

For discussion
on 7 June 2004

**Bills Committee on
Adoption (Amendment) Bill 2003**

Draft Committee Stage Amendments (CSAs) – Part III

Purpose

This paper highlights the main provisions in the last batch of draft Committee Stage Amendments (CSAs) at Annexes A and B. They mainly seek to cater for the scenario of possible non-recognition of adoption orders made under derogatory agreements between two Contracting States to the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (the Hague Convention), consequential amendments to some Ordinances and transitional provisions.

Background

2. Convention adoptions will be recognized under section 20F (clause 24) of the Adoption (Amendment) Bill 2003 (the Amendment Bill)¹. Non-Convention adoptions will continue to be recognized under

¹ Section 20F of the Adoption (Amendment) Bill 2003 provides that :

- “(1) This section applies to and in relation to a Convention adoption made in accordance with the provisions of the Convention -
- (a) in a Contracting State; or
 - (b) in any other part of the People's Republic of China where the Convention is in force.
- (2) Subject to sections 20G and 20H, a Convention adoption to which this section applies shall, for the purposes of this Ordinance and all other Ordinances, have the same effect as an adoption order validly made in accordance with this Ordinance in respect of a full adoption (as defined in section 20G(2)), and shall have no other effect.
- (3) A Convention adoption certificate in respect of an adoption issued by the competent authority authorized in that behalf in the place where the adoption was made is for all purposes prima facie evidence of the facts stated on it.”

the revised section 17 (clause 19) of the Amendment Bill².

Possible Non-Recognition of Intercountry Adoptions

3. Article 23 of the Hague Convention provides that an adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Hague Convention shall be recognized by operation of law in the other Contracting States.

4. Article 25 of the Hague Convention³ provides that any Contracting State may declare that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39(2) of the Hague

² The revised section 17 of the Adoption (Amendment) Bill 2003 provides that (changes shown in bold italics):

“(1) Where a person has been adopted, whether before or after the coming into operation of this section, in any place outside Hong Kong according to the law of that place, and the adoption is one to which this section applies, then for the purposes of this Ordinance and all other Hong Kong enactments, the adoption shall have the same effect as an adoption order validly made in accordance with the provisions of this Ordinance, and shall have no other effect.

(2) Subsection (1) shall apply to an adoption in any place outside Hong Kong (*other than a Convention adoption*), if-

- (a) the adoption is legally valid according to the law of that place; and
- (b) in consequence of the adoption, the adoptive parents or any adoptive parent had, or, if the adopted person had been a young child, would have had, immediately following the adoption, according to the law of that place, a right superior to that of any *natural birth* parent of the adopted person in respect of the custody of the person; and

(c) either-

- (i) the adoption order was made by an order of any Court whatsoever of a Commonwealth country or of the United States of America or of any State or territory of the United States of America; or
- (ii) in consequence of the adoption, the adoptive parents or any adoptive parent had immediately following the adoption, according to the law of that place, a right superior to or equal with that of any *natural birth* parent in respect of any property of the adopted person which was capable of passing to the parents or any parent of the person in the event of the person dying intestate without other next of kin and domiciled in the place where the adoption was made and a national of the State which had jurisdiction in respect of that place,

but not otherwise.

(3) Nothing in this section shall restrict or alter the effect of any other adoption made in any place outside Hong Kong.

(4) *In this section, the expression “Convention adoption” shall have the meaning assigned to it by paragraph (b) of the definition of the expression in section 20A(1) as if the reference to ‘section 20F’ in that paragraph were a reference to “section 17”.*”

³ Article 25 of the Hague Convention provides that “Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2”.

Convention⁴ (i.e. an agreement which derogates from certain procedural requirements of the Hague Convention). Examples of such declarations made by some Contracting States are at Annex C.

5. As explained in the paper entitled “Explanations for excluding certain Articles in the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption from the schedule of the Adoption (Amendment) Bill 2003” (ref : LC Paper No. CB(2)2586/03-04(01)), there is no need to include Article 25 in the Adoption Ordinance as it merely operates on the international plane. Any declaration under Article 25, if made, is to be made by the Central People’s Government (CPG). We expect that in such circumstances, the CPG would, in accordance with Article 153 of the Basic Law⁵, consult the HKSARG before making such a declaration if it is intended that the declaration would be applicable to the HKSAR.

