Regulations made under United Nations Sanctions Ordinance (Cap 537)

Views of the Hong Kong Bar Association

1. The Legislative Council Subcommittee dealing with the issue of Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions (" the Subcommittee") has invited the Hong Kong Bar Association ("HKBA") to give its views on the Subcommittee's report on the matter and the Administration's response to that report.

The Framework of Implementation: Basic Law of the HKSAR and the United Nations Sanctions Ordinance (Cap 537)

2. Prior to 1 July 1997, resolutions of the United Nations Security Council ("Security Council") to impose sanctions were implemented by the United Kingdom in Hong Kong by way of Orders in Council made under s 1 of the United Nations Act 1946 [Eng]. Such Orders in Council contained a recital that the British Monarch made the Order in exercise of the powers conferred on Her by s 1 of the United Nations Act 1946. Such Orders in Council had to be laid before Parliament: United Nations Act 1946 s 1(4).

3. The United Nations Act 1946 and the Orders in Council made under it ceased to have effect in Hong Kong on 1 July 1997.

4. The Basic Law of the HKSAR came into effect on that date. It is a constitutional document that distributes and delimits powers and responsibilities and provides the framework within which the Central People's Government ("CPG") and the institutions of the HKSAR operate, in respect of the HKSAR, an inalienable part of the People's Republic of China ("PRC").

5. The United Nations Sanctions Ordinance (Cap 537) ("UNSO") came into operation on 18 July 1997, after a swift legislative process. The relevant Bill was gazetted on 8 July 1997 and introduced into the Provisional Legislative Council on 9 July 1997. No Bills Committee was set up to examine it. The House Committee of the Provisional Legislative Council exempted the Bill from the standard period of notice for the resumption of the Second Reading debate. The Provisional Legislative Council passed the Bill the following week on 16 July 1997. The Chief Executive signed and promulgated the UNSO on 18 July 1997.

6. The principal provision of UNSO is s 3(1); it requires the Chief Executive to

make regulations to give effect to an instruction given by the Ministry of Foreign Affairs ("MFA") to the Chief Executive to implement sanctions specified therein against a place outside the PRC, such sanctions being measures that the Security Council has decided to employ to give effect to its decisions and has called upon the PRC to implement.

7. Regulations made by the Chief Executive under s 3(1) of the UNSO may create criminal offences for contravention of their provisions, punishable upon conviction on indictment with an unlimited fine and a term of imprisonment not exceeding seven years: UNSO s 3(2), (3).

8. Section 3(5) of the UNSO provides that ss 34 and 35 of the Interpretation and General Clauses Ordinance (Cap 1) ("IGCO") do not apply to regulations made under this section. This means that regulations the Chief Executive makes under the UNSO will not be laid before the Legislative Council for vetting. In effect, the Legislative Council has no power to amend the regulations after they are made, unless, arguably, a Bill is introduced afterwards for their amendment.

9. The Chief Executive has made 28 regulations under s 3 of the UNSO to date. The measures implemented include those taken to give effect to arms embargoes, prohibitions of entry and transit of specified persons, and

prohibitions of making available of technical and financial assistance to specified persons or undertakings.

Previous Submission of HKBA

10. The HKBA was asked in 2004 to give its views on the process involved in the making of the United Nations Sanctions (Liberia) Regulation 2003 (LN 245/2003) (now ceased to have effect). The HKBA was of the view that the regulation was subsidiary legislation within the meaning of the IGCO and the removal of negative and positive vetting by the Legislative Council after it had been made raised a question as to the constitutionality of the UNSO s 3(5). The HKBA also commented on the refusal on the part of the Administration to produce to the Legislative Council the MFA instruction to the Chief Executive that was implemented by the making of the regulation.

Issues for Comment

11. The HKBA has been asked "to give views on the findings and observations of the Subcommittee as detailed in the report". The HKBA proposes to comment

on the following issues:

- Whether the legislature of the HKSAR may enact s 3(1) and (5) of the UNSO to empower the Chief Executive to make regulations (which is a species of subsidiary legislation) that will not be subject to subsequent negative and positive vetting by the legislature.

- Whether regulations made under the UNSO, in so far as they are directed at persons, undertakings or entities, are made outside the scope of the power vested upon the Chief Executive in the UNSO.

