and substance. This is less frequently observable in other jurisdictions. One major reason for this is that other common law jurisdictions, like England, Wales, and Singapore, have imposed practice directions—on top of the doctrine of *stare decisis*—which set limits for the citation of foreign authorities to certain circumstances.[12]

By contrast, Hong Kong has not been as restrictive. First, Article 84 of the Basic Law constitutionally entrenches that the courts "may refer to

9. Jigme Tsewang Athoup v. Brightec Ltd. & Ors., [2015] 1 H.K.C. 566, ¶ 47 (C.F.I.) (adopting the defence of reportage from the English case of Roberts v. Gable [2007] EWCA (Civ) 721).

10. *See generally* W v. The Registrar of Marriages, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.).

11. This is an empirical fact that no practitioner would deny. For an example on applying (not just quoting for comparison) New Zealand authorities together with English cases, *see* The Secretary for Justice v. The Oriental Press Group Ltd., [1998] 2 H.K.L.R.D. 123, ¶ 48 (C.F.I) (applying *Solicitor-General v. Radio Avon Ltd.* [1978] 1 NZLR 225 on contempt of court). The Hong Kong court adopted New Zealand's notion of "scandalizing of the court" that specifically focuses on maintaining public confidence in the due administration of justice, as a separate branch of the law of contempt. At the same time, the Hong Kong court at ¶ 54 supplemented the New Zealand's notion with the English case of Attorney-General v. Times Newspapers Ltd. [1974] AC 273 (HL) on the standard of proof for contempt.

For illustrative cases of applying Canadian authorities together with Australian and English cases, *see* H.K.S.A.R. v. Tam Lap Fai, [2005] H.K.C.F.A.R. 216, ¶¶ 17, 18 (C.F.A.) on the issue of obstruction of police officer. The Hong Kong court approved the Canadian decision of R v. Robinson (2000) 287 A.R. 79 that the inconvenience caused to the officer must be more than *de minimis*. At the same time, this Canadian principle was used to supplement the English test in Hinchliffe v. Sheldon [1955] 1 WLR 1207 on the threshold of "making it more difficult for the police to carry out their duties."

For an example which applied Singaporean authority together with English cases, *see* China Citic Bank Corporation Ltd (Quanzhou Branch) v. Li Kwai Chun, HCMP 1439/2017 ¶¶ 37-38 (C.F.I. Feb. 22, 2018) (Legal Reference System) (H.K.). It involved an application for asset freezing injunction, and the Singaporean case was applied for the legal point on whether asset disclosure made pursuant to the injunction application can in turn be used to prove the risk of dissipation. The Hong Kong judge adopted the Singaporean court's approach that it depends, and the possible circumstances highlighted by English cases like Z Ltd v A-Z and AA-LL [1982] 1 All ER 556. A Solicitor v. The Law Society of Hong Kong, [2008] 2 H.K.L.R.D. 576, ¶ 16.

12. For example, Rule 9.2(iii) of the Practice Direction (Citation of Authorities) 2001 under English law provides that foreign cases cannot be cited if there is already a local binding authority. *See* Practice Direction (CA: Citation of Authorities) [2001] 1 W.L.R. 1001, Rule 9.2(iii). Rule 74(5)(b) of the Singaporean State Courts Practice Directions 2021 set the threshold that the foreign authority must be of assistance to the development of local jurisprudence. *See* Singaporean State Courts Practice Directions 2021, Rule 74(5)(b). The point is, Hong Kong does not have these formal thresholds.

precedents of other common law jurisdictions."[13] The general reference to "common law" authorities means there is no limitation as to the precedents of a specific foreign jurisdiction. Article 84 has been argued elsewhere as a unique "constitutional assurance" of the judicial ability to cite foreign precedents, which cannot be found in other jurisdictions.[14] This gives Hong Kong courts an unrivalled freedom and openness to refer to foreign legal wisdom.[15] Second, there is an unspoken and uncontested practice of some Hong Kong judges, who are willing to overlook the doctrine of *stare decisis*, in the sense of applying foreign precedents instead of existing binding local precedents, *if* the foreign precedent is from a leading foreign court and the reasoning is more compelling.[16] These features are justifiable because of Hong Kong's eagerness to update its small case pool with the leading legal standards derived from other competing jurisdictions (such as English law, which is widely trusted by the commercial sector).[17] These vitally mark out Hong Kong's openness in legal form. Nevertheless, it will be proposed in subpart V(C) that Hong Kong should introduce a practice direction.

Hong Kong's unrivalled openness in substance is also something with which it is quite difficult to disagree. In terms of the judiciary, Hong Kong uniquely welcomes a large number of foreign judges from the highest court in Australia, Canada, and the U.K. to join the Hong Kong

13. Hin Ting Liu & Joshua Chan, *Horizontal Effect of the Hong Kong Basic Law*, 45 COMMON L. WORLD REV. 101, 103 (2016).

14. Martin Kwan, *Is the Hong Kong Courts' Ability to Refer to Foreign Authorities Unrestrained?*, 4 AMICUS CURIAE 71, 73-74 (2022)*'*.

