Bills Committee on Land Titles Bill

The Constitutionality of the Indemnity Cap

Purpose

This paper elaborates on the Administration's position as to the constitutionality of the proposed cap on the indemnity available in fraud cases under the Land Titles Bill, makes specific response to points raised in submissions by the Hong Kong Bar Association ("Bar") and the Real Estate Developers Association of Hong Kong ("REDA"), and comments on observations of the Legal Services Division of the Legislative Council ("LSD").

Background

2. In May 2003, the Administration explained in its paper (LC Paper No. LS114/02-03) ("our First Paper") why the Bill is consistent with the constitutional protection of property rights provided for in BL 6 and 105, and particularly why it does not deprive any property for the purposes of BL 105. Since then, the Administration has received the paper by the LSD, and the further submissions by the Bar and the REDA (collectively "the Responses"). In the light of the views expressed in the Responses, the Administration wishes to further explain its above positions on BL 6 and 105.

3. In **Annex A**, the Administration sets out in greater length the approach that it takes in construing the scope of the right to compensation for lawful deprivation of property provided for in BL 105 ("BL 105 compensation right").

4. In **Annexes B, C and D**, the Administration replies to some specific issues raised by the Bar, REDA and LSD respectively in the Responses.

Housing, Planning and Lands Bureau
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Annex A

The Scope of the Right to Compensation for Lawful Deprivation of Property provided for in BL 105

Summary

The whole issue on the constitutionality of the cap to the indemnity turns on the proper approach to interpret the expression of "deprivation" in BL 105 and its corresponding expression "徵用" (*zhengyong*) in the Chinese text of the same article. The expression "徵用" (*zhengyong*) bears a meaning much narrower than that of "deprivation": it is confined to an act by the state or the government to resume or acquire property for public purposes. In its decision of 28 June 1990, the Standing Committee of the National People's Congress ("NPCSC") resolved that in cases of any discrepancy in the meaning of wording between the Chinese text and the English text of the Basic Law, the Chinese text shall prevail. While the present Bill provides for statutory limitations to the rule of *nemo dat quod non habet* (ie no one gives who possess not), it does not authorize the Government or any other person to resume or acquire property from another person. Following the above interpretation approach of the NPCSC and the above meaning of "徵用" (*zhengyong*), there is no doubt that the Bill does not involve any "deprivation"/"徵用" (*zhengyong*) for the purposes of BL 105.

2. The above view is reinforced by the context of the Basic Law. The use of the expression "徵用" (*zhengyong*), as opposed to "剝奪", in BL 105 shows that it is not the legislative intent of the drafters of the Basic Law that the word "deprivation" in BL 105 should bear a meaning as broad as "剝奪" or what "deprivation" is used to mean in ordinary language. Further, the wording of the part of the Joint Declaration corresponding to BL 6 and 105 (ie Section VI of Annex I) shows that the BL 105 compensation right was intended to continue the right to compensation for lawful deprivation before the reunification. Prior to the reunification, the *nemo dat* rule was subject to statutory exceptions without any compensation from the Government for any incidental loss of an owner's title. Following the theme of "continuity" in Section VI of Annex I as well as that in the Basic Law as identified by the Court of Appeal in *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761, the Administration considers that the BL 105 compensation right was not

intended to transform beyond recognition the system of legal protection of private property as actually enjoyed and practised in Hong Kong prior to 1 July 1997 by requiring, as from that date, real-value compensation to statutory exceptions to the *nemo dat* rule of a similar nature.

3. In view of the above analysis, the exceptions to the *nemo dat* rule provided for in the Bill should fall outside the ambit of "deprivation"/"徵用"(*zhengyong*) in BL 105 as construed in the light of the language used as well as its context and purpose. This result is generally consistent with the approach developed in the jurisprudence under section 51(xxxi) of the Australian Constitution and that under Article 1 of the First Protocol of the European Convention on Human Rights.

4. Since the Bill does not involve any "deprivation"/"徵用"(*zhengyong*) for the purposes of BL 105, the constitutional objections raised by the Bar Association and the Real Estate Developers Association of Hong Kong on the cap to the indemnity are misconceived. In this regard, the Administration notes that the Legal Service Division of the Legislative Council Secretariat was of the view that "the cap and the limitation would not constitute a deprivation for the purposes of BL 105." It also opined that the Bill was consistent with BL 6.

Proper approach to the interpretation of the Basic Law

5. The argument that the cap to the indemnity provided for in the Bill is unconstitutional is premised on the allegation that the Bill "deprives" property for the purpose of BL 105: because it effects such "deprivation" without giving real-value compensation to the affected owners, it is, as the argument goes, inconsistent with BL 6 and 105. Whether the Bill does "deprive" property for the purposes of BL 105 hinges on, of course, how the notion of "deprivation" in BL 105 and its corresponding expression "徵用" (*zhengyong*) in the Chinese text of the same article should be interpreted.

6. In *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533, the CFA, at pp 546C-547F, set out comprehensively the proper approach to interpret the Basic Law:

> "The courts' role under the common law in interpreting the Basic Law is to construe the language used in the context of the instrument in order to ascertain *the legislative intent as expressed*

in the language. …

The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See *Ng Ka Ling* at pp.28-29. The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. As was observed in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at p.329E, a case on constitutional interpretation: 'Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language'.

