

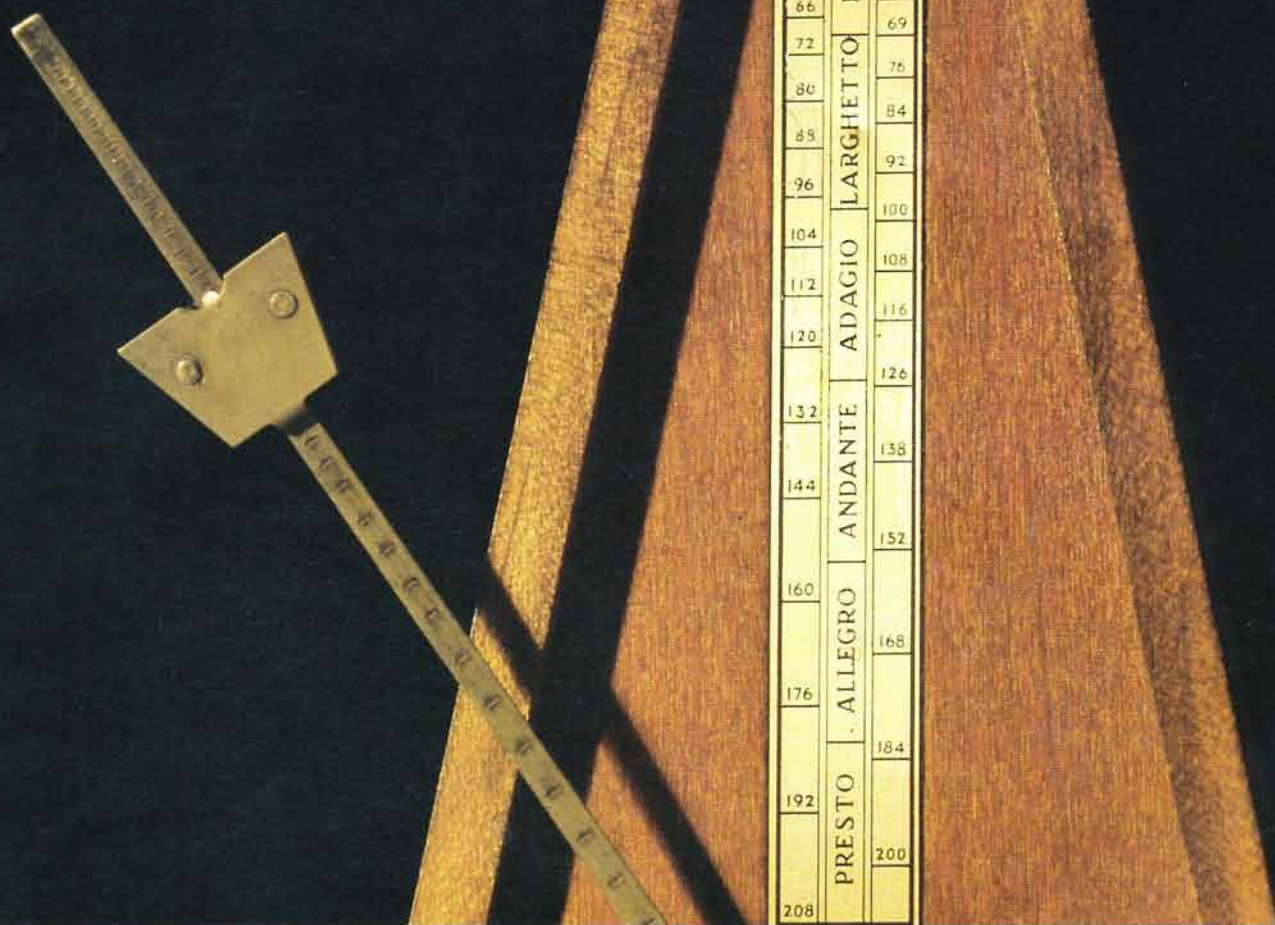
Momentum

The Chamber of Hong Kong Listed Companies Magazine 香港上市公司商會雜誌

春

Spring 2009

Tangled Up in Red Tape
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◆ Facilitate Communication ◆ Strengthen Understanding ◆ Create Opportunities ◆