15. Martin Kwan, *A Curious Question from Hong Kong: What is Relationship Between Capitalism and Common Law?*, FLETCHER F. WORLD AFF. (2022), http://www.fletcherforum.org/home/2022/10/28/a-curious-question-from-hong-kong-what-is-the-relationship-between-capitalism-and-common-law ("Hong Kong has sent the rather unusual, yet market-friendly, signal that, as long as a rule is efficient, the local courts are willing to adopt it even if it is a foreign one." This efficiency-driven approach is justified by the combined effect of Hong Kong's internationalized common law system and its capitalist system with world-leading market freedom.); Kwai Hang Ng & Brynna Jacobson, *How Global is the Common Law? A Comparative Study of Asian Common Law Systems—Hong Kong, Malaysia, and Singapore*, 12 ASIAN J. COMP. L. 209, 218 (2017) (finding "overwhelming evidence that citing to foreign cases is a common, everyday practice" in Hong Kong). The same openness cannot necessarily be found elsewhere. For example, Justice Gavai of the Supreme Court of India has openly expressed his view that "there's no necessity to refer to the foreign judgments." *See* Lisa Monteiro*, I Am Not for BCI's Idea of Having Foreign Faculty at Law University: Supreme Court Judge B R Gavai,* TIMES OF INDIA (June 10, 2022), https://timesofindia.indiatimes.com/city/goa/i-am-not-for-bcis-idea-of-having-foreign-faculty-at-law-university-sc-judge-gavai/articleshow/92113944.cms'.

16. Kwan, *supra* note 14, at 81-84.

17. *Id*.

Court of Final Appeal.[18] This fact further reinforces Article 84's general reference to "common law jurisdictions." There is "unusually" no nationality requirement for all judges, except the two Chief Justices of the Court of Final Appeal and the High Court respectively.[19] By contrast, other common law jurisdictions like Singapore and Malaysia have reportedly ditched foreign judges.[20] In the U.K., judges must be citizens of the U.K., Republic of Ireland, or a commonwealth country.[21] In terms of the supply of lawyers, Hong Kong recognizes foreign legal qualifications much more flexibly than Singapore.[22] Singapore has a limited list of approved foreign law schools, but there is no such list in Hong Kong.[23] This has the effect of (1) welcoming more lawyers from other common law jurisdictions, and (2) sending signals to market stakeholders that the Hong Kong legal system can reflect their needs "effectively through representative lawmakers (international judges and lawyers)."[24]

The tempting benefits of having a greater pool of reference materials is obvious and already well-explored, so there is no need for repetition.[25] Besides, this Article will not repeat other well-discussed, *generalized*

18. Martin Kwan, *Understanding the Hong Kong Court of Final Appeal: Statistics and Inexplicable Patterns*, 21 ASIA PAC. L. & POL'Y. J. 1, 5 (2020).

19. Teresa Cheng, *Judicial Independence Protected*, NEWS.GOV.HK (Mar. 30, 2022) https://www.news.gov.hk/eng/2022/03/20220330/20220330_190244_135.html.

20. Dewey Sim, *Will Hong Kong join Singapore, Malaysia in Ditching Foreign Judges After British Law Lords' Exit?*, S. CHINA MORNING POST, (Apr. 23, 2022), https://www.scmp.com/week-asia/politics/article/3175236/will-hong-kong-join-singapore-malaysia-ditching-foreign-judges.

21. *Become a Judge*, LAW SOC'Y (Nov. 4, 2021), https://www.lawsociety.org.uk/career-advice/career-development/judicial-careers/become-a-judge.

22. Kwan, *supra* note 15.

23. *See, e.g.*, *Approved Universities,* SING. INST. LEGAL EDUC., https://www.sile.edu.sg/united-kingdom-approved-universities. This is a very restrictive list that even excludes some Russell Group and other reputable law schools such as the University of Manchester and University of Southampton. *See* Amelia Teng, *SOAS, University of London "Extremely Disappointed" to Lose S'pore Accreditation*, STRAIT TIMES (Mar. 12, 2015), https://www.straitstimes.com/singapore/education/soas-university-of-london-extremely-disappointed-to-lose-spore-accreditation#:~:text=Min%20Daily%20News-,SOAS%2C%20University%20of%20London%20%22extremely%20disappointed%22,to%20lose%20S'pore%20accreditation&text=SINGAPORE%20%2D%20The%20School%20of%20Oriental,it%20is%20%22extremely%20disappointed%22.

24. Kwan, *supra* note 15.

25. *See* Kwan, *supra* note 14, at 83; V. K. Rajah, *Judicial Dynamism in International Trade in Hong Kong and Singapore—An Indivisible Link*, 40 H.K. L.J. 815, 827 (2010); Ryan C. Black & Lee Epstein, *(Re-)Setting the Scholarly Agenda on Transjudicial Communication*, 32 L. & SOC. INQUIRY 791, 793 (2007); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 132, n.86 (1994); Gerard V. LaForest, *The Use of American Precedents in Canadian Courts*, 46 MAINE L. REV. 211, 220 (1994).

drawbacks, such as how over-reliance could prevent the development of their own style of jurisprudence.[26] Those drawbacks will occur even when authorities from only one foreign jurisdiction are cited, so they are not specifically addressing the current situation involving multiple jurisdictions.

III. THE DRAWBACK OF CONCURRENTLY REFERRING TO FOREIGN AUTHORITIES FROM MULTIPLE JURISDICTIONS

This Part explains the unexplored observation that, when foreign authorities—from multiple jurisdictions that deal with seemingly the same principle—are cited with approval at the same time, there is a risk of unknowingly causing legal inconsistency.

This Part discusses three examples which involve unspotted clashes between local, Australian, and English authorities. The authorities seem consistent and supplementary to each other, but in fact, they are not. The pinpointed inconsistencies are—as evident from the judicial oversight—difficult to spot.

