

LEGISLATIVE COUNCIL BRIEF

HONG KONG COURT OF FINAL APPEAL ORDINANCE (CHAPTER 484)

HONG KONG COURT OF FINAL APPEAL (AMENDMENT) BILL 2001

INTRODUCTION

At the meeting of the Executive Council on 29 May 2001, the Council ADVISED and the Chief Executive ORDERED that the Hong Kong Court of Final Appeal (Amendment) Bill 2001, at the Annex, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

General Background

2. Under section 22 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), an appeal lies to the Court of Final Appeal ("CFA") in any civil cause or matter only from a judgment of the Court of Appeal ("CA").

3. During the passage of the Hong Kong Court of Final Appeal Ordinance in 1995, the Hong Kong Bar Association proposed a leapfrog procedure by which civil cases of great general or public importance that would eventually reach the CFA could go direct to the CFA from the Court of First Instance, subject to the leave of the CFA. The Administration did not agree to the proposal at the time but agreed to revisit the possibility of introducing a leapfrog procedure after the CFA had been established for a number of years and its reputation established.

4. Pursuant to a review, the Administration submitted a proposal to the Legislative Council ("LegCo") Panel on the Administration of Justice and Legal Services on 18 April 2000 for the introduction of a leapfrog procedure,

modelling on that provided in Part II of the UK Administration of Justice Act 1969 for appeals from the High Court to go direct to the House of Lords, bypassing the Court of Appeal. The proposal was endorsed in principle by Panel Members as well as the Hong Kong Bar Association and the Law Society of Hong Kong. The Administration has since been working on the details of the arrangement and the requisite legislative amendments to the CFA Ordinance.

The Leapfrog Arrangement

5. Under the proposed arrangement, no appeal to the CFA direct will be permitted unless a certificate has been issued by the trial judge making the decision against which an appeal is to be made and leave to appeal has been granted by the CFA.

6. In considering an application, the trial judge may issue a certificate if he considers that a sufficient case for appeal to the CFA has been made out and all parties to the proceedings consent to the grant of a certificate. The trial judge should also be satisfied that the point of law in the case is of great general or public importance and that -

- (a) it relates wholly or mainly to the construction of an Ordinance or subsidiary legislation and has been fully argued in the proceedings and fully considered in the judgment of the trial judge in the proceedings; or
- (b) it is one in respect of which the trial judge is bound by a decision of the CA or the CFA in previous proceedings, and was fully considered in the judgments given by the CA or the CFA (as the case may be) in those previous proceedings; or
- (c) if it relates wholly or mainly to the construction of the Basic Law, the point of law is one in respect of which the trial judge is bound by a decision of the CA or the CFA in previous proceedings and was fully considered in the judgments given by the CA or the CFA (as the case may be) in those previous proceedings.

7. In terms of procedure and timing, an application for a certificate will have to be made to the trial judge immediately after he has given his judgment

or within 14 days after the judgment is given or such other period as may be prescribed by rules of court. The decision of the trial judge to grant or refuse a certificate is final and is not subject to appeal.

8. If a certificate has been granted by the trial judge, no appeal will lie to the CA until -
 - (a) the time within which an application for leave to appeal to the CFA has expired; and
 - (b) where such an application is made, that application has been determined.
9. Upon the issuing of a certificate by the trial judge, any party to the proceedings could make application to the Appeal Committee of the CFA for leave by way of motion within 28 days from the date of issue of the certificate or such extended time as the CFA may allow. The application may be determined by the Appeal Committee without a hearing.
10. If leave is granted by the Appeal Committee, no appeal from the decision of the trial judge to which the certificate relates shall lie to the CA, but shall lie from that decision to the CFA. The CFA may grant leave subject to such conditions as it considers necessary.

