

CSO/ADM CR 10/4/3222/85(01)

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25 January 2002

Mrs Percy Ma
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
Hong Kong

(Fax No.: 2509 9055)

Dear Mrs Ma,

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

Thank you for your letters of 8 October 2001 and 10 January 2002.

We have studied in detail the points as recorded in paragraph 2 of the minutes of meeting held on 4 October in conjunction with the Judiciary Administrator and the Department of Justice. Our responses are set out in the ensuing paragraphs. The Committee Stage amendments to the Bill (the “**proposed CSAs**”) which we would like to propose are attached.

Clause 3 of the Bill

(a) Appeal relating to the Chief Executive election

The Chief Executive Election Ordinance (Cap. 569), which was enacted last year, introduced, inter alia, consequential amendments to section 22(1) and 24(3) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) (the “**CFA Ordinance**”). From the drafting point of view, it is appropriate to add the provisions relating to the Chief Executive election appeal to this part of the CFA Ordinance because certain procedures for civil appeal from the Court of Appeal (the “**CA**”) to the Court of Final Appeal (the “**CFA**”), as reflected in sections 23 to 25 of the CFA Ordinance, are also applicable to appeal for the Chief Executive election.

We however appreciate the point that the heading of Division 2 in the Bill does not include appeal relating to the Chief Executive election. In the interest of clarity, we propose to amend the heading of Division 2 to “Division 2 – Appeal from Court of Appeal to Court; Appeal relating to Chief Executive Election”. Clause 3 of the proposed CSAs seeks to address this point.

(b) The reference to “judgment” in the new section 27C(2)(a)(i) and the reference to “judgments” in the new sections 27C(2)(a)(ii) and (b)(ii)

We are of the view that the reference to “judgment” in section 27C(2)(a)(i) and the reference to “judgments” in sections 27C(2)(a)(ii) and (b)(ii) are appropriate in their respective context. The “judgment” referred to in section 27C(2)(a)(i) basically relates to that made by a particular judge in proceedings in which the point of law of great general or public importance has been canvassed. One judgment or more than one judgment may have emanated from that judge in respect of that point of law but in accordance with legislative drafting practice, the singular is used to avoid any syntactic ambiguity that may occur. In sections 27C(2)(a)(ii) and 27C(2)(b)(ii), “judgments” are used because the contexts of the 2 provisions dictate that the plural form is more appropriate given that more than one judgment must have been given by the CA or the CFA as a whole in previous proceedings.

(c) Appeal involving a point of law relating to the construction of the Basic Law

In the light of Members’ comments, we agree that drafting of the relevant provisions could be further improved. In clause 4(b) of the proposed CSAs, we have now set out the requirements for a point of law not relating to the construction of the Basic Law in the new section 27C(2)(a) and those for a point of law relating to the construction of the Basic Law in the new section 27C(2)(b) separately.

The new section 27C(2)(b) provides that, if an applicant makes a leapfrog application based on a point of law relating to the construction of the Basic Law, that point of law must: (a) relate wholly or mainly to the construction of the Basic Law; and (b) be one in respect of which the 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.

(d) Absence of the trial judge to entertain application for a leapfrog certificate

To deal with the unlikely event that a trial judge is not available to entertain an application for a leapfrog certificate, we have proposed in the new section 27B(2)(a) and the new section 27C(4) that a leapfrog certificate may be issued by any judge of the Court of First Instance (the “CFI”), provided that he shall, as far as is practicable and convenient, be the trial judge in the proceedings to which the application relates. Clause 4(a) and the last paragraph of clause 4(b) of the propose CSAs deal with these changes.

Proposed section 27D

(e) Time limit for appeal from the CFI to the CA, if an application was previously made for appeal to the CFA

We agree with Members on the need to provide for an express provision to avoid a situation where a party, whose application for leave to make a leapfrog appeal to the CFA had been refused, might be barred from appealing to the CA because the time limit for appeal from the CFI to the CA had expired. We have therefore proposed to amend Order 59, rule 4 of the Rules of the High Court as per the last clause of the proposed CSAs to that effect. Under the new provision, if an appeal may lie under the leapfrog provisions (i.e. Division 3 of Part II of the CFA Ordinance), the time limit for making an appeal from the CFI to the CA on the same case will not start to run until after: (a) the determination of an application under the new section 27C of the CFA Ordinance where such an application has been made; and (b) the determination of an application under the new section 27D where such an application has been made.

Clause 5

(f) Transitional provision

We would like to confirm that there is no legal policy objection to applying the leapfrog arrangement to those judgments of the CFI given before the commencement of the Bill. On the other hand, we consider that, for the sake of certainty, there is a need to provide a new transitional provision. We would therefore like to propose in clause 5 of the CSAs that appeals against certain CFI judgments given before the commencement date of the amending Ordinance may be leapfroggable if, on this commencement date, (a) the time for making a leapfrog application under section 27C has not expired; and (b) a notice of appeal to the CA has not been served.

Please let me know if you would like to have any further information.

Yours sincerely,

(Chan Yum-min, James)
for Director of Administration

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