

**Bills Committee on Hong Kong Court of Final Appeal
(Amendment) Bill 2001**

The responses of the Administration to the issues raised in the Clerk to Bills Committee's letter of 20 July 2001 are set out as follows:

Item (1)

What is the rationale for introducing the "leapfrog appeal" mechanism and what kind of cases is the mechanism intended for?

2. There are certain cases which by their character and nature would eventually find their way to the Court of Final Appeal (CFA). A leapfrog procedure, where appropriately applied, would have the benefit of saving time and enhancing the efficiency of the process of litigation.

3. The leapfrog procedure is intended for certain civil cases. To qualify for "leapfrog", the point of law in such cases must be 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 Court of Appeal (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.

For the avoidance of doubt, the criterion at paragraph 3(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. It should be noted that the criteria at paragraphs 3(a) and (b) are modelled on similar provisions in Part II of the UK Administration of Justice Act 1969 which deals with appeals from the High Court to the House of Lords.

5. The criterion at paragraph 3(a) is set out on the basis that as a first step in introducing the leapfrog mechanism, it is prudent to confine the issue in question to one being the construction of an Ordinance or subsidiary legislation which has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, subject to the exception as set out at paragraph 3(b).

6. For issues outside the remit of the criterion at paragraph 3(a), it is considered prudent to restrict the application of the leapfrog procedure to points of law falling under the criterion at paragraph 3(b). Where the CA or the CFA has already ruled on a point of law definitively and where the trial judge is bound by a decision of the CA or the CFA in previous proceedings in respect of the point of law and where the point was fully considered in the judgments given by the CA or the CFA (as the case may be) in those previous proceedings, there is a good case for the appeal to bypass the CA and go direct to the CFA.

7. The Basic Law is a constitutional instrument of the Hong Kong SAR under its new legal order and the jurisprudence has to be developed. It is considered that questions of the interpretation of the Basic Law should generally be excluded from the leapfrog procedure, except where the judge is bound by a decision of the CA or the CFA as provided by paragraph 3(b). The CFA would not therefore be deprived of the benefit of the CA's judgment.

Item (2)

To provide information on similar "leapfrog appeal" system in overseas common law countries, particularly as regards the conditions and the procedures for the application for and granting of leave for such appeals.

Leapfrog appeal system in the UK

8. The proposed leapfrog appeal system in Hong Kong is modelled on the UK leapfrog appeal system provided in Part II of the UK Administration of Justice Act 1969 (which deals with appeals from the High Court to the House of Lords).

9. The UK leapfrog appeal system only applies to civil proceedings in the High Court of the UK. The main conditions for a civil case to leapfrog in the UK are:

- (1) The parties must consent to leapfrog.
- (2) The decision of the trial judge must involve a point of law of general public importance which relates wholly or mainly to the construction of an enactment or of a statutory instrument

and has been fully argued in the proceedings and fully considered in the judgment of the trial judge in the proceedings, or be a point of law in respect of which the trial judge is bound by a decision of the Court of Appeal or the House of Lords in previous proceedings and which was fully considered in the judgments given by the Court of Appeal or the House of Lords (as the case may be) in those previous proceedings.

- (3) The trial judge must be satisfied that a sufficient case has been made out to justify an application to leapfrog.

10. If the trial judge is satisfied with the above conditions, he/she may issue a certificate which entitles the parties to apply for leave to leapfrog to the House of Lords. The Appeal Committee of the House of Lords will determine the application without an oral hearing.

Comparable leapfrog appeal system in other jurisdictions

11. There are no comparable leapfrog procedures in other major common law jurisdictions including Australia, Malaysia, New Zealand and Singapore. The nearest equivalent to the proposed Hong Kong leapfrog system is the Canadian “appeals per saltum” system which is available only in a limited situation and is infrequently used.

12. Under the Canadian arrangement, an appeal from a final judgment of a court of first instance could be heard by the Supreme Court of Canada if leave is granted by that court. Similar to the proposed Hong Kong system, the appeal must be on a question of law alone, and

the parties must give their consent to the appeal. Unlike the proposed Hong Kong system, the Canadian system is not restricted to civil matters or to matters arising out of the construction of a statute or statutory instrument. Nor is there a requirement for a binding court of appeal or Supreme Court judgment on the question in issue.

Item (3)

Whether the Administration has consulted the Judiciary on the impact of the Bill on judicial procedures, and if so, what are the views of the Judiciary?