THE BILL

11. The criteria and the procedures for gaining access to the leapfrog arrangement are set out in clause 4 of the Bill.

LEGISLATIVE TIMETABLE

12. The legislative timetable is as follows-

Publication in the Gazette	1 June 2001
First Reading and commencement of Second	13 June 2001

Reading Debate

Resumption of Second Reading debate, committee stage and Third Reading to be notified

BASIC LAW IMPLICATIONS

13. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

14. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

15. The Bill will not affect the binding effect of the Hong Kong Court of Final Appeal Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

16. There are no additional financial and staffing implications arising from implementation of the Bill.

PUBLIC CONSULTATION

17. The Law Society of Hong Kong and the Hong Kong Bar Association have been consulted on the Bill and have indicated their support. The LegCo Panel on the Administration of Justice and Legal Services has been consulted and Members have no comment on the Bill.

PUBLICITY

18. A press release will be issued on 30 May 2001. Spokespersons from the Judiciary and the Administration Wing will be available to answer enquiries.

ENQUIRIES

19. For enquiries on this brief, please contact Mr James Chan, Assistant Director of Administration at 2810 2576.

Administration Wing
Chief Secretary for Administration's Office
May 2001

A BILL

To

Amend the Hong Kong Court of Final Appeal Ordinance to provide for civil appeals to be brought directly from the Court of First Instance to the Court of Final Appeal; and to make related amendments.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Hong Kong Court of Final Appeal (Amendment) Ordinance 2001.

(2) This Ordinance shall come into operation on a day to be appointed by the Chief Justice by notice published in the Gazette.

2. Division heading added

Part II of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) is amended by adding "**Division 1 - Preliminary**" immediately before section 19.

3. Division heading added

The following is added before section 22 -

"Division 2 - Appeal from Court of Appeal to Court".

4. Division 3 added

The following is added immediately after section 27 -

"Division 3 - Appeal from Court of First Instance to Court

27A. Definitions

In this Division -

"Court of First Instance" (原訟法庭) means the Court of First Instance of the High Court;

"judge" (法官) means a judge of the Court of First Instance, a recorder of the Court of First Instance or a deputy judge of the Court of First Instance.

27B. Civil appeals

(1) Notwithstanding section 22, an appeal may lie to the Court at the discretion of the Court of First Instance and the Court, from any judgment of the Court of First Instance in any civil cause or matter if the criteria set out in section 27C(1)(a), (b) and (c) are satisfied.

(2) No appeal shall be admitted unless -

- (a) a certificate has been issued by the trial judge under section 27C; and
- (b) leave to appeal has been granted by the Court under section 27D.

27C. Grant of certificate by trial judge

(1) Where on the application of any of the parties to any proceedings in respect of which an appeal may lie under this Division the judge is satisfied -

- (a) that the relevant conditions are fulfilled in relation to his decision in those proceedings; and

- (b) that a sufficient case for an appeal to the Court has been made out to justify an application for leave to bring such an appeal; and
- (c) that all the parties to the proceedings consent to the grant of a certificate under this section,

the judge, subject to the provisions of this Division, may grant a certificate to that effect.

(2) For the purposes of subsection (1)(a), the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of great general or public importance is involved in that decision and that that point of law -

- (a) relates wholly or mainly to the construction of an Ordinance or subsidiary legislation, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings; or
- (b) is one in respect of which the judge is bound by a decision of the Court of Appeal or the Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Court (as the case may be) in those previous proceedings.

(3) For the avoidance of doubt, subsection (2)(b) applies to and in relation to a decision that involves a point of law relating wholly or mainly to the construction of the Basic Law as it applies to any other decision.

(4) An application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings.

(5) Notwithstanding subsection (4), the judge may in any particular case entertain any such application made at any time before the end of the following period -

- (a) 14 days beginning with the date on which the judgment is given; or
- (b) such other period as may be prescribed by rules of court.

(6) No appeal shall lie against the grant or refusal of a certificate under this section.

27D. Leave to appeal

(1) Where in any proceedings the judge grants a certificate under section 27C, any of the parties to the proceedings may make an application to the Court for leave to appeal by way of a notice of motion at any time within -

- (a) 28 days from the date on which that certificate is granted; or
- (b) such extended time as in any particular case the Court may allow.