6. To enable us to implement any such declaration that may be made by the CPG, we have mentioned in LC paper No. CB(2)2586/03-04(01) that we intend to introduce CSAs to enable the Secretary for Health, Welfare and Food to make an order published in the gazette, if and when the CPG makes such a declaration, for possible non-recognition of adoption arrangements made in accordance with the agreements concluded by application of Article 39(2) of the Hague Convention [new section 20J at Annex A]. The content of our order will essentially be the same as the declaration of the CPG.

7. Once an order has been made under section 20J, the adoptions made in accordance with such Article 39(2) agreements would not be recognized as “Convention adoptions” under section 20F of the Amendment Bill but may still be recognized if they meet the

⁴ Article 39(2) of the Hague Convention provides that “Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.”

⁵ Article 153 of the Basic Law provides, inter alia, that the application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and **after seeking the views of the government of the Region.**

requirements in section 17 of the Adoption Ordinance, i.e. the provision for our recognition of overseas adoptions (other than Convention adoptions). Such proposed arrangement would put the adoptions made under Article 39(2) agreements to be on par with other non-Convention adoptions, and subject to the same requirement for recognition.

Consequential Amendments to Other Ordinances

8. The proposed amendments to the Adoption Ordinance would have implications on the other Ordinances as follows :

- (a) ***Recognition of Convention adoptions*** : at present, some Ordinances explicitly provide that, in construing parent and child relationship, children by adoption includes adoptions made in a place outside the HKSAR if these are recognized under section 17 of the Adoption Ordinance. When the Hague Convention takes effect in the HKSAR, the scope of overseas adoptions would be extended because adoptions validly made in accordance with the Hague Convention shall be recognized in Hong Kong under section 20F (clause 24) of the Adoption (Amendment) Bill 2003.

Amendments are therefore needed for the Intestates' Estates Ordinance (Cap. 73), the Widows and Orphans Pension Ordinance (Cap.94), the Employees' Compensation Ordinance (Cap. 282), and the Employees Compensation Assistance Ordinance (Cap. 365). Detailed CSAs are set out in Annex B.

- (b) **Step-parent adoption** : In some other Ordinances, in construing parent and child relationship, they will treat the adoptive child as the child of the adoptive parent(s) and not the child of anybody else (including the birth parents), in line with the existing provisions of section 13 of the Adoption Ordinance. Under our new option for a step-parent to adopt the child of his/her spouse (who is a parent of this child born in previous marriage or out of wedlock), as a sole applicant under the revised section 5(1)(c) of the Amendment Bill, we have provided under the revised section

13(1)(c)(i)⁶ (clause 16) of the Amendment Bill that the child shall after the adoption be treated as if he/she were a child born in the wedlock of the step-parent and the parent married to the step-parent, and not the child of any other person. Similar amendments are needed for the other Ordinances mentioned above so that if the adoption order is granted upon that type of application, the adoptive child would be regarded as the child of the step-parent and the parent concerned, and not the child of any other person.

Amendments are needed for the Employment Ordinance (Cap. 57), the Intestates' Estates Ordinance (Cap. 73), the Surviving Spouses' and Children's Pensions Ordinance (Cap.79), the Pensions Ordinance (Cap. 89), the Widows and Orphans Pension Ordinance (Cap. 94), the Pensions Benefits Ordinance (Cap. 99), the Auxiliary Forces Pay and Allowances Ordinance (Cap. 254), the Employees' Compensation Ordinance (Cap. 282), the Employees Compensation Assistance Ordinance (Cap. 365) and the Pensions Benefits (Judicial Officers) Ordinance (Cap. 401). Detailed CSAs set out in Annex B.

