

Consumer Protection in Hong Kong

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Existing situations in Hong Kong

- There is no comprehensive trade practices law in Hong Kong.
- There are laws and regulations that can be grouped into two categories
 - consumer safety
 - marketing conduct.

Safety and product legislation

- There are ordinances covering
 - (1) safety requirements for electricity supply, electrical wiring and products;
 - (2) safety requirements for children's toys and consumer goods;
 - (3) disclosure requirements for medicines and labeling requirements;
 - (4) safety aspects of food and drugs.

Safety and product legislation

- The enactment over the past years of the Toys and Children's Products Safety Ordinance and the Consumer Goods Safety Ordinance marked a significant forward move on product safety. However, Hong Kong is still lagging behind many jurisdictions, such as the United States, Japan, and Australia, in its laws on product liability.

Safety and product legislation

- When Hong Kong consumers suffer injury or damage caused by defective products, they have to sue for compensation by relying on the common law of contract or negligence. Under contract law, consumers will most likely encounter the problem of privity of contract with the manufacturer; while under the law of negligence, they have to prove all the technical legal elements of negligence.

Safety and product legislation

- Against this background, the Law Reform Commission of Hong Kong did prepare a report in 1999 proposing to expand the law beyond the ambit of contract and negligence law and create a new form of liability based on the defect approach. This means a product is to be ruled as defective if it does not meet standard of safety that people generally are entitled to expect.
- Unfortunately, nothing eventuated from that initiative.

Marketing legislation

- As to marketing conduct, there are laws in HK:
 - (1) prohibiting false trade descriptions of goods;
 - (2) control and regulation of travel agents;
 - (3) restricting certain advertisements relating to medical matters;
 - (4) prohibiting the promotion of pyramid selling schemes;
 - (5) empowering the courts to give relief in certain contracts found to be unconscionable;

Marketing legislation

(6) consolidating and amending the common law with respect to the terms to be implied in contracts for the supply of services; and

(7) limiting the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by means of exemption clauses, and to restrict the enforceability of arbitration agreements.

Hong Kong's reactive approach

- The Hong Kong Government adopts the “wait and see” approach and launches legislative responses to problems as they emerge. Since the early 1990s, laws were introduced or existing laws amended to address obvious concerns over unconscionable conduct, deception in the supply of services and the widespread use of exemption clauses.

Hong Kong's reactive approach

- The Unconscionable Contracts Ordinance was passed in 1995 to codify principles found in common law, and to provide easier access to relief for consumers where the court finds the concerned contract unconscionable.
- The Supply of Services (Implied Terms) Ordinance was introduced in 1994 to meet a deficiency in the Sale of Goods Ordinance.

Hong Kong's reactive approach

- This legislation, which originated in Britain and commenced in 1896, implies into contracts for the sale of goods only, terms like merchantable quality and fitness for purpose. The new legislation implies into contracts for supply of services, terms as to care and skill, time for performance and consideration.

Hong Kong's reactive approach

- Control of Exemption Clauses Ordinance was introduced to limit the extent to which civil liability for breach of contract, or for negligence or other breach of duty can be avoided by means of contract terms and otherwise; and to restrict the enforceability of arbitration agreements.

Hong Kong's reactive approach

- Despite the above initiatives, the piece of legislation prohibiting false trade descriptions in Hong Kong, the Trade Descriptions Ordinance introduced in 1981, is outdated and in clear need of alteration to meet the rapid changes in the economy.
- The Ordinance covers goods only, but not services and real property. Moreover, only when an “advertisement” contains a false or misleading trade description can consumers be protected.

Hong Kong's reactive approach

- If the advertisement contains misleading information which falls outside the ambit of “trade description”, no offence is committed. An example is misleading price information.
- In a dynamic economy, policy makers should realize the detriments that arise, in terms of economic efficiency, from playing “regulatory catch up” and should minimize the time lag.

The piecemeal approach: an example of fallacy

- The amendments to the Copyright Ordinance, introduced by the Intellectual Property (Amendments Ordinance) 2000, have obviously been enacted with the interests of property right holders in mind.
- There are two key issues for consumer protection. The first is what safeguards are in place to protect consumers from misleading and deceptive practices in the market, where infringing articles may be sold.

The piecemeal approach: an example of fallacy

- The second is what measures are in place to safeguard consumers against the collective actions of property right holders, who in the circumstances of the new criminal provisions, may use the confusion and fear that arises from the amendments, to extract excessive fees from consumers and the business community, i.e., they may exercise their collective market power.
- Let us look at the first issue: unfair trade practices.

