

Implementing China and Hong Kong's Preliminary Reference System: Transposability of Article 267 TFEU Principles

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Article 158(3) of Hong Kong's post-handover constitution stipulates a preliminary reference procedure that was modelled upon article 267 of the Treaty on the Functioning of the European Union ("TFEU"). In the first 16 years of its life, Hong Kong's Court of Final Appeal ("CFA") has through four judgments laid down some principles for implementing the reference procedure. Yet the jurisprudence is unclear and pertinent aspects of the procedure remain undefined. Notwithstanding calls by jurists for the CFA to draw on principles developed by the European Court of Justice ("ECJ") under article 267 TFEU, there has hitherto been no discussion on how meaningful transposition can take place, given the vast differences in institutional, constitutional and political landscapes between the EU and Chinese contexts. This paper seeks to plug this gap by sketching a set of criteria for evaluating the transposability of article 267 principles to Hong Kong, and applying such criteria to examine how the CFA can borrow from the ECJ's resources in resolving key issues it faces in implementing article 158(3). This paper will make two points. First, the CFA may borrow a juridical doctrine developed under article 267 TFEU only if the doctrine is in line with the text and purposes of article 158(3) as well as the institutional and constitutional role of the CFA. Secondly, applying such criteria, while some of the ECJ's principles can assist the CFA in rationalising existing jurisprudence and answering unresolved questions, others, including the acte clair doctrine, are not transposable.

Introduction

Article 267 of the Treaty on the Functioning of the European Union ("TFEU") mandates national courts of last instance to seek a preliminary ruling from the European Court of Justice ("ECJ") on the interpretation of EU law if the question of such interpretation is raised in a case.¹ While

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many scholars have documented the transplant of this novel system to other European arrangements, few have tracked its first transplant to Asia:² it inspired art.158(3) of the Hong Kong Basic Law (“BL”)³ – the key provision regulating the interface between China’s Socialist legal system and Hong Kong’s common law system. Under this article, Hong Kong’s Court of Final Appeal (“CFA”) has final powers of adjudication and may interpret all provisions in the BL during adjudication, subject to a duty to seek an interpretation from Beijing’s Standing Committee of the National People’s Congress (“NPCSC”) on the meaning of a provision concerning the Chinese government’s responsibilities, if the court needs to interpret that provision in order to give judgment.⁴

The EU model was adopted by drafters of Hong Kong’s post-handover constitution to ease the tensions inherent in China’s reunification philosophy of “one country, two systems”. The EU model could apparently reconcile respecting China’s control over its sovereign prerogatives with protecting the integrity of Hong Kong’s common law system.⁵ Yet just *how* the balance between these countervailing interests is to be struck is unclear from the vague text of the article, which

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¹ Ex Art.234 EC, Art.177 EEC. Article 267 TFEU:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court...”

² Apart from art.143 of the Macau Basic Law, which are in almost identical terms with art.158 BL, I am not aware of any other transplants of art.267 TFEU in Asia.

³ The transplant was expressly acknowledged in *Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (For Solicitation of Opinions)* (Consultation Committee for the Basic Law, April 1988), para.52.

⁴ Article 158(3): “The courts of Hong Kong... may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.”

⁵ An examination of the drafting records on art.158 reveals this. For a helpful compilation of these records, see 李浩然《香港基本法起草過程概覽（全三冊）》（三聯書店(香港)有限公司, 2012) pp.1178-1209.

does not define, for instance, which provisions concern the Chinese government's responsibilities and when there is a "need" to interpret them.

The task of elaborating the reference procedure, and hence partly delineating the boundaries of Hong Kong's autonomy vis-à-vis China, has fallen on the CFA. In the first 16 years of its life, the CFA has through four cases laid down some principles for implementing the reference procedure.⁶ However, the jurisprudence is at times confusing and important aspects of the procedure remain undefined. There have been voices from the academia and judiciary calling expressly or implicitly for the CFA to borrow principles developed by the ECJ on art.267 TFEU, including the *acte clair* doctrine, in implementing art.158(3) BL.⁷ Nonetheless there has hitherto been no discussion on how meaningful transposition can take place, given the vast differences in institutional, constitutional and political landscapes between the EU and Chinese contexts. Nor has there been much discussion on how the transposition can help resolve central issues on the duty to refer in Hong Kong.

This paper seeks to plug these gaps. First, it will sketch a set of criteria for evaluating the transposability of principles developed under art.267 TFEU to the CFA. It argues that a principle will only be transposable if it coheres with the text of art.158 and serves the purpose of the provision and the implementation thereof is within the constitutional and institutional capacity of the CFA. Secondly, this paper will apply the proposed criteria to examine how the CFA can borrow from the ECJ's resources in resolving three key issues it faces in implementing art.158(3), namely, when there is a need to interpret a provision, which provisions concern China's sovereign prerogatives, and when a point of interpretation is arguable. It will show that while some of the ECJ's principles can assist the CFA in rationalising existing jurisprudence and answering unresolved questions, others, including the *acte clair* doctrine, are not transposable, primarily due to the different underlying purposes of arts 267 and 158(3) and the unique

⁶ *Ng Ka Ling v Director of Immigration* [1999] HKCFA 72; *Chong Fung Yuen v Director of Immigration* [2001] HKCFA 48; *Democratic Republic of Congo v FG Hemisphere Associates LLC* [2011] HKCFA 42; *Vallejos Evangeline Banao v Commissioner of Registration and Registration of Persons Tribunal, Domingo Daniel L v Same* [2013] HKCFA 17.

⁷ Albert Chen, leading scholar in the field, argued that art.267 principles, including *acte clair*, are "of great assistance in applying" art.158(3) BL. A. Chen, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case" in J.M.M. Chan, H.L. Fu and Y. Ghai (eds), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong University Press 2009) ("*Constitutional Debate*"), pp.116-123. An implicit call for transposition can be found in P.Y. Lo, "Rethinking Judicial Reference" in H. Fu, L. Harris and S.N.M. Young (eds) *Interpreting Hong Kong's Basic Law: the Struggle for Coherence* (Palgrave Macmillan, 2007), p.157. See text to notes 44-46 below for an analysis of how certain judges seemed to have endorsed the *acte clair* doctrine.

constitutional role of the CFA. It is hoped that this paper will lay the groundwork for meaningful transplant of judicial norms from the ECJ to Hong Kong and shed light on how the CFA should implement art.158(3).

This paper proceeds on the assumption that it is important to explore how the CFA should apply the reference procedure. This assumption may be challenged on the ground that how the CFA implements the procedure is inconsequential. Under art.158(1) BL, the NPCSC may issue an interpretation of any provision in the BL any time on its own initiative.⁸ It may therefore issue an interpretation of art.158(3) to overturn the CFA's understandings of the duty to refer. The objection goes that there is no point in analysing how the CFA should implement the reference system. My reply is, despite the NPCSC's plenary powers of interpretation, the CFA retains significant room to shape the reference procedure. Two points must be noted. First, the CFA's interpretations of art.158(3) will stand unless and until the NPCSC issues a contrary interpretation, because the latter's interpretations do not affect judgments previously rendered (art.158(3)). Secondly, although the NPCSC's power of issuing interpretations is theoretically unlimited, it is limited by practical constraints.⁹ Indeed, post-handover reality shows that the NPCSC would only issue an interpretation of the BL if it has important vested interests at stake, and even then it would be careful to limit the breadth of the interpretation, narrowing it to the facts of the case and avoiding pronouncing general principles on the duty to refer.¹⁰ So the CFA retains significant room to develop art.158(3). This paper sets out to elucidate how that room should be utilised, drawing from art.267 experiences.

