

**Regulations made under the United Nations
Sanctions Ordinance (Cap 537)**

**Response of the Administration to the Views of the Hong Kong Bar Association
dated 20 October 2007**

Introduction

This paper sets out the response of the Administration to the Views of the Hong Kong Bar Association (“HKBA”) dated 20 October 2007 (“the Submission”) on the United Nations Sanctions Ordinance (Cap 537) (“UNSO”). The Submission addresses the following two issues arising from the Report of the Legislative Council (“LegCo”) Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions (“the Report”) (see para. 11 of the Submission):

- a) whether the legislature of the Hong Kong Special Administrative Region (“the HKSAR”) may enact s3(1) and (5) of the UNSO to empower the Chief Executive (“CE”) to make regulations that will not subsequently be subject to either negative or positive vetting by the legislature (“the constitutionality issue”);
- b) whether regulations made under the UNSO, insofar as they are directed at persons, undertakings or entities, are made outside the scope of the power vested upon the CE in the UNSO (“the vires issue”).

The Constitutionality Issue

2. It is noted that the HKBA’s specific comments are substantially influenced by their view on the doctrine of separation of powers. Therefore, before responding to the specific issues raised in the Submission, the Administration wishes to set out its view on this important issue.

3. As summarised in para. 4 of the Administration’s paper dated 21 June 2005 (CB(1)1934/04-05(01) attached as Appendix IV to the Report):

- a) While there is division of powers and functions among various organs of the HKSAR under the Basic Law, the Basic Law does not institute a rigid separation of powers.
- b) Therefore, while LegCo is entrusted with the power and function to enact laws, the Basic Law does not prohibit the delegation of a law-making power/function to other bodies or persons to make sub-leg, which is clearly contemplated by BL 56(2), BL 62(5), BL 8 and BL 18.
- c) In line with the theme of continuity of the Basic Law and s 2(1) of Cap 1, LegCo may disapply s 34 (negative vetting procedure) and s 35 (positive vetting procedure) of Cap 1 in relation to sub-leg made by the CE under and in accordance with s 3 of the UNSO to give effect to the relevant directive of

the Central People's Government ("CPG") and implement the relevant United Nations Security Council ("UNSC") sanction.

- d) It is considered that sufficient guidance is laid down in the UNSO as to how the CE may exercise his powers/functions under the UNSO.
4. To the above, the following can be added:
- a) It has been noted by leading English constitutional commentators that "[t]here is no, and never has been, a strict separation of powers in the English constitution in the sense that legislative, executive and judicial powers are assigned respectively to different organs."¹
 - b) In the Hong Kong context, the powers and functions of, and relationship among, the executive authorities, the legislature and the judiciary of the HKSAR are clearly specified in the *Basic Law*.² It can be seen that an executive-led government is the central theme of such provisions in the *Basic Law*. Moreover, under the *Basic Law*, the Judiciary exercises judicial power independently, free from any interference.
 - c) In the CFI's judgment in *Leung Kwok Hung v. President of LegCo and SJ* (HCAL 87/2006), para. 66 and 67, Hartman J commented as follows: "the executive, the administration and the legislature are each to perform their constitutionally designated roles in a co-ordinated and co-operative manner for the good governance of Hong Kong" and that "Hong Kong has an executive-led government". As regards the legislature, he commented as follows (para. 5 of the Judgment): "Being subordinate to the Basic Law, LegCo must, of course, act in accordance with that Law."
 - d) Under BL 13(1), the CPG shall be responsible for the foreign affairs of the HKSAR. The principle of executive-led government coupled with CE's constitutional function under BL 48(8) to implement CPG's directives in matters of foreign affairs provide additional support to the justification for the disapplication provision in Cap 1.

