

立法會
Legislative Council

LC Paper No. LS 151/98-99

**Paper for the House Committee Meeting
of the Legislative Council
on 30 April 1999**

**Legal Service Division Further Report on
Adaptation of Laws (No. 5) Bill 1999**

Members may recall that the Legal Service Division made a report to the House Committee on 12 March 1999 on the Bill (LC Paper No. LS 119/98-99 refers). The purpose of the Bill is to adapt Ordinances and subsidiary legislation dealing with land and buildings to bring them into conformity with the Basic Law and with the status of Hong Kong as a Special Administrative Region of the People's Republic of China. Members agreed to defer the decision on the Bill pending our enquiry with the Administration on the following :

The Aliens (Rights of Property) Ordinance (Cap. 185)

2. The Bill proposes to repeal the preamble and amend sections 2 and 3 of the Aliens (Rights of Property) Ordinance (Cap. 185) by replacing "Commonwealth citizen" with "Chinese citizen". The Administration has confirmed that the rights of a Commonwealth citizen residing in Hong Kong to hold and transfer immovable property herein prior to 1 July 1997 are the same as those of a Chinese citizen residing after that date. The Administration confirms that there is no policy change resulting from the proposed adaptation because an "alien" would enjoy the same rights before and after the adaptation is made.

3. The purpose of Cap. 185 is to remove doubts regarding the rights of aliens to hold and transfer immovable property in Hong Kong which had arisen pursuant to the Act of Parliament 10 and 11 Victoria, chapter 83, instituted "An Act for the Naturalization of Aliens" ("the Act"). The Act serves to validate all acts, statutes or ordinances enacted in British colonies or possessions imparting privileges of naturalisation to aliens residing there. A copy of the Act is attached at Annex A to the Administration's reply.

4. The Act has ceased to apply to Hong Kong after the reunification because Hong Kong is no longer a British colony. The purpose for enacting Cap. 185 has therefore become obsolete unless the Administration could provide information on any existing ordinance or subsidiary legislation imparting privileges of naturalization to aliens residing in Hong Kong.

5. The Administration confirms that the new definition of “alien” in the Interpretation and General Clauses Ordinance (Cap. 1) will apply to Cap. 185 and has agreed to amend the Chinese rendition for “alien” in Cap. 185 by way of a miscellaneous amendments bill.

The Lifts and Escalators (Safety) Ordinance (Cap. 327)

6. The Bill proposes to replace references to the government of any member of the Commonwealth with the Central People’s Government in sections 3(1A)(a) and 46(1) of the Lifts and Escalators (Safety) Ordinance (Cap. 327). The Administration explains that the policy intent is to preserve the status quo in relation to the non-application of Cap. 327. Buildings belonging to the government of any member of the Commonwealth previously exempted from the application of Cap. 327 under section 3(1A)(a) will now be in the category of “government of a foreign country” and exempted under section 3(1A)(d). Buildings belonging to the Central People’s Government exempted under section 3(1A)(d) prior to 1 July 1997 may now continue to be so exempted under section 3(1A)(a).

The Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337)

7. The Bill proposes to amend section 12(3) of the Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337) by repealing references to the powers and remedies of a mortgagee by deed under the Law of Property Act 1925 and the common law in England and substituting the powers and remedies of a mortgagee under a legal charge or equitable mortgage by deed under the Conveyancing and Property Ordinance (Cap. 219) and the common law in Hong Kong.

8. A comparison of the powers and remedies under the two legislation and common law systems is set out in Annex B to the Administration’s reply. The Administration agrees with our view that the statutory powers and remedies under the Conveyancing and Property Ordinance (Cap. 219) are wider than those provided in the Law of Property Act 1925. However, they believe that it is appropriate to include the proposed adaptation in the Bill.

9. Copies of the correspondences exchanged are at the Appendix. Members may wish to consider whether a Bills Committee be formed to study the policy aspects of the Bill.

Encl

Prepared by
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Legislative Council Secretariat

26 April 1999

Bill/Further/99adapt5/LS/B/54/98-99

L/M(H) in PLEBE(CR.)10/32/98
LS/B/54/98-99
2869 9204
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10 March 1999

Planning, Environment and Lands Bureau
9/F, Murray Building,
Garden Road,
Hong Kong.