A. The Cases on Contractual Interpretation

This is an example where an inconsistent Australian case is cited unknowingly. Under English contract law, *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No. 1)* provides that the meaning of the terms has to be ascertained by reference to the "background"—but not simply the face meaning of the words—which was emphasized in Lord Hoffmann's guiding principles:

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge . . .
>
> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of

26. *See, e.g.*, K. G. Balakrishnan, *The Role of Foreign Precedents in a Country's Legal System*, 22 NAT'L. L. SCH. INDIA REV. 1, 6, 7, 15 (2010). Most generalized drawbacks are largely inapplicable to Hong Kong. For example, Hong Kong's invitation of foreign judges already clearly signals that it is not bothered of any allegations of over-reliance of foreign resources or susceptibility to foreign influences. In terms of having own style of jurisprudence, arguably Hong Kong. has already established a practical one, which is to be open to international common law thoughts. For an analysis of the drawbacks tailored to the Hong Kong situation, *see* Martin Kwan, *Relying on Foreign Authorities: The Relevance of the Notion of Incremental Legal Development*, 2023 BRISTOL L. REV. (forthcoming May 2023).

> the document is what the parties using those words against the relevant background would reasonably have been understood to mean . . .
>
> . . . if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

By contrast, the key Australian case of *Codelfa* provides that evidence of surrounding circumstances is only admissible if the words of a contract term are ambiguous.[27] In other words, Australian law has an "ambiguity threshold" or "gateway" to be passed before the background can be considered, and is therefore stricter in this sense than English law.[28] Making things even more complicated, *Codelfa* has subsequently split into three camps of cases in Australia, which each apply *Codelfa* differently.[29] The second and third camps of ensuing Australian cases, however, align (closer) with *Investors Compensation Scheme*.

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27. *Codelfa Construction Pty. LTD. v State Rail Authority Of N.S.W.*, (1982), 149 CLR 337, ¶ 22 (Austl.).

28. Natalie Byrne, *Contracting for 'Contextualism'—How Can Parties Influence the Interpretation Method Applied to Their Agreement?*, 13 QUT. L. REV. 52, 61-2 (2013). *See also* Robert McDougall, Paper Delivered at the College of Law, Specialist Legal Conference: The Interpretation of Commercial Contracts—Hunting for the Intention of the Parties 22 (May 18, 2018), http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/McDougall_20180518.pdf; David McLauchlan, *Some Issues in the Law of Contract Interpretation in Australia*, Current Legal Issues Seminar Series, UNIVERSITY OF QUEENSLAND, BRISBANE 1, 8 (Aug. 28, 2014), https://law.uq.edu.au/files/23500/CLI-28Aug2014-D-McLauchlan.pdf.

29. Three camps of Australian cases regarding this matter are noteworthy and relevant for illustration, though there are actually more than three as the law has sometimes been inconsistent. The first is that in *Codelfa*. *See Codelfa Construction Pty. LTD. v State Rail Authority of NSW* (1982) 149 CLR 337, ¶ 22 (Austl.). This is currently the prevailing approach, as confirmed in *Byrnes v Kendle* (2011) 243 CLR 253, n.135 (Austl.) and *Western Export Services Inc. v Jireh International Pty Ltd.* [2011] HCA 45, ¶ 4 (despite being a case on refusal of leave to appeal). *See, e.g.*, Kenneth Martin, *Surrounding Circumstances Evidence: Construing Contracts and Submissions About Proper Construction: The Return of the Jedi (sic) JUDII*, WA BAR ASSOCIATION 1, 26, 29 (Mar. 17, 2015), https://www.supremecourt.wa.gov.au/_files/Surrounding%20Circumstances%20Evidence%20Construing%20Contracts%20and%20Submissions%20About%20Proper%20Construction%20The%20Return%20of%20the%20Jedi%20(sic)%20Judii%20Justice%20Kenneth%20Martin%2017%20Mar%202015.pdf. For the contrary view, *see* McLauchlan, *supra* note 30, at 13.

The second one is a line of cases which referred to evidence of surrounding circumstances without mentioning the requirement of ambiguity. Examples include *Pacific Carriers Ltd. v BNP Paribas* (2004) 218 CLR 451 (Austl.); *Toll (FGCT) Pty Ltd. v Alphapharm Pty Ltd.* (2004) 219 CLR 165 (Austl.); and *International Air Transport Association v. Ansett Australia Holdings Ltd.* (2008) 234 CLR 151. In this regard, *see* Byrne, *supra* note 28, at 57. *See also* Eugene Chan, *Why so Ambiguous? Codelfa and Contractual Interpretation*, LINKEDIN (Nov. 28, 2016) https://www.linkedin.com/pulse/why-so-ambiguous-codelfa-contractual-interpretation-eugene-chan.

Investors Compensation Scheme has been approved by the Court of Final Appeal in *Ying Ho Co. Ltd. v. The Secretary for Justice*, thereby incorporating it as binding law in Hong Kong.[30] Conversely, *Codelfa* has not been adopted by the precedent-creating Court of Final Appeal nor the Court of Appeal. Therefore, in light of the doctrinal inconsistency, neither the courts nor counsels should cite *Codelfa* for this matter, especially when *Codelfa* has caused complicated and varied applications in Australia.