5. Reliance has been placed by HKBA on the decision of the South African Constitutional Court in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (Case No CCT 27/95) (*Executive Council (1995)*). It refers to the comparative survey conducted by the Court (see in particular para. 51 – 61 of *Executive Council (1995)*) and the divergent approaches to the doctrine of separation of powers in the United States and Ireland on the one hand and some leading Commonwealth countries (including Canada and Australia)

¹ See O'Hood Phillips and Jackson, 'Constitutional and Administrative Law' (8th Ed, 2001), paragraph 2-020.

² According to the *Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)" and its Related Documents* presented by Ji Pengfei at the Third Session of the Seventh National People's Congress on 28 March 1990, the relationship between the executive authorities and the legislature should be that of check and balance as well as coordination.

on the other hand. The HKBA's preferred approach in the light of the political system under the Basic Law is set out in para. 26 of the Submission as follows:

“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”.

6. With respect, insufficient regard has been given to the theme of continuity of the Basic Law in general and the common law system of the HKSAR in particular. (See, eg, the discussion on the theme of continuity of the Basic Law by the Court of Appeal in *HKSAR v David Ma* [1997] HKLRD 761).

7. Moreover, whilst *Executive Council (1995)* is South African authority on the issue of impermissible delegation of legislative powers by Parliament to the President, it is not a direct authority on the issue of whether a legislature's power of scrutiny could lawfully be disapplied in suitable cases.

8. In *Executive Council (1995)*, a widely drawn provision is provided in Section 16A of the Local Government Transition Act so that “[t]he President may amend this Act and any Schedule thereto by proclamation in the Gazette”. In the majority judgment of the President of the Constitutional Court, Chaskalson P has held as follows (para. 62):

“... [Parliament] is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication. ... An unrestricted power to amend the Transition Act itself cannot be justified on the grounds of necessity, nor can it be said to be a power which by necessary implication is granted by the Constitution to the President. Sections 59, 60 and 61 of the Constitution [which prescribe the basic procedures for the introduction and enactment of bills] are part of an entrenched and supreme Constitution. They can only be departed from where the Constitution permits this expressly ...or by necessary implication. In the present case neither of these requirements is present.”

9. It is clear from the above that the South African judgment does not address directly the constitutionality of a disapplication provision. In any event, the constitutionality issue would need to be considered under the applicable constitutional instrument and its constitutional history. As pointed out by Chaskalson P after the above-mentioned comparative survey on the issues of separation of powers and delegation of law-making power to the executive (at para. 61):

“This brief and somewhat limited survey of the law as it has developed in other countries is sufficient to show that where Parliament is established under a written constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history. ...”.

10. In view of the above, whilst comparative jurisprudence provides useful reference, the constitutionality issue must ultimately be resolved in the light of the HKSAR's constitutional instrument, the Basic Law, particularly where the legal positions of other common law jurisdictions to the issue are divergent. We turn now to the specific comments of the HKBA in para. 14, 18-19, 29-30 and 32 of the Submission on the constitutionality issue.

11. As to the questions raised by in para.14 of the Submission:

- a) The legislature of the HKSAR is competent to enact laws on matters relating to "foreign affairs" insofar as it is so empowered in accordance with the Basic Law.
- b) Article 73(1) of the Basic Law provides that the LegCo of the HKSAR shall exercise the power to enact, amend and repeal laws *in accordance with* the provisions of the Basic Law and legal procedures.
- c) Article 17(3) of the Basic Law provides that where the Standing Committee of the National People's Congress ("NPCSC") considers that any law enacted by the legislature of the HKSAR is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities (including "foreign affairs") or regarding the relationship between the Central Authorities and the HKSAR, the NPCSC may return the law in question.
- d) Article 13 of the Basic Law provides that the CPG shall be responsible for the "foreign affairs" relating to HKSAR. Article 153(1) of the Basic Law provides that the application to the HKSAR of international agreements to which the People's Republic of China ("PRC") is a party shall be decided by the CPG, in accordance with the circumstances and needs of the HKSAR, and after seeking the views of the Government of the HKSAR.
- e) The Basic Law also provides that the CE and the Government of the HKSAR can make subordinate legislation (see Articles 56(2) and 62(5)) and that the CE has the duty and power to implement the directives issued by the CPG in respect of the relevant matters provided for in the Basic Law (Article 48(8)).
- f) The Basic Law does not draw a distinction between (a) exercising legislative power in respect of a matter of foreign affairs and (b) exercising legislative power in respect of the modalities for the domestic implementation of a treaty obligation.
- g) As regards the UNSO, as the CPG decided to apply to the HKSAR the international obligation of the PRC under Chapter 7 of the United Nations Charter to implement UNSC sanctions, the legislature in Hong Kong is competent to enact laws in relation thereto pursuant to the provisions of Basic Law, including the aforementioned Articles 13, 17, 48, 56, 62, 73 and 153.

