

For information

LegCo Panel on Administration of Justice and Legal Services

**Further paper on implementation of
international agreements in the Hong Kong SAR**

I. Introduction

Members will recall that in March 2007, the Administration submitted a paper to the Administration of Justice and Legal Services Panel (Ref. CB(2)1398/06-07(4)) entitled "Implementation of international agreements in the Hong Kong SAR". The paper sets out the legislative approaches adopted in Hong Kong legislation to implement international agreements. Following request of Members at the meeting of the Legislative Council Administration of Justice and Legal Services Panel held on 26 March 2007, this paper elaborates on two aspects concerning legislation that implement international agreements:

- (a) the approach of making general references to the provisions of an international agreement, i.e. making reference to the international agreement or to its requirements as a whole without referring to specific provisions; and
- (b) giving effect in the implementing legislation to future amendments to the international agreement.

II. Making general references to the provisions of an international agreement

2. Some implementing legislation contain general references to an international agreement, or to the requirements of the international agreement as a whole, without referring to specific provisions. At the Panel meeting on 26 March 2007, some Members expressed concern that such general references might give rise to ambiguities.

3. At present, as far as the Department of Justice is aware, the general reference approach is used where the legislation/international agreement in question concerns matters of a technical nature, and there is a need to ensure compliance with

international standards. Examples of general reference clauses in Hong Kong legislation include:

- Section 5 of the Merchant Shipping (Safety) (Life-Saving Appliances) Regulation, Cap 369AY implementing the Life-Saving Appliances Code¹;
- Section 7 of the Freight Containers (Safety) Ordinance, Cap 506 implementing the International Convention for Safe Containers²;
- Section 23 of the Protection of Endangered Species of Animals and Plants Ordinance, Cap 586 implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)³.

4. Examples of general reference clauses can also be found in legislation of other common law jurisdictions, such as:

¹Section 5 provides, “*For every ship to which this Regulation applies which is constructed on or after 1 July 1998, the life-saving appliances and arrangements provided on board shall comply with the standards as described in the LSA Code unless otherwise provided in this Regulation.*”

The LSA Code was adopted under the auspices of the International Maritime Organisation to “provide international standards for life-saving appliances”. It sets out the technical specifications and requirements of life-saving appliances. Persons affected by the requirement in Section 5 of Cap 369AY are ship owners and masters who are expected to be familiar with the international standards laid down by the LSA Code. Under such circumstances, a general reference to the standards in the LSA Code is considered to be sufficiently clear to those persons who have to comply with the requirements, without the text of the LSA Code being set out in the Regulation.

²Section 7(1) provides that an approval issued in a country or place outside Hong Kong in respect of a container shall be a valid approval for the purposes of the Ordinance if the approval complies with the requirements listed in Subsection (2), namely,

“(2) *The approval must-*

(a) *be issued by or under the authority of-*

(i) *a government of a country which has ratified, accepted, approved or acceded to the Convention; or*

(ii) *a government of a place to which the Convention applies; and*

(b) *be issued or be deemed to be issued in accordance with the Convention.*”

The reference to the approval being issued in accordance with the Convention, is considered to be appropriate.

³Section 23(2) provides, in relation to an application to the Director of Agriculture, Fisheries and Conservation for a licence, that, “*The Director shall not approve an application made under this section if such approval would contravene any requirement under the Convention.*”

Subsection (2) seeks to prohibit the issue of a licence if any requirement under the Convention would otherwise be contravened. Such a provision seems appropriate and furthers the policy objective of the Ordinance which, among other things, ensures compliance with the requirements of the Convention in Hong Kong.

- Australia: Section 37F of the Environment Protection and Biodiversity Act 1999⁴;
- Canada: Section 13 of the Chemical Weapons Convention Implementation Act 1995⁵;
- UK: Section 4(2) of the Outer Space Act 1986⁶.

5. The examples set out above indicate that from time to time, the general reference approach is used in implementing legislation in Hong Kong and in other common law jurisdictions. Depending on the nature and contents of the international agreement and the policy framework and contents of the legislation, this approach may be appropriate.

6. Nevertheless, the Department of Justice appreciates the concerns expressed by Members about the possibility that ambiguity may arise from the use of general reference clause.

7. When advising policy Bureaux/Departments on the enactment of implementing legislation in future, the Department of Justice will continue to relay to them LegCo's concerns that general reference clauses may give rise to ambiguities, and would advise them to carefully examine the appropriateness of including such references in the draft legislation concerned.

⁴Implementing the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat ("Ramsar Convention"). Section 37F concerns the power of the Minister in making a declaration under section 37A to exempt certain actions from the approval regime under the Act, which provides that, "*The Minister may make a declaration under section 37A relating to a declared Ramsar wetland only if:*

- (a) *the Minister is satisfied that the declaration is not inconsistent with Australia's obligations under the Ramsar Convention; and*
- (b) *the Minister is satisfied that the declaration will promote the management of the wetland in accordance with the Australian Ramsar management principles. "*

⁵Section 13 relates to the powers of an international inspector and provides, inter alia, that, "*(1) Subject to this Act, an international inspector may, at any reasonable time and consistent with the provisions of the Convention,*

- [...]
- (c) *where appropriate, install, use and maintain in respect of any such place monitoring instruments, systems and seals in a manner consistent with the provisions of the Convention and any facility agreement applicable to the place. "*

⁶Implementing UK's international obligations with respect to the launching and operation of space objects and the carrying on of other activities in outer space. Section 4(2) provides that "*the Secretary of State shall not grant a licence*" under the Act "*unless he is satisfied that the activities authorised by the licence ... (b) will be consistent with the international obligations of the United Kingdom.*"

8. In practice, the legislative approach used to implement an international agreement in Hong Kong is decided by the responsible policy bureau/department on a case by case basis, having regard to legal advice and its policy preferences.

