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Session D5: The use of Non-local Judges in Overseas Jurisdictions

*Judges from other common law jurisdictions
in the Hong Kong Court of Final Appeal*

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Introduction

1. The Hong Kong Court of Final Appeal (“CFA”) sits as a court of five judges to hear appeals. One of those judges is almost invariably a visiting judge from another common law jurisdiction.

2. I shall address the following matters relevant to the participation of those visiting judges in the Hong Kong Court of Final Appeal:
 - (1) The constitution of the CFA and what leads to it sitting with visiting judges;
 - (2) The identity of the visiting judges who have sat with the CFA;
 - (3) The rationale for including visiting judges on the CFA; and
 - (4) The influence of those judges on its jurisprudence.

¹ Permanent Judge of the Hong Kong Court of Final Appeal. The contents of this paper are, in part, derived from a speech given by me to the Law Council of Australia Hong Kong Chapter on 3 November 2016, entitled “The Influence of the Australian judges on the Hong Kong Court of Final Appeal”.

Crudely, these matters may be described as the *what*, the *who*, the *why* and the *how* of the CFA’s use of visiting judges.

3. Before going any further, there are some definitional issues to deal with.
 - (1) First, by the term “non-local”, I refer to a judge qualified for the bench otherwise than by reason of local legal qualifications. In other words, I do not use the term as the equivalent of “non-indigenous”, which is an altogether different concept. In the CFA’s founding Ordinance,² our visiting judges are referred to as “judges from other common law jurisdictions”.
 - (2) Secondly, the reference to “overseas” jurisdictions in the title of this stream topic has the potential to confuse. When referring to an “overseas” jurisdiction, those who sit or practise within that jurisdiction are doing so in their own “home” jurisdiction. It is an “overseas” jurisdiction only from the perspective of the “non-local” visiting judge, who in all likelihood will be from overseas (hence the risk of confusion). In Hong Kong, the visiting judge in the CFA is often referred to as the “overseas non-permanent judge” or “overseas NPJ”.

The What

4. I begin with what leads to the CFA including visiting judges. The CFA is the final appellate court within the court system of the Hong Kong Special Administrative Region (“HKSAR”). The Court was established on 1 July 1997,

² The Hong Kong Court of Final Appeal Ordinance (Cap.484): see, e.g. s.9.

on the commencement of the Court's founding Ordinance, and it replaced the Judicial Committee of the Privy Council in London as Hong Kong's highest appellate court after 30 June 1997. The Court hears civil and criminal appeals involving important questions of law, including in particular points of public and constitutional importance, or where leave to appeal has otherwise exceptionally been granted.

5. The jurisdiction and constitution of the CFA is to be found in the Basic Law of the Hong Kong SAR and in the Court's founding Ordinance. The Basic Law guarantees the continuation of the previous legal system, namely the common law, rules of equity, ordinances, subordinate legislation and customary law.³ Article 81 of the Basic Law provides for the establishment of the CFA and that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court. Crucially, Article 82 of the Basic Law then provides:

“The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.”

6. The first part of that provision is arguably of greater importance, conferring on the CFA the power of final adjudication within the Region. It is that power, coupled with the three separate references in the Basic Law to exercise by the courts in Hong Kong of judicial power independently⁴ that guarantees the power and duty of the courts to exercise judicial independence including the role of constitutional review of legislative and administrative acts. However, the latter part of Article 82, enabling judges from other common law

³ Basic Law, Articles 8 and 18.

⁴ In Articles 2, 19 and 85.

jurisdictions to be invited to sit on the CFA, is also, I believe, one of the key factors in the success of the Court since its establishment.

7. Under the Court's founding Ordinance, the Court is constituted by the Chief Justice and the permanent judges and may as required also invite other non-permanent Hong Kong judges and judges from other common law jurisdictions to sit. To hear a substantive appeal, the Court sits as a bench of five.⁵ The number of permanent judges appointed at any one time has not been more than three, so to constitute the full Court, at least one other non-permanent judge – either a non-permanent Hong Kong judge or a judge from another common law jurisdiction – is required to sit.

8. A list of judges from other common law jurisdictions is maintained, together with a list of non-permanent Hong Kong judges, the latter consisting of retired permanent judges of the CFA and retired judges of the Hong Kong Court of Appeal. The total number of non-permanent judges on these lists may not exceed 30 at any one time.⁶

9. To be eligible for appointment as an overseas non-permanent judge, the Ordinance provides that he or she must be: (i) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; (ii) a person who is ordinarily resident outside Hong Kong; and (iii) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.⁷ Non-permanent judges hold office for

⁵ Overseas NPJs only sit in substantive appeals and not on the Appeal Committee, which hears applications for leave to appeal as a bench of three.