12. As to para. 18 and 19 of the Submission:

- a) The instruction given by the CPG to the HKSAR is to take measures to implement the relevant UNSC resolution. After the full set of draft regulation is prepared by the HKSAR Government, it would be forwarded to CPG for comment. After considering the full set of draft regulation, the CPG would inform the HKSAR Government that they endorse the draft regulation as the appropriate measure to implement the relevant UNSC resolution. It is after HKSAR Government receives the CPG's approval of the terms of the draft regulation that the draft regulation is tabled before the Executive Council.
- b) What is stated above is a directive within the meaning of Article 48(8) of the Basic Law, in respect of the relevant matters provided for in the Basic Law, namely, foreign affairs for which the CPG is responsible as stated in Article 13 of the Basic Law.
- c) This directive, which the CE is duty-bound to implement, includes the specific instruction to the CE to make regulations in accordance with the entire set of the draft regulations (consisting of provisions on offences, penalties and investigation powers) duly approved by the CPG.

13. As to para. 29 and 30 of the Submission:

- a) As stated above, the rigid approach to the issues of separation of powers and delegation of law-making powers adopted by the South African Constitutional Court is not applicable to the HKSAR's constitutional context.
- b) However, even assuming that the list of relevant factors outlined by Sachs J is applicable to the HKSAR, the arrangement under the UNSO is plainly within the constitutional limits of the HKSAR (as the HKBA also appears to be inclined to that view – see the various points grouped under para. 30 of the Submission).
- c) In relation to matters related to foreign affairs, and more specifically the implementation of UNSC sanctions, the legislature of the HKSAR has competence to legislate thereon through the UNSO pursuant to the provisions of the Basic Law, after the CPG decided to apply the PRC's international obligations under the United Nations Charter to the HKSAR. This is supplemented by the specific directives issued by the CPG to the CE to implement the relevant UNSC sanctions.
- d) As pointed out by the HKBA, the UNSO contains a legislative determination of principles and policies. Thus, the legislature of the HKSAR has in fact controlled the power of the CE in making the regulations by putting specific restrictions on maximum penalties and prescribing the scope of application through the UNSO. The regulation of course cannot go outside the UNSC resolution itself. Further, CPG has vetted the regulation and approved it. There will be little room for abuse.

- e) As regards the 5th and last bullets in para. 30 of the Submission, LegCo may not exercise ex post facto control over the terms of a particular regulation as it has been approved by the CPG as measures it considers necessary to discharge the PRC's international obligation.
- f) In this connection, it should be pointed out that the CE is under the constitutional duties (i) of accountability to the CPG (BL 43(2)) and (ii) to implement relevant CPG directives (BL 48(8)). It is therefore necessary for the CE to closely liaise with the CPG to ensure that the draft regulations would implement adequately and effectively the relevant UNSC sanctions in accordance with CPG's directives.
- g) Further, as pointed out by the HKBA, the subject matter of the UNSO necessitates the use of forms of rapid intervention.
- h) Moreover, despite the disapplication provision, regulations made under the UNSO by the CE are gazetted before they can take effect, and LegCo briefs are prepared to inform Members about the regulations. They are also examined by the LegCo subcommittee (the Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions), with the assistance of government officials where appropriate. This is in addition to LegCo's power to debate and discuss with the Administration on issues pertaining to the general topic of implementation of UNSC sanctions (mentioned in the last bullet of para. 30 of the Submission).

