

Urgent by fax and by despatch
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Dear Stephen,

Chief Executive Election (Election Petition) Rules (L.N. 241)

I refer to your letter of 22 November 2001 which raises a number of questions on the captioned Rules. Our responses, in the same order as the questions appear in your letter, are set out in the following paragraphs.

General observation

Q1 : Could you explain the reason for adopting “sections” for the provisions of the Rules, whereas “rules” for the provisions of the Legislative Council (Election Petition) Rules (Cap. 542 sub. leg.) (“LegCo (EP) Rules”)?

A1 : According to our new drafting practice, “rule X” will only be adopted for rules of courts. For other rules, we use “section ...”.

Sections 9 and 15

Q2 : Section 9 is based on rule 11 of the LegCo (EP) Rules. It is appreciated that rule 11(1) is not adopted because there is no substitution of respondent as reflected in section 70 of the Legislative Council (“LegCo”) Ordinance and rule 17 of the LegCo (EP) Rules. Instead of the arrangement for substitution of respondent, section 15 provides for the circumstances in which a petition is regarded as withdrawn. Could you explain the appropriateness, as a matter of policy, in adopting the new arrangement under section 15?

A2 : Under section 15, an election petition will be regarded as having been withdrawn under three circumstances, namely,

- (a) if the petitioner dies or, if there are more than one petitioner, the last remaining petitioner dies;
- (b) if the successful candidate cannot assume the office of the CE before the deadline prescribed under section 11(3) of the CEEO; or
- (c) if the successful candidate ceases to hold the office of the CE because of death or otherwise.

You will recall that the ground under (a) reflects an established practice adopted for the LegCo elections whereby an election petition is terminated upon the death of the petitioner (see section 69(1) of the LegCo Ordinance (Cap. 542)).

As regards (b) and (c), they are provided for in view of section 37 of the Chief Executive (“CE”) Election Ordinance (“CEE”) (Cap. 569). Under that section, the Court of First Instance can only rule that the successful candidate is duly or not duly elected, but not that another candidate is elected instead. As you will appreciate, in terms of effect, the occurrence of the circumstances under (b) and (c) is no different from a Court ruling that the successful candidate is not duly elected. As such, it makes no sense to continue with an election petition under such circumstances.

Sections 11 and 12

Q3 : Why is it appropriate to omit the reference to “abandon or cease to prosecute a petition” in sections 11 and 12 (c.f. rules 13 and 14 of the LegCo (EP) Rules)?

A3 : The Petition Rules have to tally with the enabling provisions of the principal ordinance. While the phrase “withdraw or abandon, or cease to prosecute” is adopted under the LegCo Ordinance (re : section 68(1) thereof), section 40(a) of the CEEO only uses the word “withdrawal” and contains no reference to “abandon or cease to prosecute”. As such, the CE Election (Election Petition) Rules only adopt the term “withdraw”.

Section 14(2)(b)

Q4 : Would it be clearer in meaning to add “with the Registrar” after “motion”?

A4 : Under section 4(1), all documents that are required to be filed under the rules have to be filed with the Registrar. There is no need to add the words.

Section 15(1)(b)

Q5 : Section 11(3) of the Chief Executive Election Ordinance (Cap. 569) (“CEEO”) provides for the fixing of a new polling date where the candidate returned at an election for appointment to fill the vacancy in the office of the Chief Executive that will arise under section 4(a) of the CEEO cannot assume that office. It does not specify the reason why the returned candidate cannot resume office. Therefore, would it be appropriate to specify in section 15(1)(b) the reason, i.e. “due to his death or otherwise”, for the returned candidate’s failure to assume office?

A5 : If the Subcommittee agrees, an amendment will be made to delete the words “due to his death or otherwise” in sections 15(1)(b).

Section 15(1)(c)

Q6 : Is the scope of section 15(1)(c) intended to cover the situation where an incumbent Chief Executive is the respondent of an election petition?

A6 : Yes.

Q7 : Section 5 of the CEEO refers to the declaration of vacancy of the office of the Chief Executive arising from section 4(b) (i.e. the death of the Chief Executive) or (c) (i.e. the removal of the Chief Executive from office in accordance with the Basic Law by the CPG) of the CEEO. Therefore, it would be appropriate to specify in section 15(1)(c) “death” as a ground for the Chief Executive ceases to hold the office of the Chief Executive. But would it be appropriate to specify in section 15(1)(c) a general ground (i.e. “or otherwise”) for the Chief Executive ceases to hold the office of the Chief Executive other than that under section 4(c)?