III. Giving effect in the implementing legislation to future amendments to the international agreement

9. In some implementing legislation, the international agreement is defined to mean the agreement “as amended from time to time and as applied to Hong Kong”. Examples of such definitions include:

- Section 2(1) of the Protection of Endangered Species of Animals and Plants Ordinance, Cap 586⁷.
- Section 2(1) of the Freight Containers (Safety) Ordinance, Cap 506⁸;
- Schedule 1 of the Merchant Shipping (Seafarers) (Certification and Watchkeeping) Regulation, Cap 478T⁹;

10. Examples of such references can also be found in legislation of other common law jurisdictions, such as:

- Australia:

Section 528 of the Environment Protection and Biodiversity Act 1999¹⁰;

⁷Section 2(1), “ “Convention” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington D.C. on 3 March 1973, as amended from time to time and as applied to Hong Kong”. The CITES prescribe different procedures for amendments to different parts of the Convention. Broadly speaking, amendments to Appendices I to III of the Convention will apply to all Parties save for those who have objected to the amendment or made a reservation within a prescribed time period. Other amendments to the Convention will apply only to those Parties who have expressly accepted those amendments.

⁸Section 2(1), “ “the Convention” means the International Convention for Safe Containers signed at Geneva on 2 December 1972 as amended from time to time and as applied to Hong Kong”

⁹Various paragraphs in the Schedule refers to “the requirements in force of the International Regulations for Preventing Collisions at Sea 1972”. The “requirements in force” would apparently cover amendments to the Convention from time to time.

¹⁰Section 528 includes references to a number of international agreements including ““CITES” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora done at Washington on 3 March 1973, as amended and in force for Australia from time to time, “JAMBA” means the Agreement between the Government of Japan and the Government of Australia for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment done at Tokyo on 6 February 1974, as amended and in force for Australia from time

- Canada:

Section 2 of the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act¹¹;

- Singapore:

Section 2(1) of the Endangered Species (Import and Export) Act 2006¹²;

- UK:

Section 182A of the Merchant Shipping Act 1995¹³;

Section 1(2) of the Nature Conservation (Scotland) Act 2004¹⁴.

11. These examples indicate that such provisions may be found from time to time in implementing legislation in Hong Kong and in other common law jurisdictions, particularly in cases where the international agreements and relevant amendments are of a technical nature, or where it is highly desirable to ensure uniform international practice¹⁵. Defining the “Convention” in the implementing legislation

to time, "**Ramsar Convention**" means the Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971, as amended and in force for Australia from time to time and "**World Heritage Convention**" means the Convention for the Protection of the World Cultural and Natural Heritage done at Paris on 23 November 1972, as amended and in force for Australia from time to time".

¹¹Section 2, “*“Convention” means the Convention on international trade in endangered species of wild fauna and flora, made on March 3, 1973 in Washington, D.C., United States and ratified by Canada on April 10, 1975, as amended from time to time, to the extent that the amendment is binding on Canada*””.

¹²Section 2(1), “*“CITES” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington, D. C., on 3rd March 1973, and any amendment to, or substitution of, the Convention that is binding on Singapore*”

¹³Section 182A(1), “*(1) In this Chapter, unless the context otherwise requires, “the Convention” means the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996*”... (3) In interpreting the definition of “hazardous and noxious substances” in Article 1, paragraph 5 of the Convention, any reference in that paragraph to a particular convention or code as amended shall be taken to be a reference to that convention or code as amended from time to time (whether before or after the commencement of this Chapter)”

¹⁴Section 1(2), “In complying with the duty imposed by subsection (1) a body or office-holder must have regard to- ...*(b) the United Nations Environmental Programme Convention on Biological Diversity of 5 June 1992 as amended from time to time (or any United Nations Convention replacing that Convention)*”

¹⁵As in the case of CITES mentioned above.

to include future amendments to the Convention means that the implementing legislation refers to the latest version of the Convention applicable to the relevant jurisdiction. On the whole, such a legislative approach has not given rise to any difficulties in the past and continues to be adopted in other common law jurisdictions.

12. Nevertheless, the Department of Justice appreciates the concerns expressed by Legislative Council members about the references in implementing legislation to future amendments of an international agreement.

13. When advising policy Bureaux/Departments on the enactment of implementing legislation in future, the Department of Justice will continue to relay to them LegCo's concerns, and will advise them to ensure the appropriateness of including references to future amendments to an international agreement in the draft legislation concerned.

14. In practice, whether an international agreement is defined in the implementing legislation to include future amendments to the agreement is decided by the responsible policy bureau/department on a case by case basis, having regard to legal advice and its policy preferences.

Department of Justice
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