

## HONG KONG BAR ASSOCIATION

### VIEWS ON THE UNITED NATIONS SANCTIONS (LIBERIA) REGULATION 2003

1. The UN Sanctions (Liberia) Regulation 2003 ('the Regulation') has been made under section 3 of the UN Sanctions Ordinance, Cap. 537 (UNSCO) by the Chief Executive (CE) on the instructions of the Ministry of Foreign Affairs. A Legco sub-committee formed for the purpose of considering the Regulation has raised a question of constitutionality about the process under which the Regulation was made. It has asked the Bar Association to consider the matter.

#### The United Nations Sanctions Ordinance, Cap. 537

2. UNSCO is a short ordinance. It enables sanctions imposed by the United Nations to be translated into domestic law. That is its purpose: see Long Title.
3. The word 'sanction' is defined in section 2(1) UNSCO as *including* a complete or partial economic trade embargoes, arms embargoes, and other mandatory measures decided by the Security Council of the [UN], implements against a place outside the [PRC].
4. The mechanism for translating sanctions into HK law is a two-stage process.
5. In the first place there is a 'relevant instruction' (See section 2(2) UNSCO) to the CE from the Ministry of Foreign Affairs, the 'instructing authority' (section 2(1) UNSCO) to implement the sanctions mentioned in the instruction. As noted above, the definition of 'sanction' is not an exclusive definition and so is not strictly limited to those measures decided upon by the Security Council of the UN.
6. Then the CE makes 'regulations' giving effect to the instruction: s. 3(1). He has no discretion in the matter: *The [CE] shall make regulations to give effect to a relevant instruction.*
7. The regulations in this case are the Regulation which imposes restrictions on trade with Liberia. These restrictions are backed up with penal measures, including fines and imprisonment that have their source in section 3(3) UNSCO.

#### The Legislative Status of the Regulation

8. The word 'regulations' appearing in an ordinance normally attracts the meaning given that word by section 3 Interpretation and General Clauses Ordinance, Cap. 1 (IGCO) unless a contrary intention appears (section 2(1) IGCO). The meaning of 'regulations' in section 3 IGCO is 'has the same meaning as subsidiary legislation and subordinate legislation'.

9. Those terms are defined elsewhere in section 3 and they include regulations 'made under or by any Ordinance and having legislative effect'.
10. There can be little doubt, given the nature of the restrictions contained in the Regulation and the fact that it contains criminal offences, that the Regulation has, and was meant to have, 'legislative effect. It is 'subsidiary legislation' within the meaning of IGCO.
11. However, section 3(4) of UNSCO disapples sections 34 and 35 IGCO which require, respectively, the placing of subsidiary legislation before Legco for scrutiny (negative resolution) and the placing of subsidiary legislation before Legco for approval (positive resolution).
12. This provision removes the traditional oversight by Legco of delegated powers to make laws by a donee of those powers. The question is whether this is constitutional.

#### The Making of the Regulation

13. The CE has purported to act on a 'relevant instruction' within the meaning of section 2(2) UNSCO. That means that by making the Regulation he has represented to Legco that he has received an instruction from the instructing authority that conforms with the definition of 'relevant instruction'.
14. The Administration will not produce the 'relevant instruction' to Legco and have offered no explanation for the refusal.
15. The situation is therefore that Legco has to take it on trust that the donee of the power to make regulations having legislative effect has in fact understood the nature of the relevant instruction and, in making the Regulation, has gone so far, and no further, to implement the same.
16. The Bar Association assumes that the unwillingness of the Administration to reveal the relevant instruction would be reproduced if a judicial challenge to the Regulation were made in a judicial review.
17. The issue could arise in a case where administrative or prosecutorial action were taken under the Regulation and a *prima facie* case could be made out that the UN Resolution (1478 of 2003), the text of which is freely available, only required measures to be applied in respect of particular goods and services and the Regulation goes further than the UN resolution. Given the non-exclusive nature of the definition of 'sanction' at section 2(1) that is a possibility.
18. This person would, like Legco, presumably be refused sight of the 'relevant document'. But seeing that document would be the only way that he or she would know whether the measure was one which was authorised by the relevant instruction. In other words he would have to take it on trust that the Regulation was made lawfully.