Transitional Provisions

9. It is necessary to make CSAs to provide for transitional arrangements to cater for certain types of adoption cases that are at different stages of the adoption process on the commencement of the Amendment Ordinance. The provisions in the Amendment Ordinance would have a bearing on local unrelated adoptions (either general or specific consent) and intercountry adoptions. An adoption normally takes about 10 months to one year to complete. Our main objective is to minimize the disruption to the child who may have been placed with the

⁶ The revised section 13(1)(c)(i) of the Adoption (Amendment) Bill 2003 after our proposed Committee Stage Amendments provides that :

"(1) Upon an adoption order being made –

- (a)
- (b) ...
- (c) in respect of the relevant matters –
 - (i) where the order is made under section 5(1)(c), the infant shall stand to the adopter and that parent exclusively in the position of a child born to them in lawful wedlock;"
 - (ii)...."

prospective adoptive parent on the commencement of the Amendment Ordinance. The draft CSAs are at Annex A, and the operational details are set out below.

10. For local unrelated adoptions, on the commencement of the Amendment Ordinance, where a submission of the Notice of Intention to Apply for an Adoption Order has been made (placement of a child in the home of a prospective adoptive parent for adoption), the relevant adoption arrangements should be allowed to proceed until the adoption order is granted (in line with the provisions before the commencement date). This would avoid any interruption to the adoption process for the child. This is provided for under new section 35(1). In such cases, involvement of parties other than Accredited Bodies and the Social Welfare Department (SWD) will be allowed (new section 34(1)). However, if on the commencement of the Amendment Ordinance, the Notice of Intention to Apply for an Adoption Order has not yet been submitted (placement of a child has normally not yet started) and parties other than SWD were making the adoptive arrangements, the prospective adoptive applicant would need to approach an Accredited Body or SWD to start the adoption process in accordance with the provisions in the amended Ordinance [sections 35(2) and 35(3)].

11. For intercountry adoptions, similar arrangements would apply. If on the commencement of the Amendment Ordinance, a Notice of Intention to Apply for an Adoption Order has been submitted (for adoption of overseas children by Hong Kong residents) or the child has left Hong Kong (for adoption of Hong Kong children by overseas prospective adoptive parents), parties other than Accredited Bodies/SWD can continue to handle the case [sections 34(1) and 34(2)]. Otherwise, the prospective adoptive parent would need to approach an Accredited Body or SWD to take forward the essential steps of intercountry adoption such as assessment of his/her suitability in Hong Kong (for adoption of overseas children by Hong Kong residents) [sections 35(2) and 35(3)].

Presentation

12. Members may wish to note the contents of this paper in going through the last batch of draft CSAs at Annexes A and B.

Health, Welfare and Food Bureau
June 2004

**Detailed Committee Stage Amendments for
Article 25 of the Hague Convention and Transitional Provisions**

24. Part 5 added

The following is added immediately after section 20—

**“PART 5
THE CONVENTION**

20A. Interpretation of Part 5

(1) In this Part, unless the context otherwise requires—
“the Convention” (《公約》) means the Convention on Protection of
Children and Co-operation in respect of Intercountry Adoption
done at the Hague on 29 May 1993 or such Convention as may
be amended from time to time and as applied to Hong Kong;
“Convention adoption” (公約領養) means an adoption to which the
Convention applies by virtue of Article 2 (as read together with
Article 3) of the Convention and -

- (a) subject to paragraph (b), in respect of which Hong
Kong acts as the State of origin or the receiving
State;
- (b) for the purposes of section 20F, regardless of
whether in respect of which ~~whether or not~~ Hong
Kong acts as the State of origin or the receiving
State.

other than any adoption that is excluded by an order made under
section 20J;

...

20J. Modification of the definition of "Convention adoption"

(1) Subject to subsection (2), the Secretary for Health, Welfare and Food may by order published in the Gazette declare that, for the purposes of this Ordinance, such adoptions as specified in the order shall be excluded from the meaning of "Convention adoption".

(2) An order under subsection (1) may be made only if -

- (a) the People's Republic of China has made a declaration under Article 25 of the Convention to the effect that Hong Kong will not be bound to recognize adoptions made in accordance with any agreement concluded by application of paragraph 2 of Article 39; and
- (b) the order specifies the adoptions.

...

34. Transitional Provisions for s.23A

(1) If a person has filed, before the commencement of section 23A, a notice under section 5(7)(b) stating his intention to apply for an adoption order in respect of an infant, then section 23A shall not apply to any arrangement or placement for the adoption of the infant by the person.

