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By fax and by hand
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20 December 2006

Ms. Kitty Fung
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Legal Policy Division
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1/F High Block, QGO
Hong Kong.

Dear Ms. Fung,

Consultation Paper on Domicile Bill 2006

I refer to your letter dated 17 May 2006.

I enclose herewith a copy of comments of the Hong Kong Bar Association on the Consultation Paper on Domicile Bill 2006 for your consideration which was resolved at the Bar Council Meeting held on 14 December 2006.

Yours sincerely,

Philip Dykes SC
Chairman

/al
Encl.

HONG KONG BAR ASSOCIATION 'S COMMENTS ON CONSULTATION PAPER ON THE DOMICILE BILL 2006

BACKGROUND

1. In May 2004, the Bar was invited by the Law Reform Commission to comment on the Consultation Paper on Rules for Determining Domicile prepared by its Domicile Sub-committee. The Bar's submissions were delivered in June 2004. By letter dated 2nd February 2005, the Law Reform Commission replied to the points raised by the Bar. In April 2005, the Law Reform Commission published a report on "Rules for Determining Domicile" ("the Report"). The Report reviewed the existing domicile rules, (see Chapter 1), discussed the problems and anomalies arising from those rules (see Chapter 2) and made recommendations for reform (see Chapters 3 – 5).

2. The object of the Domicile Bill 2006 ("the Bill") is to simplify the common law rules for determining a person's domicile by implementing the recommendations set out in the Report. It is anticipated that the new law would not change the domicile of many people. The principal changes lie in the following aspects:-

- (1) The concept of domicile of origin will be abolished.
- (2) The domicile of children will no longer be tied strictly to the parents' domicile.
- (3) A married woman's domicile will no longer depend on that of her husband.

THE BAR'S COMMENTS

3. The Bar's comments on the Bill are set out in the following paragraphs.

Clause 4: Domicile of children

4. Clause 4 seeks to abolish the traditional rules regarding domicile of origin and domicile of dependency of children. The Bar in its 2004 submissions supported this approach. Under the Bill, a child is domicile in the country or territory with which he is "most closely connected".
5. Clause 4(2) expressly stipulates that the intention of the child can be taken into account in determining which country or territory he is most closely connected with. The "closest connection test" in Clause 4 of the Bill appears similar to the test governing proper law of a contract in the absence of an express choice of law clause. In that context, there is

uncertainly as to whether the court should treat the “closest connection test” as a purely objective test so that the element of subjective intention should not be taken into account (see *Chitty on Contracts*, 29th Ed., Vol. 1, 30-004). Further, according to Article 3 of the Rome Convention, the test is purely objective and does not involve the consideration of intention of the parties.

6. The Bar agrees that the intention of the child should be taken into account for the following reasons:-

(1) Insofar as the “closest connection test” is concerned, the approach for domicile should be different from that for proper law because:-

(a) In the context of proper law, the court ceases to look for the intention of the parties (since they are presumed to have no intention on the point in the absence of any express choice of law provision). However, a person should normally have his own intention as to where he intends to reside.

(b) Further, it is unlikely that the subjective intentions of the parties will be of much assistance in determining the proper law of a contract as each party is bound to have its own preference.

- (2) There is no reason why intention of children should be ignored in the context of domicile whilst their wishes are taken into account by the court in considering the question of custody in matrimonial proceedings.
7. Clause 4(2) states that the court shall take into account all relevant factors in determining which country or territory a child is most closely connected with. However, it appears from Clauses 4(3) and (4) that the country or territory of closest connection will be primarily determined by two presumptions, which can be rebutted when the contrary is proved. Hence, the Bar suggests that Clause 4(2) be expressly made subject to Clauses 4(3) and (4).
8. Further, in relation to Clause 4(2), it is unlikely that a child is able to “make a home”. The Bar suggests that the phrase “make a home” be amended. Perhaps, the phrase “have a home” can be considered.

Clause 7: domicile in another country or territory

9. Clause 7 stipulates that in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, “one of the factors that

should be considered is whether his presence in that country or territory is lawful by the law of that country or territory”. However, the effect of the issue regarding the lawfulness of his presence is unknown. In the context of Clause 6, unless exceptional circumstances can be shown, an adult does not acquire a domicile in Hong Kong unless he is lawfully present in Hong Kong. It is unclear from Clause 7 as to whether the proposed legislation intends to take a similar approach in deciding whether an adult acquires a domicile in another country.

Clause 11: burden of proof

10. According to Clause 11, any fact that needs to be proved for the purposes of this Ordinance shall be proved on a balance of probabilities. However, it should be noted that under Clause 6(2), an adult’s presence in Hong Kong shall be presumed to be lawful “unless the contrary is proved”. It is necessary to consider if a flexible civil standard is required when it comes to proof of unlawfulness of a person’s presence, which would have the effect of denying his acquisition of a domicile in Hong Kong (see *R v Home Secretary, ex p Rahman* [1998] QB 136 at 173 C-D).

The phrase “for the time being” used in some provisions

11. It is unclear as to whether the phrase “for the time being” as contained in Clauses 4, 8 and 10 is intended to serve any particular purpose. If it is intended to exclude the effect of the concept of domicile of origin under the traditional rules, what is set out in Clause 13 should already be sufficient. Further, on the assumption that there is a particular need to insert the phrase, there seems to be a lack of consistency in the use of the same. To say the least, there is no reason why it does not appear in Clauses 4(3) and (4).

Dated 19th December 2006.