⁶ (Cap.484), s.10.

⁷ *Ibid.*, s.12(4).

terms of three years, and these terms may be extended by the Chief Executive on the recommendation of the Chief Justice.⁸

10. Although from other common law jurisdictions, the visiting overseas non-permanent judges are, nevertheless, Hong Kong judges upon their appointment. That this is so is underscored by the provisions in the Basic Law that require the Chief Executive, when acting in accordance with a recommendation of the Judicial Officers Recommendation Commission⁹ to make the appointment, (i) to obtain the endorsement of the Legislative Council for that appointment and (ii) to report the appointment to the Standing Committee of the National People's Congress of the People's Republic of China.¹⁰

11. That they are Hong Kong judges is also reinforced by the fact that, upon taking up appointment, in practice on the first occasion on which the overseas non-permanent judge comes to Hong Kong to sit, he or she will attend before the Chief Executive to take the judicial oath of a Hong Kong judge to uphold the Basic Law, bear allegiance to Hong Kong and to serve it “conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit”.¹¹ So it bears emphasising that the non-permanent judge, although he has acquired that status because of his pre-eminence in another common law jurisdiction, is

⁸ *Ibid.*, s.14(4).

⁹ This independent commission carries out the functions stipulated in Article 88 of the Basic Law, which provides: “Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.”

¹⁰ Basic Law, Article 90; see, also, (Cap.484), s.7A.

¹¹ The full text of the judicial oath reads: “I swear that, in the Office of a Judge of the Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China, serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.”

appointed to be a Hong Kong judge and to discharge a constitutional function as such.

12. Unlike the Chief Justice and permanent judges of the CFA, there is no retiring age for the non-permanent judges.¹² Like all other judges in Hong Kong, a non-permanent judge of the CFA may only be removed by the Chief Executive on the recommendation of an independent tribunal consisting of other judges.¹³

13. As a matter of convention and practice, except for about 10 cases (mostly heard in the early years of the court's existence and when an erupting Icelandic volcano interfered with air travel), the Court has heard all other full appeals with one overseas non-permanent judge sitting on the bench.

14. This is a significant feature of Hong Kong's judicial system. The overseas judge, in substance a foreigner, has an equal say on all final appeals, including appeals by way of constitutional review of legislation and administrative action.

The Who

15. So who are the judges who discharge this important function? There are currently 10 judges on the list of overseas non-permanent judges: seven are from the UK and three from Australia. They are: Lord Hoffmann, Lord Millett, Lord Neuberger of Abbotsbury, Lord Walker of Gestingthorpe, Lord Collins of Mapesbury, Lord Clarke of Stone-cum-Ebony and Lord Phillips of Worth

¹² (Cap.484), s.14(3).

¹³ Basic Law, Articles 89 and 90; (Cap.484), s.14(8).

Matravers from the UK; and Justices Murray Gleeson, James Spigelman and William Gummow from Australia.¹⁴

16. The former judges who have been overseas non-permanent judges of the CFA are no less eminent a group of jurists, hailing from the UK, Australia and New Zealand. There are twelve former overseas NPJs.

- (1) Two are former Chief Justices of the High Court of Australia: Sir Anthony Mason and Sir Gerard Brennan. Two others are former Justices of the High Court of Australia: Sir Daryl Dawson and Justice Michael McHugh.
- (2) Four are former Lords of Appeal in Ordinary from the UK: Lord Cooke of Thorndon, Lord Nicholls of Birkenhead, Lord Woolf of Barnes and Lord Scott of Foscote.
- (3) CFA judges from New Zealand have been: Sir Thomas Eichelbaum, a former Chief Justice; Sir Thomas Gault, a former Justice of the New Zealand Supreme Court; Sir Ivor Richardson, a former President of the New Zealand Court of Appeal; and Sir Edward Somers, a former Judge of the New Zealand Court of Appeal.

The Why

17. Why was it thought necessary to include visiting judges on the CFA?

¹⁴ Two new appointments by the Chief Executive have recently been announced, of Justice French from Australia (formerly Chief Justice of the High Court of Australia) and Lord Reed from the UK (currently a member of the UK Supreme Court), and are pending the completion of the endorsement and reporting processes (see para.10 above).

