

立法會

Legislative Council

LC Paper No. LS 35/15-16

Finance Committee

Legal and procedural issues arising from the decision of the Deputy Chairman of the Finance Committee to dispense with the notice requirement for two agenda items related to the Hong Kong Section of Guangzhou – Shenzhen – Hong Kong Express Rail Link

Purpose

At the meeting of the Finance Committee (FC) on 5 February 2016, members raised certain legal and procedural issues arising from the decision of the Deputy Chairman to dispense with the notice requirement for two agenda items related to the Hong Kong Section of Guangzhou – Shenzhen – Hong Kong Express Rail Link (Express Rail Link). This note provides information to address the relevant issues.

Whether the Deputy Chairman of Finance Committee has the power to dispense with the notice requirement under paragraph 21 of the Finance Committee Procedure

2. On 1 February 2016, the Chairman publicly announced his decision that he would not chair the FC's deliberation of the Express Rail Link items. By a circular dated 2 February 2016, the Clerk to FC informed members that approval had been sought from the Deputy Chairman for inclusion of the Express Rail Link items in the agenda of the meeting on 5 February 2016 and that the Deputy Chairman had agreed to dispense with the necessary notice requirement for the items. By a letter dated 4 February 2016, the Chairman formally informed FC members of his decision not to chair the meetings for the Express Rail Link items.

3. Under paragraph 21 of the Finance Committee Procedure (FCP), notice of agenda items to be given by the specified designated public officer should reach the Clerk to FC at least six clear days before the meeting concerned, but shorter notice may be given if the Chairman so directs. Under paragraph 13 of the FCP, if the Chairman decides that he is unable to act for a particular item, the Deputy Chairman shall chair the meeting for that particular item.

4. It is noted that paragraph 21 of the FCP does not specify the time for making the relevant decision. As such, it would be open to the Deputy Chairman who took the chair at the meeting on 5 February 2016 by virtue of paragraph 13 of the FCP to waive the notice period for the Express Rail Link items at any time during the meeting before FC started its discussion on those items. This would have been sufficient to dispose of the question concerning the Deputy Chairman's power to dispense with the notice requirement under paragraph 21 of the FCP. For the sake of completeness, other issues raised at the meeting on 5 February 2016 are dealt with in the following paragraphs.

Interpretation of paragraph 13 of the Finance Committee Procedure

5. At the FC meeting on 5 February 2016, a view was expressed to the effect that since paragraph 13 of the FCP only confers on the Deputy Chairman the power to "chair a meeting" if the Chairman decides that he is unable to act, the Deputy Chairman could only act while chairing a meeting but not before the meeting. It was also suggested that since paragraph 21 of the FCP only makes reference to "Chairman", it was not in order for the Deputy Chairman to dispense with the notice requirement before the meeting on 5 February 2016.

6. Paragraph 13 of the FCP does not specify the time and manner for the Chairman to decide not to act for a particular item. Arguably, the Chairman's public announcement on 1 February 2016 that he would not chair the meetings for the Express Rail Link items would have the effect of triggering paragraph 13 of the FCP such that the responsibility to chair the meetings for those items was passed to the Deputy Chairman following the Chairman's public announcement. The question to consider is how "chair a meeting" under paragraph 13 of the FCP should be construed: whether it only means acting during a meeting when the relevant agenda item is considered or whether it includes doing things required to be done before the meeting in relation to that agenda item.

7. It is noted that apart from the provisions relating to election of the Chairman and Deputy Chairman (i.e. paragraphs 4 to 6 and 6A of the FCP) and paragraph 13, there is no other provision in the FCP that makes reference to the Deputy Chairman. While paragraph 4 of the FCP provides for the scenario that a member may be elected to act as chairman during the absence of the Chairman and Deputy Chairman and that paragraph 13 confers on the Deputy Chairman the power to chair a meeting when the Chairman decides that he is unable to act, all the provisions relating to the convening and conduct of meetings such as

determination of time and place of meetings, waiver of notice of meetings and agenda items, inviting public officers and other persons to attend meetings, etc. make reference to "Chairman" only. If a literal interpretation is to be given to these provisions, this would mean that even if the Chairman has decided not to act for a particular item, the Deputy Chairman cannot exercise these powers, including those relating to matters required to be decided before the actual meeting is held. It should also be pointed out that such literal interpretation is inconsistent with the practice adopted by other committees of the Legislative Council (LegCo) with procedures similar to those of FC. According to the Secretariat's records, there have been cases where the deputy chairman of a committee or the member elected as the presiding member exercised the powers of the chairman during and before the meetings in circumstances where the chairman had decided not to act, including deciding the dates and agendas of meetings¹.