Like a pendulum swinging back and forth, governments and agencies around the world tend to toughen their regulations following corporate scandals and the collapse of major institutions. After changes to the listing rules on directors' share trading were debated earlier this year, now new regulations are being discussed for Hong Kong as a result of the financial tsunami. *Momentum* asks the authors of a recent review of financial regulation in Hong Kong whether these potential regulations could go too far.

The participants in this discussion are:

Dr Douglas Arner, Director, Asian Institute of International Financial Law and Associate Professor of the Faculty of Law, University of Hong Kong

Syren Johnstone, Visiting Fellow, Asian Institute of International Financial Law, University of Hong Kong, former lawyer and investment banker

Antonio Da Roza, Barrister-at-Law and Research Fellow, Asian Institute of International Financial Law, University of Hong Kong

Francisco Da Roza, Director of Holly & Associates, former banker and licensed financial advisor

Momentum: Can regulations be reformed in way that they are better, rather than just more of them?

Francisco Da Roza: We do have to be very careful when we are talking about reforming regulations. It is governments with their policies that led to market behaviour of excessiveness and then market failure. The focus is too much on regulations because it could politically be an easy way out.

Antonio Da Roza: Objectivity is an important component in trying to write smarter rather than more regulations. You need to come at the problems in a very constructive way, and not in way that attempts to lay the blame at anyone's feet. And it is very difficult to immediately assess whether you have written something smart. Nobody sets out to write stupid regulations. It is only with hindsight that we can say if something was smart.

Syren Johnstone: Hong Kong took a step toward smarter regulations with the SFO [Securities and Finance Ordinance in 2003] by giving the regulatory bodies such as the SFC [Securities and Futures Commission] quite a lot of flexibility on how they regulate. In the past few years the government has had the attitude of trying

就像左右搖晃的鐘擺那樣，世界各國的政府與機構往往在出現企業醜聞和大型機構倒閉後收緊監管政策。繼今年早時就有關修訂上市規則之董事股份交易條例展開辯論後，由於發生金融海嘯，香港如今又要對一些新的規例進行討論。今期*Momentum*訪問了兩位知名學者、一位大律師及一位退休銀行家，就香港近期對金融監管政策的檢討，討論該些潛在的監管是否屬於矯枉過正。

參與是次討論的人士有：

安納德博士，香港大學亞洲國際金融法研究院主任兼法律學院副教授

Syren Johnstone，香港大學亞洲國際金融法研究院訪問學人，前律師及前任投資銀行家

Antonio Da Roza，大律師、香港大學亞洲國際金融法研究院研究員

Francisco Da Roza，前任銀行家，Holly & Associates 董事及持牌金融顧問



Momentum: 是否可以改革監管政策，使之更有完善，而不是規則越來越多？

Francisco Da Roza: 我們在討論改革規例時，的確要很謹慎。正是由於政府的政策，致使市場出現過度行為，然後引致市場失效。問題是政府過分強調監管，因為從政治上來講，這種解決方式比較容易。

Antonio Da Roza: 想要制定更明智而非更多的規例，

to liberalise Hong Kong by allowing more investment products to be brought here which gives the investors the opportunities to buy more exotic products. How those products have come into the market is now subject to some criticism. But the problem with issuing more regulations is that you risk swinging the pendulum back too far in the other direction. In Japan, the ability of retail investors to buy interesting financial products was extremely limited. It is a lot better now, but it is a long way behind where we are in Hong Kong. Is this something that should be regarded as a freedom and liberalness that we should be proud of? Unfortunately, it carries the risk of [investors] getting their fingers burned.