Yet, this difference is not necessarily noticed. In *Industry Automation LDC v. Uni Link Ltd and others*, the Court of First Instance wrongly believed *Codelfa* was the correct approach after being referred to *Investors Compensation Scheme* and other Hong Kong cases.[31] The court wrongly stated that there was no need to understand the background and even said that to consider the background would be an "error."[32] In direct conflict with Lord Hoffmann's guiding principles that interpretation is "not the same thing as the meaning of its words*,"*[33] it was erroneously ruled that:

> Where however the contractual intention is clear from the words used then the Court must give effect to it. *It is not permissible to inquire into preliminary or background matters in order to find a different meaning*.[34]

It is easy to have the false impression that Australian and English contract law are in general conformity. This is especially because some subsequent Australian cases—split from *Codelfa* itself, as mentioned above—are consistent with English and Hong Kong laws.

B. The Cases on Indemnity Costs

In *A Solicitor v. The Law Society of Hong Kong/ The Solicitors Disciplinary Tribunal*,[35] the issue was whether it was appropriate for the Solicitors Disciplinary Tribunal to impose an indemnity cost order against

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The third camp is the recent position taken in New South Wales in *Cherry v Steele-Park* [2017] 96 NSWLR 548, which tried to reconcile the position by arguing: "ambiguity is a conclusion, to be reached after consideration of evidence of surrounding circumstances, rather than a precondition to the admissibility of evidence of surrounding circumstances." *See also* McDougall, *supra* note 28, at 27.

30. Ying Ho Co. Ltd. v. The Secretary for Justice, [2005] 1 H.K.L.R.D. 135, ¶ 213 (C.F.I).

31. Industry Automation LDC v. Uni Link Ltd, [2008] H.K.C.F.I. 80 (C.F.I).

32. *Id*. at 31-32.

33. *Id*.

34. *Id.* (emphasis added).

35. A Solicitor v. The Law Society of Hong Kong, [2008] 2 H.K.L.R.D. 576, ¶ 16 (C.F.A.).

the disciplined lawyer. When considering the legal grounds for granting an indemnity cost order, the Court of Appeal cited only the Australian decision of *Walton v McBride.*[36]

This example is peculiar, because the Hong Kong court itself has stated the correct principle and cited an inconsistent case at the same time. This leads to confusion. On the one hand, the court in *A Solicitor* said *correctly* that indemnity costs "are *almost always* used as a mark of disapproval by a court for the conduct of one of the parties."[37] On the other hand, the Australian case *Walton* provided that such an order is reserved to situations which "*must* mark its disapproval for wrongful conduct."[38] In other words, *Walton* applies a higher standard which mandatorily requires judicial disapproval, and this does not sit well with existing Hong Kong laws.

The correct legal position in Hong Kong is that it is not mandatory to establish wrongful conduct, so the quoted remarks from *Walton* are inconsistent. Based on previous binding authorities (both local and adopted English ones), whilst instances of wrongful misconduct will attract an indemnity costs order, they are not "necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate.'"[39]

36. [1995] 36 NSWLR 440, ¶¶ 122, 126 (Austl.). *See* A Solicitor v. The Law Society of Hong Kong, [2008] 2 H.K.L.R.D. 576, ¶ 16 (C.F.A.).

37. A Solicitor v. The Law Society of Hong Kong, [2008] 2 H.K.L.R.D. 576, ¶ 126 (C.F.A.) (emphasis added).

38. *See Walton v McBride* [1995] 36 NSWLR 440, ¶ 36 (Austl.) (emphasis added).

39. Macmillan v. Bishopsgate Investment Trust Ltd., unreported, judgment delivered 10 December 1993 approved by Sung Foo Kee Ltd v. Pak Lik Co. (A Firm) [1996] 3 H.K.C. 570, ¶ 17 (C.A.) and Choy Yee Chun v. Bond Star Development Ltd. [1997] H.K.L.R.D. 1327, ¶ 27 (C.A.). *See also* Disney v. Plummer, unreported, judgment delivered 16 November 1987 (English Court of Appeal), which took the same view (per Kerr L.J.): "I do not accept, as counsel submitted, that indemnity costs are only appropriate if there is some deception or underhand conduct on the part of the losing party, but not if the litigation is merely fought bitterly or even unreasonably." *See also* Munkenbeck & Marshall v. McAlpine (1995) 44 Con. L.R. 30, 33: "In my view it is a pity that various courts have attempted to define in exactly what circumstances indemnity costs may be ordered. It is a matter in each case of the judge exercising his discretion to order costs on an indemnity basis when appropriate to the facts before him." *Disney* and *Munkenbeck* were expressly approved in *Sung Foo Kee* at ¶ 19. With hindsight, an example where an indemnity costs order was ordered in the absence of wrongful conduct is Town Planning Board v. Society for Protection of the Harbour Ltd., [2004] 7 H.K.C.F.A.R. 1 (C.F.A.), where an indemnity costs order was made in favor of the applicant who (1) brought the action for public interest and (2) was of limited resources. The aim was to achieve a fair allocation of costs.

C. The Cases on Unconscionable Contracts

In contract law, the unconscionability doctrine is available in both *common law* and *statutory* law such as the Hong Kong *Unconscionable Contract Ordinance*.[40] The Hong Kong courts have accepted both Australian and English cases on this common law doctrine.[41] The heart of the problem is that the courts have not noticed that Australian and English cases are actually different and inconsistent.