(2) If an infant has been placed with a person for an adoption to be effected in a place outside the People's Republic of China and the adoption has not yet been effected as at the commencement of section 23A, then that section shall not apply to any arrangement or placement for the infant's adoption by the person.

35. Transitional Provisions for Part 7

(1) Part 7 shall not apply in relation to any arrangement or placement for adoption referred to in section 34.

(2) If the Director has assessed that a person is suitable to be an adoptive parent and the assessment remains valid as at the commencement of section 27, then it may be taken as an assessment made by the Director under section 29, and accordingly, the provisions of Part 7 shall apply in relation to any decision made after that commencement for placing a particular infant with that person.

(3) If a prospective adopter for the adoption of an infant has not filed, as at the commencement of Part 7, a notice under section 5(7)(b) stating his intention to apply for an adoption order in respect of the infant, then subject to subsection (2), the prospective adopter shall apply for an assessment under section 27 and accordingly, that Part shall apply in relation to the proposed adoption in all respects.

Detailed Committee Stage Amendments for Consequential Amendments to Other Ordinances

Employment Ordinance (Cap. 57)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-

...

"issue" (後嗣) means a child whether under the age of majority or not of a deceased employee and-

- (a) includes a step-child;
- (b) includes a child adopted by the employee, but does not include a child of the employee adopted by another person [otherwise than under an adoption order granted under section 5\(1\)\(c\) of the Adoption Ordinance \(Cap. 290\)](#);
- (c) does not include an illegitimate child; and
- (d) where polygamy lawfully subsists, does not include a child who is not an adopted child of the employee unless his mother was, at the time of his birth, the employee's principal wife-
 - (i) in case the relevant marriage or, where appropriate, each such marriage constitutes a customary marriage for the purposes of the Marriage Reform Ordinance (Cap 178), according to Chinese law and custom; or
 - (ii) in any other case, according to the law which, as regards the relevant marriage or marriages, was the proper personal law of the employee;

...

Intestates' Estates Ordinance (Cap. 73)

2. Interpretation

...

- (2) For the purposes of this Ordinance, a person adopted under-
 - (a) an adoption order made under the Adoption Ordinance (Cap 290);
 - (b) an adoption to which section 17 [or 20F](#) of that Ordinance applies; or
 - (c) an adoption made in Hong Kong in accordance with Chinese law and custom before 1 January 1973,

shall be treated as the child of the adopter, or (if the adoption order was granted to the adopter under paragraph (c) of section 5(1) of that Ordinance) as the child of the adopter and the parent referred to in that paragraph, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly.

...

Surviving Spouses' and Children's Pensions Ordinance (Cap. 79)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-

...

"child" (子女) in relation to a contributor includes an illegitimate child, a step-child and a child adopted by the contributor, but, except as provided in subsection (5)(ac), does not include a child of the contributor adopted by another person otherwise than under an adoption order granted under section 5(1)(c) of the Adoption Ordinance (Cap. 290);

...

Pensions Ordinance (Cap. 89)

18. Pensions to dependants when an officer dies on duty

...

(3) For the purposes of this section-

(e) "child" (子女) means-

- (i) any child of an officer, ~~other than a child of an officer adopted by another person except a child of an officer adopted by another person otherwise than under an adoption order granted under section 5(1)(c) of the Adoption Ordinance (Cap. 290)~~; and
(Replaced 3 of 1993 s. 28)
- (ii) a person wholly or mainly dependent upon the deceased officer for support, adopted as a child by such officer before the date of injury in a manner recognized by the Chief Executive.

...

Widows and Orphans Pension Ordinance (Cap. 94)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-

"child" (子女) includes an illegitimate child and a child adopted under and in accordance with the provisions of the Adoption Ordinance (Cap 290), or in such other manner as is referred to in section 17 or 20F of that Ordinance;

...