19. Subsidiary legislation can, of course, be challenged by judicial review on the ground that the delegate has exceeded his powers: see *Bennion, Statutory Interpretation, (4<sup>th</sup> edn)* at pp. 208-215. It is axiomatic that in such a challenge the court is able to scrutinise every step taken by the donee of the power required by the law. That would mean the court scrutinising the text of the 'relevant instruction' in order to see whether it has been lawfully implemented.
20. Subsidiary or subordinate legislation is a type of law recognized by the Basic Law (BL): see Articles 8, 56 and 62 where it is specifically mentioned.
21. The Bar Association will assume that Legco can, consistently with the Basic Law, enact a provision like section 3(5) UNSCO and deny to itself the power to scrutinise subsidiary legislation. (Whether it ever should do so is a different question.)
22. If Legco is able to donate the power to legislate to the CE with no strings attached the later refusal to produce the relevant instruction is at least consistent with that donation.
23. Of more concern would be a refusal to produce the document to the court in a situation where, because of action of the kind described above, the *vires* of the Regulation was in issue. The courts have not relinquished any relevant power. In fact, consistent with Article 85 BL, they have a duty to exercise judicial power independently 'free from any interference'.
24. The Bar Association does not wish to speculate on whether the Administration would refuse to disclose a relevant instruction to a court and if so, on what grounds. That is a matter for the Administration to comment upon. However, the Bar Association can see a judge staying a prosecution for an offence under the Regulation if it was not produced to an accused person so that he or she could satisfy himself that a prosecution commenced against him had a solid legal foundation.
25. It seems to the Bar Association that the Administration needs to answer the question whether, upon a challenge to a court about the lawfulness of the Regulation, it would say that the court is precluded from examination of the relevant instruction. If a court is so limited in its powers, the Administration needs to further explain the constitutional basis of this limitation. If it accepts that a court could inspect the document it needs to explain why, if there is no constitutional limitation as regards courts at least, Legco cannot have sight of it.

Hong Kong Bar Association

16<sup>th</sup> March 2004

Our Ref : CIB CR 41/08/4 IV

Tel : 2918 7490  
Fax : 2530 5966

28 April 2004

Clerk to Subcommittee on  
United Nations Sanctions (Liberia) Regulation 2003  
Legislative Council  
Legislative Council Building  
8 Jackson Road  
Hong Kong  
(Attn: Mr Raymond Lam)  
By Fax : 2509 0775

Dear Mr Lam,

**Subcommittee on  
United Nations Sanctions (Liberia) Regulation 2003**

Thank you for your letter of 18 March 2004 enclosing a submission from the Hong Kong Bar Association (“the Association”). I set out below our response to the issues raised therein.

**Disclosure of Relevant Instruction to the Court**

2. The Association asked the Administration whether, upon a challenge to a court about the lawfulness of the United Nations Sanctions (Liberia) Regulation 2003 (“the Regulation”), it would say that the court is precluded from examination of the relevant instruction from the Ministry of Foreign Affairs (“the relevant instruction”). The Administration’s view is that the relevant instruction would be protected from disclosure under the doctrine of public interest immunity. That said, the Administration accepts that the question whether the public interest required the

withholding of the relevant document is ultimately a matter for the court to determine. If there is a challenge on the vires of the Regulation and if the court is satisfied that the relevant instruction is likely to give substantial support to the case and asks for inspection, the Administration would be prepared to submit the relevant instruction to the court for inspection for a determination as to whether the relevant instruction should or should not be disclosed. This common law doctrine is maintained as part of the laws of the Hong Kong Special Administrative Region by virtue of Articles 8, 18 and 160 of the Basic Law (BL).

### **Disclosure of Relevant Instruction to LegCo**

3. The Association also asked the Administration to explain the constitutional basis as to why LegCo could not have sight of the relevant instruction. As aforementioned, it is the Administration's view that the relevant instruction would be protected under the common law doctrine of public interest immunity. Similarly the relevant instruction would be protected from disclosure to LegCo under BL48(11) which entrusts the Chief Executive with the power and function to "decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees". When BL48(11) is construed in the common law context, this provision would be wide enough to cover those documents that could be withheld from disclosure under the common law doctrine of public interest immunity.

Yours sincerely,

(Mrs Philomena Leung)

for Secretary for Commerce, Industry and Technology

c.c.

DoJ

Attn

Mr Peter H H Wong

Mr John Hunter

Fax

2869 0720

2877 2130