A7 : If the Subcommittee agrees, an amendment will be made to delete the words “due to his death or otherwise” in sections 15(1)(c).

Section 15(2)

Q8 : Would it be clearer in meaning to add “with the Registrar” after “shall file a notice of the death of the petitioner”?

A8 : See our reply to Q4 above.

Section 17(1)(b)

Q9 : Would it be clearer in meaning to add “with the Registrar” after “notice”?

A9 : See our reply to Q4 above.

Section 19

Q10 : Could you explain why rule 21(3) of the LegCo (EP) Rules is not adopted?

A10 : Section 52A(2) of the High Court Ordinance prohibits awarding costs against people other than parties. It is considered inappropriate to include a provision similar to rule 21(3) of LegCo (EP) Rules.

***2(a) of the Schedule**

Q11 : Is the term “determination” wide enough to cover the various acts of the Returning Officer under section 33(1) of the CEEO which is also reflected in (Or)*1.(a)?

A11 : “Determination” is wide enough. Before a candidate is elected ipso facto, the Returning Officer must have determined that there is only one valid nomination.

Time requirements under the Hong Kong Court of Final Appeal Rules

Q12 : There are various requirements for the time limit within which certain acts are required to be done by the applicant or respondent under the Hong Kong Court of Final Appeal Rules (Cap. 484 sub. leg.) (“HKCFA Rules”). The whole process under the HKCFA Rules is rather time consuming. In the light of your intention that all election petitions and appeals should be dealt with expeditiously, would the arrangement for various time requirements under the existing HKCFA Rules serve your purpose?

A12 : It is a conscious decision for an appeal against the CFI’s decision on an election petition to follow the HKCFA Rules. This helps ensure the integrity and fairness of the appeal process. As regards the timing, the Judiciary fully appreciates the time constraints of the CE election and accordingly has undertaken to settle such an appeal (if any) as a matter of urgency without compromising judicial integrity. We believe the arrangement of adopting the established HKCFA Rules, coupled with the undertaking by the Judiciary to expedite action where appropriate, strikes a right balance between the need for timeliness and the requirement of judicial integrity.

Forms under Schedule 1

Q13 : It appears that appeals to CFA are classified as either civil or criminal. Rule 5 of the HKCFA Rules prescribes the procedure for filing of the notice of application in “every cause or matter, civil or criminal”. Various Forms prescribed in Schedule 1 to the HKCFA Rules also refer to “CIVIL/CRIMINAL APPEAL NO.”. Could you explain the nature of the appeals under section 22(1)(c) of the HKCFA Ordinance, so that they could fit in the existing Forms?

A13 : An election petition or JR which brings into issue whether a returned candidate was duly elected or can lawfully assume office will be of a civil nature. There is no provision under the CEEO for criminal sanctions against any party. Accordingly, an appeal under section 22(1)(c) of the HKCFA Ordinance, i.e. on determination in election petitions or judicial reviews, will also be of a civil nature. Form C of the HKCFA rules will be applicable.

Q14 : Furthermore, how does Form A (Notice of intended application for leave to appeal), which refers to appeal to the CFA from the Court of Appeal, fit in the leap-frog arrangement?

A14 : The reference to the Court of Appeal is not appropriate in the leap-frog arrangement. An appellant may change the reference to the Court of First Instance when he makes the application. Rule 46 of the HKCFA rules provides that the forms may be varied to such an extent as the circumstances require.

Scope of the HKCFA Rules

Q15 : Does the scope of the HKCFA Rules cover determination, judgment or order made under section 22(1)(c) of the HKCFA Ordinance?

A15 : Leap-frog jurisdiction of the CFA in relation to election matters is founded on section 22(1)(c) of the HKCFA Ordinance. The existing rules are made under section 39 of the HKCFA Ordinance, which provides that rules may be made in all causes and matters in or in respect to which the CFA has jurisdiction. There is nothing in the rules to suggest that its application does not extend to appeals arising under section 22(1)(c). Therefore, the availability of the rules to decisions of election petitions and judicial reviews should not be a concern.

In the interest of time, I am issuing the English version of the letter first. The Chinese translation will follow shortly.

Yours sincerely,

(Chris SUN)
for Secretary for Constitutional Affairs

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