18. Under the constitutional framework, as a matter of the CFA’s jurisdiction, each judge has an equal say to that of the other members of the Court in the outcome of any appeal. The Court’s founding Ordinance provides that: “The judgment or order which is that of the majority of the judges sitting shall be deemed to be the judgment or order of the Court.”¹⁵ So the judgment of an overseas non-permanent judge is but one voice out of five as far as the determination of an appeal is concerned.

19. But our visiting overseas non-permanent judge is, of course, much more than just another Hong Kong judge when sitting with us on the CFA. By dint of their backgrounds, the overseas NPJs bring enormous judicial experience and wisdom to the Court. They are all judges who have had significant influence in shaping the jurisprudence of their own jurisdictions and they bring that wealth of experience to bear when they participate in the deliberations and decisions of the Court.

20. I would like to highlight four important aspects of the role of the overseas NPJ on the CFA that address the “why” question I have posed.

21. The first aspect is the dimension of judicial experience at the level of a final appellate court. This dimension should not be under-estimated. Prior to 1997, there were no Hong Kong judges who had experience of sitting in any Hong Kong court other than an intermediate court of appeal.¹⁶ The role and function of the CFA as a final appellate court, especially in a jurisdiction where the courts are charged with a duty of constitutional review of laws, is different to that of an intermediate court of appeal. It is not simply a second court of

¹⁵ (Cap.484), s.16(5).

¹⁶ The first Chief Justice (Andrew Li Kwok-Nang, Chief Justice from 1997-2010) had deputised in the High Court at first instance and the first three permanent judges (Justices Litton, Ching and Bokhary) had only sat as members of the Court of Appeal in Hong Kong at a time when there was no final appellate court sitting within the jurisdiction and before the development of any jurisprudence of such a court.

appeal reviewing again the decision of a trial court. Instead, it fulfils the role, at the apex of the court hierarchy, of resolving questions of law of general importance.¹⁷ This was not a capacity in which any Hong Kong judge had prior experience when the CFA was originally established and commenced operation. In contrast, the overseas non-permanent judges sitting on the Court bring a wealth of experience in this respect. This was particularly important in the early years of the Court's existence, when it was building up its initial body of jurisprudence, in particular in constitutional law.

22. The second aspect I would highlight is the practical ability that the Chief Justice has of assigning cases to particular non-permanent judges, in whose fields of specialty a particular case may lie. The panel of overseas non-permanent judges consists of judges who, both in practice as advocates and on the bench, have specialised in various areas of the law. It is certainly no exaggeration to say that, in many cases, their expertise in those fields is recognised worldwide and their judgments are regularly cited as definitive expositions of the common law in diverse fields of law. The panel of overseas non-permanent judges therefore provides a deep pool of specialist expertise on which the Chief Justice draws when assigning particular overseas judges to particular sitting sessions of the Court during the year and also when the Appeal Committee grants leave to appeal and fixes hearing dates for specific cases in those particular sessions.¹⁸

23. The third aspect I would highlight, which very much follows from the second, is the international dimension that the overseas non-permanent judge brings to the Court's deliberations and eventual judgment. The Basic Law permits the courts of Hong Kong to refer to precedents of other common law

¹⁷ *Solicitor v Law Society of Hong Kong & Secretary for Justice (Intervener)* (2003) 6 HKCFAR 570 at [27]-[30]; *HKSAR v Cheng Chee Tock Theodore* (2015) 18 HKCFAR 292 at [12]-[17], [31]-[33].

¹⁸ *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd* [2016] 2 HKC 157 at [4].

jurisdictions, continuing the previous practice.¹⁹ Having experienced judges from some of those jurisdictions to whose precedents reference is made is an obvious and practical advantage. This aspect of the function of the overseas NPJs was also alluded to by Lord Cooke in an early case heard by the Court as to whether the Hong Kong courts should give effect to a Taiwanese bankruptcy order. In that case, he stated that he was in full agreement with the judgment given by one of the permanent judges, with which the other three members of the Court also agreed. But he thought it right to add a separate judgment because of the role in the CFA of the judges from other common law jurisdictions. In particular, he said this:

“... I think that it may be inferred that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law.”²⁰

24. The fourth aspect I would highlight is the demonstration of confidence both internally and externally in the independence of the Hong Kong Judiciary. This, I believe, is a critically important role played by the overseas non-permanent judges. By their participation in the work of the CFA, and also their public statements about their own experiences as Hong Kong judges,²¹ the overseas non-permanent judges provide an external affirmation of real value about the independence of the Court and the Hong Kong Judiciary. It is perfectly reasonable to ask, “Would so many eminent serving²² and retired judges have sat, and continue to sit, in a court in Hong Kong if any of them thought the system was subject to improper interference from outside

¹⁹ Basic Law, Article 84.