UNSO: Section 3(1) and (5)

The Administration's Comments

12. The HKBA considers that paragraphs 4 to 11 of the Administration's comments of the Subcommittee's report raise a number of issues of constitutional importance on the legislative competence of the HKSAR in so far as the subject matter relates to foreign affairs.

13. Paragraph 6 of the Administration's comments makes the point that Art 73 of

the Basic Law does not confer any power on the HKSAR Government or the Legislative Council to override, curtail or regulate the CPG's sovereign power in respect of her dealings in foreign affairs affecting the HKSAR. Then it is stated in paragraph 8 that the enactment of the UNSO was an instance of the enactment of laws relating to foreign affairs by the HKSAR legislature in accordance with the Basic Law and with the agreement of the CPG.

14. Bearing in mind that Art 13 of the Basic Law provides that the CPG shall be responsible for the foreign affairs relating to the HKSAR and the CPG authorizes the HKSAR to conduct relevant external affairs on its own in accordance with the Basic Law, the HKBA would like the Administration to say –

(a) Whether the Administration takes the view that, notwithstanding the general and ample language of Arts 17 and 73 of the Basic Law, the legislative power of the HKSAR is circumscribed in so far as such power is to be exercised in respect of matters relating to foreign affairs.

(b) Whether, in the event that the Administration answers (a) in the affirmative, it recognizes a distinction between exercising legislative power in respect of a matter of foreign affairs and exercising legislative power in respect of the

modalities for the *domestic* implementation of a treaty obligation (which, arguably, involves matters of manner and form not involving the substance of a concluded treaty obligation).

(c) Whether, in the event that the Administration answers (a) in the affirmative and (b) in the negative, it is the case that on each occasion the Legislative Council proposes to legislate in respect of a treaty obligation having effect in Hong Kong (such as the Safety of United Nations and Associated Personnel Ordinance (Cap 590)), authority has to be, and was indeed sought in the case of the last-mentioned Ordinance, from the CPG to provide the HKSAR with the *additional* power to enact the relevant legislation.

15. The HKBA also considers that paragraphs 11, 16 to 18 of the Administration's comments raise another set of issues of constitutional importance on the relationship between the Central Authorities and the HKSAR.

16. These paragraphs may be read in light of the legislative history of the UNSO. The Secretary for Trade and Industry indicated in her speech to the Provisional Legislative Council on 9 July 1997 that the directives the Chief Executive received from the CPG (which he had to implement under Art 48(8) of the Basic Law) did not empower the Chief Executive to give legal effect to the

Security Council sanctions by way of announcement or promulgation and domestic laws had to be made to facilitate the implementation of the sanctions (which the Secretary later on described as "the legislative tool").

17. The Secretary went on to say that consent had been obtained from the CPG to make laws to empower the Chief Executive to lay down regulations after obtaining instructions from the MFA to implement Security Council sanctions. (The Secretary re-stated the CPG's approval to the Bill on 16 July 1997.) In relation to clause 3(5) of the Bill disapplying negative vetting by the legislature, the Secretary acknowledged that it was an unusual move but one adopted because "United Nations sanction fall into external affairs. Under the Basic Law, the SAR has no autonomy over foreign affairs but it may engage in connected matters with authorization from the Central People's Government. For this reason, the proposed arrangements must ensure that the implementation of sanctions and the nature and scope of sanctions continue to be decided by the Central People's Government. The SAR Government will be responsible for implementing sanctions in Hong Kong. I can assure Members that the arrangements will not set a precedent for matters over which the SAR has autonomy under the Basic Law."

18. The HKBA understands paragraphs 11, 16 to 18 of the Administration's

comments to mean that the regulation-making process under the UNSO involves the following steps:

(a) Where the CPG is called upon by the Security Council to give effect to a sanction measure which the latter has adopted, the CPG sends a communication to the Chief Executive, notifying the latter of the call.

(b) The HKSAR Government, in light of the CPG's communication, drafts a set of regulation and submits the draft to the CPG for approval.

(c) The CPG approves the draft regulation.

(d) The MFA issues an instruction to the Chief Executive requiring the latter to implement the sanction measure by making a regulation, the draft of which is contained in the said instruction.

(e) The Chief Executive makes the regulation pursuant to s 3(1) of the UNSO.