⁸ Interestingly a reading of art.267(1) TFEU to give the ECJ a free-standing power to issue preliminary rulings had been proposed by jurists in the EU, but unanimously rejected by the ECJ. See M.R. Mok, "Should the 'First Paragraph' of Article 177 of the EEC Treaty be Read as a Separate Clause?" (1968) 5 CMLRev 458. See also J. Crawford, "Rights in One Country: Hong Kong and China", *Hochelaga Lectures 2004* (Faculty of Law, University of Hong Kong, 2005), p.9.

⁹ Some constraints include: 1. China is keen to use Hong Kong to demonstrate to Taiwan – its ultimate destination of reunification – that its promises of "two systems" are real. 2. Too many interpretations would damage the already thin trust of the general public in Hong Kong towards the Chinese government; without such trust Hong Kong will become ungovernable. 3. China needs to ensure cooperation from Hong Kong's judiciary. One can imagine the constitutional crises that might ensue if Hong Kong's courts refuse to enforce the NPCSC's interpretations. 4. In its struggle to be recognised as a world power, China is anxious to demonstrate that it is willing to abide by its international obligations. Blatant violation of its promises in the Sino-British Joint Declaration of giving a high degree of autonomy to Hong Kong would be a black mark. Cf Sir Anthony Mason's argument that the extent to which the rule of law can be maintained in Hong Kong depends on the frequency and manner with which the NPCSC issues an interpretation of the BL, in "The Rule of Law in the Shadow of the Giant: the Hong Kong Experience" (2011) 33 Sydney Law Review 623.

¹⁰ See e.g. the NPCSC's mellow response to the CFA's defiant judgment in *Chong Fung Yuen* and the specificity of the NPCSC's interpretation regarding *Congo*.

In the following, I will first propose criteria for evaluating whether art.267 principles are transposable to Hong Kong. I will then examine what principles the CFA can borrow to resolve key issues it faces in implementing art.158(3).

Criteria for Evaluating Transposability of Principles

A principle developed by the ECJ will only be transposable if it is internally justified, i.e. coherent with the BL. This requires firstly, the principle to be in line with the text of art.158(3); secondly, that it serves the underlying purposes of this provision; and thirdly, the implementation the principle be within the constitutional and institutional reach of the CFA.¹¹ The third point requires more elaboration. A principle will only be transposable if it does not require the CFA to adopt methods of interpretation that it lacks the constitutional basis to apply. Relatedly, the CFA will not be able to fulfil its constitutional functions if it has to adopt interpretative methods that it lacks expertise or knowledge or is otherwise institutionally unequipped to apply. So a principle for implementing the reference procedure will only be transposable if it does not require the CFA to adopt interpretative methods that it is unequipped to employ. Admittedly, institutional capacity can be built up over time, so the more important concern in determining whether a principle is transposable is whether the CFA is constitutionally tasked with applying the interpretive methods required by such principle.

1. Text

If an art.267 principle flies in the face of the wording of art.158(3) BL, it will not be transposable. Here the similar structure and wording of art.158(3) and its EU counterpart make them natural sites for cross-fertilisation. Under both articles, the court of last instance must seek a preliminary ruling before handing down a judgment when two conditions are met.¹² First, the court needs to interpret a legal provision in order to resolve a case. Following the CFA, I will call

¹¹ These criteria are in line with the CFA's established common law purposive approach to interpreting the BL, which seeks to ascertain the meaning of the text in light of its purpose and context. *Ng Ka Ling v Director of Immigration* [1999] HKCFA 72 at [74]-[76]; *Chong Fung Yuen v Director of Immigration* [2001] HKCFA 48, section 6.3.

¹² Yet unlike art.267 TFEU, art.158 does not prescribe an optional reference scheme for lower courts.

this the “necessity condition”.¹³ The two articles stipulate the necessity condition in similar terms – art.158(3) BL: when the court “in adjudicating cases... need[s] to interpret” a provision and “such interpretation will affect the judgments on the cases”; art.267(3) TFEU: when a question of interpretation is “raised in a case pending before a court”. The second condition is that the provision that the court needs to interpret is, in the case of the BL, regarding “affairs which are the responsibility of the Central People’s Government” or “the relationship between the Central Authorities and the Region”, and in the case of the EU, inter alia, a provision in the TFEU or Treaty on European Union. Following the CFA, I will call these provisions “excluded provisions” and this condition, the “classification condition”.¹⁴

2. Underlying purposes

Apart from the text, a principle developed by the ECJ is only transposable to the CFA if it serves the purpose of art.158(3) BL, which differs from that of art.267 TFEU. It is axiomatic that the latter is to ensure the uniformity of interpretation and application of EU law in member states, as part of the European integration project.¹⁵ The purpose of art.158, however, is less clear. The text of the provision reveals two interests: preserving China’s control over the excluded matters *and* maintaining judicial autonomy and the integrity of the common law system in Hong Kong. A moment’s reflection will reveal that this is not a coherent purpose. It is impossible to satisfy both interests to the fullest extent. If the excluded matters are widely drawn, then the integrity of the common law system will be tarnished. This is because unlike the ECJ which is a court that functions upon traditions common to the member states, the NPCSC is a legislative body of a Socialist regime and its values and reasoning methods are fundamentally different from the CFA’s.¹⁶ Every interpretation issued by the NPCSC is to some extent an affront to the integrity of the common law system, because procedurally, such legislative interpretation flouts the common law practice of vesting the power of interpreting the law with courts rather than the legislature, and substantively, the interpretation may violate common law principles. Therefore,

¹³ *Ng Ka Ling v Director of Immigration* [1999] HKCFA 72 at [89].

¹⁴ *Ibid.*

¹⁵ See eg *Case 107/76 Hoffmann-La Roche* [1977] ECR 957, at [5].

¹⁶ E.g. Y. Ghai, “Litigating the Basic Law: Jurisdiction, Interpretation and Procedure” in *Constitutional Debate*, pp.5-6, 35-36; M. Elliott and C. Forsyth, “The Rule of Law in Hong Kong: Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People’s Congress” (2000) 8(1) *Asia Pacific Law Review* 53, section D.

to have a clear idea as to what art.158(3) seeks to serve, it is necessary to find out how the balance between, put crudely, sovereignty and autonomy, is intended to be struck.

The text is silent on this question. However, an examination of the materials that the CFA considers admissible for ascertaining legislative purpose,¹⁷ including other provisions of the BL, drafts of the BL and the Sino-British Joint Declaration – the international treaty that the BL was supposed to implement – reveals overriding concerns over maintaining the common law system and upholding judicial autonomy in Hong Kong.¹⁸ The BL and Joint Declaration repeatedly emphasized these concepts, which are stated to be non-amendable in the BL (art.159(4)). The textual history of the BL reinforces the significance of these concepts. In the early drafts, Hong Kong courts were only given the power to interpret non-excluded provisions; later drafts expanded this power to cover all provisions in the BL, subject to the duty to refer, which was narrowed down at each subsequent stage to safeguard the integrity of the common law system.¹⁹ There is no doubt that separation of systems and judicial autonomy are core purposes of the reference scheme. If these were taken to be sole purposes of the scheme, then references should be limited as far as possible.

However, there is another side to art.158(3) – protecting China’s control over certain affairs. The question is how narrowly these affairs should be drawn. An examination of the above-stated contextual materials reveal that the only sovereign concerns that rank on the same level of importance as judicial autonomy appear to be: control over Hong Kong’s foreign affairs and defence, maintaining Hong Kong as an inalienable part of China, and preserving national unity and territorial integrity. Most of the Chinese government’s other supervisory powers are not listed in the Joint Declaration, nor are they stated to be non-amendable in the BL. A holistic reading of the context of art.158(3) therefore suggests that the purposes of this provision are to uphold judicial autonomy *and* protect China’s control over the above-listed sovereign prerogatives.