The piecemeal approach: an example of fallacy

- What is a right-infringing article?
- Where articles for sale are indistinguishable from legitimate articles and a trader who knows the articles infringe intellectual property rights does not declare that the articles are not legitimate, the trader may be engaging in misleading and deceptive conduct by omitting a material fact. A consumer in these circumstances, where there is a reasonable belief that the articles are genuine, would be a victim of an unfair trade practice.

The piecemeal approach: an example of fallacy

- In other jurisdictions, there are general consumer protection laws administered by an enforcement agency, prohibiting misleading and deceptive conduct and consumers have rights to protect themselves from such behavior. In Hong Kong, there is no general legislative prohibition against misleading and deceptive conduct, and consumers have to rely on specific legislative provisions that are enforced by the Commissioner of Customs and Excise under Section 7 of the Trade Descriptions Ordinance.

The piecemeal approach: an example of fallacy

- The provisions of the Trade Description Ordinance are not as comprehensive for consumer protection as found in other jurisdictions, and are enforced as offences, under the criminal onus of proof, making remedies difficult to achieve.
- The Consumer Council released a report called “Regulating Deceptive, Misleading and Unfair Practices in Consumer Transactions” that examined the levels of current safeguards to protect consumers in HK (available from the Council's website www.consumer.org.hk).

A comprehensive legislation against unfair trade practices

- The Council advocates a comprehensive trade practices legislation containing:
 - (1) Prohibitions against traders from engaging in, deceptive, misleading, unfair and oppressive conducts in the course of consumer transactions.
 - (2) Breaches of the prohibited trade practices should incur strict liability and lead to both criminal and civil penalties. The penalties may include pecuniary fines in order to deprive the delinquent trader of the profits of the unlawful activity.

A comprehensive legislation against unfair trade practices

(3) The law should provide a fair and adequate consumer redress mechanism for injured consumers, which may, for example, take the form of monetary compensation, repair order or restitution order.

(4) The proposed legislation should be enforced by a public agency.

(5) The enforcement agency should be empowered, to institute court proceedings against offenders by seeking court orders for declarations, injunctions, specific performance, damages, etc.

A comprehensive legislation against unfair trade practices

(6) The enforcement agency should be empowered to accept voluntary assurance or undertaking of compliance from traders who have engaged in unfair and deceptive practices and to enforce the undertaking if breached.

(7) It should also be empowered to order publication of correction notices or institution of corporate compliance programmes.

(8) The agency should also be empowered to prescribe codes of practices for the conduct of business in specific sectors.

Protection against collective actions

- The second issue in the example of property rights ordinance is related to the manner in which copyright fees can be collected in Hong Kong, especially in the absence of general safeguards against collective enforcement of license fees by copyright holders.
- The trouble is that there is no general competition law in Hong Kong.

Protection against collective actions

- With a competition law, the onus would be placed on aggregations of competitors that may raise competition concerns, to convince the competition authority that a public benefit emerges from the aggregation, and that the benefit outweighs the potential detriments to competition. The competition authority should examine the application in a public forum. Exemptions should be conditional and regularly reviewed.

Protection against collective actions

- Hong Kong's current Copyright Ordinance provides limited safeguards, e.g. where an organization that is representative of persons claiming that they require licenses for the public performance of their work, it may refer the terms of a licensing scheme to the Copyright Tribunal. The Tribunal has the potential to provide some oversight of the fee that copyright holders jointly require persons to pay.

Protection against collective actions

- However, the Tribunal's jurisdiction is limited. It has no role to play in deciding whether an aggregation of competitors is justified as a means of setting a fee in the first place. Neither has it a role in determining whether the fee should be set through the process of copyright holders competing amongst each other on license fees. Likewise, there is no role for the Tribunal to place conditions on how the aggregation of competitors operates in collecting the fees.

A general Competition Law is needed

- Regarding this kind of problems, the Hong Kong Consumer Council's position is that a general competition law should be put in place that would make any aggregation of competitors, including copyright holders, more open and accountable. Such a law, with exemption process, should expose to scrutiny any claimed public benefits arising from the aggregation.
- This would guard against copyright owners and owners of any rights exercising collectively their market power.

Conclusions

- The Hong Kong SAR Government continues to adopt the piecemeal and sector-specific approach in both consumer protection and competition.
- A more comprehensive approach for both is recommended by the Hong Kong Consumer Council.
- The two aspects are intimately linked, as I hope that I have demonstrated.