



## **The 2023 meeting of the Private Law Consortium: Private Law and the Problem of Vulnerability and Sustainability**

The Hong Kong Commercial and Maritime Law Centre organized the 2023 meeting of the Private Law Consortium, with the theme "Private Law and the Problem of Vulnerability and Sustainability" on May 4-5, 2023. Scholars from the Consortium shared their latest research on a wide range of topics, including transnational tort litigation, faith-based investing, and the doctrine of frustration.

Panel 1 started with a presentation by **Prof Oren PEREZ (Bar-Ilan University, Faculty of Law)** on "Credible Climate Commitments." Prof PEREZ noted that although companies make climate commitments, it is difficult to assess their credibility under the current regulatory framework. Therefore, he proposed two instruments: a carbon letter of credit and a climate pledge green bond, which will ensure that corporate climate pledges are fulfilled. **Prof Michael TSIMPLS (City University of Hong Kong, School of Law)** spoke on the topic of "Can the Demand for Sustainability Determine Contractual Performance?" From a maritime law perspective, Prof TSIMPLS discussed the evolution of contract standards and the possibility of adopting sustainable practices through contracts without affecting the legality standard. **Professor TJIO Hans (National University of Singapore,**

**Faculty of Law**) gave a presentation on "Sustainable Directors Duties." From the perspective of directors' duties, Professor TJIO believes that a mechanism is necessary to ensure that there is responsibility for ESG concerns. He suggested that the proper purpose rule may be best at balancing different shareholder interests in rights issues, restructuring, disclosure, and even ESG matters. **Dr FANG Meng (City University of Hong Kong, School of Law)** also focused on environmental issue, but from public law perspective. In her paper entitled "Regulating Electric Vehicle Batteries' Carbon Footprint: EU's Climate Ambition or Green Protection," she concluded that the EU's new regulation on batteries may be permissible under WTO regimes, but the EU needs to ensure that its Battery Regulation contributes to its climate ambition rather than being viewed as 'green protectionism.'

Panel 2 began with a presentation by **Dr. Omer PELLED (Bar-Ilan University, Faculty of Law)** on "Strict Liability for Unreasonable Harm." Instead of the current regime where medical institutions are only liable for harm caused by neglecting to take reasonable care, Dr. PELLED suggested an alternative liability regime based solely on outcome. Under this regime, medical institutions would only be required to pay when the harm could have been reasonably avoided. He also suggested that this liability regime could be applied to manufacturers of AI devices. **Dr Kim BOUWER (Durham University, Law School)** gave a presentation on "The Power of Tort and Power in Tort – An Essay on Transitional Tort Litigation." During her talk, she analyzed the reassertion of transnational tort litigation as tort cases.

**Prof Koen SWINNEN (Erasmus University Rotterdam, Erasmus School of Law)** brought the conference into panel 3 by introducing his research titled "Data and Property Law: Worlds Apart?" He analyzed that data, which is a most valuable asset class, has uncertain status under property law. He tried to explore the main

challenges and the main opportunities and benefits of bringing data and property law together. **Dr Tommaso De Mari CASARETO DAL VERME (University of Trento, Faculty of law)** gave a presentation on “Artificial Intelligence, Neuromarketing and New Vulnerabilities – What Role for Private Autonomy in the Digital Economy?” He observed that new technologies, specifically AI and neuromarketing, make consumers a vulnerable group, as neuromarketing can reduce the private autonomy of consumers. He analyzed the extent to which EU regulation and Italian national law provide remedies to protect consumers’ private autonomy. On the research titled “Doing business in a World of Goliaths – Bargaining Power Imbalances in Platform-to-Business Relation”, **Dr Samuel SCANDOLA (University of Trento, faculty of Law)** observed that in Platform-to-Business (P2B) relations, the business user may be the weaker party, but EU regulations do not provide sufficient protection for them. He suggested harmonizing the abuse of economic dependence at the EU level. **Dr ZHAO Liang (University of Southampton, Law School)** spoke on “UK Electronic Trade Documents Bills: What Are They and What Should Be?” He argued that the current legal reform of electronic documents bill is against the parties’ freedom of contract. Therefore, he concluded that it should leave the question to businessmen to find contractual solutions instead of statutory search for the legal effect of electronic trade documents.