…

To assist in the task of the interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation.

Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration … The state of domestic legislation at that time and the time of the Joint Declaration will often also serve as an aid to the interpretation of the Basic Law…" (emphasis original)

Meaning of "deprivation" in ordinary language

7. In *Oxford English Dictionary* (2nd ed, 1989), "deprivation" is defined to mean "the action of depriving or fact of being deprived; the taking away of anything enjoyed; dispossession, loss". "Deprive" is defined in turn to mean "to divest, strip, bereave, dispossess *of* … a possession…; *to deprive* (a person) *of* (a thing) = to take it away from him."

Meaning of "徵用" (*zhengyong*) in ordinary language

8. In 《漢語大詞典》(1997), the expression "徵用" is defined to mean "國家依法將個人或集體所有的土地或其他生產資料收歸公用". In 《辭海》(1989), the expression is defined to mean "國家依法將土地或其他生產資料收作公用的措施".

9. Hence, it is clear that the meaning of "徵用" (*zhengyong*) in ordinary language is much narrower than that of "deprivation". The former is confined to an act by the state or the government to resume or acquire property for public purposes. Indeed, the meaning of "徵用" (*zhengyong*) is close to the meaning of "compulsory acquisition" and "expropriation" as discussed by Professor AJ van der Walt in *Constitutional Property Clauses* (1999), at p 18:

> "When referring to the acquisition of property in terms of the power of eminent domain, most constitutions in the Anglo tradition refer to *compulsory acquisitions*, whereas most jurisdictions in the German tradition refer to *expropriations*, with the two terms having roughly the same meaning. The fairly widely accepted interpretation is that these terms require the state to actually *acquire property* or *derive a benefit* from the expropriation or acquisition in some way, thereby excluding state actions that destroy or take away property without any benefit for the state. …" (emphasis original)

10. In its decision of 28 June 1990, the NPCSC resolved that in cases of any discrepancy in the meaning of wording between the Chinese text and the English text of the Basic Law, the Chinese text shall prevail. Following this interpretation approach and the above meaning of "徵用" (*zhengyong*), there is no doubt that the Bill does not involve any "deprivation"/"徵用"(*zhengyong*) for the purposes of BL 105:

(a) the Bill contains no provision which **authorizes** the Government or any other person to resume or acquire property from another person;

(b) the loss of title which gives rise to concerns originates from fraud, and as discussed in paragraph 15 of our First Paper, the overall scheme under the Bill, combined with the operating procedures of the Land Registry, the Law Society's

practice guidance, and checks by solicitors firms and banks, is intended to keep the risk of successful fraud in relation to property to the minimum;

(c) even where there is fraud and there is a subsequent transfer made by the fraudster in favour of a bona fide purchaser for value without notice, the original owner may still apply to the court for rectification of the Title Register to restore his title under clause 81 of the Bill;

(d) in the above application, the court will need to have regard to, inter alia, whether it would be unjust not to rectify the Title Register against the registered owner/lessee (clause 81(3)(a));

(e) the right of the innocent owner to seek personal remedies against the fraudster remains intact and is not extinguished by the Bill.

Internal aids to interpretation of "deprivation" and "徵用" (*zhengyong*)

11. The above view is reinforced by the context of the Basic Law. The use of the expression "徵用" (*zhengyong*), as opposed to "剝奪" (which means "用强制手段奪去"; "剝削；掠奪"[1] – a meaning which is close to the above meaning of "deprivation"), in BL 105 supports that the scope of "deprivation" in that article was not intended to be as broad as its above ordinary meaning. In this regard, reference may be made to BL 28 which refers to, in its English text, "arbitrary or unlawful **deprivation** of life of any resident", and in the corresponding Chinese text, "任意或非法**剝奪**居民的生命". Although the context of BL 28 would make it inappropriate to use "徵用" in substitution for "剝奪" in that article, BL 28 shows that the drafters of the Basic Law were conscious that "剝奪" might be used to correspond to "deprivation" if they wanted. The fact that they did not use that expression and adopted instead "徵用" in BL 105 is a strong indicia that it was not their legislative intent to have the word "deprivation" in that article construed

[1] 《辭海》(1989). In 《漢語大詞典》(1997), the expression is defined to mean "盤剝，掠奪"; "依照法律取消"; "用强制的方法奪去". The expression "盤剝" is in turn defined to mean "反複剝削；高利貸剝削".

as broadly as "剝奪" or what "deprivation" is used to mean in ordinary language.

Extrinsic aids to the interpretation of "deprivation" and "徵用" (*zhengyong*)

12. Further, we may call in aid the Joint Declaration and the state of domestic legislation at the time of the Joint Declaration and the adoption of the Basic Law to assist in ascertaining the meaning of "deprivation"/"徵用"(*zhengyong*).

13. As regards the Joint Declaration, its relevant part that corresponds to BL 6 and 105 is Section VI of Annex I, which provides:

> "Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) **shall continue to be protected by law**." (emphasis added)

14. As discussed in paragraph 22 of our First Paper, it is apparent from the above wording of Section VI of Annex I that the BL 105 compensation right was intended to basically mirror the right to compensation for lawful deprivation of property before the reunification.

