Drafting in Unfamiliar Territories

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Abstract Of Paper

Law students, trainees and even junior lawyers generally find the drafting of commercial agreements difficult. In this paper, the author examines the performance of different groups of students in agreement drafting in the Postgraduate Certificate in Laws (PCLL) course at the University of Hong Kong, and shares some of her insights and experiences in teaching agreement drafting. The author argues that the major problems of the students lie as much in their unfamiliarity with legal practice and their habits in rote learning, as their insensitivity to the English language. The author also discusses the measures to be adopted to address these problems.

Introduction

Ask any law student, trainee solicitor or junior lawyer what he or she finds most difficult in "switching" from legal studies to legal practice. More likely than not, the answer will touch upon the drafting of commercial contracts. Indeed, in a recent survey conducted by the Law Society of Hong Kong, [1] many of the trainees and junior lawyers

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1 A survey was conducted in March 2005 by the Law Society of Hong Kong. The survey was targeted at first and second year trainees and junior lawyers who have been

who responded indicated a preference for more practice in drafting commercial agreements in the PCLL[2]. This may indicate a certain degree of unease among the more junior members of the profession with their own drafting competencies. In fact, many a student has come to me with long faces complaining how difficult he or she finds drafting. This in itself is good reason for me to ponder upon what makes agreement drafting so difficult for law students, and how we teachers can make life easier for our students. Hence, this paper.

In this paper, I will identify and analyse students' major problems in agreement drafting by reference to their examination performance. Then I will share some of my own thoughts on solving these problems.

The Teaching of Agreement Drafting in PCLL

In response to the recommendation by two legal education experts for the adoption of "practical training" in professional legal education in Hong Kong[3], and their criticism that the (former) PCLL was merely an "additional year of law studies"[4], the PCLL curriculum has undergone considerable reform and is now heavily skewed towards training in lawyering skills[5].

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qualified for 1 year or less, that is, they were PCLL students in 2001-2004. A total of 605 questionnaires were sent, and 203 responses were received. The University of Hong Kong was sent a copy of the summary of responses compiled by the Law Society. In addition to setting out certain data, the summary contains written comments by PCLL students on various aspects and components of the PCLL course.

2 In this paper, "PCLL" means the Professional Certificate in Laws course at the University of Hong Kong, unless otherwise stated. At the time of writing, both the University of Hong Kong and the City University of Hong Kong offer Professional Certificate in Laws courses. These are 1-year full-time legal practice courses which prepare law graduates for on-the-job training as trainee solicitors or pupil barristers. (City University offers a 2-year part-time course, whilst the University of Hong Kong began to offer part-time PCLL courses from September 2005 onwards.) Only law graduates and students who have passed all relevant subjects in their Common Professional Examinations are eligible to enroll in the PCLL course. Students who have passed the PCLL examinations may commence training as trainee solicitors or pupil barristers without being required to sit any further qualifying examinations set by the profession.

3 In 2001, Professor Paul Redmond and Professor Christopher Roper conducted a review of legal education and training in Hong Kong at the request of the (then) Steering Committee on the Review of Legal Education and Training in Hong Kong. Their report, *Legal Education And Training in Hong Kong: Preliminary Review* was published in August 2001 (the Report). The recommendation for more practical training appears in section 8.16 of the Report.

4 The Report, section 15.4.1.

5 In this paper, the term "lawyering skills" refers to those skills which are specific to the discipline of law and generally regarded as appropriate to both academic and professional legal education. They include communication, client interviewing, drafting, negotiation, advocacy, legal research and writing, document analysis and problem-solving.

Agreement drafting has, in the past five years or so, been taught in the context of Commercial Law & Practice, and assessed as a component of this subject.[6] It was taught by a combination of large group lectures and demonstrations and small group practice sessions. In the large group sessions, students were taught both skills and knowledge. For skills, they learnt the rules of document interpretation, the general layout of a commercial agreement, and the elements of good drafting. Since skills cannot be practised in a knowledge vacuum, it is necessary for students to be equipped with at least some basic knowledge of the transaction which provides the context for them to carry out the drafting practice. Therefore, students were given a brief overview of a share purchase transaction, before they split into small groups to carry out the actual drafting of the share purchase agreement.

Assessment of Agreement Drafting in PCLL

In the past 3 years, agreement drafting has been assessed in PCLL by requiring students to work with a "skeleton" agreement (which took more or less the same format as the precedent share purchase agreement with which they were provided during term time). Students were asked to amend or re-draft certain clauses in the skeleton agreement as they considered necessary or appropriate, in the light of the instructions given them in a hypothetical share purchase transaction. In the agreement drafting examination, one of the tasks which students were asked to perform was to "clean up" a particular clause -- included in the clause concerned were a few rather obvious drafting mistakes or typographical errors, which the students were asked to spot and correct. In addition, students were required to answer two questions which tested their analysis and understanding of the share purchase agreement.

General Observations

In addition to the usual "complaint" by students that agreement drafting is difficult, we at the University of Hong Kong have seen quite a high failure rate in the agreement drafting examination – 21.21% (63 in a class of 297 students) in the academic year 2002-03, 15.09% (40 in a class of 265 students) in 2003-04, and 11.50% (26 in a class of 226 students) in 2004-05. It would appear from these figures that PCLL students did experience some difficulties with agreement drafting.

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6 The PCLL comprises 5 subjects: Civil and Criminal Procedure, Commercial Law and Practice, Conveyancing and Probate Practice, Advocacy, and Professional Practice. Although the PCLL curriculum now focuses on skills training, skills-practice exercises are still organized by reference to different "subjects".

From my experience in marking agreement drafting assessments and from the statistical analysis of students' examination performance, I have identified 3 possible causes for the students' poor performance: students' insensitivity to English as a second language, their tendency to learn by rote memorisation, and their unfamiliarity with commercial transactions.