So while art.267 TFEU aims to create a uniform legal system, art.158(3) BL seeks to segregate two diverse systems and protect China’s control over a limited list of prerogatives.²⁰

¹⁷ Under the common law approach to interpretation, in general only certain pre-enactment extrinsic materials are admissible to shed light on the context of a provision. See n 11 above.

¹⁸ Y. Ghai, *Hong Kong’s New Constitutional Order* (2nd edn, Hong Kong University Press, 2001), pp.222-224.

¹⁹ Note 5 above.

²⁰ One might argue that the aim of art.158(3) can be rephrased as to achieve uniformity in the national approach to China’s sovereign prerogatives such as foreign affairs and defence. However, it would be more accurate to describe

Hence techniques developed in the EU to ensure the uniformity of law may not be transposable. However, both procedures have generated an imperative to limit references. In the case of the EU, the need to ensure an effectively functioning preliminary ruling system spawned the need to limit the ECJ's workload, subject to the uniformity of law not being threatened.²¹ In the case of the BL, the need to uphold judicial autonomy engenders an imperative to curb references to situations where China's control over the narrow list of sovereign prerogatives is at stake. Techniques developed in the EU for limiting references may therefore be instructive to the CFA.

3. The CFA's constitutional and institutional capacity

A principle developed by the ECJ will not be transposable if its operation requires the CFA to apply methods of interpretation beyond its institutional and constitutional reach. In the EU, national courts are seen as EU courts in their own right and are mandated to interpret EU law from the EU legal system's perspective when the uniformity of application of law is not endangered.²² In contrast, courts in Hong Kong are constitutionally mandated to apply common law methods to interpret the BL only.²³ By virtue of their common law training, they are also only institutionally capable of applying such methods. While the CFA is bound by prior interpretations issued by the NPCSC (art.158(3)), it is not in a position to apply, on its own, Chinese methods of interpretation. Therefore in attempting to borrow from the ECJ, one should be wary of transposing principles that require the CFA to go beyond its institutional and constitutional ambit.

the purpose as ensuring China's ability to *control* these prerogatives than to define it as to achieve *uniformity* in the national approach to these affairs. The Chinese government is guided predominantly by pragmatism and seems ready to tolerate divergent approaches whenever pragmatism dictates so. It is not always easy to discern one uniform approach to these affairs on the part of the Chinese government. For instance, the Chinese government's insistence on Hong Kong adopting absolute sovereign immunity in *Congo* has ironically led to inconsistencies in the two jurisdictions' approaches towards granting immunity to certain states. See E.T.M. Cheung, "Undermining our judicial independence and autonomy" (2011) 41 Hong Kong Law Journal 411. Also, despite its official stance of non-recognition of the Taiwanese government, the Chinese authorities seemed complacent with the CFA's recognition of a Taiwanese judgment in *Chen Li Hung v Ting Lei Miao* [2000] HKCFA 69.

²¹ For a recent exposition of this point, see T. de la Mare and C. Donnelly, "Preliminary Rulings and EU Legal Integration: Evolution and Stasis" in P. Craig and G. de Burca (eds) *The Evolution of EU Law* (2nd edn, OUP, 2011) p.363.

²² P. Craig, "The Jurisdiction of the Community Courts Reconsidered" in G. de Burca and J.H.H. Weiler, *The European Court of Justice* (OUP, 2008), p.178.

²³ Articles 8, 18, 19, 82, 84, 88 BL.

Evaluating transposability

I will now apply the proposed criteria to evaluate the transposability of key principles developed by the ECJ on three issues that the CFA faces in implementing art.158(3): 1. When does the need to interpret a provision arise; 2. when is a point of interpretation arguable; 3. which provisions in the BL are excluded provisions. My conclusions on issues 1 and 2 do not apply to situations where the CFA needs to interpret a non-excluded provision, which meaning is arguably affected by that of an excluded provision. This situation will be dealt with in my analysis of issue 3.

1. The necessity condition

It would be helpful to begin the discussion by surveying the CFA's brief and vague jurisprudence on when there is a need to interpret a provision during adjudication. Last year, the court in *Democratic Republic of the Congo v FG Hemisphere* ("Congo")²⁴ provided a cursory answer to this question. In this case, FG Hemisphere, a US distressed debt fund, sought to enforce two ICC awards it had bought against the Democratic Republic of Congo ("the Congo") by garnishing certain funds in Hong Kong. The court had to decide whether the government of the Congo was immune from its jurisdiction. This question depends on whether Hong Kong recognises sovereign immunity in all cases ("absolute immunity") or only for non-commercial acts ("restrictive immunity"). Under arts 13 and 19 BL, which are indisputably excluded provisions, courts in Hong Kong have no jurisdiction over acts of state, which include foreign affairs – matters that fall within the exclusive responsibility of the Chinese government. The majority engaged in lengthy discussions to justify why a decision on the doctrine of state immunity in Hong Kong constitutes a foreign affair outwith Hong Kong courts' jurisdiction, and China's determination that Hong Kong should adopt absolute immunity, an unreviewable act of state.²⁵ However, the majority's discussion on why there is a need to interpret arts 13 and 19 is brief: it held that since the case "cannot be resolved without a determination" of the meaning of the terms "act of state" and "foreign affair", accordingly it was necessary to interpret, and hence

²⁴ *Democratic Republic of Congo v FG Hemisphere Associates LLC* [2011] HKCFA 42 ("Congo").

²⁵ At [223]-[373], per Chan PJ, Ribeiro PJ and Mason NPJ.

seek reference on, these articles.²⁶ The court's superficial definition of the necessity condition does not provide much guidance for future courts as it does not explain when the court would need to interpret a provision in order to resolve a case.

In March this year, the CFA missed an important opportunity to elaborate the necessity condition in *Vallejos Evangeline Banao v Commissioner of Registration*²⁷ ("Vallejos"). Here the court had to decide whether foreign domestic helpers in Hong Kong are entitled to the right of abode under art.24(2)(4) BL, which grants such right to non-Chinese persons who have continuously ordinarily resided in Hong Kong for at least seven years. The government's case consisted of various strands, two of which are relevant for present purposes. Its principal argument was that these workers clearly fall outside a common law reading of the term "ordinary resident".²⁸ In the alternative, the government suggested that the court was obliged to seek reference on what constitutes a binding "interpretation" issued by the NPCSC, i.e. a reference on the meaning of art.158 itself – a provision that was accepted by both parties as an excluded provision.²⁹ The argument goes that it was unclear whether the NPCSC's interpretation issued in 1999³⁰ to reverse the CFA's rulings in *Ng Ka Ling*³¹ and *Chan Kam Nga*³² was controlling in the present case. The 1999 interpretation was issued on arts 22(4) and 24(2)(3) BL, the provisions at stake in those two rulings. Yet the NPCSC, in explaining its interpretation of the latter article, made a general statement ("General Statement") to the effect that the legislative intent of *all* other subsections of art.24(2) – presumably including art.24(2)(4) which governs the right of abode of the foreign workers – is reflected in a report issued by a Chinese committee in 1996 ("1996 Document").³³ This report states that foreign domestic helpers are not entitled to the right of abode under the BL.³⁴ These workers' fate therefore hinges on whether the General Statement forms part of the binding "interpretation" issued by the NPCSC in 1999. Courts in Hong Kong

²⁶ At [406].

²⁷ *Vallejos Evangeline Banao v Commissioner of Registration and Registration of Persons Tribunal, Domingo Daniel L v Same* [2013] HKCFA 17.

²⁸ At [22].

²⁹ At [24]-[25], [97]-[99], [110].

³⁰ The Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law, adopted by the Standing Committee of the Ninth National People's Congress at Its Tenth Session on 26 June 1999.

³¹ *Ng Ka Ling v Director of Immigration* [1999] HKCFA 72.

³² *Chan Kam Nga v Director of Immigration* [1999] HKCFA 16.