15. Prior to the reunification, the *nemo dat* rule was subject to statutory exceptions without any compensation from the Government for any incidental loss of an owner's title. In paragraph 24 of our First Paper, an example was given in the context of the Land Registration Ordinance (Cap 128) to illustrate this point. Other examples include sections 24 (on market overt) and 25 (on sale under voidable title) of the Sale of Goods Ordinance (Cap 26). Pursuant to these provisions, a person can give a better title than his own, with the result that the interests of a bona fide purchaser for value without notice prevail over the interests of the true owner.[2] No compensation is provided for in Cap 26

[2] Section 24 provides that where goods are openly sold in a shop or market in Hong Kong, in the ordinary course of the business of such shop or market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. Section 25 provides that when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title. Reference may also be made to

for the loss of the true owners' interests by virtue of these provisions.

16. As a matter of fact, exceptions to the operation of the *nemo dat* rule are commonplace in common law jurisdictions. Very often, such exceptions reflect the conflict between two fundamental legal policies. As observed by Denning LJ in *Bishopsgate Motor Finance Corpn v Transport Brakes Ltd* [1949] 1 KB 322, at 336-7:[3]

> "In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

17. The objective of the proposed title registration system is to increase the security and convenience with which property transactions can take place in Hong Kong. This is achieved by providing that title can be established as a matter of fact by reference to the title register. Purchasers need not concern themselves with matters that may lie behind the register.[4] The statutory exceptions to the *nemo dat* rule provided for in the Bill are necessary to achieve this purpose. Without them the aim of the title register would be defeated since a purchaser would have to go behind the register to investigate title before proceeding with a transaction. With them engrafted into our law, a purchaser can enter into a transaction with confidence, can enjoy greater security thereafter and be able to have greater assurance of being able to transfer the property safely in future. The conveyancing procedures involved will also be simpler and swifter, improving the overall efficiency and productivity of the property market. Despite the exceptions, the interests of an innocent owner or a holder of an equitable interest are given very extensive protection, as set out in paragraph 30 of our First Paper. Given these protections, and given the general benefits that will flow from law as proposed, the Administration is of the view that the exceptions to the *nemo dat* rule provided in the Land Titles Bill are proportionate.

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section 27 (seller or buyer in possession after sale).

[3] Cited in Michael Bridge, *Personal Property Law* (3rd ed, 2002), at p 116. As noted by Simon Fisher in *Commercial & Personal Property Law* (1997), at p 643, this often-cited dictum of Denning LJ has been referred to with approval by Australian and New Zealand court in many cases.

[4] See S.Rowton Simpson, *Land Law and Registration*, at paragraph 2.6.12.

18. In view of the theme of "continuity" in Section VI of Annex I as well as that in the Basic Law as identified by the Court of Appeal in *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761,[5] the Administration considers that the BL 105 compensation right was not intended to transform beyond recognition the system of legal protection of private property as actually enjoyed and practised in Hong Kong prior to 1 July 1997 by requiring, as from the said date, real-value compensation to limitations to the *nemo dat* principle of a nature similar to those prior to the reunification.

19. The statutory exceptions to the *nemo dat* rule provided for in the Bill should therefore fall outside the ambit of "deprivation"/"徵用"(*zhengyong*) in BL 105 as construed in the light of the language used as well as its context and purpose as evidenced in Section VI of Annex I and the state of local laws at the time of the Joint Declaration and the adoption of the Basic Law. This conclusion is reinforced by the jurisprudence under section 51(xxxi) of the Australian Constitution and that under Article 1 of the First Protocol of the European Convention on Human Rights ("ECHR").

Reference value of overseas jurisprudence

20. Under BL 84, the court of the HKSAR is expressly empowered to "refer to precedents of other common law jurisdictions". In relation to human rights jurisprudence, it has been an established practice for the HKSAR courts to refer to other human rights instruments such as the ECHR.[6] Our reference to the above Australian jurisprudence and that under the ECHR to throw light on the construction of the BL 105 compensation right is in line with this practice.

Australian jurisprudence

21. In some of the Responses, it was pointed out that section 51(xxxi) of the Australian Constitution dealt with the power of the Parliament to make laws relating to the acquisition of property from any State or person,

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[5] See pp 790D and 800J: the whole tenor of the Basic Law, following the Joint Declaration, is to establish continuity save for those changes necessary upon the Chinese resumption of sovereignty.

[6] See, for instance, *Lau Cheong v HKSAR* [2002] 2 HKLRD 612, and *Kowloon Poultry Laan Merchants Association v Department of Justice* [2002] 4 HKC 277 referred to in paragraph 27 of the First Paper.

and that it was concerned with acquisition, not deprivation.

22. The above queries are not well founded. First, as observed by Peter Hanks, a leading commentator on the Australian Constitution, the orthodox and unchallenged view of section 51(xxxi) was expressed by Dixon J in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, at 349-350, as follows:[7]

> "Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time, as a condition upon the exercise of the power, it provides the individual or the State affected with a protection against governmental interferences with his proprietary rights without just recompense … In requiring just terms s 51(xxxi) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just."