In order to establish unconscionability, English authorities provide that it must be proved that the contract *terms* are oppressive.[42] The scope of the doctrine is subject to three limitations:

> The first is that the bargain *must* be oppressive to the complainant in overall *terms*; the second that it may only apply when the complainant was suffering from certain types of bargaining weakness; and the third that the other party *must* have acted unconscionably in the sense of having *knowingly* taken advantage of the complainant.[43] (emphasis added)

However, Australian law does not necessitate the proof of unconscionable "terms." Establishing unconscionable "conduct" is equally sufficient.[44] Throughout the whole judgement of the Australian highest authority of *Commercial Bank of Australia Ltd v. Amadio* (*Amadio*), Wilson J., focused only on the conduct when finding unconscionability, but not on the terms of the contract of guarantee at all.[45]

Whilst *Amadio* has often been discussed in English cases and literature, there was never any endorsement to the effect that the Australian law in *Amadio* is the same as English law on unconscionability.[46]

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40. *See generally* MICHAEL J. FISHER, CONTRACT LAW IN HONG KONG (Hong Kong Univ. Press, 2007).

41. Freeway Finance Co. Ltd. v. Lai Sau Kei, [2016] H.K.C.F.I. 1089, ¶¶ 137, 140, 142 (C.F.I.).

42. EDMUND H.T. SNELL, SNELL'S EQUITY 230, 8-042 (John McGhee ed., 33d ed. 2015) ('First, B is suffering from a particular kind of vulnerability; second, the *terms* of the transaction are oppressive to B; and third, A *knowingly* took advantage of B's vulnerability. The doctrine can therefore be seen as preventing A's insisting on a right as against B where to do so would involve A's benefiting from a *knowing* exploitation of B's vulnerability.') (emphasis added).

43. JOSEPH CHITTY, CHITTY ON CONTRACTS 744-45, 7-133 (Hugh Beale ed., 32d ed. 2012). This quoted paragraph was expressly approved in Irvani v. Irvani [2000] 1 Lloyd's Rep. 412, 424 (Lord Justice Buxton).

44. GRAHAM VIRGO, PRINCIPLES OF RESTITUTION 285 (3d ed. 2015) ("However, in the *Amadio* case the guarantee was set aside specifically because of the bank's unconscionable conduct.").

45. *Commercial Bank of Australia Ltd. v. Amadio*, (1983) 46 ALR 402, 417-18 (Austl.).

46. GERALDINE ANDREWS & RICHARD MILLETT, LAW OF GUARANTEES 262 (6th ed. 2011). The reference to this case by English courts has mostly been fleeting. *See, e.g.*, Barclay's Bank

In relation to the second limitation mentioned above, English law and Australian law are arguably consistent. Under English law, it is a prerequisite to have weakness in bargaining power,[47] whilst under Australian law, *Amadio* was based on "inequality of bargaining power" which "arose from a number of different factors."[48]

Regarding the third limitation, there are both consistent and inconsistent elements when English and Australian laws are compared. In terms of the consistency, both Australian and English laws require unconscionable conduct.[49] Yet, as regards the inconsistency, it is not a mandatory requirement under Australian law for the defendant to know the complainant's weakness, but is only a vital factor in establishing unconscionable conduct.[50] There can be exploitative conduct even if the defendant has no *knowledge* of the weakness. For example, Australian law recognizes a cause of action where, unbeknownst to the defendant, the complainant did not understand the impugned transaction and the defendant happened to exacerbate this with fraudulent misrepresentation.[51] By contrast, English law says there must be a "knowing" exploitation.[52]

In Hong Kong, however, the courts have adopted both English and Australian laws.[53] An example would be the 2000 case of *Lo Wo v. Cheung Chan Ka Joseph* which provided that "conduct" and "terms" are only "factors."[54] Both Australian and English cases were taken into

Plc. v. Goff [2001] EWCA (Civ) 635 [33]; Portman Building Society v. Dusangh & Ors. [2000] EWCA (Civ) 142 (citing *Amadio* merely for distinguishing undue influence and unconscionable conduct)'; National Westminster Bank Plc. v. Breeds [2001] EWHC (Ch) 21 [76] (cited merely for banks' obligation to reveal); Janet Boustany v. George Pigott Co. [1993] UKPC 17 (Ant. & Barb.) (cited for the proposition that conduct has to be unconscionable; subsequently applied by Minder Music Ltd v. Sharples [2015] EWHC (IPEC) 1454 [25]); Evans & Ors. v. Lloyd & Anor [2013] EWHC (Ch) 1725 [50].

47. GARETH SPARK, VITIATION OF CONTRACTS: INTERNATIONAL CONTRACTUAL PRINCIPLES AND ENGLISH LAW 297 (Cambridge Univ. Press 2013) (weakness in the bargaining process and unacceptable conduct by the defendant "are true prerequisites of unconscionability in English law").

48. *See* VIRGO, *supra* note 44, at 285.

49. *See* SPARK, *supra* note 47, at 297 (Spark noted that no Australian case expressly requires proving defendant's awareness of the complainant's weakness).

50. *Id*. at 289.

51. *Id*.

52. *Id*.

53. *See, e.g*., Freeway Finance Co. Ltd. v. Lai Sau Kei, [2016] H.K.C.F.I. 1089, ¶¶ 137, 140, 142 (C.F.I.).

54. Lo Wo v. Cheung Chan Ka Joseph, [2000] 2 H.K.L.R.D. 370, ¶ 18 (C.F.I.) (subsequent appeal to the Court of Appeal dismissed in Lo Wo v. Cheung Chan Ka Joseph, [2001] 3 H.K.C. 70).

account in that case.[55] *Lo Wo* itself was wrong to treat "conduct" as a mere factor, because both English and Australian laws treat unconscionable conduct as mandatory.[56]

By striking contrast, another Hong Kong 2017 case, *Citibank v. KCL Chemical*, considered only English authorities (through citing the above passage quoted in block), but not Australian precedents.[57] The court ruled that the terms must be oppressive for unconscionability to be found—i.e., consistent with English authorities but not Australian ones.[58] By further contrast, a 2006 Court of Final Appeal decision approved the Australian decision of *Amadio*.[59]

It remains uncertain as to whether Australian or English case law prevails. Apparently, English and Australian cases have been commingled together without their (however minor) differences being noticed.