BY FAX
Fax no. : 28453489
Total no. of pages : 2

(Attn. : Mr. Anthony Li
Assistant Secretary (Lands) 1)

Dear Mr. Li,

Adaptation of Laws (No. 5) Bill 1999

We are scrutinizing the above Bill with a view to advising Members on the legal and drafting aspects. I shall be grateful if you would clarify the following :

1. Section 30(1B) of the Land Registration Ordinance (Cap. 128)

Please explain the reason for adding section 30(1B) of the Land Registration Ordinance (Cap. 128) since textual amendments to the First Schedule of the Ordinance have been and will be made respectively by the Adaptation of Laws (Courts and Tribunals) Ordinance (25 of 1998) and the Bill.

2. Sections 2 and 3 of the Aliens (Rights of Property) Ordinance (Cap. 185)

Please explain whether the proposed repeal of the preamble of the Ordinance arises from the reference therein to the Act of Parliament 10 and 11 Victoria, chapter 83, intituled "An Act for the Naturalization of Aliens". Please supply us with a copy of that Act. Has the Administration considered that the preamble may be helpful in providing assistance in the interpretation of any ambiguities within the Ordinance? In particular, could the Administration clarify:

- (a) whether it has been the original intent for the repealed definition of "alien" in the Interpretation and General Clauses Ordinance (Cap. 1) to apply to this Ordinance prior to 1 July 1997? If so, how would the Administration reconcile the difference in the Chinese rendition for the term?

/P. 2 ...

- (b) whether it is the policy for the new definition of “alien” in Cap. 1 to apply to this Ordinance, and if so, whether the Chinese rendition will be amended accordingly?

3. Section 3(1A)(a) and 46 of the Lifts and Escalators (Safety) Ordinance Cap. 327)

The LegCo Brief mentions that it is necessary to replace the references to the government of any member of the Commonwealth in this context by references to the Central People’s Government. Please explain. Is it due to the fact that buildings belonging to the Central People’s Government have been previously exempted from the application of the Ordinance under section 3(1A)(d) prior to 1 July 1997, but may not continue to be so exempted after that date? If a strict interpretation of adaptation is adopted, wouldn’t a simple repeal of the reference to the government of any member of the Commonwealth suffice?

4. Section 12(3) of the Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337)

It would assist Members if the Administration could let us have a comparison of the rights and remedies of a mortgagee by deed under the Law of Property Act 1925 and the common law in England with those of a mortgagee under a legal charge or equitable mortgage by deed under the Conveyancing and Property Ordinance (Cap. 219) and the common law in Hong Kong.

Your early reply will be appreciated.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

c.c. LA

L/M(H) in PELB(CR)10/32/98
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15 March 1999

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Fax no. : 28453489
Total no. of pages : 2

(Attn. : Mr. Anthony Li
Assistant Secretary (Lands) 1)

Dear Mr. Li,

Adaptation of Laws (No. 5) Bill 1999

I write further to my letter of 10 March 1999.

Sections 2 and 3 of the Aliens (Rights of Property) Ordinance (Cap. 185)

At the meeting of the House Committee last Friday, a Member asked for clarification of what special rights a Chinese citizen residing in Hong Kong would have to hold and transfer immovable property herein. In this connection, would the Administration also explain :

- (a) whether the rights of a Commonwealth citizen residing in Hong Kong to hold and transfer immovable property herein prior to 1 July 1997 are the same as those of a Chinese citizen residing here after that date?
- (B) the different categories of persons covered by the two definitions of "alien". Is there a change of policy resulting from the proposed adaptation?

Section 12(3) of the Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337)

It is our view that the English and Chinese texts of the proposed amendment are different. Please clarify the policy intent, and in particular, explain the scope of powers and remedies "otherwise available in Hong Kong". If the phrase means the common law powers and remedies in Hong Kong, what does the Administration mean by "common law"?