Difficulty in drafting in a Second Language

Since the 1960s, there has been a strong call for drafting in plain language. Notwithstanding the trend towards bilingualism and the increased use of Chinese as a business medium in Hong Kong, "drafting in plain language" essentially means "drafting in plain English". Most commercial agreements in Hong Kong which were drafted by lawyers are in English. This is especially so for transactions involving an international element. Therefore, in Hong Kong as well as globally, the ability to express oneself clearly in English is a pre-requisite of good drafting. Whilst the use of flowery language or esoteric expressions is not necessary (indeed, it is positively discouraged as part of the plain language movement), a draftsman must have a reasonable command of the English language to enable him or her to record and communicate accurately and effectively the contracting parties' intention, which is the gist of good commercial drafting.

It is only natural that one would associate the difficulties experienced by PCLL students in agreement drafting to their cultural and ethnic origin, and attribute the reason to their being required to draft in a second language. However, from my observations and experience in marking PCLL drafting examinations, the answer is not quite as simple as this.

It would not take long for any person with a reasonable command of English to realize that the English writing competency of PCLL students who failed the drafting examination was far from perfect. Their scripts were rife with grammatical mistakes. Besides, the failed scripts in agreement drafting consistently display insensitivity to the English language. For example, students used words and expressions which are vague and imprecise. Students also seemed quite oblivious to the ambiguities caused by the positioning of a certain word or the multiplicity of meanings which may result from the adoption of a particular sentence structure.

Such insensitivity is apparent from students' poor performance in the use of definitions. One of the tasks which students were asked to perform in the definitions question was to draft new definitions for the agreement as they consider it necessary or appropriate in view of client's instructions. Most students (even those students who passed the drafting examinations) failed this part of the question. Reviewing

these new definitions and their use is one of the most frustrating tasks I have encountered in my teaching career. Even after they have rightly introduced a new defined term and properly defined it, students failed to use the defined term when it should be used, or somehow used the term to mean something other than its defined sense. This is not to mention the many cases where students used two defined terms to mean essentially the same thing, or when using a defined term in the agreement, students repeated time and again what they had already included as part of the definition for that defined term. This shows that it was not the case that students were unable to properly define a term due to their poor English. Students had the ability to articulate the meaning which such a term had in the agreement. It was only that, having defined the term, students were unable to use it appropriately. Their weakness lies in their insensitivity when it comes to the *use* of those defined terms, not their inability to give them appropriate meanings or to express these meanings.

The insensitivity to language is also apparent from students' performance in the clean-up clause. Students were specifically told that mistakes existed in the clause concerned. All these mistakes should have been apparent, even to laymen – no prior legal knowledge was required in spotting them. Yet, most students who failed agreement drafting overlooked these obvious errors.[7]

This shows that weakness in spotting obvious drafting errors is a common phenomenon among the failed students. This echoes the frequent complaint I received from fellow members of the profession that trainees nowadays fail even to pick up obvious typographical errors. There are two possible reasons behind this omission: (1) students failed to recognise there is a mistake even when one was staring them in the face; or (2) they were so careless that they overlooked the mistakes. In a drafting examination where every ½ mark matters, it is hard to imagine such a degree of carelessness among students, especially when they were specifically told to identify and correct drafting mistakes from a particular clause. Therefore, I would be inclined to believe that students did painstakingly make every attempt to spot the mistakes, but were unable to correctly identify them. Was the omission due to their poor English? Was it because English is a language which they learnt at school but rarely use outside the classroom? In this regard, it is worth noting that such oversight was not specific to any particular group of students. It is as much a problem with overseas returnees (who, by definition, had

[7] In the 2002-03 examination, 22 out of the 26 failed students scored less than 50% of the marks allocated to this question. Another 2 only scored 50%. In the 2004-5 examination, 9 of the 22 failed students scored less than 50% of the marks allocated to this question. Another 9 only scored 50%. (The 2003-04 scripts are no longer available at the time of writing.)

more exposure to the English language and more opportunities to use it) as it is with our home-grown law graduates. Therefore, it would appear that overseas exposure and increased use of English do not necessarily ensure better performance in the clean-up clause.

Hence, I would venture to suggest that being asked to draft in English is not the sole or even the main reason why these students performed unsatisfactorily in their agreement drafting examinations. Indeed, all PCLL students have reasonable competencies in the English language. Since 2002-03, we at the University of Hong Kong have required all students to have attained a minimum overall band score of 7[8] (out of a maximum overall band score of 9) in an International English Language Testing System (IELTS) test before they would be admitted to the PCLL. Therefore, we believe that all PCLL students are competent to write in English. However, from the students' performance in the last two years, clearly, their IELTS scores bear no relations to the students' drafting skills, although the IELTS test includes two tasks on academic writing[9]. Many of the students who failed agreement drafting are "very good users" of English by IELTS standards.[10] A number of them were in fact native English speakers. Therefore, these students who failed drafting clearly possess reasonable competencies in writing English. I would therefore conclude that they failed drafting not because of any difficulty in expressing their ideas in written English. Rather, one reason why they failed was because they were not sufficiently sensitive or meticulous when it comes to using the English language. The fact that English happens to be a second language to most PCLL students does not seem to be directly relevant in this respect.

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8 An IELTS overall band score of 7 indicates that the person who sat the test is a "good user" who "has operational command of the language, though with occasional inaccuracies, inappropriacies and mis-understandings in some situations". Such a person "generally handles complex language well and understands detailed reasoning".

