

In so far as the Basic Law guarantees the maintenance of Hong Kong's common law system, the rule of law and the independence of the judiciary, it has been an unqualified success. The more challenging issues have tended to arise from the interface between the two legal systems. Examples include NPCSC's power of interpretation, the implementation of BL 23, the proposed arrangements for the surrender of fugitive offenders and the reciprocal enforcement of judgments. In each of these areas, we must strive to implement 'one country, two systems' in a way that preserves the core values of our legal system. These core values include the rule of law, the independence of the judiciary, the protection of fundamental

human rights, and the integrity and quality of our legal system. Such core values remain intact more than seven years after Reunification. They will remain intact as we seek to resolve outstanding, and new, issues that confront our legal system.



SIDELIGHTS

Members of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress¹

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¹ Adopted at the 1st Meeting of the Standing Committee of the Tenth National People's Congress on 19 March 2003.

Implementation of international agreements

Like many other common law systems, international agreements (or treaties) that apply to the HKSAR do not themselves have the force of law in the domestic legal system of the HKSAR. They cannot be directly invoked before the courts as the source of individual rights. Nor can they be enforced, or relied upon, as conferring any legal rights in the courts.¹

However, the court may look at the relevant international agreement implemented by a statute in order to resolve ambiguities in the statute, even though the statute does not mention the agreement, or does not exactly correspond with the agreement in wording or in effect, or even if the statute is enacted before the application of the agreement.² In general, domestic statutory provisions will be interpreted in the light of and, if possible, in such a way as to be consistent with the relevant international obligations.³ This rule of construction, however, does not apply if the statute is clear and unambiguous.⁴

A way of giving effect in local law to treaty obligations (especially when they require changes to existing laws or when they affect private rights) is to enact specific new legislation. An example is the Child Abduction and Custody Ordinance (Cap 512) which was enacted to implement the Convention on the Civil Aspects of International Child Abduction signed at The Hague. Sometimes, instead of enacting a specific piece of legislation, changes are

made to the existing legislation. For example, a new Part will be added to the Adoption Ordinance (Cap 290) to implement the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (signed at The Hague) when it is applied to the HKSAR.⁵

One of the means to incorporate a treaty is by including the text of the whole or part of the treaty in the schedule to an Ordinance, which will provide that those provisions of the treaty set out in the schedule shall have the force of law in the HKSAR. The Child Abduction and Custody Ordinance as mentioned above is a typical example.⁶

It is also possible that the treaty text is not set out in any schedule to the relevant Ordinance but the treaty obligations are given effect by the substantive provisions of the Ordinance. For example, the Ozone Layer Protection Ordinance (Cap 403) has given effect to the 1985 Vienna Convention for the Protection of the Ozone Layer though the text of the latter has not been scheduled to the Ordinance.

On occasion, principal legislation may provide a framework within which subsidiary legislation may be made to give effect to international agreements. For example, various Orders have been made under the Fugitive Offenders Ordinance (Cap 503) to give effect to various bilateral international agreements on the surrender of fugitive offenders.

¹ *Winfat Enterprises (HK) Co Ltd v Attorney-General of Hong Kong* [1985] 1 AC 733.

² I A Shearer, *Starke's International Law* (Butterworths, 11th ed.), p 71, note 15.

³ Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (Longman, 9th ed.), Vol. 1, p 62.

⁴ See note 2 above, at p 71.

⁵ See the Adoption (Amendment) Ordinance 2004 (Ord. No. 28 of 2004) (which is not yet effective as at 28 February 2005).

⁶ See section 3 of and Schedule 1 to the Ordinance.

Once a treaty has been given effect by local legislation,⁷ it can have effect in domestic law; but it should be noted that the court will apply the provisions in the legislation rather than the provisions in the treaty itself (though, as mentioned above, the treaty may affect the interpretation to be given to the legislation).

The relationship between the Basic Law and the implementation of treaties can be illustrated with reference to a post-Reunification case, *Re Yung Kwan Lee & Others* [1999] 3 HKLRD 316. In that case, it was argued that a provision in an Ordinance which implemented a treaty was unconstitutional. Yung Kwan Lee and the others (“Yung & others”) were Hong Kong permanent residents who trafficked in dangerous drugs in Thailand and were convicted and sentenced by Thai courts. They served part of their sentences in Thailand and were transferred to Hong Kong pursuant to prisoner transfer arrangements created by a treaty between the UK and Thailand before Reunification. Shortly before Reunification, the Transfer of Sentenced Persons Ordinance (Cap 513) (“TSPO”) was enacted to fill the gap which would otherwise be left by reason of the Anglo-Thai treaty, the Repatriation of Prisoners Act 1984 and the Orders-in-Council all ceasing to apply to Hong Kong upon Reunification. Yung & others argued that section 10(1)⁸ of the TSPO was unconstitutional and that their detention

became unlawful upon Reunification.