8. The modern approach adopted by the courts to legislative interpretation is to consider the context and purpose of the words in question, especially in the case of general words². Further, based on decided cases, in construing statutes, the courts would apply a certain amount of common sense³ and would be inclined to construe a statute in such a way as to implement, rather than defeat, the legislative purpose⁴. Applying the above approaches to the interpretation of paragraph 13 of the FCP, it is likely that the courts would take into consideration matters such as the purpose of having a deputy chairman and conferring on the Deputy Chairman of FC the power to chair meetings under that paragraph, the construction of paragraph 13 in the context of other paragraphs of the FCP and the prevailing practice of other LegCo committees when their

¹ For example, in 2011, when the Committee on Members' Interests (CMI) was handling the complaints against a Member, both the Chairman and Deputy Chairman did not act as the chairman to consider the complaints on the ground of possible conflict of interest. A member of CMI was elected to chair the meetings (Member Presiding) to consider the complaints having regard to the procedure in paragraph 13 of the FCP. The Member Presiding then exercised the powers and functions of the chairman in the handling of the complaints, including deciding the dates and agendas of meetings and other arrangements necessary for CMI's consideration of the complaints.

² The purposive and contextual approach to legislative interpretation was reaffirmed by the Court of Final Appeal in *Vallejos Evangeline Banao v Commissioner of Registration & Anor* [2013] 4 HKC 239 and applied by the Court of Appeal in *China Star Enterprise Hong Kong Ltd v Hung Wing San, Tony & Anor* [2014] 1 HKC 132.

³ See, for example, *Barnes v Jarvis* [1953] 1 WLR 649, per Lord Goddard CJ at 652; *Beck v Scholz* [1953] 1 QB 570. In *A v Securities and Futures Commission* [2008] 1 HKLRD 591, it was decided that common sense may be needed in working out the detail which is not provided in the statute but is reasonably incidental to the exercise of the power conferred by the statute. This rule of construction is reflected in section 40(1) of Cap. 1.

⁴ See, for example, *R (on the application of Hasani) v Blackfriars Crown Court* [2006] 1 All ER 817; *Whitney v IRC* [1926] AC 37.

chairmen are not available or unable to act. Based on these considerations, it seems unlikely that the courts would construe paragraph 13 of the FCP as confining the Deputy Chairman's power of chairing a meeting to acting during a meeting and that he could not exercise other powers conferred on the Chairman by other provisions of the FCP (including those required to be exercised before the meeting in relation an agenda item). Based on decided cases, it is probable that the courts would consider such a construction as being inconsistent with common sense and rendering it impossible for FC to function in relation to the agenda item in the event that the Chairman decides that he is unable to act. Further, under section 40(1) of the Interpretation and General Clauses Ordinance (Cap. 1), where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing. Applying the principle in section 40(1) of Cap. 1 to interpreting paragraph 13 of the FCP, the Deputy Chairman who is vested with the power to chair a meeting for an agenda item for which the Chairman has decided not to act should have all the powers that are reasonably necessary to enable the Deputy Chairman to chair the meeting. This would include doing things that the Chairman is empowered to do under the FCP.

9. It has also been suggested that in the absence in the FCP of an express provision similar to Rule 3(3) of the Rules of Procedure (RoP), the power to waive the notice period of agenda items under paragraph 21 of the FCP could only be exercised by the FC Chairman as reference is made to "Chairman" only in that paragraph.

10. Rule 3(3) of RoP, which is derived from Standing Order No. 3(4) of the Standing Orders of the pre-1997 LegCo, provides that the President's deputy or other Member presiding shall enjoy all powers conferred by the RoP on the President or Chairman that are exercisable in respect of the meeting, or part of the meeting, of the Council or a committee of the whole Council at which the President's deputy or that Member presides or is Chairman. It should be pointed out that the office of the President of the pre-1997 LegCo was established under the Royal Instructions and his powers were provided in the Royal Instructions and Standing Orders. Since 1 July 1997, the office of the President of LegCo is established under the Basic Law (BL) with his powers and functions provided in BL and the rules of procedure made by LegCo under BL 75(2). Under BL 72, the President has, among others, the powers and functions to preside over meetings and to exercise other powers and functions as prescribed in the rules of procedure of LegCo. No reference,

however, is made to "President's deputy" in the Basic Law. Given the constitutional nature of the office of the President and the constitutional origin of his powers and functions both before and after 1 July 1997, separate provisions need to be made in the rules of LegCo to enable the President's deputy to exercise the powers and functions conferred on the President. This may explain why Standing Order No. 3(4) and Rule 3(3) have been included in the Standing Orders and RoP respectively.