23. Hence, as noted by Professor A J van der Walt, the provision in section 51(xxxi) has been recognized and treated as a constitutional property guarantee by the Australian courts.[8] Further, he observed that it was the first reference to the constitutional right to property in a written Commonwealth constitution, and therefore it is of special importance.[9]

24. Moreover, as discussed in paragraph 9 above, the Chinese version of "deprivation" in BL 105 is "徵用" (*zhengyong*) which is confined to the act where the state or the government resumes or acquires properties for public purposes. In this light, our reference to the Australian jurisprudence with respect to section 51(xxxi) is apposite.

25. On the scope of "acquisition" under section 51(xxxi), Professor A J van der Walt in his work noted that in a series of decisions handed down on 9 April 1994, the High Court of Australia provided a more comprehensive and systematical explanation of the exclusions from the section. In these decisions, it was reiterated that section 51(xxxi) does not apply to all acquisitions of property. One of the recognized categories of exclusions is cases where the acquisition was not the sole or main purpose of the law or action, but was incidental to the taking of reasonable and appropriate measures to promote a different purpose, such

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[7] Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996), p 499.
[8] AJ van der Walt, *Constitutional Property Clauses* (1999), p 39. See also Peter Hanks, op cit, p 499, citing the dicta of Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ in *Clunies-Ross v Commonwealth* (1984) 155 CLR 193.
[9]. AJ van der Walt, op cit, p 39.

as the adjustment or regulation of competing rights, claims and interests of parties in a relationship that requires regulation in the public interest.[10] The present Bill is in the nature of the above category of laws. It does not involve any acquisition of property by the HKSARG or any other person as such, but is a general scheme to regulate competing interests in land in the common interest, with certain exceptions to the *nemo dat* rule provided for as a part of that scheme.

ECHR jurisprudence

26. Article 1 of the First Protocol of the ECHR provides for protection of property rights. Whilst its wording is different from that in BL 6 and 105, it was noted that in one response that the majority view as shown by the ECHR jurisprudence is that Article 1, notwithstanding its silence on compensation, should be read as "in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State."[11]

27. On the ECHR jurisprudence on the construction of "deprivation", the following observations were made in Leigh-Ann Mulcahy (ed), *Human Rights and Civil Practice* (2001), at para 16.68:[12]

> "The starting point in establishing deprivation is the extinction of all of the owner's legal rights either by operation of law or through the exercise of a legal power. The Court has generally been reluctant to find that 'deprivation' has occurred. The Commission has stated that the second rule [ie the rule that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general provisions of international law] is directed at those cases **where the state seizes, or gives another the right to seize,** a specific asset to be used for the realization of a goal in the public interest. The most frequent example of deprivation is therefore that of the expropriation of land by the state by compulsory purchase orders, compulsory transfer orders, or other means such as nationalization. …" (emphasis added)

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[10] Ibid, pp 43-45.
[11] See para 24 of the Bar's submission of 22 May 2003.
[12] The discussion in this work on *de facto* expropriation under the ECHR jurisprudence was cited with approval by Deputy High Court Judge Woolley in *Kaisilk Development Limited v Urban Renewal Authority*, HCA10017/2000, paragraph 17.

28. *Bramelid v Sweden* (1982) 5 EHRR 249, referred to in para 27 of our First Paper, was one of the decisions cited in support of the above observations regarding the approach of the European Commission of Human Rights ("ECnHR") on the scope of "deprivation" under Article 1. That case concerned a provision in the Swedish company law which provided that if a takeover bidder acquired 90 per cent of the shares in a target company, it could compel the non-accepting minority to be bought out at a price determined by an arbitrator. The ECnHR held that the Swedish legislation did not involve expropriation. It held, among other things, the following (at p 256):

> "In all the State parties to the Convention, laws governing private-law relations between individuals, including legal persons, contain provisions which determine, so far as property is concerned, the effects of those legal relations and, in certain cases, **oblige one person to surrender to another property of which the former has hitherto been the owner**. One may cite by way of example the division of property upon succession particularly in the case of agricultural property, the winding-up of certain matrimonial settlements and above all seizure and sale of goods in the course of execution proceedings.
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> Rules of this kind, which are indispensable for the functioning of society under a liberal regime, cannot in principle be considered as breaching Article 1 of the Protocol No. 1. …" (emphasis added)

29. As noted in paragraph 27 of our First Paper, in the recent case of *Family Housing Association v Donnellan* [2001] 1 P&CR 34, the English High Court followed the ECnHR's decision in *Bramelid*. The case concerned section 15 of the Limitation Act 1980, which provided a 12-year limitation period in respect of actions for the recovery of land. At paragraph 29, Park J held that the European jurisprudence supported that the operation of law of adverse possession did not involve the type of deprivation of possessions that Article 1 prohibited. In this regard, it should be noted that in *Donnellan* under the 1980 Limitation Act, as is under the current Hong Kong law,[13] as long as the requisite period of dispossession was established, the true owner's title would be extinguished (see paragraphs 16 and 17 of the judgment).

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[13] See Court of Appeal's recent decision in *Tang Kwan Tai v Tang Koon Lam* [2002] 4 HKC 482, at 490F.

30. In the present case, the proposed title registration system is essentially a scheme to govern or control private law relations between different interests in land. The statutory exceptions to the *nemo dat* rule are some of the constituent elements of such a larger control scheme. Similar to the Swedish company legislation on sale of minority shareholding or the English law of adverse possession, they certainly do not involve any seizure of a specific asset by the Government or any other person.