9 There are 4 test modules in a typical IELTS test – listening, reading, writing and speaking. For the writing test module, candidates are asked to perform two tasks. The writing task types are divided into academic writing tasks and general training writing tasks. For academic writing task 1, candidates are required to interpret a diagram or table and present the information in their own words. For academic writing task 2, students are required to present arguments, opinions or solutions to a problem.

10 12 out of the 22 failed students in 2004-05 have an IELTS overall band score of 8 or above. 8 of them scored 8 or above in the IELTS writing component. 31 out of the 40 failed students in 2003-04 were required to sit the IELTS before they were admitted to the PCLL. 10 out of the 31 who sat the test attained an IELTS overall band score of 8 or above (the remaining 9 were either repeaters or deferral cases, so the requirement to take IELTS did not apply to them.), with 8 of them scoring 8 or above in the IELTS writing component.

Indiscriminate Use of Precedents

Students' "reluctance" to correct even obvious errors in the agreement given them, as can be seen from their poor performance in the clean-up clause and their omission in making consequential changes, raises not only questions as to their English competencies. More worrying is the fact that such omissions reveal a tendency for students to regard a precedent as sacrosanct and unassailable. Despite our repeated exhortations to students to make use of precedents sensibly and critically, many students still regard precedents as the embodiment of perfection and hence, ideal for copying.

Why do students regard a precedent as sacrosanct and unassailable? One would associate this with students' tendency not to query or challenge things given them by teachers, be they notes or precedent documents. Much as we would nurture critical thinking and intellectual curiosity among our students, and notwithstanding the Hong Kong government's numerous educational reform measures in the past two decades, we teachers regret that most of our students are still prone to passivity in learning, preferring to sit back and be spoon–fed with information. Unfortunately, this phenomenon is not unique to Hong Kong students. It has been pointed out[11] that, with increased demand for skilled labour, many Asian countries have adopted policies which promote "intensive learning style and factory-like 'rolling off' of new graduates". Hence, "Asian students become prone to memorizing vast amounts of information without any time for thought, analysis or critical thinking".[12] Such students will happily take whatever notes we teachers care to give them, diligently memorise these notes and then faithfully regurgitate them in the examination. In the case of legal studies, all too often, little effort is made to analyse the legal principles and apply them in solving problems. To these students, it is totally unthinkable that they should "correct" a document given them by teachers.

Rote Learning

A rather interesting (though I personally find it rather disconcerting) incident happened to me in a lecture on drafting commercial contracts. As I was taking students through the various issues which required addressing in the agreement and bombarding students to ask themselves the 5 "w"s in drafting (namely, who, what, when, where and how), I was

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11 Steven Freeland, Grace Li and Angus Young, *Crossing* the Language and Cultural Divide – The Challenges of Educating Asian Law Students in a Globalising World, 2005 *Legal Education Review* 219.

12 *Ibid*, 225.

abruptly interrupted. A brave soul raised his hand and requested that I "get round to the real drafting and show us the model clauses we are to use in different scenarios". Whilst I have good reasons to commend this student for his courage and outspokenness, I cannot help but feel discouraged by the approach he adopts in learning drafting.

Why such an approach? Why choose to memorise "model clauses" when students are at liberty to draft as they see fit? Most of the scripts (failed or otherwise) which I marked in the drafting examinations in the past 2-3 years shows a significant degree of memorization or copying. After the examination results were released in July 2005, I have personally interviewed 5 of the failed students, all of whom admitted that they memorized "standard clauses" in preparation for the drafting examination. Their explanation was that such clauses were "better". This may point to a certain degree of lack of confidence on the students' part because of their limited vocabulary and also the belief that they could not couch their own provisions in "good enough" English. Such diffidence could stem from the fact that English is, to most PCLL students, a second language. However, this may also indicate intellectual laziness on the part of students.

The failed scripts not only display a general tendency by students to memorise and regurgitate "standard clauses", they show that students tend to do so without due consideration of and application to the facts at hand. When asked to draft warranties in relation to the target company's borrowings in the 2004-05 drafting examination, most of the failed students simply reproduced (some almost word for word) certain warranties which they were shown in relation to their take-home drafting exercise, without any application to the facts at hand and notwithstanding that they were specifically instructed that the target company was indebted to ABC Bank for an overdraft facility. In total disregard of express instructions, students faithfully reproduced the warranties which they were shown in their small group drafting exercise in which the vendor warranted that the target company had no borrowings whatsoever. The underlying problem here must be more fundamental than simply weak English.

Partly to blame is perhaps the prior introduction to students of various "standard clauses" in other subjects. For example, in wills drafting, students were introduced to certain "sample clauses" which they could adopt if, say, a firm of solicitors were to be appointed as executor of the will. Similarly, in conveyancing, students were shown several "sample clauses" which they could incorporate into their Sale and Purchase Agreement to limit their clients' liabilities. This approach might have the undesirable (though unintended) effect of encouraging students to memorise "sample clauses". It gives them the impression that only these "magic formulae" work whilst everything else falls short of the requisite standard. Not only is this prone to promoting intellectual laziness, it

might also undermine students' confidence and lead them to believe that they cannot draft anything as good.

Indeed, the very idea of "model clauses" seems inconsistent with the trend since the 1960s towards plain language writing and drafting. If drafting is to be done in plain, simple language, then there is no magic in "model clauses". Rather, any reasonably competent lawyer (and for that matter, any reasonably competent law student) should be able to draft and express what he or she wants to communicate in plain, simple English. If students are accustomed to adopting "standard clauses" for certain types of drafting but not in others, they will easily become confused by this somewhat schizophrenic approach. Consistency should therefore be paramount in any curriculum design. There must be consistency in the way lawyering skills are taught and the criteria by which they are assessed.