The CFA held that the pre-Reunification legislature was justified in considering it to be for the “peace, order and good government” of Hong Kong (under Art VII(1) of the Letters Patent) to leave it with a provision like section 10(1) of the TSPO to cover the post-Reunification position of existing transferred prisoners like Yung & others. The CFA also held that the Anglo-Thai treaty was being implemented in Hong Kong at Reunification by means of section 10(1) of the TSPO. The purpose of that provision was therefore a purpose expressly permitted by BL 153⁹ and was maintained by BL 8¹⁰. It followed that the detention for which the provision catered was not arbitrary, unlawful or for the purpose of enforcing a foreign penal law. It was detention for a Hong Kong purpose expressly permitted by the Basic Law. Therefore, section 10(1) of the TSPO was constitutional when enacted prior to Reunification and remained constitutional.



Economic Leaders' Meeting of the Asia-Pacific Economic Cooperation in Shanghai in 2001

⁷ An international agreement may also be implemented by administrative means if the provisions of the international agreement do not need to be given legal effect in the HKSAR.

⁸ Section 10(1) : “Where –

- (a) a sentenced person is in custody in Hong Kong by virtue of a warrant issued under the Repatriation of Prisoners (Overseas Territories) Order 1986 (App. III, p. C1); and
- (b) the sentence to be served by that person has not expired on or before the date on which -
 - (i) any arrangements for the transfer of sentenced persons come into operation between Hong Kong and the place outside Hong Kong from which that person was brought into Hong Kong pursuant to the warrant; or
 - (ii) that Order ceases to be part of the law of Hong Kong,

whichever first occurs, then that warrant shall be deemed to be an inward warrant issued under [the TSPO] on that date in respect of the unexpired portion of that sentence remaining to be served after that date, and the other provisions of [the TSPO] (including section 6) shall be construed accordingly.”

⁹ BL 153 : “... International agreements to which the [PRC] is not a party but which are implemented in Hong Kong may continue to be implemented in the [HKSAR] ...”.

¹⁰ BL 8 : “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the [HKSAR].”



Legal development subsequent to *Yau Kwong Man & Anor v Secretary for Security*

Following *Yau Kwong Man & Anor v Secretary for Security* [2002] 3 HKC 457, the Criminal Procedure (Amendment) Ordinance (Ord. No. 22 of 2004) was enacted on 16 July 2004. This amended the Criminal Procedure Ordinance (Cap 221) (“CPO”) in order to put in place a revised scheme applicable to prisoners (the “prescribed prisoners”) who have been serving discretionary life sentences or serving mandatory life sentences (for murder committed under 18 years of age) or detained at Executive discretion (the “relevant sentences”) since the commencement of, or any time before the commencement of, the provisions in section 67C and in section 67D (both as originally enacted). Those sections previously provided for the determination by the CE (on the recommendation of the Chief Justice) of the minimum terms to be served by such prescribed prisoners.

Under the new section 67C(1) of the CPO, as soon as practicable after the commencement of the provision and in any event within 6 months thereof the Secretary for Justice must, in respect of each prescribed prisoner, apply to the court for a determination by a judge of the minimum term that the prescribed prisoner must serve for his relevant offence.

The new section 67C(4) of the CPO provides

that, where the prescribed prisoner is serving the relevant sentence in respect of the conviction of murder committed when he was under 18 years of age, then, subject to his consent, the judge has the discretion as to whether (a) to make a determination of a minimum term; or (b) to determine instead that the relevant sentence be quashed, and be substituted by a determinate sentence as the judge considers appropriate.

The new section 67C(6) of the CPO provides that if the term determined by the judge as the new minimum term that the prescribed prisoner must serve is longer than the term specified as the minimum term to be served by him under the previous recommendation made by the Chief Justice under the old section 67C (as originally enacted), then the term so determined is, for all purposes, to be treated as equal to the term so specified.

On 18 October 2004, the CFI heard the Secretary for Justice’s first application made under the revised scheme in respect of Lai Hung Wai, one of the two applicants in the case.¹ The judge then gave a fixed-term sentence of 23 years of imprisonment.

As at 23 March 2005, including the above application in respect of Lai Hung Wai, a total of 23 applications have been before the CFI. One of them had been discontinued² under section 67E of the CPO as the prescribed prisoner concerned had ceased to serve the relevant sentence before any determination was made in respect of him. In six applications, judgment was reserved.³ In five applications, the judge had handed down minimum terms.⁴ In the remaining ten applications, the judge had handed down determinate sentences.⁵

¹ HCMP 2208/2004.