(5) The child of an officer who is or has been adopted by any other person under and in accordance with the provisions of the Adoption Ordinance (Cap 290) other than section 5(1)(c) of that Ordinance, or in such other manner as is referred to in section 17 or 20F of that Ordinance ~~thereof~~,-

- (a) in the lifetime of the officer, or while a pension is or was then being paid under this Ordinance to the mother of that child, shall be deemed, for the purposes of this Ordinance, to have died at the date of the adoption unless, at the date of enactment of the Widows and Orphans Pension (Amendment) (No. 2) Ordinance 1967 (72 of 1967), such child was being paid a pension or a share of a pension under this Ordinance, in which case such child shall continue to be paid such pension or such share;
- (b) after the death of the officer shall, if he is being paid a pension or a share of a pension under this Ordinance, continue to be paid such pension or such share.

Pension Benefits Ordinance (Cap. 99)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-

...

"child" (子女) in relation to an officer includes an illegitimate child, a step-child and a child adopted by the officer, but does not include a child of the officer adopted by another person otherwise than under an adoption order granted under section 5(1)(c) of the Adoption Ordinance (Cap. 290);

...

Auxiliary Forces Pay and Allowances Ordinance (Cap. 254)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-

"child" (子女) means-

- (a) any child, including an illegitimate child or a step-child, of a member, ~~other than a child of the member adopted by another person except a child of the member adopted by another person otherwise than under an adoption order granted under section 5(1)(c) of the Adoption Ordinance (Cap. 290)~~; or

- (b) a child who was wholly or mainly dependant upon the deceased member for support, and who had been adopted by the member before the date of the injury which resulted in the death of the member;

...

Employees' Compensation Ordinance (Cap. 282)

3. Interpretation

...

(2) For the purposes of the definition of "member of the family" (家庭成員)-

- (a) an adoption means an adoption-
 - (i) made under an adoption order made in accordance with the Adoption Ordinance (Cap 290);
 - (ii) to which section 17 ~~of the Adoption Ordinance (Cap 290)~~ or 20F of that Ordinance applies; or
 - (iii) made in Hong Kong in accordance with Chinese law and custom before 1 January 1973; and
- (b) any person so adopted shall be treated as the child of the adopter, or (if the adoption order was granted to the adopter under paragraph (c) of section 5(1) of that Ordinance) as the child of the adopter and the parent referred to in that paragraph, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly.

Employees Compensation Assistance Ordinance (Cap. 365)

2. Interpretation

...

- (2) For the purposes of the definition of "eligible person"-
 - (a) an adoption means an adoption-
 - (i) made under an adoption order made in accordance with the Adoption Ordinance (Cap 290);
 - (ii) to which section 17 ~~of the Adoption Ordinance (Cap 290)~~ or 20F of that Ordinance applies; or
 - (iii) made in Hong Kong in accordance with Chinese law and custom before 1 January 1973; and
 - (b) any person so adopted shall be treated as the child of the adopter, or (if the adoption order was granted to the adopter under paragraph (c) of section 5(1) of that

Ordinance) as the child of the adopter and the parent referred to in that paragraph. and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly.

Pension Benefits (Judicial Officers) Ordinance (Cap. 401)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-

...

"child" (子女) in relation to an officer includes an illegitimate child, a step-child and a child adopted by the officer, but does not include a child of the officer adopted by another person otherwise than under an adoption order granted under section 5(1)(c) of the Adoption Ordinance (Cap. 290);

...

**Examples of Declarations Made by Contracting States
of the Hague Convention on Protection of Children and Cooperation
in respect of Intercountry Adoption (the Convention)
in respect of Article 25**

Australia

Pursuant to Article 25 of the Convention, Australia declares that it will not be bound to recognise adoptions made in accordance with an agreement concluded in accordance with Article 39, paragraph 2.

Bulgaria

In accordance with Article 25 of the Convention, the Republic of Bulgaria declares that it will not be bound to recognise adoptions made on the basis of agreements concluded pursuant to Article 39, paragraph 2, to which the Republic of Bulgaria is not a Party.

France

In accordance with Article 25, France declares that it will not be bound under the Convention to recognise adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Luxembourg

In accordance with Article 25, the Grand Duchy of Luxembourg declares that it will not be bound under the Convention to recognise adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

United Kingdom of Great Britain and Northern Ireland

Pursuant to Article 25 of the Convention, the United Kingdom declares that it will not be bound to recognise any agreements made under Article 39, paragraph 2.