³³ Opinions of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on the Implementation of Article 24(2) of the Basic Law, adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region on 10 August 1996 ("1996 Document").

³⁴ At para.3.

had previously ruled in *Chong Fung Yuen* that the General Statement does not relate to the subject articles of the 1999 interpretation, and is therefore *obiter dicta* and non-binding.³⁵ The government contended that a reference should be sought on whether this position is correct.

In response, the CFA first held in favour of the government on the latter's primary argument: construing art.24(2)(4) using the common law approach, it is clear that foreign domestic helpers do not have the right of abode.³⁶ The court further held that since the case was determined in favour of the government on the primary issue, there was no need for it to resolve the alternative point regarding judicial reference.³⁷

This judgment left readers in the dark as to why the CFA need not decide the question of reference. The court seems to be suggesting that since the meaning of art.24(2)(4) is clear, therefore according to the common law approach to interpretation, there is no basis for admitting extrinsic materials such as the 1996 Document as interpretative aid, thus no need to ascertain whether the General Statement binds.³⁸ Yet this reasoning does not withstand scrutiny. Under art.158, once the NPCSC issues an interpretation of a provision, Hong Kong courts are bound by it and are not free to interpret the provision using common law methods. *If* the General Statement indeed forms part of the 1999 interpretation, then the latter constitutes a binding interpretation on art.24(2)(4) and the CFA is not free to interpret this provision using the common law approach. So logically, whether the General Statement is binding is an *a priori* question that the court has to decide before it can proceed to interpret art.24(2)(4) using the common law approach. The CFA's apparent reasoning for not seeking reference is therefore problematic.

The ECJ's jurisprudence on when a question of interpretation is raised can shed light on how the CFA should determine when it needs to interpret a provision. As will be shown, such jurisprudence can provide a rational thread to the CFA's judgments. Also, given that the purposes of art.158(3) dictate the necessity condition to be construed narrowly to cover only situations where China's ability to control the excluded matters may be threatened, certain juridical doctrines developed by the ECJ to limit the scope of the necessity condition may be handy to the CFA.

³⁵ *Master Chong Fung Yuen v Director of Immigration* [1999] HKCFI 1307, at [64]-[65]; [2000] HKCA 499 at [49], [67], [70], [71], [105]; [2001] HKCFA 48 at section 6.2. The CFA's remarks on this point may be *obiter* since the point was no longer in dispute before the CFA.

³⁶ At [91].

³⁷ At [91], [96], [97], [111].

³⁸ *Ibid.* This reading is reinforced by the judgment on costs: *Vallejos Evangeline Banao v Commissioner of Registration and Registration of Persons Tribunal, Domingo Daniel L v Same* [2013] HKCFA 56 at [6].

One transposable principle from the EU is to treat the necessity test as having been passed only when the interpretation of a provision can potentially affect the *outcome* of the case. The ECJ ruled that if the “question [of interpretation] is not relevant, that is to say, if the answer to the question, regardless of what it may be, can in no way affect the outcome of the case”, then reference is not needed.³⁹ This technique can comfortably be accommodated within the wording of “will affect the judgments on the cases”. Also, the operation of this principle is in line with the purpose of art.158(3); China’s command over its sovereign interests will not be affected as the interpretation will in no way affect how such interests are played out.

This “outcome” approach can rationalise the CFA’s decisions on judicial reference in *Vallejos* and *Congo*. In the former, an interpretation of the binding scope of the 1999 interpretation could in no way affect the outcome of the case: if the General Statement was binding, then the foreign workers would not be entitled to the right of abode; if it was not, the court would be free to interpret art.24(2)(4) using the common law approach, in which case, the court held, these workers would still not be entitled to the right of abode. In contrast, the outcome of *Congo* could potentially be affected by an interpretation of the terms act of state and foreign affair: if foreign affair included the adoption of the doctrine of state immunity, then the court would be bound to follow China in embracing absolute immunity; given the court’s determination that the Congo had not waived its immunity, the latter would be immune from the court’s jurisdiction. If on the other hand the term foreign affair excluded the adoption of the doctrine of state immunity, the court would be free to determine what the applicable doctrine of state immunity was without the assumption that adoption of such doctrine was a foreign affair – a question which the majority has arguably not resolved.⁴⁰ The ECJ’s precise formulation of the outcome approach (cited above) can guide the CFA in fleshing out when an interpretation of a provision is needed to resolve a case.

Another transposable principle for expounding the necessity condition is to see it as being fulfilled only if the interpretation relates to the *actual* circumstances of the case. The ECJ

³⁹ Case 283/81 *Sri CILFIT v Ministry of Health* [1982] ECR 3415, p.3429, at [10]; see also D.W.K. Anderson QC and M. Demetriou, *References to the European Court* (Sweet & Maxwell, 2002), pp.91-95.

⁴⁰ Arguably, the majority’s various prongs of arguments were all premised on its view that adoption of state immunity law is a foreign affair, and China’s determination that Hong Kong should adopt absolute immunity, an act of state. It is unknown whether the majority would still conclude that Hong Kong was bound to follow China’s position on sovereign immunity if this basic premise was lifted. If it determined that restrictive rather than absolute immunity applied in Hong Kong, then the Congo may not be immune. See C. Chan, “State Immunity: Reassessing the Boundaries of Judicial Autonomy in Hong Kong” [2012] PL 601.

considers a point of interpretation of EU law not to have been raised in a case if the point is merely relevant to future or hypothetical cases.⁴¹ This principle can comfortably be transposed to the CFA. If the question of interpretation over a provision is irrelevant to the factual circumstances of the present case, then its answer is irrelevant to the “judgment on the case”. The operation of this principle will not affect China’s ability to regulate the excluded matters as they are not really at stake in the dispute in question. When they are, as the speculative or hypothetical facts materialise, references can and should then be sought.

So far there has not been any request for reference under art.158(3) based on hypothetical disputes. Nonetheless, the prospects of such a request are not entirely remote. The issue of “double-no children” – children born in Hong Kong when *both* of their parents are Mainland persons not settled in Hong Kong – draining Hong Kong’s resources has plagued the city ever since the CFA ruled in *Chong Fung Yuen* that these children are entitled to the right of abode under art.24(2)(1) BL. The government alluded that its request for reference in *Vallejos* was partly motivated by the desire to solve the issue of double-no children through this case.⁴² This might be possible for the government because the 1996 Document, in addition to stating that foreign domestic helpers are not entitled to permanent residency, also stipulates that double-no children are so not entitled.⁴³ Although the government’s request for reference in *Vallejos* was not based on hypothetical facts, such request suggests the government’s determination to solve the double-no issue, including by means of using the facts of another dispute to do so. The CFA must be keenly aware of any similar attempts in future, and be ready to dismiss requests for reference that are based on non-present facts.

2. The arguability requirement

The arguability requirement is one of the most obscure aspects of the CFA’s jurisprudence. The court has elaborated two possibly overlapping facets of this requirement. The first, which understands arguability as the presence of interpretative doubt, was advanced by the majority

⁴¹ See e.g. Case C-458/93 *Saddik* [1995] ECR I-511. Case C-467/04 *Criminal Proceedings against Gasparini and others* [2006] ECR I-9199. This should be distinguished from the ECJ’s barring of references based on fabricated disputes, which is more controversial. For the latter, see Case 104/79 *Pasquale Foglia v Mariella Novello* [1980] ECR 745; Case 244/80 *Pasquale Foglia v Mariella Novello (No 2)* [1981] ECR 3045.

⁴² See the remarks by the Secretary for Justice, Mr Rimsky Yuen on 13 December 2012, available at http://www.doj.gov.hk/eng/public/pr/20121213_pr3.html.