² HCMP 2207/2004. This application was in respect of Yau Kwong Man, one of the applicants in the case.

³ HCMP 2184/2004, HCMP 2252/2004, HCMP 2254/2004, HCMP 2255/2004, HCMP 2257/2004 and HCMP 2256/2004.

⁴ HCMP 2242/2004, HCMP 2248/2004, HCMP 2249/2004, HCMP 2250/2004 and HCMP 2251/2004.

⁵ HCMP 2209/2004, HCMP 2211/2004, HCMP 2220/2004, HCMP 2212/2004, HCMP 2213/2004, HCMP 2214/2004, HCMP 2217/2004, HCMP 2216/2004, HCMP 2219/2004 and HCMP 2218/2004.



Travel documents

To many of us, travel documents are, literally, a passport to some great time overseas. But amidst all the excitement of a trip abroad, have you ever given any thought to that little booklet in your hand while waiting for your flight in the departure hall? Check out some useful information on our travel documents.

In accordance with BL 154 and the Hong Kong Special Administrative Region Passports Ordinance (Cap 539), the HKSARG issues the passports of the Hong Kong Special Administrative Region to all Chinese citizens who hold HKSAR permanent identity cards. Under BL 154, the HKSARG is also authorized to issue other travel documents. Apart from the HKSAR passports, travel documents issued by the Immigration Department are the Certificate of Identity and the Document of Identity for Visa Purposes.

HKSAR passport

As at 1 January 2005, 133 countries/territories have agreed to grant visa-free access or visa-on-arrival to HKSAR passport holders. The Immigration Department is the authority for processing passport applications, maintaining the records database, and issuing the HKSAR passports. As at 1 January 2005, over 3,145,000 HKSAR passports have been issued.

Certificate of Identity

A Certificate of Identity (CI) is a travel document which was issued by the Immigration Department prior to 1 July 1997 to permanent residents of Hong Kong who did not hold and were unable to obtain a passport or any other travel document. The validity period for CIs is generally 10 years and extends beyond 1 July 1997. No CIs have been issued after 30 June 1997.

The majority of CI holders are Chinese nationals holding Hong Kong permanent identity cards. They are therefore eligible for the HKSAR passport. When a CI holder is issued with a HKSAR passport, his or her CI is cancelled.

Document of Identity for Visa Purposes

The Document of Identity for Visa Purposes (DI) is a travel document of 7 years' validity issued by the Immigration Department under the Immigration Ordinance (Cap 115) to non-permanent Hong Kong residents who do not hold or cannot obtain any other travel document. When DI holders of Chinese nationality complete 7 years' continuous ordinary residence in Hong Kong, they can acquire the right of abode in Hong Kong and then become eligible to apply for the HKSAR passport.

the present case. It was noted that the Listing Rules related solely to market matters. Persons brought before the Disciplinary Committee were representatives of or directors of listed companies. They were persons reasonably presumed to have experience in and knowledge of the market and the rules that regulated the market. Such persons were not lay persons, ignorant of the issues. It was also important to consider the nature of the disciplinary process. The Disciplinary Procedures made it plain that disciplinary hearings were not to be burdened with the rules of evidence, that the procedures were to be informal and that the emphasis was on written

submissions exchanged in accordance with a procedural timetable. The persons who were brought before the Committee might be accompanied by legal representatives and might take advice from them before answering questions or making final “limited” oral submissions.

Conclusion

In addition to the above, the Applicants’ argument based on the common law rule of procedural fairness also failed. Accordingly, the application for judicial review was dismissed.



SIDELIGHTS

Air services

BL 128 to BL 135 provide for matters related to HKSAR’s civil aviation. BL 128 stipulates that the HKSARG shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation. In this regard, the HKSAR aims at ensuring the provision of air links to a wide range of destinations to meet the needs of the traveling public and shippers.

To achieve these objectives, the HKSAR adopts an approach of progressive liberalization of air services under the bilateral regime. Under this approach, the HKSARG continues to negotiate air service agreements and arrangements with new aviation partners and to review

the arrangements with existing partners from time to time in the light of market development.

In accordance with international practices, air services between the HKSAR and foreign countries are governed by bilateral air service agreements (“ASAs”) which are international treaties and provide the framework for scheduled air services between two bilateral partners.

Air service agreements

Under BL 133, acting under specific authorizations from the CPG, the HKSARG may negotiate and conclude new air service agreements providing routes for airlines incorporated and having their principal place



of business in the HKSAR and providing rights for over-flights and technical stops. Such agreements cover scheduled air services to, from or through Hong Kong, which do not operate to, from or through the Mainland.

Arrangements for air services between the HKSAR and other parts of the PRC for airlines incorporated in the HKSAR and having their principal place of business in Hong Kong and other airlines of the PRC shall be made by the CPG in consultation with the HKSARG (BL 131).