Douglas Arner: In responding to this crisis, we have to be very careful in following the regulation reforms of other jurisdictions. Because even though there have been problems here, the problems we have had are much less severe than in the US and the UK. As a result, we have to be very careful in choosing which path we follow. There will be aspects where there is international agreement on certain things. We are already seeing the impact of that in Hong Kong in the context of sharing tax information and banking secrecy issues. Hong Kong is one of the jurisdictions that have been specifically targeted on this issue. But there is still going to be a lot of latitude in different areas for more restrictive or less restrictive approaches.

SJ: However, we also cannot take advantage of a situation where we encourage regulatory arbitrage. Global markets involve a competition for capital. We cannot go too far out of step with what is being done in major markets like the US and the UK. If we do that, then we risk putting Hong Kong in a situation where it is labeled as an under-regulated jurisdiction, even if it is not true.

DA: The failure of an AIG in any jurisdiction can cause problems in other jurisdictions. As a result, other jurisdictions are going to be taking a much closer look at major financial centres. Consequently, there will not be a great deal of scope for Hong Kong to be less regulated. Had AIG been allowed to fail, that would have been a disaster for the Hong Kong financial system with two million policyholders with no compensation arrangements. One of the greatest dangers in a globalised financial system, is the failure of one of those firms. It is a fact that there is no global mechanism for resolving the insolvency of a failed global financial firm.

Momentum: In what areas does Hong Kong have discretion to diverge from other jurisdictions with its regulations?

客觀性是重要的要素。人們要以非常有建設性的方式去處理問題，而不是試圖把責任推到別人身上。很難在短時間內評定已制定的規例是否明智，沒有人一開始就想制定一些愚蠢的規例。只有通過事後觀察，才能確定孰好孰壞。

Syren Johnstone: 香港在監管方面賦予證監會[證券及期貨事務監察委員會]等監管機構很大的靈活性，從而在SFO [2003年的《證券及期貨條例》] 中制定一些更明智的規例向前邁了一步。在過去數年，政府的態度一直是積極開放香港，容許更多投資產品進入本地，讓投資者有機會購買更多新穎的產品。讓這些產品進入市場，現正備受批評。但頒佈更多規例的問題是，有像把鐘擺推向另一個更遠方向的風險。在日本，零售投資者以往極難購買到複雜的金融產品。現在情況有所好轉，但依然落後於香港的現狀。這又應否被視為值得驕傲的自由和開放呢？不幸的是，它附帶著[令投資者] 血本無歸的風險。



安納德: 在應對此次危機時，我們要非常謹慎地仿效其他司法地區的監管改革，因為即使我們存在問題，我們的問題的嚴重程度也比美國和英國輕得多。因此，我們要非常小心地選擇追隨哪條路徑。在某些範疇上，國際間已就一些問題達成共識。我們已經看到這在香港產生的影響，譬如在分享稅務資料及銀行業保密方面。香港在這個問題上是受到特別關注的司法地區之一。但至於是採取限制程度較高還是較低的做法，不同領域仍會存在許多迴旋餘地。

SJ: 然而，我們亦不可以利用鼓勵監管套利的情形。全球市場涉及資金爭奪。我們不能太落後於美國和英國等主要市場的做法，否則便有可能讓香港被指為一個監管不足的司法地區，縱使事實並非如此。

DA: It is going to be with the approach we allow financial innovation. A range of jurisdictions are now discussing having extreme, 1930s-style restrictions on financial services. Some jurisdictions are going to begin treating banks as utilities – they won't be taking any risks. But it seems unlikely there are going to be international agreement on going that far. The greatest latitude is for jurisdictions that want to continue to allow a certain level of risk-taking in finance. There is now a very low tolerance for the level of risk that will be accepted in many jurisdictions. But historically, we have been more tolerant of risk in Hong Kong and we haven't had the same pain [as other countries] as a result of this crisis. Restrictiveness will increase, but we have a choice of how much we restrict.