IV. EVALUATING THE CAUSES OF THE PITFALL

Both the courts and counsels were unaware of the inconsistencies and this was primarily caused by the practical difficulty of spotting the inconsistencies.

A. Not Easy to Spot the Inconsistencies

The intuitive cause would be the lack of comprehensive comparison between the jurisdictions, which would have revealed their differences.[60] However, this view misses the point: not doing sufficiently thorough research in the first place is the outcome in this context, not the cause.

55. Lo Wo v. Cheung Chan Ka Joseph, [2000] 2 H.K.L.R.D. 370, ¶ 18 (C.F.I.).

56. SPARK, *supra* note 47, at 279.

57. Lo Wo v. Cheung Chan Ka Joseph, [2000] 2 H.K.L.R.D. 370, ¶ 32 (C.F.I.) (citing the above passage from CHITTY ON CONTRACTS, *supra* note 43). For other examples which cites the same passage with approval, *see* Shum Kit Ching v. Caesar Beauty Centre Ltd., [2003] 3 H.K.L.R.D. 422, ¶ 14 (C.F.I.); Freeway Finance Co. Ltd. V. Lai Sau Kei, [2016] H.K.C.F.I. 1089, ¶ 137 (C.F.I.); Citibank (Hong Kong) Ltd. v. Au Wai Lun, DCCJ 1816/2003 (D.C. Jan. 9, 2006) (Legal Reference System) (H.K.).

58. Citibank, Na v. KCL Chemical, [2017] H.K.C.F.I. 185, ¶ 32 (C.F.I.).

59. Ming Shiu Chung and Others v. Ming Shiu Sum and Others, [2006] 9 H.K.C.F.A.R. 334, ¶ 99 (C.F.A.).

60. Similar problems occur in other jurisdictions. *See, e.g.*, Adam M. Smith, *Making Itself a Home-Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 223 (2006); Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL L. ST. 37, 72 (2006); Reed, *supra* note 1, at 264; John Bell, *Researching Globalization: Lessons from Judicial Citations*, 3 CAMBRIDGE J. INT'L & COMP. L. 961, 975 (2014).

Rather, the cause is the premature assumption of consistency which obviates the need for an in-depth review.

How did the assumption arise? In the unconscionability example above, excerpts of *Amadio* were mentioned here and there in textbooks and cases, especially when they all use very similar terminologies.[61] The differences between the authorities are usually not readily perceptible, yet subtle. It is not easy for judges, counsels, and academics to spot the inconsistency in light of the sea of relevant legal quotes and materials.

Besides, the already hidden inconsistency is further overshadowed by the force of the reasoning. Naturally, "the appeal and normative value" of authorities from the highest court overseas "is irresistible."[62] Yet, the "mere luck that an issue had attracted judicial comment (or had been litigated in another jurisdiction) could tilt the balance of reasons in favor of deferring to an erroneous view, just because there were more persuasive sources in its favor."[63]

Moreover, there is the pressure of time from the need to resolve disputes expeditiously. When coupled with the heavy workload of the judiciary, there is even less room for conducting rigorous review.

B. The Larger Role of Counsels

In practice, the courts would not know the inconsistency without any alert from counsels. This is because:

> judges seldom do any legal research of their own. Nor do they have, on an individual basis, the assistance of law clerks. For the most part, however, judges rely upon counsel to do the research and refer them to the relevant materials.[64]

The primitive view is that this is counsels' *fault* as they "can cite or ignore overseas cases as they choose, and the court may be none the wiser."[65] However, the better view is that it is the counsels' occasional *inadvertence*. Apparently in the examples above, the counsels from both sides were not aware of the inconsistency and have wrongly assumed consistency. Otherwise, one side would have raised the inconsistency in order to oppose the authority that goes against his/her case. In any event, they nevertheless bear the largest responsibility as officers of the court.

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61. *See* ANDREWS & MILLET, *supra* note 46, at 262.

62. *See* Yap, *supra* note 7, at 471.

63. Grant Lamond, *Persuasive Authority in the Law*, 17 HARV. REV. PHIL. 16, 29 (2010).

64. *See, e.g.,* Lord Hoffman, *Causation*, *in* PERSPECTIVES ON CAUSATION 3 (Richard Goldberg ed., 2011).

65. *See* Allan, Huscroft & Lynch, *supra* note 1, at 445.

To avoid the pitfall, the suggestions below focus on preventing hasty assumptions of consistency that are sometimes inadvertently held.

V. SUGGESTIONS

Rather than reconciling (if possible) the legal inconsistency after it arises, the better solution is to avoid it in the first place to ensure clarity and certainty.

A. Look for Inconsistency

Whenever authorities from multiple jurisdictions are cited, judges and counsels should maintain a skeptical attitude.[66] They should not easily assume the applicability of a foreign authority simply because it has similar terminologies, applies a familiar principle, or has a cogent reasoning. There should be a scrutiny of whether there is any inconsistency.

B. Apply Binding Cases First

This suggestion may sound too obvious, but this has, in practice, become more complicated than expected.