(2) Subject to subsection (4), if on an application made under this section it appears to the Court to be expedient to do so, the Court may grant leave for an appeal to be brought directly to the Court; and where leave is granted under this section -

- (a) no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but
 - (b) an appeal shall lie from that decision to the Court.
- (3) Applications under this section shall be determined by the Appeal Committee, with or without a hearing.
- (4) Without prejudice to subsection (2), no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 27C until -
- (a) the time within which an application can be made under this section has expired; and
 - (b) where such an application is made, that application has been determined.

27E. Leave to appeal subject to conditions

- (1) Leave to appeal granted under section 27D(2) may be granted subject to such conditions as the Court considers necessary.
- (2) Section 25(2), (3), (4) and (6), with the necessary modifications, shall apply in relation to the grant of leave under this section as it applies to the grant of leave under that section.
- (3) Section 26 shall apply in relation to a judgment appealed from and grant of leave to appeal under this Division as it applies in relation to a judgment appealed from and grant of leave to appeal under Division 2.

(4) Section 27 shall apply in relation to an application for final leave to appeal to the Court under this Division as it applies in relation to an application for final leave to appeal to the Court of Appeal or to the Court under Division 2.

27F. Cases excluded from section 27B(1)

(1) No appeal shall lie under section 27B(1) in respect of a decision of the judge in any proceedings where by virtue of any enactment, apart from the provisions of this Division, no appeal would lie from that decision to the Court of Appeal, with or without the leave of the judge or of the Court of Appeal.

(2) No appeal shall lie under section 27B(1) in respect of a decision of the judge where by virtue of any enactment, apart from the provisions of this Division, no appeal would (with or without the leave of the Court of Appeal or of the Court) lie from any decision of the Court of Appeal on an appeal from the decision of the judge.

(3) Where by virtue of any enactment, apart from the provisions of this Division, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no appeal shall lie under section 27B(1) in respect of that decision unless it appears to the judge that apart from the provisions of this Division it would be a proper case for granting such leave.

(4) No appeal shall lie under section 27B(1) where the decision of the judge, or any order made by him in pursuance of

that decision, is made in the exercise of jurisdiction to punish for contempt of court."

5. Transitional

The amendments made under section 4 of this amending Ordinance do not apply to any judgment of the Court of First Instance given before the commencement of this amending Ordinance.

Consequential Amendments

High Court Ordinance

6. Appeal in civil matters

Section 14(3) of the High Court Ordinance (Cap. 4) is amended by adding -

"(eb) from a decision of the Court of First Instance in respect of which a certificate is granted under section 27C of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) and leave to appeal is granted under section 27D of that Ordinance in any proceedings;"

Hong Kong Court of Final Appeal Rules

7. Interpretation

Rule 2(2) of the Hong Kong Court of Final Appeal Rules (Cap. 484 sub. leg.) is amended by adding ", 27D" after "section 24".

8. Filing

Rule 5(1)(c) is amended by adding "27C or" after "section".

Explanatory Memorandum

This Bill amends the Hong Kong Court of Final Appeal Ordinance (Cap. 484) ("the principal Ordinance") to provide for an appeal mechanism, commonly known as the "leapfrog appeal", whereby civil appeals may be brought directly from the Court of First Instance to the Court of Final Appeal.

2. Clauses 2 and 3 divide Part II of the principal Ordinance into 2 Divisions.
3. Clause 4 adds new Division 3 to Part II of the principal Ordinance to -
 - (a) allow civil appeals to be brought from the Court of First Instance to the Court of Final Appeal at the discretion of the Court of First Instance and the Court of Final Appeal (new section 27B);
 - (b) specify the criteria and conditions for the grant of a certificate by the trial judge before a party to the proceedings may apply to the Court of Final Appeal for leave to appeal (new section 27C);
 - (c) provide for the procedures and time limit regarding applications to the Court of Final Appeal for leave to appeal (new section 27D) and for the imposition of conditions where leave is granted (new section 27E).

4. Clause 5 specifies that the appeal mechanism does not apply to judgments of the Court of First Instance given before the commencement of the Bill.

5. Clauses 6, 7 and 8 deal with consequential and related amendments to the High Court Ordinance (Cap. 4) and the Hong Kong Court of Final Appeal Rules (Cap. 484 sub. leg.).