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**Paper for the House Committee meeting on
26 April 2002**

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

Purpose

This paper reports on the deliberations of the Bills Committee on Hong Kong Court of Final Appeal (Amendment) Bill 2001 (the Bill) .

Background

2. Under section 22 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) (CFA Ordinance), an appeal lies to the Hong Kong Court of Final Appeal (CFA) in any civil cause or matter only from a judgment of the Court of Appeal (CA). During the enactment of the CFA 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 CFA could go direct to CFA from the Court of First Instance (CFI). The Administration did not agree to the proposal at the time but agreed to revisit the possibility of introducing a leapfrog procedure after CFA had been established for a number of years and its reputation established.

The Bill

3. The Bill provides for an appeal mechanism, commonly known as "leapfrog appeal", whereby civil appeals may be brought directly from CFI to CFA. The criteria and procedures for gaining access to the leapfrog arrangement are set out in clause 4 of the Bill (new sections 27A - F).

The Bills Committee

4. At the House Committee meeting on 29 June 2001, members agreed to form a Bills Committee to scrutinise the Bill. A membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Hon Margaret NG, the Bills Committee has held three meetings, including two meetings with the Administration.

Deliberations of the Bills Committee

5. The Bills Committee has consulted the Hong Kong Bar Association and the Law Society of Hong Kong on the Bill. The two professional bodies are in support of the Bill. The Bills Committee has been advised that 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.

6. The main deliberations of the Bills Committee are set out below.

"Leapfrog appeal" system in overseas common law jurisdictions

7. The Bills Committee has requested the Administration to provide information on the leapfrog appeal system in overseas common law jurisdictions.

"Leapfrog appeal" system in the United Kingdom (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). 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 -

- (a) the parties must consent to leapfrog;
- (b) the decision of the trial judge must involve a point of law of general public importance which (i) either 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 (ii) is one 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; and

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

If the trial judge is satisfied with the above conditions, he 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

9. According to the Administration, 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.

10. 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.

Benefits of the proposed "leapfrog appeal" system

11. Some members point out that for a point of law which is of great general or public importance, the deliberation of CA may be extremely valuable. They are concerned that the “leapfrog appeal” mechanism might deprive all parties of the benefit of the CA’s decision and the right to appeal to CA.

12. The Administration has advised that 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 CA in other deserving cases. Moreover, the right to appeal to 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.

Appeals involving both leapfroggable and non-leapfroggable points of law

13. The Bills Committee has asked whether the proposed leapfrog procedure is intended to apply to all the related points of law in a case, or only to the leapfroggable point.

14. The Administration has advised that the leapfrog procedure should only be applied to cases which have good and sound reasons to bypass CA in the appeal process with a view to expediting the litigation process. In a case which involves leapfroggable and non-leapfroggable points of law, it is the CFI judge who has to exercise his judicial discretion, having regard to the grounds of appeal and the particular circumstances of the case, to decide whether to grant the leapfrog certificate for the case to proceed direct to CFA. Even if the certificate is granted, the appellants are required to obtain leave to appeal under the new section 27D. The Appeal Committee will consider if it is expedient for the appeal to go direct to CFA and decide if leave should be granted. The Administration is of the view that there are sufficient safeguards to ensure that the leapfrog procedure would be properly applied in all appeals including those involving multiple points of law.

Appeals relating to Chief Executive (CE) election

15. Clause 3 proposes to add "Division 2 - Appeal from Court of Appeal to Court" before section 22 of the CFA Ordinance. Members have queried why the heading of Division 2 does not include appeal relating to the CE election. The CE Election Ordinance (Cap. 569), which was enacted last year, introduced, inter alia, consequential amendments to sections 22(1) and 24(3) of the CFA Ordinance.

16. The Administration has explained that the Bill was introduced before the CE Election Ordinance was enacted. Since certain procedures for civil appeal from CA to CFA, as reflected in sections 23 to 25 of the CFA Ordinance, are also applicable to appeal for the CE election, and in the interest of clarity, the Administration has agreed to amend the heading of Division 2 to "Division 2 - Appeal from Court of Appeal to Court; Appeal relating to Chief Executive Election".