Paragraph 5(e) of the LegCo Brief states that extensive research by the Lands Department and the advice of the Department of Justice reveal that the powers and remedies under the relevant English laws are *sufficiently covered* (italics added) by the Conveyancing

and Property Ordinance (Cap. 219) and the common law. The result of our preliminary research indicates that the relevant statutory powers and remedies set out in the Conveyancing and Property Ordinance (Cap. 219) are wider than those provided in the Law of Property Act 1925. Would the Administration agree that the present proposal is not a straight-forward adaptation in that the amendment would widen the scope of the original provision?

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

c.c. LA

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27 March 1999

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Central
Hong Kong.

Dear Bernice,

Adaptation of Laws (No.5) Bill 1999

Thank you for your letters of 10 March 1999 and 15 March 1999 on the above. The following paragraphs set out our responses to your questions about certain provisions of the above Bill-

1) **Section 30(1B) of the Land Registration Ordinance, Cap 128**

The purpose of adding a provision to section 30 is to give a proper context to the amendments made to the First Schedule by the Adaptation of Laws (No.5) Bill 1999 and the Adaptation of Laws (Courts and Tribunals) Ordinance (25 of 1998) so as to be consistent with the operation of section 30 and the First Schedule.

2) **Sections 2 & 3 of the Aliens (Rights of Property) Ordinance, Cap 185**

(a) Repeal of the preamble

The principal purpose of the repeal of the preamble is to get rid of the colonial references to "Governor" and "Governor-in-Council" etc. in the second part of the preamble, which refers to a historical fact and

cannot be adapted in the usual way. In addition, the preamble does not serve any useful purpose. The first part of the preamble which gives the background to the enactment of the Ordinance is already reflected in the long title. The second part of the preamble simply sets out the powers upon which the Ordinance was enacted and does not provide an aid to the interpretation of the Ordinance. A copy of the Act of Parliament 10 and 11 Victoria, Chapter 83 is at Annex A as requested.

(b) Whether the repealed definition of “alien” in Cap 1 applied to Cap 185 prior to 1 July 1997

As there was no definition of “alien” in Cap 185 itself and no contrary intention appears in Cap 185, the repealed definition of “alien” in Cap 1 applied to Cap 185 prior to 1 July 1997, as a matter of statutory interpretation. Although the Chinese rendition for “alien” in Cap 1 is “外籍人士” while that in Cap 185 is “外國人”, Section 10B(1) of Cap 1 provides that the English text and the Chinese text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly. Section 10B(2) of Cap 1 further provides that the provision of an Ordinance is presumed to have the same meaning in each authentic text. In the absence of any indication as to the meaning of “外國人” in Cap 185, we believe that “外國人” in Cap 185 carried the same meaning of the old definition of “alien”, i.e. “外籍人士”, in Cap 1 prior to 1 July 1997 by virtue of sections 10B(1) and (2) of Cap 1.

(c) Whether the new definition of “alien” in Cap 1 will apply to Cap 185 and whether the Chinese rendition will be amended accordingly

For the same reasons set out in paragraph 2(b) above, the new definition of “alien” in Cap 1 applies to Cap 185. In order to remove any doubt and the need to rely on section 10B of Cap 1 to arrive at the conclusion that “外國人” in Cap 185 carries the same meaning of “外籍人士” in Cap 1, we are liaising with the Department of Justice to amend the Chinese rendition of “alien” in Cap 185 by way of a miscellaneous amendments Bill.

- (d) **Whether the rights of a Commonwealth citizen residing in Hong Kong to hold and transfer immovable property herein prior to 1 July 1997 are the same as those of a Chinese citizen residing here after that date**

The answer to the above question is yes.

- (e) **Categories of persons covered by the old and new definitions of “alien”; whether there is a policy change resulting from the proposed adaptations**

As mentioned in paragraph 2(b)&(c) above, there is no definition of “alien” in Cap 185 itself and no contrary intention appears in Cap 185, the definition of “alien” relies on that in Cap 1. Under the old definition, an alien means a person who is neither a Commonwealth citizen nor a British Protected person nor a citizen of the Republic of Ireland. Under the new definition, an alien means a person other than a Chinese citizen.