31. The meaning of deprivation/"徵用"(*zhengyong*) in BL 105 as discussed above is therefore generally consistent with the approach adopted in the Australian jurisprudence and the ECHR jurisprudence.

Annex B

The Administration's Response to the Bar's Submissions

(A) Bar's submission of 22 May 2003 ("the Bar's First Paper")

Interpretation of "deprivation"

In paragraph 14 of the Bar's First Paper, the Bar accepted that the Joint Declaration could be used as an aid to the interpretation of the Basic Law and that Section VI of Annex 1 to the Joint Declaration sought to preserve private property rights which existed before the reunification. However, it argued that it was the Basic Law, rather than the Joint Declaration, which was the constitution of Hong Kong. In paragraph 16, it further argued that "insofar as the proposed legislation seeks to remove the right of the owner to retain ownership of property from the effect of fraud, that is a deprivation of his property right". In paragraph 17, the Bar put forth the view that "whether there is deprivation *now* cannot be helped by considering the question whether there was a right to compensation before reunification". In paragraph 18, the Bar questioned whether the limitations on the *nemo dat* rule under the pre-reunification law advanced the Administration's argument that the Bill does not involve any "deprivation" for the purposes of BL 105.

2. The above arguments of the Bar are unconvincing because they fail to take into account the following matters:

(a) the proper approach to the interpretation of the Basic Law decided by the CFA in *Chong Fung Yuen* (as discussed in paragraph 6 of this Paper);

(b) the notion of "徵用" (*zhengyong*) in BL 105, and its meaning in the light of (i) the decision of the Standing Committee of the National People's Congress of 28 June 1990, and (ii) BL 28 where "剝奪" is used to correspond to "deprivation" (as discussed in paragraphs 10 and 11 of this Paper);

(c) the context and purpose of the BL 105 compensation right as evidenced in Section VI of Annex I of the Joint Declaration as well as the state of domestic legislation at the time of the Joint Declaration and the adoption of the Basic Law (as

discussed in paragraphs 12-18 of this Paper).

3. In paragraph 18 of the Bar's First Paper, the Bar argued that "the Basic Law preserves the common law subject to those limitations which already existed prior to reunification. The mere existence of such pre-existing limitations does not give the Government the liberty to take away rights which were not otherwise limited by those pre-existing limitations." If this argument suggests that after the reunification, any additional statutory limitations to any pre-existing common law rights without real-value compensation would necessarily be unconstitutional, it was put too high to be tenable. The issue of whether such additional statutory limitations without real-value compensation are constitutional would need to be determined by having regard to the matters referred to in paragraph 2 above.

Australian jurisprudence

4. The queries raised by the Bar in paragraphs 20-22 regarding the Australian jurisprudence are answered in paragraphs 22-25 of this Paper.

ECHR jurisprudence

5. In paragraph 25 of its First Paper, the Bar stated that "[w]e do not find support, on the examination of the jurisprudence of ECHR, for the Administration's contention that the deprivation provisions under Article 1 of [the First Protocol of] the ECHR is confined to State expropriation or State-authorized expropriation for public purposes." The authorities cited in paragraphs 27 and 28 of this Paper provide the support which the Bar looked for.

6. In paragraph 26 of its First Paper, the Bar referred to a number of cases with the aim of showing that "private disputes are held to involve or engage the deprivation provisions under Article 1". However, for reasons discussed below, none of these cases is contrary to the main contention in our First Paper with regard to the ECHR jurisprudence, namely that the latter supports that a law which is not directed towards deprivation as such but is concerned with the adjustment or regulation of competing private property claims is unlikely to be susceptible of legitimate characterization as a law which deprives property for the purposes of BL 105 (see para 25 of our First Paper):

(a) ***Pressos Compania Naviera SA v Belgium [1996] 21 EHRR 301***

(i) In this case, the relevant Act of Belgium extinguished, with retrospective effect going back 30 years and without compensation, claims in negligence for very high damages that the victims of the pilot accidents could have pursued against the Belgian State or against the private companies concerned, and in some cases even in proceedings that were already pending (paragraph 39 of the judgment). Indeed, the Belgian Government estimated that the financial impact of the actions then pending against the Belgian State was at 3,500 million Bfr (paragraph 40 of the judgment). Hence, this case was not one where the interference with, or deprivation of, rights in question involved solely private disputes.

(b) ***James v United Kingdom(1986) 8 EHRR 123***

(i) In this case, the European Court of Human Rights ("ECtHR") considered that the landlords in question were deprived of their possessions by virtue of the Leasehold Reform Act 1967. However, the ECtHR did not give reasons for this decision, and simply mentioned that this point was not disputed before it.

(ii) Under the 1967 Act, landlords were unable to refuse to sell the property to the tenants in the event that the statutory conditions were satisfied, and the price of the sale was set by statute (paragraphs 21-23 of the judgment). Thus, it was one of applicants' criticisms in the *James* case that the legislation did not allow scope for discretionary and variable implementation according to the particular circumstances of each individual property (paragraph 36 of the judgment). In other words, the legislation appears to be one, in terms of both intent and effect, effecting a compulsory transfer of property from one individual to another. Seen in this light, it appears to be akin to those cases which in the opinion of the ECnHR the part of Article 1 concerning deprivation is directed against, namely cases where the state seizes, or gives another the right to seize, a specific asset to be used for the realization of a goal in the public interest: see paragraph 27 of this Paper.