The fact that failed students were guilty of rote learning would go some way in explaining some of the phenomena in the PCLL commercial drafting examinations that I have outlined above. Students were weak in their use of defined terms. They were the ones who created these defined terms specifically for the agreement concerned. More likely than not, these terms have no equivalents in the precedents. Therefore, there was nothing to copy from in relation to how to use these terms. Accustomed to copying, students were at a loss when they had to decide on how these newly created terms were to be used, which required analysis and some understanding of the document concerned. This is one skill which they were not used to practising, owing to the over-emphasis on memory work.

For the same reason, students are weak in making consequential changes. When students have only a poor understanding of the structure of the agreement and the relationship of the individual clauses to one another, how could they have appreciated that making a change in one provision would impact on and necessitated consequential changes in other provisions?

Similarly, this explains why students were weak at cleaning up obvious drafting errors. The weakness does not stem from carelessness, nor is it attributable to poor English. Rather, it is because students have not made any previous attempt to understand and analyse provisions in the precedent agreement given them. They read such precedents not with a view to understanding their structure and meaning, but to memorizing them. It is not easy for students to have to figure out for themselves (in the case of some of them, probably for the first time ever) the meanings and functions of the agreement concerned and its various provisions whilst they labour under examination conditions.

Despite our repeated attempts to challenge students to think critically, there is still too much rote learning by students. Unfortunately, in legal education, rote learning will usually give rise to a more fundamental

problem -- lack of understanding of the agreement and the transaction concerned on the part of students.

Lack of Understanding of the Transaction and the Agreement

When students spend their time memorizing rather than analyzing an agreement and understanding its provisions, they will have at most a superficial understanding of the structure of the agreement and the functions and relationship of its individual provisions. I would argue that students' preference in rote learning is a more compelling reason behind their poor performance in agreement drafting than their insensitivity to English as a second language. Students were weak not so much in expressing their ideas in English. Their weakness is rooted in something more fundamental than their language abilities. Rather, students were weak in understanding (1) the transaction and the function of the agreement in the transaction; and (2) the structure of the agreement and the relationship between the individual clauses. It was not a case where students knew full well what should go into the provision, but had difficulty expressing it in English. All too often, what they wanted to say was itself inadequate – it failed to address all relevant factual and legal issues which require addressing in the agreement, for example, what has to be done, who is to do it, and also when, where and how it has to be done. This shows that students have not given adequate consideration to the functions of those provisions which they were asked to draft. Consequently, they failed to cover all relevant issues which need addressing in order to record and reflect the parties' intentions. They did not seem to realize that in drafting, they were creating legally binding rights and obligations on the part of the parties. Their client might one day have to rely on the contractual provision and enforce his or her rights in court. Similarly, by their drafting, legally binding obligations might be imposed on the client. If there was any omission or ambiguity in the drafting, it might be construed against the client and, as a result, the client might have incurred a more onerous obligations than he or she had anticipated. Many students, however, seemed happily oblivious of the seriousness of what they were doing in drafting, and their drafting showed a lack of in-depth and careful consideration of what required inclusion in the provision.

This point is illustrated by students' performance in the most recent PCLL agreement drafting examination. In the 2004-05 drafting examination, students were asked to draft provisions to deal with client's instruction to retain part of the consideration if a certain document was not provided to the purchaser at completion. A significant number of

students duly provided for the purchaser's right to retain part of the consideration, but made no attempt whatsoever to provide for the timing or condition for the release of the retained amount. In cases such as these, where the students had not given sufficient thought to what should be included in the clause to ensure that all relevant aspects which need dealing with were adequately covered, even if students had expressed what they intended to say in succinct and grammatical English, their drafting would still have been inadequate. The problem is that students did not seem to realize that client was relying on the proper exercise by them of their drafting skills in order that the parties would have their contractual rights and obligations clearly, fully and adequately communicated and recorded by the agreement. The deficiency was in their thinking, not their power of expression. It was this deficiency in thinking which manifested itself in the drafting. Conversely, even if students had been asked to draft the agreement in Chinese (or whatever their first language happened to be), then more likely than not the provisions they drafted would still have been plagued with the deficiency.

Besides, in cases where students had correctly identified an issue which required addressing in the agreement, somehow students would deal with the issue at the wrong place. For example, for a share purchase agreement, all too often, students would include warranties under a clause heading which clearly shows that this clause sets out the conditions precedent which are to be fulfilled before completion is to take place. Students seemed not to have a good idea as to *what* to put *where*. Again, this would suggest that students failed to understand the structure of the agreement which they were asked to draft, the functions of the individual clauses in the agreement and the relationship between them. Breaches of conditions precedent and of warranties entail quite different legal consequences and remedies. That is why they are dealt with separately under different clause headings in an agreement. An agreement which has warranties jumbled together with conditions precedent in the same clause would not only be poorly organized, but downright confusing, and it would be a poor piece of drafting by any standards. If a student failed to see this, then the cause was probably something more fundamental than simply linguistics deficiency. A student who includes a warranty in the conditions precedent clause either did not understand the difference between these two types of terms, or failed to appreciate that there are already provisions in the share purchase agreement where warranties are set out, or (worse still) failed in both respects. Therefore, the student's mistake reveals his or her failure to appreciate the different functions served by the warranties clause and the conditions precedent clause, and the relationship between these clauses in the matrix of the agreement. In short, he or she did not have a good idea of how such an agreement works and how the agreement relates to the rights and obligations of the parties in the transaction.

Indeed, the examination results of PCLL students show a direct correlation between poor commercial drafting and poor understanding of the transaction which they were asked to document. Many of the students who failed the agreement drafting examination also failed the knowledge examination.[13] In particular, most of them also performed very badly on the question in the knowledge examination on share purchase (the context in which their agreement drafting examination was set). This shows that their understanding of the transaction was far from adequate at the time they drafted the agreement. This could very well have contributed to their poor performance in the agreement drafting examination. Conversely, a student rarely excelled in agreement drafting when his or her knowledge of the transaction was so poor that the student failed the knowledge examination.[14] A student with solid transactional knowledge may not necessarily excel in agreement drafting, but those with poor transactional knowledge are unlikely to do well in agreement drafting. Therefore, sound transactional knowledge is a necessary pre-condition to effective drafting.