⁴³ 1996 Document, para.2.

judges and Bokhary PJ in *Congo*. The majority diverged with Bokhary PJ on whether reference must be sought, but they seemed to have agreed that there is only a need to *interpret* (as opposed to merely *apply*) an excluded provision if such provision is reasonably capable of bearing two or more different meanings; if the meaning of the provision is clear, there is no need to interpret, only a need to apply it. In other words, according to this line of jurisprudence, arguability is a *requirement of the necessity condition*. In *Congo*, the court had to decide whether it needs to interpret the terms act of state and foreign affair in arts 13 and 19 BL. The majority's own view was that adoption of the doctrine of state immunity is a foreign affair,⁴⁴ but it held that whether such adoption is indeed a foreign affair is disputable, "no other conclusion as to arguability is possible" since there are diverging judicial opinions on this issue, both within the CFA and in lower courts.⁴⁵ Accordingly the majority concluded that a question of interpretation of arts 13 and 19 was involved. Contrary to the majority's views, Bokhary PJ held that the issue of what doctrine of state immunity applies is clearly just a question of law, not of foreign affair, hence arts 13 and 19 were not "engaged" in the case at all; but even if they were, the meaning of these provisions was clear – they clearly excluded the adoption of the doctrine of state immunity – accordingly only the application and not the interpretation of these provisions was involved.⁴⁶ This reasoning, as I will soon explain, resembles the ECJ's *acte clair* doctrine.

The second facet of arguability, advanced by the CFA in *Ng Ka Ling* and *Vallejos* and Mortimer NPJ in *Congo*,⁴⁷ understands arguability as a *minimum threshold* that the *quality* of the arguments for seeking reference must attain. In *Ng Ka Ling*, the court held that a reference would not be needed if the arguments for seeking reference are "plainly and obviously bad", i.e. not *even* arguable.⁴⁸ In this case, the court suggested that the arguability test is an enquiry that is *separate from* and *precedes* the necessity and classification tests: "If the Court decides... that the point [about seeking reference] is unarguable, that would be an end of the matter as far as a question of reference is concerned. If the Court decides that it is arguable, the Court would then consider whether the classification and necessity conditions are satisfied."⁴⁹ On the other hand, in *Vallejos*, the court intimated that the arguability test is a *standard of review* for assessing

⁴⁴ At [239]-[247], [331], [352]-[355], [361]-[364].

⁴⁵ At [404].

⁴⁶ At [84]-[85].

⁴⁷ *Congo*, at [521].

⁴⁸ At [100].

⁴⁹ *Ibid.*

whether the necessity and classification conditions are met rather than a separate enquiry:⁵⁰ “Underlying any consideration by the Court whether or not to refer... is the requirement of arguability... [This] factor is implicit in Article 158(3)...”⁵¹.

This jurisprudence raises a number of questions. Regarding the first aspect of arguability, the court in *Congo* seemed to have recognised a conceptual space of the court having to apply (or engage) but not interpret a provision. Yet it is not known how courts should determine whether a provision is applicable in a case in the first place, and how this enquiry differs from the necessity test. How should a court distinguish provisions that are applicable and relevant to the case from those that are entirely irrelevant? Also, if the CFA can avoid a reference on the basis that the meaning of an applicable excluded provision is clear from the court’s own perspective, anomalous situations may arise whereby the court could resolve a case according to its own, rather than the NPCSC’s, interpretation of such provision. This potentially jeopardises China’s control over its sovereign prerogatives. Regarding the second aspect of arguability, it is unclear whether it is a distinct stage of enquiry from the necessity and classification conditions. It is also not known how courts should determine whether an argument in support of a reference is plainly bad. Finally, it is unclear whether the two facets of arguability are independent or overlapping requirements. Looking to the ECJ’s experiences will elucidate how the CFA should approach these issues.

Arguability as interpretative doubt

Let us first examine the former facet of arguability, namely, if the meaning of an applicable excluded provision is clear then there is no need to interpret, only a need to apply it. The ECJ’s framework for analysing whether a reference is admissible or mandatory illuminates how the CFA should determine whether a provision is applicable to the case, and why the first facet of arguability elaborated by the CFA is problematic and should be abandoned.

The dominant understanding of EU jurisprudence is that EU courts should analyse the question of reference in two stages.⁵² First, assuming that the provision at stake is an EU

⁵⁰ I thank P.J. Yap for suggesting the concept of the standard of review.

⁵¹ At [103]-[104], [109].

⁵² Admittedly, some jurists seem to view the analysis as comprising one stage only – whether a point of interpretation is raised. These jurists seem to suggest that if a point of interpretation is *acte clair* or *acte éclairé*, then

provision, courts should decide whether a question of interpretation is raised, i.e. the necessity question. *Subject to a limited proviso that will be propounded in the next section*, at this stage, EU courts are not concerned with issues of interpretative doubt. If a point of interpretation of an EU provision is raised, the provision is applicable and relevant to the case,⁵³ the *jurisdiction* and *duty* to refer kick in, and courts should move on to the next stage of analysis. At this subsequent stage, they should decide whether *exceptions* to the duty to refer apply. The ECJ has prominently developed two exceptions, both based on the absence of interpretative doubt: *acte éclairé*⁵⁴ - where the ECJ had previously ruled on the point of interpretation in question; and *acte clair*⁵⁵ - where the correct application of EU law leaves no scope for reasonable doubt. It is at this stage that EU courts consider issues of interpretative doubt. Even if any of these exceptions is established, national courts still have the jurisdiction to refer; they are just not bound to do so.

An examination of the ECJ's case law on preliminary rulings reveals that the court adopts a thin definition of "interpretation" in the phrase "where a question of interpretation is raised", which simply encompasses the ascertaining of the meaning of a provision.⁵⁶ Presence of interpretative doubt is not part of the definition. Building on the analysis in the preceding section on the principles developed by the ECJ in elaborating the necessity condition, according to the thin definition, a question of interpretation is raised whenever the meaning of the provision can potentially affect the outcome of the present case, *regardless of* whether such meaning is clear. This thin understanding of interpretation is contrasted with a loaded understanding which defines

no real question of interpretation is raised. See e.g. M. Lagrange, "The European Court of Justice and National Courts: the Theory of the *Acte Clair*: a Bone of Contention or a Source of Unity" (1971) 8 CMLRev 313. However, this view conflates the jurisdiction to refer with the duty to do so. It cannot account for the ECJ's view that *acte clair* and *acte éclairé* are *exceptions* to the duty to refer rather than factors that delineate the jurisdiction to refer. In *Sri CILFIT v Ministry of Health* [1982] ECR 3415, the ECJ made it clear at [15] that once a point of interpretation is raised, national courts have the jurisdiction to refer; they are just not bound to do so if any of the exceptions is established. The ECJ's definition of *acte clair* at [16] reflects this: "correct application of Community law... leave[s] no scope for any reasonable doubt as to the manner in which the *question raised* is to be resolved" (emphasis added).

⁵³ Various formulations have been used, e.g. the provision "governs" or is "relevant" or "applicable" to the case. See eg J. Bengoetxea, N. MacCormick and L.M. Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice" in G. de Burca and J.H.H. Weiler, *The European Court of Justice* (OUP, 2008), pp.52-53.

⁵⁴ Cases 28-30/62 *Da Costa* [1963] ECR 31.

⁵⁵ Case 283/81 *Sri CILFIT v Ministry of Health* [1982] ECR 3415 at [16]-[21].

⁵⁶ Cf Lagrange, "The European Court of Justice and National Courts: the Theory of the *Acte Clair*: a Bone of Contention or a Source of Unity" (1971) 8 CMLRev 313, 318; Bengoetxea, MacCormick and Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice" in G. de Burca and J.H.H. Weiler, *The European Court of Justice* (OUP, 2008), 52-56.

