Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation

Administration's Response to the Views of the Hong Kong Bar Association dated 8 April 2011

The submission of the Hong Kong Bar Association ("HKBA") dated 8 April 2011 ("the submission") was discussed at the meeting of the Subcommittee held on 20 April 2011. The Subcommittee has asked the Administration to provide a detailed response to the submission, in particular paragraph 29 of the submission and its footnote.

General comments

2. The Administration agrees with HKBA's interpretation of sections 28(1)(b) and 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO"). This interpretation does not undermine the role of the Legislative Council (LegCo) as the legislature of Hong Kong under the Basic Law. This is because the power to make subsidiary legislation must have been delegated by LegCo to an executive authority or other body through a parent legislation in the first place for a legitimate reason. In enacting the parent legislation, LegCo can determine whether the executive authority or other body should be given power to make the subsidiary legislation. Once enacted, all persons and institutions would be bound by the law, including both the delegate and the delegator.

3. We share HKBA's views that it may not always be easy to differentiate between a legislative and an administrative instrument. Therefore, since October 1999, the Administration has adopted the approach whereby, in cases where there may be doubt as to the nature of an instrument to be made pursuant to an ordinance, an express provision would be included indicating whether the instrument is subsidiary legislation or not. Whether or not an instrument should have legislative effect may be subject to further discussion in the relevant Bills Committee depending on the circumstances of each case.

4. As discussed in the Administration's paper entitled "*Principles Underlying the Cases Quoted in the LegCo Secretariat's Information Paper LC Paper No. CB(2)852/10-11"* (LC Paper No.CB(2)1558/10-11(02), both local and other common law authorities have identified general criteria for determining if an instrument has legislative effect[1]. To recap, these criteria include -

- whether an instrument extends or amends existing legislation, or alters the common law;
- whether the instrument has general application to the public or a class of public, as opposed to individuals;
- whether the instrument formulates general rules of conduct, with reference to particular cases;
- whether the measure is legally binding, as opposed to providing guidance only;
- whether the instrument is subject to parliamentary control; and
- whether the legislative intent is to treat the instrument as subsidiary legislation.

5. These criteria are non-exhaustive and are not dissimilar to those factors identified by Sachs J of the South Africa Constitutional Court in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (Case No. CCT 27/95)[2]. In the event that the Administration and LegCo differ in their views on whether or not an instrument has legislative effect, the above criteria may form a good basis on which the Administration and LegCo can deliberate and work together to resolve their difference. As noted by the Panel on Administration of Justice and Legal Services in its report to the House Committee, any dispute over whether or not an instrument is subsidiary legislation would ultimately have

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[1] See paras. 3 – 5 of the Administration's paper.

[2] Those factors mainly concerned time and effectiveness. See the discussion in para. 32 of the submission. The case dealt with the issue of impermissible delegation of the legislative powers by Parliament to the President and must be construed in the context of the South African Constitution.

to be decided by the court[3].

6. HKBA is of the view that the current provisions for LegCo's power to amend subsidiary legislation, namely, sections 34 and 35 of the IGCO do not have to be changed. What HKBA considers to be problematic is when the primary legislation excludes the application of sections 34 and 35 altogether. In particular, HKBA refers to section 3(5) of the United Nations Sanctions Ordinance (Cap. 537) ("UNSO"). HKBA has expressed its views on the UNSO on another occasion and the Administration has commented on HKBA's views[4]. It would not be necessary for us to repeat either side's views here.

7. Insofar as the disapplication of sections 34 and 35 of the IGCO is concerned, it must be reiterated that disapplication is the exception, not the norm. The proposal to disapply sections 34 and 35 would be subject to close scrutiny by LegCo and the relevant Bills Committee. It is extremely unlikely that the proposal would get through LegCo unless the Administration can establish to the satisfaction of Members that there are cogent and concrete reasons justifying the disapplication of the vetting procedures. It however remains within the power of LegCo to disapply sections 34 and 35 of the IGCO where the legislature is satisfied that it is appropriate and justifiable in the circumstances to disapply the vetting procedures[5].

Specific comments

Differences in interpretation

8. The Administration shares HKBA's views that where LegCo and the Administration differ on the interpretation of an empowering provision which limits LegCo's power to amend the subsidiary legislation, it would be good practice for both sides to substantiate their position with full legal reasons, and engage in deliberations that are timely, open and transparent to the public. The Administration will endeavour to work more closely with the Legal

[3] See LC Paper No. CB(2)990/04-05, para. 19.

[4] See HKBA's comments in LC Paper No. CB(1)108/07-08(01) and the Administration's response in LC Paper No. CB(1)144/07-08(01).