(iii) It is clear from the discussion above that the *James* case, contrary to the Bar's suggestion, is very different from the present case. There are no provisions in the Bill which authorize the Government or any other person to seize a property from another (see paragraph 10(a)-(e) of this Paper).

(iv) Besides, as noted by Park J in *Family Housing Association v Donnellan* [2002] 1 P&CR 449, at para 25, in the *James* case, the ECnHR affirmed the principles stated in *Bramelid v Sweden* (1982) 5 EHRR 249 regarding the scope of "deprivation". It said that the concept of deprivation of possessions in Article 1 "was not intended to be so wide as to cover every case in which property passes from one person, against his will, to another, by virtue of the operation of rules of private law." This statement applies with equal force to the scope of "deprivation"/"徵用" (*zhengyong*) in BL 105.

(c) ***Hatton v United Kingdom [2001] ECHR 36022/97***

(i) This case did not involve Article 1, and did not deal with the notion of "deprivation" therein.

(ii) On the suggested positive obligation on the part of the HKSAR to protect property rights under BL 105, the Bar accepted that the system provided for in the Bill would simplify conveyancing and achieve certainty of title (paragraph 30). Having regard to the fact that the Bill does not involve any "deprivation"/"徵用" (*zhengyong*) for the purposes of BL 105, as well as the above merits of the proposed system and the matters mentioned in paragraph 30 of our First Paper, the enactment of the Bill is certainly consistent with the fulfilment of the above suggested obligation.

(d) ***Guerra v Italy 4 BHRC 63***

(i) This case did not involve Article 1, and did not deal with the notion of "deprivation" therein.

(e) ***Dennis v Ministry of Defence [2003] EWHC 793***

(i) Article 1 was engaged in this case, and the High Court held

that in view of the extent of the noise nuisance concerned and the agreed fact that it significantly reduced the market value of the property concerned, there was an interference with rights under Article 8 of the ECHR and rights under Article 1 of the First Protocol. However, there was no discussion on the notion of "deprivation" under Article 1, though it cited the ECnHR's decision in *S v France* [1990] 65 D & R 250 that "noise nuisance which is particularly severe in both intensity and frequency may seriously affect the value of real property or even render it unsaleable or unusable and thus amount to a partial expropriation."

(ii) As this case as well as the above notion of "partial expropriation" are concerned with a nuisance which disturbs an owner's enjoyment of his property (rather than an adjustment or a regulation of competing private property claims), they are not authorities which are inconsistent with the position in our First Paper mentioned in paragraph 6 above.

(f) ***Marcic v Thames Water Utilities Limited [2001] 3 All ER 698***

(i) This case concerned the failure of a statutory water sewerage undertaker to perform the necessary works to prevent the plaintiff's property from being affected by persistent flooding and back-flow from its sewer system. In the first instance, it was held, inter alia, that the plaintiff had been deprived, at any rate in part, of the peaceful enjoyment of his possessions. There was evidence that the value of his property was seriously and adversely affected by the nuisance. In reliance on the ECnHR's decision in *S v France* (supra), the court held that the effect had constituted a "partial expropriation" (paragraph 69 of the judgment).

(ii) The comments made in sub-para (e)(ii) above also apply to this case.

(iii) The Bar sought to argue that if allowing a private nuisance to take place was sufficient to constitute an infringement of property rights, to take away property right from a property owner by legislation is, a fortiori, deprivation in the context of BL 105. The reasoning of this argument is fallacious in

the following ways:

- The cases of *Dennis* and *Marcic* involved the so-called "partial expropriation". While they are cases about "infringement of property rights", they did not elucidate clearly the meaning of "deprivation" under Article 1.

- Each of the above case was concerned with a nuisance, rather than an adjustment or a regulation of competing private property claims which the present Bill is about.

- On the question of whether a nuisance or an adjustment or regulation of competing private property claims would have the effect of "deprivation"/"徵用" (*zhengyong*) for the purposes of BL 105, regard should be had to the matters referred to in paragraph 2 of this Annex.

Bramelid v Sweden [1982] 5 EHRR 249

7. In paragraph 27 of the Bar's First Paper, the Bar questioned whether the ECnHR's decision in *Bramelid* represented the ECHR jurisprudence on the scope of "deprivation" under Article 1. The discussion in Leigh-Ann Mulcahy's work as quoted in paragraph 27 of this Paper shows that the decision in *Bramelid* does represent the ECHR jurisprudence on the above scope.

Family Housing Association v Donnellan [2002] 1 P&CR 449

8. In paragraph 28 of the Bar's First Paper, the Bar queried the weight of Park J's judgment in the *Donnellan* case on the following grounds:

(a) Park J relied on the ECnHR's judgment in the *James* case, but not ECtHR's judgment in the same case.

(b) Park J's judgment was very much affected by the Court of Appeal's judgment in *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804.

(c) Park J only dealt with a case of adverse possession, which is very different from the present situation. The Limitation Act did not deprive a person of his property as such, but

merely deprive him of his right of access to courts for the purpose of recovering property if he has delayed the institution of his legal proceedings for more than the limitation period.