The purpose of Cap 185 is to remove doubts regarding the right of aliens to hold and transfer property in Hong Kong. In the light of the new meaning of an alien in Cap 1, it is necessary to make the proposed adaptation amendments to the references to “Commonwealth citizen” in Cap 185 in order to achieve the purpose of Cap 185. There is no change of policy resulting from the proposed adaptation.

3. Section 3(1A)(a) and 46 of the Lifts and Escalators (Safety) Ordinance, Cap 327

The Central People’s Government was exempted by virtue of section 3(1A)(d) of Cap 327 prior to 1 July 1997. If we simply repeal the reference to the “government of any member of the Commonwealth” in section 3(1A)(a) as you suggested rather than adapting it to a reference to the “Central People’s Government”, the law will be changed and there will be no exemption provided to the Central People's Government.

4. Section 12(3) of the Demolished Buildings (Re-development of Sites) Ordinance, Cap 337

- (a) **A comparison of the rights and remedies of a mortgagee by deed under the Law of Property Act 1925 and the common law in England with those of a mortgagee under a legal charge or equitable mortgage by deed under the Conveyancing and Property Ordinance, Cap 219 and the common law in Hong Kong**

A comparison of the above is at Annex B.

- (b) **Difference in Chinese and English text; scope of powers and remedies “otherwise available in Hong Kong”**

Although the wordings in the Chinese text and English text of the Bill in respect of the proposed adaptations to section 12(3) of Cap 337 are different, we consider that the effect of the proposed adaptations in both the Chinese text and the English text are the same. As regards the scope of powers and remedies “otherwise available in Hong Kong”, please see the comparison at Annex B.

- (c) **Powers and remedies set out in the Conveyancing and Property Ordinance, Cap 219 vs those under the Law of Property Act 1925**

As you can see from the comparison at Annex B, the powers and remedies of a mortgagee by deed under the common law in England are similar to those of a mortgagee under a legal charge or equitable mortgage by deed under the common law in Hong Kong. However, the powers and remedies of a mortgagee under a legal charge or equitable mortgage by deed under the Conveyancing and Property Ordinance, Cap 219 are in general slightly wider than those of a mortgagee by deed under the Law of Property Act 1925. Although this is not a straight-forward adaptation, we are of the view that it is appropriate to include the proposed adaptation in the Bill.

Should you have any further enquiries, please feel free to contact the undersigned.

Yours sincerely,

(Anthony LI)
for Secretary for Planning,
Environment and Lands

c.c.

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SCHEDULE of Forms to which this Act referz

Form of Certificate of Dismissal

WE } of Her Majesty's Justices of the Peace for the County of
 } [or I, a Magistrate of the Police Court of] as the Case may be, do hereby
 certify, That on the Day of in the Year of our Lord at
 the said County of M.N. was brought before us the said Justices [or me the said Magistrate] in
 charged with the following Offence, (that is to say,) [here state briefly the Particulars of the Charge,
 and that we the said Justices [or I the said Magistrate] thereupon dismissed the said Charge. Given
 under our Hands [or my Hand] this Day of

Form of Conviction.

Be it remembered, That on the Day of in the Year of our Lord One thou-
 sand eight hundred and at in the County of [or Riding,
 Division, Liberty, City, &c., as the Case may be,] A.O. is convicted before us, J.P. and Q.R., Two of
 Her Majesty's Justices of the Peace for the said County [or Riding, &c.], [or me, S.T., a Magistrate
 of the Police Court of as the Case may be], for that he the said A.O. did [specify the
 Offence, and the Time and Place when and where the same was committed, as the Case may be, but
 without setting forth the Evidence], and we the said J.P. and Q.R. [or I the said S.T.] adjudge the
 said A.O. for his said Offence to be imprisoned in the [or to be imprisoned in the
 and there kept to hard Labour for the Space of], [or we [or I]
 adjudge the said A.O. for his said Offence to forfeit and pay], [here state the Penalty
 actually imposed], and in default of immediate Payment of the said Sum, to be imprisoned in the
 [or to be imprisoned in the and there kept to hard Labour] for
 the Space of unless the said Sum shall be sooner paid. Given under our Hands and Seals
 [or my Hand and Seal] the Day and Year first above mentioned.