ADR: We have to be very careful about following other jurisdictions because they will be responding to their own political pressures. We need to take a step back and analyse what the problems are rather than what people think they are and what affects them. We must not change regulations for sake of changing them or appearing to improve them. The SFC and HKMA recommended in their reports [made in response to the minibonds issue] to increase the amounts of investor education. However, it is clear the existing system of investor education has not been successful and investors in Hong Kong still carry certain attitudes about making quick, easy money out of stocks without understanding the products they are buying or managing risk.

Momentum: What are your opinions on the SFC and HKMA's recommendations for regulations following the minibonds problems?

ADR: I thought the entire approach to those recommendations was very superficial. It was almost without addressing the root problems.



安納德: 任何司法地區出現類似AIG的機構倒閉，都會對其他司法地區造成問題。因此，其他司法地區會比以前更密切地關注一些主要金融中心。這樣，香港可放寬監管的餘地不會很大。倘若允許AIG倒閉，對於香港的金融體系將會是一場災難，兩百萬保單持有人將無法獲得賠償安排。全球化金融體系中最大的危險之一，便是此類公司的倒閉。事實上，並沒有全球機制可以解決倒閉的環球金融機構無力償債的問題。

Momentum: 香港可以在哪些方面自行選擇有別於其他司法地區的監管？

安納德: 這將會是透過容許金融創新的方式去達致。一些司法地區目前正討論是否要像1930年代般對金融服務實施極端嚴格的限制。有些司法地區正開始將銀行視為公用事業 — 不容許它們承擔任何風險。但國際上似乎不會贊同這樣極端的做法。最大的自由度是讓希望如此的司法地區繼續容許在金融中承擔一定程度的風險。目前許多司法地區對可接受的風險水平容忍度很低。但在歷史上，香港對風險的容忍度較高，而我們亦未因這次危機而經歷[像其他國家]那樣的痛苦。限制性會增強，但我們可以選擇限制的程度。

ADR: 我們在仿效其他司法地區時要非常謹慎，因為該些地區將要應付自己的政治壓力。我們應回過頭來分析問題的癥結，而不是人們對問題的看法和他們所受的影響。我們不能為了改變規例而改變，又或是為了看似在改善規例而改變。證監會和金管局在其[應因迷你債券問題的]報告中建議加強投資者教育。然而，現有的投資者教育體系顯然並不成功，香港投資者依然抱著炒股賺快錢的心態，但缺乏對他們所購買的產品或風險管理的瞭解。

Momentum: 您對證監會和金管局在迷你債券問題發生後，就監管事宜所提出的建議有何看法？

ADR: 我認為這些建議的整體做法非常表面化，幾乎沒有觸及根本問題。

SJ: 這兩家監管機構僅有不足三個月的時間完成報告。我視它們為一個起點。[這個問題] 帶有感情和政治色彩，監管機構在此情況下傾向於主宰一切，可能覺得必須為自己辯護。我並不同意報告中的許多內容。例如，[金管局報告] 要求在售賣點[把銀行職員與客戶的對話]錄音是不切實際，而且成本高昂。這樣做會成為金融機構的護盾，很可能不利於投資者的利益 — 得悉被錄音說了那些話。真正的解決方案是在這些金融機構中發展適當的文化，以分辨哪些行為恰當，哪些不恰當。監管機構負有部分責任，但大部分工作都落在金融機構身上。

安納德: 那些報告是有用的，因為它們著眼於監管機構提出的一個具體問題。在立法會的辯論中，人們的研討範圍超越了監管機構在報告中所述的内容，並試圖找出事情的真相。這是流程的第二階段。第三階段

SJ: Both regulators had less than three months to put their reports together. I see them as a starting point. [The issue] is emotional and political and regulators in this context tend to be juggernauts and may feel the need to defend themselves. I don't agree with a lot of things in the reports. For example, [the HKMA report's] requiring point-of-sale recordings [of conversations between banking staff and customers] is impractical and expensive. It may well work against the interests of investors by becoming a shield for the financial institution – showing what has been said under the knowledge of being recorded. The real solution is in developing an appropriate culture within these financial institutions on what is and is not appropriate behaviour. It is partly a job for the regulators but largely a task for the institutions themselves.