11. Unlike the office of the President of LegCo, the offices of the chairman and deputy chairman of FC and indeed of other committees are established by the RoP with the powers of the chairman provided in the RoP. In committees with their own procedure such as FC, the powers of the chairman are further provided in their respective procedures. While it may be desirable to provide for the powers of the Deputy Chairman of FC expressly in the RoP or FCP, the absence of such express provision would not necessarily mean that the powers vested in the Chairman under the RoP and FCP could not be exercised by the Deputy Chairman in circumstances where he acts as the chairman. It would depend on whether, on the proper construction of the relevant provisions of the RoP or FCP, the Deputy Chairman has the same powers as the Chairman of FC when he acts as the chairman. Members may refer to paragraph 8 above on how the courts would possibly construe paragraph 13 of the FCP when applying the relevant approaches to legislative interpretation.

Application of Rule 79B of RoP

12. Rule 79B was added to the RoP in 2006 to deal with the circumstances where the chairman of a committee cannot be contacted for considering a request made by a member of the committee for holding a meeting of the committee to discuss a specific issue of urgent importance. Rule 79B of RoP allows the deputy chairman of the committee to consider the request and determine the time and place of the meeting in such circumstances. Details on the purpose of Rule 79B are set out in a paper of the Committee on Rules of Procedure for the House Committee meeting on 7 July 2006 (LC Paper No. CROP 45/05-06), which is at **Annex**. It is noted that the present case is not one where the FC Chairman cannot be contacted for considering a request for holding an urgent meeting. Hence, Rule 79B of the RoP is not applicable.

Prepared by
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**Paper for the House Committee meeting
on 7 July 2006**

Committee on Rules of Procedure

**Proposed amendments to Rules of Procedure regarding
determination of the time and place of a committee meeting**

Purpose

This paper invites the House Committee (HC) to endorse the amendments to the Rules of Procedure (RoP) proposed by the Committee on Rules of Procedure (CRoP) regarding the determination of the time and place of a committee meeting.

Background

2. According to RoP, the time and place of meetings of the Finance Committee, the Public Accounts Committee (PAC), the Committee on Members' Interests (CMI), CRoP, HC, a Bills Committee, a Panel and a Select Committee (SC) are determined by the chairmen of the committees. RoP have no such provisions for an Investigation Committee (IC) (Rule 73A).

3. A Member suggested that CRoP should review the above provisions because a committee would not be able to function if the chairman, for whatever reason (e.g. not in Hong Kong), could not be contacted to decide to convene an urgent meeting to discuss an important issue. A procedure should therefore be put in place to enable an urgent meeting to be held in such circumstances.

Current arrangements

Calling of meetings of committees

4. With the exception of PAC, CMI, CRoP, an IC and SC, the chairmen of which are appointed by the President, the first meeting of a committee in a term is called by the member of the committee¹ who has the highest precedence in the Council.

5. All subsequent meetings of a committee are called by the chairman in office. According to Rule 24(l) of the House Rules (HR), at the first meeting of a committee, the chairman of the committee will anticipate the number of subsequent meetings required and set tentative dates for them so that members of the committee may take note of the dates from the outset. For Panels, it is usual practice for the tentative dates for the regular meetings in the session to be drawn up at the first meetings.

6. In addition to the regular meetings, the chairman of a Panel may hold special meetings to discuss urgent issues as and when necessary. In doing so, the chairman very often takes into account the views of members of the Panel. This practice is also applicable to other committees and subcommittees of the Council.

Meeting place

7. The meetings of committees are normally held in Hong Kong. According to Rule 22(u) of HR, if a Panel considers it necessary to meet or undertake any activities outside Hong Kong, it should seek HC's permission to do so. This practice is applicable to other committees and subcommittees of the Council.

Practice and procedure in overseas legislatures

8. CRoP has studied the procedures in the legislatures of the United Kingdom (UK), Canada, New Zealand, Australia and the United States (US).

9. In general, the five legislatures adopt two different approaches for handling the situation. In the House of Commons of the UK Parliament and the House of Commons of the Parliament of Canada, in the absence of the chairman of a committee, no member of the committee is allowed to determine the time and place of a meeting of the committee.

10. The Houses of Representatives of the New Zealand Parliament, the Parliament of Australia and the US Congress each has a procedure for determining the time and place of a meeting of a committee in the absence of the chairman of the committee.