Similarly, a good understanding of the structure of the agreement and the functions of its individual provisions is essential to good drafting. This can be seen by comparing students' performance in the drafting-related short questions in their drafting examination with their overall drafting results. In this part of the drafting examination, students were asked to answer two short questions on drafting without being required to do the actual drafting. These questions were formulated with a view to assessing students' ability to understand the structure of the agreement, the relationship between its various clauses, and the parties' rights and obligations under individual provisions. Examination performance of the PCLL students shows that weakness in commercial drafting closely correlates to poor understanding of the structure and functions of the agreement which they were asked to draft.[15]

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13 The numbers of students who failed agreement drafting and who also failed the Commercial Law & Practice Knowledge examination are as follows:

2002-03 -- 36 / 63.
2003-04 -- 11 / 40 (with an additional 3 students who only just passed)
2004-05 -- 15 / 22.

14 In 2002-03, 31students attained Distinction grade (75%) in agreement drafting. Only 1 student out of them failed the Knowledge examination. In 2003-04 and 2004-05, the proportions were 1/30 and 1/50 respectively.

15 In 2002-03, 25 out of the 26 students who failed the supplementary examination in agreement drafting also failed the drafting-related questions. In 2004-05, 14 out of the 22 students who failed the agreement drafting examination also failed the drafting-related short questions.

Skills vs Transactions?

The above observations, in my view, point to a pitfall in the adoption of skills-based training[16] – it is very tempting to put undue emphasis on the practice of generic skills and relegate the teaching of transactions to a mere subsidiary role. In a curriculum whose entire focus is the hierarchical development of generic skills and their transfer from one context to another, it is often easy to overlook that transactions are what lawyers really work on in legal practice. One of the main objectives of this paper is to point out that the learning of lawyering skills can be severely hampered by inadequate learning of transactional knowledge by students.

Inadequate Learning of Transactional Knowledge

In Hong Kong, the undergraduate law program focuses largely on the teaching of substantive law. Law placements are not (yet) a component of academic legal education. As part of their academic education, law students learn to formulate legal arguments which are not unlike submissions made by advocates in litigation. However, rarely do law students learn about the many transactions which non-litigious lawyers handle. Something important is amiss if students are to proceed straight from a curriculum which focuses on the teaching of substantive law to a skills-based curriculum whose focus is training in generic skills. In real life, lawyering skills are inevitably performed in the context of transactions. Indeed, such skills are performed with the clear objective of facilitating the conduct of such transactions and bringing about their fruition. Therefore, it must be a pre-requisite for any practical training in lawyering skills that students be equipped with the necessary transactional knowledge. Such knowledge cannot be presumed just

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16 In this paper, the term "skills-based" training refers to training which focuses on the practice by students of certain generic skills (for example, drafting, advocacy, negotiation, and communication, etc.) generally regarded as essential for commencing on-the-job legal training (the so-called "lawyering skills"). Teaching in a "skills-based" curriculum often takes the form of specially-designed activities in which students are asked to perform these lawyering skills. The focus of such a curriculum is on the practice of such skills by students, and the ability for students to transfer the skill they learn from one context to another. Transactions are taught not in their own right but only to provide contexts for the carrying out of lawyering skills. Hence, the teaching of transactions will be selected on the basis of their relevance to the skills-based activity, and only those aspects of a transaction which are relevant to the skills-based activity will be taught. To ensure that students focus on the skill in which they are being trained, activities are often simplified and geared towards the practice of one "focus" skill. For more details on a "skills-based" curriculum, see Stephen Nathanson, Putting Skills and Transactions Together in Professional Legal Training, (1987) 5 *Journal of Professional Legal Education*, 187.

because students have learnt the substantive law principles in their contract or company law courses.

One drawback of a purely skills-based curriculum is that students would not be given the opportunity to "handle" a transaction from start to finish. Transactions are only introduced to students merely as the context for the practice of generic skills, and it is these skills which form the gist of what students learn in the curriculum. The teaching of transactions is restricted to those bare essentials which must be taught in order to enable the generic skills to be practiced, so as to ensure that students' attention is not distracted but is instead fixated single-mindedly on the skill which forms the focus of the skills exercise. Not surprisingly, students' transactional knowledge lacks depth – for example, they would have only a vague idea of the different stages of a transaction, and therefore have difficulty perceiving the relevance of documentation to the different stages of the transaction. Many students have problems grappling with what happens pre-signing, at signing and between signing and completion. It is therefore little wonder that they get confused when, in drafting the documentation, they are asked to distinguish between a matter which requires dealing with before signing and another matter which is to be dealt with between signing and completion.

It is not difficult to understand their difficulties. In a skills-based course, students are often asked to practice skills as part of a transaction about which, ironically, they learn very little from the course. Students would get only a brief overview of the transaction, but the focus is on only those topics which are carefully selected with the objective of enabling a particular skill to be performed. Therefore, in a skills-based course, students only get the opportunity to learn *about* transactions, either from lectures or reading (which, for many Hong Kong students, equates memorization of what is in their notes or reading materials). They do not really learn to handle a transaction, nor do they get the experience of handling one. As a result, students are hardly familiar with the various stages of the transaction and what the parties do in each of these stages. They are not in any way guided to appreciate that they practise skills as part of the overall conduct of the transaction concerned, and with the ultimate goal of facilitating successful conclusion of the transaction. A lawyering skill is not performed for its own sake. In fact, it is rarely performed in isolation. Lawyering skills are performed for the purpose of and as an integral part of carrying out a transaction, and it must be one of the objectives of practical legal training that students appreciate this.