9. The above arguments put forth by the Bar are not convincing:

(a) As discussed in paragraph 6(b)(iv) above, the ECnHR in the *James* case affirmed the approach in *Bramelid* on the scope of "deprivation" under Article 1, though on the particular facts it held that the relevant U.K. legislation deprived the landlord's possession. As noted in paragraph 6(b)(i) above, when the *James* case reached the ECtHR, the latter did not give reasons for its decision that the landlords were deprived of their possessions by virtue of the legislation. It simply mentioned that this point was not disputed before it, and did not make any comments on the approach adopted by the ECnHR on the scope of "deprivation" under Article 1. Such being the case, it is difficult to understand the Bar's suggestion that Park J should have relied on the ECtHR's decision in the *James* case to throw light on the above scope. Besides, in *Donnellan*, Park J did note that, at paragraph 27, the ECnHR's decision in the *James* case was subsequently considered by the ECtHR, which upheld the ECnHR's decision.

(b) Park J discussed (in paragraphs 31-33) the Court of Appeal's decision in *JA Pye (Oxford) Ltd v Graham* after he had examined in much greater length (in paragraphs 22-30) the ECHR jurisprudence on the part of Article 1 which is about deprivation. There is hardly any doubt that his decision in *Donellan* was based on, apart from the Court of Appeal's decision in *Pye*, the ECHR jurisprudence (see paragraph 21 of the judgment).

(c) As noted in the above work of Leigh-Ann Mulcahy, at paragraph 16.98, it could be readily argued that, although it is correct that the limitation period simply bars access to courts to recover the property in question rather than effecting a transfer of title, the reality of the situation is that the owner is thereby deprived of his possession (see also paragraph 29 of this Paper). Certainly, the owner has effectively lost all control as well as all possibility to use and enjoy his property.

(d) In *Donnellan*, Park J agreed to the following characterization of the law on adverse possession advanced by the defendants' counsel (at paragraph 16):

> "Adverse possession is a matter of private law. The State has nothing to do with the operation of the law in a case such as the present one, except in the background sense that the U.K. Parliament has enacted the statutory provisions which, if the conditions set out in them exist, mean that the Association's title has been extinguished and the defendant's (sic) have acquired possessory title."

> For the reasons mentioned in paragraph 10(a)-(e) of this Paper, the above description of the law on adverse possession may equally apply *mutatis mutandis* to the present Bill. Of course, no compensation is currently provided in our law for any loss of title incidental to the operation of the law on adverse possession.

Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation [2002] 4 HKC 277

10. In paragraph 27 of our First Paper, the above case was referred to in the following statement:

> "It may be noted that in the recent case of *Kowloon Poulty Laan Merchants Association v Department of Justice* [CACV 1521/2001] the Hong Kong Court of Appeal has relied on the decision of the European Commission of Human Rights in *Baner v Sweden* [60 DR 128] to construe the meaning of 'deprivation of property' under BL 105."

11. The above statement is a statement of fact, and nothing in paragraph 29 of the Bar's First Paper shows that it is not correct.

Fair Balance

12. In paragraph 30 of the Bars' First Paper, the Bar stated that it had no difficulty in accepting that inasmuch as the proposed legislation would result in deprivation of property rights, such may be justified by public

interests and the benefits to the society as a whole. It noted that the virtues of a system of registered title must have been carefully considered long before drafting of the Land Titles Bill, and some of the virtues are set out in paragraph 30 of our First Paper.

13. The above views expressed by the Bar suggest that the only difference between the Bar and the Administration on the Bill is whether the latter involves "deprivation"/"徵用"(*zhengyong*) of property for the purposes of BL 105. On this question, the discussion above and that in our First Paper should be sufficient to demonstrate that it should be answered in the negative. Hence, there should not be any remaining doubt on the consistency of the Bill with BL 6 and 105.

(B) The Bar's submission of 30 May 2003 ("the Bar's Second Paper")

14. In its submission of 30 May 2003, the Bar maintained its view that the Bill has the effect of depriving property for the purposes of BL 105 because "the new law makes it possible for one to lose his title to landed property in circumstances where before the enactment of the new legislation, he would not have lost his title to the property." (paragraph 6) For the reasons mentioned in paragraph 2 of this Annex, this view of the Bar is unconvincing.

15. In paragraph 7 of its Second Paper, the Bar sought to show that there are differences between an action in tort against the fraudulent or negligent person on the one hand, and a claim for the return of land under the existing law on the other. Since the Bill does not deprive/"徵用"(*zhengyong*) property for the purposes of BL 105, the above differences, if any, cannot demonstrate that the Bill is inconsistent with BL 105 by failing to provide real-value compensation for deprivation.

16. In paragraph 7(3), the Bar argued that in any action for the recovery of the land, the existing *nemo dat* rule would protect the original owner to the extent that even if he is negligent, he would still be entitled to recover his property. This argument is too sweeping to be correct. For instance, as discussed in Charles Harpum, *Megarry & Wade's Law of Real Property* (6th ed, 2000), at paragraph 19-203, an earlier mortgagee of a legal estate in unregistered land could, by gross negligence in failing to obtain the title deeds, lose priority as against a later equitable mortgagee who exercised due diligence himself. According to the learned editor of the above work, the postponement of an earlier legal to a

later equitable incumbrancer for this reason of gross negligence in relation to the title deeds, is "explicable only as an intervention by equity against the ordinary rules governing estates, in particular against the rule that no one can convey what he has not got" (see paragraph 19-204).