Grant of leapfrog certificate

17. New section 27C specifies the criteria and conditions for the grant of a certificate by the judge before a party to the proceedings may apply to CFA for leave to appeal. In considering an application, the judge may issue a certificate if he considers that a sufficient case for appeal to CFA has been made out and all parties to the proceedings consent to the grant of a certificate. Under new section 27C(2) and (3), the judge should also be satisfied that the point of law in the case is of great general or public importance and -

- (a) if it does not relate wholly or mainly to the construction of the Basic Law, that point of law must :
 - (i) relate wholly or mainly to the construction of the Ordinance or subsidiary legislation and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings (the "construction of statute" route); or

- (ii) 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 (the "bound by precedent" route); and
- (b) if it relates wholly or mainly to the construction of the Basic Law, the point of law must be one in respect of which the judge is bound by a decision of CA or CFA in previous proceedings and was fully considered in the judgements given by CA or CFA (as the case may be) in those proceedings (the "Basic Law" route).

18. In response to members' comments that the drafting of the relevant provisions should be revised to reflect the policy intent as discussed in paragraph 17 above, the Administration has agreed to introduce the necessary amendments.

19. On the requirement for the point of law to relate wholly or mainly to the construction of the Basic Law under the "Basic Law" route, the Administration has advised that the policy intent is that questions of the interpretation of the Basic Law should generally be excluded from the leapfrog procedure, subject to the exception where the judge is bound by a decision of CA or CFA and that the point of law was fully considered in the judgments in those previous proceedings. The exceptional "Basic Law" route for leapfrogging should be narrowly confined to cases where the point relates wholly or mainly to the construction of the Basic Law. If the point of law is not in essence a Basic Law point, it would concern some other aspect of law and may fall under one of the other routes, i.e. the "construction of statute" route or the "bound by precedent" route.

Time limits for lodging an application for leapfrog certificate

20. Some members have expressed concern about the requirement under new section 27C(4) that an application for a leapfrog certificate shall be made to the judge immediately after he gives judgment in the proceedings. They consider that parties to the proceedings should be given reasonable time to seek legal advice and decide whether an application for a certificate should be made.

21. The Administration has advised that in the light of the experience of the Judiciary, at the time of final submissions, the parties would have addressed the different issues and decided whether to appeal by way of the leapfrog mechanism. Counsel for the parties should have discussed and indicated to each other whether the consent to leapfrog will be forthcoming. 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 new section

27C(5)(a). The judge will deal with it on paper without hearing unless the judge otherwise orders. It is therefore considered that the provision in new section 27C(4) should not create any great difficulty in practice.

22. Nevertheless, the Administration considers that there may be merits in stating in more specific terms the time limits for lodging an application for leapfrog certificate. The Administration has agreed to amend new section 27C(4) and (5) to the effect that an application for leapfrog certificate under this section shall be made to the judge within -

- (a) 14 days from 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) such other longer period as may be prescribed by rules of the Court.

Absence of trial judge to entertain application of leapfrog certificate

23. The Bills Committee notes that the term "judge" refers to "a judge of the CFI, a recorder of the CFI or a deputy judge of the CFI". The term "trial judge" used in section 27B(2)(a) refers to the particular judge or judges who give(s) the judgment in the CFI from which the appeal is lodged. Members have requested the Administration to address the situation where the trial judge sitting alone is not available to entertain an application for a leapfrog certificate.

24. After consideration, the Administration has agreed to introduce amendments to new section 27B(2)(a) and 27C to the effect that a leapfrog certificate may be issued by any judge of CFI, provided that he shall, as far as is practicable and convenient, be the trial judge in the proceedings to which the application relates.

Transitional provision

25. In response to the Bills Committee, the Administration has confirmed that there is no legal policy objection to applying the leapfrog arrangement to those judgments of CFI given before the commencement of the Bill. Nevertheless, the Administration considers that, for the sake of certainty, there is a need to provide a new transitional provision. The Administration will introduce amendments to clause 5 accordingly.

Time limit for appeal from CFI to CA

26. Under the proposed leapfrog arrangement, no appeal to the CFA direct will be permitted unless a certificate has been issued by a judge (section 27C) and leave to appeal has been granted by CFA (section 27D). An application for a certificate has to be made to the judge within 14 days after the judgment is given

or such other longer period as may be prescribed by rules of court (paragraph 21 above refers). The decision of the judge is final and is not subject to appeal. Upon issuing of a certificate by the judge, any party to the proceedings could make application to the Appeal Committee of CFA for leave by way of motion within 28 days from the date of issue of the certificate or such extended time as CFA may allow. If leave is granted by the Appeal Committee, no appeal from the decision of the judge to which the certificate relates shall lie to CA, but shall lie from that decision to CFA. A flow chart showing the calculation of time for appeal under the Bill is in **Appendix II**.