13. The Judiciary supports the introduction of the leapfrog procedure as set out in the Bill. The Administration has been working closely with the Judiciary on the details of the arrangement, including the procedure and the criteria for the cases to leapfrog. The proposed framework is agreeable to the Judiciary.

Item (4)

For a point of law which is of great general or public importance, the deliberation of the Court of Appeal (CA) may be extremely valuable. Would the “leapfrog appeal” mechanism deprive all parties of the benefit of the CA’s decision and the right to appeal to CA?

14. As pointed out in paragraphs 5 to 7 above, only cases falling under the strict criteria in the Bill can leapfrog. This is to ensure that the CFA will not be deprived of the benefits of the deliberations of the CA in other deserving cases. The right to appeal to the CA will not be affected since one of the conditions for the grant of the leapfrog certificate is to obtain consent from all parties concerned.

Item (5)

To explain the reasons and policy considerations for the criteria and conditions for the grant of a certificate by the trial judge, in particular, to explain the need for the judge to be satisfied:

- (i) under section 27C(2)(a), that a point of law has been fully argued in the proceedings and fully considered in his judgment; or*
- (ii) under section 27C(2)(b), that a point of law was fully considered in the judgments given by the CA or the CFA in previous proceedings.*

15. The general policy considerations are set out at paragraphs 5 to 7 above.

16. The requirement that the point of law of great general or public importance should be fully argued and fully considered in the judgment relates to a point of law which relates wholly or mainly to the construction of the Ordinance or subsidiary legislation (section 27C(2)(a)). If such point has not been fully argued and fully considered in the judgment appealed from, it is considered that it should not bypass the CA and go direct to the CFA. Under such circumstances, deliberations of the CA on such points of law would be useful and valuable.

17. Referring to section 27C(2)(b), we believe the Bills Committee is referring to the requirement whereby the point of law of great general or public importance 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. In cases where the trial judge is not bound on a point of law by a decision of the CA or the CFA in previous proceedings or where the trial judge is so bound by a decision of the CA or the CFA but such point has not been fully considered in the judgments given by the CA or the CFA (as the case may be) in those previous proceedings, it is considered that such points of law should not bypass the CA and go direct to the CFA. Under such circumstances, deliberations of the CA on such points of law would be useful and valuable.

Item (6)

What are the factors that would assist the trial judge to conclude that the relevant conditions laid down in proposed section 27C(2) are satisfied?

18. The trial judge would have regard to the proceedings conducted in the Court of First Instance (CFI) and the points of law that have been argued and considered. In deciding whether or not to grant a certificate, the trial judge should also have regard to the condition that consent by the parties has been given.

Item (7)

Whether section 27C applies to cases where a point of law relates wholly or mainly to the construction of the Basic Law?

19. As provided under section 27C(2)(b) and (3), in a decision that involves a point of law relating wholly or mainly to the construction of the Basic Law, the trial judge could, upon application, grant a leapfrog certificate for the case if the point of law is of great public or general

importance and it is a point that the judge is bound by a decision of the CA or the CFA in previous proceedings, and was fully considered in the judgment given by the CA or the CFA in those previous proceedings. The rationale for this section is set out at paragraph 7 above.

Item (8)

*What is the purpose of having section 27C(3) as a separate subsection?
Can it be incorporated in section 27C(2)?*

20. Section 27C(3) is a provision to put it beyond doubt that the condition under section 27C(2)(b) would apply to cases involving the point of law relating to the Basic Law. Inclusion of section 27C(3) should reduce any possible contention that the leapfrog procedure does not apply to the Basic Law since it has not been specifically mentioned. In this connection, it is considered that section 27C(3) should be retained for the sake of certainty and clarity.

Item (9)

*What is the meaning of “immediately” in proposed section 27C(4)?
What would happen if judgment is handed down? How could consent of all parties be obtained immediately after judgment? Parties to the proceedings would also need reasonable time, among other things, to seek legal advice on whether there are sufficient grounds for an appeal before deciding whether an application for a certificate is to be made. The Administration is requested to review new sections 27C(4) and 27C(5)?*

21. The drafting of section 27C(4) was modelled on section 12(4) of the UK Administration of Justice Act 1969. “Immediately” in section

27C(4) should be construed by the judge on a case by case basis. In our view, it should refer to the earliest reasonable opportunity.

