

Adaptation of Laws Programme:
item 7 of Schedule 9 to Cap. 1

Schedule 9 of Cap.1 contains temporary provisions, added by the Adaptation of Laws (Interpretative Provisions) Ordinance (Ordinance No. 26 of 1998). Item 7(1) of the Schedule provides as follows -

“(1) Where it is expressly provided in an Ordinance that the Ordinance-

(a) affects or does not affect the right of; or

(b) is or is not binding on,

the Crown, then that reference to the Crown shall be construed as a reference to the State.”

2. The LegCo Panel on Administration of Justice and Legal Services has asked for an explanation of that item, given the existence of items 1 and 2 of Schedule 8 of Cap. 1. Those items provide as follows-

**“CONSTRUCTION ON AND AFTER 1 JULY 1997 OF WORDS AND
EXPRESSIONS IN LAWS PREVIOUSLY IN FORCE**

1. Any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) where the content of the provision -

(a) relates to title to land in the Hong Kong Special Administrative Region;

(b) involves affairs for which the Central People’s Government of the People’s Republic of China has responsibility;

(c) involves the relationship between the Central Authorities and the Hong Kong Special Administrative Region,

shall be construed as a reference to the Central People's Government or other competent authorities of the People's Republic of China.

2. Any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) in contexts other than those specified in section 1 shall be construed as a reference to the Government of the Hong Kong Special Administrative Region.”

Schedule 8

3. Schedule 8 of Cap. 1 was added by the Hong Kong Reunification Ordinance, which was enacted on 1 July 1997. It reflects the principles of interpretation set out in Annex 3 of the decision of the Standing Committee of National People's Congress on 23 February 1997.

4. Before Cap. 1 was adapted, the Department of Justice considered whether item 1 or 2 of Schedule 8 could be applied in construing the reference to 'Crown' in section 66 in Cap. 1. At that time, section 66 read as follows-

“66. Saving of rights of Crown

No Ordinance shall in any manner whatsoever affect the right of or be binding on the Crown unless it is therein expressly provided or unless it appears by necessary implication that the Crown is bound thereby.”

Item 1 of Schedule 8 applies only where there is a reference to the ‘Crown’ in three contexts, and item 2 of Schedule 8 applies where the ‘Crown’ is referred to in other contexts. The problem was that section 66 is a provision of general application and has no specific context for the purpose of applying item 1 or item 2 of Schedule 8.

5. The Department of Justice considered whether section 66 could be interpreted so that it reflected the alternative constructions of the ‘Crown’, and so that the relevant context for deciding which construction to apply would be the specific Ordinance whose binding effect was in question. For example, if an Ordinance related exclusively to title to land in the Hong Kong SAR, item 1 of Schedule 8 would apply, and the effect of section 66 of Cap. 1 would be that the Ordinance would not be binding on the ‘CPG or other competent authorities of the PRC’ unless it appeared by necessary implication that they were bound by it.

6. There were, however, two major problems with such an approach.

- (1) Many Ordinances have contexts that straddle items 1 and 2 of Schedule 8 e.g. they may include a few provisions relating to title to land, but not relate generally to such title.
- (2) The approach would result in either (i) the CPG or other competent authorities or (ii) the HKSARG being presumed not to be bound by an Ordinance, but never both.

7. The effect of construing section 66 of Cap. 1 in accordance with item 1 or item 2 of Schedule 8 would therefore have been to make substantial changes to the binding effect of laws previously in force, e.g. the SARG would be bound by many Ordinances that were not previously binding on the Hong Kong Government. We do not believe that this was intended.

8. Section 2(1) of Cap. 1 provides that the provisions of Cap.1 (including Schedule 8) shall apply 'Save where the contrary intention appears either from [Cap. 1] or from the context of any other Ordinance or instrument.' In the light of the above considerations, the Department of Justice concluded that there was no legislative intention to apply items 1 and 2 of Schedule 8 to section 66 of Cap. 1.

Adaptation of section 66

9. The adaptation of the word 'Crown' in section 66 was therefore achieved by substituting the word 'State', which was defined in a way that closely approximates to the meaning of 'Crown' but that reflects the change in sovereignty.

10. Since section 66 was adapted in that way, it was logical to provide that other references in laws previously in force that had the effect of reinforcing, or reversing, the effect of section 66 should be construed in the same way. That was achieved by the addition of item 7 of Schedule 9 to Cap. 1.

11. That item is a temporary provision, which is of general application throughout the laws of Hong Kong. It is intended to clarify and preserve what we consider to be the status quo pending the textual adaptation of relevant provisions. As with other general principles of interpretation, it will be necessary when making those textual adaptations to decide on the specific formulation of the adaptation in the context in which it appears.

12. Once all relevant provisions have been adapted, item 7 of Schedule 9 to Cap.1 can be repealed.