C A P. LXXXIII.

An Act for the Naturalization of Aliens.

[22d July 1847.]

WHEREAS by divers Acts, Statutes, or Ordinances enacted by the Legislatures of divers of Her
 Majesty's Colonies or Possessions abroad Provision hath been made for imparting to divers
 Aliens there resident the Privileges or some of the Privileges of Naturalization, to be exercised and
 enjoyed within the respective Limits of such Colonies and Possessions respectively: And whereas
 Doubts have arisen as to the Competency of the said Legislatures to enact any such Laws, Statutes, or
 Ordinances, and as to the Validity of the same when so enacted, and it is expedient that such Doubts
 be removed: Be it therefore and it is hereby declared and enacted by the Queen's most Excellent
 Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in
 this present Parliament assembled, and by the Authority of the same, That all Acts, Statutes, and
 Ordinances heretofore made and enacted by the Legislatures of any of Her Majesty's Colonies and
 Possessions abroad for imparting to any Person or Persons the Privileges or any of the Privileges of
 Naturalization, to be by such Person or Persons exercised and enjoyed within the respective Limits
 of such Colonies or Possessions respectively, shall within such Limits have and be taken and reputed to
 have had from the Time of the Enactment thereof respectively all such and the same Force and Effect
 as doth by Law belong to any other Law, Statute, or Ordinance made or enacted by any such respective
 Legislatures.

All Acts, &c.
 of Colonial
 Legislatures
 imparting Pri-
 vileges of Na-
 turalization
 valid.

II. And be it and it is hereby enacted and declared, That all Laws, Statutes, and Ordinances which
 shall hereafter be made and enacted by the Legislatures of any of Her Majesty's Colonies or Possessions
 abroad for imparting to any Person or Persons the Privileges or any of the Privileges of Naturalization,
 to be by any such Person or Persons exercised and enjoyed within the Limits of any such Colonies and
 Possessions respectively, shall within such Limits have the Force and Authority of Law, any Law,
 Statute, or Usage to the contrary in anywise notwithstanding: Provided nevertheless that all such
 Laws, Statutes, and Ordinances shall be made and enacted in such Manner and Form, and subject to and
 in conformity with all such Rules as now are or hereafter shall be in force in respect of other Laws,
 Statutes, or Ordinances enacted or to be enacted by any such Legislatures respectively, and shall
 may be confirmed or disallowed by Her Majesty in such and the same Manner, and subject to the same
 Rules and Regulations as extend or as shall hereafter extend to the Confirmation or Disallowance of any
 other such Laws, Statutes, or Ordinances.

All Laws, &c.
 hereafter made
 imparting Pri-
 vileges of Na-
 turalization
 valid, but sub-
 ject to Con-
 firmation or
 Disallowance
 by Her Ma-
 jesty.

III. And whereas a certain Act was made and enacted in the Seventh and Eighth Year of the Reign
 of Her present Majesty, intituled An Act to amend the Laws relating to Aliens: And whereas Doubts
 have arisen whether the said recited Act of the Seventh and Eighth Year of Her Majesty's Reign
 extends to and is in force in Her Majesty's Colonies or Possessions abroad: now it is hereby further
 enacted and declared, That the said recited Act of the Seventh and Eighth Year of Her Majesty's Reign,
 or any Part of it, doth not extend to the said Colonies or Possessions, or to any of them.

7 & 8 Vict. c. 66.
 not to extend to
 Colonies or
 Possessions
 abroad.

IV. And be it enacted, That this Act may be amended or repealed by any other Act of this present
 Session of Parliament.

Act may be
 amended, &c.

