

立法會

Legislative Council

LC Paper No. LS 67/11-12

Application of Rule 92 of the Rules of Procedure of the Legislative Council

At the House Committee meeting held on 18 May 2012, the Legal Service Division was requested to provide a paper on the application of Rule 92 of the Rules of Procedure of the Legislative Council ("RoP").

2. This paper sets out the origin of Rule 92, its purpose and application. All the rules referred to in this paper are rules of the RoP unless otherwise stated.

Origin of Rule 92

3. The RoP were made on 2 July 1998 by the First LegCo pursuant to the power given to it to make rules of procedure on its own under Article 75 of the Basic Law ("BL"). These rules, which have since been amended from time to time, are an adaptation of the Standing Orders of the pre-1997 Legislative Council ("the Standing Orders"). The adaptations that have been made were based on the need for continuity and compatibility with the Basic Law.

4. The text of Rule 92, as set out below, has retained its original wording since the First LegCo:

"92. Procedure if Rules of Procedure do not Provide

In any matter not provided for in these Rules of Procedure, the practice and procedure to be followed in the Council shall be such as may be decided by the President who may, if he thinks fit, be guided by the practice and procedure of other legislatures." .

Rule 92 could be traced back to Standing Order 69 of the 1968 version of the Standing Orders of the Legislative Council, which provides:

"69. Procedure in Case of Doubt

In a matter not provided for in these Standing Orders or in any other case of doubt the usage and practice of the Commons House of Parliament of Great Britain and Northern Ireland shall be followed as far as applicable to the Council and as far as it is not inconsistent with these Standing Orders or with the practice of the Council, but no restriction which the House of Commons has introduced by standing order shall extend to the Council or its Members until the Council has provided by standing order for a similar restriction."

In 1971, Standing Order 69 was amended to read as follows:

"69. Procedure if Standing Orders do not provide

In any matter not provided for in these Standing Orders, the practice and procedure to be followed in the Council shall be such as may be decided by the President who may, if he thinks fit, be guided by the practice and procedure of the House of Commons of the United Kingdom."

The reason for the above amendment, as stated in L.N. 138 of 1971, was that "the adoption of Commons practice as a whole is sometimes unsatisfactory. The extent of some of these practices is obscure and some of them are inappropriate to Hong Kong".

5. Standing Order 69 was originally to enable the local legislative body to adopt and follow usage and practice of the House of Commons of the United Kingdom ("UK"). Under this standing order, if the UK usage and practice for adoption was not a restriction of LegCo or its Members, the adoption would be automatic. If it was, it could only be adopted through the making of a standing order by LegCo. It is unclear what usage and practice should constitute a restriction within the meaning of Standing Order 69.

6. In 1971, the above adoption mechanism was modified to giving discretion to the President to decide on the practice and procedure to be followed in the Council in relation to any matter not provided for in the Standing Orders. The President was only required to be guided by the practice and procedure of the House of Commons of the United Kingdom

if he thought fit when deciding what that practice and procedure should be in order to deal with a matter identified as not having been provided for in the Standing Orders. There is no further provision on how the President's discretion should be exercised, nor how his decision should be given effect. It was left to the President's discretion entirely.

7. Rule 92 was modeled on Standing Order 69 with the modification that instead of deciding whether to be guided by the practice and procedure of the House of Commons of the United Kingdom only, the President may decide to be guided by the practice and procedure of any other legislature as he thinks fit.

Purpose of RoP and Rule 92

8. RoP serves to regulate the proceedings of the Legislature by providing for, among other things, the legislative procedure for the processing of a bill in the Council and the powers and functions of the President to decide the agenda and to conduct meetings of the Council¹.

9. Under Rule 44, the President's decision on a point of order is final. It is therefore generally accepted that the President has the power to give an authoritative interpretation of a rule when deciding on a point of order.

10. The purpose of Rule 92 may be ascertainable from Article 72 of the Basic Law (BL 72), which sets out the powers and functions of the President of the Legislative Council as follows:

- " (1) To preside over meetings;
- (2) To decide on the agenda, giving priority to government bills for inclusion in the agenda;
- (3) To decide on the time of meetings;
- (4) To call special sessions during the recess;
- (5) To call emergency sessions on the request of the Chief Executive; and
- (6) To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council."

Among these powers and functions, the first and sixth items are particularly pertinent. It is to be noted that presiding over a meeting

¹ See paragraphs 9, 10 and 34 of First Affidavit of NG Man Wah, Pauline in the case of *LEUNG Kwok-hung v. The President of the Legislative Council of the Hong Kong Special Administrative Region*, HCAL 87 of 2006.

should mean the President exercising power and function to ensure the due process and progress of LegCo meetings.

11. In light of the above, it should be reasonable to conclude that LegCo in making the RoP has already contemplated that it is not feasible to make rules to deal with all possible scenarios and circumstances, and has therefore decided by Rule 92 to empower the President to devise the necessary practice and procedure required to deal with these scenarios and circumstances as and when they arise for the purpose of exercising his powers and discharging his functions under BL 72 and the RoP, including to preside over a meeting.

Application of Rule 92

12. Rule 92 may be considered as having a limiting effect on the President's power to preside over meetings in that he has to act in accordance with the terms of Rule 92. He should not simply rely on implied powers that are considered to be reasonably incidental to the power and function to preside over meetings, such as an implied power to devise practice and procedure freely without any benchmark to follow.

13. In accordance with Rule 92, the President's power to decide on the practice and procedure that should be followed can only be exercised if there is a matter to be dealt with which he is satisfied as one that is not provided for in the RoP. If the President is so satisfied, he has to consider if he should be guided by the practice and procedure of other legislatures before he makes the necessary decision.

14. Despite the established principle that a court does not, as a rule, interfere with the internal working of the legislature unless there is a case of an exceptional nature², the President should follow the usual principles in the Administrative Law which apply to the exercise of statutory powers. These include rules of fairness and reasonableness, and taking into account relevant considerations, but not those which are irrelevant.

Whether Chairman of Committee of the Whole Council can invoke Rule 92

15. Under Rule 92, the power to decide on the practice and procedure that the Council is to follow is vested in the President. It is

² *Cheng Kar Shun v Honourable Li Fung Ying and others* [2009] 4 HKC 204, paragraphs 214 to 220.

arguable that it is only when the President is acting in that capacity that he could exercise that power. This view is supported by the approach of distinguishing the President from the Chairman of a committee of the whole Council in rules which provide for a power that equally applies to the Council when sitting as Council or a committee of the whole Council, for example, Rules 44 and 45. Nevertheless, in light of Rule 3(1) which requires the President to act as Chairman of the committee of the whole Council, the fact that a Rule 92 power is exercised in a committee of the whole Council by the President when he is chairing the committee should, in the absence of a clear contrary intention, not be a ground sufficient to invalidate a decision made by him pursuant to Rule 92.

Conclusion

16. Members are invited to note the information provided in this paper.

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