27. Under Order 59, rule 4 of the Rules of the High Court, the time limit for an appeal from CFI to CA would normally be 28 days, beginning on the date immediately following the date on which the judgment or order of CFI was sealed or otherwise perfected. According to the Administration, there is no special provision for the calculation of time for appeal to 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 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. 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.

28. Members have expressed concern about the situation where a party, whose application for leave to make a leapfrog appeal to CFA has been refused, might be barred from appealing to CA because the time limit for appeal from CFI to CA has expired. They consider that there is a need to provide for an express provision to prevent such a situation from arising.

29. After consideration, the Administration has agreed to amend Order 59, rule 4 of the Rules of the High Court by introducing a new clause 6A. Under the new provision, where an appeal may lie under the leapfrog provisions, the time limit for an appeal from CFI to CA will not start to run until -

- (a) the date of determination of an application for a leapfrog certificate made under section 27C where such an application has been made; or
- (b) the date of determination of an application made to the CFA for leave to appeal under section 27D where such an application has been made.

30. Members are also concerned about the situation where a party having successfully obtained a leapfrog certificate from CFI, decides not to apply to CFA for leave to appeal but wishes to appeal to CA. The Administration has advised that in such rare and exceptional circumstances, parties can seek extension of time under Order 3, rule 5 and Order 59, rule 15 of the Rules of the High Court.

Committee Stage Amendments (CSAs)

31. A set of the CSAs proposed by the Administration and agreed by the Bills Committee is in **Appendix III**.

Recommendation

32. The Bills Committee supports the Bill and recommends that the Second Reading debate on the Bill be resumed at a future Council meeting.

Advice sought

33. Members are invited to note the recommendation of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
25 April 2002

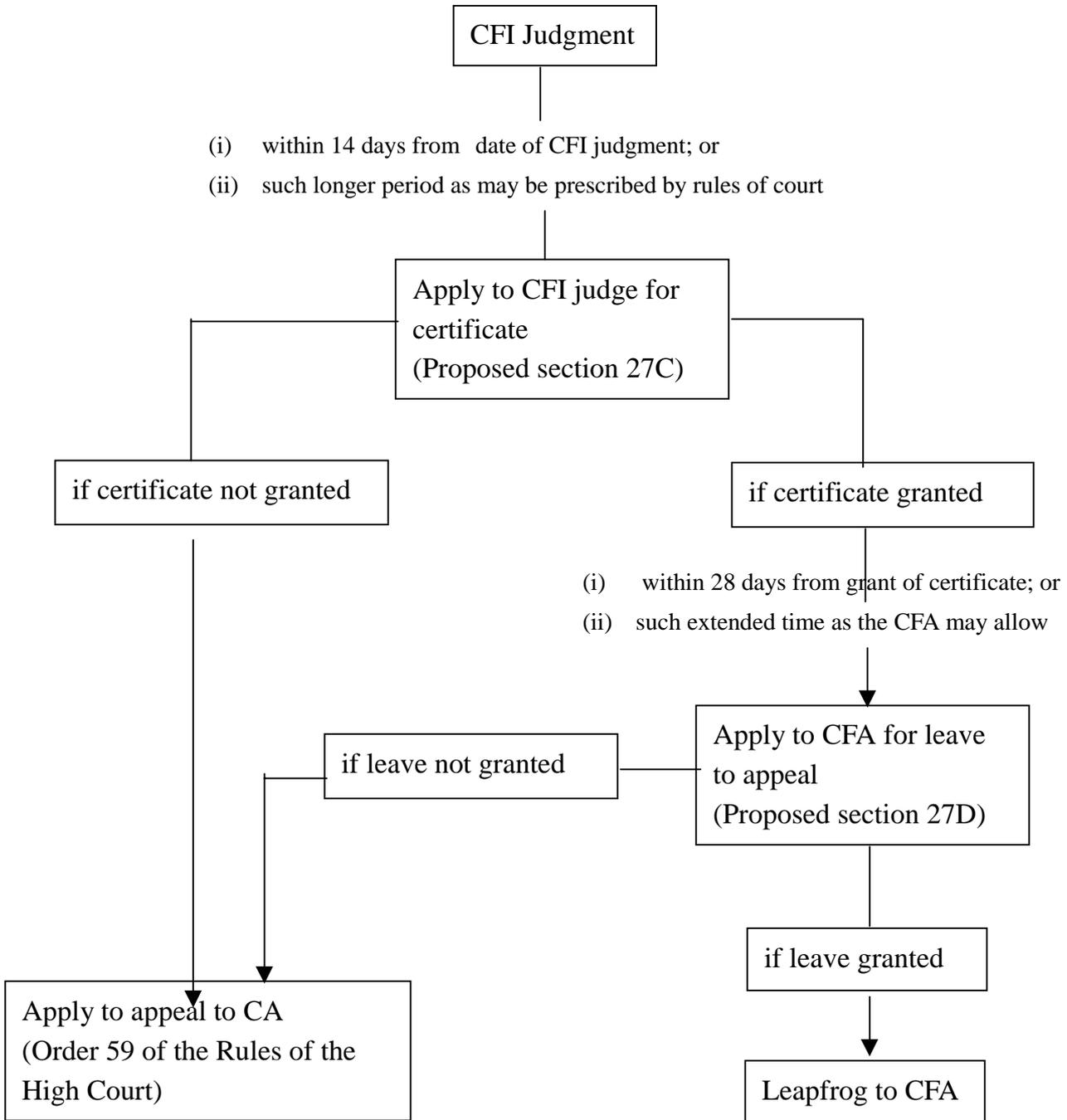
**Bills Committee on Hong Kong Court of Final Appeal
(Amendment) Bill 2001**