²⁰ *Chen Li Hung & Ors v Ting Lei Miao & Ors* (2000) 3 HKCFAR 9 at 23B.

²¹ See, as a recent example, the speech of Lord Neuberger of Abbotsbury NPJ to the Hong Kong Competition Association on 13 September 2016, *The Implementation of Competition Law in Hong Kong and the Role of Judges*, at [29]: see http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html.

²² From 1997, it has been, by agreement with the Lord Chancellor, a convention that two serving Law Lords (and now two members of the UK Supreme Court), would be available to sit as NPJs: *Hong Kong's Court of Final Appeal*, edited by Simon N.M. Young and Yash Ghai (CUP, 2014), at p.231.

agencies?” There is also what may, in crude terms, be described as the allied “canary in the coalmine” phenomenon. By this, I mean the confidence generated internally within the Court and the Hong Kong Judiciary as a whole that our judicial system is operating independently and free from outside interference.

The How

25. How do the visiting judges contribute to the work of the CFA?

26. The standing of any court and its jurisprudence is primarily, if not solely, to be measured by the quality of its judgments and it is in this respect that the overseas NPJs make their most direct contribution to the work of the Court. There are two ways in which they do so: first and foremost in writing a judgment; and secondly, in collegiate discussions contributing to a judgment written by another member of the Court.

27. The first and most direct way in which an overseas NPJ influences the work of the CFA is in writing a leading or concurring judgment or in contributing to a joint judgment of the Court as a whole. The CFA usually sits to hear seven or eight sessions of final appeals each year. The practice is for an overseas NPJ to come to Hong Kong for a stint of four weeks in the course of which the Court hears appeals during the first two weeks, leaving the latter two weeks for the writing of the judgments. Given the number of overseas NPJs on the Court’s panel, each judge will usually sit once every 12 to 18 months or so. In the, now, twenty years of the CFA’s operation, the overseas NPJs have written, or contributed to, many of the leading judgments of the Court. This is not the time to analyse the particular decisions constituting the jurisprudence of the CFA, but the judgments which the overseas NPJs have written or to which

they have contributed are significant and establish important binding precedents on the courts of Hong Kong in all areas of the law. Their judgments have also been cited in final appellate courts in other jurisdictions.²³

28. The second way in which an overseas NPJ influences the jurisprudence of the Court, that is by way of collegiate discussions leading to the Court's decisions, is more abstract but nevertheless very real. This is an indirect way in which the overseas NPJs shape the eventual judgment or judgments that decide a particular appeal. In an article in the Southern Cross University Law Review, Sir Anthony Mason included a reflection, in the context of a discussion of the argument for joint judgments in the High Court of Australia, on the practice in the CFA in Hong Kong of seeking to arrive at an agreed judgment and that he adjusted to this practice, which is more rigid than that in Australia, "because it involves more continuous discussion between the judges than occurred in the High Court".²⁴ The CFA has been described, accurately, by its first Chief Justice, Andrew Li, as a "collegiate" court²⁵ and this involves extensive discussion of a case before, during and after a hearing amongst the participating judges. In the article to which I have just referred, Sir Anthony Mason commented that the collegiality and practice of the CFA "has a lot to commend it". Even if they are not writing, the overseas NPJs all contribute to a greater or lesser extent in each appeal.

²³ See, e.g., *Joseph v Spiller* [2011] 1 AC 852 citing Lord Nicholl's judgment in *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339; *Bilta (UK) Ltd (In Liquidation) v Nazir* [2016] AC 1 citing Lord Walker's judgment in *Moulin Global Eyecare Trading Ltd v Inland Revenue Commissioner* (2014) 17 HKCFAR 218; *Momcilovic v The Queen* (2011) 245 CLR 1 citing Sir Anthony Mason's judgment in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 citing Sir Anthony Mason's judgment in *Shiu Wing Ltd v Commissioner of Estate Duty* (2000) 3 HKCFAR 215; *R v Boulanger* [2006] 2 SCR 49 citing Sir Anthony Mason's judgment in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381.