“interpretation” as the selection of one among different reasonable constructions of a provision.⁵⁷ Under the loaded definition, a question of interpretation is only raised if the meaning of the provision can potentially affect the outcome of the present case *and* the provision is reasonably capable of bearing two or more different meanings.

I propose that the thin definition of interpretation should be transposed to Hong Kong for understanding the phrase “need to interpret” in art.158(3). If transposed, it would mean that whenever the meaning of a provision can potentially affect the outcome of the present case, the provision is applicable and relevant to the case, and the necessity test is passed, regardless of whether the meaning of the provision is clear. If the provision is an excluded provision, then reference must be sought, unless, as I will soon explain, the NPCSC had previously issued an interpretation on point. It is necessary to adopt a thin definition of “need to interpret” in order to preserve the Chinese government’s control over its sovereign prerogatives. If the meaning of an excluded provision can potentially affect the outcome of the case, China’s sovereign prerogatives are at stake and the purpose of art.158 dictates that the Chinese government should be able to control the meaning of the provision.

To illustrate my proposal, suppose the CFA is faced with a case which hinges on whether the government of Hong Kong is allowed to openly take sides in an armed conflict between two foreign states. Although there is no doubt that “foreign affair”, carved out of Hong Kong’s jurisdiction by art.13 BL, includes officially taking sides in warfare, this excluded provision can potentially affect the outcome of and are applicable to the case. According to my proposal, the need to interpret this provision arises and reference must be sought.

This point partly explains why the doctrine of *acte clair* is not transposable. Contrary to prevailing academic opinion⁵⁸ and Bokhary PJ’s analysis in *Congo* which resembles the *acte clair* doctrine, I argue that there is *no* room for the CFA to apply *any* form of such doctrine once it has determined that the meaning of an excluded provision can potentially affect the outcome of the case. The doctrine was developed by the ECJ to encourage national courts to be EU courts in their own right,⁵⁹ to apply EU law on their own if they believe there is no doubt as to the application of such law *from the EU legal system’s perspective*. If we transpose this doctrine to

⁵⁷ Ibid.

⁵⁸ Note 7 above.

⁵⁹ See e.g. T. Tridimas, “Knocking on Heaven’s Door: Fragmentation, Efficiency, and Defiance in the Preliminary Reference Procedure” (2003) 40 CMLRev 9, 12.

Hong Kong, it would exempt the CFA from referring where the court considers that an excluded provision will potentially affect the outcome of the case, but is sure of how the NPCSC would interpret the provision. But the CFA is not a Chinese court. There is no constitutional basis for it to adopt Chinese methods of interpretation. Nor is it institutionally equipped to second-guess how a Chinese body may interpret a provision.⁶⁰ For the same reasons, the CFA is also not competent to assess whether the meaning of a provision is clear from both the Chinese *and* common law perspectives.

Further, it would not be acceptable for the CFA to apply a modified version of *acte clair* that exempts it from referring where the meaning of an applicable excluded provision is clear *from the common law perspective*. This relates to my earlier point on why it is necessary for the CFA to adopt a thin definition of “need to interpret”. Article 158(3) aims to protect judicial autonomy as much as the Chinese government’s ability to control its sovereign prerogatives. Once the CFA decides that the meaning of a provision concerning these prerogatives can potentially affect the outcome of the case, the interpretation of such provision must be a matter of Chinese law. Otherwise, the Chinese government’s ability to control these prerogatives will be endangered. Thus with respect, Bokhary PJ’s position in *Congo* that even if the excluded provisions were engaged in the case, reference would still not be needed because the meaning of these provisions were clear from the common law angle, is indefensible.

The exception of *acte éclairé*, however, is applicable to Hong Kong. In fact, it need not be transposed from the EU as it necessarily flows from firstly, the text of art.158(3) BL, which provides that interpretations issued by the NPCSC are binding on Hong Kong courts, and secondly, the fact that only one jurisdiction is obliged to refer under the BL, as opposed to the plurality of jurisdictions in the EU which compels the creation of *acte éclairé* to ensure that preliminary rulings bind not just the referring jurisdiction.⁶¹ So even if the meaning of an excluded provision will potentially affect the outcome of the case, the CFA should be exempted from seeking reference if the NPCSC had already issued an interpretation on point.

⁶⁰ This was forcefully affirmed by the Court of First Instance and Court of Appeal in *Chong Fung Yuen* in rejecting government counsels’ invitation to second-guess how the NPCSC would interpret art.24(2)(1). *Master Chong Fung Yuen v Director of Immigration* [2000] HKCA 499 at [17], [50], [68], [69], [71], [107], [108]; [1999] HKCFI 1307, at [64]-[65]. Nonetheless, it must be acknowledged that if the Chinese government has vested interest in the issue, it will likely have hinted how it would interpret the provision in question, even before the NPCSC officially issues an interpretation. E.g. China’s Office of the Commissioner of the Ministry of Foreign Affairs issued three letters to the Hong Kong government to expound its position on *Congo*, extracted at [197], [202], [211].

⁶¹ P. Craig and G. de Burca, *EU Law: Text, Cases and Materials* (5th ed, OUP, 2011), pp.475-476.

Arguability as threshold

Turning now to examine the second aspect of arguability, namely, reference is only needed if arguments for seeking reference are at least arguable, i.e. not plainly bad. The ECJ's jurisprudence can illuminate whether this requirement is a separate enquiry from the necessity and classification conditions or a standard of review, as well as how the CFA should evaluate whether arguments are plainly bad.

The ECJ has adopted the arguability threshold in determining whether a point of interpretation of EU law is raised; if such point is not arguably raised, the jurisdiction and duty to refer do not arise.⁶² This suggests that the ECJ views arguability as a standard of review for assessing, rather than a separate enquiry from, whether the necessity and classification conditions are satisfied. This makes sense because in deciding whether arguments for seeking reference are at least arguable, the court would inevitably have to consider whether the necessity and classification conditions are arguably satisfied. So contrary to the CFA's analysis in *Ng Ka Ling*, arguability should not be treated as a separate stage of analysis.

The CFA can draw inspiration from the ECJ on how to determine if an argument for seeking reference is plainly bad. To understand this, we must note that the CFA's decisions on whether there is arguably a need to interpret an excluded provision can be divided into two categories. First is where the court can determine this question without having to ascertain, even at a preliminary level, the meaning of the provision itself. For example, according to my rationalisation of *Vallejos*, the court was able to determine that there was no need to interpret art.158, without having to ascertain the meaning of this provision. This is because the court's reading of art.24(2)(4) using the common law approach yields no right of abode for foreign domestic helpers, hence the meaning of art.158 can in no way affect the outcome of the case.

The second category involves cases where a determination of whether there is arguably a need to interpret an excluded provision is *predicated upon* the CFA's preliminary understanding of the provision. This was the situation in *Congo*, where the court's judgment on whether there was a need to interpret arts 13 and 19 was premised on the court's preliminary understanding of

⁶² See, recently, Joined Cases C-128-131, 134-135/09, *Boxus* (2011) I-09711; Opinion of Advocate General Sharpston at [42]. Although the ECJ does not always use the term "arguable", its reasoning reflects the concept. See Anderson and Demetriou, *References to the European Court* (Sweet & Maxwell, 2002), p.87.

what foreign affair and act of state mean. In this category of cases, an argument for seeking reference will be plainly bad if the provision is clearly not capable of bearing the meaning upon which the arguments for reference lie. For instance, suppose a private businessman in the U.S. sells garment to a private businessman in Hong Kong. There is a contractual dispute between them and the case comes before the CFA. One party argues that the court has no jurisdiction to hear the case because a foreign affair, namely cross-jurisdictional trade, is involved. The court's decision on whether there is arguably a need to interpret arts 13 and 19, which exclude foreign affairs from the jurisdiction of Hong Kong courts, will be premised upon its preliminary understanding of what foreign affair means. If the CFA concludes that this term is clearly not capable of encompassing a *mere* cross-jurisdictional contractual dispute, then arguments that the two provisions are applicable in the case will be plainly bad.