Adaptation of Laws (No.5) Bill 1999
Demolished Buildings (Re-development of Sites) Ordinance (Cap.337)

A comparison of the rights and remedies of a mortgagee by deed under the Law of Property Act 1925 (“LPA”) and the common law in England with those of a mortgagee under a legal charge or equitable mortgage by deed under the Conveyancing and Property Ordinance Cap. 219 (“CPO”) and the common law in Hong Kong

A. The Statutory powers and remedies of a mortgagee by deed

(I) Power of Sale

<u>LPA</u>	<u>CPO</u>
<p>(1) The power arises as soon as the mortgaged money is due and becomes exercisable when any one of the following conditions has been satisfied : -</p> <ul style="list-style-type: none">(i) mortgagor fails to comply within 3 months of a notice calling in the mortgage; or(ii) interest being arrears for at least 2 months; or(iii) mortgagor in breach of any other provision under the mortgage or be implied by LPA. <p>(Ss.101(1)(i) & 103)</p>	<p>(1) The power becomes exercisable upon occurrence of any one of the following events of default :-</p> <ul style="list-style-type: none">(i) mortgagor fails to comply within one month of a notice calling in the mortgage; or(ii) interest being arrears for at least one month; or(iii) mortgagor in breach of any other provision under the mortgage or be implied by CPO. <p>(para. 11, Sch. 4)</p>
<p>(2) Includes power to vary or rescind any contract of sale, buy in at an auction and re-sell without being answerable for loss (s. 101(1)(i)).</p>	<p>(2) Same (para. 8, Sch. 4)</p>

<p>(3) The mortgagee is expressly authorised to sell part of the mortgaged property.</p>	<p>(3) The sale of part of the mortgaged property is not expressly authorised. It may be possible to argue that the discretion of the mortgagee to sell "in such manner as he thinks fit" may entitle him to sell part of the property.</p>
<p>(4) The mortgagee is entitled to sell the property, either subject to prior charges or not, and either with or apart from the minerals (S. 92). He may also impose either on the sold or on the unsold part of the mortgaged property such conditions or restrictive covenants as he seems desirable (S.101(2)).</p>	<p>(4) In the absence of an express provision in the mortgage deed, the mortgagee will not be able to grant easements or impose covenants over or for the benefit of either the part retained or sold.</p>
<p>(5) Sale by auction or private contract is expressly authorized (S. 101(1)(i)).</p>	<p>(5) Sale by auction or private contract is not expressly authorised. However, as the mortgagee has wide discretion to conduct the sale in such manner as he thinks fit, it should enable the mortgagee to adopt either mode of sale.</p>
<p>(6) No similar provisions.</p>	<p>(6) The widely worded para. 9, Sch. 4 also enable the mortgagee to do all things necessary or desirable for realising the mortgaged property.</p>

(II) Power to insure

<u>LPA</u>	<u>CPO</u>
<p>(1) Power becomes exercisable at any time after the date of mortgage (S. 101(1)(ii)).</p>	<p>(1) Same (Para. 1, Sch. 4)</p>

<p>(2) The mortgagee may insure the mortgaged property against loss or damage by fire.</p>	<p>(2) The risks against which insurance may be effected are not specified. It would therefore seem open for the mortgagee to insure against risks other than the normal fire and typhoon risks, e.g. against subsidence or landslide.</p>
<p>(3) The insurance premiums may be treated as capital advanced under the mortgage.</p>	<p>(3) Same</p>

(III) Power of leasing

<p style="text-align: center;"><u>LPA</u></p>	<p style="text-align: center;"><u>CPO</u></p>
<p>(1) Power becomes exercisable by the mortgagee while in possession (S. 99(2)).</p>	<p>(1) Power becomes exercisable upon occurrence of any one of the 3 events of default above-mentioned (para. 11, Sch. 4). However, in order to grant exclusive possession which is a hallmark of a lease, the mortgagee must have obtained possession of the mortgaged property.</p>
<p>(2) Includes power to accept surrender of lease of the mortgaged property or any part thereof (S. 100(2)).</p>	<p>(2) The mortgagee does not only entitle to accept surrender of lease of the mortgaged property, he may also surrender the lease of the mortgaged property itself. This may be desirable if it is necessary for the Government to resume the mortgaged property as part of an overall development scheme (para. 4, Sch. 4).</p>