Membership list

| | |
|----------------------|---|
| Chairman | Hon Margaret NG |
| Members | Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Dr Hon Philip WONG Yu-hong Hon Jasper TSANG Yok-sing, JP Hon Ambrose LAU Hon-chuen, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP (Total : 8 Members) |
| Clerk | Mrs Percy MA |
| Legal Adviser | Ms Bernice WONG |
| Date | 19 July 2001 |

Civil Appeal

(under the Hong Kong Court of Final Appeal (Amendment) Bill 2001)



28 days beginning on the date immediately following the date on which the judgment or order of CFI was sealed or otherwise perfected

Note:

- CFI - The Court of First Instance of the High Court
- CA - The Court of Appeal of the High Court
- CFA - The Court of Final Appeal

DMA No. #51667 v7

Draft

HONG KONG COURT OF FINAL APPEAL (AMENDMENT) BILL 2001

COMMITTEE STAGE

Amendments to be moved by the Chief Secretary
for Administration

| <u>Clause</u> | <u>Amendment Proposed</u> |
|---------------|---|
| 3 | In the proposed Division heading, by adding “; Appeal relating to Chief Executive Election” at the end. |
| 4 | (a) In the proposed section 27B(2)(a), by deleting “the trial” and substituting “a”. (b) In the proposed section 27C – (i) in the heading, by deleting “by trial judge”; (ii) in subsection (1) – (A) by adding “hearing the application for a certificate” before “is satisfied”; (B) in paragraph (a), by deleting “his decision” and substituting “a decision of the judge”; (iii) by deleting subsections(2) to (5) and |

substituting –

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

(a) where that point of law does not relate wholly or mainly to the construction of the Basic Law, it must –

(i) relate 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

(ii) be 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

giver by the
Court of
Appeal or
the Court
(as the case
may be) in
those
previous
proceedings
; and

(b) where that point of
law relates wholly or
mainly to the
construction of the
Basic Law, it must be
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) An application for a

certificate under this section shall be made to a judge within –

(a) 14 days from the date on which the judgment is given; or

(b) such other longer period as may be prescribed by rules of court.

(4) The judge before whom an application for a certificate under this section is made shall, as far as in practicable and convenient, be the trial judge in the proceedings to which the application relates.”.

(c) In the proposed section 27D(1), by deleting “the judge” and substituting “a judge”.

(d) In the proposed section 27F –

(i) in subsection (1), by deleting “the judge” where it secondly appears and substituting “a judge”;

(ii) in subsection (3), by deleting “the judge” where it secondly appears and substituting “a judge”.

5 By deleting the clause and substituting –

“5. Transitional

An appeal may, subject to the provisions of this amending Ordinance, lie to the Court from a judgment of the Court of First Instance given on or before the commencement of this amending Ordinance.”

New By adding immediately after clause 6 –

“The Rules of the High Court

6A. Time for appealing

Order 59, rule 4 of the Rules of the High Court (Cap. 4 sub. leg.) is amended by adding –

“(2) In the case where an appeal may lie from a judgment of the Court of First Instance under Division 3 of Part II of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), the following period of time shall be disregarded in determining the period referred to in paragraph (1) –

- (a) where an application has been made under section 27C of that Ordinance, the period from the date on which the judgment is given to the date on which the application is determined; or
- (b) where an application has been made under section 27D of that

Ordinance, the period from the date on which the judgment is given to the date on which the application is determined.”.”