19. If this understanding is right, the HKBA would like the Administration to confirm –

(a) Whether the communication referred to in paragraph 18(a) above is a directive within the meaning of Art 48(8) of the Basic Law, bearing in mind that such directive has to be one "in respect of the relevant matters provided for in [the Basic Law]";

(b) Whether the instruction referred to in paragraph 18(d) above is a directive within the meaning of Art 48(8) of the Basic Law, bearing in mind that such directive has to be one "in respect of the relevant matters provided for in [the Basic Law]";

(c) Whether the Administration takes the view that it is the Chief Executive who is to implement *personally* directives issued by the CPG, pursuant to Art 48(8) of the Basic Law.

(d) Whether the Administration's comments were approved by the CPG before transmission to the Legislative Council.

The Subcommittee's Report

20. The Subcommittee expressed in its report grave concerns as to the constitutionality of s 3(5) of the UNSO. The Subcommittee based its views on the submission of Professor Yash Ghai, who advised that "the Basic Law vests

[the Legislative Council] with the authority and responsibility to keep control over subsidiary legislation. It has plenary law making powers (73(1)); and the draft of subsidiary legislation has to be introduced to [the Legislative Council] (62(5)). *An Ordinance that takes away from [the Legislative Council] the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional.* [The Legislative Council] has been given its legislative responsibilities by [the National People's Congress] and it cannot divest itself of that power ('*delegatus non potest delegare*')."

21. The HKBA cannot support Professor Ghai's submission in so far as it is based upon the proposition that the Legislative Council cannot divest itself of its law-making power because such power has been given to it by the National People's Congress. The Privy Council held in R v Burah (1878) 3 App Cas 889 that while the Indian Legislature had powers expressly limited by the Act of the Imperial Parliament which created it and could do nothing beyond the limits which circumscribed those powers, it, when acting within those limits, was not in any sense an agent or delegate of the Imperial Parliament, but had, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.

22. The HKBA thus considers that the legislative power vested in the HKSAR and

intended to be exercised by the Legislative Council under the Basic Law, while subject to limits provided under the Basic Law, should be considered as a plenary power and as such, the doctrine of agency and the prohibition against sub-delegation of authority are not apt in expounding the nature and principles of legislation.

23. On the other hand, the HKBA considers that the principle of separation of powers that Professor Ghai highlighted in his submission to be highly relevant and that, in so far as the Administration emphasized the theme of continuity under the Basic Law to contest what it understood to be Professor Ghai's claim of a "rigid" separation of powers under the Basic Law, such a position does not necessarily hold in relation the constitutional order established under the Basic Law, with different powers separately vested with different institutions.

24. The South African Constitutional Court surveyed the jurisprudence of major jurisdictions on the question of delegation of legislative power to the executive in Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (10) BCLR 1289 (CC). Chaskalson P, in his judgment, indicated at p 1312 that, while previously the South African courts had considered the same question, there should be a fresh look into it under the new constitutional order in which the Constitution was both entrenched and

supreme. Chaskalson P proceeded to identify two lines of jurisprudence. In the United States of America, delegation of legislative power to the executive is dealt with under the doctrine of separation of powers. While delegation of legislative power within prescribed limits is permissible, the delegation must not be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the framework of law made by Congress. See Hampton & Co v United States 276 US 394, 407 (1928) (per Taft CJ). The Republic of Ireland follows the approach of the United States.

25. Chaskalson P then turned to a number of Commonwealth countries, namely Australia, India and Canada, which seemed to take a broader view of the power to delegate legislative authority and permitted Parliament to delegate plenary law-making powers to the executive, including the power to amend Acts of Parliament, subject to the restraint against "abdication of the power of legislation". It was thought that such an approach owed much to the influence of English law and the decisions of the Privy Council and in part to the form of responsible government in which executive government is embedded in Parliament through membership and requires its support to govern. See Victorian Stevedoring and General Contracting Co Pty Ltd & Meakes v Dignan (1931) 46 CLR 73 (HC Aust); Re Gray (1918) 57 SCR 150 (SCC); Re the Delhi Laws Act [1951] SCR 747 (Ind SC); and Madhya Pradesh High Court

Bar Association v Union of India et al [2004] 4 LRI 9 (Ind SC).

26. The HKBA considers that the jurisprudence of the courts of the United States and Ireland, accepting as they do a stricter view of separation of powers under a constitutional instrument, should be preferred over the approach reflected in the jurisprudence of the courts of the Commonwealth.