14. As to para. 32 of the Submission:

As regards the comparative survey and the need for speedy implementation of UNSCRs (as discussed in para. 32 of the Submission), the Administration wishes to respond as follows:

- a) Before the Reunification, UN sanctions were implemented by the UK Government in Hong Kong by way of HM's Orders in Council under the United Nations Act 1946 of the UK. What the HKBA has not pointed out regarding the UK position is that although the Orders in Council implementing the UNSC sanctions are laid before the Parliament, they are not subject to any Parliamentary procedure. In other words, neither the UK Parliament nor the Hong Kong Legislative Council had any power to amend or repeal such Orders.
- b) After the Reunification, the UNSO was enacted. Section 3(5) of the Ordinance excludes LegCo's power to amend or repeal any regulations (made by the CE under the UNSO) in accordance with sections 34 or 35 of the Interpretation and General Clauses Ordinance (Cap 1). There is no change in respect of the powers of the Legislature in relation to the implementation of UNSC sanctions in Hong Kong before and after the Reunification.

- c) The disapplication of sections 34 and 35 of Cap 1 also serves the purpose of ensuring that a resolution of the UNSC can be implemented by domestic laws with the least possible delay. It should be noted that many of the UN sanctions are ad hoc in nature and are time limited, and prompt implementation is needed to ensure the effectiveness of the sanctions. That there have been delays in the making of the regulations in the past does not negate the need to ensure prompt implementation of the sanctions, as was intended when the UNSO was enacted. Moreover, steps have now been taken to speed up the making of regulations after the relevant instructions are received.

The Vires Issue

15. At para. 38 of the Submission, the HKBA observes that “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 organisation are identified as “relevant persons” in s1 of the United Nations Sanction (Afghanistan) Regulation (Cap 537 sub leg K) (“the Afghanistan Regulation”) and offences are created in respect of their movement or the provision of assistance to them, for example, s3A(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”.

16. The Administration does not consider that the measures against Usama Bin Laden and the Taliban take the Afghanistan Regulation outside the scope of sanctions “against a place” within the meaning of s2(1) of the UNSO.

17. In the context of the UNSO, it would be too restrictive to view sanctions “against a place” in isolation from the persons/entities who operate there or who have a connection with that place. In practice, sanctions against a “place” will necessarily include sanctions targeted at the activities or conduct of individuals or entities in that place or having a connection with that place.

18. In the case of Afghanistan, the use of Afghanistan, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts gave rise to a threat to international peace and security. UNSC resolutions 1267, 1333 and 1390 created a package of sanctions in order to deal with the problem. The Taliban, Usama bin Laden and his associates are key contributors to the security threat posed by Afghanistan, and measures against them form part of the package of sanctions against Afghanistan.

19. As the HKBA noted in para. 39 of the Submission, UNSC 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. As the UNSO is the legislative tool to implement those UNSC sanctions, the legislative intention behind the UNSO plainly is to have regulations covering both places and persons associated with those places.

Conclusion

20. The Administration would like to summarise its position on the constitutionality and vires issues (as set out in para. 1 of this paper) as follows:

- a) it is within the constitutional competence of the legislature of the HKSAR to enact s3(1) and (5) of the UNSO to empower the CE to make regulations that will not subsequently be subject to either negative or positive vetting by the legislature;
- b) whilst the Administration will continue to pay due regard to the vires issue when making sub-leg under the UNSO, it is considered that the Afghanistan Regulation (made under the UNSO and referred to in para. 15 above), insofar as it is directed at persons or groups of persons, are made within the scope of the power vested upon the CE in the UNSO.

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