An example will illustrate this point. A client gives instructions to his lawyer that a certain matter is an important factor which influenced his decision to purchase the company. As part of the due diligence investigation into the target company, the purchaser discovers

something undesirable is affecting such matter which is of "deal-breaking" importance to him. As a result, the purchaser wants to ensure its rectification before he is required to complete the purchase. To ensure that the purchaser will not be obliged to complete against his wishes, the rectification of this matter must be made a condition precedent to completion of the transaction. Since the share purchase agreement sets out the rights and obligations of the parties in relation to the share purchase, it is the duty of the purchaser's solicitors to ensure that a carefully-worded condition precedent clause is included in the agreement to cover the rectification. A student who has gone through the whole transaction from taking instructions, due diligence, documentation, all the way to signing and completion will have a fuller appreciation as to why the rectification should be included in the agreement (it is a deal breaker, so client should not be required to complete if it is not secured), where in the agreement should it be included (as a condition precedent), and how such a provision should be drafted (matters required by client in relation to the rectification should be clearly spelt out). This is what makes the students' learning process complete and effective. With better understanding of the transaction and the function of the agreement in such a transaction, students are better empowered to carry out the drafting of the agreement in a way which ensures it serves its functions in the transaction. In contrast, if students are taught to perform a skill without due reference to the function played by such a skill in the greater picture of the transaction, students are prone to lose sight of the objective of the whole exercise. We must let students understand that lawyering skills are performed to serve the purposes required by the transaction, not the other way round. If we teach transactions for the sole purpose of providing contexts for skills practice, then we risk putting the cart before the horse.

It is therefore important that, as part of their professional education, students should be asked to "handle" at least one simple transaction under guidance even if the curriculum is heavily skewed towards skills practice. As shown above, students' competency in commercial drafting has a direct correlation with their understanding of the transaction and the role of the agreement in that transaction. Therefore, I would disagree with the approach to use commercial transactions merely as "contexts" for students to perform lawyering skills, if such an approach entails downgrading the teaching of transactional knowledge or reducing the amount of such knowledge taught to those bare essentials which enable generic skills to be performed. It would be misleading to students if they are only taught those aspects of a transaction which are conducive to the skills practice concerned, for it gives the students the mistaken impression that other stages or aspects of the transaction are not important. For example, in previous years, the teaching of shares acquisition in PCLL focused solely on the drafting of the share purchase agreement, because

share acquisitions are taught for the sole purpose of giving students a context to perform commercial drafting. Since due diligence has relatively little to do with the drafting of the share purchase agreement, it was only mentioned in passing in the share acquisition knowledge lectures. Yet, feedback from former PCLL students[17] has indicated that they would prefer more teaching on the conduct of due diligence in a share acquisition, for as trainees, they are often involved in this process. However, despite its importance in real life legal practice, it is rare for due diligence to be given centre stage in a skills-based curriculum, if share acquisition is only used to provide a context for the carrying out of agreement drafting activities. This is unfortunate, because in the many share acquisition transactions which occur in real life, the information obtained from a due diligence investigation often impacts on the drafting of the agreement. For example, what goes into the warranties is often closely related to the type of information revealed from the due diligence investigation. This important aspect of a share acquisition will be completely overlooked if we only selectively teach those aspects of a share acquisition transaction so as to provide a context which enables agreement drafting to be carried out. In 2004-05, we made a bold departure from the skills-based approach by expanding the teaching of share acquisitions to embrace other non-skills related aspects of the transaction, including due diligence. The response from students and the Law Society to this change has been favourable. We also saw a higher pass rate in agreement drafting this year than in previous years. These may go some way in supporting my argument that sound transactional knowledge is a necessary pre-condition to effective drafting.

Besides, if transactional teaching is limited to those areas which are conducive to skills practice, then, for the other aspects of the transaction, students would often be asked to simply read about it in textbooks. With students' tendency to rote learn, it is tempting for them to simply memorise a lot of information about these other aspects of the transaction, without making any real attempt to understand and apply them. It would have been different if we get students to work on the transactions. Students will be learning by doing, rather than memorising. Students will engage themselves more in the analysis of law and facts, and their application to the transactions at hand, than the studying of notes and other reading materials. When a student learns by doing, the experience would make a more long-lasting impression on the student than any rote learning. Hence, by handling a transaction (albeit a simple one under the guidance of teachers), students acquire a more solid understanding of the various stages of a transaction, the role of the various players,

[17] Information obtained from conversations between former PCLL students and their tutors and from the survey conducted by the Law Society of Hong Kong (*supra*, note 1).

and the functions of the various contractual provisions. The contractual provisions become something more than just a bunch of words printed on a piece of paper – their meaning and significance become much clearer when students come to appreciate how these provisions actually impact on the transaction and the parties' behaviour. Also, the practice exercise would become more realistic, because it would resemble what lawyers do in real life. This would, in turn, increase students' motivation to learn. Therefore, it is beneficial that students are given the opportunity to learn by working on transactions, and at least handling one transaction from start to finish.