Theoretically, EU courts' determinations of whether a point of interpretation of EU law is arguably raised can be categorised in this way too. However, the ECJ has rarely openly admitted to making category 2 determinations, namely, decisions on whether a point of interpretation is arguably raised that are premised on its own preliminary reading of the EU provision at stake.⁶³ Nor has the ECJ expressly formulated principles on how to determine if a case for seeking reference is at least arguable.

Nevertheless, I contend that the CFA may draw insights from the ECJ in respect of category 2 cases. Although there is no room for the operation of *acte clair* after the CFA determines that the need to interpret an excluded provision arguably arises, the CFA in determining whether a particular reading of a provision is plainly bad may borrow *techniques* embraced by EU jurists for deciding whether an issue is *acte clair*.⁶⁴ Note, however, that this is not the transposition of the *acte clair* doctrine *itself*, which would exempt the court from referring whenever the meaning of the provision is clear – be it clear such that a proposed reading of the provision is plainly bad (e.g. a reading of the term foreign affair to include a mere cross-jurisdictional dispute), or clear such that a proposed reading of the provision is plainly convincing (e.g. reading foreign affair to

⁶³ Although Advocate General Capotorti famously opined in *Sri CILFIT v Ministry of Health* [1982] ECR 3415 that a court needs to determine the meaning of a provision in order to establish whether it is applicable to the case in question (at p.3436). Cf J.L. Mashaw, "Ensuring the Observance of Law in the Interpretation and Application of the EEC Treaty: the Role and Functioning of the Renvoi D'Interpretation under Article 177" (1970) 7(4) CMLRev 423, 426-230.

⁶⁴ I am calling for the transposition of *acte clair* principles endorsed generally by academics and the ECJ, not practices of abuse by national courts. For the latter, see e.g. A. Arnall, "The Use and Abuse of Article 177 EEC" (1989) 52 MLR 622.

include a government decision to take sides in a war). The arguability hurdle serves only to exempt references in the former situation, *not* the latter. The ECJ has not expressly adopted *acte clair* techniques in making category 2 decisions, although similar reasoning must be at work for it to screen out meanings of EU law that are implausible.⁶⁵ It is only in *this* limited sense that EU courts are concerned with issues of interpretative doubt at the stage of deciding whether a point of interpretation is raised. My earlier contention that EU courts are not concerned with interpretative doubt at this stage is subject to this one narrow proviso.

Before I elaborate on the techniques the CFA may borrow to decide whether a proposed meaning of a provision is plainly bad, I would like to emphasize that the CFA should decide this question using the common law approach to interpretation. This may be open to one objection. I have previously argued that once the CFA determines that there is arguably a need to interpret an excluded provision, it should not refuse to refer on the basis that the meaning of the provision is clear from the common law viewpoint, as this would threaten China's ability to control the reading of excluded provisions. The objection goes that allowing the CFA to rule out references on the ground that a provision clearly cannot bear a certain meaning from the common law perspective will similarly trespass upon China's ability to interpret excluded provisions, if China favours that particular reading of the provision and believes that reference should be sought.

My reply is, as the court in *Vallejos* explains, the arguability threshold is needed to prevent abuse of the reference procedure. Without it, reference would have to be sought whenever a party requests it, however "fanciful" his arguments are.⁶⁶ The integrity of the common law system and judicial autonomy in Hong Kong would be harmed even where China's sovereign prerogatives are not truly at stake. This cannot be the intent behind art.158(3). As explained above, sometimes the question of whether an argument for seeking reference is plainly bad can only be answered based on the CFA's own preliminary understanding of the provision at stake. In the absence of a prior NPCSC interpretation on the provision, the CFA is constitutionally mandated and institutionally equipped to decide if a proposed meaning of the provision is plainly bad from the common law perspective only. The objector is right in saying that it would be paradoxical if the Chinese government in fact endorses the meaning rejected by the CFA. This paradox exemplifies the tension inherent in art.158(3). Owing to the segregation of two

⁶⁵ Note 63 above.

⁶⁶ At [104].

fundamentally different legal systems, the interpretation of excluded provisions will inevitably be bifurcated between two interpretative traditions. The interpretation of excluded provisions will not be able to achieve the level of coherence that can be achieved in the interpretation of EU law through art.267 TFEU. The best that the CFA can do is to maximise the attainment of the purposes of art.158 – i.e. upholding judicial autonomy and China’s control over a limited list of sovereign prerogatives – within its constitutional limits. I have sought to argue that the way to do so is to rule out references when arguments for seeking reference are plainly bad from the common law perspective, while seeking reference once an excluded provision is arguably applicable, regardless of whether its meaning is clear from the common law or Chinese perspectives.

Moving on to suggest what techniques on *acte clair* the CFA can borrow in deciding whether a proposed meaning of a provision is plainly bad. The ECJ ruled that national courts should study an excluded provision’s different language versions, which are equally authentic in the EU, to determine whether an application of the provision is *acte clair*.⁶⁷ Although the Chinese version of the BL prevails over the English in case of conflict, Hong Kong courts have routinely only referred to the latter version. The ECJ’s prescription on *acte clair* is a reminder to the CFA that it should examine if there are any discrepancies between the Chinese and English texts before concluding that a particular interpretation of a provision is fanciful. In addition, numerous EU writers have suggested that there must be objective grounds for determining whether a point is *acte clair*, and that diverging judicial opinions over the meaning of a provision are an indicator, albeit an inconclusive one, of interpretative doubt.⁶⁸ This must be correct and elucidates how the CFA should decide if an interpretation of a provision is fanciful. That a particular meaning has been endorsed judicially, or unanimously rejected by judges, indicate, respectively, that the meaning is plausible or implausible. Yet such indication should not be considered as conclusive as one must allow for the small possibility of judges getting a point of interpretation wrong. Thus the majority in *Congo* was too rash in treating diverging judicial

⁶⁷ Case 283/81 *Sri CILFIT v Ministry of Health* [1982] ECR 3415 at [18].

⁶⁸ See e.g. M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (OUP, 2012), 244-246; G. Bebr, “The Rambling Ghost of ‘Cohn-Bendit’: *Acte Clair* and the Court of Justice” (1983) 20 CMLRev 439, 469.

opinions on the meaning of the excluded provisions as conclusively indicating reasonable interpretative doubt.⁶⁹

I will now apply these suggested techniques on arguability to explore the contentious issue of whether the CFA should treat the General Statement as a part of the NPCSC's 1999 interpretation. The court was able to avoid resolving this issue in *Vallejos*, but it will not always be able to do so. Given that the issue of double-no children is unresolved,⁷⁰ the government may, when the opportunity arises, once again ask the court to seek reference on whether the General Statement binds. Assume that the government is able to trigger facts resembling those in *Chong Fung Yuen* by, say, refusing to grant permanent residency status to a double-no child, who then takes the government to court. When the case reaches the CFA, the court would face head-on with whether to depart from its previous decision in *Chong Fung Yuen* that the General Statement is non-binding. In this situation, according to my proposal, the CFA should first ask whether a reading of the term "interpretation" in art.158 to encompass the General Statement is plainly bad from the common law perspective. If it is not, then there is arguably a need to interpret the provision to resolve the case and reference would have to be sought. If it is, then there is no need to interpret the provision.