17. Further, McDonnell and Monroe in their work *Kerr on the Law of Fraud and Mistake* (6th ed, 1952), at pp 124-125, wrote the following:

> "…if a man on taking the legal estate makes no inquiry for the title deeds which constitute the sole evidence of the title to the property, or allows them to remain in the hands of the vendor or mortgagor, his conduct affords evidence of an amount of negligence and carelessness sufficient to justify the Court in assuming that he had abstained from making inquiry from a suspicion that his title would be affected if it was made, and in imputing to him the knowledge which by the use of ordinary diligence he might have discovered. So, also, gross negligence will be imputed to a man who, having lent the title deeds to the vendor or mortgagor, or any other agent for a temporary and reasonable purpose, allows them to remain out of his hands for an unreasonable time, and does not reclaim them with proper diligence. If in either of such cases a fraudulent use is made of the title deeds by the vendor or mortgagor, and a new title is created by means of them in favour of a subsequent purchaser for value without notice, the first purchaser or mortgagee will be postponed in equity to the subsequent incumbrancer."[14]

18. Acquisition of title through adverse possession is another example, though in a different legal context, showing that the former owner's "neglect [has] allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another."[15]

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[14] See, for instance, *Walker v Linom* [1907] 2 Ch. 104. The head note of that case reads: "By his marriage settlement W. conveyed real estate to trustees to be held upon trusts under which he took a life interest determinable on alienation, and, subject to that and to a discretionary trust in the event of his interest determining in his lifetime, his wife was entitled for her life. The same solicitors acted for all parties. They had in their possession a bundle of deeds purporting to be title deeds of the property, and were not aware that W. still retained the deed by which the property was conveyed to him. Some years after the marriage W. mortgaged the property and handed over the conveyance to the mortgagee, who afterwards sold the property. Neither the mortgagee nor the purchaser from him had any notice of the settlement. W. absconded, and his wife brought an action against the purchaser, the trustees, and her husband for a declaration that W's life interest had determined and that the purchaser's interest in the property was subject to her interest under the settlement." It was held, inter alia, that all the parties except W. had acted honestly, but that the trustees had been guilty of negligence, and their legal estate must be postponed to the subsequent equitable interest of the purchaser from the mortgagee.

[15] Oliver Wendell Holmes, *The Path of the Law*, (1897) 10 Harv L Rev 457, at 477, quoted in Gray and Gray, *Elements of Land Law* (3rd ed, 2001), at p 242.

19. In paragraph 8 of its Second Paper, the Bar stated that "it is strongly arguable that the new legislation would not meet the requirement of Article 105 if the net result is that the property owners may be getting something less than what they would be entitled to before." This argument suggests an extremely broad ambit of "deprivation"/"徵用"(*zhengyong*) under BL 105, without reference to the matters referred to in paragraph 2 of this Annex, and cannot be correct.

Annex C

The Administration's Response to the REDA's Submission of 19 May 2003

In paragarph 5(a) of its above submission, the REDA questioned the appropriateness to refer to the Australian jurisprudence and the ECHR jurisprudence. This query is answered in paragraphs 20, 24 and 26 of this Paper.

2. On the continuity of protection of property rights before and after the reunification raised in paragraph 5(c) of the REDA's submission, the Administration's position is set out in paragraphs 14-18 of this Paper.

3. In paragraph 5(d), the REDA argued that the Bill divested the innocent owner of his property, which amounts to an expropriation of property. For the reasons mentioned in paragraph 10(a)-(e) of this Paper, this argument is untenable.

4. In paragraph 6.2, the REDA argued that it was neither fair nor just to take away the property rights of an innocent owner who owns a property with a value in excess of the proposed cap of HK30 million without full compensation corresponding to the real value of the property. The fairness of this arrangement should be seen against the position of an innocent purchaser who has paid full value for the property without knowledge of the fraud, and other considerations mentioned in paragraph 30 of our First Paper.

Annex D

The Administration's Response to the LSD's Paper of 15 May 2003

In paragraph 10, the LSD questioned the relevance of the Australian jurisprudence. This question is answered in paragraphs 21-25 of this Paper.

2. In paragraph 15, the LSD discussed the case of *Kowloon Poultry Laan Merchants Association*, and noted that the Court of Appeal in that case quoted passages from the ECnHR's decision in *Bramelid* which discussed, inter alia, the notion of "*de facto* expropriation". In paragraph 19, the LSD relied on ECnHR's approach in *Bramelid* to "*de facto* expropriation" to support its view that "the cap and the limitation would not constitute a deprivation for the purposes of BL 105". On the question of whether the Bill involves any deprivation/"徵用"(*zhengyong*) of property for the purpose of BL 105, the Administration prefers the approach discussed in paragraphs 5-31 of this Paper.

3. In paragraph 20, the LSD discussed the issue of fair balance, highlighting some of the relevant factors for consideration. It left the question of whether the Bill strikes a fair balance to members of the Legislative Council to decide. On the above issue of fair balance, the Administration maintains the views stated in paragraphs 28-30 of our First Paper.

4. The Administration notes that the LSD in paragraph 21 of its above paper opined that the Bill was consistent with BL 6.