DA: The reports are useful because they focused on one specific issue by the regulators. In LegCo's [the Legislative Council] debates, it is delving beyond what the regulators said in those reports and trying to find out what actually happened. That is the second stage of the process. The third stage is one which has been announced but we have not seen yet. And that is a comprehensive review of the performance of the regulatory system in the financial crisis as a whole. Not only in the context of the Lehman Brothers-minibonds problem, but looking at general issues. As a result of [regulatory] changes internationally, there will have to be changes in the legislation and regulations.

Momentum: Does the regulatory system need a shake-up? Should the responsibilities of the two financial regulators, the Securities and Futures Commission and the Hong Kong Monetary Authority, be re-allocated or should they be merged?

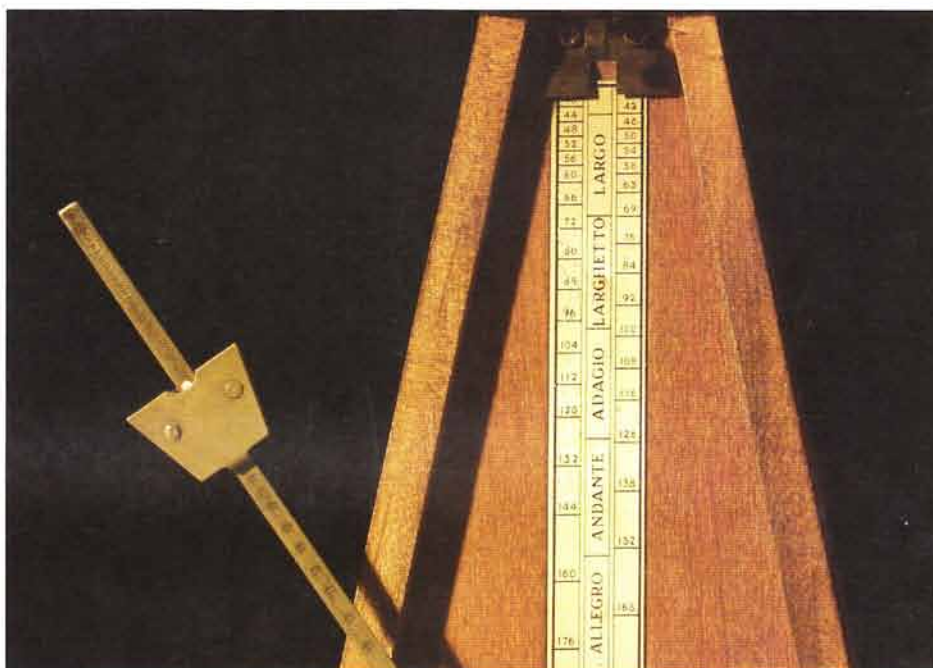
SJ: The banking and securities industries are staffed by people of rather different personalities, mentalities and approaches. Rather than simply merging regulators, we should look at trying to carve up functionally what it is that needs to be achieved and then staff that need.

DA: Securities regulators tend to be prosecutorial by nature. The problem with that is that if you give them a technical role in capital regulation, it is not very exciting. They want to be in court. In the monetary authority, most of the people there want to be looking at safety and soundness, big-picture financial stability issues. It makes

已經公佈，但我們尚未看到，也就是全面檢討監管體系在整個金融危機中的表現，不僅是探討重慶元華這你債券這個問題，還要研究一般性的問題，在全球修改 [監管政策] 的背景，法例與規管都必須作出改變。