Strictly speaking, citing only non-binding foreign cases that are entirely *consistent*—without citing local binding precedents—is still legally acceptable. This makes sense because it essentially means the same legal principle is applied. For the same reason, this does not go against the doctrine of *stare decisis*. This was confirmed by the Court of Appeal in *Zhang Hong Li v. DBS Bank (Hong Kong) Ltd.*, where the first instance judge did not cite the binding and leading trust law case, *Royal Brunei Airlines v. Tan*,[67] on dishonest assistance but other sources and the appellant argued the judge had failed to apply the relevant laws.[68] Nevertheless, the Court of Appeal held that "[t]he fact that the judge did not mention these cases in his lengthy judgment does not mean he was not aware of or was confused as to the standard of dishonesty," as long as the same principle has been applied.[69]

66. For comparable observations from overseas experience, *see id.* at 446; Bell, *supra* note 60, at 973.

67. Royal Brunei Airlines v. Tan [1995] UKPC 4, [1995] 2 AC 378 has been adopted as part of H.K. law by the Court of Final Appeal in Peconic Industrial Development Ltd. v. Lau Kwok Fai and Others, [2009] 12 H.K.C.F.A.R. 139, ¶ 24 (C.F.A.).

68. Zhang Hong Li and Ors. v. DPS Bank (Hong Kong) Ltd. and Ors., [2018] H.K.C.A. 435, ¶ 46 (C.A.).

69. *Id.*

This practice is actually quite common. In *Real Maker Development Ltd. v. Cobow Contracting & Engineering Company Ltd.*, the legal issue was how to distinguish between a penalty and liquidated damages clause.[70] The judge noted that "[n]either counsel referred to any local precedents."[71] The counsel cited only the 1915 English case of *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co Ltd.*[72]. Apparently, the judge was professionally skeptical and cited the more recent, local, 2002 Court of Final Appeal case of *Polyset Ltd. v. Panhandat Ltd.*,[73] based on her own research. This safe approach was laudable because any reformulation or rephrasing of seemingly the same legal test may have subtle differences. In fact, whilst *Dunlop* has actually been adopted as binding law in Hong Kong, the very issue in *Polyset* was whether the lower court applied the *Dunlop* test wrongly with a different formulation of the test.[74] Therefore, it was good and cautious practice to apply the more recent, authoritative formulation from *Polyset*.

Similarly, in the examples in Part III, foreign authorities have been applied in place of local and binding authorities. However, consistency was *wrongly assumed*.

C. Introduce a Practice Direction

In order to emphasize and formalize the above suggestions, the judiciary should introduce a practice direction to guide counsels. This has already been done by other common law jurisdictions.

In England and Wales, the practice direction requires counsels to certify that there is no domestic authority that precludes acceptance of the foreign authority.[75] In Saunders' view, it has the following advantage:

> The several requirements in the Practice Direction thus serve to reinforce an appropriate relationship between national and foreign law, to pinpoint with greater accuracy the purpose of reliance on foreign law, to ensure "proper consideration of whether it does indeed add to the existing body of law," and, in that sense, to manage unnecessary use.[76]

70. Real Maker Development Ltd. v. Cobow Contracting & Engineering Company Ltd., DCCJ6607/2004 ¶ 77 (D.C. May 31, 2005) (Legal Reference System) (H.K.).

71. *Id.*

72. Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co Ltd. [1914] UKHL 1, [1915] AC 79.

73. Polyset Ltd. v. Panhandat Ltd., [2002] 5 H.K.C.F.A.R. 234 (C.F.A.).

74. *Id.* ¶ 150.

75. Practice Direction (Citation of Authorities) [2001] 1 W.L.R. 1001.

76. *See* Saunders, *supra* note 60, at 75 (making the same suggestion for Australia).

Singapore has a comparable practice direction, which provides that (1) domestic judgement should be cited in precedence to foreign authorities, and (2) greater weight should be accorded to domestic judgement.[77] Just like the English direction, the Singaporean direction imposes on counsels the requirement "to ensure that such citation will be of assistance to the development of local jurisprudence on the particular issue in question."[78] This curbs over-zealous citation of foreign authorities.[79] It also ensures that "one should not naturally feel the need to turn to (foreign) law as a first resort."[80]

VI. UNHELPFUL SOLUTIONS

This Part explains why other possible solutions are not as helpful or feasible as that mentioned above.

A. Rely on Secondary Resources

Requiring judges and counsels to refer to secondary sources, such as comparative law textbooks, may help.[81] Often, secondary resources provide a more comprehensive review of the legal developments, debates, and criticisms. However, it is not as practical. First, the relevant foreign law textbooks may not be accessible in Hong Kong, be it in counsels' chambers, courts' libraries, online databases, or even local law schools' libraries.

Furthermore, there may not happen to be a textbook that specifically compares the specific jurisdictions involved, especially when Hong Kong courts do not just cite Australian and English cases, but also others like Singapore and New Zealand. Also, even if there is such a comparative literature, it may not necessarily have addressed the specific inconsistency.

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77. *State Courts Practice Directions 2021*, STATE COURTS SINGAPORE, ¶ 75(4), https://epd-statecourts-2021.opendoc.gov.sg/PART-09-DOCUMENTS-AND-AUTHORITIES-FOR-USE-IN-COURT.html.

78. *Id*. ¶ 75(5).

79. *Id*. ¶ 75(4) (stating the goal is to "'ensure that the Courts are not unnecessarily burdened with judgments made in jurisdictions with differing legal, social or economic' contexts").

80. Yihan Goh & Paul Tan, *An Empiricial Study on the Development of Singapore Law*, 23 SING. ACAD. L.J. 176, 191 (2011).