27. This is because the political system established under the Basic Law of "mutual check and balance and mutual co-ordination" between the Chief Executive and the HKSAR Government on the one hand and the Legislative Council on the other hand (see Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (3rd Ed) pp 212, 231-232) is not consonant with the English influenced legal doctrines based on parliamentary sovereignty and responsible government that underlie the jurisprudence of many Commonwealth systems. Rather such a political system is more consonant with systems of government with distinct political branches interacting with each other within the framework of a written constitution such as those of the United States, Ireland and South Africa.

28. In Cityview Press Ltd & Anor v An Chomhairle Oiliuna & Ors [1980] IR 381, the Irish Supreme Court identified the test to be "[whether] what is challenged

as an unauthorized delegation of parliamentary power is more than the mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorized; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution."

29. Mahomed DP of the South Africa Constitutional Court in the Executive Council of the Western Cape Legislature case, having examined the comparative jurisprudence, was of the view at p 1344 that –

"The competence of a democratic Parliament to delegate its lawmaking function cannot be determined in the abstract. It depends inter alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally."

Sachs J agreed at p 1371 that a complex balancing of various relevant and

interactive factors had to be done, against a background of what Parliament was there for in the first place. The relevant factors included –

"(a) The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;

(b) The public importance and constitutional significance of the measure – the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;

(c) The shortness of the time period involved;

(d) The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

(e) The extent to which the subject-matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

(f) Any indications in the Constitution itself as to which such delegation was expressly or impliedly contemplated."

30. Applying these tests and factors to the present case, the HKBA observes that

- A legislature cannot give away or share a matter in respect of which it does not have competence. Therefore, it is of fundamental importance to determine whether the Legislative Council has competence to make laws on foreign affairs generally or it only acquires such competence on each occasion from the CPG when enacting an Ordinance "with the agreement of the CPG" to give effect in the HKSAR a treaty obligation of the PRC applicable to the HKSAR.

- The UNSO contains a legislative determination of principles and policies. It makes provision for a mechanism to give effect to Security Council sanctions indicated by the MFA to be applicable to the HKSAR, subject to a specific restriction on maximum penalties (s 3(3)) and an enabling provision to exclude benevolently certain categories of things from the scope of application of the regulation (s 3(4)).

- The contents of the regulation must to a large extent depend on the terms of the Security Council sanction measure and the instruction given to the Chief Executive.

- The subject matter of the UNSO necessitates the use of forms of rapid intervention at least occasionally.

- The Legislative Council may not exercise ex post facto control over the terms of a particular regulation and in this connection, the operation of the UNSO resembles a complete loop of interaction involving the MFA (or more broadly, the CPG) on the one hand and the Chief Executive (or more broadly, the HKSAR Government) on the other.

- The Legislative Council may continue to debate and discuss with the Chief Executive and the HKSAR Government on issues pertaining to the general topic of implementation of Security Council sanction measures.

31. Nevertheless, the HKBA endorses the Subcommittee's view that the "current arrangement" under the UNSO should be reviewed and improved upon.

32. The HKBA finds s 3(5) of the UNSO to be unusual as it purports to preclude any form of formal notification or substantive scrutiny by the Legislative Council of regulations made under s 3(1). The HKBA notes that –

- Orders in Council made under the United Nations Act 1946 were laid before the Parliament in Westminster after they were made. While the practice in the *United Kingdom* leaves the choice of what level of Parliamentary scrutiny to apply to the exercise of a particular power to legislate to the Government department responsible for the Bill conferring the power, that department is to have regard in making that choice to precedent and past expressions of opinion by Parliamentary Committees. The Joint Committee on Delegated Legislation recommended in 1973 that affirmative resolution procedure was as a general rule appropriate for, inter alia, powers creating serious criminal offences. There is also a convention operated by the Joint Committee on Statutory Instruments to the effect that an instrument subject to the negative resolution procedure should not be made so as to come into force less than 21 days after laying (which has come to be known as the "21 day rule"). It is expected that the United Kingdom Government should address the reasons for the choice in each case. See *Craies on Legislation* (8th Ed, 2004) paras 6.2.3, 6.2.6, and 6.2.13.

- In *Australia*, regulations made by the Governor-General under the Charter of the United Nations Act 1945 [Aust] to give effect to Security Council sanctions have all along been subject to the requirement of being tabled before the Parliament in Canberra, with either House of the Parliament

having a right to move for the disallowance of the regulation so tabled.