22. In considering the applicability of this relevant UK provision in the Hong Kong context, the Administration has consulted the Judiciary on how the section as drafted would work in practice. In the experience of the Judiciary, litigants, in particular the legally represented ones, would think and plan well in advance. At the time of final submissions, the parties would have addressed the different issues and recognised whether the point of law concerns great general or public importance and whether that point of law falls within section 27C(2)(a) or (b) or section 27C(3). The counsel should have instruction from his client as to whether to appeal by way of the leapfrog mechanism in case a ruling is not in his client's favour. Counsel for the parties should have discussed and indicated to each other whether the consent to leapfrog will be forthcoming. It is therefore considered that the provision in section 27C(4) should not create any great difficulty in practice. If the judge hands down the judgment instead of delivering it (by reading it out) in the presence of counsel, the counsel could still, if the parties so wish, turn up to make application immediately as the judge is present. Alternatively, if there is no attendance of counsel at the time of handing down, parties may make the application (by way of consent summons supported by affidavit) within the 14-day period set out in section 27C(5)(a). The judge will deal with it on paper without hearing unless the judge otherwise orders. Hence, the Judiciary did not envisage any great difficulty with the implementation of section 27C(4).

23. Nevertheless, the Administration notes that there may be merits in stating in more specific terms the time limits for lodging the

application for leapfrog certificate. The Administration considers that an alternative approach is to amend section 27C(4) and (5) to the effect that an application for leapfrog certificate under this section shall be made to the judge :

- (a) within 14 days beginning with the date on which the judgment is given (and this will not preclude the parties from lodging the application immediately after the judgment is given); or
- (b) within such other period as may be prescribed by rules of the Court.

24. The Administration has consulted the Judiciary on this alternative approach. The Judiciary supports this approach.

Item (10)

To explain why no appeal shall lie against the grant or refusal of a certificate under section 27C(6).

25. The main rationale for the leapfrog arrangement is to speed up the litigation process. If the judge, in applying the statutory criteria, refuses to grant the certificate, appeal against the decision of the Court of First Instance (CFI) could still lie to the CA under established rules and procedures.

Item (11)

To explain the mechanism for calculation of time for appeal to the CA if an application is made for appeal to the Court of Final Appeal.

26. Under Order 59, rule 4 of the Rules of the High Court, the time limit for the appeal from the CFI to the CA would normally be 28 days, beginning on the date immediately following the date on which the judgment or order of the CFI was sealed or otherwise perfected.

27. There is no special provision for the calculation of time for appeal to the CA in case where leapfrog appeal has been applied for. The time for appeal would therefore start to run immediately following the date on which the judgment or order of the CFI was sealed or otherwise perfected. It is unlikely that the parties would seal the judgment without waiting for the result of the determination of the application for leave to appeal under section 27D(4). In any event, the parties could seek extension of time under Order 3, rule 5 and Order 59, rule 15 of the Rules of the High Court.

Item (12)

To review whether the terms “judge”, “trial judge”, “Court” and “Court of First Instance” are used consistently.

28. The term “judge” has been defined in section 27A as “a judge of the CFI, a recorder of the CFI or a deputy judge of the CFI”. The term “trial judge” is used in section 27B(2)(a) to refer to the particular judge or judges who give(s) the judgment in the CFI from which the appeal is lodged. Immediately following on from section 27B(2)(a), references to the term “judge” in sections 27C and 27D are meant to relate back to the antecedent “trial judge”. When references to the term “judge” appear separately in section 27F, they carry the general meaning of “judge” as defined in section 27A according to the ordinary

rules of statutory interpretation.

29. The term “Court” has already been defined in section 2 of the CFA Ordinance as the “Court of Final Appeal”, while “Court of First Instance” has been defined in section 27A of the Bill as “Court of First Instance of the High Court”.

Item (13)

To clarify if there are any implications arising from the amendments introduced by the Chief Executive Election Ordinance providing for a leapfrog mechanism for appeal against the decision of the Court of First Instance in relation to the election of the Chief Executive.

30. The CFA (Amendment) Bill was introduced before the Chief Executive Election Ordinance was enacted. It is noted that the Division heading added under Clause 3 of the Bill, i.e. “Division 2 – Appeal from Court of Appeal to Court” may not be entirely consistent with the new section 22(1)(c) of the CFA Ordinance which provides for the appeal mechanism from the Court of First Instance to the CFA with regard to specific matters relating to the Chief Executive election.

31. The Administration is considering what further refinements should be made in this regard.