As at the end of 2004, the HKSAR has signed ASAs with 54 aviation partners, including Australia, Bahrain, Canada, Denmark, France, Germany, Hungary, India, Japan, Kuwait, Luxembourg, Malaysia, Nepal, New Zealand, Oman, the Philippines, Russia, Singapore, Thailand, the United Kingdom, the United States and Vietnam.

Scheduled services

A Hong Kong airline seeking to operate scheduled services must obtain a licence for the route from the Air Transport Licensing Authority (“ATLA”). The ATLA, an independent statutory body comprising non-Government members appointed by the CE, is to ensure the provision of the most effective service without uneconomical overlapping of services. Once licensed, a Hong Kong airline is eligible for designation and allocation of traffic rights by the HKSARG under the relevant ASA.

Non-scheduled air services

Airlines seeking to operate non-scheduled services to and from Hong Kong have to apply for a permit from the Director-General of Civil Aviation.



SIDELIGHTS

Hong Kong’s participation in the World Trade Organization

BL 116 provides that the HKSAR may, using the name “Hong Kong, China”, participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade (“GATT”) (now the World Trade Organization (“WTO”)).



WORLD TRADE ORGANIZATION

Hong Kong became a separate contracting party to the GATT in 1986, and is a founding member of the WTO established in 1995. Hong Kong is a member of the WTO in its own right. After Reunification, the HKSAR continues to participate in the WTO as a full and separate member, using the name “Hong Kong, China”. The Mainland formally

became a member of the WTO on 11 December 2001. Its WTO membership does not affect HKSAR's participation in the WTO. Hong Kong continues to participate in the WTO as a separate customs territory¹ and enjoys full autonomy in the conduct of its external commercial relations.

The GATT

The GATT is a binding international agreement which came into force in 1948. The objective of the GATT is to provide a secure and predictable world trading environment and a continuing process of trade liberalisation for promoting the expansion of world production and exchange of goods. In this way, the multilateral trading system contributes to economic growth and development throughout the world.

As a small, open and externally-oriented economy, Hong Kong has benefited substantially from the GATT. Before 1986, Hong Kong participated in the GATT as part of the United Kingdom delegation. Hong Kong became a separate contracting party in 1986.

The WTO

The WTO was established on 1 January 1995, as a result of the Uruguay Round (UR) of multilateral trade negotiations conducted under the auspices of the GATT. As at the end of 2004, its membership numbers 148 and accounts for over 90 per cent of world trade.

The WTO provides an institutional framework for the implementation, administration and operation of the agreements reached in the UR. These

agreements have a much wider scope than the GATT. While the GATT is concerned with trade in goods only, the UR agreements cover trade in services and intellectual property rights as well. In addition, there is a much improved machinery for the resolution of trade disputes between WTO members. The multilateral trading system under the WTO embodies a set of legally binding rules to ensure that international trade is conducted on a fair and equitable basis. The WTO is thus the cornerstone of Hong Kong's external trade policy.

As a small and open economy, Hong Kong's participation in the WTO is guided by two objectives. First, to sustain the momentum of trade liberalisation, especially in areas of interest to Hong Kong, such as tariffs and services. Second, to strengthen and update the multilateral rule-based trading system so that it remains an effective framework to promote trade expansion and liberalisation, as well as to protect Hong Kong against arbitrary and discriminatory actions of our trading partners.

¹ BL 116 also provides that the HKSAR shall be a separate customs territory.



LEGCO PRESIDENT'S DECISIONS ON MEMBERS' BILLS

delivered since the last issue (September 2004)



Title	Purpose of the Bill	Decision
Citibank (Hong Kong) Limited (Merger) Bill	To provide for the vesting in Citibank (Hong Kong) Limited of the undertakings of the Hong Kong Branch of Citibank, N.A. and for other related purposes.	Proposed by Dr Hon David LI Kwok-po <i>Date of Decision: 13 December 2004</i> The Bill related to Government policies (on the regulation of banks, taxation, and the control of tenancies) within the meaning of Rule 51(4) of the Rules of Procedure and required the written consent of the CE for its introduction.

Abbreviations

BL	Basic Law / Basic Law Article
BoR	Hong Kong Bill of Rights
CA	Court of Appeal
CE	Chief Executive
CE in C	Chief Executive in Council
CFA	Court of Final Appeal
CFI	Court of First Instance
CPG	Central People's Government
ExCo	Executive Council
HKSAR	Hong Kong Special Administrative Region
HKSARG	Government of the HKSAR
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LegCo	Legislative Council
NPC	National People's Congress
NPCSC	Standing Committee of the NPC
PRC	People's Republic of China

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