- In *Canada*, orders and regulations made by the Governor in Council under the United Nations Act (RSC 1985 c U-2) must be laid before the Parliament in Ottawa forthwith after it has been made (or, if Parliament is not then sitting, forthwith after the commencement of the next ensuing session), with both the Senate and the House of Commons having the specific power to resolve annul the order and regulation within 40 days after it has been so laid.

- Several of the regulations made under the UNSO were made months after the relevant Security Council sanction-prescribing resolution was adopted.

Therefore, the HKBA considers that one rationale put forward by the Administration for having s 3(5), namely the timely implementation of Security Council sanctions, is not supported in overseas Parliamentary practice, particularly the practice adopted by common law jurisdictions with a written constitution, and in actual implementation of the UNSO.

33. Given that the HKSAR was acting under pressure in the first weeks of its establishment to have in place legislation to give effect to CPG directives for

the implementation of Security Council sanctions, the UNSO was introduced as a stop-gap measure and should continue to be so understood. See the Administration's press release on 8 July 1997, which described the relevant Bill as being introduced "[to] minimize the gap between the lapse of the previous measures and the introduction of the replacement ones". The HKBA therefore is of the view that it is eminently desirable for the Administration and the Legislative Council to review together the UNSO to ensure that the implementation of Security Council sanctions in Hong Kong is carried out in an efficient, effective, transparent and accountable manner.

34. Having reviewed a number of regulations made under the UNSO, the HKBA is of the view that it is useful for the Administration and the Legislative Council to consider in any review along the lines suggested in the preceding paragraph the additional matter of clarifying the power of the Chief Executive under s 3(1) in respect of the following matters –

- The application of provisions of the regulation to persons or entities in respect of their activities outside the HKSAR;

- Powers of investigation (including search and detention of persons, vehicles, ships and aircrafts);

- Powers of seizure and forfeiture;

- The delegation or authorization of delegation of powers or functions provided under the regulation.

UNSO: Section 2

35. Lastly, the HKBA turns to the question of whether regulations made under the UNSO, in so far as they are directed at persons, undertakings or entities, are made outside the scope of the power vested upon the Chief Executive in the UNSO.

36. The crux of the question appears to lie in s 2(2) of the UNSO, which refers as a "relevant instruction" for the purposes of s 3(1), an instruction given by the MFA to the Chief Executive to implement specified sanctions "against the place" specified therein.

37. Section 2(2) of the UNSO can be readily construed as covering measures which will involve the creation of offences that may be committed by natural persons

and corporations in Hong Kong. If there are no laws prohibiting relevant exports from Hong Kong to a place outside the PRC, international sanctions cannot be made to work.

38. However, at least one regulation made under the UNSO implements Security Council sanction measures not on a place, but person or groups of persons. Usama Bin Laden and the Taliban organization are identified as "relevant persons" in s 1 of the United Nations Sanction (Afghanistan) Regulation (Cap 537 sub leg K) and offences are created in respect of their movement or the provision of assistance to them, for example, s 3A(1), which prohibits a relevant person entering Hong Kong and s 3(1) which prohibits giving assistance to a relevant person, wherever he or she might be.

39. It is clear that United Nations Security Council resolutions can be phrased in such a way as to enjoin states to take action against a place or against a person or persons associated with a place. See, for example, United Nations Security Council Resolution 1390, which in section 1 called specifically for measures to be put in place to prevent Usama Bin Laden and the Taliban travelling and being provided with assistance.

40. The HKBA is concerned that the UNSO may be drawn too narrowly if the

intention behind the Ordinance is to give effect to United Nations Security Council resolutions covering both places and persons associated with places. Although the intention behind the Ordinance is to give effect to resolutions about matters of great concern to the international community and legislation giving effect to international obligations must be construed in such a way, if possible, to be consistent with those obligations, nonetheless the regulations made under UNSO create serious criminal offences (see the UNSO s 3(3) prescribing maximum penalties of unlimited fines and imprisonment for seven years) and a competing principle is therefore in play, which is that no one shall be subject to a criminal penalty except under a clear law.

41. The HKBA notes, not without irony, that such a question of proper drafting is exactly the kind of problem that would be picked up by a legislature permitted to scrutinize a Bill and relevant subsidiary legislation.

Dated 20 October 2007.

Hong Kong Bar Association