²⁴ *The High Court of Australia – Reflections on Judges and Judgments* (2013) 16 Southern Cross University Law Review 3 at 14-15.

²⁵ *Hong Kong's Court of Final Appeal* (CUP, 2014) at p.260.

29. These contributions of the overseas NPs to the work of the CFA have substantively rebutted the minority of doubters, one of whom described the visiting judges from outside Hong Kong as “parachute judges”,²⁶ and who warned that they would not be familiar with conditions in Hong Kong.²⁷ The overseas NPs have been sensitive to their roles as Hong Kong judges and any concerns that these eminent jurists would seek to dominate the working of the Court have proved unfounded. In practice, the overseas NP always sits as the most junior judge of the Court of five and it is rare for the visiting judge to dissent from the majority: this has only happened in two final appeals²⁸ and once in relation to an ancillary matter of consequential relief after a unanimous substantive decision.²⁹

30. One obvious respect in which an overseas judge can offer particularly valuable assistance to the work of a common law court is in relation to the citation of comparative law. The important place of comparative law in the development of the jurisprudence of Hong Kong has been recognised, in particular in an article written by Sir Anthony Mason to commemorate the 10th anniversary of the establishment of the HKSAR.³⁰ As Sir Anthony has separately noted, there is a strategic advantage in referring to authorities in other jurisdictions since external impressions of Hong Kong judicial decision-making

²⁶ See Ma Lik, *A Judgment Found Wanting*, Hong Kong iMail, 5 December 2000.

²⁷ See Cliff Buddle, *Judges Who ‘Drop in’*, South China Morning Post, 9 March 2001.

²⁸ The first occasion was Lord Nicholls’ dissent, as part of a 3:2 split, in *Bank of East Asia Ltd v Tsien Wui Marble Factory* (1999) 2 HKCFAR 349; the second occasion was Lord Cooke’s dissent, also in a 3:2 split, in *Next Magazine Publishing Ltd v Ma Ching Fat* (2003) 6 HKCFAR 63.

²⁹ Lord Millett dissented, as part of a minority of 2, on the rate of interest to be awarded in *Hong Kong Electric Co Ltd v Commissioner of Rating and Valuation (No.3)* (2012) 15 HKCFAR 1, following the Court’s unanimous decision in *Hong Kong Electric Co Ltd v Commissioner of Rating and Valuation (No.2)* (2011) 14 HKCFAR 579.

³⁰ *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299.

may be important for its reputation and standing in the international commercial world.³¹

31. As well as influencing and contributing to the jurisprudence developed by the CFA, the overseas NPs have also contributed positively to the standing of the Court and the independence of the Judiciary. As to the latter, I have earlier mentioned how the non-permanent judges provide reassurance that Hong Kong continues to be served by an independent judiciary. As to the former, the overseas NPs on the CFA regularly participate in speaking engagements when visiting Hong Kong and refer to the jurisprudence of the Court in their extra-judicial writings: Sir Anthony Mason, for example, has spoken on his experiences of sitting on the CFA and written about the development of Hong Kong law since 1997.³²

32. In addition, it is an inevitable by-product of their judicial careers in Hong Kong that, in discussions on matters of law with their colleagues and legal connections in their own jurisdictions, the overseas NPs are likely to refer to any relevant decisions of the CFA and thereby propagate the jurisprudence of the Court in the legal circles in which they travel.

Conclusion

33. It is to Hong Kong's great advantage that we have distinguished visiting judges from overseas participating in the work of the CFA. Their influence, collectively, on the development of the law of Hong Kong since 1997 has been immense. Undoubtedly, the standing of the Court has been raised by their

³¹ http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html: a speech given to the Hong Kong Judicial Institute on 25 October 2013, entitled *Sitting as Non-Permanent Judge in the Court of Final Appeal for the past 16 years*.

³² See the references at FN 29 and 30 above and, also, *The Rule of Law in the Shadow of the Giant* (2011) 33(4) Sydney Law Review 623.

participation. What they derive from their participation is a matter you will have to ask them. But, from a Hong Kong judge's point of view, it is a privilege and a pleasure to sit with them and they have our respect, admiration and gratitude.

34. This is a brief reflection on the experience of having visiting non-local judges sit on a Hong Kong court. Thank you for your attention.