This paper does not in any way suggest that practical training in lawyering skills is unimportant. Skills training must form an integral part of any professional legal education. This paper only serves as a reminder that skills training should not be over-simplified at the expense of transactional training. Transactional knowledge is also important in legal education, and must be given its rightful place in the curriculum if the practice of lawyering skills is to be truly effective and meaningful. The crucial issue in curriculum design is therefore one of proper integration and striking the right balance. The issue of allocating sufficient time to the teaching of these two essential components, namely, transactional knowledge and lawyering skills, is particularly challenging when in Hong Kong, England as well as many other common law jurisdictions, legal practice courses rarely last for over 10 months. The problem is more acute in jurisdictions such as England and Hong Kong, where traditionally, legal education is divided into the academic stage (which focuses on the teaching of substantive law) and the professional stage (which focuses on legal practice), and the teaching of transactions and skills is commonly carried out as part of professional rather than academic legal education.[18] Legal education in North America tends to take longer than the Hong Kong or English model, and thus can afford more time for the teaching of transactions.[19] Indeed, the teaching of

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18 Northumbria University in England offers a 4-year LLB program which combines academic legal education with professional legal education. Graduates from its LLB course are exempted by the Law Society of England and Wales and the Bar Council for Legal Education from the need for further professional training before commencing their training contract or pupilage. At the University of Newcastle, Australia, upon completing their first year of law studies, undergraduate students can opt to enroll in an LLB/Diploma of Legal Practice program which merges "traditional" law studies with practical legal training and experience. Graduates from this program are eligible to apply for admission to practice without the need to undertake any further studies in legal practice.

19 In the United States of America, students spend 3 years studying law after having done a 4-year undergraduate course. Then they take Bar examinations. In Canada, students spend 3 years studying law after having done a 4-year undergraduate course, followed by formal professional training. In England, a law student spends 3 years on an undergraduate law degree, before spending another year on a 10-month legal practice course. In Hong Kong, a law student used to be able to obtain an LLB

transactions is a more common practice in North American law schools. Besides, since law is only offered as a post-graduate degree program in North American law schools, it ensures the maturity of its students, many of whom are likely to have work experience and have engaged in transactions before. In contrast, law undergraduates in Hong Kong are "disadvantaged" in this respect. In view of this and also the fact that first-class legal service is one of the strong buttresses of Hong Kong's role as an international business centre, I would advocate that the teaching of commercial transactions be incorporated into the undergraduate law curriculum.

Introduction of Transactions into Academic Legal Education

Law teaching should be a continuum. The division of legal education into the academic stage and the professional stage is purely artificial. There seems to be little justification why students should not learn about legal practice in their academic legal education. It is therefore my belief that transactions should be introduced into legal education at as early a stage as is pedagogically feasible. It is important that students are able to connect principles of contract law which they have learnt to tasks which they are asked to perform in a transaction, and vice versa. For example, before students are asked to draft a conditions precedent clause in an agreement, they should be made aware of the difference between a condition and a warranty, as well as the implications of breaching them. Clarity of thought is conducive to clarity of expression. When students are clear as to the meaning and legal implications of client's instructions and are able to "translate" them into pertinent contractual principles, surely they would be less confused as to whether these instructions should be carried out by requiring something to be performed as a condition precedent or a mere warranty?

The distinction between a warranty and a condition is something nearly all law students learn in their contract law course. Why then are they not able to recall the relevant legal principles when asked to perform a drafting task? The reason may lie in the way they learnt these legal principles in their academic legal education. Most legal principles were learnt from studying cases in which these principles were litigated and adjudicated upon. In short, students learn "after the event", after things have gone wrong. In contrast, students rarely have the opportunities to see how legal principles operate in the context of a transaction and how they impact on the carrying out of the transaction. Rarely do they receive instruction on how to apply the legal principles which they have learnt with a view to minimizing any chances of dispute. Studying case law only partially empowers the students. To make their legal education

complete and effective, students must learn how to apply the law, not only *retrospectively* to hypothetical cases where things have again gone wrong, but also *prospectively* to transactions so as to minimize the chances of things going wrong or, at least, to minimize the damage if things should go wrong in the future. In this connection, I would propose that students must learn about transactions as part of their legal education.

In view of the emphasis which our academic legal education puts on the study of cases, it is not surprising that students tend to find it easier to handle litigation than commercial transactions. After all, they are more accustomed to litigating disputed points of law, having read about it in law reports time and again.[20] Handling transactions, on the other hand, requires a completely different mindset, as well as quite different skills and competencies. Yet, students in Hong Kong seldom have the opportunities to learn about transactions in their academic legal education. They may spend tens of hours reading about contractual principles, but they would never be shown a contract.[21] They have little idea what real contracts look like and what goes into them. Some students even fail to appreciate how the contractual principles they have learnt apply in real life. I once asked a class of PCLL students whether they had seen a contract. At least 15 students raised their hands to indicate they had not. I then asked these students whether they owned mobile phones and whether they had to sign any papers before they obtained mobile phone services. All the raised hands were immediately lowered. I would have thought that, as law students, they would have been more sensitive to the application of legal principles to transactions they came across in their daily lives. After all, they were the persons who were incurring the contractual obligations.

One cannot assume that students know about transactions and what handling a transaction involves simply because they have learnt all the relevant principles of substantive law.[22] If, in our academic legal education, students are only taught legal principles without reference to transactions in real-life legal practice, then they would be at a loss if there

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degree after 3 years of undergraduate studies. Law undergraduates admitted to the University of Hong Kong commencing September 2004 are required to undertake 4 years of undergraduate study before the conferment of an LLB degree. They will then be required to spend another 9 months to study the PCLL.

20 It has been said that although we claim to teach students "to think like a lawyer, for the most part we teach students to think like litigators". See Tina L Stark, Thinking Like A Deal Lawyer, (2004) 54 *Journal of Legal Education* 223.

21 Contrast the approach increasingly adopted in the US law schools to integrate the analysis and drafting of contracts with the teaching of contract law principles in their curriculum. See, for example, Edith R Warkentine, 'Kingsfield Doesn't Teach my Contracts Class: Using Contracts to Teach Contracts', (2000) 50 *Journal of Legal Education* 112.