I do not seek to provide a definitive answer to whether a reading of "interpretation" to include the General Statement is plainly bad. I only wish to highlight three observations, applying the proposed principles on the arguability threshold. First, assessing the question objectively, if the General Statement is treated as binding, the 1999 interpretation would effectively be an interpretation on all subsections of art.24(2). This would fly in the face of the repeated indications throughout the 1999 interpretation that it is an interpretation on arts 24(2)(3) and 22. Secondly, judicial opinions in Hong Kong – a non-conclusive indicator of interpretive doubt – unanimously rejected the binding nature of the General Statement.⁷¹ Thirdly, the CFA should consider whether the proposed meaning of "interpretation" is plainly bad from the common law perspective rather than second-guess the NPCSC's answer to the question.

⁶⁹ At [404].

⁷⁰ It must be noted that the problem has been partially alleviated by the government's administrative measures in the past year.

⁷¹ Note 35 above.

3. *The classification condition*

There is limited potential for borrowing from the ECJ on the issue of whether a provision is an excluded provision. Since the wording of the excluded matters in the EU and Hong Kong provisions is different, the ECJ's definition of these matters is irrelevant to the CFA. Also, a reading of the EU case law demonstrates that many of the challenges that the ECJ faces in deciding whether the classification condition is satisfied are unique to the EU setting.⁷² The ECJ's principles for dealing with these challenges will be of limited use to Hong Kong. Moreover, even if common challenges can be identified, the ECJ's approach in dealing with them will likely not be transposable. Guided by the aim of ensuring uniform judicial protection in the EU, the ECJ has generally adopted a generous approach in construing the excluded matters, regarding matters as referable whenever the uniformity of law may be at issue.⁷³ I have previously mentioned that the ECJ has developed techniques to limit its workload. On the classification condition, however, the overriding aim of uniformity constrained the court's room to develop such techniques. The ECJ's inclusive disposition and principles of interpretation will not be transferable to Hong Kong, given the imperative underlying art.158(3) to read excluded matters narrowly to cover only situations when a handful of sovereign prerogatives are at stake.

An example will reveal the limits of transposing principles on the classification issue. A thorny question that the CFA has had to face is whether it is obliged to refer when it needs to interpret a non-excluded provision, which meaning will arguably be affected by that of an excluded provision.⁷⁴ The court in *Ng Ka Ling* controversially held that in this situation reference would only be required if the predominant provision to be interpreted is the excluded provision.⁷⁵ The court argued that this "predominant test" is needed to uphold its judicial autonomy. The argument goes that the NPCSC's interpretation of the excluded provision may affect the meaning of the non-excluded provision. The predominant test is needed to ensure that that CFA's ability

⁷² Eg whether the following matters must be referred: interpretation of international agreements between an EU organ and non- member states; an agreement which the Union has non-exclusive jurisdiction to enter into; acts of institutions set up by international agreement to which the Union is party; and national law that is modelled upon EU law. See Broberg and Fenger, *Preliminary References to the European Court of Justice* (OUP 2012), ch.4.

⁷³ See eg Broberg and Fenger, *Preliminary References to the European Court of Justice* (OUP 2012), ch.4

⁷⁴ The CFA in *Ng Ka Ling* considered the predominant test as part of the classification condition, but the test can be understood as a separate enquiry from the classification and necessity conditions.

⁷⁵ At [101]-[106]. This test has been subject to criticisms. See eg Chen, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case" in *Constitutional Debate*, pp.127-129.

to interpret the latter is not circumscribed by the NPCSC's interpretation of the former.⁷⁶ Subsequent courts and the NPCSC have cast doubt on, though not overruled, this test.⁷⁷

In the EU, it is commonplace for a case to involve an interpretation of both EU law and national law. An interpretation of the former would similarly affect the meaning of the latter. For example, an interpretation of EU law would affect how national courts should interpret national legislation implementing such law; an interpretation of a national law concept referred to by an EU act would affect national courts' ability to develop the former.⁷⁸ Nonetheless, as yet no version of the predominant test has been developed in the EU. I do not intend to discuss in depth whether it was right for the CFA to adopt this test. All I wish to say here is that the absence of a predominant test in the EU does not indicate that such a test is not justified in the Chinese context.

In Hong Kong, excluded and non-excluded provisions are located within a single constitutional document. The context for interpreting each provision includes all other provisions. Excluded provisions may often arguably be relevant to the understanding of non-excluded provisions. If reference is sought every time this arguable relevance arises, the integrity of the common law system and judicial autonomy may be seriously jeopardized.⁷⁹ Thus the CFA may need to find a way – and the predominant test was such an attempt – to minimise references in these situations.⁸⁰ This imperative does not exist in the EU because firstly, upholding national courts' ability to control the development of national law is not part of the purpose of art.267, which overriding aim is to ensure uniform and effective judicial protection in the EU. Loss of national courts' autonomy to develop national law is theoretically coherent with this telos. Secondly, even if protecting national courts' autonomy is a concern, EU law does not threaten such autonomy to the extent that the NPCSC's interpretations may compromise the CFA's autonomy. Notwithstanding the impact of EU law on national law, the former belong to a legal system that is distinct from the national legal systems and many national laws remain unaffected by EU law. In contrast, in the case of the BL, the meaning of non-excluded provisions may often be influenced by that of excluded provisions.

⁷⁶ Ibid.

⁷⁷ Eg *Lau Kong Yung v Director of Immigration* [1999] 3 HKCFA 5 at [64]; The Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law, adopted by the Standing Committee of the Ninth National People's Congress at Its Tenth Session on 26 June 1999, para.1.

⁷⁸ See Broberg and Fenger, *Preliminary References to the European Court of Justice* (OUP, 2012), ch 4.

⁷⁹ Cf The CFA's reasoning in *Ng Ka Ling* at [101]-[106].

⁸⁰ Cf Ghai, "Litigating the Basic Law: Jurisdiction, Interpretation and Procedure" in *Constitutional Debate*, p.36.

Conclusion

The CFA possesses significant room to shape the reference procedure, thereby demarcating Hong Kong and China's boundaries of power. This paper has sketched criteria for evaluating the transposability of principles developed under art.267 TFEU to Hong Kong, and applied such criteria to demonstrate what principles the CFA can borrow to resolve three key issues it faces in implementing the reference procedure. To re-cap my conclusions on what are and are not transposable:

1. The necessity condition: following the ECJ, the CFA should consider there to be a need to interpret a provision only when the meaning of such provision will potentially affect the outcome of the case in question.
2. The arguability requirement: the *acte clair* principle is not transposable. Once the CFA concludes that an excluded provision passes the necessity test, the court should not be exempted from referring on the ground that the meaning of such provision is clear, and must seek reference, unless the NPCSC had previously issued an interpretation on point. So the first facet of arguability developed by the CFA should be discarded.

On the other hand, the court's second facet of arguability should be preserved. The court should only seek reference if arguments for seeking reference are at least arguable, i.e. not plainly bad. Following the ECJ, the CFA should consider the arguability threshold as a standard of review for assessing whether the necessity and classification conditions are satisfied.

In situations where a determination of whether arguments for seeking reference are at least arguable is predicated upon some preliminary understanding of the provision at stake, the CFA can draw inspiration from the ECJ's principles on assessing whether a point is *acte clair*, to decide whether a proposed meaning of the provision, upon which arguments for reference lie, is plainly bad. These principles include examining the different language versions of the provision

to see if the proposed meaning can be accommodated and considering whether judges have unanimously rejected the proposed meaning.

3. The classification condition: there is limited room for the CFA to borrow from the ECJ on this question.

It is hoped that this paper has provided the basis for meaningful migration of judicial norms between the two institutions and pointers to the CFA on how to go about implementing the reference procedure. These findings will be pertinent, as impending issues on the interpretation of the BL hinging on key aspects of Hong Kong's autonomy, such as what form of democratic elections are compatible with the BL, what form of local national security legislation is compliant with Hong Kong's international human rights obligations, and whether double-no children are entitled to permanent residency, are expected to find their way to the courts at some point in future.