¹ In the case of a Bills Committee and a subcommittee of a committee, the Member who has the highest precedence on the preliminary membership list of the relevant committee/subcommittee (the list comprises those Members who indicate their intention to join the relevant committee/subcommittee at the meeting of HC which decides to form it), calls the first meeting of the relevant committee/subcommittee.

Proposed arrangements for dealing with a request for holding a meeting of a committee if the chairman of the committee cannot be contacted

11. Having regard to the procedure in the overseas legislatures, CRoP proposes that if the chairman of a committee cannot be contacted for considering a request made by a member of the committee for holding a meeting of the committee to discuss a specific issue of urgent importance, the deputy chairman of the committee should be given the authority to consider the request and determine the time and place of the meeting in such circumstances. The clerk to the committee should be given 48 hours to contact the chairman before approaching the deputy chairman who will then decide whether to convene the meeting and, if convened, the time and place of it. The arrangement should also be applicable to subcommittees of committees of the Council.

12. As the arrangement has impact on the power of the chairman and deputy chairman of a committee in determining the time and place of a meeting of the committee, CRoP proposes that the arrangement should be implemented from the next session.

13. To enable the clerk to a committee to convey a request for a meeting of the committee to discuss a specific issue of urgent importance, the chairman and deputy chairman of the committee should provide the clerk with adequate information on how they can be contacted.

Proposed amendments to RoP

14. The **Appendix** contains the proposed amendments to RoP. A general provision, i.e. Rule 79B, is proposed to be added so that in the circumstances mentioned in paragraph 11 above, the deputy chairman of a committee may consider the request for a meeting of the committee, and determine the time and place of the meeting.

15. The proposed Rule 79B should apply to any committee and its subcommittee, which includes a joint subcommittee appointed by two or more Panels under Rule 77(9A). As the current definition of “committee” in paragraph (e) of Rule 93 (Interpretation) does not include a joint subcommittee, it is recommended that the paragraph be revised to include such subcommittee. On the other hand, the definition of “committee” in Rule 79A(4) includes a joint subcommittee. As a result of the proposed inclusion of “joint subcommittee” in the definition of “committee” in Rule 93(e), the reference to “joint subcommittee” in Rule 79A(4) will become redundant. Consequential deletion of the reference in Rule 79A(4) is also proposed.

16. The opportunity is also taken to rectify a discrepancy between the Chinese and English versions of Rule 79(2). While the Chinese version stipulates that both the time and place of the meeting of a select committee are to be determined by the chairman, the English version stipulates that only the time is to be so determined. The English version is also inconsistent with the corresponding provisions of RoP in respect of other committees of the Council, for which both the time and place of a committee meeting are to be determined by the chairman. Amendment to the English version of Rule 79(2) is proposed to the effect that both the time and place of a meeting of a select

committee are to be determined by the chairman.

Advice sought

17. Members are invited to endorse CROP's proposal in paragraphs 11 to 13 above and the proposed amendments to RoP in the **Appendix**. With HC's endorsement, the amendments will be presented to the Council for passage at the first regular Council meeting in the next session.

Legislative Council Secretariat
6 July 2006

**Proposed amendments to the Rules of Procedure regarding
determination of the time and the place of a committee meeting**

79B. Determining the time and the place of a meeting of a committee by the deputy chairman of the committee

Where a Rule of this Part provides that a committee shall meet at the time and the place determined by the chairman of the committee, if a member of the committee makes a request for a meeting to discuss a specific issue of urgent importance for consideration by the chairman and within 48 hours of the request being made, the chairman cannot be contacted for making any such determination, the determination may be made by the deputy chairman (if any), who may also direct that a shorter notice of the meeting be given as provided in that Rule.

* * * *

93. Interpretation

In these Rules of Procedure, unless the context otherwise requires —

* * * *

- (e) “committee” means a standing or select committee or any other committee of the Council, or a subcommittee of such committees, *including a joint subcommittee appointed under Rule 77(9A) (Panels) ; and*

* * * *

79A. Exercise of Voting Rights of Chairmen of Committees

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- (4) Notwithstanding the definition of “committee” in Rule 93(e) (Interpretation), in this Rule, “committee” includes ~~a joint subcommittee appointed under Rule 77(9A) (Panels)~~ and a joint meeting referred to in Rule 77(10) (Panels).

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79. Procedure of Select Committees

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- (2) A select committee shall meet at the time *and the place* determined by the chairman. The meetings of a select committee shall be held in public unless the chairman otherwise orders in accordance with any decision of the committee.

* * * *

Legend:

Texts proposed to be added are shown in *italics*.

Texts proposed to be deleted are shown with deletion lines.