22 Stark, *supra* note 20. Also see Karl S Okamoto, Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School, (1995) 45 *Journal of Legal Education* 498.

occurs a sudden paradigm shift when they come to professional legal education, and are asked to practise various lawyering skills (like drafting) as if they were already familiar with how commercial transactions are carried out in real life, and possessed adequate knowledge of the structure and functions of a commercial agreement. More often than not, such transactional knowledge cannot and should not be presumed. A "bridge"[23] is much needed to link the teaching of substantive law with skills training, as students' performance in the agreement drafting examinations in the PCLL Commercial Law & Practice course would tend to suggest. Before students carry out any skills practice in agreement drafting, they must at least be given sufficient time and instruction to enable them to understand the different stages in the transaction, the roles of the parties in the transaction, their respective rights and obligations, and the function of the agreement in the transaction. Any legal education which does not provide sufficient teaching of transactional knowledge is inadequate in that it fails to sufficiently empower the students so as to ensure that lawyering skills are practiced in a meaningful way. Therefore, I would disagree with the approach to teach only such parts of transaction as are necessary to enable the practice of generic skills. The teaching of transactions is important in its own right, as well as in forming the necessary groundwork for skills practice.

At this juncture, I would make reference to the Report prepared by the two legal education experts[24]. Although the two consultants clearly emphasized the need for practical training in professional legal education, it is quite clear that by "practical training", they meant "training in transactions and skills" [emphasis added].[25] One cannot sensibly practise skills except when one is armed with sufficient knowledge of the transaction which forms the basis on which such skills are to be performed. Skills can only be meaningfully practised in the context of transactions, when its role and functions in the transaction concerned are properly understood. By this, I did not mean students must be taught very specific knowledge about every type of commercial transactions. After all, there is an almost endless array of commercial transactions ranging from the setting up of a corner shop to the issue of convertible bonds. But students must learn at least the basics of handling a simple commercial transaction from start to finish. Only then will they get a good idea of what constitutes a commercial transaction and how

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[23] Some US law schools offer "bridge" courses to give students the opportunity to apply the legal doctrines which they have learnt in substantive law courses. For example, Western State University has offered a Fundamentals of Contract Drafting course which taught law students how the contract law principles they had learnt are manifested in contract documents – see Edith K Warkentine, *supra* note 21.

[24] *Supra*, note 3.

[25] The Report, *supra*, note 3, section 8.16, and the Position Paper, *supra* note 25, section 2.4.

various lawyering skills come into play in carrying out a transaction. In this connection, it has been suggested[26] that the use of a "truncated file" would be useful. Whilst such a device is useful in facilitating the learning of transactions, the file must not be over-simplified to the extent of becoming unrealistic. Besides, students should not simply be "shown" what a transaction file looks like; they must be given the opportunity to sufficiently engage themselves in the conduct of the file in order to make the learning experience meaningful.

Conclusion

In this paper, I have examined the difficulties experienced by PCLL students in agreement drafting and identified three main problems, namely, students' insensitivity to language, their tendency to rote learning, and their unfamiliarity with commercial transactions. The root cause of the first two problems lies outside the realm of legal education. They are more appropriately dealt with as part of Hong Kong's overall education reform. The third (and more fundamental) problem, however, is something we law teachers can help solve, so each of us should "at least set my lands in order"[27].

In response to the recommendation in the Report for the adoption of "practical training" in professional legal education in Hong Kong, and the call by the Law Society of Hong Kong[28] for a professional practice course which comprises 80% skills and 20% substantive law[29], the University of Hong Kong have introduced considerable skills training into the PCLL curriculum. Undoubtedly, lawyering skills are important to legal practice. However, skills are just one of the ingredients of competencies in legal practice.[30] Most lawyers, especially those engaged in non-litigious legal practice, work on transactions. Transactions form the bulk of legal work. They are what most lawyers actually do in real life legal practice, and must be given due recognition as such. Transactions are therefore more than just contexts for the teaching of skills. They must

26 Nathanson, *supra* note 16, at 189. Nathanson refers to a curriculum design device called "truncation" in which steps in a transaction which are too elementary, or which will be taught in another context, or which require only a low level of skill are truncated, retaining only those steps which are conducive to the practice of higher level skills.

27 T S Eliot, *The Waste Land* (from *T S Eliot, Collected Poems 1909-1962 (Faber and Faber Limited, London)*.)

28 The Law Society of Hong Kong, *Position on Legal Education and Training,* September 2001 (the Position Paper).

29 *Ibid,* section 1.3.

30 See, for example, Australian Professional Legal Education Council and Law Admissions Consultative Committee, *Competency Standards for Entry Level Lawyers* (November 2000), and the Law Society of England and Wales, *Qualifying as a Solicitor – A Framework for the Future, a Consultation Paper* (March 2005).

be adequately covered in any legal education curriculum. Besides, for the practice of lawyering skills to be meaningful and effective, students must first understand the conduct of transactions and also the functions of these skills in the transactions.

It would perhaps be too late if students were to start only in PCLL to learn from scratch both the handling of transactions and the performance of the many lawyering skills which are required in legal practice. This is particularly so in a thriving economy like Hong Kong, where lawyers may conduct a wide range of cases from matrimonial disputes to stock exchange listings. Much is demanded of Hong Kong lawyers, both in terms of knowledge and skills. It is quite unrealistic to believe that everything can be crammed into a 9-month legal practice course. Notwithstanding arguments that legal education should also be a liberal education, we should recognize that most of Hong Kong's law students study law because they aspire to become lawyers, and as such, the legal profession expects highly of them, in terms of substantive and transactional knowledge, as well as practical lawyering skills. If the teaching of transactional knowledge and skills does not start until the PCLL, then there is good reason to fear that it might be "too little, too late".