[5] In the UK, some statutory instruments are merely to be laid and there is no vetting procedure applicable to those instruments. See Wade, H.W. & Forsyth, C.F., *Administrative Law*, (10th ed.), New York: Oxford University Press, 2009, p. 766.

Advisor of LegCo to identify potential differences and possible remedies.

9. It is the view of HKBA that judicial determination should be seriously considered if the difference between the LegCo and the Administration on the interpretation of a provision cannot be resolved[6]. The Administration does not dispute that generally speaking, legal proceedings (including judicial review applications where appropriate) are often the ultimate method to resolve disputes between parties and should be seriously considered. That notwithstanding, it is well established that judicial review should normally be considered as a remedy of last resort where the parties have exhausted all other methods to resolve their differences or settle their disputes.[7] The remedy is of discretionary nature and would be refused if it can bring no practical benefits to the parties.

10. In the case of the Country Parks (Designation)(Consolidation) (Amendment) Order 2010[8], the crux of the issue is whether five hectares of the country park land should be used as landfill site. Realising the strong local objections to the proposed use of a portion of country park as landfill site, the Environment Bureau has conducted a review and assessment of the ways as to how the solid waste disposal problem could be dealt with. Having taken all matters into account, the Administration decided to alter the proposal of the South East New Territories Landfill Extension to dispense with the use of the five hectares of country park land as landfill site. As a result of that decision, there was no longer a need for the Administration to commence legal action to pursue the use of the five hectares of country park land for landfill purpose[9].

11. Different parties may have different views on the interpretation of a statutory provision. Indeed, it is not unusual for different judges sitting on the same appellate court to come to a different interpretation of a particular provision. The fact that different parties may have different views on the proper interpretation of the law does not necessarily mean that the law is invalid. As referred to by the House of Lords in *Factortame Ltd. v Secretary*

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[6] The underlying presumption here is that the LegCo (or the Administration) has made a decision which the other side does not agree. The court would not be involved in any dispute between the LegCo and the Administration during the legislative process where no decision has been made by either party.

[7] *Yeung Chun Pong and Others v Secretary for Justice* [2008] 3 HKLRD 1, para. 62.

[8] This case was referred to in paras. 28-29 of the submission .

[9] For detail of the Administration's reasons not commencing legal action against the LegCo resolution, see the Chief Secretary for Administration's letter to the LegCo President on 4 January 2011.

of State[10], there is a presumption that "the delegated legislation is valid unless and until declared invalid". With the presumption of validity in place, there is no legal uncertainty regarding the LegCo Resolution.

Footnote 13 of the submission

12. HKBA has queried the discrepancy between the "version date" of the BLIS version of Country Parks (Designation)(Consolidation) Order (Cap. 208B) and the historical notes to item 21 of that Order (see footnote 13 of the submission). This is a technical, editorial issue and the Administration's response is set out below.

13. The references to numbers of amending legislation marked in parenthesis at the end of a provision published in the Laws of Hong Kong or BLIS are historical notes[11]. They serve to facilitate users who wish to trace the amendment history of the provision.

14. The LegCo Resolution has been published as a legal notice. As part of the legislative history, the legal notice number of the LegCo Resolution has been included in parenthesis as a note against item 21, the entry for the Clear Water Bay Country Park in the Country Parks (Designation)(Consolidation) Order (Cap. 208B).

15. The "version date" appearing in the BLIS version of Cap. 208B[12] current at the time HKBA submitted its paper was 7 November 2008.[13] This "version date" served to tell a user of BLIS that the contents of the Schedule to Cap. 208B had not been changed since 7 November 2008. As there has been no change to the contents of item 21 since 2008, arguably a user may be confused by the historical note to it listing legal notice numbers that are subsequent to the "version date". Consequently we have reviewed our practice and have changed the version date to 15 October 2010, signifying the

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[10] [1989]2 All ER 692, 702j-703a.

[11] The notes list the ordinance/legal notice numbers in which amendments have been made, or were intended to be made, to the provision. They contain information which the editor (of the Loose-leaf edition of the Laws of Hong Kong) considers useful to the users but they do not form part of the law (please see s. 2(4) and (6) of the Laws (Loose-leaf Publication) Ordinance 1990). The usual practice is for the editor to include in the historical notes references to all amending legislation made in respect of a provision, whether or not they brought about a change in the text, to give users a complete picture of the history of the provision.

[12] BLIS has no official status.

[13] This is the date on which LN 190 of 2008 (the Order designating the Lantau North (Extension) Country Park) came into operation (see item 24 of the Schedule of Cap 208B).

commencement date of the last legal notice (i.e. the LegCo Resolution) made in respect of Cap. 208B.

Administration Wing, Chief Secretary for Administration's Office /
Department of Justice

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