Momentum: 監管體系是否需要作大幅革新？證券及期貨事務監察委員會與香港金融管理局這兩家全職監管機構的職責是否應重新分配，它們應否合併？

SJ: 銀行業與證券業從業員的個性、思維及處事方式均不相同。我們不應簡單地將兩者合併，而應研究如何在職能上劃分所需實現的目標，然後需要什麼人員。



安納德: 證券監管機構天性傾向於檢控。那麼，問題就在於：如果給予他們資本監管的技術角色，他們不會感到欣喜。他們希望上法庭。在金融管理機構，大多數人員希望研究有關安全性與穩健的問題，也就是整體金融穩定性的問題。合理的做法是將目標分開，建立對這些目標擁有共同動機的組織。在香港成立單一監管機構的想法乍看起來具有吸引力。香港是彈丸之地，何不將各項職能統一起來？問題是，我們目前其實擁有兩個非常成型的監管機構，試圖將它們整合為一個組織將會非常複雜和麻煩。而在這個過程中，兩家機構都不會在職能上發揮得很好。我們看到英國的情況是，即使將各項職能合併之後，也不一定如你所願地運作。在香港，我認為還是應該接受行之有效的現狀，慢慢加以改進。

Momentum: 如果以1至10進行評分，10為風險最大，1為風險最小，在今後12個月中，香港的監管政策令營商負擔過重的風險有多大？

sense to separate the objectives and build organisations that have a common motivation around those objectives. The single regulator idea in Hong Kong seems initially appealing. We are a small place, why not put everything together? The downsides are we actually have at the moment two rather well-established regulators, and trying to put them together into an organisation is going to be very complicated and messy. And while that process is taking place, neither is likely to do a very good job with their functions. What we saw in the UK is that even when you put everything together, it still does not necessarily work as you would hope. In Hong Kong, my view is you take what you have that is working and build on that.

Momentum: On a rating between one and 10, how much is Hong Kong at risk of having its regulations becoming too great a burden for business during the next 12 months, with 10 being riskiest and one the least risk?

DA: I am going with a five. We could see not a lot of change. We could see some pretty radical changes. It is evenly balanced. In other jurisdictions, particularly in the US and the UK, I give them a 10; they are definitely going to go too far.

SJ: I don't see a great deal that is going to change fundamentally here. Once things progress further on the minibonds saga and some of the emotional heat goes out of the story, then hopefully people will see that what is happening in the US and the UK is a different order of problem and start looking forward rather than backward. I would give it a five.

ADR: I don't think we are at a huge risk in Hong Kong of going too far. I can't think of areas where Hong Kong is overregulated at present. Something the Government is quite careful about is not to overregulate the financial markets. And you have various interests groups that will help to make sure we do not go too far in that respect. You could put me at a three.

FDR: I would go with three, simply because Hong Kong has not been hit badly [by the global downturn], and we always have this culture of valuing our economic freedoms. **M**

This is an edited transcript of a roundtable discussion held at the University of Hong Kong. Further information, including the working paper "The Global Financial Crisis and the Future of Financial Regulation in Hong Kong", can be found at the Asian Institute of International Financial Law's website at www.aiifl.com.

安納德: 我認為可以評5分。我們可能看到變化並不大，也可能看到一些相當劇烈的變化，兩者的機會各半。至於其他司法地區，尤其是美國和英國，我給它們評10分，它們肯定是做得太過火了。

SJ: 我並不認為香港會發生許多根本性的改變。當迷你債券事件有了進一步的進展，一些情緒得以降溫，到時希望人們目睹美英兩地所發生的事情屬於不同的制度問題，並開始展望未來而不是回顧過去。我覺得可以評5分。

ADR: 我認為香港沒有做得過火的巨大風險。我不覺得香港目前有哪些方面是監管過度。政府在謹慎加以避免的正是過度監管金融市場。不同的利益團體會有助確保我們在這方面不會做得過火。我的評分是3。

FDR: 我的評分也是3，理由很簡單，[全球經濟下滑]對香港的打擊並不嚴重，我們始終具有珍視經濟自由的文化。 **M**

本文是在香港大學舉行的圓桌討論會上之發言稿，內容經過編輯整理。如欲瞭解更多資料，包括「全球金融危機及香港金融監管的未來」的工作報告，可瀏覽亞洲國際金融法研究院的網址：www.aiifl.com。