<p>(3) The leases that may be granted are :-</p> <ul style="list-style-type: none"> (i) agricultural or occupation leases for not more than 50 years; and (ii) building leases for not more than 999 years (s. 99(3)) 	<p>(3) No such restrictions.</p>
<p>(4) Besides, the lease granted must comply with certain conditions. It must :-</p> <ul style="list-style-type: none"> (i) take effect in possession within 12 months of its date; (ii) reserve the best rent reasonably obtainable; (iii) contain a covenant for payment of rent and a condition of re-entry on failure to pay rent within a time therein specified not exceeding 30 days; and (iv) a counterpart of the lease must be executed by the lessee and delivered to the lessor (S. 99(5), (6), (7) & (8)) 	<p>(4) No such requirements.</p>

(IV) Power to appoint receiver

<u>LPA</u>	<u>CPO</u>
<p>(1) Power arises and becomes exercisable in the same circumstances as the power of sale (Ss. 101(1)(iii) & 109(1)).</p>	<p>(1) Power arises as soon as the mortgage money has become due (S.50(1)).</p>
<p>(2) Includes power to remove or replace the receiver (S. 109(5)).</p>	<p>(2) Same</p>

(V) Other Statutory rights and remedies

<u>LPA</u>	<u>CPO</u>
<p>Power, while in possession, to cut and sell timber and other tree ripe for cutting and not planted or left standing for shelter or ornament, or contract for this to be done within 12 months of the contract. (S. 101(1)(iv))</p>	<p>In contrast, there are wider powers contained in CPO. These include:</p> <ul style="list-style-type: none"><li data-bbox="807 551 1382 663">(i) right to possession of the mortgaged property (para. 2, Sch. 4) (see further discussion below)<li data-bbox="807 712 1382 1099">(ii) power to do all things necessary or desirable to preserve, maintain and manage the mortgaged property. This has included taking action to preserve the property against vandalism, to apply for the renewal of a licence in respect of licensed premises and to recover the cost of reasonable and permanent improvements (para. 3, Sch. 4)<li data-bbox="807 1149 1382 1339">(iii) power to deal with any dispute or claim relating to the mortgaged property, either by settlement or through litigation (paras. 6&7, Sch.4)<li data-bbox="807 1388 1382 1527">(iv) and generally to exercise any powers or rights incidental to the ownership of the mortgaged property (para. 5, Sch.4); and

	<p>(v) appropriate only to an equitable mortgagee by deed of the purchase's interest under a sale and purchase agreement, there are additional powers contained in para. 10, Sch.4. The powers provide for the performance of the sale and purchase agreement, the acceptance of the assignment to the mortgagor and the execution of the legal charge in favour of the mortgagee and generally to do any other thing necessary to complete the sale or legal charge.</p> <p>Apparently, this paragraph is enacted to deal with the particular features of the Hong Kong property scene.</p>
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<u>Remarks</u>	<u>Remarks</u>
<p>(1) The statutory right and remedies conferred on a mortgagee by deed under the provision of LPA may be varied or extended by the mortgage deed, and apply only so far as a contrary intention is not expressed in it.</p>	<p>(1) The exercise of the implied powers set out in Sch.4 except the power to insure is restricted under para. 11 thereof upon the occurrence of any one of the three events of default above-stated.</p> <p>(2) These powers will be implied into any legal charge or equitable mortgage by deed, unless the contrary intention is expressed. (S. 51(1))</p> <p>(3) Under S.51(4), the powers as well as the conditions regulating the exercise thereof as set out in para. 11 may be extended or varied in the mortgage deed.</p>

B. The common law rights and remedies of a mortgagee by deed

There are certain rights of a mortgage that have not been made the subject of any comprehensive statutory provision. As the common law of Hong Kong follows those of England, set out hereunder are the common law rights and remedies of a mortgagee by deed in general and where appropriate, the statutory modifications in England and Hong Kong will be highlighted.

(1) Right to sue on the covenant to pay

The moment that the mortgagor has covenanted to repay passed, the mortgagee may maintain an action on the covenant for the recovery of the principal sum and any interest that may be in arrears and can have the judgment satisfied out of any property belonging to the mortgagor. The mortgagee is not restricted to enforce the security comprised in the mortgage.