During Panel 4, speakers discussed research related to the principles of change of circumstance doctrine under civil law, the frustration doctrine at common law, and the notion of force majeure under different legal systems. **Professor Liu Qiao (City University of Hong Kong, School of Law)** presented on "Frustration, Force Majeure and Change of Circumstances in the Chinese Mainland and Hong Kong: Prospect of Harmonisation." He compared the differing attitudes of courts in Hong Kong and Mainland China towards unexpected impediments or hardship in contract

performance. He concluded that harmonization is necessary due to Hong Kong's economic dependency on trade with Mainland China. **Dr Jia WANG (Durham University, Law School)** and **Dr Ruyi DU (Jinan University, Law School & Intellectual Property School)** presented their research titled "How to Deal with the Change of Circumstances – A Doctrinal and Empirical Study of Chinese Contract Law." They identified factors that Chinese courts consider when dealing with change of circumstances, including the timing and significance of the change, foreseeability and unfairness of the change, and parties' accountability towards the change. However, they found that judges consider these factors randomly. Therefore, they suggested three solutions: a more structured operational order for applying the change of circumstance test, clarification of the scope of the rule on change of circumstances, and remedies for affected contracts. In her research titled "Judicial Abstentionism to Interventionism: A Case of the Chinese Doctrine of Change of Circumstances", **Dr DING Chunyan (City University of Hong Kong, School of Law)** discovered that while the Supreme People's Court emphasized that the doctrine of change of circumstances is exceptional, lower courts had different practices. She also found that Chinese judges are easily influenced by policy and are responsive to social demands. **Prof Alexander Loke (City University of Hong Kong, School of Law)** discussed the change of circumstance under the common law system. In his research titled "Vulnerability with Change in Circumstances: The Frustration Doctrine Amidst COVID," he found that risk allocation is the most critical factor when applying the frustration doctrine.

Panel 5 began with a presentation by **Prof Virginia HARPER HO (City University of Hong Kong, School of Law)** titled "Rethinking Corporate Law Boundaries." She proposed methods for corporate and securities law to better support climate governance for all corporations. She also emphasized that these methods are not

about choosing, but rather about selecting the appropriate tools. **Ms TAN Petrina (National University of Singapore, Faculty of Law)** introduced her research on “The Interplay Between Faith-based investing and Sustainability: A Comparative Analysis.” She found that faith-based investing could be another way to achieve sustainable development, given its values and investment methods. However, the challenges of faith-based investing include higher costs and a lack of consensus regarding attitudes toward climate change. **Dr LAI Sin Chit Martin (City University of Hong Kong, School of Law)** gave a presentation on “Identity Disclosure of Leniency Recipients in Hong Kong.” He suggested that Hong Kong should disclose the identity of successful leniency applications because if the identity of the leniency recipient is disclosed, it will reduce the cartel formation ultimately. **Prof TAN Cheng Han (National University of Singapore, Faculty of Law)** gave a presentation on “The Law of Agency – Essence, Extension and Equivocation.” He argued that the power liability theory is still the best explanation for agency law.

In the last panel, **Dr Irina SAKHROVA (Durham University, Law School)** spoke on “Contact as Expectation and The Puzzle of Present Exchange.” While acknowledging the importance of expectation in understanding contracts, she argued that we can still consider simultaneous transactions as contracts without introducing new complications in private law relations. **Dr Alberto Quintavalla (Erasmus University Rotterdam, Erasmus School of Law)** spoke on “More Public to the Private: Protecting 21st Century Challenges.” He noted that there is a trend towards using private law to address societal challenges that were traditionally dealt with by public law. Contemporary challenges are cross-cutting and difficult to address solely through public or private law. It is also difficult to differentiate between public and private demarcation. **Dr Hao JIANG (Bocconi University, Department of Law)**

gave a presentation on “The Forgotten Doctrine of Cause: A Plea for Reconsideration.” He argued that the doctrine of cause which has been neglected both in common law system and civil law system should be reconsidered to better understand contemporary contract law.