81. Russell Smyth, *Citing outside the Law Reports: Citations of Secondary Authorities on the Australian State Supreme Courts over the Twentieth Century*, 18 GRIFFITH L. REV. 692, 698 (2009); Lawrence Friedman et al., *State Supreme Courts: A Century of Style and Citation* 33 STAN. L. REV. 773, 814 (1981).

B. More Judicial Personnel

Some have suggested employing more judicial assistants.[82] Having a larger workforce is without a doubt helpful. In fact, the Hong Kong Court of Final Appeal have noted the contribution from the judicial assistants. For example, in *Securities and Futures Commission v. Yiu Hoi Ying Charles*, the court relied on a decision of the European Court of Justice.[83] The case was not provided by the parties; it was found by the court's judicial assistant. Similarly, in another case of *H.K.S.A.R. v. Nguyen Anh Nga*, one of the judicial assistants directed the court's attention to a relevant publication, which happened to support the appellant's arguments.[84]

However, seeking support from judicial assistants can be problematic. First, it is questionable if the same luxury can be afforded by lower courts. Also, recruiting suitable legal talents is more difficult than one can imagine.[85]

Second, and most importantly, it is also not sensible to shift the counsels' research burden to the judiciary. It is against common law tradition to adopt the judge-led inquisitorial approach that the civil law system does.

Lastly, and practically, a judge quoting own-researched authorities may sometimes risk creating a ground for appeal. This risk exists in lower courts, but certainly not in the Court of Final Appeal, as further appeal is impossible. The starting point is that there is no need to allow the parties to comment on every authority relied on by the judge.[86] However, where (1) the authorities are central (as opposed to peripheral) to the decision and (2) substantial prejudice arises from not giving the counsels' an opportunity to comment on them, natural justice is breached.[87]

There is a noteworthy case where the help from the tribunal assistant became a hindrance. In *Kwong Ka Yin Phyllis v. The Solicitors Disciplinary Tribunal*, the tribunal cited authorities on the standard of proof and sentencing that were referred to by the tribunal clerk, but not

82. David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 573 (2011).

83. Securities and Futures Commission v. Yiu Hoi Ying Charles, [2018] 21 H.K.C.F.A.R. 475, ¶ 52 (C.F.A.).

84. H.K.S.A.R. v. Nguyen Anh Nga, [2017] 20 H.K.C.F.A.R. 149, ¶ 39 (C.A.).

85. Maisy Mok, *Judiciary Struggles to Fill Vacancies*, STANDARD (June 18, 2021), STANDARD https://www.thestandard.com.hk/section-news/section/4/231308/Judiciary-struggles-to-fill-vacancies.

86. Stanley Cole (Wainfleet) Ltd. v. Sheridan [2003] EWCA (Civ) 1046, [29].

87. *Id*. at [33], [34].

from the counsels who have not addressed this issue.[88] Breach of natural justice was found, and this amounted to a ground of appeal.[89]

How does this compare to the good practice in *Real Maker Development*, (mentioned in subpart V(B)) where the judge cited local binding authority on her own?[90] *Real Maker Development*[91] would not fall into such a risk, because the counsels have cited foreign authorities on the same principle. Those foreign authorities have been adopted by local appellate courts in previous cases and are therefore binding and compatible.[92] The judge in *Real Maker Development* merely cited diligently the latest binding local authority. In the similar case of *Trinity Concept Ltd. (In Liquidation) v. Wong Kung Sang*, the Court of Appeal held that there will be no breach of natural justice where the judge merely cited own-researched authorities that are "entirely consistent with other authorities referred to."[93]

C. Limit the Number of Jurisdictions

It is legally wrong to limit the citation of foreign authorities to only one jurisdiction, because Article 84 of the Basic Law stipulates that Hong Kong courts "may refer to precedents of other common law jurisdictions."[94] Furthermore, citing authorities from multiple jurisdictions at the same time is useful and beneficial and therefore should not be discouraged. Instead, the proper focus should be on having an approach that properly handles concurrent citations.

VII. CONCLUSION

The citation of foreign law (whether for cases of first impression or not) can be very useful, because it could foster the development of Hong Kong laws. Therefore, they should be maintained and promoted. If not done properly, however, it can lead to inconsistencies in principles and doctrines, especially when it has become increasingly common to rely on

88. Kwong Ka Yin Phyllis v. The Solicitors Disciplinary Tribunal, HCAL 93/2004 ¶ 48 (C.F.I. July 12, 2006) (Legal Reference System) (H.K.).

89. *Id.* ¶ 49.

90. Real Maker Development Ltd. v. Cobow Contracting & Engineering Company Ltd., DCCJ6607/2004 ¶ 77 (D.C. May 31, 2005) (Legal Reference System) (H.K.).

91. *Id.*

92. *Id.*

93. Trinity Concept Ltd. (In Liquidation) v. Wong Kung Sang, CAMP 221/2022 ¶ 8 (C.A. Aug. 11, 2022) (Legal Reference System) (H.K.).

94. XIANGGANG JIBEN FA art. 84 (H.K.).

foreign authorities in this globalized world. Hong Kong and other jurisdictions[95] should pay attention to avoid this potential pitfall.

95. There are many other jurisdictions, such as Malaysia and Singapore, which frequently rely on foreign common law precedents. *See* Ng & Jacobson, *supra* note 15, at 212 ("the common law as practiced in Hong Kong, Malaysia, and Singapore is much more global and transnational than the common law as practiced in England and the United States").