(2) Right to take possession of the mortgaged property

Unless the contrary is expressed or be implied into the mortgage deed, a legal mortgagee is entitled at common law to enter into possession of the mortgaged property immediately upon the execution of the mortgage even though there is no default on the part of the mortgagor.

The right is exercised by the taking of physical possession of the mortgaged property where the mortgagor or a tenant, under a tenancy that is not binding on the mortgagee, is in occupation. Where the tenancy is binding on the mortgagee, the right is exercised by giving notice to the tenant to pay rent to the mortgagee.

Note :-	
<p style="text-align: center;"><u>England</u></p> <p>The exercise of the right to possession may now be regulated by statutory restrictions such as those under S.36 of the Administration of Justice Act 1970, S.129 of the Consumer credit Act 1974, the Protection from Eviction Act 1977 and the Rent Act.</p>	<p style="text-align: center;"><u>Hong Kong</u></p> <p>The common law right to possession is retained by S.44(2) of CPO in favour of a legal mortgagee but the exercise of which is restricted until after the default of the mortgagor.</p>

	<u>Remarks</u>
	An equitable mortgagee at common law does not have a right to take possession nor does a receiver, where he is an agent for the mortgagor. Para. 2, Sch. 4 now grants an equitable mortgagee, if his mortgage is by deed, and a receiver a power to take possession.

(3) Rights to consolidate

A mortgagee who holds several mortgages under the same mortgagor which are redeemable by virtue of the equity of redemption may consolidate the mortgages and decline to be redeemed as to any unless he is redeemed to all.

Note :	<u>England</u>	<u>Hong Kong</u>
	In order that this right may be reserved, it is necessary that the statutory exclusion under S.93 of LPA must be displaced.	The common law right to consolidate is preserved by virtue of S.44(2) of CPO to a legal chargee by deed.

(4) Right to foreclose

Foreclosure was formerly a mortgagee's primary remedy, but is rarely sought or granted today. By bringing an action to foreclose, the equity of redemption of the mortgagor and all persons claiming through him, including subsequent incumbrancers, may be extinguished, so as to vest the mortgaged property absolutely in the mortgagee.

Note :	<u>England</u>	<u>Hong Kong</u>
	The common law right to foreclose is now subject to the statutory jurisdiction of the Court under S.91 of LPA to order a sale in lieu of foreclosure.	The power to foreclose is preserved to a legal chargee by deed under S.44(2) of CPO. Under S.53, a foreclosure order operates to vest the mortgagor's full estate in the mortgaged property in the mortgagee, subject to prior interests but free from the mortgage under which foreclosure is granted and any subsequent mortgages.

(5) Rights to tack

At common law, two forms of tacking exist. The first allows a subsequent equitable mortgagee to buy in the legal estate from the first encumbrancer and thereby squeezing out an intermediate mortgagee. The second form is the tacking of further advances, whether those advances are secured by the terms of the mortgage or by a separate further mortgage provided that he has no notice of the intervening mortgage.

Note :- <u>England</u>	<u>Hong Kong</u>
<p>A mortgagee's right to tack has been materially affected by the LPA. The first form of tacking has been abolished. Nowadays, tacking is only permissible in the case of a prior mortgagee making further advances to rank in priority to subsequent mortgages (s.94(1) of LPA). The right to tack is exercisable in the cases when :-</p> <p>(i) the later mortgagee agrees to the arrangement; or</p>	<p>The common law right to tack is modified by S.45(1) of CPO. The first form of tacking no longer exists. The section specifies three circumstances as to when tacking is still possible :-</p> <p>(i) the first circumstance is when the intervening mortgagee consents to the tacking;</p>
<p>(ii) there is no notice of later charges; or</p> <p>(iii) the mortgage imposes an obligation on the mortgagee to make further advances.</p>	<p>(ii) the second is where the further advance, together with other sums outstanding under the prior mortgage do not exceed the amount expressed to secure by that prior mortgage; and</p> <p>(iii) the last situation is where the further advance is made under an 'all moneys' mortgage provided that the mortgage is in favour of a licensed bank or licensed or registered deposit-taking company.</p>